IN THE SUPREME COURT OF FLORIDA

P.W. VENTURES, INC., Appellant, v. KATIE NICHOLS, ET. AL, Appellees,	)	CASE NO. 71,462

REPLY BRIEF OF AMICI CURIAE INDUSTRIAL COGENERATORS

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SUMMARY OF ARGUMENT

Over the past five years, the Commission has given varying interpretations to a 38-year old statute. Its Brief changes the facts from those found below, varies its argument within itself and relies on a legal theory rejected in 1985. The Court should reject such result-oriented decision-making and argument.

Section 366.02(1) is clear on its face and the Commission should not be allowed to use the language of an exemption to expand its power to include small, private contracts for the sale of electricity. Its exemption analysis is misplaced.

The Purpose of Chapter 366 is to protect the public from the abuse of monopoly power, not to protect monopolists. When it re-enacted Section 366.02 in 1980, it adopted the Commission's 1970 common-law interpretation of that Section. Reading Chapters 366 and 367 in para materia, it is clear that Chapter 366 was not intended to protect the monopoly of electric utilities, otherwise it would have included exclusive monopoly certificates as in Chapter 367.

The Commission's territorial dispute powers and "grid bill" powers were intended only to control competition between large, monopoly utilities, not from naturally competitive sources. Competition among large, central station electric companies is wasteful, however, cogenerators are far more efficient than central station power. Further, Section 366.04(2)(d) and (e) does not effectively control competition from small, private electric suppliers because they must actually build duplicating facilities before they become "public utilities" under Section 366.02(1).

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

INTRODUCTION

This case involves the interpretation of a 38-year old statute that has received varying interpretations from case to case over the past five years. In 1983, the Commission declared that electric utilities had an exclusive right to serve within their service areas and that cogenerators were prohibited from selling electricity at retail.[1] In 1985 it abandoned that theory, recognizing that it had no statutory basis.[2] In early 1987, the Commission concluded that a sale to a single end-user was the "antithesis" of a sale to the public.[3] In its order below the Commission decided that a sale to a single end-user was a sale "to the public."[4] Now, in its Answer Brief, the Commission has turned 360 degrees, returning to its 1983 theory that it rejected in 1985: that electric utilities have an exclusive right to serve. (Answer Brief at 6 and Appendix C).

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[1] 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).

[2] In re: Repeal of Rule 25-17.835 and Adoption of Rules 25-17.88, 25-17.882 and 25-17.883 - Wheeling of Cogenerated Energy; Retail Sales, Florida Public Service Commission, Docket No. 840399-EU, Order No. 15053 (September 27, 1985).

[3] 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).

[4] 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-A (October 16, 1987).

An agency interpretation is entitled to deference if it is consistent with legislative intent. Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 879, 889 (Fla. 1985). The Commission's varying legal theories show that its construction of Section 366.02(1) has nothing to do with the intent of the legislature. The Commission is simply casting about for defensible logic to support the result that it desires. The Court should have no confidence in such result-oriented decision-making.

Not only has the Commission changed its interpretation over the years, but the Commission has actually changed the facts of the case. In its "Preliminary Statement," the Commission states that PW Ventures proposes to sell electricity to five named end-users. (Answer Brief at page iv). In its order below, however, the Commission found that it was faced with "a case involving one, or at the most two, customers." Order No. 18302-A, at 5 and 6 (See Appendix A-5 and A-6 of Initial Brief).

The Commission's argument also changes within its Answer Brief. At the beginning, the Commission states that a sale to a single end-user makes the seller a public utility. (Answer Brief at 2). Then it argues the case as if the sale in question is to multiple, unrelated end-users. At page 12 of its Answer Brief the Commission states that the case is the same as Fletcher Properties because PW Ventures is proposing to sell electricity to "all the public" in a "several thousand acre industrial park."

