IN THE SUPREME COURT OF FLORIDA



| | | |
|---|---|---|
| PW VENTURES, INC., Appellant, vs. KATIE NICHOLS, et. al., Appellees. | ) | Case No. 71,462 |

On appeal from the Florida Public Service Commission

# INITIAL BRIEF OF APPELLANT PW VENTURES, INC.

Richard D. Melson
Hopping Boyd Green & Sams
420 First Florida Bank Building
Post Office Box 6526
Tallahassee, Florida 32314

TABLE OF CONTENTS

TABLE OF CITATIONS..... ii

STATEMENT OF THE CASE..... 2

STATEMENT OF FACTS..... 3

SUMMARY OF ARGUMENT..... 6

ARGUMENT

The Sale of Electricity to a Single Industrial Host is Not a Sale "To The Public" Within the Meaning of Section 366.02(1), Florida Statutes, Particularly Under the Narrow Factual Circumstances of this Case..... 9

A. The Commission's interpretation of the phrase "to the public" is inconsistent both with prior judicial constructions and with the plain meaning of that phrase..... 11

B. The Commission's interpretation of the phrase "to the public" is inconsistent with the Commission's own prior constructions of that phrase..... 18

C. The Commission's reasoning is insufficient to support its changed interpretation..... 25

D. The Commission's changed interpretation is not consistent with the public policy underlying Chapter 366, Florida Statutes, and is unconstitutionally broad..... 28

E. The Commission's changed interpretation is entitled to little deference, and any reasonable doubt about the extent of the Commission's jurisdiction must be resolved against it..... 32

F. Under Section 120.68(9), Florida Statutes, this Court should modify the Commission's declaratory statement to reflect the correct interpretation of the law..... 34

CONCLUSION..... 36

INDEX TO APPENDIX..... 38

TABLE OF CITATIONS

Cases

Belk-James, Inc. v. Nuzam
358 So.2d 174 (Fla. 1978)..... 31

Campus Communications Inc. v. Department of Revenue, State of Florida, 473 So.2d 1290 (Fla. 1985)..... 32

Cherry Lake v. Kearce,
26 So.2d 434 (Fla. 1946) ..... 17

Citizens v. Florida Public Service Commission,
425 So.2d 534 (Fla. 1982)..... 11

City of Orlando v. Florida Public Employees Relations Commission, 435 So.2d 275 (Fla. 5th DCA 1983)..... 34

City of St. Petersburg v. Carter,
39 So.2d 804 (Fla. 1949)..... 28

City of Tampa v. Thatcher Glass Corporation,
445 So.2d 578 (Fla. 1984)..... 11

Department of Revenue v. Merritt Square Corporation,
334 So.2d 351 (Fla. 1st DCA 1976).....16, 17

Englewood v. City & County of Denver,
229 P.2d 667 (Colo. 1951),
overruled, 718 P.2d 246 (Colo. 1986)..... 16

Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So.2d 289 (Fla. 1978).....13, 14, 15, 20

Florida Power Corp. v. Pinellas Utility Board,
40 So.2d 305 (Fla. 1949) (en banc)..... 28

Goldstein v. Acme Concrete Corporation,
103 So.2d 202 (Fla. 1958)..... 14

Higgs v. City of Fort Pierce,
118 So.2d 582 (Fla. 2nd DCA 1960)..... 16, 26

Hoffman v. Jones,
280 So.2d 431 (Fla. 1973)..... 33

McRae v. Robbins
9 So.2d 284 (Fla. 1942) (en banc)..... 28

Newman v. Carson
280 So.2d 426 (Fla. 1973)..... 31

Ocasio v. Bureau of Crimes Compensation,
408 So.2d 751 (Fla. 3d DCA 1982)..... 11

Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 170 So.2d 577 (Fla. 1965)..... 34

Southeastern Utilities Service Company v. Redding,
131 So.2d 1 (Fla. 1961)..... 32

Southern Ohio Power Co. v. Public Utilities Commission,
143 N.E. 700, 34 A.L.R. 171 (Ohio 1924),..... 16

State v. Lick,
390 So.2d 52 (Fla. 1980)..... 32

Tatzel v. State,
356 So.2d 787 (Fla. 1978)..... 11

Teleprompter Corporation v. Hawkins,
384 So.2d 648 (Fla. 1980)..... 33

Village of Virginia Gardens v. City of Miami Springs,
171 So.2d 199 (Fla. 3d DCA 1965)..... 15

Administrative Orders

In re: Amendment of Rules 25-17.80 through 25-17.89 relation [sic] to cogeneration
Order 12634, 83 F.P.S.C. 10:150 (1983)..... 22

In re: Amendment of Rule 25-17.835, etc.,
Order 14143, 85 F.P.S.C. 3:48 (1985)..... 23

In re: Petition of Lightnet for declaratory statement that it is not a telephone common carrier,
Order 14583, 85 F.P.S.C. 7:170 (1985)..... 27

In re: Petition of Metropolitan Dade County for Expedited Consideration of Request for Provision of Self-Service Transmission,
Order 17510, 87 F.P.S.C. 5:32 (1987)..... 23, 24

In re: Petition of RCA Communications for a Declaratory Statement,
Order No. 16092, 86 F.P.S.C. 5:92 (1986)..... 20, 26, 33

In re: Petition of Timber Energy Resources, Inc. for a Declaratory Statement,
Order No. 17251, 87 F.P.S.C. 3:44 (1987)..... 21, 23, 33

In Re; Repeal of Rule 25-17.835, etc.,
Order No. 15053, 85 F.P.S.C. 9:298..... 23

In re: Investigation of the practice, policy and procedures of public utilities engaged in the sale of electricity to be resold,
Order No. 4874 (Public Service Commission 1970)..... 19, 25

