IN THE SUPREME COURT OF FLORIDA

CASE NO. 01-373

LEE COUNTY ELECTRIC
COOPERATIVE, INC.,

Appellant,

vs.

E. LEON JACOBS, JR., et al.,

Appellees.

ON REVIEW FROM THE PUBLIC SERVICE COMMISSION
Case No. PSC-01-0217-FOF-EC

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

Lee County Electric Cooperative, Inc. ("LCEC") appeals the decision of the Florida Public Service Commission (the "Commission") dismissing, on jurisdictional grounds, LCEC's Complaint concerning the wholesale rate structure imposed by Seminole Electric Cooperative, Inc. ("Seminole"). LCEC purchases power generated by Seminole for distribution to LCEC's retail customers. LCEC's Complaint centers around a change in Seminole's rate structure that departs from generally accepted rate making standards and unwisely discourages the conservation of electric power.

When LCEC brought its Complaint to the Commission, Seminole moved to dismiss, arguing that the Commission has no jurisdiction over the wholesale rate structure of rural electric cooperatives. The Commission's legal and technical staff unanimously recommended that Seminole's motion be denied on the basis that the Commission did, in fact, have wholesale rate structure jurisdiction under the plain language of the Florida Statutes. A sharply divided panel of Commissioners however, rejected the recommendation of staff and declined to exercise jurisdiction. The Chairman of the Commission, Commissioner Jacobs, dissented on grounds that the plain language of the statute gave the Commission jurisdiction over Seminole's rate structure.

The relevant statutory provision is simple and clear. The Commission has jurisdiction "[t]o prescribe a rate structure for *all* electric utilities." § 366.04(2)(b), Fla. Stat. (2000) (emphasis added). Seminole concedes that it is an electric utility within the meaning of Section 366.04(2)(b). Moreover, there is nothing in Chapter

366, Florida Statutes, that expressly excepts the wholesale rate structure of rural electric cooperatives, such as Seminole, from the Commission's jurisdiction, even though Chapter 366 specifically excepts from regulation certain wholesale sales of power by investor-owned electric utilities.

In this brief, LCEC will show that Section 366.04(2)(b) plainly and unambiguously grants jurisdiction to the Commission to review and regulate Seminole's wholesale rate structure. This exercise of jurisdiction is consistent with the statutory purpose of Section 366.04, which was enacted in 1974 as part of the Grid Bill to encourage electric power conservation and to ensure the reliable distribution of power within a coordinated grid. Ch. 74-196, Laws of Fla. If the Commission does not exercise jurisdiction, Seminole's wholesale rate structure will go entirely unregulated even though it sharply departs from generally accepted rate making standards and the statutory goals of conservation and reliability. Thus, LCEC will have no choice but to bring its concerns over Seminole's rate structure to the Circuit Court. It makes no sense to interpret the statute to create a "regulatory gap" and leave to the various Circuit Courts around the state important questions of utility regulation within the technical expertise of the Commission.

Chairman Jacob's dissent and the staff's recommendation to accept jurisdiction are correct. This Court should reverse the majority's decision overruling staff and remand with instructions to reinstate LCEC's Complaint.

STATEMENT OF THE CASE AND FACTS

The facts are taken from LCEC's Complaint, which, of course, must be accepted as true for the purposes of this appeal. LCEC is a non-profit electric distribution cooperative organized under Chapter 425, Florida Statutes, and engaged in the distribution and sale of electric energy within its approved service territory in southwest Florida. LCEC serves approximately 139,000 customers, most of which are in Lee County (R. 8). Seminole is a non-profit electric generation and transmission cooperative also organized pursuant to Chapter 425. Seminole provides electricity at wholesale to its ten owner-members, one of which is LCEC. Each of Seminole's members, like LCEC, is a distribution electric cooperative engaged in the retail sale of electricity to Florida customers (R. 8).

