IN THE SUPREME COURT OF FLORIDA

Lee County Electric Cooperative, Inc.,	)	Case No. SC01-373
Appellant,	)	FPSC Docket No. 981827-EC
vs.	)	
E. Leon Jacobs, Jr., et al.,	)	
Appellees.	)	

APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, the Florida Public Service Commission, will be referred to in this brief as "the Commission."

Appellee, Seminole Electric Cooperative, Inc., will be referred to as "Seminole."

Appellant, Lee County Electric Cooperative, Inc., will be referred to as "LCEC."

References to the record on appeal are designated (V. ___ R. ___). References to LCEC's initial brief are designated (Brief at ___). References to the appendix to this brief are designated (APP-1).

The order on appeal in this case, the order that dismissed LCEC's complaint, Order No. PSC-01-0217-FOF-EC, issued January 23, 2001, shall be referred to as the "Final Order." (APP-1)

All references to the Florida Statutes refer to Florida Statutes (2000), unless otherwise noted.

There are regulatory terms and names that the industry commonly refers to by acronyms. When this is the typical practice, the following acronyms have been used:

FEECA	Florida Energy Efficiency and Conservation Act
FERC	Federal Energy Regulatory Commission
FPC	Federal Power Commission
PURPA	Public Utility Regulatory Policies Act of 1978
REA	Rural Electrification Act

STATEMENT OF THE CASE AND FACTS

LCEC's statement of the case and facts is argumentative, and much of it is irrelevant to the issue before the court. The Commission therefore offers the following statement of the case and facts.

The Parties

LCEC is a non-profit electric distribution cooperative organized under Chapter 425, Florida Statutes. (V. I R. 8) It sells electric power at retail to its member owners. (V. I R. 46) LCEC serves approximately 139,000 customers. (V. I R. 8)

Seminole is also a non-profit electric cooperative organized under Chapter 425, Florida Statutes. (V. I R. 46) However, it is different from LCEC in that it generates and transmits power only at wholesale. (V. I R. 46) Seminole itself has no retail customers. (V. I. R. 46) Instead, Seminole provides service to 10 distribution cooperatives in Florida, who are members and owners of Seminole. (V. I R. 46)

Cooperatives are governed by a board of trustees, the members of which must be members of the cooperative. Section 425.10(1), Fla. Stat. For example, Seminole is governed by a 30-member board that consists of two voting members and one alternate from each of its 10 member distribution cooperatives. (V. I R. 46) LCEC is a member-owner of Seminole, and as such sits on the board of Seminole. (V. I R. 46)

The Contract

On May 22, 1975, LCEC, like the other member-owners of Seminole, entered into a Wholesale Power Contract with Seminole. (V. I R. 60) Prior to entering into this agreement, LCEC purchased its power from Florida Power and Light Company. (V. II R. 314-15) The negotiated contract between LCEC and Seminole, which has a 45-year term, has been amended over the years. (V. I R. 66, 70, 71, 75, 78) The contract specifies the procedure for determining the rate LCEC pays Seminole for wholesale service. (V. I R. 63-64). This contract term is one of the provisions that has been amended since the contract's inception. (V. I R. 72)

The current rate provision provides that the board of trustees will review Seminole's rate schedule at least once a year. (V. I R. 72) Under the express terms of the contract, LCEC agreed to be bound by the rate schedule established by the board. (V. I R. 72) The contract specifically provides that the only regulatory review required is approval from the Administrator of the Rural Electrification Act (REA). (V. I R. 72)

The Commission

Until 1974, the Commission had no jurisdiction whatsoever over cooperatives. In re: General investigation of fuel adjustment clauses of electric companies, Docket No. 74680-CI, Order No. 6899, issued September 10, 1975. This changed when the Legislature

enacted the Grid Bill[1] which gave the Commission limited jurisdiction over cooperatives and municipals. Id. The purpose behind this legislation was "to place authority in the Commission for the development of a total energy network or grid for the State of Florida." Id.