## Florida Statutes

Section 120.565..... 2

Section 120.68(9)..... 8, 34

Section 286.011(1)..... 12

Chapter 364..... 18

Chapter 366..... Passim

Section 366.02(1)..... Passim

Section 366.04(3)..... 30

Section 366.05(9)..... 3

Chapter 367..... 18

Section 367.021(3)..... 13

## Florida Administrative Rules

Chapter 25-17, F.A.C..... 3, 5

Rule 25-22.020, F.A.C..... 2

## Federal

Public Utility Regulatory Policies Act
Public Law 95-617, 92 Stat. 3117.....3, 4, 6

18 C.F.R. §292.602(c)..... 6

## Other

Webster's Ninth New Collegiate Dictionary..... 11

Black's Law Dictionary (Rev. 4th ed.)..... 12

**IN THE SUPREME COURT OF FLORIDA**

| | | |
|---|---|---|
| PW VENTURES, INC., Appellant, | ) | |
| vs. | ) | Case No. 71,462 |
| KATIE NICHOLS, et. al., Appellees. | ) | |

**INITIAL BRIEF OF APPELLANT PW VENTURES, INC.**

PW Ventures, Inc. appeals from a final order (Order No. 18302-A) issued by the Florida Public Service Commission on October 22, 1987. (A. 1)[1/] The appeal challenges the Commission's declaration that the proposed sale of electricity by PW Ventures to a single industrial customer would make PW Ventures a "public utility" subject to the Commission's regulatory jurisdiction under Chapter 366, Florida Statutes.

---

1/ "R. ___" refers to pages of the Record. PW Ventures' Appendix ("A. ___") contains the final order being appealed, its petition for declaratory statement, and one Commission order that predates the publication of its official reporter.

## STATEMENT OF THE CASE

On April 24, 1987, PW Ventures filed a petition for declaratory statement with the Commission pursuant to Section 120.565, Florida Statutes, and Rule 25-22.020, Florida Administrative Code. (A. 8)

The petition asked the Commission to declare that the proposed sale of electricity by PW Ventures to Pratt & Whitney ("P&W") under the factual circumstances described in the petition would not make PW Ventures a "public utility" under Section 366.02(1), Florida Statutes (1985), and that PW Ventures hence would not be subject to regulation by the Commission under Chapter 366, Florida Statutes. (A. 9)

The Commission's legal staff analyzed the petition and made a written recommendation that was considered by the Commission at its agenda conference on September 15, 1987. PW Venture's request to address the Commission at the agenda conference, and its alternative request for oral argument on the petition, were denied by the Commission. (R. 20)

On October 16, 1987, the Commission entered Order 18302 which declared that PW Ventures' proposed sale of electricity to a single industrial customer would make it a public utility subject to the Commission's regulatory jurisdiction. On October 22, 1987, the Commission entered an amendatory order (Order 18302-A) which made minor changes to the analysis contained in the earlier order. (A. 1) This appeal followed.

## STATEMENT OF FACTS

The facts are not in dispute. Due to the nature of the declaratory statement process, the facts alleged in PW Ventures' petition were accepted as true, and formed the basis for the Commission's declaration. The facts are set forth in detail in both the petition (A. 9-13) and in the Commission's order (A. 1-2).

The following is a synopsis of the relevant facts:

PW Ventures is a Florida corporation organized for the sole purpose of constructing, owning, operating and maintaining a cogeneration facility (the "Project") at P&W's industrial plant site in Palm Beach County. (A. 2, 9, 12) [2/]

A cogeneration facility consists of equipment that burns fuel to produce two types of useful energy -- electrical energy and thermal energy (steam). Both the state and federal governments encourage cogeneration as a means of electric production, because it converts what otherwise would be waste heat into useful energy, thus making more efficient use of the nation's scarce fuel resources. [3/] The

---

[2/] When the petition was filed and the order was entered, PW Ventures' stock was owned 50% by FPL Energy Services Inc. and 50% by Impell Corporation (a wholly-owned subsidiary of Combustion Engineering, Inc.). Subsequent to entry of the order, FPL Energy Services Inc.'s interest was transferred to Combustion Engineering, Inc., which is now the sole parent of PW Ventures.

[3/] See, for example, Section 210 of Public Utility Regulatory Policies Act of 1978 (PURPA), Public Law 95-617, 92 Stat. 3117, 16 U.S.C.S. §824a-3 (Supp. 1987); Section 366.05(9), Florida Statutes (1985); and Chapter 25-17, Florida Administrative Code.

Project will be designed and operated in accordance with the requirements necessary to obtain and maintain "qualifying facility" status as a cogenerator under the Public Utility Regulatory Policies Act of 1978 (PURPA). (A. 11)

P&W is a division of United Technologies Corporation. P&W manages a several thousand acre industrial plant site owned by United Technologies in Palm Beach County. That site combines research and testing operations of P&W's Government Products Division with the operations of three other divisions or subsidiaries of United Technologies. The Federal Aircraft Credit Union also maintains a branch office at the site to serve employees of the various United Technologies' companies. (A. 1, 10)

Electric energy is currently provided to the entire site through two points of connection between Florida Power & Light Company (FPL) and P&W. P&W allocates the cost of this electricity among the entities with whom it shares the site. (A. 1, 5, 10)

PW Ventures proposes to construct, own and operate the Project for P&W on land leased from it. The Project, consisting initially of three 6,000 KW gas engine-generators and an associated waste heat recovery boiler, will satisfy most of P&W's needs for electric energy and all of its needs for thermal energy. Both forms of energy will be sold by PW Ventures to P&W under a long-term contract at rates to be negotiated. The contract will contain a "take-or-pay"

provision that guarantees a minimum level of purchases by P&W. (A. 1, 10-11, 12)

When the Project is out of service, or when its electric output is insufficient to meet P&W's needs, P&W will purchase additional electricity from FPL at that utility's Commission-approved tariff rates for supplemental or back-up power. (A. 1-2, 13)

Any excess electricity from the Project may be sold by PW Ventures to an electric utility on an "as available" basis under the Commission's rules relating to cogenerators. See, Chapter 25-17, F.A.C. No electricity will be sold to any party except P&W or an electric utility. None of the electricity sold to P&W will be "wheeled" (transmitted) to any off-site location. (A. 2, 12-13)