LCEC purchases all of its power requirements from Seminole pursuant to a wholesale power contract between LCEC and Seminole originally dated May 22, 1975 and supplemented and amended from time to time (R. 71 at Ex. 1-A). Essentially, LCEC is a captive customer of Seminole. LCEC must purchase all of its power requirements from Seminole during the 45-year term of the contract, which does not expire until 2020 (R. 8, R. 71 at Ex. 1-A p.7). The contract does not set the rates but gives Seminole's Board the power to develop a rate structure pursuant to "generally accepted rate making standards" (R. 71 at Ex. 1-6 at ¶ 2). These rates must "recognize and provide for variations in the cost of providing services of different voltages, load factors and power factors . . ." (R. 71 at Ex. 1-C

at ¶ 2). There is no provision in the contract preventing LCEC or any other member of Seminole from filing a complaint with the Commission if Seminole's rate structure is not in accordance with generally accepted rate making standards (R. 71 at Ex. 1, R. 72 at ¶ 2).

On October 8, 1998, the Seminole Board approved a new rate schedule applicable to all of its members, Rate Schedule SECI-7, effective January 1, 1999 (R. 7-8). The new rate schedule is an abrupt departure from Seminole's historical rate structure. Under this new rate structure, a higher percentage of Seminole's fixed costs are shifted from the existing "demand charge" to a new "production fixed energy charge" which is allocated to members based on an average of their three-year historical energy usage (R. 9-10, 12, 14-17).

[1]

Rate Structure: Demand vs. Energy Charges

An important and generally accepted principle of utility rates is that the rates imposed by a utility should, as closely as possible, mirror the actual costs of producing and distributing the electricity.

[2] As the Commission has noted, designing rate structures to accurately recover

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[1] The rates established in Rate Schedule SECI-7 also reflect a reduction in the cost of providing service to Seminole members, which results from commendable cost control measures that Seminole has taken for the benefit of its members. This cost reduction is not the subject of LCEC's Complaint.

[2] *See In re: Investigation as to rate structure of municipal electric systems and rural electric cooperatives,* 6 F.P.S.C. 3:519, 519 (1979) (rate structure should be based on the cost of service).

costs encourages efficiency and conservation.

[3] The costs to be recovered by the rate structure include the fixed costs of constructing power generating facilities, variable costs such as fuel and labor to produce the electricity on a day-to-day basis as well as the costs of building and maintaining a transmission grid. A utility's rate structure is the method by which a utility attempts to fairly apportion these various costs among its customers based on factors such as the cost of serving the customers and the customer's power consumption and load characteristics. Fla. Admin. Code R. 25-9051(7) and 25-9.052(4) (R. 9-10, 14-17).

[4]

At issue in this case is the relationship between Seminole's demand and energy charges. The "demand charge" is that portion of the rate designed to recover the fixed costs of constructing electric generating and transmission capacity. A utility must have sufficient generating and transmission capacity

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[3] *Id.*

[4] For regulatory purposes, the Commission has clearly distinguished "rate making" from "rate structure". *See In re: General Investigation of Fuel Adjustment Clauses of Electric Companies*, Docket No. 74680-CI, Order No. 6899 (1975), 1975 Fla. PUC Lexis 171 at *8 (". . . [W]e perceive a clear distinction between the terms "rates" and "rate structure". This Commission . . . has traditionally utilized the former term in the context of determining the revenues necessary to provide a utility a reasonable rate of return. Conversely, the latter term is used to connote the rate relationship between various customer classes as well as the rate relationship between various levels of consumption within a customer class. Thus, ratemaking relates to the determination of dollars required by a utility while rate structure relates to the method by which those dollars shall be generated through the rate schedules of the utility."). The Commission went on to hold that Chapter 74-196 [the Grid Bill] vests the Commission with "rate structure", but not "ratemaking", jurisdiction over rural electric cooperatives. *Id.* at *6-7.

available to serve all of its customers at peak demand, such as an August afternoon when every air conditioner is running and electricity demand is at its highest. While some of this generating capacity may sit idle on a balmy Florida spring day when windows are open, breezes are blowing, and air conditioners are silent, a prudent utility must have system capacity immediately available to meet peak demand and avoid power outages (R. 14-17).

A "demand charge" represents a utility's attempt to apportion the cost of this peak capacity among its customers. For example, a customer representing 10% of that peak demand should pay a demand charge designed to recover 10% of the fixed costs of constructing the generating capacity needed to meet that customer's peak demand. This is only fair because the customer that creates the need for 10% of the generating capacity required to meet peak demand should pay for those costs.

