IN THE SUPREME COURT OF FLORIDA

P.W. VENTURES, INC.,

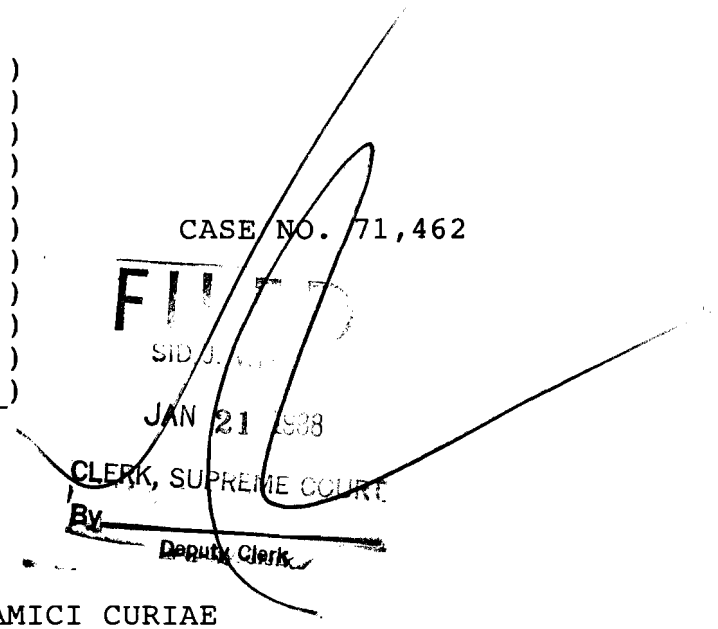
Appellant,

v.

KATIE NICHOLS, ET. AL,

Appellees,

CASE NO. 71,462



INITIAL BRIEF OF AMICI CURIAE INDUSTRIAL COGENERATORS

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PREFACE

This brief is filed in support of the Appellant, P.W. Ventures, Inc.

The Florida Public Service Commission will be referred to herein as "the Commission." The Appellant, will be referred to as "P.W. Ventures." Amici Curiae, will be referred to as "Industrial cogenerators."

STATEMENT OF THE CASE AND OF THE FACTS

Industrial Cogenerators adopt the Statement of the Case and Statement of the Facts of the Appellant, P.W. Ventures. In addition, Industrial Cogenerators provide the following statement of facts so that the Court may understand the interest of Industrial Cogenerators in this case, as well the impact of this case on cogeneration in Florida.

The Industrial Cogenerators own, operate or are constructing cogeneration facilities, also known as "Qualifying Facilities" or "QFs".[1] Cogeneration facilities are private electrical generation plants that are associated with industrial processes. They may use waste heat produced by industrial processes to generate electricity or, in generating electricity, produce heat to be used in industrial process. As a practical matter, the electrical output of a cogeneration facility can be consumed on-site, off-site, or can be sold to an electric utility. On-site consumption can include consumption by the electrical needs of the industrial process itself or consumption by unrelated uses located at the site. Off-site consumption can include consumption by remote facilities associated with the industrial process or by unrelated uses in the general vicinity of the cogeneration facility.

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[1]The terms Qualifying Facility or QF refer to certain electrical generating facilities defined under Federal Law. They are cogeneration facilities and small power producers which meet specific efficiency standards or fuel use criteria. A cogeneration facility is one which produces (a) electric energy and (b) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes. 16 U.S.C. Sec. 796(18)(A). Small power producers are defined as facilities which produce electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources or any combination thereof. 16 U.S.C. Sec. 796(17)(A).

Industrial Cogenerators have cogeneration output that can be provided to other persons. Under the Commission's interpretation of Section 366.02, Florida Statutes, any of the Industrial Cogenerators will become a "public utility" if it provides its output to anyone other than a utility, even if pursuant to negotiated contract with a single purchaser.

Just as importantly, the Commission's interpretation limits how Industrial Cogenerators can finance their future cogeneration projects and their industrial processes. First, Industrial Cogenerators will be unable to contract with other persons to construct and operate cogeneration projects but must own them outright. Otherwise, the independent operator will become a public utility. Second, where the cogeneration facility is owned exclusively by one person, he cannot enter into a joint venture in any industrial process that consumes the electrical output without becoming a public utility.