These changes in fact and argument are used to draw the court's attention away from the weakness of the Commission's "single end-user" argument. Yet, in order to defend the variation from its Timber Energy decision, the Commission then asserts that the "specific facts" of this case justify a different "conclusion." (Answer Brief at 16). These "specific facts" are that the case involves "one, or at most two, customers."[5] Thus, depending on the page of the Commission's answer brief, the facts in this case involve either one or two, five, or "all" customers. The Court should have no confidence in argument that varies from the order below, and within itself.

1. THE MEANING OF SECTION 366.02(1).

The Commission's analysis of the language of Section 366.02(1) makes what is clear unclear. On its face, Section 366.02(1) defines a public utility as a person supplying electricity or gas "to or for the public." This simple term is neither hard to understand nor to apply. It is improper to employ rules of construction to expand this term beyond it logical meaning to include private sales of electricity. An express grant of authority cannot be expanded through the terminology of an exemption. Dickinson v. City of Tallahassee, 325 So.2d 1, 4 (Fla. 1975). Yet, this is exactly what the Commission has done.

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[5]See Order No. 18302-A, at 6. In fact, however, the Commission had previously been presented with the question of a sale to a single end-users. The Monsanto and Dade County cases each involved single end-users.

The "exemption" of natural gas pipeline companies in Section 366.02(1) reflects nothing more than the Legislature's intent not to regulate natural gas pipeline companies.[6] The "exemption" is similar to amendments to statutes which are intended to clarify what was doubtful and safeguard against misapprehensions of law. See State ex rel. Szabo Food Services, Inc., of North Carolina v. Dickinson, 286 So.2d 529, 531 (Fla. 1974); Florida Patients Compensation Fund v. Mercy Hospital, Inc., 419 So.2d 348, 350 (Fla. 3rd DCA 1982).

The Commission errs in its reference to the "numerical" exemption in Section 367.022(6), Florida Statutes.[7] The Commission fails to look at Subsection (8), which exempts persons who remeter service at no more than cost. There is no "parallel exemption . . . in Chapter 366." Under the Commission's argument, "the only conclusion that can be reached is" that persons who remeter electricity at cost are public utilities. (See Answer Brief at 5). This result is consistent with the Commission's "exemption" analysis, yet it contravenes the Commission's own

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[6]The Commission emphasizes the term "sales to direct industrial customers" but does not explain why the current remetering by Pratt and Whitney to occupants of the industrial park is not a "sale" within the meaning of Section 366.02(1). Compensation is received.

[7]See Answer Brief at 4. This exemption is not a "numerical" exemption but a "capacity" exemption. This is made clear by Commission Rule 25-30.055, which makes no reference to persons at all, but exempts systems with a capacity of 10,000 gallons per day or less. (See Appendix A-1).

interpretation of Section 366.02(1).[8] The Commission's "exemption" analysis simply misses the mark. Exemptions are often simply included for clarity and cannot be taken on their face.

2. THE PURPOSE OF CHAPTER 366

The Commission's Answer Brief turns Chapter 366 on its head in an effort to find support for its interpretation of Section 366.02(1). The Legislature's purpose was to protect the public from the abuses of monopoly power by electric and gas companies, not to protect monopolists. Yet, it is protection of monopolists that the Commission urges upon this Court. Were this so, Chapter 366 would require exclusive service territories granted pursuant to certificates of public convenience and necessity. It clearly does not. Further, neither the Commission's territorial agreements and disputes jurisdiction nor its "grid bill" authority are substitutes.

The Legislative history of Chapter 366 confirms that it was intended only to regulate companies that offer service to the general public -- large, monopoly utilities. In 1970, the Commission interpreted the term "public utility" in Section 366.02 to have its common law meaning and determined that the term "to or

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[8] In 1970 the Commission held that landlords who provide electricity to their tenants are not utilities, no matter what the charge. 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). Even now, the Commission describes the practice of remetering electricity at cost to be an unregulated activity. See Order No. 18302-A, at 7 (Appendix A-7 to Initial Brief).

for the public" meant the indefinite or general public.[9] It was fully aware of its powers to approve territorial agreements, for it had been approving territorial agreements for five years and its power to do so had been confirmed by this Court. See Storey v. Mayo, 217 So.2d 304, 307 (Fla. 1968).