The "energy charge" in a utility's rate structure is designed to recover the variable costs of producing electricity. Such costs include the fuel and variable operations and maintenance costs incurred to produce electric power as needed. Each customer pays a per kilowatt hour energy charge based on the number of kilowatt hours used.

The distinction between demand and energy charges is important. By imposing a demand charge reflective of a customer's share of peak demand, utilities provide financial incentives for load management that encourage

customers to shift their electricity demands from peak to off-peak periods. In doing so, a utility lowers its peak demands and, therefore, reduces the fixed costs of generation necessary to meet the total peak demand.

With the financial incentives provided by a properly calculated demand charge, customers are more likely to participate in load management programs which permit a utility to cut off power to air conditioners or pool pumps for short periods of time during periods of peak demand. Likewise, industrial customers might install self-generating equipment to supply their own needs during peak periods or shift production from afternoons to the night time when demand is reduced. Encouraging customers to manage peak demand results in lower costs of producing or purchasing electricity and may reduce the need for further generating capacity (R. 9-10, 14-17).

Florida law recognizes the importance of reducing peak demand through load management. Section 366.81 declares a legislative intent to encourage energy conservation through control of peak demand and forbids any discrimination in rates to customers that utilize load management.

The Problem with Seminole's New Rate Structure

Seminole's new rate structure is not in accordance with generally accepted rate making standards because it transfers an inordinate portion of Seminole's fixed costs from the demand charge to the energy charge. In other words, Seminole's new rate structure takes a portion of its fixed costs and, instead of recovering those fixed costs through the demand charge, recovers those charges through a new "production fixed energy charge (R. 9-10, 14-17, 219-21, R. 7 at Ex. 1)." This production fixed energy charge is calculated based on each member's three-year historical energy usage (R. 14-17, 219-21).

As a result, Seminole's new rate structure arbitrarily removes incentives for the customer to limit peak demand and is not reflective of fundamental principles of cost causation. Equally important, the new rate structure is contrary to sound regulatory policy because it unreasonably inhibits energy conservation and favors construction of otherwise uneconomic new generation (R. 14-17, 219-21). In particular, by assessing the production fixed energy charge on the basis of 3-year historical usage, rather than on current demand requirements, Seminole's rate structure makes it exceedingly difficult for LCEC to encourage retail customers to conserve electric energy. Indeed, the production fixed energy charge will be the same for the current month regardless of whether LCEC's retail customers increase or decrease their energy usage during the month. LCEC also believes that the new rate structure puts its load management program in serious jeopardy. At the time it

filed its Complaint, LCEC had 46,000 residential customers on load management programs and a significant corresponding investment in load control equipment. Because Seminole's new rate structure provides no economic incentives for energy conservation, it is no longer cost effective for LCEC to utilize the load control equipment in which it has invested (R. 15-16).

LCEC's Complaint

The Seminole Board approved the new rate structure on October 8, 1998, over the objections of LCEC. On December 8, 1998, LCEC filed its Complaint with the Commission, asking the Commission to conduct a full investigation and evidentiary hearing on Seminole's new rate structure (R. 7-20).

[5] LCEC based its Complaint on Section 366.04(2)(b) which gives the Commission power to "prescribe a rate structure for all electric utilities." The Commission's charge is to prescribe a "fair, just and reasonable" rate structure taking into consideration the cost of providing service to each customer class, the load characteristics of various classes of customers, fairness in apportioning costs, avoidance of undue discrimination, and encouragement of efficiency. Florida Admin. Code R. 25-9.052(4).

Seminole moved to dismiss LCEC's Complaint, claiming that the Commission is without jurisdiction to review Seminole's wholesale rate structure (R. 71-88). In response, LCEC pointed out that the Commission's exercise of jurisdiction falls squarely within the language and intent of Section 366.04 and is consistent with the Commission's duty to encourage conservation and ensure the reliability of the electric grid (R. 91-92, R. 99-101).

The Commission staff recommended denial of Seminole's motion to dismiss

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[5] After LCEC filed its Complaint, Seminole revised its rate structure adopting Rate Schedule SEC1-7b. The new rate structure contains the same structural flaws as SEC1-7.