SUMMARY OF ARGUMENT

The Commission's order below erroneously re-interpreted the words "to the public" in Section 366.02, Florida Statutes, to mean "any one person." In so doing, it improperly amended the statute by administrative re-interpretation to suit its current agenda. The word "re-interpretation" is appropriate in this case because the Commission's current construction of the words "to the public" is contrary to its earlier interpretations of those words, one of which was approved by this Court. The only change since those earlier interpretations was the Commission's regulatory agenda.

Chapter 366, Florida Statutes, was enacted by the Florida Legislature in 1951 to regulate large utilities which would otherwise abuse their monopoly power to the injury of the public welfare. It was intended to regulate utilities that provide service to the public at large. Hence, the words, "to the public" were included in the definition of the term "public utility" in Section 366.02. The purpose of Chapter 366 has not changed since that time.

The Commission's re-interpretation of Section 366.02 is contrary to the plain meaning of the words "to the public" and to the meaning of the word "public" as used throughout Chapter 366. The re-interpretation is contrary to the purpose of Chapter 366, which is to regulate natural monopolies via a comprehensive scheme of regulation of their rates and terms and conditions of service. By extending the application of Chapter 366 to a private sale of

electricity, the Commission has improperly imposed a comprehensive scheme of regulation where the legislature did not intend.

The Commission's re-interpretation of Section 366.02 is contrary to its 1970 interpretation of that Section, wherein its held that a person was a "public utility" under that section if it held itself out to offer service to the general public. Its re-interpretation is also contrary to its 1977 interpretation of the words "to the public" in Section 367.021, Florida Statutes. In that case, the Commission construed Sections 366.02 and 367.021 in para materia and, citing its 1970 interpretation of Section 366.02, held that a person was a "public utility" if it held itself out to serve the general public. This Court affirmed that interpretation.

The Commissions's re-interpretation is also contrary to Section 212.08(4), Florida Statutes, and the cases construing that Section, as well as Chapter 361, Florida Statutes, which grants the power of eminent domain to "public utilities."

THE COMMISSION'S INTERPRETATION OF SECTION 366.02, FLORIDA STATUTES IS ERRONEOUS

INTRODUCTION

The Commission's interpretation of Section 366.02 is in error for a number of reasons: 1) It changes the definition of "public utility" in direct conflict with the plain language of the statute; 2) It ignores the purpose of Chapter 366, which is to regulate natural monopolies; 3) It extends the application of Chapter 366 to persons not contemplated by the legislature, improperly imposing a comprehensive scheme of regulation on private contracts; and 4) It is contrary to its own prior interpretations of the words "to the public," decisions of the Courts and related statutes.

In its order below, the Commission states that the issue is whether the supply of electricity to one end-user constitutes supplying "electricity to or for the public."[2] The Commission then concludes that the words "to the public" do not have their common meaning and that the legislature did not intend to define "public utility" in accordance with its meaning at common law. Id at 3. The Commission then concludes that a sale to one end-user is "to the public." Id at 5. The Commission closes its discussion by asserting that it is guided by "legislative wisdom."

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[2] In re: Petition of PW Ventures, Inc., for declaratory statement in Palm Beach County, Florida Public Service Commission Docket No. 870446-EU, Order No. 18302, October 16, 1987, at 3 (Appendix A-3).

Id at 7. In fact, however, the Commission has substituted its own motives for the wisdom of the legislature.

The Commission's interpretation of Section 366.02 is, in essence, an amendment of that section -- an amendment by administrative re-interpretation to suit its current agenda. Chapter 366 was enacted by the Legislature in 1951 to regulate large utilities which exercised monopoly power.[3] Recognizing that fact, in 1970 the Commission ruled that, to be a public utility under Section 366.02, one must offer service to the general public.[4] In 1977, citing its 1970 order as authority, the Commission gave the same interpretation of Section 367.021 -- an interpretation that was approved by this Court.[5] In 1980, the Legislature reenacted Chapter 366 after a Senate Commerce Committee Report described the purpose of Chapter 366 as being to control the monopoly power of public utilities.[6]

In 1983, however, when it realized the potential for small, private producers of electricity to sell electricity to end-

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[3]Chapter 26545, Laws of Florida, 1951.