At the end of the contract term (and under certain conditions during the contract term), P&W will have the option to purchase the Project from PW Ventures at a market-based price. (A. 2, 12)

The Project is an attractive solution to P&W's energy supply needs because it enables P&W to take advantage of the efficiencies associated with cogeneration in a manner that meets P&W's financial and managerial goals better than if P&W constructed the facility itself or entered into a pure financial lease. The financial advantages include the fact that the Project will not affect P&W's balance sheet. The managerial advantages include the fact that the Project will

be constructed, owned and operated by an entity with experience in cogeneration, rather than one with experience in building aircraft engines. (A. 22)

## SUMMARY OF ARGUMENT

The sole issue to be determined on appeal is whether the sale of electricity by PW Ventures to Pratt & Whitney in the factual circumstances of this case constitutes a sale "to the public" within the meaning of Section 366.02(1), Florida Statutes. If it does, then PW Ventures is subject to Commission jurisdiction under Chapter 366.[4/] If it does not, then the Project can proceed without Commission regulation.

The key phrase, "to the public," is not defined in Chapter 366 nor in any of the Commission's other regulatory statutes. Under Florida's rules of statutory construction, the phrase must therefore be given either its common meaning or, if it is a legal term of art, its legal meaning.

Given a common meaning, the phrase "to the public" connotes service to the people as a whole, or at least to a group of people. Given its legal meaning, as established by prior decisions of this Court and other courts, the phrase

---

[4/] The extent of the Commission's authority over "qualifying facilities" is limited in any event by the preemptive provisions contained Section 210(e) of the Public Utility Regulatory Policies Act of 1978 (PURPA), Public Law 95-617, 92 Stat. 3117, 16 U.S.C.S. §824a-3(e) (Supp. 1987) and by the Federal Energy Regulatory Commission's implementing regulations at 18 C.F.R. §292.602(c) (1987).

"to the public" means service that is "available to the public generally and indiscriminately" from those who "hold themselves out as serving or ready to serve all members of the public, who may require it, to the extent of their capacity." Neither of those meanings fits the circumstances of this case. Indeed, from 1970 until the date of the order in this case, the Commission itself had consistently held that service to a single customer is not service "to the public" for purposes of its regulatory jurisdiction.

In holding that the proposed sale by PW Ventures to Pratt & Whitney is a sale "to the public," the Commission ignored these precedents and re-interpreted Section 366.02(1) to fit its own, expansive view of its jurisdiction. Under the Commission's re-interpretation, the phrase "to the public" is now synonymous with the phrase "to any member of the public." While this interpretation draws a bright line that makes Chapter 366 easier for the Commission to administer, the desire for an easy-to-apply test does not give the Commission carte blanche to ignore both the Legislature's choice of language and prior judicial decisions.

The Commission's re-interpretation of Chapter 366 is not consistent with the public policy underlying that chapter. In the circumstances of this case, P&W does not need the "protection" from monopoly abuses that Chapter 366 was designed to provide. Nor is Commission regulation of this transaction necessary to protect the general body of utility

ratepayers. The transaction has no different impact on them whether PW Ventures sells electricity to P&W, or whether P&W itself builds, owns and operates the cogeneration facility (an admittedly non-jurisdictional activity). By seeking to extend the reach of Chapter 366 to cover private transactions that are not affected with the public interest, the Commission is urging a construction that would render the statute unconstitutionally broad.

The issue in this case is purely one of law. The Commission's changed interpretation is not entitled to the deference normally accorded to that agency's orders. Instead, any doubt about the extent of the Commission's jurisdiction must be resolved against the agency. The Court should therefore modify the Commission's order, under Section 120.68(9), to reflect the correct interpretation of the law.

## ARGUMENT

**The Sale of Electricity to a Single Industrial Host is Not a Sale "To The Public" Within the Meaning of Section 366.02(1), Florida Statutes, Particularly Under the Narrow Factual Circumstances of this Case.**

This appeal presents a narrow issue of statutory construction:

Does the sale of electricity to a single industrial host constitute a sale "to the public" so as to make the seller a public utility under Section 366.02(1), Florida Statutes, where:

- the facility that produces the electricity is located on land leased from the industrial host at the plant site where the electricity will be consumed (A. 12)
- the industrial host will purchase the electricity as part of a larger contract that also involves the purchase of thermal energy (A. 12)
- the contract will contain a "take-or-pay" provision under which the host guarantees minimum purchase levels and thus shares the financial risk of the project (A. 12)
- the host will have the option to purchase the generating facility at the end of the contract term, and under certain conditions during the contract term (A. 12)
- the host admittedly could own the facility itself without triggering Commission jurisdiction (A. 5)

PW Ventures submits that the answer to this question is "No," and that the Commission's answer to the contrary must be reversed.

Chapter 366, Florida Statutes, generally gives the Commission the jurisdiction to regulate "public

utilities." The specific section of the statute to be construed, Section 366.02(1), Florida Statutes (1985), provides as follows:

> (1) "Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity . . . to or for the public within this state; . . . .

(emphasis added)

The petition for declaratory statement framed a narrow question; the Commission gave a broad answer. The Commission's order states in effect that any sale of electricity to any single "member of the public" constitutes a sale "to the public" and is sufficient to trigger Commission jurisdiction, regardless of the factual setting in which the sale occurs. (A. 3-4)

> The Commission's jurisdiction does not turn on the size of the territory or the number of customers but, more simply, on the supply of electricity to an unrelated entity. We hold that the statutory language "to the public" does not permit us to find that service to one, or a few, or some members of the public is nonjurisdictional, for once embarked on that course the statute does not tell us where to draw the line.

(A.4, emphasis added).

Appellant is tempted to argue that a sale of electricity to one member of the public is never a jurisdictional activity under Chapter 366. However, the Court does not need to reach that question to dispose of this appeal. Instead, the Court needs to consider the question only in

light of all the special factual circumstances, listed above, that surround the proposed sale by PW Ventures to P&W.

