



that OREMC had been serving the Holiday Inn until JEA constructed electric facilities and lines to provide service to the Inn, thereby displacing OREMC's existing facilities.

On December 31, 1991, JEA filed a Motion to Dismiss the Petition, which the Commission denied in Order No. PSC-92-0058-FOF-EU, Issued March 12, 1992. In that order the Commission held that it had exclusive jurisdiction to resolve 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 is set to be heard by the Commission on June 17, 1992. This order sets out the prehearing procedures to be followed, and the issues to be resolved, in the case.

## II. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 366.093(2), Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 366.093, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- 1) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 366.093, Florida Statutes, shall

notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.

- 2) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- 3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Commission Clerk's confidential files.

### III. PREFILED TESTIMONY AND EXHIBITS

Testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to

appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

IV. ORDER OF WITNESSES

<u>Witness</u>	<u>Appearing For</u>	<u>Issues #</u>
<u>Direct</u>		
Robert Page	OREMC	5,8,9,16,17,22
Pete J. Gibson	OREMC	6,16,17,18,22
Emory Middleton	OREMC	6, 22
Robert Dew	OREMC	7-15, 23
Glenn S. Wrightson	OREMC	10-12, 19-21
Sheldon Ferdman	JEA	All rights to serve in the city of Jacksonville and JEA service to Holiday Inn, Airport Road
<u>Rebuttal</u>		
Robert Dew	OREMC	Rebuttal to Direct Testimony of Sheldon Ferdman
Sheldon Ferdman	JEA	Rebuttal to Direct Testimony of Emory Middleton, Pete Gibson, Robert Dew, Robert Page, and Glenn Wrightson.

V. BASIC POSITIONS

OKEFENOKE RURAL ELECTRIC MEMBERSHIP CORPORATION (OREMC): Insofar as JEA claims the exclusive right to provide retail electrical service throughout Duval County, every location where OREMC presently provides service in Duval County and all undeveloped areas where OREMC could efficiently provide service in Duval County are in dispute or are areas of potential dispute. Even though OREMC has been providing retail electric service in northern Duval County since the late 1940's, JEA has over the years encroached on the areas historically served by OREMC by systematically building duplicative facilities and serving new customers when it has been "practical and economical" for JEA to do so.

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

The resulting duplication of facilities in Duval County has had an adverse economic impact on the customers and members of JEA and OREMC, both inside and outside of Duval County. Whenever duplication of facilities occur, the risk of safety hazards and other harms to the public increase. These adverse economic impacts and other harms are precisely what the Legislature intended to prevent when it passed the Grid Bill in 1974. Unless the FPSC acts to stop JEA's practice of duplicating OREMC's facilities in northern Duval County, the harm JEA's policies have caused to the public inside and outside of Duval County will continue.

With this in mind, the FPSC should resolve this dispute by ordering the parties to enter into a territorial agreement dividing the territory in northern Duval County. Alternatively, the FPSC should resolve this dispute by (1) drawing a territorial boundary - perhaps the "magic line" established in the 1978 Operating Guidelines agreed to by JEA and OREMC - dividing the territory in northern Duval County between OREMC and JEA, and (2) establishing conditions to promote efficiency and avoidance of further uneconomic duplication of facilities on either side of the boundary. Since OREMC has had a contract with the Holiday Inn -

Jacksonville Airport since before October 1, 1968, and since facilities have been installed which duplicate OREMC's existing facilities at this location, the JEA should be ordered to cease providing service to the Holiday Inn and OREMC should be allowed to resume providing service to the Holiday Inn - Jacksonville Airport.

**JACKSONVILLE ELECTRIC AUTHORITY (JEA):** The commission should deny OREMC's request that JEA be ordered to refrain from serving the Holiday Inn - Airport Road, and, if the parties are ordered to enter into a territorial agreement, the boundary must be the municipal corporate limits of the City.

The Jacksonville Electric Authority is the municipally owned electric utility for the Consolidated City of Jacksonville. The Jacksonville municipal corporate boundaries are defined by the Florida Legislature in the Jacksonville Charter as all of Duval County except the incorporated urban districts of Atlantic Beach, Jacksonville Beach, Neptune Beach, and Baldwin. The JEA has on file with the commission a territorial agreement with Florida Power and Light Company concerning service to portions of the City.

