
IN THE SUPREME COURT OF FLORIDA

LEE COUNTY ELECTRIC
COOPERATIVE, INC.,

Appellant,

vs.

CASE NO. SC 01-373

E. LEON JACOBS, JR.,
et al.,

Appellees.

_____ /

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION
Docket No. 981827-EC
Order No. PSC-01-0217-FOF-EC

**ANSWER BRIEF OF APPELLEE
SEMINOLE ELECTRIC COOPERATIVE, INC.**

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STATEMENT OF THE CASE AND FACTS

The statement of the case and facts in Appellant's Initial Brief is argumentative and goes far beyond what is necessary to resolve the sole issue in this appeal. That issue is whether the Florida Public Service Commission (Commission) has subject matter jurisdiction over a wholesale rate schedule adopted by Seminole Electric Cooperative, Inc. (Seminole) such that it can hear a complaint by Lee County Electric Cooperative, Inc. (LCEC) involving that rate schedule. Seminole therefore offers this counter-statement of the case and facts.¹

Seminole is a non-profit electric generation and transmission cooperative organized pursuant to Chapter 425, Florida Statutes. (R.46) Seminole provides electricity at wholesale to its ten owner-members, one of which is LCEC. (R.8, 46) Each of Seminole's owner-members is a distribution electric cooperative engaged in the retail sale of electricity to Florida consumers. (R.8, 46) Each owner-member has two voting representatives on Seminole's governing body, its Board of Trustees. (R. 46)

¹ LCEC's statement of the case and facts, for example, includes almost five pages which recite LCEC's position regarding the ratemaking principles that should apply *if the Commission has jurisdiction*, and how LCEC would apply those principles to Seminole's wholesale rate schedule. (Initial Brief at 4-8) As reflected in the parties' prehearing statements, these matters are in dispute. (R.262, 270) In any event, they are not germane to the issue of the Commission's subject matter jurisdiction.

Like the other Seminole owner-members, LCEC purchases all of its power requirements from Seminole pursuant to a voluntarily negotiated wholesale power contract.² (R.8, 46-47) The 45-year contract between LCEC and Seminole was originally executed on May 22, 1975, and has been supplemented and amended from time to time. (R.8, 60, 71) Prior to entering the contract with Seminole, LCEC had purchased all of its electrical power requirements from Florida Power & Light Company. (R.314-315)

The rate at which owner-members purchase power from Seminole is included in a rate schedule that is incorporated by reference in the wholesale power contract as Schedule C. (R.72) Seminole has only a single class of member-consumers and the wholesale rate schedule applies uniformly to all of those members. (R.337, *see* R.25, 72) Under the contract, the rates on Schedule C can be amended from time to time by majority vote of Seminole's Board of Trustees, subject to approval by the Administrator of the federal Rural Utilities Service (formerly the Rural Electrification Administration). (R.47, 72) The contract makes no reference to any requirement for approval by the Commission. (R.47) Although Seminole has had a number of rate schedule amendments since the wholesale power contract with LCEC became effective in 1975, LCEC's representatives on

² The contracts between Seminole and its various members are identical in all respects material to this case.

Seminole's Board of Trustees have never previously suggested that any of these amendments should be submitted to the Commission for further review or approval. (R.49-50)

Under the terms of the contract, Seminole's total wholesale revenue to be generated by sales to its owner-members is limited to the amount necessary (when combined with revenues from all other sources) to meet Seminole's costs of operation and maintenance, to meet the cost of purchased power and transmission services, to make payments of principal and interest on Seminole's debt, and to provide for the establishment and maintenance of reasonable reserves. (R.47, 72)

In addition to meeting this overall revenue cap, all amendments to Seminole's wholesale rate schedule "shall recognize and provide for variations in the cost of providing service at differing delivery voltages, load factors, and power factors, the specific provisions therefore to be made in accordance with generally accepted ratemaking standards." (R.73)

On October 8, 1998, the Seminole Board of Trustees approved a new rate schedule applicable to all of its owner-members, Rate Schedule SECI-7, effective January 1, 1999. (R. 8, 25-34, 47) This rate schedule was approved by a vote of 17-2, with only the two LCEC representatives voting in the negative. (*See* R.143)