(R. 174, 287). The staff concluded that the Commission's exercise of jurisdiction fit within the plain language of Section 366.04(2)(b) and within the broad purpose of Section 366.04 which is to require electric power conservation and ensure reliability within a coordinated electric grid. The staff pointed out that, in the absence of jurisdiction, the wholesale rate structure of rural electric cooperatives would go entirely unregulated (R. 182-91).

The Commission met and considered the motion to dismiss twice. The first time the motion was denied by virtue of a 2-2 tie vote (R. 198-99). Upon the request of the parties, the Commission later reconsidered the jurisdictional issue and this time a panel of Commissioners voted 2-1 to reject the staff's recommendation and to dismiss LCEC's Complaint (R. 305). The majority held that the statutes do not "expressly indicate that this Commission has jurisdiction to prescribe a wholesale rate structure for a rural electric cooperative" (R. 375). Chairman Jacobs filed a dissenting opinion articulating why the majority in the panel had erred in granting the motion to dismiss. According to Commissioner Jacobs, the plain language and intent of the statute dictate the exercise of jurisdiction over Seminole's wholesale rate structure (R. 377-385).

LCEC's timely appeal followed (R. 386).

SUMMARY OF THE ARGUMENT

The Commission was wrong to reject the recommendation of its legal and technical staff and decline jurisdiction over LCEC's Complaint. Section 366.04(2)(b) gives the Commission the broad power to "prescribe a rate structure for all electric utilities." Seminole concedes that it is an electric utility within the meaning of Section 366.04. Thus, the inevitable conclusion is that the Commission has the power to prescribe a rate structure for rural electric cooperatives, like Seminole, that sell only at wholesale.

The Commission's exercise of this jurisdiction is consistent with the purpose of the Grid Bill, which gives the Commission the duty to prescribe fair, just and reasonable rate structures to encourage conservation and ensure a reliable power grid. LCEC's Complaint concerning Seminole's rate structure falls squarely within this purpose. The whole point of LCEC's Complaint is that Seminole's new rate structure discourages conservation by substantially reducing the incentives to participate in load management and other conservation programs. As a result, Seminole's rate structure is arbitrary and unreasonable and directly contrary to the purpose of the Grid Bill.

If the Commission declines to exercise jurisdiction here, LCEC will have no choice but to take its complaint over Seminole's rate structure to Circuit Court. It makes no sense, however, for the Circuit Courts, rather than the Commission, to make energy policy for the state. The Commission, not the various Circuit Courts, is uniquely qualified to determine whether Seminole's rate structure is consistent with Florida energy policy as expressed by the Grid Bill.

ARGUMENT

The Commission should have accepted the recommendation of its staff and exercised jurisdiction over LCEC's Complaint. This brief opens with a discussion of the applicable statute, Section 366.04, proving that the Commission's exercise of jurisdiction is required by the plain language of the statute and the absence of any exception relating to the Commission's exercise of jurisdiction over wholesale rate structures. The brief then shows that the exercise of jurisdiction is consistent with the purpose of Section 366.04, which is to encourage conservation and ensure a reliable power grid. Next, the brief demonstrates that if the Commission does not exercise jurisdiction, wholesale rate structures of rural electric cooperatives will go entirely unregulated. Inevitably this "regulatory gap" will result in Circuit Courts, rather than the Commission, making energy policy for the state in a highly technical area where the Commission has specific expertise. Finally, the brief demonstrates that the Commission's previous inactivity in the area of wholesale rate regulation cannot excuse the Commission from exercising its statutory duties. This Court should reverse and direct the Commission to reinstate LCEC's Complaint.

Standard of Review

The Commission's granting of a motion to dismiss is a legal question reviewed *de novo*. *See Execu-tech Bus. Sys. v. New Oji Paper Co.,* 752 So. 2d 582, 584 (Fla. 2000)*; Southwest Florida Water Management District v. Save the*

Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000) (courts are free to disagree with agency on questions of law).