One of the provisions of the Grid Bill provided the Commission with jurisdiction "[t]o prescribe a rate structure for all electric utilities." Section 366.04(2)(b), Fla. Stat. Both LCEC and Seminole meet the definition of an "electric utility" under section 366.02(2), Florida Statutes. No cooperative, however, meets the definition of a "public utility" in section 366.02(1), Florida Statutes, over which the Commission exercises much broader jurisdiction. For example, the Commission has ratemaking authority over public utilities, but not over cooperatives and municipals. In re: General investigation of fuel adjustment clauses of electric companies, Docket No. 74680-EI, Order No. 6899, issued September 10, 1975.

In exercising its jurisdiction over the rate structure of electric utilities, the Commission has regulated only cooperative and municipal electric utilities that sell power at retail to member-owners. (V. I R. 51-54) The Commission has never regulated Seminole's wholesale rate structure. (V. I R. 10, 54)

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[1] The Grid Bill is codified at sections 366.04(2) and 366.05(7)-(8), Florida Statutes.

The Complaint

LCEC filed a complaint with the Commission, in which it asked the Commission to review a rate schedule approved by the Seminole board on October 8, 1998. (V. I R. 8) In its complaint, LCEC argued that this rate schedule "creates a new rate structure that replaces the existing demand charge with two separate charges: a reduced demand charge based on monthly billing demand, and a new 'Production Fixed Energy Charge' which is allocated to members based on their 3-year historical energy usage." (V. I R. 9)

Seminole filed a motion to dismiss LCEC's complaint, in which it argued that the Commission was without jurisdiction to consider LCEC's complaint. (V. I R. 46) The first time the Commission considered Seminole's motion, it failed on a two-two vote. (V. I R. 198) The Commission considered the motion again, at the request of the parties. This time, the Commission dismissed Seminole's complaint on a two-one vote. (V. I R. 305) The majority of the Commission found that the "Legislature did not intend for our rate structure jurisdiction to extend to the wholesale rate schedule at issue in this case." (APP-1, p. 9; V. II R. 375)

STANDARD OF REVIEW

The Commission agrees with LCEC that the standard of review is de novo. Execu-Tech Business Systems, Inc. v. New Oji Paper Company Ltd., 752 So. 2d 582, 584 (Fla. 2000)("A trial court's ruling on a motion to dismiss based on a question of law is subject to de novo review.") Nevertheless, as discussed in Part IV of this brief, the Commission's construction of the statute it has responsibility for administering is entitled to great deference.

SUMMARY OF THE ARGUMENT

The Commission's Final Order finding that it was without jurisdiction to hear LCEC's complaint should be affirmed. Section 366.04(2)(b), Florida Statutes, provides the Commission with jurisdiction to prescribe a rate structure for all electric utilities. The Commission properly construed section 366.04(2)(b) as not extending its jurisdiction to regulate a rate schedule attached to a wholesale power contract negotiated between two self-regulated bodies.

Section 366.04(2)(b) should not be read in isolation. The statute is not plain and unambiguous when viewed in the context of the Grid Bill and chapter 366. The Commission's main role is to protect the public from monopolistic abuses, and not to oversee a negotiated contract between two self-regulated bodies. The Grid Bill was enacted to give the Commission expanded authority over the planning, development, and coordination of electric facilities throughout the state. When the Legislature enacted the Grid Bill, it was widely believed that the Administrator of the Rural Electrification Act preempted any other governmental jurisdiction over the wholesale rate structure of cooperatives. Thus, there was no need for the Legislature to specify that the Commission's rate structure jurisdiction was over retail electric utilities only, because to do so would have been superfluous.

In the 25 years that the Commission has had jurisdiction over the rate structure of electric utilities, the Commission has never regulated Seminole, who sells power only at wholesale to its members. Instead, the Commission has asserted its rate structure jurisdiction over only cooperatives that sell at retail. During this time, the Legislature has never indicated that the Commission's interpretation of section 366.04(2)(b) was wrong. When interpreting the statute, the long acquiescence by the legislature in a particular construction is entitled to great weight and that weight should be accorded here.

It does not matter that the Commission's decision leaves a regulatory gap. There is no federal requirement that states regulate the wholesale rate structure of cooperatives. Any dispute between LCEC and Seminole over the rate schedule attached to their contract can be resolved by the courts.