This rate schedule was submitted to the Rural Utilities Service and was approved by that body on or about November 20, 1998. (R.47, 80)

On December 9, 1998, LCEC filed a complaint with the Commission asking the Commission to conduct a full investigation and evidentiary hearing on Seminole's new rate schedule. (R.7, 19) Seminole moved to dismiss LCEC's complaint on the grounds that the Commission lacks jurisdiction over Seminole's wholesale rate schedules. (R.46)

The dispute on the merits, which is not germane to the jurisdictional question before the Court, is whether Rate Schedule SECI-7 reflects the application of generally accepted ratemaking principles. Suffice it to say that LCEC contends that the rate schedule does not comport with accepted ratemaking principles and improperly discourages load management and conservation. (R.9-10) Seminole contends that the rate schedule complies with the ratemaking requirements of the contract, comports with accepted ratemaking principles, and provides appropriate price signals that encourage economically efficient load management and energy conservation programs.³ (R.274-275) Prior to the Commission's ruling on the

³ Seminole believes that it is both unnecessary and inappropriate to address the merits of the case in this brief. To the extent that LCEC's Initial Brief includes extensive argument concerning the merits (*e.g.* pages 4-8, 20, 25), those portions of the brief should be disregarded or stricken.

motion to dismiss, LCEC and Seminole had each prefiled extensive written testimony of their expert consultants addressing this ratemaking issue.

The Commission first considered Seminole's motion to dismiss on November 16, 1999. As the result of a 2-2 tie vote, the Commission entered its order stating that Seminole's motion to dismiss "fails for lack of support by a majority of this Commission" and that "this Order does not reflect a decision by the Commission concerning the merits of Seminole Electric Cooperative, Inc.'s motion to dismiss."⁴ (R. 200, 209)

Upon the request of both Seminole and LCEC, the Commission again considered the jurisdictional issue on September 5, 2000. (R.279) At that time, the Commission voted 2-1 to grant Seminole's motion to dismiss for lack of jurisdiction.⁵ (R.305) That decision was embodied in Order No. PSC-01-0217-FOF-EC, issued January 23, 2001. (App.1; R.367) LCEC's appeal followed.

⁴ At the time of this vote, there were only four sitting Commissioners. Chairman Garcia and Commissioner Jacobs voted to assert jurisdiction; Commissioners Deason and Clark voted to grant the motion to dismiss. (R.198-199)

⁵ At the time of the second vote, there were only three sitting Commissioners. Commissioner Jaber joined Commissioner Deason in voting to grant the motion to dismiss. Chairman Jacobs voted to assert jurisdiction and deny the motion to dismiss. (R.305-306)

SUMMARY OF ARGUMENT

The sole issue before the Court is whether the Commission has "rate structure" jurisdiction under Section 366.04(2)(b) over a rate schedule contained in a voluntarily negotiated wholesale power purchase agreement between Seminole and LCEC, one of its ten owner-members.

The Commission determined that the rate schedule incorporated in the Seminole-LCEC agreement does not involve a "rate structure" as that term is used in Chapter 366. That determination by the agency charged with administration of the statute comes to this Court with a presumption of correctness. The presumption is particularly strong in this case since the Commission's determination is consistent with the way that Section 366.04(2)(b) has been applied since its adoption in 1974, over twenty-five years ago.

The interpretation advanced by LCEC would significantly expand the Commission's day-to-day exercise of jurisdiction. It would bring within the Commission's reach all wholesale power contracts in which either a municipally-owned utility or a cooperative is the seller. These are all transactions over which the Commission has never asserted rate structure jurisdiction.

The Commission's decision that the Seminole-LCEC agreement does not involve a question of rate structure is consistent with both the purpose and the

language of Chapter 366. The fundamental purpose of that chapter is to protect the public from potential abuses of monopoly power by regulating the relationship between a utility and its captive ratepayers; it is not to regulate contractual relationships between utilities. In this case, there is no monopoly and no captive customer in need of protection. LCEC is a voting owner-member of Seminole and voluntarily negotiated a long-term power supply arrangement with Seminole. The Commission's conclusion that the Legislature did not intend the term "rate structure" to apply to this type of contractual wholesale power rate schedule is a reasonable interpretation of the statute and should be affirmed.