I. THE COMMISSION'S EXERCISE OF JURISDICTION IS COMPELLED BY THE PLAIN LANGUAGE OF THE STATUTE.

The divided panel of Commissioners below erroneously held that the Commission has no jurisdiction over wholesale rate structures of rural electric cooperatives. This position is belied first and foremost by the plain language of the statute, which must control. *See, e.g., City of Miami Beach v. Galbut*, 626 So. 2d 192, 193 (Fla. 1993) (if statute is unambiguous, it must be enforced as written without any need to resort to statutory construction); *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (same). The statutory language at issue here is refreshingly simple. The Commission has the power to "prescribe a rate structure for *all* electric utilities." § 366.04(2)(b) (emphasis added). Section 366.02(2) defines "electric utility" to mean "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." Seminole concedes that it is an "electric utility" within the meaning of Section 366.04(2)(b). There is also no question that Seminole's rate structure is at issue. Thus, the plain and unambiguous language of Section 366.04(2)(b) provides the Commission with jurisdiction over LCEC's Complaint.

The Commission suggested (contrary to the recommendation of its staff) that

"rate structure" should be interpreted narrowly to mean only retail rate structure, not wholesale rate structure. There are several problems with this analysis. The Commission's narrow jurisdiction ignores the Legislature's admonishment that the provisions of Chapter 366 be "liberally construed" for the accomplishment of its purposes. § 366.01, Fla. Stat. Moreover, if the Legislature had wished to restrict the Commission's jurisdiction to retail rate structure, it would have been easy to do so by adding the word "retail" to Section 366.04(2)(b). Indeed, the Legislature has demonstrated that it is fully capable of making regulatory distinctions between "retail" and "wholesale" utility operations. *See, e.g.,* § 366.11 (exempting wholesale sales from investor-owned utilities to rural electric cooperatives); § 366.82 (requiring retail (but not wholesale) utilities to adopt certain conservation goals). However, the Legislature drew no such distinction with respect to rate structure jurisdiction over rural electric cooperatives.

Equally telling is the Legislature's decision to grant the Commission jurisdiction over the rate structure of *all* electric utilities. As Seminole concedes, "all" electric utilities includes those electric utilities, like Seminole, that sell only at wholesale. Therefore, the duty to prescribe a rate structure for all electric utilities, including those that sell only at wholesale, necessarily includes the jurisdiction to prescribe a wholesale rate structure for Seminole. There is no other plausible reading unless "all electric utilities" is read to mean only those electric utilities selling at retail. Just as this Court may not add the word "retail" to the statute, it

cannot change "all" to mean only "some." *Atlantic Coast Line R.R. v. Boyd*, 102 So. 2d 709, 712 (Fla. 1958) (court must give meaning to all words).

The fact that the Legislature chose the more general and inclusive term - "all" - should be dispositive. *See State ex rel. Triay v. Burr*, 84 So. 61 (Fla. 1920) (construing the general term "railroad incorporations" and "common carriers" to include street car companies, rejecting the argument that the statute did not specifically refer to street cars). The courts may not add words to a statute to create limitations that do not otherwise exist. *See Atlantic Coast Line R.R.*, 102 So. 2d at 712 (court cannot take the liberty of supplying words to the statute); *Overstreet v. Florida*, 629 So. 2d 125, 126 (Fla. 1993) (same).

Finally, the Commission's decision ignores that the Legislature specifically exempted from the application of Section 366.04 certain sales of electricity at wholesale by investor-owned utilities. § 366.11, Fla. Stat. (2000). Such state regulation is unnecessary because wholesale sales by investor-owned utilities are already subject to exclusive regulation by the Federal Energy Regulatory Commission ("FERC"). *Arkansas Pub. Serv. Comm'n v. Arkansas Elec. Corp.,* 461 U.S. 375, 382 (1983). Chapter 366, however, contains no similar exemption from state regulation for the wholesale rate structure of rural electric cooperatives. The absence of such an exemption makes perfect sense because FERC does not regulate the wholesale rate structure of rural electric cooperatives.

[6] Thus, as noted by staff, the Legislature knew how to exempt certain wholesale matters, "but chose not to exempt wholesale sales" in their entirety (R. 186).