The powers and responsibilities of the JEA as well as the powers and responsibilities of other electric utilities in the City are set forth in the Charter and Municipal Code. Pursuant to those laws, the JEA has the right to serve all customers in the City except as otherwise provided in the Florida Power and Light agreement or in the incorporated urban districts. These same laws do not allow JEA to grant OREMC the right to serve any territory within the City. The Jacksonville City Council has not granted OREMC a franchise or other permission to serve in the City. JEA has attempted to negotiate an agreement with OREMC without success.

**STAFF:** No basic position at this time.

## VI. ISSUES AND POSITIONS

### LEGAL ISSUE

**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?

**OREMC:** We agree with staff that this issue has already been considered by the Commission. However, to the extent

that this issue has not been resolved, OREMC's position is set forth below. The FPSC's jurisdiction to hear and resolve this territorial dispute is provided by the Grid Bill. The existence of a formal, signed territorial agreement between JEA and OREMC is not a jurisdictional prerequisite under the Grid Bill. The Legislature of the State of Florida has explicitly granted the FPSC jurisdiction to approve territorial agreements and resolve territorial disputes between all electric utilities throughout the state.

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

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

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

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

\* \* \*

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

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

\* \* \*

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

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

Notably, none of the sections cited above specifically grant the Consolidated Government or JEA an "exclusive" right to serve. If the Legislature had intended to grant an "exclusive" right to serve, the Legislature would have said so. Proof that the Legislature knows how to grant an exclusive right to provide electricity when it intends to can be seen in other special acts. For example, in the special act creating the City of Key West Utility Board, the Legislature granted "the full, complete and exclusive power and right to manage, operate, maintain, control, extend, extend beyond the limits of the City of Key West, Florida, improve, finance and refinance the electric public utility now owned by the city, and to build, construct, and acquire other utilities by purchase." See Charter of City of Key West, § 21.01. In 1927, Section 113 of the Charter of the City of Tallahassee was amended by Chapter 13439, 1977 Laws of Florida, by inserting the following language:

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

(Emphasis added.)

The Consolidated Government's and/or JEA's attempt to claim an exclusive right to serve in Duval County clearly violates the prohibition against inserting words or phrases into a statute, see generally 49 Fla. Jur. 2d Statutes § 120 (1984), and is inconsistent with the public policy purposes behind the Grid Bill.

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

unreasonable to suggest that the Consolidated Government has an "exclusive" right to provide electric service in Duval County. Rather, Section 2.04 can be reasonably construed to allow the Consolidated Government to provide services from the laundry list of services.

Importantly, even if JEA did have the "exclusive" right to serve throughout Duval County as of October 1, 1968, or on July 1, 1974, the JEA has never enforced that right. OREMC was providing retail electric service in northern Duval County before October 1, 1968, and continues to do so today. JEA's failure to enforce whatever right it may have had, together with (1) the existence of the 1978 Operating Guidelines, and (2) the fact that JEA continues to release new customers to OREMC (but only when it is not "practical or economical" for JEA to serve those customers), strongly suggest that JEA has waived whatever right it may have had as of those dates. These same factors also suggest that JEA should be estopped to assert an "exclusive" right to serve throughout Duval County. In a case involving the City of Tallahassee Electric System, a Leon County Circuit Judge on August 4, 1972, held that (1) the City was estopped to assert its legislatively granted exclusive right to serve within the corporate boundaries of the City of Tallahassee and a surrounding 3-mile-wide zone, and that (2) the City of Tallahassee had waived its right to serve by acquiescing in the Talquin Electric Corporation's provision of service within the 3-mile zone. This case, together with the Public Policy Purposes of the Grid Bill, compels the conclusion that the FPSC is free in this proceeding to (1) decide in favor of OREMC's right to serve within Duval County, and (2) order the JEA to refrain from providing retail electric service to certain customers located within certain areas of Duval County.

JEA: 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 Holiday Inn-Jacksonville 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. As set forth in JEA's Motion to Dismiss, or in the Alternative, Motion to Strike Portion of OREMC's Petition to Resolve Territorial Dispute, JEA maintains that 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, 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 any provision 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 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. 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 Section 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, as noted by OREMC, 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:

Apart from the Commission's mandate to avoid further uneconomic duplication of generation, transmission and distribution facilities, [n]o provision of this chapter . . . .

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 the Commission has avoided the plain meaning of the 1974 municipality provision in asserting its jurisdiction over this territorial dispute.