[4]In re: investigation of the practice, policy and procedures of public utilities engaged in the sale of electricity to be resold, Florida Public Service Commission Docket No. 69318-EU, Order No. 4874 (April 23, 1970). (Appendix A-8)

[5]Fletcher Properties v. Florida Public Service Commission, 356 So.2d 289 (Fla. 1978).

[6]A Review of Chapter 366, Florida Statutes, Public Utilities, Prepared Pursuant to the Regulatory Reform Act, Chapter 11.61, Florida Statutes, by the Staff of the Senate Commerce Committee, January 1980. (Appendix A-16)

users, the Commission declared such sales prohibited.[7] When the Commission later realized that no law actually prohibited private supply contracts, it declared such sales subject to Chapter 366 by re-interpreting the words "to the public" in Section 366.02 to include even a single contract sale. By including a contract with a single end-user within the term "to the public," the Commission has made the private sale of electricity by small, private producers subject to the extensive and overwhelming regulation of Chapter 366, effectively preventing such private sales.

1. THE MEANING OF THE WORDS "TO THE PUBLIC".

The meaning of the words "to the public" is plain and unambiguous. They mean: "to the general public." The Commission's re-interpretation of those words is contrary to that plain meaning.

a. The Plain and Ordinary Sense of the Words.

The word "public" is a word of common usage and should be construed in its plain and ordinary sense. State v. Cormier, 375 So.2d 852 (Fla. 1979). The Commission recognized that the word "public" had a plain and ordinary meaning when, in 1970, it construed that word to mean the indefinite or general public.[8]

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[7] In re: Amendment of Rules 25-17.80 - 25-17.89 relation (sic) to cogeneration, Florida Public Service Commission Docket No. 820406-EU, Order No. 12634, October 12, 1983.

[8] In re: investigation of the practice, policy and procedures of public utilities engaged in the sale of electricity to be resold, supra.

Among the cases cited in that 1970 order, the Commission quoted Cawker v. Meyer, 133 N.W. 157, 147 Wis. 320, 37 LRA, NS, 510:

> "It is very difficult, if not impossible, to frame a definition of the word 'public' that is simpler or clearer than the word itself. The Century Dictionary defines it as: 'Of or pertaining to the people; relating to or affecting a nation, state or community at large.'...

Id at 2,3. (Appendix A-9,10)

The rule of statutory construction, that a regulatory agency's construction is entitled to great weight, does not apply when the language of a statute is plain and its meaning is clear. Kimbrel v. Great American Insurance Company, 420 So.2d 1086, (Fla. 1982). See Also Holly v. Auld, 450 So.2d 217 (Fla. 1984).

b. Construing the words in light of Chapter 366 as a Whole.

In construing the words "to the public" in Section 366.02, it is necessary to consider Chapter 366 as a whole. Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District, 274 So.2d 522, 525 (Fla. 1973). This is particularly appropriate in this case, since Section 366.02 triggers the application of the entire Chapter. Looking at the use of the word "public" throughout Chapter 366, it is plain to see that the legislature intended the words "to the public" in Section 366.02 to mean the general public and not to include private contracts to sell electricity.

The word "public" appears in several places throughout the Chapter and, as used, can only be reasonably interpreted to mean the general public. The word "public" used in Section 366.02

should have the same meaning. Goldstein v. Acme Concrete Corporation, 103 So.2d 202, 204 (Fla. 1958).

Under Section 366.01, the police power is exercised "for the protection of the 'public' welfare." As a matter of law, the word "public" in this sentence means the welfare of the general public. See Hamilton v. State, 366 So.2d 8, 10 (Fla. 1979). Under Section 366.05(1), the Commission may require "repairs, improvements, additions and extensions to plant and equipment reasonably necessary to promote the convenience and welfare of the 'public.'" Under Section 366.06(2) Commission must determine "the cost of property used and useful in the 'public' service, which shall be the money prudently invested in property used and useful in serving the 'public.'" Under Section 366.06(3), the Commission must "hold a 'public' hearing, giving notice to the 'public.'" Under Section 366.07, the Commission may act "after a 'public' hearing."