### A. The Commission's interpretation of the phrase "to the public" is inconsistent both with prior judicial constructions and with the plain meaning of that phrase.

The cornerstone of "public utility" status and Commission jurisdiction under Chapter 366 is the provision of electric service "to the public". This phrase is not defined in Chapter 366, nor in any of the Commission's other jurisdictional statutes. Under Florida's rules of statutory construction, the phrase "to the public" must therefore be given either its plain and ordinary meaning or, if it is a legal term of art, its legal meaning. City of Tampa v. Thatcher Glass Corporation, 445 So.2d 578 (Fla. 1984); Citizens v. Florida Public Service Commission, 425 So.2d 534 (Fla. 1982); Tatzel v. State, 356 So.2d 787 (Fla. 1978); Ocasio v. Bureau of Crimes Compensation, 408 So.2d 751 (Fla. 3d DCA 1982). Under either test, a sale to a single industrial host in the circumstances of this case is not a sale "to the public."

#### 1. Plain and Ordinary Meaning

The phrase "to the public" commonly connotes the people as a whole, or at least a group of people. Webster's Ninth New Collegiate Dictionary (1983) gives two relevant definitions for "public":

> 2: the people as a whole: POPULACE
> 3: a group of people having common interests or characteristics; specif: the group at which a particular activity or enterprise aims

Black's Law Dictionary (Revised 4th ed.) similarly defines "public" to mean:

> The whole body politic, or the aggregate of the citizens of a state, district, or municipality. . . .In one sense, everybody; and accordingly the body of the people at large; the community at large, without reference to the geographical limits of any corporation like a city, town, or county; the people. In another sense the word does not mean all the people, nor most of the people, nor very many of the people of a place, but so many as contradistinguishes them from a few. . . .

Thus if Section 366.02(1) is given its plain and ordinary meaning, a person is not supplying electricity "to the public" if it supplies electricity only to a single industrial customer on whose property the electric generating facility is located. In the same way, a Public Service Commission meeting would not be open "to the public" within the command of Section 286.011(1), Florida Statutes, if only Pratt & Whitney and its affiliates were given the opportunity to attend.

If the Legislature had intended to bring every sale of electricity in the state within the scope of Chapter 366, it could easily have done so. The Legislature could have regulated "supplying electricity to any member of the public" or "supplying electricity to any person" or, more simply, "supplying electricity." These three expressions all have a plain meaning that is entirely different than the

phrase "supplying electricity to the public." Yet the Commission's order would make the four synonymous.

**2. Legal Meaning**

The Commission's interpretation of the phrase "to the public" is also contrary to the established legal meaning of that phrase. That meaning has been established and reaffirmed by this Court and others in a variety of cases dealing with public utilities. Not only is the Commission's interpretation inconsistent with these cases, but the Commission affirmatively chose not to cite or discuss them in its order -- though it did acknowledge their existence. (A. 3)

The leading Florida case dealing with the meaning of the term public utility, and the only definitional case that specifically involves the Commission's regulatory jurisdiction, is Fletcher Properties, Inc. v. Florida Public Service Commission, 356 So.2d 289 (Fla. 1978). That case was a declaratory statement proceeding in which Fletcher Properties proposed to provide water and sewer service to condominium units, rental apartments, and single family homes located in its residential development by reselling service obtained from another regulated utility. Fletcher had sought a declaration that its provision of service would not make it a "utility" under Chapter 367, Florida Statutes, which gave the Commission jurisdiction over persons who provide "water or sewer service to the public for compensation." §367.021(3), Fla. Stat. (1977) (emphasis added)

In affirming the Commission's declaration that Fletcher Properties would be a "utility" under this definition, the Court quoted with approval from the Commission's order:

> 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 3d, 107; service must be available to all indivuduals [sic] in general without discrimination, within a given area, including subvendees, tenants and others, with whom Fletcher had no contractual relations. (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).)

356 So.2d at 291.

The Fletcher Properties case stands for two important propositions. First, the "to the public" language in Chapter 367 requires that "service must be available to the indefinite public," and that "service must be available to all individuals in general without discrimination, within a given area" before Commission jurisdiction is triggered. Because the Legislature used the same exact phrase in defining the scope of the Commission's jurisdiction under Chapter 366, the two chapters are in pari materia and this interpretation of "to the public" is equally applicable to the case at bar. See Goldstein v. Acme Concrete Corporation, 103 So.2d 202, 204 (Fla. 1958).

Second, in affirming the Fletcher Properties declaratory statement, this Court held that "'utility' is defined by statute and decisional law." 356 So.2d at 292. In effect,

the Court held that the Legislature has incorporated the common law definition of public utility into the Commission's jurisdictional statutes. Thus other cases dealing with the common law meaning of "public utility" or "to the public" are relevant in construing the scope of the Commission's regulatory authority under Chapters 364, 366 and 367.

All the other Florida cases dealing with the meaning of the phrases "public utility" or "to the public" are consistent with the rule laid down in Fletcher Properties. They require a party to offer or provide service to the public "at large" or "indiscriminately" before statutory or common law provisions applicable to utilities are triggered. 356 So.2d at 289.

In Village of Virginia Gardens v. City of Miami Springs, 171 So.2d 199 (Fla. 3d DCA 1965), the court held that the City was not a "public utility" (whose rates would be subject to judicial review under the common law) as a result of providing bulk water under contract to the Village of Virginia Gardens. In holding that the City was not a public utility, the court adopted two generally accepted tests of "public utility" status taken from judicial decisions in other states:

> To constitute a 'public utility' the devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police powers of the state.

171 So.2d at 201, quoting from Southern Ohio Power Co. v. Public Utilities Commission, 143 N.E. 700, 34 A.L.R. 171 (Ohio 1924), and:

> [T]o fall into the class of a public utility, a business or enterprise must be impressed with a public interest and that those engaged in the conduct thereof must hold themselves out as serving or ready to serve all members of the public, who may require it, to the extent of their capacity. The nature of the service must be such that all members of the public have an enforceable right to demand it.