This Court has long held that a Legislature's decision to grant a specific exemption should be interpreted as a refusal to grant other exemptions. For example, in *PW Ventures, Inc. v. Nichols,* 533 So. 2d 281 (Fla. 1988), this Court considered whether the Commission could regulate public utilities that sold only to a single customer instead of selling to the general public. In reaching its conclusion that the Commission had jurisdiction, this Court noted that the Legislature had specifically granted an exemption for the sale of natural gas to a single entity. The absence of a similar exemption relating to the sale of electricity to a single entity could only be interpreted as a Legislative decision to grant jurisdiction. *Id.* at 283; *see State Dep't of Health and Rehabilitative Servs. v. Hartsfield*, 443 So. 2d 322, 325 (Fla. 1st DCA 1983) ("[w]here the legislature creates specific exceptions to the language in a statute, we may apply the rule to infer that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally"); s*ee also Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976) (if a statute specifically mentions certain things, it ordinarily is construed as excluding from its operation all things not mentioned); *Beach v. Great Western Bank*, 692 So. 2d 146, 152 (Fla. 1997) (when the Legislature has used a term in one section of the statute but omits it in another, the Court will not imply

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[6] More about this "regulatory gap" in Section III below.

what has been excluded).

The Legislature gave the Commission the power to prescribe the rate structure for all electric utilities, which necessarily includes those utilities selling only at wholesale. The exception from regulation for certain wholesale investor-owned utilities has not been extended to rural electric cooperatives. The plain language of the statute compels the Commission's exercise of jurisdiction.

II. THE COMMISSION'S EXERCISE OF JURISDICTION IS CONSISTENT WITH THE PURPOSE OF THE GRID BILL.

In 1974, the Florida Legislature extended the jurisdiction of the Commission over rural electric cooperatives with the enactment, of what is commonly referred to as the "Grid Bill." Ch. 74-196, Laws of Fla.

[7] In addition to the power to prescribe a rate structure for all electric utilities set

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[7] Chapter Law 74-196 amended, *inter alia*, Section 366.04 to include a new subsection (2), which provided:

> (2) In the exercise of its jurisdiction the commission shall have power over rural electric cooperatives and municipal electric utilities for the following purposes:
>
> * * *
>
> (b) To prescribe a rate structure for all electric utilities.

Ch. 74-196, § 1, at 439, Laws of Fla.

In 1989, the Legislature subsequently amended Sections 366.02 and 366.04 to further clarify that the Commission has jurisdiction to prescribe rate structures for all electric utilities. Ch. 89-292, Laws of Fla. Chapter Law 89-292 amended Section 366.04(2) to read:

> (2) In the exercise of its jurisdiction, the commission shall have the power over ~~rural electric cooperatives and municipal~~ electric utilities for the following purposes:
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> * * *

forth in Section 366.04(2)(b), the Grid Bill gives the Commission the power to "require electric power conservation and reliability within a coordinated grid . . . ". § 366.04(2)(c). The statute must be "liberally construed" for the accomplishment of its purposes. § 366.01.

The majority decision ignores this broad statement of purpose. Indeed, the Commission treated its jurisdiction as if its limited purpose is to protect retail customers from the monopolistic excesses of electric utilities. The majority suggests (and Seminole has argued) that there is no such concern with respect to

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(b) To prescribe a rate structure for all electric utilities.

Ch. 89-292, § 2, at 1798, Laws of Fla. Further, Chapter Law 89-292 created a definition of electric utility by adding subsection 2 to Section 366.02:

> (2) "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.

Ch. 89-292, § 1, at 1798, Laws of Fla.

The amendments in Chapter Laws 74-196 and 89-292 demonstrate the Legislature's desire to give the Commission broad powers to regulate all electric utilities, including rural electric cooperatives, for the purpose of establishing "a total energy network or grid for the State of Florida." *In re: General investigation of fuel adjustment clauses of electric companies,* Docket No. 74680-CI, Order No. 6899, 1975 Fla. PUC Lexis 171, at *6-7 (Fla. Public Serv. Comm'n Sep. 10, 1975) (internal citations omitted); Fla. S. Comm. on Econ., Prof., & Util. Reg., CS for SB 1224 (1989) Staff Analysis (May 17, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.) ("The Commission's statutory powers include the coordination of a state wide electric grid to ensure that sufficient energy resources are available to fulfill electricity needs throughout the state."). Neither the amendments, nor the legislative history accompanying the amendments, remotely suggests that the Commission's rate structure jurisdiction over rural electric cooperatives is limited solely to retail rate structures.