As used throughout Chapter 366, the word "public" clearly means the general public. The Commission's new and differing interpretation of the same word in Section 366.02 is simply not reasonable.

2. THE PURPOSE OF CHAPTER 366

The Commission's re-interpretation of Section 366.02 is contrary to the intent of the legislature in enacting Chapter 366, even though legislative intent is the polestar to statutory construction. Parker v. State, 406 So.2d 1089, 1092 (Fla. 1981).

It is the purpose of the legislature that is the primary guide to statutory construction. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963). A "public utility" under Section 366.02 is subject to the full regulation of Chapter 366, yet the Commission did not even attempt to look at the purpose of the legislature in adopting Chapter 366.

a. The Scheme of Regulation

In considering whether a private contract to provide electricity is one "to the public," it is appropriate to consider the history of the statute, the evil to be corrected, the intention of the legislature, the subject to be regulated and the object to be obtained. DeBolt v. Department of Health and Rehabilitative Services, 427 So. 2d 221, 224 (Fla. 1st DCA 1983); Englewood Water District v. Tate, 334 So.2d 626, 628 (Fla. 2nd DCA 1976). The legislative intent should be gleaned from the subject to be regulated, the purpose to be accomplished and the means adopted for accomplishing the purpose. Beebe v. Richardson, 23 So.2d 718,719 (Fla. 1945). The scheme of regulation under Chapter 366 shows that it was intended to apply only to utilities that serve the general public.

The stated purpose of Chapter 366 is to "protect the public welfare." Section 366.01, Fla. Stat. This Court, in City Gas Company v. Peoples Gas System, Inc, 182 So.2d 429, 435 (Fla. 1965), described Chapter 366 as "what can only be considered a very extensive authority over the fortunes and operation of the

regulated entities." On its face, the comprehensive regulatory scheme in Chapter 366 is aimed at public utilities as recognized at common law -- those who served the general or indefinite public. On its face, the comprehensive regulatory scheme in Chapter 366 cannot reasonably be applied to a small, private supplier of electricity.

Chapter 366 incorporates the common law duties to provide service to all, and to maintain fair, just and nondiscriminatory rates, charges, rules and regulations (366.03). The Commission is authorized to prescribe rates, charges, terms and conditions of service; to prescribe a uniform system of accounts, including depreciation rates; to require periodic reports; to require repairs, improvements and additions to plant and equipment; and to provide for the testing of meters (366.04, 366.05, 366.06 and 366.07).[9] Section 366.06 requires that all rates, charges, rules and regulations be filed with the Commission and contains detailed criteria governing the rates and charges of public utilities, particularly the manner in which rate base is to be set for ratemaking purposes. Sections 366.80, et seq., require public utilities to submit conservation plans to meet goals set by the Commission and requires them to offer energy audits to their residential customers.

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[9]This Court referred to these five Sections (366.03, 366.04, 366.05, 366.06 and 366.07) in City Gas Company v. Peoples Gas System, supra, as granting the Commission "extensive powers," which included "control over areas of service." Id. at 436. However, this "control" is only ancillary to the overall scheme of regulation under Chapter 366.

The "public welfare," as described in Section 366.01, is not protected by subjecting a private supplier of electricity to comprehensive regulation as a public utility under Chapter 366. In this case, PW Ventures proposes to supply electricity to Pratt and Whitney pursuant to a private, arms-length contract. Regulation of the rates, terms and conditions in a private contract, such as that between PW Ventures and Pratt and Whitney, has no effect on the public welfare. PW Ventures can visit no harm on the public which can be alleviated by requiring PW Ventures to file a tariff with the Commission for approval; maintain a uniform system of accounts; file annual reports; have its depreciation rates approved by the Commission; have its rate base set by the Commission; seek Commission approval before issuing securities; have the Commission order improvements, enlargements or extension of its plant or facilities; or submit conservation plans to the Commission for approval.

