IN THE
SUPREME COURT OF FLORIDA

PW VENTURES, INC.	)	
Appellant,	)	
v.	)	CASE NO. 71,462
KATIE NICHOLS, ET AL.,	)	
Appellee.	)	

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

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PRELIMINARY STATEMENT

The Commission accepts the Appellant's Statement of the Case. The Appellant's Statement of the Facts is also accepted except the statement "No electricity will be sold to any party except P&W [Pratt and Whitney] or an electric utility." That statement is incorrect. In fact, electricity is also sold to Sikorsky Aircraft, United Technologies Optical Systems, Inc., United Technologies Airport Operations Group, and the Federal Aircraft Credit Union. Pratt and Whitney is simply the point of entry and Pratt and Whitney will be allocating the cost of the electricity among those other end-users.

SUMMARY OF THE ARGUMENT

The sale of electricity by PW Ventures to Pratt and Whitney, for use by it and other end-users, makes PW Ventures a "public utility" within the meaning of section 366.02(1), Florida Statutes. Considering the definition in section 366.02(1), Florida Statutes in its entirety and in comparison with sections 367.021 and 367.022, Florida Statutes, an entity which sells electricity to any member of the public is a public utility for regulatory purposes.

This interpretation is consistent with the Legislature's intent in enacting chapter 366, Florida Statutes. The intent was to promote and protect the public interest by authorizing electric utilities to provide electricity in a given area, free of competition, but subject to a pervasive regulation. Unlimited and unfettered competition as would result from the interpretations proposed by Appellant and Amici, is contrary to that intent.

The Commission's conclusion that PW Ventures is a "public utility" is entitled to great weight, since the Commission is charged with interpreting and enforcing chapter 366, Florida Statutes. The Commission has been consistent in its interpretation of the term "public utility," and its interpretation is neither erroneous nor contrary to case law.

The Commission's order should be affirmed.

POINT I

THE SALE OF ELECTRICITY BY PW VENTURES TO PRATT AND WHITNEY MAKES PW VENTURES A PUBLIC UTILITY WITHIN THE MEANING OF SECTION 366.02(1), FLORIDA STATUTES.

PW Ventures is an entity created for the sole purpose of generating and selling electricity to Pratt and Whitney for use by Pratt and Whitney and other end-users. Under section 366.02(1), Florida Statutes, PW Ventures is a public utility subject to the jurisdiction of the Public Service Commission (Commission). This conclusion is consistent with the definition of public utility and the Legislature's intent in enacting Chapter 366.

1. The Definition Of Public Utility Includes Entities Making Sales To An End-User(s).

It is a fundamental rule of statutory construction that the entire provision under scrutiny be considered, and effect given to every part. Wilensky v. Fields, 267 So.2d 1 (Fla. 1972). When the entire definition contained in section 366.02(1), Florida Statutes, including the exclusions, is given effect, it is clear that the sale of electricity to any member of the public is included in the definition.

Section 366.02(1) provides:

> 366.02 Definitions.-- As used in this chapter: (1) "Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this

> state; but the term "public utility" as used herein does not include either a cooperative now or hereafter organized and existing under the Rural Electrification Cooperative Law of the state; a municipality or any agency thereof; any natural gas pipeline transmission company making only sales of natural gas at wholesale and to direct industrial consumers; or a person supplying liquefied petroleum gas, in either liquid or gaseous form, irrespective of the method of distribution or delivery, unless such person also supplies electricity or manufactured or natural gas. (Emphasis supplied.)

The exclusion given to natural gas suppliers for sales "at wholesale and to direct industrial consumers" is not given to electricity suppliers. The explicit exemption for sales of gas to direct industrial consumers leads to the conclusion that no other exceptions were intended. If the sale of gas or electricity directly to industrial consumers were already excluded from the phrase "to or for the public", the specific exemption would not have been necessary. The sale of electricity to direct industrial consumers is therefore included in the phrase "to or for the public." PW Ventures' sale of electricity to Pratt and Whitney involves a direct sale of electricity to industrial consumers and, not being exempted, is included thus subjecting PW Ventures to Commission jurisdiction. The fact that PW Ventures is contracting only with Pratt and Whitney is not dispositive. The end-users are Pratt and Whitney, Sikorsky Aircraft, United Technologies Optical Systems, Inc., United Technologies Airport Operation Group, and the Federal Aircraft Credit Union. Pratt and Whitney in effect submeters to these end-users to allocate the costs. It is

appropriate to look beyond the "meter" to determine the end-users. The Court previously approved the Commission's looking beyond the meter to determine jurisdiction in Fletcher Properties Inc. v. Public Service Commission, 356 So.2d 289 (Fla. 1978).