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 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 Holiday Inn without subjecting itself to the clear risk of violating federal

anti-trust laws. OREMC relies on the 1978 operating guidelines between the parties in support of its position that it should be awarded the right to provide service to the Holiday Inn. The 1978 operating guidelines arrangement is not a Commission-approved territorial agreement. 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" exemption. 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 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 Holiday Inn to take service from OREMC.

Under Sections 1.01, 2.04 and 21.04 of the Charter of the Consolidated Government of Jacksonville, and under Sections 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 pre-existing 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 Holiday Inn. JEA disagrees and maintains that it has not waived its statutory authority to serve the 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.

STAFF: The Commission ruled on this issue in Order No. PSC-92-0058-FOF-EU, denying JEA's motion to dismiss. The issue has been resolved and should no longer be considered an issue in this case.

LEGAL ISSUE

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?

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

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

STAFF: The Commission ruled on this issue in Order No. PSC-92-0058-FOF-EU, denying JEA's motion to dismiss. The issue has been resolved and should no longer be considered an issue in this case.

LEGAL ISSUE

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

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

JEA: Yes, as discussed in JEA's position under Issue 1, incorporated herein by reference. Under the legislatively enacted Charter, the JEA has the right to "furnish electricity to private persons, firms and corporations, the City, and any other public or private body, organization or unit, in any part of the City." This right has been limited in the urban districts and in the area served by Florida Power and Light. Except as addressed in the Charter and Municipal Code, the JEA has the exclusive right to serve citizens of the City of Jacksonville.

STAFF: No position at this time.

LEGAL ISSUE

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?

OREMC: The rights and obligations to serve go hand in hand. If a utility has a right to serve a particular area, it must accept the responsibility to serve. Since JEA has failed to serve certain customers in certain areas, it has waived any rights it might have had. Further, JEA does not have the right under Chapter 366 to serve anywhere it wants if the FPSC decides there would be uneconomic duplication of facilities and an adverse impact on ratepayers.

JEA: Yes, as discussed in JEA's position under Issue 1, incorporated herein by reference. Except for the exclusions addressed above, an individual or citizen of Jacksonville can compel service by the JEA.

STAFF: No position at this time.

ISSUE 5: What is the geographical description of the area in dispute?

OREMC: OREMC provides retail electric service to approximately 2200 members in northern Duval County. The area in northern Duval County where OREMC serves includes the Black Hammock Island Area, Yellow Bluff/Starrett Road Area, Airport Area, Lannie Road Area and West Dinsmore Area. Insofar as JEA claims the exclusive right to serve throughout Duval County, every location where OREMC provides retail electric service in Duval County and all undeveloped areas where OREMC could efficiently provide service are in dispute or are potential areas of dispute. One location in which the territorial dispute between JEA and OREMC is greatest is the Holiday Inn-Jacksonville Airport ("Holiday Inn"). JEA began serving the Holiday Inn on November 25, 1991, without OREMC's permission, even though OREMC has been providing service to that customer for over 20 years. The Holiday Inn was OREMC's largest customer. [Page]

JEA: The area in dispute is the Holiday Inn-Jacksonville Airport.

STAFF: The area in dispute in this case is all of Northern Duval County.

ISSUE 6: Which utility has historically served the area in dispute?

OREMC: OREMC has been providing retail electric service to members in Duval County since the late 1940's. OREMC built facilities into northern Duval County (the "Victor" and "K" projects) at that time to provide retail electric service to persons and businesses in northern Duval County who could not get electric service from a municipal electric system or an investor-owned utility. Since that time, OREMC has upgraded and expanded its facilities in northern Duval County to accommodate member growth, improve reliability and reflect changes in technology. OREMC had a significant investment and operating presence in Duval County at the time JEA and the Consolidated Government came into existence. OREMC signed a contract to provide electric service to the Holiday Inn before the Consolidated Government of Jacksonville came into existence and actually began providing service to the Holiday Inn shortly thereafter. [Gibson, Middleton]

JEA: Both JEA and OREMC have a long history of service in the consolidated corporate limits of the City of Jacksonville which, apart from the Holiday Inn-Jacksonville Airport, are not the subject of a territorial dispute. JEA began serving the Holiday Inn-Jacksonville Airport on or about November 25, 1991. Prior to that time, the Holiday Inn-Jacksonville Airport was served by OREMC.

STAFF: No position at this time.

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?