The comprehensive scheme of regulation imposed on public utilities under Chapter 366 makes sense only when applied to a traditional electric utility serving the general public. It simply does not make any sense when applied to a small producer of electricity who provides service under private contract. The legislature intended to use this comprehensive regulatory scheme to protect the "public welfare." It could not reasonably have intended to use the police power to regulate a private contract.[10]

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[10] See Hamilton v. State, supra; Belk-James, Inc. v. Nuzum, 358 So.2d 174,175 (Fla. 1978); Miami Bridge Co. v. Railroad Commission, 20 So.2d 356,361 (Fla. 1945).

b. The Legislature's 1980 Sunset Review of Chapter 366

The legislature's purpose in enacting Chapter 366 is confirmed by a legislative analysis of Chapter 366 during Sunset review in 1980.[11] This report, currently maintained in the Legislative Library, outlines the history of the regulation of public utilities in Florida and the adoption of Chapter 366; describes alternatives to continued regulation by the Commission; and contains a recommendation for continued regulation. (Appendix A-16). It verifies that Chapter 366 was enacted to provide for statewide regulation of electric and gas utilities exercising monopoly powers which could otherwise be abused without adequate regulation.

The report notes that as the technology grew, small utility companies merged and consolidated, having the effect of creating a natural monopoly. Id, at 6. (Appendix A-27) In its analysis of the potential impact of non-regulation, the report stated that the Commission's responsibility "is to implement regulation as a replacement for the nonexisting market forces of competition." Id, at 36. (appendix A-57) In its analysis of alternatives to regulation, the report states that, under common law, "public utilities have an obligation to provide safe, adequate, and

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[11] A Review of Chapter 366, Florida Statutes, Public Utilities, supra. In the introduction, the report states that the review is a product of staff research, meetings with Commission Staff and information received from utilities. Special thanks were extended to the Commissioners, the Commission's Executive Director, General Counsel, and their staffs for supplying technical data and information. Id at 2. (Appendix A-21)

reliable service to supply customer requirements." Id, at 37. (Appendix A-58)

The report concluded that the absence of regulation would harm or endanger the public health, safety, or welfare:

> ...Because regulation provides the necessary checks normally supplied by competition in competitive industries. As natural monopolies, electric and gas companies provide fundamental and absolutely necessary services essential to life itself. The potential for gross abuses in the areas of providing service and charging for that service is great.

Id, at 39. (Appendix A-61)

It also concluded that there appeared to be no feasible alternative to state regulation:

> Regulation at the local level, as was the case prior to the enactment of Chapter 366, Florida Statutes, proved to be very confusing, resulting in different standards for service in each area the utility served. In the absence of regulation, utilities would probably have a common law obligation to provide reasonable service and rates, which would be enforceable by individual action in court.[12] This method is lengthy and cumbersome.

Id, at 40. (Appendix A-62)

The report recommending that Chapter 366 be re-enacted. Chapter 366 was re-enacted in Sections 6 and 16 of Chapter 80-35, Laws of

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[12] This was recognized by this Court in Tampa Electric Company v. Cooper, 14 So.2d 388 (Fla. 1943), and Cooper v. Tampa Electric Company, 17 So.2d 785 (Fla. 1944). In those cases, this Court recognized that the legislature was empowered to regulate public utilities but had yet to do so. In the absence of such legislative action, this Court held that the Common Law and the courts would act to provide recourse. See Cooper v. Tampa Electric Company, supra, at 787. However, the Court noted that, while the courts may provide relief against discriminatory rates, they may not prescribe rates for the future. See Cooper v. Tampa Electric Company, supra, at 786.

Florida. Though amended in several minor respects in the process, it retained intact its comprehensive scheme of regulation.

From this legislative review, it is clear that the Legislature did not intend that small, private producers of electricity be subject to Chapter 366. The purpose of Chapter 366 is to protect against the abuses of large utilities which, by virtue of their superior monopoly position, can dictate the terms of service, set their rates at excessive levels and discriminate among customers. PW Ventures has no natural monopoly. It is a small company that seeks to provide electricity to one customer. There is no potential for abuse of monopoly power. PW Ventures cannot dictate the terms of its service. It cannot set its charges at excessive levels. It cannot discriminate among customers. The relationship of PW Ventures to Pratt and Whitney is through a typical private contract. There is no threat to the health, safety or welfare of the public if PW Ventures is not regulated by the Commission. The relationship between PW Ventures and Pratt and Whitney is a private one.