LCEC argues that the Commission's interpretation is inconsistent with the additional purpose of Chapter 366 to advance energy conservation and load management. The primary provisions in Chapter 366 which address conservation, and the only ones which address load management, were added in 1980, over six years after the Commission was granted rate structure jurisdiction over electric cooperatives. The existence of those later-enacted provisions provides no useful information about the Legislature's intent in 1974 as to the scope of the Commission's rate structure jurisdiction.

The Commission's decision is a reasonable and permissible interpretation of Chapter 366 and should therefore be affirmed.

ARGUMENT

I. THE COMMISSION'S DETERMINATION OF ITS JURISDICTION IS ENTITLED TO DEFERENCE.

The construction of a statute by the administrative body responsible for its administration is entitled to great weight and should not be overturned unless it is "clearly contrary to the language of the statute," *Greyhound Lines, Inc. v. Yarborough*, 275 So.2d 1, 3 (Fla. 1973), or "clearly erroneous," *Pan Am. World Airways, Inc. v. Florida Pub. Serv. Comm'n*, 427 So.2d 716, 719 (Fla. 1983). So long as the agency's construction is reasonably defensible, this principle applies even if the courts might prefer another view of the statute. *Smith v. Crawford*, 645 So.2d 513, 521 (Fla. 1st DCA 1994) *citing Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 497 (1979).

As demonstrated in Part II of this brief, the Commission's determination that it lacks subject matter jurisdiction over Seminole's wholesale rate schedule is neither contrary to the language of Section 366.04(2)(b) nor is it clearly erroneous. It is consistent with both the purpose of Chapter 366 and with the Commission's long-standing practical implementation of that Chapter. The Commission's construction is also fully consistent with the principle that any reasonable doubt about the existence of the Commission's jurisdiction must be resolved against the exercise thereof. *City of Cape Coral v. GAC Utils., Inc. of Fla.*, 281 So.2d 493 (Fla.

1973); *Radio Tel. Communications, Inc. v. Southeastern Tel. Co.*, 170 So.2d 577, 582 (Fla. 1964).

II. THE COMMISSION CORRECTLY DETERMINED THAT IT LACKS SUBJECT MATTER JURISDICTION OVER SEMINOLE'S WHOLESALE RATE SCHEDULE.

Seminole is an "electric utility" as defined in Section 366.02(2), Florida Statutes. This means that the Commission has limited jurisdiction over Seminole under Section 366.04(2) and other provisions of Chapter 366 which refer specifically to electric utilities. Seminole is not, however, a "public utility" as defined in Section 366.02(1). It therefore is not subject to the Commission's general ratemaking jurisdiction or to most other provisions of Chapter 366. *See* §366.11(1), Florida Statutes (2000).

LCEC's complaint sought to invoke the Commission's jurisdiction under Section 366.04(2)(b), Florida Statutes, which provides:

(2) In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:

(b) To prescribe a rate structure for all electric utilities.

The question the Commission resolved in ruling on Seminole's motion to dismiss was whether its power to prescribe a rate structure for electric utilities gives it jurisdiction over a wholesale rate schedule adopted in conformance with a

wholesale power contract between a rural electric cooperative and one of its owner-members. The Commission concluded that it lacks jurisdiction in that situation, holding that the Legislature did not intend for the Commission's "rate structure" jurisdiction to extend to a rural electric cooperative's wholesale rate schedule established pursuant to contract. (App.10; R.376) For the reasons set forth below, the Commission's decision was correct, and must be affirmed.

A. THE COMMISSION IS NOT COMPELLED TO EXERCISE JURISDICTION BY THE PLAIN LANGUAGE OF SECTION 366.04(2)(b).

The crux of LCEC's first argument is that the plain language of Section 366.04(2)(b) unambiguously gives the Commission jurisdiction over the rate structure of all electric utilities, hence there is no room for statutory construction and the Commission must exercise jurisdiction over Seminole's wholesale rate schedule. (Initial Brief at 13-17) While this argument has some superficial appeal, it does not withstand closer analysis.