The Commission's construction of the statute it is charged with enforcing is entitled to great deference. Courts should not depart from an agency's interpretation of a statute unless it is clearly erroneous or unauthorized. The Commission's decision that it will not interfere with the negotiated contract between two self-regulated parties should be affirmed.

ARGUMENT

I. THE COMMISSION'S INTERPRETATION OF THE STATUTE IS LAWFUL AND SHOULD BE AFFIRMED.

The central issue in this case is whether the Commission has jurisdiction to hear LCEC's complaint, in which LCEC seeks to have the Commission review the wholesale rate schedule of Seminole, a rural electric cooperative that sells power only at wholesale to its member-owners. Seminole does not sell power to retail customers.

The case turns on whether the Commission has rate structure jurisdiction over Seminole's wholesale rate schedule under section 366.04(2)(b), Florida Statutes. Pursuant to this provision, the Legislature provided the Commission with jurisdiction "[t]o prescribe a rate structure for all electric utilities." Section 366.04(2)(b), Fla. Stat. It is undisputed that Seminole is an electric utility as that term is defined in Section 366.02(2), Florida Statutes.[2] Contrary to the arguments raised by LCEC, however, the Legislature did not intend for the Commission to regulate Seminole's wholesale rate schedule.

LCEC argues that under the plain and unambiguous meaning of section 366.04(2)(b), the Commission must regulate Seminole's

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[2] Pursuant to section 366.02(2), Florida Statutes, "'electric utility' means any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state."

wholesale rate schedule. LCEC is wrong. When it is read in the proper historical context with the Grid Bill and the remainder of chapter 366, Florida Statutes, section 366.04(2)(b) does not plainly and unambiguously provide the Commission with rate structure jurisdiction over cooperatives that sell wholesale power only, pursuant to contracts with their member-owners.

A. History of Electric Utility Regulation

Early in the last century, the United States Supreme Court held that state control over interstate wholesale power transactions imposed a direct burden on national commerce, in violation of the Commerce Clause of the U.S. Constitution. Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927). In response to that decision, Congress created the Federal Power Commission (FPC), now the Federal Energy Regulatory Commission (FERC), to regulate wholesale sales by investor-owned electric utilities. Charles G. Stalon and Reinier H. J. H. Lock, State-Federal Relations in the Economic Regulation of Energy, 7 Yale J. on Reg. 427, 439 (Summer, 1990).

At about the same time, Congress enacted the Rural Electrification Act (REA). 7 U.S.C.S. §901, et seq. Cooperatives were created "to provide electricity to those sparsely settled areas which the investor-owned utilities had not found it profitable to service." Salt River Project Agricultural Improvement and Power District v. Federal Power Commission, 391

F.2d at 470, 473 (D.C. Cir. 1968). Cooperatives are distinctly different from investor-owned electric utilities, who are solely motivated by profit. Cooperatives are also organized differently than investor-owned electric utilities:

> [C]ooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are non-profit. Each member has a single vote in the affairs of the cooperative, and service is essentially limited to members. No officer receives a salary for his services and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn a profit.

Id.

The Commission began regulating the retail sales of investor-owned electric or public utilities in 1951. Ch. 26545, Laws of Fla. (1951). The Legislature established uniform statewide regulation of electric investor-owned utilities because regulation over the investor-owned electric utilities by local governments was piecemeal and inconsistent. Richard C. Bellak and Martha Carter Brown, Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida, 19 Fla. St. U.L. Rev. 407, 409 (Fall 1991). The Commission did not have any kind of jurisdiction over cooperatives until the Legislature enacted the Grid Bill in 1974, codified at sections 366.04(2) and 366.05(7)-(8), Florida Statutes. Bellak and Brown at 414; Ch. 74-196, Laws of Fla.

The primary purpose of the Grid Bill "was to give the Commission expanded authority over the planning, development, and

coordination of electric facilities throughout the state." Bellak and Brown at 415. When the Legislature enacted the Grid Bill, the focus was on "the energy problems of the State." Id. at 414. It was believed that a coordinated energy grid "would use energy more efficiently and would help control the dramatic rise in the cost of electricity." Id.