OREMC: Okfenoke provides service to its members in Duval County from three sources. One is a substation located in Callahan, Florida, another is the Yulee Metering Point located on Highway 17 just north of the Duval County

line, and the third is the Oak Grove Metering Point located near the intersection of Cedar Point Road and New Berlin Road inside Duval County. The Callahan Substation was extensively rebuilt in 1990 and presently consists of 2-12/16/20 MVA 230-24.5 KV transformers and 3-14.4/24.5 KV distribution circuits. One of these circuits, known as the Dinsmore Circuit, provides service into Duval County via a 4/OACSR primary line which has a capacity of 14.7 MVA. This line presently serves an electric demand of approximately 6.2 MW.

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

The Oak Grove Metering Point consists of 3-200 amp voltage regulators which are served by JEA. This station has 2-14.4/24.5 KV distribution circuits, both of which serve a total demand of 2.7 MW within Duval County. The capacity of this station is 8.6 MVA.

OREMC is without knowledge as to specific details regarding the location, purpose, type and capacity of JEA's facilities throughout Duval County as of the filing of the Petition in this case; however, as discussed below in OREMC's response to Fact Issue No. 11, OREMC has identified numerous, specific instances in which JEA has duplicated OREMC's facilities in northern Duval County. Representative examples of such duplication and a description of JEA's duplicative facilities are outlined in OREMC's response to Fact Issue No. 11.

Insofar as the JEA's facilities at the Holiday Inn are concerned, JEA recently constructed four new spans of three-phase 2ACSR wire on concrete poles parallel to Airport Road to a riser pole located approximately 40 feet from the existing riser pole owned by OREMC. From that point, a two and one-half foot wide trench was cut for a length of about 600 feet through the parking lot of the Holiday Inn. One three-phase underground primary

cable was installed in conduit in this trench. Two manholes were also installed to facilitate pulling of this cable. The trench ends at the Holiday Inn's electric switch yard, which contains one 1000 KVA transformer, one 1500 KVA transformer, a new 600 volt switch yard and bus arrangement feed permanently from JEA's transformers. All of this equipment duplicates equipment which OREMC has been using to provide service to the Holiday Inn over the years. [Dew]

JEA: This is not a disputed issue. This information has been provided to commission staff pursuant to the request for documents.

STAFF: No position at this time.

ISSUE 8: Are there other areas of potential conflict between the service areas of Okefenoke and JEA?

OREMC: Insofar as JEA claims the exclusive right to serve throughout Duval county, every location where OREMC presently provides retail electric service in Duval County and all undeveloped areas where OREMC could provide service in Duval County are in dispute or are potential areas of dispute. Otherwise, there are no other areas of potential conflict between OREMC and JEA. [Page, Dew]

JEA: No.

STAFF: Apart from Northern Duval County, Staff is not aware of any other areas of potential conflict between the service areas of Okefenoke and JEA.

ISSUE 9: Is either utility presently serving the area in dispute?

OREMC: Even though OREMC was the first to provide retail electric service in northern Duval County in the late 1940's, and had a significant investment and operating presence in Duval County at the time JEA and the Consolidated Government came into existence, JEA has over the years encroached on the areas historically served by OREMC by systematically building duplicative facilities and serving customers when it was "practical and economical" for JEA to do so.

A particularly vivid example of this practice is the Holiday Inn episode wherein four new spans of three-phase 2ACSR wire on concrete poles, a new riser pole, 600 feet of three-phase underground primary cable, one 1000 KVA transformer, and one 1500 KVA transformer, were installed by JEA so JEA could provide service to the Holiday Inn. JEA began providing service to the Holiday Inn on November 25, 1991, without OREMC's permission, even though OREMC had been providing service to the Holiday Inn for over 20 years. The equipment installed to serve the Holiday Inn duplicated OREMC's existing facilities. [Page, Dew]

JEA: JEA is presently serving the Holiday Inn-Jacksonville Airport. Although not the subject of a territorial dispute, JEA is also presently serving customers in the northern part of the City of Jacksonville.

STAFF: Both utilities are presently serving the area in dispute.

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

OREMC: Future growth in the disputed area is an important issue in this case. It is generally recognized that the growth in northern Duval County will increase now that the Dames Point Bridge has been completed. OREMC has plans and the ability to meet expected customer load and energy growth in the disputed areas. However, OREMC suggests that the issue of specific load growth rates be dropped since neither party has placed it in issue. [Dew, Wrightson]

JEA: This information was provided by requested documents.

STAFF: No position at this time.