Seminole's rate structure because LCEC's rates are set by contract (R. 375). As a member of Seminole, LCEC participates in the process of setting rates.[8]

Once again, the Commission's analysis is replete with problems. The case on which Seminole relies to support a narrow view of jurisdiction, *City of St. Petersburg v. Carter*, 39 So. 2d 804 (Fla. 1949), was decided in 1949, long before the enactment of the Grid Bill. Although the Florida Railroad and Public Utilities Commission originally may have been created for the purpose of protecting the general public from unreasonable and arbitrary charges by monopoly utility companies, the Commission's functions are much broader today. The Commission's narrow interpretation of its jurisdiction completely ignores the power granted to the Commission by Section 366.04(2) to prescribe a rate structure for all electric utilities and to require conservation and ensure a reliable grid.

As noted by staff and Chairman Jacobs' dissent, review of Seminole's rate structure by the Commission fits squarely within this purpose. The whole point of LCEC's Complaint is that Seminole's new rate structure discourages conservation by substantially reducing the incentives to participate in load management and other conservation programs. By shifting a larger portion of the recovery of fixed costs from its demand charge to its energy charge, more efficient customers who avoid high-peak usage must subsidize less efficient customers who do not. Indeed,

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[8] LCEC, like every member of Seminole, has two out of twenty votes on the Board.

LCEC's Complaint points out that its popular load control program, used by 46,000 of its customers, may well be placed in jeopardy by the new rate structure. Thus, Seminole's rate structure runs directly contrary to the Commission's duty to encourage energy conservation programs including load management. *See* § 366.81, Fla. Stat. 2000.

By reducing the incentives to lower peak demand, Seminole also threatens the reliability of the grid. Reducing on-peak demand lessens the chance that power reserves will be inadequate to meet extraordinary demand and lessens the need for the construction of new generational capacity. Seminole's rate structure runs directly counter to this purpose. LCEC's Complaint notes that Seminole is going forward with the installation of new generating capacity in Hardee County. LCEC believes that Seminole's change in rate structure was created, part, for the very purpose of re-enforcing the need for new generating facilities. Clearly, the Grid Bill gives the Commission the power to examine Seminole's rate structure to ensure that it is consistent with the goals of conservation and reliability.

[9]

Moreover, it is highly artificial to suggest that, just because Seminole sells only at wholesale, its rate structure has no impact on retail consumers. Obviously,

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[9] In other contexts, the Commission has noted the importance of designing Seminole's rates to provide incentives to lower on-peak demand. *See, e.g., In re: Petition for determination of need for the Osprey Energy Center*, 01 F.P.S.C. 2:443 (2001). In *Osprey Energy Center*, the Commission specifically looked at Seminole's rate structure and its affect on conservation in making its decision. *Id.* at 448.

Seminole's members must design their retail rates so as to accurately pass through to the ultimate retail user the costs that Seminole members pay for the electricity they purchase at wholesale from Seminole. *See In re: Investigation as to rate structure of municipal electric systems and rural cooperatives,* 79 F.P.S.C. 6:519, 519 (1979) (rate structure should be based on cost of service). Thus, any inequities or other flaws in Seminole's wholesale rate structure inevitably will flow through to, and by borne by, retail customers.

The staff recognized these important purposes in recommending to the Commission that it deny Seminole's motion to dismiss. According to staff, LCEC's Complaint falls squarely within the Commission's power to assure an adequate and reliable source of energy for the state:

> Staff acknowledges an argument could be made that the Commission's rate structure jurisdiction was intended to provide the Commission some limited measure of control over the rates charged by municipal electric utilities and rural electric cooperatives to protect captive retail customers from unreasonable charges. However, given the clear purpose of the Grid Bill – to assure an adequate and reliable source of energy for the state – it appears equally, if not more likely, that the Commission's rate structure jurisdiction was intended to ensure that rates were structured in a manner consistent with the goals of reliability and conservation.