171 So.2d at 201 (emphasis added), quoting from Englewood v. City & County of Denver, 229 P.2d 667 (Colo. 1951), overruled, 718 P.2d 246 (Colo. 1986). Since the City met neither test, it was not acting as a public utility.

These same tests have been applied by other Florida courts. In Higgs v. City of Fort Pierce, 118 So.2d 582, 585 (Fla. 2d DCA 1960), the court applied the Southern Ohio Power Co. test to determine that local gas dealers were not "public utilities" for purposes of a municipal referendum requirement.

And in a case involving the application of a sales tax exemption for natural gas used by public or private utilities, the First District Court of Appeal relied on both tests in holding that a shopping center owner that supplied electricity to approximately 70 tenants of the shopping center was a "private utility" because it sold to a limited group consisting of its own tenants. It was not a "public utility" holding itself out to serve the general public. Department of Revenue v. Merritt Square Corporation, 334

So.2d 351 (Fla. 1st DCA 1976). Although Merritt Square involved a taxing statute, it is still relevant to the case at bar because it demonstrates a recognition by both the Legislature and the courts that there is a distinction between "public utilities" and "private utilities." Otherwise the distinction in the taxing statute would have been meaningless. Id. at 354.

A similar test of public utility status was applied by this Court to determine that a telephone system serving numerous businesses and residences within a rural rehabilitation and resettlement project was not a "public utility" for Fair Labor Standards Act purposes. Cherry Lake v. Kearce, 26 So.2d 434, 437 (Fla. 1946) ("[T]he essential feature of a public use is that it is not confined to privileged individuals but is open to the indefinite public, the test being whether the general public has a legal right to use which cannot be gainsaid, or denied or withdrawn at the pleasure of the owner").

Under any of the foregoing judicial tests, the cogeneration project proposed by PW Ventures is not a "public utility" providing service "to the public."

o PW Ventures' service is not available to the public generally and indiscriminately; it is available only to P&W, on whose property the generating machines will be located.

o PW Ventures does not seek a public franchise, nor to have the state's police powers exercised in its behalf; it seeks only to enter into a private contract with a single

industrial customer and to confine its sale of electricity to a single location.

o PW Ventures' service is not impressed with a public interest; its proposed arrangement with P&W affects the private interests of the two parties to the contract, and does not affect the community at large.

### B. The Commission's interpretation of the phrase "to the public" is inconsistent with the Commission's own prior constructions of that phrase.

The Commission's determination that a sale to a single person constitutes service "to the public" is inconsistent with the Commission's prior interpretations of that phrase in the definitional sections of Chapter 364 (telephone), Chapter 366 (electric), and Chapter 367 (water and sewer). The Commission's attempt to harmonize its prior decisions relating to cogeneration with its decision in the case at bar is an effort to direct the Court's attention away from these prior inconsistent rulings.

#### 1. The Commission's Prior Decisions

In its prior decisions relating to the scope of its regulatory jurisdiction the Commission has consistently applied the common law test of service to the indefinite public -- the same test that the Commission now seeks to disavow.

First, in a 1970 decision, the Commission considered whether its jurisdiction under Chapter 366 extended to the

resale of electricity by trailer parks, apartment complexes, shopping centers, and similar businesses. In re: Investigation of the practice, policy and procedures of public utilities engaged in the sale of electricity to be resold, Order No. 4874 (Public Service Commission, 1970)[5] (A. 27) In resolving this question, the Commission first analyzed the "to or for the public" language of Section 366.02 in light of judicial decisions from throughout the country. The Commission then concluded that:

> 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. . . .A tenant who may be dissatisfied with any service provided by a landlord, whether it be the 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.

Order 4874 at 3-4 (emphasis added) (A. 29-30).[6]

Later, in its 1977 declaratory statement to Fletcher Properties, the Commission continued to apply the same

---

[5] Order 4874 is included in Appellant's Appendix.

[6] Section 366.02 was subsequently amended in 1980 to eliminate the receipt of compensation as an element in the definition of public utility. However, the landlords and others under consideration in the 1970 decision were admittedly receiving compensation, and the Commission's analysis therefore focused on the issue of what constituted a sale "to or for the public." That language has been in the statute since its adoption in 1951.

common law test of availability to the indefinite public as the criteria for analyzing the extent of its jurisdiction over a water and sewer utility under Chapter 367. See Fletcher Properties, 356 So.2d 289, 291, quoting with approval from the Commission's decision.

Next, in a 1986 declaratory statement to RCA Communications, the Commission ruled that telephone service provided under contract by RCA to a single customer was not service to the public and did not subject RCA to Commission jurisdiction as a telephone utility under Chapter 366. In Re Petition of RCA Communications for a Declaratory Statement, Order No. 16092, 86 F.P.S.C. 5:92 (1986).

> We conclude that RCA will not be operating a "telephone line" within the meaning of Section 364.02(5), Florida Statutes, because it will not be providing "telephonic communications to the public for hire within this state." This is so because RCA has engaged in a single contract to provide telephone service to a single entity and is not soliciting or providing intrastate telephone service to any other person.

Id. (emphasis added). Under this test, PW Ventures would not be providing service to the public. Like RCA, PW Ventures proposes a single contract to provide service to a single entity. It exists solely to bring this single project to life and is not soliciting or providing electricity to any other person. (A. 2, 9, 12).

Finally, in a declaratory statement issued early in 1987, the Commission reaffirmed that the phrase "to the public" has this same meaning when used in Section 366.02(1)

to define the Commission's regulatory jurisdiction over electric utilities. In Re Petition of Timber Energy Resources, Inc. for a Declaratory Statement, Order No. 17251, 87 F.P.S.C. 3:44 (1987). In holding that proposed sales of cogenerated electricity by Timber Energy Resources to multiple tenants of its industrial park would subject it to regulation as a public utility, the Commission distinguished the situation in RCA Communications, stating:

> Petitioner suggests that our answer to the RCA Petition for Declaratory Statement recognizes that one can provide traditional utility service to something other than "public" and we agree. [citation omitted] RCA serves one customer -- a situation which to even the casual observer would appear to be the antithesis of "public".