First, LCEC does not address the fundamental question of whether a rate schedule contained in a negotiated wholesale power contract constitutes a "rate structure" as that term is used in Section 366.04(2)(b). LCEC focuses instead on the undisputed fact that Seminole is an electric utility and that the Commission has rate structure jurisdiction over "all" electric utilities. LCEC's entire discussion of

whether Seminole's rate schedule establishes a "rate structure" is limited to the bare assertion that "[t]here is also no question that Seminole's rate structure is at issue." (Initial Brief at 13) Yet the fundamental conclusion in the Commission's order is that a wholesale rate schedule established by contract between two cooperative utilities is not a "rate structure" as that term was used by the Legislature in Section 366.04(2)(b).

"[R]ate structure" is not defined anywhere in Chapter 366, Florida Statutes. As set forth below, we find that there are cogent reasons to believe that the Legislature did not intend for our rate structure jurisdiction to extend to the wholesale rate *schedule* at issue in this case.

(App.9; R.375) (emphasis added)

As explained by Commissioner Deason at the time he seconded the motion to grant Seminole's motion to dismiss:

When I read this language, and I think I've indicated this earlier, to me, rate structure -- and I don't think rate structure is defined anywhere in the statute. But to me, rate structure means the structure of rates as they relate to different rate classes, and a classic example is residential, commercial, industrial, classifications of those types. And that rate structure connotes to me an offering by a utility that says these are the terms and conditions that we will provide service to you, and if you meet those terms and conditions, you will be provided the service on a nondiscriminatory basis, and it doesn't really apply to a situation where you have entities who have voluntarily entered into a negotiated contract.

And if there are provisions within that contract which allow for the rates to change over time, I still don't think that meets the definition of a rate structure as I think it's contemplated.

(R.362-363; see also, R.351-352)

In 1987, the Commission held that, in the absence of a statutory definition of rate structure, the determination of what types of charges are within the Commission's rate structure jurisdiction will be made only on a case-by-case basis.⁶ *In re: Filing Requirements for Municipal Electric Authorities and Rural Electric Cooperatives*, 87 F.P.S.C. 5:303, 304 (1987).

The Commission in this case adopted an allowable construction of Section 366.04(2)(b) when it concluded that a contractually-based, uniform rate schedule that applies to the members of a single class of wholesale consumers of a generation and transmission cooperative -- each of whom is an owner-member with voting representation on the board that adopted the rate schedule -- is not a rate structure as contemplated by the Legislature in that section. As discussed in later sections of this brief, that conclusion is consistent with the fundamental purpose of

⁶ It is worthy of note that, in 1987, it was the Florida Rural Electric Cooperative Association, of which LCEC was a member, which challenged the Commission's attempt to determine in the abstract what charges fell within its rate structure jurisdiction. The Association withdrew that challenge only when the Commission approved a stipulation calling for such matters to be considered in the context of a specific charge being levied by a specific utility. 87 F.P.S.C. 5:303, 306.

Chapter 366 and with the Commission's prior exercise of its rate structure jurisdiction.

Second, LCEC's plain language argument has merit only to the extent that the language of the statute is indeed clear and unambiguous. The inherent ambiguity of the statute is demonstrated by the fact that, of the five Commissioners who considered the jurisdictional question after briefing and argument by the parties, three concluded that the statute did not give the Commission jurisdiction and two concluded that it did. In light of this difference of opinion by those charged with administration of Chapter 366, it is difficult to conclude that the language of Section 366.04(2)(b) is such a "clear and unambiguous" expression of legislative intent as to warrant application of the plain meaning rule.

B. THE COMMISSION'S DECISION IS CONSISTENT WITH THE PURPOSE OF CHAPTER 366.

The underlying purpose of Chapter 366 is to prevent potential abuses of monopoly power when the public obtains electric service from a monopoly provider. *See, City of St. Petersburg v. Carter*, 39 So.2d 804, 806 (Fla. 1949). That purpose is not served by Commission oversight of the terms of the wholesale power contract between Seminole and its members.