3. PRIOR INTERPRETATIONS AND JUDICIAL DECISIONS

The Commission's re-interpretation of the words "to the public" in Section 366.02 conflicts with its prior interpretations of that Section, its interpretation of Section 367.021 approved by this Court, and judicial decisions defining "public utility."

a. The Commission's 1970 Interpretation of Section 366.02

The Commission's interpretation of the words "to the public" is contrary to its 1970 interpretation of those same words.[13] In Order No. 4874 (Appendix A-8), the Commission held that a landlord reselling electricity to his tenants was not a public utility because he was not selling "to or for the public." In that order, the Commission held:

> It is our view and we hold that a landlord does not become a public utility under Chapter 366 by virtue of his reselling electricity to his tenants. Such a sale is not one to or for the public. The purchase of electricity from the landlord is not open to the indefinite or general public but only to particular individuals who are tenants of the landlord. This is simply one service among others which a landlord may provide to his tenants. A tenant who may be dissatisfied with any service provided by a landlord, whether it be electric service or otherwise, has the option to move to another location where he may find the service more to his satisfaction. Such is not the case where one is served by a true public utility obligated to serve any member of the public who may desire service within its service area. There, the availability of service does not rest upon a special relationship such as that of landlord and tenant but rests upon the duty of the public utility to serve all members of the public indiscriminantly.
>
> In view of the foregoing, it is rather clear that landlords engaged in the practice of re-metering and reselling electricity, whether for profit or for allocating the cost of service, are not included in the statutory definition of public utilities and are not subject to the regulatory jurisdiction of this Commission. (Emphasis supplied)

Id, at 3 and 4. (Appendix A-10,11)

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[13] In re: investigation of the practice, policy and procedures of public utilities engaged in the sale of electricity to be resold, supra.

In making this ruling, the Commission cited numerous cases interpreting the words "to the public" to mean the public at large. In particular, it quoted at length Cawker v. Meyer, 133 N.W. 157, 147 Wis. 320, 37 LRA, NS, 510:

> "It is very difficult, if not impossible, to frame a definition of the word 'public' that is simpler or clearer than the word itself. The Century Dictionary defines it as: 'Of or pertaining to the people; relating to or affecting a nation, state or community at large.' The tenants of a landlord are not the public; neither are a few of his neighbors or a few isolated individuals with whom he may choose to deal, though they are part of the public. The word 'public' must be construed to mean more than a limited class defined by the relation of landlord and tenant, or by the nearness of location, as neighbors, or more than a few who, by reason of any peculiar relationship to the owner of the plant, can be served by him.
>
> "...The statute was intended to include those, and only those, who furnished the commodities therein named to or for the public. It was not intended to affect the relation of landlord and tenant, ..."

Id, at 2 and 3. (Appendix 9,10)

The Commission's 1970 interpretation of Section 366.02 was correct and remains correct. The Commission's re-interpretation of that Section is not.

In the order under appeal, the Commission attempts to reconcile its conclusion that providing electricity to one end-user is consistent with its 1970 holding. In so doing, it distinguishes between "the submetering of electricity on a pass-through-the-cost basis and the production and sale of electricity" and concludes that its "approval" of pass-through submetering does not render a sale by PW Ventures nonjurisdictional. Id at 7. (Appendix A-7) This entire argument is disingenuous.