At the time the Legislature gave the Commission jurisdiction over cooperatives for limited purposes, the FPC had determined less than 10 years earlier that it did not have jurisdiction over the wholesale rates of cooperatives. Dairyland Power Cooperative, 37 F.P.C. 12 (1967). The FPC reasoned that because of the Administrator of the Rural Electrification Act's (REA's) plenary authority over cooperatives, Congress did not intend for the FPC to regulate this type of electric utilities as well. Id. at 16. See also, Salt River Project, 391 F.2d 470 (Agreeing with the FPC that it does not have jurisdiction over cooperatives).

Thus, at the time that the Florida Legislature enacted the Grid Bill in 1974, the presiding sentiment was that the administrator of the REA had preemptive federal jurisdiction over cooperatives. The Legislature did not specify that the Commission's rate structure jurisdiction over electric utilities applied only to retail service because to do so would have been superfluous. McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1076 (11th Cir. 1996), cert. denied, 520 U.S. 1228 (It is a familiar

cannon of statutory construction that "evaluation of congressional action must take into account its contemporary legal context.").

B. The Legislature's use of the term rate structure leads to ambiguity

Under the circumstances of this case, the meaning of section 366.04(2)(b) was not at all clear. The Commission struggled with the application of its rate structure jurisdiction to a negotiated contract between a wholesale power cooperative and its members. As noted by Commissioner Deason:

> [T]o me, rate structure means the structure of the rates as they relate to different rate classes, and a classic example is residential, commercial, industrial, classifications of those types. And that rate structure connotates to me an offering by a utility that says these are the terms and conditions that we will provide service to you, and if you meet these terms and conditions, you will be provided the service on a nondiscriminatory basis, and it doesn't really apply to a situation where you have entities who have voluntarily entered into a negotiated contract.
>
> And if there are provisions within that contract which allow for the rates to change over time, I still don't think that that meets the definition of a rate structure as I think it's contemplated. And for that reason, I do not think the Commission has jurisdiction to prescribe rate structure on a wholesale basis when that was from the result of a contractual negotiated situation between the parties.

(V. II R. 362-63)

Commissioner Deason was troubled because the rate schedule is part of a negotiated contract between Seminole and its members. The contract specifically provides that all board members are entitled to vote on any rate schedule revisions, and LCEC is duly

represented on the board. Under these facts, it was difficult to discern any discriminatory or unfair treatment of LCEC, the evil that Commission's jurisdiction over rate structure is designed to prevent. Cf. Action Group v. Deason, 615 So. 2d 683, 685 (Fla. 1993).

Because the Commission could not square Seminole's contract rate that had been approved by the board with its understanding of its rate structure authority under section 366.04(2)(b), the Commission determined that its authority did not reach that far. The Commission found "that there are cogent reasons to believe that the Legislature did not intend for our rate structure jurisdiction to extend to the wholesale rate schedule at issue in this case." (APP-1, p. 9; V. II R. 375)

C. The result of Commission jurisdiction

If the Commission were to assert jurisdiction over the wholesale rate structure of cooperatives, it would be asserting more jurisdiction over cooperatives than it does over electric investor-owned utilities. The Commission does not regulate the wholesale rate structure of investor-owned utilities. Yet, if the Commission were to assert jurisdiction as LCEC requests, the Commission would suddenly be in the business of regulating the wholesale rate structure of municipal and cooperative electric utilities who engage in wholesale transactions with investor-owned utilities as well as other municipals and cooperatives. When the

Legislature enacted the Grid Bill, it is very doubtful that it intended to give the Commission more jurisdiction over cooperatives or municipals than that reposed in the Commission over investor-owned electric utilities.

Asserting jurisdiction over municipal and cooperative wholesale sales would result in the Commission usurping the authority of self-governing bodies to negotiate wholesale power contracts. The Commission decided against such a result, because it believed that "the Legislature did not intend our rate structure jurisdiction to apply to wholesale rates set by the terms of a negotiated contract between rural electric cooperatives." (APP-1, p. 10; V. II R. 376)

D. The rules of statutory construction dictate that the Commission's order should be affirmed

In reaching its conclusion that it was without subject matter jurisdiction to hear LCEC's complaint, the Commission acknowledged that its "powers and duties are only those conferred expressly or impliedly by statute." (APP-1, p. 9; V. II R. 375); City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So. 2d 493, 496 (Fla. 1973). The Commission also relied on the time-honored maxim of statutory construction that "any reasonable doubt as to the existence of a particular power compels [the agency] to resolve that doubt against the exercise of such jurisdiction." (APP-1, p.