The exception given for sales of natural gas to direct industrial consumers, who are specified members of the public, also gives rise to the conclusion that sales to any other members of the public is a regulated service. The Appellant and Amici concede that Pratt and Whitney, its affiliates and the credit union are members of the public. The thrust of their argument is that service to some, but not all, members of the public, is not service to the public within the meaning of the statute and therefore they are not subject to the Commission's jurisdiction. The statutory definition contains no numerical exemption from jurisdiction and the Commission concluded none was intended.

The Legislature could have easily included a numeric exemption if that was their intention. They included such an exemption for water and sewer utilities. Section 367.021(3), Florida Statutes, defines a water and sewer utility as every person "providing, or who proposes to provide, water or sewer service to the public for compensation." Section 367.022(6), Florida Statutes, expressly exempts from this definition "systems with the capacity or proposed capacity to serve 100 or fewer persons." Therefore, small water and sewer utilities are exempt from regulation. There is no parallel numerical exemption to the statutory definition of a public utility in Chapter 366.

When the definition in section 366.02(1), Florida Statutes, is read in its entirety and in comparison with sections 367.021 and 367.022, Florida Statutes, the only conclusion that can be reached is that an entity which sells electricity to any member of the public is a public utility.

2. A Finding That PW Ventures Is A Public Utility Is Consistent With The Legislature's Intent In Enacting Chapter 366.

A statute must be construed and applied to give effect to legislative intent. Deltona v. Public Service Commission, 220 So.2d 904 (Fla. 1969). This is the paramount rule of statutory construction.

An interpretation of section 366.02(1), Florida Statutes, which includes PW Ventures within the definition of public utility is consistent with the intent of the Legislature in enacting Chapter 366. Legislative intent is gleaned from the language of the statutes, the subject sought to be regulated, the purpose to be accomplished and the means adopted to accomplish the purpose. Deltona v. Public Service Commission, supra.

The decision to regulate electric utilities pursuant to the state's police power, as well as the scheme of regulation chosen, demonstrate an intent by the Legislature that electric service be provided on a monopoly basis within a given area. Storey v. Mayo, 217 So.2d 304 (Fla. 1968).

The exercise of the police power of the state is appropriate where it is necessary to protect the health, safety and general welfare of the people. The Legislature recognized electricity to

be an "absolute necessity" and that the production and distribution of electricity was a natural monopoly.[1] The Legislature's purpose was to have the public benefit from the existence of a natural monopoly, while protecting the public from potential abuses. The entities providing electric service are permitted to serve the public, without competition, but they were subject to pervasive regulation.

It is clear not only from the definition of public utility, which includes a sale to any member of the public, but also from the provisions on territorial disputes and agreements and the enactment of the "Grid Bill" that the Legislature intended electricity to be provided on a monopoly basis. §366.04, Fla. Stat. The provisions on territorial agreements and disputes gives the Commission authority to determine which utility can best serve and therefore receive an exclusive right and obligation to serve a specific area. The "Grid Bill" gives the Commission authority to prevent uneconomic duplication of facilities.

The validity of territorial agreements and the Commission's authority to approve those agreements was first recognized by this Court, prior to specific legislative language. In finding the Commission had the implied power to approve agreements, the Court stated:

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[1] "A Review of Chapter 366, Florida Statutes, Public Utilities," by the staff of the Senate Commerce Committee attached as an appendix to the Amici Curiae Brief. Pertinent pages are attached as Appendix A.

> The powers of the Commission over these privately-owned utilities is omnipotent within the confines of the statute and the limits of organic law. Because of this, the power to mandate an efficient and effective utility in the public interest necessitates a correlative power to protect the utility against unnecessary, expensive competitive practices. While in particular locales such practices might appear to benefit a few, the ultimate impact of repetition occurring many times in an extensive system-wide operation could be extremely harmful and expensive to the utility, its stockholders and the great mass of its customers. Tampa Electric Co. v. Withlacoochee River Electric Coop., 122 So.2d 471 (Fla. 1960). It was a recognition of this basic concept that led us to approve territorial service agreements between two regulated utilities. Peoples Gas System, Inc., v. Mason, 187 So.2d 335 (Fla. 1966); City Gas Co., v. Peoples Gas System, Inc., 182 So.2d 429 (Fla. 1965). In the last-cited cases we recognized the importance of the regulatory function as a substitute for unrestrained competition in the public utility field. We there noted that often a regulated or measurably controlled monopoly is in the public interest, and that in the area of public utility operations competition alone has long since ceased to be a potent or even a reasonably efficient regulatory factor. (Emphasis supplied.)

at 307.