In its 1970 order, the Commission held that landlords reselling to tenants were nonjurisdictional because service "was not open to the indefinite or general public" and that landlords were not "public utilities" regardless of whether the resale was "for profit or for allocating the cost of the service." (e.s.) Order No. 4784 at 4. (Appendix A-11)[14]

Further, the Commission makes no reference to any language in Chapter 366 that would lead to the distinction it now seeks to make. There is no identifiable reference to the concept of "production" in Section 366.02, nor is there any language in that Section that would exempt providing electricity on a pass-through-the-cost basis. The Commission's 1970 order noted that there were landlords in Florida that re-metered electricity to their tenants at a profit. But why did the Commission not declare them to be public utilities and order them to comply with Chapter 366? The reason is simple. They were not public utilities because of the scope of their offering of service. Price and production were irrelevant to the Commission's 1970 interpretation of Section 366.02 and they are irrelevant today. The scope of the offer is the only relevant test -- whether it is to the public at large.

b. The Commission's March 1987 Re-interpretation

The Commission's re-interpretation of Section 366.02 below is even contrary to a previous re-interpretation in March 1987. In

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[14]The cost-of-service limitation came only from utility tariffs. Id, at 4-8. (Appendix A-11 - A-15)

March, the Commission issued a declaratory statement concluding that a sale of electricity to a single end-user was not a sale "to the public."[15] In that order, the Commission stated:

> Petitioner suggests that our answer to the RCA Petition for Declaratory Statement recognizes that one can provide traditional utility service to someone other than "public" and we agree. (Petition of RCA Communications for Declaratory Statement, Docket No. 860163-TP, Order No. 16092, Issued May 9, 1986.) RCA serves one customer -- a situation which to even the casual observer would appear to be the antithesis of "public."[16] (Emphasis supplied)

Id, at 3.

Less than a year ago the Commission declared service to one person to be the "antithesis" of public. Now the Commission deems it the very "essence" of public. The Commission's re-interpretation in the PW Ventures' case is in error and simply cannot stand.

c. The Commission's 1977 Interpretation of Section 367.021

The Commission's re-interpretation of the words "to the public" is also contrary to its interpretation of the same words

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[15] In re: Petition of Timber Energy Resources, Inc., for a Declaratory Statement Concerning Sales as "Private Utility" Status, Florida Public Service Commission, Docket No. 861621-EU, Order No. 17251, March 5,1987).

[16] That order concluded that a cogenerator's plan to provide service to occupants of an industrial park would "supply electricity to the public." Id at 2. This particulary re-interpretation misconstrues Section 366.02 but at least acknowledges that "the public" is more than one person.

in Section 367.021, Florida Statutes (1975).[17] This is improper. Goldstein v. Acme Concrete Corporation, supra. A statute should be construed together with any other statute relating to the same subject matter or having the same purpose. Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District, supra, at 524,525. This is exactly what the Commission had done in 1977 when it interpreted the words "to the public" in Section 367.021.

In a declaratory statement issued June 2, 1977, the Commission interpreted the word "public" in Section 367.021(3) to mean the public at large. In so doing, The Commission cited its 1970 order (Order No. 4874), as well as cases reciting the common law definition of a public utility:

> The application of the term 'public' has been considered previously. (See Order No. 7415, Docket No. 73359-W). The service must be available to the indefinite public (not tenants). Order No. 4874, Docket No. 69319-EU, 85 PUR 3rd, 107;[18] service must be available to all individuals in general without discrimination, within a given area, including subvendees, tenants, and others with whom [the utility] had no contractual relations.

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[17]Subsection (3) of that Section provided:

> "Utility" means a water or sewer utility and, except as provided in s. 367.022, includes every person, lessee, trustee, or receiver owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or sewer service to the public for compensation. (Emphasis Supplied).

[18]Order No. 4784 was cited for the proposition that service must be offered to the "indefinite public." This clearly shows that the Commission viewed its 1970 order as embracing the Common Law definition of "public utility" which the Commission now rejects.

(Village of Virginia Gardens v. City of Miami Springs, 171 So.2d 199, (1965) Fla. [App]; Lorch v. Read Investment Company, and cases cited therein, 96 PUR-NS 120, 122, Wisconsin (1952)). (emphasis supplied)

Quite clearly, the Commission's re-interpretation of the words "to the public" in its order below is contrary to this 1977 interpretation of those same words in para materia.