Id. at 46 (emphasis added).

The principles underlying this line of Commission decisions are clear. At one end of the spectrum, a sale to a single customer is not service "to the public" so as to trigger Commission jurisdiction. At the other end of the spectrum, a case by case analysis is required, using the common law standards that have been articulated by the courts. The Commission's decision in the case at bar ignored both of these principles, and reached the unprecedented result that a sale to a single person constitutes service "to the public."

**2. The Commission's Attempt to Harmonize**

Although the Commission chose to ignore all of the judicial precedents and all of its declaratory statements

relating to other industries with similar statutes, it did attempt to harmonize its ruling in this case with its 1970 decision on resale of electricity by landlords and with a series of decisions it has made in recent years relating to cogenerators. (A. 6-7) On closer analysis, these decisions cannot be harmonized.

For example, the Commission begins by citing to Order No. 12634 [7] for the proposition that:

> The regulatory scheme the Commission implemented for cogeneration and small power producers was premised on our belief that cogenerators were not permitted to engage in unregulated retail sales.

(A. 6, emphasis added).

There are two flaws in this proposition. First, there is no "regulatory scheme" for cogenerators. While the Commission now has authority under Section 366.05(9), Florida Statutes, to determine the price to be paid by regulated utilities for power produced by cogenerators, it has no general authority to regulate the activities of cogenerators unless they become "public utilities" within the meaning of Chapter 366. Second, the Commission's original belief as evidenced by Order No. 12634 was that cogenerators were not permitted to engage in retail sales under any circumstances -- whether regulated or

---

[7] In Re: Amendment of Rules 25-17.80 through 25-17.89 relation [sic] to cogeneration, Order 12634, 83 F.P.S.C. 10:150 (1983).

unregulated. 83 F.P.S.C. 10:150 at 170.[8] It was only in its 1987 declaratory statements in Timber Energy Resources, 87 F.P.S.C. 3:44, and in the case at bar that the Commission first implicitly conceded that cogenerators can lawfully make retail sales, although by doing so they would become subject to Commission regulatory jurisdiction.

In its next attempt to harmonize, the Commission asserts that the principle underlying its 1987 order denying Dade County's application for self-service wheeling (i.e. the transmission of energy produced for Dade County at one location to other County-owned locations) is consistent with its decision in the case at bar. (A. 6) These cases presented two different issues. Nevertheless, if the facts in the two cases are analyzed, it is clear that the decisions cannot be reconciled. In re: Petition of Metropolitan Dade County for Expedited Consideration of Request for Provision of Self-Service Transmission, Order 17510, 87 F.P.S.C. 5:32 (1987).

In Dade County the Commission held that Dade County could not take advantage of Rule 25-17.0882, F.A.C., which permits "self-service wheeling" because the Dade County situation did not involve true "self-service":

---

[8] Indeed, in 1985 the Commission began rulemaking to codify that outright prohibition. In re: Amendment of Rule 25-17.835, etc., Order 14143, 85 F.P.S.C. 3:48 (1985). It ultimately withdrew the rule following the institution of a rule challenge proceeding (later dismissed as moot) before the Division of Administrative Hearings. See, In Re: Repeal of Rule 25-17.835, etc., Order 15053, 85 F.P.S.C. 9:298 (1985).

> This determination is based upon our finding that, while the customer to receive the "wheeled" power is clearly the County, it is just as clear that the electrical power to be wheeled is not "generated by" the County as required by our rule.
>
> * * *
>
> We find that the County does not "generate" the electrical power to be wheeled because it must first purchase the power from South Florida Cogeneration Associates pursuant to their contract.

Id. at 37 (emphasis in original). It is true that the Commission applied the same test of identity between generating machine owner and electrical consumer in both the Dade County case and the case at bar. That is where the similarity stops.

In the instant case, the Commission has asserted regulatory jurisdiction over PW Ventures based on its sale of electricity to a nonidentical entity. Although this jurisdictional issue was not presented to the Commission for decision in Dade County, it was inherent in the facts of the case. See id. at 37. The Commission did not assert regulatory jurisdiction over South Florida Cogeneration Associates based on its sale of electricity to a nonidentical entity. It failure to do so at that time, or to bring a subsequent show cause proceeding against South Florida Cogeneration Associates for operating as an unregulated public utility, cannot be squared with its decision in the case at bar. If the Commission's decisions were consistent, PW Ventures would not be before the Court today.

Finally, the Commission discusses its 1970 Order No. 4874 which had held that sales of electricity by landlords to multiple tenants were not sales "to the public." (A. 7) It now seeks to distinguish that decision by saying that Commission jurisdiction hinges on the source of the power being sold, not on the number of customers served. That attempted distinction is not supported by anything in Chapter 366, nor by anything Order 4874. Under Section 366.02(1), if a person supplies electricity to the public, it is a public utility. If it supplies electricity to something other than the public, it is not a public utility. The source of the power being supplied does not enter into the statutory equation.

### C. The Commission's reasoning is insufficient to support its changed interpretation.

The Commission advances two major reasons for now reading Section 366.02(1) to grant it jurisdiction over sales to a single member of the public:

- The statute provides no numerical exemption from regulation. Thus a bright line must be drawn to capture sales to even a single person. (A. 3-4)
- Unless the Commission has jurisdiction over sales by a cogenerator to a single member of the public, it will have no jurisdiction to resolve the territorial dispute that will inevitably occur between the cogenerator and the franchised utility. (A. 5; see also A. 4)

Neither of these reasons is a sufficient basis for this Court to overrule its prior interpretations and accept the Commission's new construction of the phrase "to the public."