9; R 375); City of Cape Coral, 281 So. 2d at 496. In this case, the closeness of both votes taken by the Commission when considering Seminole's motion to dismiss reveal that there was ambiguity and reasonable doubt surrounding the Commission's jurisdiction. The Commission did as Florida law requires when there is reasonable doubt. The Commission found that it lacked jurisdiction over Seminole's rate structure.

An agency's contemporaneous interpretation of a statute which it is charged with enforcing is entitled to great weight. PW Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988). Courts should not depart from an agency's interpretation of such a statute unless it is clearly erroneous or unauthorized. Id. In this case, it has been over 25 years since the Legislature enacted the Grid Bill. During that time, the Commission has never asserted jurisdiction over the wholesale rate structure of cooperatives. Nor has the Legislature instructed the Commission that its interpretation was wrong.

When section 366.04(2)(b) is read in context with the Grid Bill and Chapter 366, Florida Statutes, the Commission's interpretation that it is without jurisdiction over Seminole is reasonable and lawful. Acosta v. Richter, 671 So. 2d 149, 154 (Fla. 1996) ("Statutory phrases are not to be read in isolation, but rather within the context of the entire section."). LCEC has not shown that the Commission's interpretation of section

366.04(2)(b) is erroneous. The Commission's Final Order dismissing LCEC's complaint should be affirmed because it was based on a lawful construction of the statute.

II. THE COMMISSION'S DECISION THAT IT IS WITHOUT JURISDICTION IS CONSISTENT WITH THE OVERALL PURPOSE OF CHAPTER 366, AND IS NOT INCONSISTENT WITH THE GRID BILL

LCEC argues that the exercise of Commission jurisdiction would be inconsistent with the Grid Bill. LCEC's argument disregards both the Commission's treatment of cooperative conservation efforts as well as the legislative purpose of chapter 366. For the reasons discussed below, the Commission's determination that it is without jurisdiction over the wholesale rate structure of Seminole is consistent with the Grid Bill and chapter 366.

A. Commission actions taken under the Grid Bill

After the Grid Bill was enacted, the Commission considered the issue of whether it had ratemaking jurisdiction over cooperatives and municipal systems based on section 366.04(2)(b). In re: General investigation of fuel adjustment clauses of electric companies, Docket No. 74680-CI, Order No. 6899, issued September 10, 1975. The Commission concluded that it did not. The Commission found that the Legislature had "made a marked distinction between jurisdiction over rates or ratemaking, and the prescription of a rate structure." Under its contemporaneous analysis of the Grid Bill, the Commission concluded that "the main purpose of the law is to place authority in the Commission for the

development of a total energy network or grid for the State of Florida." Id.

To implement its newly found statutory authority, the Commission initiated a general investigation into the rate structures of municipal electric systems and cooperatives. In re: General Investigation as to rate structures for municipal electric systems and rural electric cooperatives, Docket No. 770811-EU, Order No. 8027, issued October 28, 1977. All municipal and cooperative utilities were ordered to file rate schedules for the Commission's review. Id. Seminole did not file any rate schedule with the Commission. Seminole argued that the Commission lacked jurisdiction over the cooperative because it was engaged only in the generation and transmission of electric energy. (V. I R. 81) In addition, Seminole argued that "[i]n view of the fact Seminole sells no energy at retail to consumers, rate structures would not be applicable to it." (V. I R. 82) The Commission accepted Seminole's response, and did not require Seminole to file rate schedules or participate in the investigation.