ISSUE 11: What additional facilities would each party have to build to serve the disputed area?

OREMC: OREMC has the ability to build additional facilities if needed to meet expected customer load and energy growth in the disputed areas. Specific additional facilities each party would have to build to serve the disputed areas has not been placed in issue by the parties. [Dew, Wrightson]

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

STAFF: No position at this time.

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

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

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

STAFF: No position at this time.

ISSUE 13: How long would it take each utility to provide service to the disputed area?

OREMC: Since JEA has already begun providing service to the Holiday Inn and did so without OREMC's permission on November 25, 1991, how long it will take JEA to serve the Holiday Inn is not an issue in this case. Since OREMC had been serving the Holiday Inn for over 20 years before November 25, 1991, it would not be difficult or time-consuming for the OREMC to re-connect its equipment and begin serving the Holiday Inn again.

Over the years, OREMC has been providing timely connections to essentially all new services which JEA has "allowed" OREMC to serve. JEA, on the other hand, has only provided service to customers when it was "economical and practical" for JEA to do so. If OREMC is allowed to operate within a discrete area of Duval County without restriction by JEA, OREMC will continue to provide timely connections in that area. [Dew]

JEA: JEA is presently serving the Holiday Inn-Jacksonville Airport. 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.

STAFF: No position at this time.

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?

OREMC: Yes. Such duplication was not been caused by OREMC. The cases of duplication of facilities (both unnecessary and uneconomical) caused by JEA's practice of encroaching on areas historically served by OREMC in Duval County are too exhaustive to list; however, a few representative examples include:

- A. Along Lannie Road east of the Jacksonville Penal Farm, OREMC has a primary line which has been in place since 1951 which serves numerous members near the end of Lannie Road. Based on pole brands (birthmarks) observed in the field on JEA's line, JEA constructed approximately 1.0 miles of primary line in 1974 to Chaddy Lane. This line serves three residential customers from two distribution transformers. These customers are located adjacent to existing OREMC lines.
- B. JEA's service to Eagle Bend Road off of Yellow Bluff Road duplicates a line OREMC has had in this area since 1955. Around 1970, JEA constructed 3,500 feet of primary line on the opposite side of Yellow Bluff Road from OREMC's line to Eagle Bend Road so they could serve the subdivision in Eagle Bend.
- C. On Moncrief-Dinsmore Road JEA constructed over 2,000 feet of three-phase primary line in 1987 along the west side of the road to serve a single consumer who required three-phase service. OREMC has a three-phase line on the east side of the road which has been in place since 1969.
- D. At 15033 Braddock Road, OREMC had been providing service to this address since 1981, and JEA had

installed a transformer, a secondary pole (branded 1991) and a secondary conductor which crosses Braddock Road and goes under OREMC's line to the secondary pole. JEA also has a length of service wire coiled up on the pole. The length of the service wire appears to be of sufficient length to extend to the weather head of the electric service at this address which is already served by OREMC.

- E. OREMC has been in the Utsey Road area since 1955. JEA constructed more than one mile of single-phase line to this road in order to serve approximately five customers. Based on the pole brands, JEA built this line in 1979.
- F. Cisco Garden Subdivision is served by both utilities. It appears that the services are equally divided between JEA and OREMC and that they both constructed within the subdivision in the early 1970's. [Dew]

JEA: No. All expansion of electric facilities by other utilities in the City must be authorized by either the Jacksonville City Council or the JEA. Since consolidation, OREMC has not been allowed to construct facilities which would cause unnecessary duplication.

STAFF: Yes.

ISSUE 16: (STIPULATED) Do the parties have a formal territorial agreement that covers the area in dispute, or any other areas of potential dispute?

OREMC: No. [Page]

JEA: No.

STAFF: No.

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

OREMC: Yes. During the mid-1970's, OREMC and JEA held discussions for the purpose of entering into a territorial agreement for Duval County. The parties

drafted an agreement, and even though OREMC was willing to do so, the parties did not execute the agreement because the general counsel of the Consolidated Government of Jacksonville advised JEA against signing the agreement. In addition, JEA and OREMC have considered whether a purchase/sale transaction would be in their mutual interests, but have never come close to consummating such a transaction.

JEA's position that it does not have the authority to enter into a territorial agreement dividing territory in Duval County is self serving. Moreover, since JEA does not have an exclusive right to serve in the disputed area, JEA's position may have no valid legal foundation. JEA's position that it has no authority to enter into a territorial agreement dividing territory in Duval County when it proposed and agreed to the 1978 Operating Guidelines places form over substance and is unreasonable. [Page, Gibson]

JEA: 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.