The Court, in affirming the Commission's authority to approve territorial agreements, specifically recognized that the Legislature's conclusion that the provision of electricity was a monopoly service necessitated a correlative power to protect the utility against unnecessary, expensive competitive practices. Regulation was substituted for competition as a more efficient means of delivering electricity (an absolute necessity) to the general public.

The authority to approve territorial agreements has the same result as issuing certificates of public convenience and necessity. It defines the boundaries between utilities. A utility has the obligation to serve and the right to serve, free of competition, within those boundaries. The validity of the territorial agreements depends upon Commission approval, just as the validity of the service territory of a telephone company or a water and sewer utility requires a certificate of convenience and necessity.

The case law on territorial agreements was codified by the Legislature in 1974 as an amendment to section 366.04, Florida Statutes. This codification affirmed the Court's interpretation that the intent of Chapter 366 is that one entity be authorized and required, free of competition, to provide electricity within a given area. In the same bill, the Legislature further confirmed this intent by enacting the "Grid Bill", provisions relating to a coordinated electric power grid. Section 366.04(3), Florida Statutes, provides:

> (3) The commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities. (Emphasis supplied.)

This amendment specifically directs the Commission to exercise its powers to avoid "uneconomic duplication of generation transmission and distribution facilities." If the proposed sale

of electricity by PW Ventures, and others like it, were outside the jurisdiction of the Commission, duplication of generation, transmission and distribution facilities could persist, to the detriment of the public interest.

It is basic economic theory that the public benefits from receiving electricity from a monopoly provider if the industry is in fact a natural monopoly.[2] Natural monopolies are found in industries which have high initial investment costs and relatively low variable operating and maintenance costs. The electricity industry fits these criteria. An industry is characterized as a natural monopoly when economies of scale are so pervasive, relative to the total market demand for the product or service, that a single firm can meet the entire demand for the product or service and still be operating within the range of declining average costs. One large firm can serve the whole market at a lower per unit cost than several smaller firms. Thus the introduction of competition into a natural monopoly industry results in higher costs to the consumer.

Unregulated competition in the provision of electricity is contrary to the public interest. If PW Ventures' theory is correct, they could serve many members of the public and still avoid regulation. Impell Corporation and FP&L Energy Services, the PW Venture partners, need only make use of multiple partnerships selling service via one-to-one contracts with those

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[2] Testimony of Ben Johnson, Ph.D., FPSC Docket No. 820537-TP, Transcript pp. 591-602, attached as Appendix B.

customers. The resultant "unregulated sales" of electric service would allow unlimited and unfettered competition in a carefully regulated monopoly market. Increased prices to the general body of ratepayers would result.

Entities like PW Ventures will target for service large industrial customers similar to Pratt and Whitney and its affiliates. Rather than sell to an electric utility as provided in the Public Utility Regulatory Policies Act (PURPA),[3] these small utilities would "skim off" small geographic areas with high use customers. Revenues that otherwise would have gone to the regulated utility (Florida Power & Light Company in this case) will be diverted. This revenue will have to be made up by other customers, most likely residential customers, who remain on the regulated system. The fixed cost of the regulated system has not changed, but the amount of electricity sold and the number of customers over whom the fixed cost can be spread, has decreased. This scenario is particularly offensive where, as here, a sister company of the regulated utility is a partner in the venture to divert the revenues. The parent company (FPL Group) will profit

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[3] The Congressional intent in enacting PURPA was to create a wholesale power market for cogenerators and small power producers. PURPA was enacted at a time of high oil prices and rampant inflation making the potential economic benefits of allowing wholesale sales of cogenerated power substantial. Congress did not intend to effect a back-door deregulation of the electric utility industry.

from the revenues from the unregulated partnership (FPL Energy Services, Inc.) and its revenues from the regulated entity (Florida Power & Light Company) will remain the same: the customer base will be smaller.[4]

PW Ventures' argument that the effect on the remaining ratepayers is the same whether PW Ventures serves Pratt and Whitney, et al. or Pratt and Whitney serves itself is irrelevant. The Legislature determined that the protection of the public interest required only limiting competition in the sale of electric service, not a prohibition against self-generation. The expertise and investment needed to build a power plant, coupled with economies of scale, would deter many individuals from producing power for themselves rather than simply purchasing it. Competition in the sale of electricity is limited by the authority given the Commission to approve territorial agreements and by the fact that public utilities are not required to furnish electricity for resale. §366.03, Fla. Stat. (1987).