B. The Commission's conservation efforts

After the Legislature provided the Commission with jurisdiction over cooperatives for limited purposes, Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA), which was one part of the National Energy Act. 16 U.S.C.S. §3601, et seq. The Commission opened several dockets to respond to

PURPA's requirements. In re: Consideration of PURPA Standards in the following dockets: Peak Load Pricing, Declining Block Rates, Cost of Service, Load Management, Decision Making, Order No. 10179, 81 F.P.S.C. 8:24 (1981). In meshing its PURPA responsibilities with its jurisdiction over cooperatives and municipals under section 366.04(2)(b), the Commission allowed the cooperatives to perform their own consideration of the load management standard. In re: Consideration of PURPA Standards in the following dockets: Peak Load Pricing, Declining Block Rates, Cost of Service, Load Management, Decision Making, Order No. 10437, 81 F.P.S.C. 12:18 (1981). From the beginning, the Commission treated the conservation efforts of cooperatives differently from those of investor-owned utilities.

The Florida Legislature also specifically addressed conservation requirements in the Florida Energy Efficiency and Conservation Act (FEECA), codified at sections 366.80-366.85 and 403.519, Florida Statutes. FEECA requires the Commission to adopt conservation goals, and provides that the Commission "shall require each utility to develop plans and programs to meet the overall goals within its service area." Section 366.82(2) and (3), Fla. Stat. "Utility" is defined for FEECA purposes in section 366.82(1), Florida Statutes. The Legislature specifically excluded small natural gas, municipal, and cooperative retail utilities from the FEECA requirements, and further broadened this exception in

1996. Ch. 96-321, §81, Laws of Fla. Because it is not a retail utility as required by Section 366.82(1), at no time was Seminole required to meet conservation goals. Moreover, since 1996 when the Legislature amended the definition of a FEECA utility, no cooperatives are required by the Commission to meet conservation goals.

Today, the only time the Commission looks at a cooperative's conservation measures is when a cooperative files a petition for a need determination. Section 403.519, Florida Statutes, requires the Commission to "expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant . . . ." Thus, as noted by LCEC, the Commission last considered Seminole's conservation efforts in In re: Petition for determination of need for the Osprey Energy Center in Polk County by Seminole Electric Cooperative and Calpine Construction Finance Company, L.P., Order No. PSC-01-0421-FOF-EC, 01 F.P.S.C. 2:443. At that time, the Commission found that "Seminole's rate structure is properly designed to provide incentives to lower on-peak demand." Id. at 448.

As shown above, the Commission has always imposed less stringent conservation standards over cooperatives than it does over investor-owned utilities. The Legislature endorsed this minimalist approach when it exempted cooperatives from the FEECA

conservation requirements. LCEC has not shown that the Commission's Final Order is inconsistent with the Commission's conservation authority as established in the Grid Bill. The Commission's decision that it does not have jurisdiction over Seminole is consistent with the Commission and Legislature's past treatment of conservation efforts by cooperatives.

C. The Commission's decision is consistent with the underlying purpose behind Chapter 366

In City of St. Petersburg v. Carter, 39 So. 2d 804 (Fla. 1949), the Commission had attempted to assert jurisdiction over street cars owned by the City of St. Petersburg. This court reversed the Commission's decision, in part, based on the Commission's designated role to protect the public from monopolies. In addition, the Court reasoned:

> It is unnecessary to exercise regulatory power in connection with a municipality which might own and operate any utility. The people themselves own a municipal utility and it functions for their benefit. They should have the right through their constituted officials to make their own regulations. The question naturally arises, Suppose a municipality makes rates and charges which are unjust and unreasonable, should not then there be some method whereby a citizen might have redress for the wrong? The answer to this question is two-fold. In the first instance, it is not to be presumed that such situation will be brought about by the officials charged with the responsibility and duty of operating the city and its utilities to the best interests of its citizens; and secondly, anyone who may be aggrieved can resort to the courts. There is no occasion to give one statutory creature, such as the Florid Railroad and Public Utilities Commission, jurisdiction over the activities of another statutory creature, to wit: a duly chartered municipality, which

> is a distinct governmental unit, unless the law unmistakably so provides.

Id. at 806. For these same reasons, the Commission properly did not usurp jurisdiction over the self-regulated rate schedule approved by Seminole's board. Contrary to LCEC's arguments, the reasoning in City of St. Petersburg is still pertinent today.