LCEC is not a captive customer of a monopoly provider. LCEC's obligation to purchase its full requirements of power and energy from Seminole is

the result of voluntary contractual negotiations, not the result of Seminole's right to serve some governmentally protected or defined service territory. The wholesale power contract with Seminole replaced LCEC's former agreement to obtain its full requirements from Florida Power & Light Company (FP&L) at rates which were regulated by the Federal Energy Regulatory Commission. At the time it executed the contract, LCEC presumably made the business decision that becoming an owner-member of Seminole and entering into a long-term power contract with a cooperative on whose Board it would be fully represented would be preferable to continuing its relationship with FP&L. LCEC is no more a "captive customer" than any party who enters into a long-term supply contract for any commodity. In fact, LCEC is less captive than the typical commodity purchaser, since it is one of the equity owners of the supplier and has equal and direct representation on its supplier's Board of Trustees.

Moreover, in entering into the wholesale power contract, LCEC specifically agreed to the method by which rate schedules would be adopted. That contractual method calls for approval by Seminole's Board of Trustees, subject to written approval from the Administrator of the Rural Utilities Service. Nowhere does the contract contemplate that any aspect of the rate schedules are subject to review or approval by the Commission. Until the present case, LCEC's representatives on

Seminole's Board have never suggested that Seminole was subject to any requirement to submit Board-approved rate schedules to the Commission for further review or approval. While Seminole acknowledges that the parties could not by agreement deprive the Commission of jurisdiction conferred on it by the Legislature, their past course of conduct provides at least some evidence of their understanding of the requirements of Chapter 366.

In an analogous case involving a contract between two telephone companies, this Court held that the provisions of Chapter 364 which gave the Commission jurisdiction to alter unreasonable rates or practices by a telephone company "refer to rates and practices as applied to ratepayers and do *not* confer jurisdiction upon the commission to alter the contractual relationship between telephone companies." *United Tel. Co. of Fla. v. Pub. Serv. Comm'n*, 496 So.2d 116, 119 (Fla. 1986) (emphasis in original). In reaching this conclusion, the Court relied in part on consistent federal court interpretations that comparable provisions in the Federal Power Act extended protection only to ratepaying members of the public, not to utility companies, and in part on the constitutional principle that a state regulatory agency cannot modify or abrogate private contracts unless such action is necessary to protect the public interest. *Id.*

The Commission's determination in this case that it lacks jurisdiction over a rate schedule contained in a contract between two utilities (one of whom is an owner-member of the other) is consistent both with the Court's decision in *United Telephone* and with the fundamental purpose of Chapter 366 to protect the public from abuses of monopoly power.

LCEC contends that, in focusing on the fundamental purpose of Chapter 366 to prevent monopoly abuses, Seminole and the Commission have ignored the broader purpose introduced into that chapter by the enactment of Chapter 74-196, Laws of Florida, sometimes referred to as the "Grid Bill." LCEC argues that, since the amendment giving the Commission rate structure jurisdiction over municipal and cooperative utilities was part of the Grid Bill, its rate structure jurisdiction should be interpreted in light of other provisions of the Grid Bill which gave the Commission the power "to require electric power conservation and reliability within a coordinated grid. . . ." § 366.04(2)(c), Fla. Stat. (Initial Brief at 17-20) LCEC further argues that Seminole's rate structure runs directly contrary to the Commission's duty to encourage energy conservation programs including load management, citing Section 366.81, Florida Statutes. (Initial Brief at 20)

LCEC gives undue emphasis to the conservation and reliability provisions of Chapter 74-196. In addition to granting the Commission certain powers with

respect to rate structure and conservation and reliability, Chapter 74-196 also authorized the Commission to:

- prescribe uniform systems and classifications of accounts for electric utilities, §366.04(2)(a);
- approve territorial agreements, §366.04(2)(d); and
- resolve territorial disputes, §366.04(2)(e).

These provisions have no relationship to the Commission's duty under other sections of the Grid Bill to require conservation and reliability within a coordinated grid; they are simply additional powers granted to the Commission as part of the same legislative enactment. Similarly, the rate structure jurisdiction is not related to the conservation and reliability provisions; it likewise has independent operation and effect.⁷

LCEC's suggestion that the intent of the Grid Bill compels the Commission to construe its rate structure jurisdiction broadly in order to advance the purpose of Section 366.81, relating to energy conservation programs, ignores one important point. Section 366.81 was enacted in 1980 as part of the Florida Energy Efficiency

⁷ For example, in *City of Tallahassee v. Mann*, 411 So.2d 162 (Fla. 1981), this court upheld the Commission's decision that it had subject matter jurisdiction to consider the validity of a surcharge on customers located outside the city's municipal boundaries. The Commission's exercise of jurisdiction in that case had nothing to do with conservation or reliability.

and Conservation Act. *See* §366.80, Fla. Stat.; Chapter 80-65, Laws of Florida.