The Commission's construction of the term "to the public" in Section 367.021 was approved by this Court in Fletcher Properties v. Florida Public Service Commission, supra. In that case, the Court approved the Commission's 1977 interpretation of the term "to the public." That interpretation is now binding on the Commission. Alford v. State, 307 So.2d 433, 436 (Fla. 1975), Cert. Den., 96 S.Ct. 3227, 428 U.S. 912, 49 L.Ed.2d 1221, Reh. Den., 97 S.Ct. 191, 429 U.S. 873, 50 L.Ed.2d 155. The Commission cannot take away from this Court the power to declare what the law is. L.B. Price Mercantile Co.v. Gay, 44 S0.2d 87,90 (Fla. 1950).

4. OTHER STATUTES AND JUDICIAL DECISIONS

The Commission's re-interpretation of Section 366.02 is contrary to statutes found outside Chapters 366 and 367.

a. Section 212.08(4), Florida Statutes

The Commission's re-interpretation of Section 366.02 is contrary to Section 212.08(4), Florida Statutes. That Section provides in part:

> (a) Also exempt are:
>
> * * *
>
> 2. All fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. ...[19] (Emphasis Supplied).

In Department of Revenue v. Merrit Square Corporation, 334 So.2d 351 (Fla. 1st DCA 1976), the Court construed the words "public utility" in Sections 366.02 and 212.08(4) to mean a utility that "holds itself out to serve the general public." Id. at 354.[20] The Court held that a private utility "is one who sells energy to a limited segment or group, such as to its own tenants, and not to the public at large. Id. at 354.

The legislative distinction between "public" and "private" utilities in Section 212.08(4) is no coincidence. It reflects the Legislature's choice that only utilities that offer service to the general public be "public utilities" under Chapter 366 and that utilities providing service to a limited group fall outside of regulation as "public utilities" under Chapter 366. There would be no need for this distinction if the sale of electricity to one

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[19]The term "public utility" in Section 212.08(4) was clearly chosen directly from Section 366.02. Section 212.08(4) specifically incorporates municipal and cooperative utilities in this term. This would be unnecessary if this term had its origin outside of Section 366.02 because only Section 366.02 excludes them from this term. The common law definition of a public utility does not. See Village of Virginia Gardens v. City of Miami Springs, 171 So.2d 199 (Fla. 1st DCA 1965).

[20]See Devon-Aire Villas Homeowners Association No. 4, Inc. v. American Associates, Ltd., 490 So.2d 60,63 (Fla. 3rd DCA 1985), where the Court cited the Merrit Square case as an authoritative construction of Section 366.02.

end-user made the supplier a "public utility" because there could then be no such thing as a "private utility."[21]

b. Chapter 361, Florida Statutes

The Commission's interpretation of Section 366.02 is contrary to Chapter 361, Florida Statutes. That Chapter, entitled: "Public Utilities: Special Powers," authorizes any corporation organized to construct, maintain or operate "public works" to exercise the power of eminent domain. Sec. 361.01, Fla. Stat. Such a power may only be exercised for a public purpose. See Demeter Land Co. v. Florida Public Service Co, 128 So.Rep. 402 (Fla. 1930). Yet, according to the Commission's re-interpretation of Section 366.02, a person who supplies energy to a single end-user may exercise the power of eminent domain as a "public utility." Such a result was not intended by the Legislature. The Commission's re-interpretation of Section 366.02 is erroneous.

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[21]Section 212.08(4) precludes the Commission's distinction between the regulated "generation and sale of electricity" and the unregulated "pass-through-the-cost" of electricity. That provision exempts "all fuels used by a public or private utility ... in the generation of electric power or energy for sale." Clearly, the Legislature contemplated that a private utility (as opposed to a public utility) would generate and sell electricity to a limited number of persons.

CONCLUSION

The Commission's re-interpretation of the words "to the public" in Section 366.02, Florida Statutes, is an improper attempt to amend the statute by administrative interpretation. The Commission's re-interpretation is contrary to the plain meaning of the words; the purpose of the legislation; its prior, reasonable interpretations of those same words; and the decisions of the Courts. The Court should construe the words of the statute as they were intended by the legislature, that is -- a public utility provides service "to the public" only when it holds itself out to provide service to the general public.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following persons by U.S. Mail 21st day of January, 1988.

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