STAFF: No position at this time.

ISSUE 18: Have the parties operated under any informal agreements or "understandings" regarding who should serve the disputed area?

OREMC: Yes. After JEA refused to sign a formal territorial agreement, JEA offered and OREMC agreed to abide by a series of guidelines in a document called the 1978 Operating Guidelines. The 1978 Operating Agreement established a boundary line between the utilities in Duval county known as the "magic line" and contained certain guidelines for cleaning up their respective territories on either side of the magic line. [Gibson]

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

STAFF: No position at this time.

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

OREMC: Since the JEA has now begun serving the Holiday Inn, whatever costs associated with JEA doing so have already been incurred. As noted in OREMC's position on Issue No. 7, a substantial amount of cable, a 1000 KVA transformer, a 1500 KVA transformer, and other equipment has recently been installed so JEA can provide the service which OREMC had been providing for over 20 years. All of this equipment duplicates facilities which OREMC had been using to serve the Holiday Inn. Little or no additional costs would be incurred by OREMC to reconnect the Holiday Inn assuming that OREMC's transformers, which were removed by an unknown third party, are not damaged. No significant additional costs would be incurred by OREMC in the remaining areas in dispute since OREMC presently is connecting new services in the area and also maintaining their facilities in the area. Otherwise, the specific additional costs for each utility to provide electric service to other portions of the disputed area have not been placed in issue by the parties. [Wrightson]

JEA: JEA currently provides service to the Holiday Inn-Jacksonville Airport. 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.

STAFF: No position at this time.

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

OREMC: The Holiday Inn was OREMC's largest customer. The Holiday Inn's average usage represents the equivalent of 420 residential members. The loss of the Holiday Inn as a member means that some of OREMC's largest and most expensive transformation equipment is not being used. It also means that related depreciation expense, interest expense and other carrying costs are not being recovered through revenues from the Holiday Inn.

If, for some reason, OREMC is not permitted to continue serving in other parts of the disputed area, OREMC's

investment in facilities to serve in Duval County would be stranded. These facilities would include all the facilities in the county as well as some facilities outside the county which were constructed to support the load in Duval County. Specifically, the Callahan Substation was designed and constructed to serve load in Nassau, Baker and Duval Counties. Loss of the load in Duval County would result in lost investment in this substation which would be oversized relative to the remaining load. The specific costs to each utility if it were not permitted to serve these other areas in the disputed area would include the carrying costs associated with the stranded investment plus lost revenue net of the carrying cost of the stranded investment for present and future load in underdeveloped areas. [Wrightson]

JEA: 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.

STAFF: No position at this time.

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

OREMC: If OREMC is not permitted to continue serving the Holiday Inn in the future, OREMC will be required, all other things being equal, to collect increased revenues of approximately \$57,300 per year. If, for some reason, OREMC is not permitted to continue providing service to existing and new members in the areas it has historically served in Duval County, all other things being equal, OREMC may lose as much as \$1 million in net revenue per year in the foreseeable future. [Wrightson]

JEA: 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.

STAFF: No position at this time.

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

OREMC: In this case, all other things may not be equal. At this time, the Holiday Inn prefers to be served by JEA. It has requested and is receiving service from JEA, even though OREMC has been providing retail electrical service to the Holiday Inn for over twenty years. In the past, when rate relationships were different, the Holiday Inn was content to be served by OREMC. [Page, Gibson, Middleton]

JEA: The Holiday Inn-Jacksonville Airport 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 which are not the subject of a territorial dispute, the unsolicited signatures of Jacksonville citizens and letters from elected representatives suggest a strong preference for JEA service.

STAFF: No position at this time.

ISSUE 23: Which party should be permitted to serve the area in dispute?

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

1. The Holiday Inn service should be returned to Okefenoke.
2. The Commission should supervise the preparation of a territorial agreement between JEA and Okefenoke. This territorial agreement would contain identifiable boundaries within Duval County and would probably involve the exchange of facilities with the public interest being the most important factor. The Commission should re-examine the territorial boundaries as shown by the "magic line" that was developed in the 1978 Distribution Operations Guidelines between JEA and Okefenoke. The Commission should encourage Okefenoke and JEA to negotiate a territorial boundary within Duval County and allow for the exchange of facilities to establish this territorial boundary over a reasonable period of time.