That provision came six years *after* the grant to the Commission of rate structure jurisdiction. The later enactment therefore reveals nothing about the intent of the Legislature as to the original scope of the Commission's rate structure jurisdiction.⁸

In summary, the Commission's decision is consistent with the underlying purpose of Chapter 366 and is not inconsistent with the other provisions of the Grid Bill.

C. THE COMMISSION'S DECISION IS CONSISTENT WITH ITS LONG-STANDING APPLICATION OF CHAPTER 366.

LCEC argues that the Commission's previous failure to exercise jurisdiction over Seminole's wholesale rate schedules is irrelevant to this appeal. (Initial Brief at 27-31) In doing so, LCEC cites a line of cases which hold that an administrative agency's failure to exercise powers which it has clearly been granted by the Legislature does not result in the loss of those powers. Seminole concedes that *if* the Legislature had clearly and unambiguously granted the Commission jurisdiction over its wholesale rate schedules, the Commission's past inactivity would not result in forfeiture of that jurisdiction. When the existence of such jurisdiction is in

⁸ The analysis by the staff of a Senate committee with respect to 1989 legislation likewise provides no useful information about the Legislature's intent in 1974. (*See* Initial Brief at page 18, footnote 7)

question, however, the Commission's past inaction is relevant to the proper interpretation of the governing statute.

In a case closely on point, this Court held that, while an agency's long-standing practical interpretation of a statute is not binding on a court, it is a factor to be given great weight when the court is called upon to construe the statute.

City of St. Petersburg v. Carter, 39 So.2d 804 (Fla. 1949). In that case, the Court quashed an attempt by the Commission's predecessor to assert regulatory jurisdiction over a municipal street railway system which had been in operation without such oversight for many years, stating:

The construction placed *actually or by conduct* upon a statute by an administrative board is, of course, not binding upon the courts. However, it is often persuasive and great weight should be given to it. Some significance must be attached to the fact that this is the first instance which has come to our attention where the Florida Railroad and Public Utilities Commission has attempted to assert jurisdiction by regulating the operation of a municipally owned street railway system. . .The transportation system of the City of St. Petersburg has been operated by said city for a period of thirty years. *During all these years many changes have been made in the rates, schedules and routes, all without application for approval by the Florida Railroad and Public Utilities Commission or any suggestion that such changes should have been so approved.*

Id. at 806 (emphasis added).

See also United States vs. Morton Salt Co., 338 U.S. 632, 647 (1950) (fact that powers long have been unexercised well may call for close scrutiny as to whether they exist); *Green v. Stuckey's of Fanning Springs, Inc.*, 99 So.2d 867, 868 (Fla. 1957) ("the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction 'except for the most cogent reasons, and unless clearly erroneous"); *Walker v. State, Dep't of Transp.*, 366 So.2d 96 (Fla. 1st DCA 1979) (Department of Transportation could not abandon a long-standing interpretation of a fee payment statute and cease accepting late payments).

Although this is the first case in which this particular jurisdictional issue has been squarely presented for a Commission determination, the Commission has a twenty-five year history of taking no action to assert jurisdiction over Seminole's wholesale rate schedules, despite a number of logical opportunities to do so.

In 1977, the Commission initiated an investigation for the purpose of implementing Section 366.04(2)(b), including the task of defining the term "rate structure." *In re: General investigation as to rate structures for municipal electric systems and rural electric cooperatives*, 1 F.P.S.C. 83 (1977). In that order, the Commission directed each rural electric cooperative and municipal electric utility to

file within 30 days a copy of its current rates and charges for electric service. The retail distribution cooperatives submitted a joint response to the order acknowledging the authority of the Commission over their rate structure, and subsequently filed their individual rate schedules with the Commission. (R.52) Seminole filed a separate response to the order in which it stated that the rate structure concept was not applicable to its wholesale transactions and it therefore would not be filing rates or charges with the Commission. (R.81-82) The Commission never questioned Seminole's interpretation of the statute and did not require Seminole to participate further in the docket.