3. The Commission's Decision Declaring PW Ventures To Be A Public Utility Is Not Contrary To Case Law.

The cases cited by Appellant and Amici are not dispositive of this case. Those cases did not involve an interpretation of public utility as that term is used in section 366.02(1), Florida Statutes. Therefore the intention of the Legislature in enacting

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[4] After this case was decided by the Commission, FPL Energy Services, Inc., divested itself of any interest in PW Ventures. Energy Services, Inc. is not, however, prohibited from engaging in such joint ventures in the future.

Chapter 366 was never involved. That is the paramount consideration in this case. Nonetheless those cases support the Commission's decision in this case, or are distinguishable.

Fletcher Properties, Inc. v. Public Service Commission, 356 So.2d 289 (Fla. 1978), is the only case cited by Appellant and Amici which interprets the term public utility for regulatory purposes. The Commission's conclusion that Fletcher Properties was a utility subject to Commission jurisdiction was affirmed. Fletcher Properties was found to be a jurisdictional utility because service was available to all individuals within a given area including those with whom Fletcher had no other existing relationship. Fletcher's sale of service to customers who were not tenants of Fletcher Properties made it a public utility. It was selling utility service to the general public in a given area.

This case is the same as Fletcher Properties. PW Ventures is proposing to sell electricity to the general public in a given area: the several thousand acre industrial park owned by United Technologies, Pratt and Whitney's parent. The electricity is offered to the general public situated in the park. PW Ventures serves the public in the limited area that it has defined for itself. It is providing service to all the public in that area.

In Department of Revenue v. Merritt Square Corporation, 334 So.2d 351 (Fla. 1st DCA 1976), a tax case, the Court found Merritt Square to be a private rather than public utility. Merritt Square was a private utility for tax purposes because it sold electricity

only to its tenants, parties with whom it had a relationship other than just the sale of electricity. PW Ventures was created for the sole purpose of selling electricity to other unrelated parties.

In Cherry Lake v. Kearce, 157 Fla. 484, 26 So.2d 434 (Fla. 1946), Cherry Lake was not found to be a public utility because the telephone system that was installed "was maintained primarily for the convenience of the corporation ... and although a few subscribers ... were allowed to participate in the service, such service was incidental and in nowise changed the dominant purpose for which the system was installed." (26 So.2d at 437).

In Village of Virginia Gardens v. City of Miami Springs, 171 So.2d 199 (Fla. 3rd DCA 1965), Miami Springs was found not be a public utility because of its incidental sale of bulk water to Virginia Gardens. The dominant purpose of the City of Miami Springs was to provide governmental services, including water, to its own residents,[5] not to provide water to Virginia Gardens. PW Ventures is not supplying electricity to itself, it is in business to sell electricity to others.

The factual circumstances in Higgs v. City of Fort Pierce, 118 So.2d 582 (Fla. 2nd DCA 1960), are somewhat unclear. No recitation is given of the facts leading the Court to conclude that the local gas dealers were not public utilities. The Court simply states "the testimony ... was uncontradicted that the local

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[5] Section 367.022(2), Florida Statutes, exempts from the definition of public utility for regulatory purposes a water or sewer utility owned and operated by an incorporated city.

dealers of artificial gas were private businesses and none ... were operating a public utility." It is significant that the local dealers were selling artificial gas (propane), rather than natural gas, and presumably were not distributing this artificial gas via an in-ground distribution system. Therefore the service provided by local dealers was more like going to a gas station for fuel for an automobile, except it was a propane tank that was filled.

PW Ventures' and the Amici's application of these cases for purposes of interpreting section 366.02(1), Florida Statutes, is inappropriate. The application introduces an arbitrary numerical standard which was not intended by the Legislature. An entity generating and selling electricity is a public utility whether it sells to one end-user, two end-users, ten or more.

4. The Commission's Decision In This Case Is Consistent With Its Prior Decisions.

The Commission has been consistent in its interpretation of chapter 366, Florida Statutes, and the interpretation of the term public utility was used in that Chapter. The Commission has concluded that a retail sale of electricity to an end-user makes the entity selling the electricity a public utility and that each public utility has the right and obligation to serve customers in its service area free of competition.

First, in the 1970 investigation into submetering of electric service, Investigation of the Practice, Policy and Procedures of Public Utilities Engaged in Sale of Electricity to be Resold,

Docket No. 69319-EU, Order No. 4874, the Commission recognized that a sale of electricity to tenants, which was submetered only to allocate costs, did not make the landlord a public utility. The landlord was not displacing service from the utility and was therefore not in competition with the regulated utility. Nor was the landlord engaged in the production and sale of electricity as a separate enterprise. In this case PW Ventures was created for the sole purpose of selling electricity in direct competition with the regulated utility.