**1. The statute does not support a bright line test.**

The Commission's order tells us that in the absence of a numerical exemption to the statutory definition of public utility under Chapter 366:

> . . .the statutory interpretation advocated by PW Ventures would require a line to be drawn somewhere between sales to some members of the public, as a presumably nonjurisdictional activity, and sales to the public generally and indiscriminately, an admittedly jurisdictional activity. Neither the Commission nor the courts can determine the locus of this line.

(A. 4, emphasis added). This statement is disingenuous at best. The Florida courts have employed the "generally and indiscriminately" test to establish such lines for over a quarter of a century without the type of confusion feared by the Commission. See Higgs v. City of Ft. Pierce, 118 So.2d 582 and the other cases cited in Part I of this brief. The Commission itself began using that test eighteen years ago when it drew a line short of claiming regulatory jurisdiction over sales of electricity by landlords to tenants. Order 4874.

Even recently the Commission has had no trouble in drawing such a line under Chapter 364 which, like Chapter 366, contains no numerical exemption to the definition of utility. In RCA Communications, 86 F.P.S.C. 5:92, the

Commission held that a sale to a single large customer would not trigger Commission jurisdiction over the seller. Yet a year earlier, it had held that sales to an indefinite number of large customers would subject the provider to regulation by the Commission. In re: Petition of Lightnet for declaratory statement that it is not a telephone common carrier, Order 14583, 1985 F.P.S.C. 7:170 (1985).

A test that worked for over two decades should not be lightly abandoned based on the Commission's sudden loss of confidence in its ability, and that of the courts, to apply anything other than a strict numerical limitation. The Commission's role has not changed. Its obligation is to apply the statutory language it has been given by the Legislature, not to rewrite that language to suit its notion of administrative convenience.

**2. Territorial dispute jurisdiction.**

The Commission's conclusion that PW Ventures must be classified as a public utility in order to avoid the creation of a territorial dispute that the Commission would have no jurisdiction to resolve (A. 5) is a classic case of circular reasoning: The statute should be construed to give the Commission jurisdiction over PW Ventures or else the Commission will not have jurisdiction over territorial disputes involving PW Ventures.

The Commission's analysis misses the point. If PW Ventures is not a public utility within the meaning of Chapter 366, its provision of service cannot create a

justiciable territorial dispute. The Commission has no territorial dispute jurisdiction to lose. It simply never had that jurisdiction in the first place.

The Commission cannot bootstrap itself into jurisdiction that it has never been granted by the Legislature.

### D. The Commission's changed interpretation is not consistent with the public policy underlying Chapter 366, Florida Statutes.

Chapter 366 is a comprehensive scheme for the regulation of public utilities. It reflects the Legislature's decision to exercise "the police power of the state for the protection of the public welfare." §366.01, Fla. Stat. (1985). The statute accomplishes this goal by giving the Commission broad authority to regulate the rates and conditions of service of "public utilities" in order to curb potential abuses of monopoly power. Cf. City of St. Petersburg v. Carter, 39 So.2d 804, 806 (Fla. 1949). The Court has previously held that this type of regulatory statute is a valid exercise of the state's police power. See Florida Power Corp. v. Pinellas County Utility Board, 40 So.2d 305 (Fla. 1949) (en banc); McRae v. Robbins, 9 So.2d 284 (Fla. 1942) (en banc).

The Commission's new interpretation of the phrase "to the public" is not consistent with this legislative scheme. To the contrary, by claiming jurisdiction over PW Ventures' private transaction, the Commission would broaden the reach of Chapter 366 to such an extent that the

constitutionality of the statute would be called into question.

**1. Because PW Ventures proposes to sell to a single customer, it has no monopoly power to abuse.**

The transaction in this case will not be a sale by a "monopoly" provider to a "captive" customer. Pratt & Whitney is a sophisticated industrial consumer. It is entering into an arms'-length contract that has been structured to meet P&W's specific financial and managerial goals. (A. 21) That contract involves much more than just the purchase of electricity. It includes (i) a lease of land from P&W to PW Ventures, (ii) a sale of thermal energy by PW Ventures to P&W, (iii) a sharing of financial risk through a take-or-pay contractual provision, and (iv) an option for P&W to purchase the generating facility from PW Ventures. (A. 12-13) Furthermore, the contract is with a company which will have no business other than the ownership and operation of the cogeneration facility located at P&W's industrial site. (A. 12)

In these narrow circumstances, the sale of electricity does not present the potential for monopoly abuse that the Legislature recognized in the case of a traditional electric utility that serves all members of "the public" within its service territory.

Thus the purpose of Chapter 366 to protect the public from monopoly abuses is not a justification for extending the Commission's jurisdiction to reach this type of private transaction.

**2. Regulation of the transaction is not necessary to protect the public at large.**

Chapter 366 has a secondary purpose to protect the public at large from unnecessary duplication of electric facilities. §366.04(3), Fla. Stat. (1985). This purpose likewise does not provide a basis for extending the Commission's jurisdiction to reach PW Ventures' proposed transaction.

Pratt & Whitney is not a typical electric customer. It has a need for both electrical and thermal energy. It also is sufficiently large so that meeting that need through cogeneration, rather than through continued purchases from FPL, is an available alternative, regardless of whether PW Ventures or any other third party is involved. (A. 11)

In this situation, Pratt & Whitney admittedly could choose to cogenerate and serve itself, or to enter into a conventional lease financing arrangement with a third party for a cogeneration facility, without triggering Commission jurisdiction. (A. 5, 6) Under either of these alternatives, exactly the same generating facilities could be built in exactly the same location and operated in exactly the same way. The impact to the general body of utility ratepayers (good, bad or indifferent, and the record in this case does not reveal which) would be precisely the same as under PW Ventures' proposal.

Regardless of the structure chosen by Pratt & Whitney, the electric utility would face the same reduction in load

and energy sales. Similarly, it would have the same right to collect fully compensatory, tariffed rates for any facilities it must maintain to provide supplemental and back-up power to Pratt & Whitney. (A. 1-2, 13)

Thus the purpose of Chapter 366 to protect the general body of utility ratepayers does not warrant treating the proposed transaction any differently than a cogeneration facility that is owned and operated by the industrial user -- and is beyond the reach of the Commission's jurisdiction.