The rate structure investigation was ultimately concluded by the entry of a Consent Order. *In re: General investigation as to rate structures for municipal electric systems and rural electric cooperatives*, 5 F.P.S.C. 3 (1979). In that order, the Commission stated that the rural electric cooperatives and municipal electric systems consented to the entry of an order which grandfathered their existing rate structures and established a procedure for submission of proposed rate structure changes pending the adoption of a formal Commission rule.

In late 1985, the Commission again took action to require rate schedule filings by municipal and cooperative utilities. *In re: Filing Requirements for Municipal and Rural Electric Cooperatives*, 85 F.P.S.C. 12:401 (1985). That

order included an attachment which listed the specific charges which were on file with the Commission for each jurisdictional municipal utility and rural electric cooperative. The order required each listed utility to file its rate schedule for any charge which it imposed that was not already reflected on the Commission's list. Seminole is notably absent from this list.

The history of these various Commission proceedings is consistent with only one conclusion: the Commission has never interpreted Section 366.04(2)(b) to give it jurisdiction over Seminole's wholesale rate schedules. If the Commission had interpreted the statute in any other manner, there is no reasonable explanation for its failure to have required filings by Seminole at any time during the twenty-five years since the statute was enacted.

Similar to the facts in the *City of St. Petersburg*, the wholesale electric system of Seminole has been operated by Seminole for a period of over twenty-five years and during those years "many changes have been made" in Seminole's wholesale rate schedules "all without application for approval by the [] Commission or any suggestion that such changes should have been so approved." 39 So.2d at 806. As in that case, the Court should give great weight to the Commission's past regulatory practice in determining whether the Commission has now properly construed the extent of its jurisdiction under Chapter 366.

D. THE COMMISSION'S DECISION DOES NOT LEAVE AN UNINTENDED REGULATORY GAP.

The regulation of electric utilities in the United States is a mixture of federal regulation by the Federal Energy Regulatory Commission and the Rural Utilities Service, state regulation by various public service commissions, and self-governance by many municipal and consumer-owned cooperative utilities. The regulatory scheme varies depending on the nature of the utility (investor-owned, municipal or cooperative), the type of transaction (retail vs. wholesale), and the specific laws of the state in which the utility is located.

There is no issue in this case of federal preemption. The United States Supreme Court has expressly upheld the power of a state to exercise jurisdiction over the wholesale rates of rural electric cooperatives like Seminole. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983). Specifically, the court held that an Arkansas statute which gave its public service commission jurisdiction over the wholesale rates charged by an Arkansas generation cooperative to its member distribution cooperatives located primarily in Arkansas was not pre-empted by the Federal Power Act, the Rural Electrification Act, or the commerce clause of the U.S. Constitution.⁹ *Id.* at 385, 389, 396. The

⁹ The Arkansas statute gave the commission general jurisdiction over electric cooperatives to the same extent as over investor-owned public utilities. This

Supreme Court reached this conclusion despite the fact that the rates of rural electric cooperatives are subject to review and approval by the Rural Utilities Service (formerly the Rural Electrification Administration). While cooperatives regulated by Rural Utilities Service (RUS) may enjoy a "freer hand" in ratemaking than their investor-owned counterparts, "it is in these areas that, by their structural nature, the cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members." *Salt River Project Agr. Dist. v. Federal Power Comm'n*, 391 F.2d 470, 473 (D.C.Cir. 1968).

The fact that the Florida Legislature *could* give the Commission authority over any aspect of Seminole's wholesale rates to its members without running afoul of federal preemption does nothing to address the question of whether the Legislature *has given* the Commission all or any part of that authority. For example, LCEC does not dispute that the Commission does not have rate level jurisdiction, as contrasted with rate structure jurisdiction, over either Seminole or

included full ratemaking jurisdiction, over both rate levels and rate structure. *In the Matter of Assertion of Jurisdiction, etc.*, Arkansas Public Service Commission, Docket No. U-2992, Order No. 2 at pages 1-2 (1979) (Appendix at 20-21) *affirmed Arkansas Pub. Serv. Comm'n v. Arkansas Elec. Coop. Corp.*, 618 S.W.2d 151, 152 (Ark. 1981); § 73-202.1, Ark. Stats. (1979).