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

LCEC argues that the Commission's decision leaves a regulatory gap that must be filled. (Brief at 23). LCEC has not shown that the gap was unintended. Moreover, any gap left is not nearly as large as LCEC would have the court believe.

A. The REA Administrator regulates cooperatives

As has been recognized by the FPC (now known as FERC), the administrator of the REA exercises regulatory control over cooperatives. When the FPC determined that it did not have jurisdiction over cooperatives, one of the overriding reasons was because of the REA Administrator's authority over these self-governing entities. As the FPC said:

> Under the Rural Electrification Act, the Administrator has virtually absolute discretion and exercises extensive and rigid supervision and control over its cooperative borrowers. The cooperative's books and records must be kept in accordance with the REA Uniform System of Accounts. Appointments of its manager, counsel, and other key personnel are subject to approval by REA. It cannot merge or consolidate, or sell or encumber any of its property without REA approval. The government's mortgage lien attaches to each of its extensions, and it cannot build extensions except with additional REA financing, or with REA approval of other financing.

> Thus, it cannot grow without REA approval. All of its contracts, including those for the purchase and sale of electric energy, must be approved by REA, and by this means REA controls the rates the cooperative pays and the rates it charges. Moreover, the need to return to REA for additional loans as the cooperative grows provides another mechanism whereby REA exercises control.

Dairyland Power Cooperative, 37 F.P.C. at 13-14. The FPC found that the Federal legislative history revealed that "[t]he REA constitutes a grant of plenary authority to the Administrator to make policy for, and to exercise regulatory authority over, the cooperatives established by the new Act." Id. at 16. In 1967, when the FPC formally declared it had no jurisdiction over cooperatives, the FPC found that "Congress has expressly authorized the Administrator to exercise virtually unlimited and continuing regulatory authority over the operations of cooperative borrowers, which authority has been fully exercised for over thirty years." Id. at 33.

The United States Court of Appeals for the District of Columbia also found that the REA exercises "extensive supervision over the planning, construction and operation of the facilities it finances." Salt River Project, 391 F.2d at 473. Moreover, that court found that, in many respects, the REA's regulation and supervision of cooperatives was "far more comprehensive than [that]

which the Federal Power Commission exercises over investor-owned utilities . . . ." Id.[3]

B. Federal Law does not require the Commission to regulate cooperatives

While it is true the United States Supreme Court determined that "[n]othing in the Rural Electrification Act expressly preempts state rate regulation of power cooperatives financed by the REA" in Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 385 (1983), the court was addressing a state's assertion of jurisdiction where the state's Legislature had clearly provided the regulatory commission authority over the cooperative's wholesale rate structure. That is not the case here. As discussed in Part I above, the Florida Legislature did not intend for the Commission to regulate the wholesale rates of cooperatives. Nothing in Arkansas Electric compels a state regulatory commission to assert jurisdiction over the wholesale rate structure of cooperatives where there is no organic authority to do so from the state. The states that do not regulate cooperatives may continue their inaction under Arkansas Electric. Stalon and Lock, 7 Yale J. on Reg. at n. 39 (There are states were no state regulation over cooperatives exists).

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[3] As a result of the 1994 reorganization of the U.S. Department of Agriculture, the Rural Utilities Service was assigned responsibility for electric loan programs formerly performed by the REA. The Secretary of the Department of Agriculture now performs the functions previously performed by the Administrator of the REA.

LCEC is not without recourse if it has a complaint with the rate structure set under the negotiated terms of its wholesale contract with Seminole. LCEC may take its complaint to circuit court, as the Commission acknowledged in its final order dismissing the complaint. (APP-1, p. 10; R 376) Florida courts are capable of dealing with utility rate issues. Cf., Rosalind Holding Company v. The Orlando Utilities Commission, 402 So. 2d 1209 (Fla. 5th DCA 1981). If the trial court has a question that requires the special expertise of the Commission, it may refer the question to the Commission for a finding. See, In re: The primary jurisdiction referral from the Circuit Court of the Sixth Judicial Circuit, Pinellas County, Florida, in Circuit Civil No. 87-14199-7, Order No. 21280, 89 F.P.S.C. 5:394 (1989).