The Commission first discussed the issue of retail sales by cogenerators when it adopted rules implementing PURPA. Amendment of Rules 25-17.80 through 25-17.89 Relation to Cogeneration, Order No. 12634, 83 F.P.S.C. 10:150 (1983). PURPA requires electric utilities to purchase power from cogenerators at a wholesale price established by state regulatory commissions. Cogenerators had proposed that they be permitted to make retail sales. The Commission found that a retail sale by a cogenerator infringed on the regulated utility's exclusive right and obligation to serve within its service area. That finding is consistent with federal law because PURPA prohibited the Federal Energy Regulatory Commission from adopting any rule that authorized a cogenerator to make retail sales, 16 USC 824 a-3(2) (1982 Supp.) (Appendix C contains the pertinent pages of Order No. 12634.)

The conclusion in the cogeneration rulemaking proceedings has been consistently applied in subsequent cases. In Petition of Monsanto Company for a Declaratory Statement Concerning the Lease

Financing of a Cogeneration Facility, Order No. 17009, 87 F.P.S.C. 12:354 (1987), the Commission found that in the lease-financing arrangement Monsanto retained all the business and financial risks associated with the cogeneration facility and therefore no prohibited retail sale had occurred.

In Petition of Metropolitan Dade County for Expedited Consideration of Request for Provision of Self-Service Transmission, Order No. 17510, 87 F.P.S.C. 5:32 (1987), the Commission denied the County's request for self-service wheeling because the entity to whom the service was to be delivered had only a partial ownership interest in the cogenerating facility. The entity receiving the electricity was not the same as the entity generating the electricity, and therefore the transaction bore some elements of a retail sale and was not self-service wheeling.

Finally, in Petition of Timber Energy Resources, Inc. for a Declaratory Statement, Order No. 17251, 87 F.P.S.C. 3:44 (1987), the Commission concluded the sale of electricity to end-users within a specific industrial park would bring the seller within our jurisdiction as a public utility.

The case now before the Court is yet a further refinement of the reasoning of all these proceedings. The conclusions in each case are consistent. While language in the Timber Energy decision seemed to suggest a different result might have been reached in this case, consideration of the specific facts led to the conclusion that the Legislature intended that the term public

utility include an entity making a sale of electricity to any member of the public.

In Petition of RCA Communications, Inc. for a Declaratory Statement, Order No. 16092 86 F.P.S.C. (1986), the Commission found RCA was not subject to Commission jurisdiction in providing telephone service exclusively to the United States Military. The RCA decision is not applicable in this case. First, the entity to whom service was to be furnished was the United States Military, an entity not defined as a person under the pertinent statutes and therefore arguably not a member of the public. But more significant to distinguishing that decision is the different legislative intent evident in chapter 364, Florida Statutes. In 1982, the Legislature determined that telephone service, except for local exchange service, should be opened up to competition. This created a vastly different market and regulatory scheme for telephone service. In the absence of a natural monopoly, competition, rather than regulation, would protect consumers. A similar change has not been made in chapter 366, which affirms the Commission's conclusion that the Legislature determined that electric service is to be provided by a single provider within a given area.

5. The Commission's Decision Is Entitled To Great Weight.

The construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight. Courts should not depart from that construction unless it is

clearly erroneous. Warnock v. Florida Hotel and Restaurant, (Fla. 3rd DCA 1965), app. dism'd 188 So.2d 811 (Fla. 1966). The Commission has interpreted the term "public utility" consistent with the entire definition in section 366.02(1), Florida Statutes, and the Legislature's intent in enacting chapter 366. Moreover, the Commission has consistently applied this interpretation in proceedings before it.

The Commission's interpretation of section 366.02(1), Florida Statutes, is not erroneous; nor has the Commission disregarded prior court decisions which interpret that section. There have been no cases which interpret section 366.02(1), Florida Statutes, for regulatory purposes. Therefore, this Court should not depart from the Commission's interpretation of section 366.02(1), Florida Statutes.

CONCLUSION

The statutory definition and legislative intent taken in combination, led the Commission to conclude that an entity generating and selling electricity to end-users, no matter how small in number or geographical area, was a public utility for purposes of Chapter 366, Florida Statutes. PW Ventures is generating and selling electricity to Pratt and Whitney for use by Pratt and Whitney and other end-users and is therefore a public utility.

This Court should concur in that conclusion and affirm the Commission's order.

Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by U.S. Mail this 15th day of February, 1988 to the following:

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