### 3. The Commission's radical new interpretation must be rejected to preserve the constitutionality of Chapter 366.

The state has broad discretion in the exercise of its police power, but that discretion is not unlimited. Regulatory statutes are valid only so long as they are reasonably related to the protection of the public health, welfare, or morals. See Newman v. Carson, 280 So.2d 426, 428 (Fla. 1973); Belk-James, Inc. v. Nuzam, 358 So.2d 174 (Fla. 1978).

The prior judicial and administrative constructions of "the public" have been consistent with the principle of protection of the public welfare. Suppliers of electricity, telephone, or water and sewer service have been brought within the Commission's jurisdiction only if they hold themselves out to serve the public "generally and indiscriminately."

The Commission's new interpretation would go too far. By bringing within its jurisdiction suppliers that serve

only single consumers, the Commission's interpretation would have the state exercise its police power to regulate private activities that are not affected with the public interest. Doing so, however, would render Chapter 366 unconstitutional as an overly broad exercise of the police power.

It is well-settled that if there are two possible constructions of a statute, the courts should select the one that preserves the statute's constitutionality. State v. Lick, 390 So.2d 52 (Fla. 1980). That principle requires rejection of the Commission's new interpretation of "the public," and a reaffirmation of the historical interpretation given to it by the Court, the Legislature, and the Commission itself.

### E. The Commission's changed interpretation is entitled to little deference, and any reasonable doubt about the extent of the Commission's jurisdiction must be resolved against it.

An agency's interpretation of the statutes it has the responsibility to administer is ordinarily afforded great weight by a reviewing court. As with every rule, however, there are exceptions. Campus Communications Inc. v. Department of Revenue, State of Florida, 473 So.2d 1290 (Fla. 1985); Southeastern Utilities Service Company v. Redding, 131 So.2d 1 (Fla. 1961). The exceptions should control in this case.

First, as discussed in Part I of this brief, the Commission's interpretation is clearly erroneous in that it

is inconsistent with prior judicial constructions of the same phrase. Although the Commission chose not to state that it was ignoring or overruling these decisions, the practical effect of its order is to do exactly that. This Court does not countenance explicit disregard of its decisions by the courts of appeal, and it should not countenance implicit disregard of those decisions by the Commission. See Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

Second, the Commission's interpretation is not one of long-standing. To the contrary, this is the first time that the Commission has held that utility service to a single person triggers its regulatory jurisdiction. As discussed in Part II of this brief, that holding is contrary to prior Commission interpretations of its jurisdictional statutes dating back to 1970. The law certainly has not changed since May 1986 when the Commission declared in RCA Communications that service under contract to a single person was not service "to the public" under the telephone regulatory statutes, or since March 1987 when the Commission stated in Timber Energy Resources that the same principle applies under the electric regulatory statutes. When there has been no intervening change in the law, the Court should give no deference to the Commission's changed interpretation of its regulatory jurisdiction. See Teleprompter Corporation v. Hawkins, 384 So.2d 648 (Fla. 1980).

Finally, the Commission is a creature of statute and has only such powers as are granted to it by the Legislature. In considering prior claims by the Commission of extended regulatory jurisdiction, this Court has declined to give the Commission's orders the deference ordinarily paid to an agency's construction of its statutes:

> We are always reluctant to disagree with an administrative body in its interpretation of the statute which it has the duty to administer; and, or course, the orders of the Florida Commission come to this court with a presumption of regularity. (citations omitted) But we cannot apply such a presumption to support the exercise of jurisdiction where none has been granted by the Legislature. If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of that power should be arrested.

Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 170 So.2d 577, 582 (Fla. 1965).

The Commission is not entitled to deference in this case, particularly since the deference would call into question the constitutionality of Chapter 366.

### F. Under Section 120.68(9), Florida Statutes, this Court should modify the Commission's declaratory statement to reflect the correct interpretation of the law.

Since the issue in this case is solely one of law, this Court has the authority to modify the Commission's declaratory statement to reflect the correct interpretation of the law. §120.68(9), Fla. Stat. (1985); City of Orlando v. Florida Public Employees Relations Commission, 435 So.2d

275, 278, 280 (Fla. 5th DCA, 1983). The Court should therefore reverse the Commission's order and declare that PW Ventures' proposed sale of electricity in the narrow circumstances of this case does not constitute a sale "to the public" nor subject it to the Commission's jurisdiction.

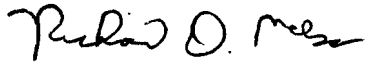
## CONCLUSION

In an effort to extend its jurisdiction to reach any sale of electricity in the State of Florida, the Commission has given the phrase "to the public" an absurdly overbroad interpretation that ignores prior judicial and administrative construction of the phrase, and is wholly unsupported by either the language or the purpose of Chapter 366.

Appellant urges the Court to hold that the Commission has erroneously interpreted Section 366.02(1), Florida Statutes, as it applies to the narrow factual circumstances of this case, and to declare that the proposed sale of electricity and thermal energy by PW Ventures to Pratt & Whitney from a cogeneration facility to be constructed on P&W's property does not make PW Ventures a "public utility," and does not subject it to Commission jurisdiction under Chapter 366, Florida Statutes.

RESPECTFULLY SUBMITTED this 21st day of January, 1988.

HOPPING BOYD GREEN & SAMS

By: 

Richard D. Melson
P.O. Box 6526
Tallahassee, Florida 32314
(904) 222-7500

Attorneys for Appellant
PW Ventures, Inc.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of PW Ventures, Inc.'s Initial Brief was sent by U.S. Mail this 21st day of January, 1988, to the following:

Susan Clark
Division of Appeals
Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

Bill Bilenky
General Counsel's Office
Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

Paul Sexton
1017 Thomasville Road
Suite C
Tallahassee, FL 32303

Attorney