IV. THE COMMISSION'S STATUTORY INTERPRETATION THAT IT DOES NOT HAVE JURISDICTION OVER THE WHOLESALE RATE STRUCTURE OF COOPERATIVES IS ENTITLED TO GREAT DEFERENCE

LCEC argues that any discussion concerning the Commission's inaction regarding the regulation of wholesale rate structures is irrelevant. (Brief at 27) The Commission acknowledges that its jurisdictional powers do not atrophy from nonuse. If this Court finds that section 366.04(2)(b) provides the Commission with jurisdiction over the wholesale rate structure of cooperatives, the Commission must hear LCEC's complaint. Nonetheless, contrary to LCEC's arguments, the Commission's contemporaneous construction of section 366.04(2)(b) is entitled to great deference and is relevant

here. BellSouth Telecommunications, Inc. v. Johnson, 708 So. 2d 594, 596 (Fla. 1998)("[A]n agency's interpretation of a statute that it is charged with enforcing is entitled to great deference and will be approved by this Court unless it is clearly erroneous.").

Moreover, the Legislature's acquiescence in the Commission's interpretation demonstrates its endorsement of the Commission's long standing practice of not exercising jurisdiction over the wholesale rate structures of cooperatives. Johnson v. State, 91 So. 2d 185, 190 (Fla. 1956) ("Long acquiescence by the legislature in a particular construction is entitled to great weight in interpreting the statute."). For the last twenty five years, the Commission has consistently interpreted section 366.04(2)(b) to mean that the Commission is without jurisdiction over the wholesale rate structure of cooperatives. During this time, the Legislature has never amended chapter 366 to reflect that the Commission's interpretation was incorrect.

This case is remarkably similar to City of St. Petersburg, in which this Court reversed the Commission's order that declared jurisdiction over rail cars in St. Petersburg. In that case, this Court found it instructive that

> the record before us does not show that any application for a certificate of public necessity and convenience was ever filed or required, by the Florida Railroad and Public Utilities Commission, to be filed. The transportation system of the City of St. Petersburg has been operated by said city for a period of thirty years.

> During all these years many changes have been made in rates, schedules and routes, all without application for approval by the Florida Railroad and Public Utilities Commission or any suggestion that such changes should have been so approved.

City of St. Petersburg, 39 So. 2d at 806.

Similarly, since its existence, Seminole has sold power to its member-owners without Commission regulation. Seminole has never filed any rate schedule with the Commission for its approval. The only regulatory body that has approved Seminole's rate structure is the Administrator of the REA. Just because LCEC has recently decided its interpretation of section 366.04(2)(b) is different from the Commission's does not mean that the Commission is now required to follow LCEC's reading. State Department of Health and Rehabilitative Services v. Framat Realty, Inc., 407 So. 2d 238, 242 (Fla. 1st DCA 1981)("Permissible interpretations of a statute [by an agency charged with its enforcement] must and will be sustained, though other interpretations are possible and may even seem preferable according to some views."). LCEC would have this Court endorse Commission interference with a negotiated contract between two self-regulated parties. The Commission, however, does not have jurisdiction to alter this contractual relationship. United Telephone Company of Florida v. Public Service Commission, 496 So. 2d 116, 119 (Fla. 1986).

LCEC has not shown that the Commission's long held interpretation of section 366.04(2)(b) is erroneous. The

Commission's Final Order dismissing LCEC's complaint for lack of subject matter jurisdiction should be affirmed.

CONCLUSION

LCEC has not met its burden of overcoming the presumption of correctness that attaches to Commission orders. City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981). The Commission's order should be affirmed.

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Dated: June 29, 2001

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 29th day of June, 2001, by U.S. Mail, to the following:

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the text and all footnotes of Answer Brief of the Florida Public Service Commission were typed using 12 point Courier New Font and that the text was fully justified. A three-and-a-half inch disk with a copy of the Commission's Answer Brief has been furnished to the Supreme Court of Florida.

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MARY ANNE HELTON

APPENDIX

ORDER NO. PSC-01-0217-FOF-EC, ORDER DISMISSING COMPLAINT AND PETITION FOR LACK OF SUBJECT MATTER JURISDICTION, ISSUED JANUARY 23, 2001.