Section 366.02 was not amended in 1974 when Section 366.04(2) and the "grid bill" were enacted. Section 364.04(2)(d) and (e) extended the Commission's existing territorial powers to municipal and cooperative electric utilities, relying on Section 366.02 to define "other electric utilities under its jurisdiction." Three years later, the Commission confirmed its 1970 interpretation of Section 366.02 by using it to construe Section 367.022. See Fletcher Properties v. Florida Public Service Commission, 356 So.2d 289 (Fla. 1978).

When the Legislature reenacted Chapter 366 in 1980, it revised the language of Section 366.02 but left intact the terms "public utility" and "to or for the public." (See Appendix A-3) In so doing, the Legislature adopted the 1970 construction placed on it by the Commission. State ex rel. Szabo Food Services, Inc., of North Carolina v. Dickinson, supra, at 531 (Fla. 1974);

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[9]In re: investigation of the practice, policy and procedures of public utilities engaged in the sale of electricity to be resold, supra, at 3 and 4 (See appendix A-10 and A-11 to Initial Brief).

It is the Commission's 1970 interpretation of Section 366.02 that is entitled to deference from this Court. An agency construction of long standing is entitled to great weight. Walker v. State Department of Transportation, 366 So.2d 96, 99 (Fla. 1st DCA 1979); Austin v. Austin, 350 So.2d 102, 104 (Fla. 1st DCA 1977), cert. den., 357 So.2d 184 (Fla. 1978).

Peninsular Supply Company v. C.B. Day Realty of Florida, Inc., 423 So.2d 500 (Fla. 3rd DCA 1982). Had the Legislature intended to regulate small, private sales of electricity it would have replaced the term "to or for the public" with other words, such as "to any member of the public" or "any person." Instead, the Legislature retained the term "to or for the public," thereby adopting the Commission's 1970 construction of that term.[10]

The Commission's reliance on the statement in the 1980 Senate Commerce Committee report is misplaced. (Answer Brief at 6). The quoted portion of the report simply states a fact. Nowhere in the report is there any discussion of the efficiency of monopolistic service, nor is there any statement that Chapter 366 has as a purpose the protection of monopolies. The purpose of Chapter 366 is clearly stated in the Report: "to protect the public from certain monopolistic practices by utilities." Id. at 35 (See Appendix A-56 to Initial Brief).

3. CHAPTERS 366 AND 367 MUST BE READ IN PARA MATERIA.

Although citing briefly to two provisions of Chapter 367, the Commission fails to read Chapters 366 and 367 in para materia. This is improper. Florida Jai Alai, Inc. v. Lake Howell Water and Reclamation District, 274 So.2d 522, 524 and 525 (Fla. 1973). When Chapters 366 and 367 are read as a whole and considered in para materia, and the means chosen to regulate in either Chapter

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[10]Had the Legislature intended to control competition from private sales through the enactment of Section 364.04(2)(d) and (e) and the "grid bill," it would have updated Section 366.02 in 1980 to use terms with a natural meaning consistent with that intent.

are considered, it is plain to see that Chapter 366 was not intended to preserve the monopoly powers of electric utilities.

a. Chapter 366 Lacks Exclusive Monopoly Areas.

Unlike Chapter 366, Chapter 367 establishes exclusive, licensed monopoly service areas. Section 367.081 prohibits the construction of a new water or sewer facility until after a utility obtains a certificate of public convenience and necessity from the Commission. There is no such provision in Chapter 366.[11] A person can become a public utility simply by providing electric service to the public. The Senate Committee Report states:

> Apparently, anyone desiring to supply either electricity or gas to the public, need only obtain the required state and federal permits needed to construct the necessary generating, transmission, and distribution facilities.[12]

Id. at 10.