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

JEA: The JEA should be permitted to continue serving the Holiday-Inn Jacksonville Airport.

STAFF: No position at this time.

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

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

JEA: No position at this time.

STAFF: No position at this time.

VII. EXHIBIT LIST

Direct

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Page	OREMC	(RP-1)	Map of OREMC's facilities as of 1/1/92

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Page	OREMC	(RP-2)	OREMC's facilities in the State of Florida as of 1/1/92
Gibson	OREMC	(PJG-1)	Contract for electrical service between OREMC and Holiday Inn-Jacksonville Airport, dated July 3, 1968
Gibson	OREMC	(PJG-2)	Letter dated April 3, 1969, from Louis H. Winnard (JEA) to Pete J. Gibson (OREMC) regarding ordinance
Gibson	OREMC	(PJG-3)	Draft of 1977 proposed territorial agreement
Gibson	OREMC	(PJG-4)	Letter dated April 2, 1978, from W.M. Irving (JEA) to Pete J. Gibson (OREMC) transmitting 1978 Operating Guidelines
Gibson	OREMC	(PJG-5)	Letter dated April 17, 1978, from Pete J. Gibson (OREMC) to W.M. Irving (JEA) accepting 1978 Operating Guidelines
Middleton	OREMC	(EM-1)	Map showing location of "Victor" Project in Duval County
Middleton	OREMC	(EM-2)	Map of "K" Project
Middleton	OREMC	(EM-3)	OREMC system as of 12/19/67 Emory Middleton
Middleton	OREMC	(EM-4)	Circuit diagram of OREMC's facilities in Duval County as of 2/7/75

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Middleton	OREMC	(EM-5)	Wholesale electric service contract between JEA and Seminole Electric Cooperative, Inc.
Dew	OREMC	(RD-1)	Detail map of Northern Duval County with duplicate facilities
Dew	OREMC	(RD-2)	Detail map of duplicate facilities in and around Dinsmore
Dew	OREMC	(RD-3)	Detail map of duplicate facilities in and around Lannie Road
Dew	OREMC	(RD-4)	Detail map of duplicate facilities in and around Jacksonville International Airport
Dew	OREMC	(RD-5)	Detail map of duplicate facilities in and around Yellow Bluff Road
Dew	OREMC	(RD-6)	Detail map of duplicate facilities in and around Black Hammock Island
Dew	OREMC	(RD-7)	Photos of Holiday Inn
Dew	OREMC	(RD-8)	Photos of duplications
Dew	OREMC	(RD-9)	Photos of duplications
Ferdman	JEA	(SRF-1)	Map-JEA Service Area
Ferdman	JEA	(SRF-2)	Jacksonville Electric Authority, City Charter

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Ferdman	JEA	(SRF-3)	Correspondence
Ferdman	JEA	(SRF-4)	Map-JEA Power Division
<u>Rebuttal</u>			
Dew	OREMC	(RD-10)	OREMC's facilities near Holiday Inn
Ferdman	JEA	(SRF-1R)	Correspondence

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

#### VIII. PROPOSED STIPULATIONS

There are no proposed stipulations at this time. OREMC maintains that the area in dispute in this case is the entire northern portion of Duval County where both utilities presently operate. JEA maintains, on the other hand, that the only area in dispute is the Holiday Inn-Jacksonville Airport.

#### IX. PENDING MOTIONS

JEA's Motion to Dismiss, or in the Alternative, Motion to Strike Portion of OREMC's Petition to Resolve Territorial Dispute in Duval County and accompanying Request for Oral Argument are currently pending. JEA's motions will be heard on June 17, 1992 immediately before the hearing in this case. The parties will be allotted 10 minutes each for oral argument on the merits of JEA's motions.

#### X. RULINGS

OREMC's request for official recognition is granted.

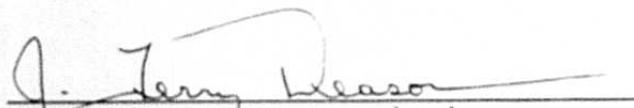
XI. OTHER MATTERS

There are no other matters pending at this time.

It is therefore,

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner J. Terry Deason, as Prehearing Officer, this 28th day of MAY, 1992.

  
J. TERRY DEASON, Commissioner  
and Prehearing Officer

( S E A L )

MAB/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 this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) 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 wastewater utility. A motion for

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reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.