LCEC.¹⁰ Instead, Florida law leaves the setting of rate levels to the discretion of each cooperative's governing board. If one discounts the importance of RUS review and approval, as LCEC does at footnote 11 of its Initial Brief, there clearly is a so-called "regulatory gap" in rate level regulation. But it is an intentional regulatory gap. The Florida Legislature simply has chosen not to interfere with self-governance by the cooperatives on the important issue of setting their rate levels.

The question in this case is not whether the Commission's determination that it lacks rate structure jurisdiction over Seminole's wholesale rate schedule leaves that rate schedule totally unregulated at the state level. Rather, the question is whether the Legislature intended for the Commission to regulate it. As discussed above, the Commission properly concluded that this type of contractual wholesale rate schedule does not involve a matter of rate structure within the meaning of

¹⁰ This Court recognized the distinction between rates and rate structure in its decision in *City of Tallahassee v. Mann*, 411 So.2d 162 (Fla. 1981), stating:

We agree that the commission does not have jurisdiction over a municipal electric utility's rates. However, there is a clear distinction between "rates" and "rate structure" though the two concepts are related. "Rates" refers to the dollar amount charged for a particular service or an established amount of consumption. Rate structure refers to the classification system used in justifying different rates.

Id. at 163 (citations omitted).

Chapter 366. Any resulting regulatory gap is simply a consequence of giving effect to the Legislature's intent, and is not a justification for construing the statute in some more expansive manner. Indeed, while LCEC argues that the Legislature intended to give the Commission jurisdiction over Seminole's wholesale rate schedules, it points to no legislative history to support its contention.

LCEC also argues that, unless the Court construes Chapter 366 to close this so-called regulatory gap over Seminole's wholesale rate schedule, LCEC will be forced to go to Circuit Court to litigate all issues regarding Rate Schedule SECI 7. That is true. But it is equally true that, regardless of the construction of Section 366.04(2)(b), LCEC would be required to go to Circuit Court to resolve any issue arising under the wholesale power contract that could not be characterized as implicating rate structure, including all issues involving rate levels. There is nothing perverse about a holding which has the effect of sending all disputes arising under the contract to a single forum.

E. LCEC'S INTERPRETATION OF CHAPTER 366 WOULD SIGNIFICANTLY EXPAND THE COMMISSION'S JURISDICTION.

LCEC's interpretation of Section 366.04(2)(b) would significantly extend the Commission's jurisdiction into areas that it has not heretofore regulated. If a contractual rate schedule negotiated between two utilities creates a rate structure

subject to the Commission's jurisdiction, then the Commission would be required to exercise rate structure jurisdiction over every wholesale power contract in which a municipal or cooperative utility is a seller. This would include not only Seminole's sales to its members (at issue in this case), but also sales by any municipal utility or cooperative utility to any investor-owned utility or to any other municipal or cooperative utility. None of these transactions are regulated by the Commission today and none have been regulated at any time in the twenty-five years since Section 366.04(2)(b) was enacted.

Under LCEC's construction of Chapter 366, the only wholesale transactions that would not be subject to rate structure regulation by the Commission are wholesale sales by investor-owned utilities. Those sales are specifically exempted by Section 366.11(1) because they are already regulated by the Federal Energy Regulatory Commission under the Federal Power Act.

The court should be slow to interpret Section 366.04(2)(b) in a way that would bring this entire range of wholesale transactions under Commission jurisdiction for the first time in history. That is particularly true in light of the principle that any doubt about the Commission jurisdiction should be resolved against the exercise of that jurisdiction. *City of Cape Coral, supra*.

CONCLUSION

For all of the foregoing reasons, the Commission's order granting Seminole's motion to dismiss LCEC's complaint for lack of jurisdiction should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of June, 2001.

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Counsel for Appellee, Seminole Electric Cooperative, Inc., hereby certifies that this Answer Brief is typed in Times New Roman 14-point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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