Unlike Chapter 366, Chapter 367 establishes exclusive monopoly service areas for existing utilities. Sections 367.041 and 367.051(3)(a) prohibit the issuance of a certificate for a system in competition with any other unless it is shown that the other system is inadequate or that service is unavailable. Chapter 366 has no such provision. Had the Legislature intended to establish exclusive monopoly service areas as the Commission

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[11]The closest thing to this requirement is found in the Power Plant Citing Act, Sections 403.501-403.519, Florida Statutes. See Section 403.506, Florida Statutes.

[12]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).

urges, it would have included provisions for issuing certificates with protection against intrusion, such as found in Chapter 367.

Commission approval of territorial agreements or resolution of territorial disputes is not at all like issuing a certificate of public convenience and necessity. The Commission may only establish a line for the territory presented to it. If it encompasses only a small area, that is the extent of its authority. Its decision does not necessarily establish service areas for either utility nor govern the entire boundary between the two utilities. It does not govern places where either utility meets a third utility.

Unlike Section 367.051, Section 366.04(2)(e) has no stated preference for the existing utility. Under policies approved by this Court, the Commission simply decides who has the lowest cost to serve. See Gulf Coast Electric Cooperative, Inc. v. Florida Public Service Commission, 462 So.2d 1092, 1095 (Fla. 1985); Gulf Power Co. v. Public Service Commission, 480 So.2d 97, 98 (Fla. 1985). On the other hand, an applicant for a certificate of public convenience and necessity under Chapter 367 who seeks to serve in another's territory must show that service is not available from the other utility. See Section 367.051(3)(a).

b. Exemptions for Small Capacity Systems.

There is an exemption for electric utilities similar to that in Section 367.022(6), though not in Chapter 366 itself. The closest thing to a certificate of public convenience and necessity for an electric utility is a certificate under the Power Plant

Citing Act (Section 430.501-403.519, Florida Statutes). Under that Act, anyone who wants to construct and operate an electrical power plant must first obtain a certificate, based on a Commission finding of need. See Section 403.506 and 403.519, Florida Statutes. Section 403.519, which provides for a Commission determination of need, implements the Commission's "grid bill" powers.[13] It contains the following standards:

1. The need for electrical system reliability and integrity;

2. The need for adequate electricity at a reasonable cost;

3. Whether the proposed plant is the most cost-effective alternative available;

4. The effect that conservation measures might have on the need for the plant; and

5. Other matters within its jurisdiction which it deems relevant.

This certification process has a small-capacity exemption just like Section 367.022(6). Under Section 403.506, the Act does not apply to a plant with a capacity of less than 75 Megawatts.

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[13] 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.

Section 366.04(3), Florida Statutes.

This small-capacity exemption is consistent with the intent of Chapter 366 to regulate only large, monopoly utilities.[14]

4. THE COMMISSION'S TERRITORIAL JURISDICTION AND "GRID BILL" POWERS WERE INTENDED TO CONTROL LARGE, MONOPOLY UTILITIES.

The Commission's authority to approve territorial agreements and resolve territorial disputes was designed to resolve competition between natural monopolies, not to preclude competition from naturally competitive sources. Its "grid bill" powers were intended to protect a captive public against poor planning.

Preventing competition between large, monopoly utilities aids efficiency, as reflected in this Court's decision Storey v. Mayo, supra (Fla. 1968). By its nature, central station electrical power is more efficiently provided by a single utility. However, cogeneration facilities, such as proposed by PW Ventures, are much more efficient than central station power.[15] FERC's efficiency standard for cogeneration is more efficient than any combination of separately generated electricity and steam using efficient, state-of-the-art technology. See 45 Federal Register 17967. Two-thirds of the energy used in central station electricity

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[14]The Commission itself has stated the opinion that the Power Plant Citing Act was designed for the addition of capacity by a regulated electric utility or by a municipality. In re: Petition of Florida Crushed Stone Company for Determination of Need for a Coal-Fired Cogeneration Electrical Power Plant, Florida Public Service Commission, Docket No. 820460-EU, Order No. 11611 (February 14, 1983). (This case involved a 125 Megawatt plant).

[15]Doctor Johnson's non-record testimony is irrelevant. It does not address the issue of whether dispersed cogeneration facilities are more efficient than central station power plants.

generation and distribution is wasted.[16] A typical backpressure steam turbine cogeneration facility has twice the efficiency of central station utility generation. 45 Federal Register 17969. The legislature intended to prevent the waste of competition between natural monopolies, not to regulate the efficient production of electricity under private contracts.

Looking to the means employed, it is clear that Commission jurisdiction to approve territorial agreements and resolve territorial disputes was not intended to apply to small, private suppliers of electricity. In order for a privately-owned company to be subject to the Commission's territorial jurisdiction under Section 366.04(2)(d) and (e), it must be a "public utility . . . supplying electricity . . . to or for the public." This scheme works well for large, monopoly utilities, for their existing operations make them "public utilities" and they can be brought before the Commission before any duplicating construction begins.

However, if a utility wishes to contest service by a small, private supplier, it must await completion of the project. Until then, the small, private supplier cannot be a "public utility" because it is not yet "supplying electricity." That small, private supplier must actually duplicate the generation, transmission and distribution facilities of another utility before the Commission can obtain jurisdiction to prevent the duplication of such facilities. Such a scheme is simply not workable.

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[16]S. Rep. No. 95-142, 95th Cong., 1st Sess., 21 (1977).

Clearly, the legislature had no intent to regulate small, private suppliers of electricity under Section 366.04(2)(d) or (e).

There are many forms of competition that Chapter 366 does not address. Electric and gas utilities compete with each other. Electric utilities seek to make their customers "all electric." Gas utilities seek to promote the use of major home appliances that use "clean, efficient" gas. Electricity can be remetered to others.[17] Industrial customers can switch from electricity or gas to coal or to other energy sources to operate their plants. They may install cogeneration. In each case the utility loses revenues to a competitive supplier but faces the same fixed costs.[18]

Likewise, the Commission's "grid bill" powers were intended to protect the public welfare against a particular form of abuse of monopoly power -- poor planning. For many years, the electric utilities in Florida had failed to coordinate their generation, transmission and distribution planning. This resulted in the uneconomic duplication of facilities, all resulting in higher costs to ratepayers. In response, Section 366.04(3) was enacted

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[17]Pratt and Whitney is doing this right now, though it is selling the energy at FP&L's metered rate. This is permissible under both the 1970 and current interpretations of Section 366.02. However, rates for large customers are often lower than for smaller ones and a utility loses revenue in cases where a large customer remeters electricity to small end-users.

[18]The Commission rejects as irrelevant PW Ventures' argument that the effect on the remaining ratepayers is the same if Pratt and Whitney owns the plant outright. (Answer Brief at 11). This response is an admission that the Commission's regulatory scheme fails to achieve either of the goals used to justify it: 1) promoting efficiency through monopoly production of electricity, and 2) preventing the loss of revenues caused by competition.

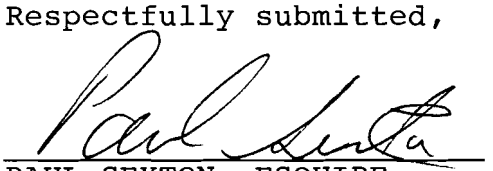
to protect against "the further duplication of generation, transmission and distribution facilities." (emphasis supplied).

CONCLUSION

The Commission's Answer Brief relies on a legal theory it rejected in 1985: that electric utilities have an exclusive right to serve. This theory is contrary to the language of Chapter 366, its purpose and the means chosen by the legislature. The purpose of Chapter 366 remains as it was in 1951: to protect the public from the abuses of monopoly power. Chapter 366 clearly lacks the exclusive monopoly service areas established under Chapter 367. There is no intent to protect the large, monopoly electric utilities from natural competitors and Section 366.04(2)(d) and (e) is not effective as a means of regulating competition from these natural competitors.

Dated: March 11, 1988

Respectfully submitted,



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CERTIFICATE OF SERVICE

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