(R. 185). Chairman Jacobs agreed, deciding that the exercise of jurisdiction fit within the meaning and intent of the statute (R. 377-85).

The fact that Seminole's wholesale rates are set pursuant to a contractual process in which LCEC participates does not change the analysis. As a threshold

matter, LCEC and Seminole cannot by contract deprive the Commission of jurisdiction provided by statute. *South Lake Worth Inlet Dist. v. Town of Ocean Ridge,* 633 So. 2d 79, 89 (Fla. 4th DCA 1994); c*f. United Tel. Co. v. Public Serv. Comm'n*, 496 So. 2d 116, 118 (Fla. 1986) (parties to a contract cannot confer jurisdiction). Nor does the contract between LCEC and Seminole prevent any party from seeking review by the Commission. Instead, the contract requires that rates be set in accordance with generally accepted rate making principles. Ultimately, in Florida, it is the Commission that determines whether a rate is fair, just and reasonable, not the parties. Fla. Admin. Code R. 25-9.052. Essentially, Seminole suggests that the parties could agree to a rate structure that raises grave risks concerning the reliability of the grid, and the Commission would have no power to intervene, simply because the parties chose to create that rate structure by contract. Not surprisingly, Seminole cites no authority for this illogical position. [10]

Put simply, there is nothing about the contract between LCEC and Seminole that is inconsistent with the Commission's exercise of jurisdiction to fulfill its duties under Section 366.04(2). The Commission should be required to review Seminole's rate structure to ensure that it is fair, just and reasonable, and consistent

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[10] The Legislature has shown that it is fully capable of excluding certain power transactions governed by contract. *See* § 366.11, Fla. Stat. (2000) (excluding from Chapter 366 certain contractual sales by investor-owned utilities from certain regulations under Chapter 366.). The absence of any regulatory exception for the contract between Seminole and its members should end the analysis.

with the purposes of the Grid Bill.

III. THE COMMISSION'S DECISION NOT TO EXERCISE JURISDICTION LEAVES A REGULATORY GAP.

To affirm the Commission, this Court would have to decide that the Legislature intended there to be comprehensive rate structure regulation at the wholesale and retail level for all electric utilities except Seminole, which is the only rural electric cooperative that sells at wholesale in Florida. This gap in regulatory protection is not filled by the FERC or other regulatory bodies. Although FERC regulates wholesale rates of investor-owned utilities (hence the exemption in Chapter 366 of certain wholesale sales by investor-owned utilities from regulation by the Commission), FERC has expressly declined to exercise jurisdiction over the wholesale rate structures of rural electric cooperatives. *See Dairyland Power Coop.,* 37 F.P.C. 12, 26 (1967) (FERC's predecessor declines to exercise jurisdiction over rural electric cooperatives). The absence of any federal regulation is precisely why the wholesale rate structure of rural electric cooperatives is not exempt from Chapter 366.

Nor is there any question of federal preemption. The United States Supreme Court has expressly upheld the exercise of state jurisdiction over wholesale rate structures of rural electric cooperatives like Seminole. *Arkansas Pub. Serv. Comm'n v. Arkansas Elec. Coop. Corp.*, 461 U.S. 375 (1983). Specifically, the

court held that a state public service commission can regulate wholesale electric sales by a rural electric cooperative to retail distribution cooperatives occurring primarily in that state and such regulation is not pre-empted by the Federal Power Act or the Rural Electrification Act. *Id.* at 384-89.

Thus, LCEC's interpretation of the statute harmonizes state and federal regulation and gives meaning to the Legislature's determination not to exempt the wholesale rate structure of rural electric cooperatives from regulation. The Commission's decision not to exercise jurisdiction, however, creates a regulatory gap leaving the wholesale rate structure of rural electric cooperatives entirely unregulated.

[11]

In light of the otherwise comprehensive state and federal regulatory framework of rate review, it makes no sense to reject a statutory interpretation that fits the federal framework like a glove in favor of an interpretation that leaves a significant portion of the industry entirely unregulated. *Garner v. Ward*, 251 So. 2d 252, 255 (Fla. 1971) (law should be construed together and in harmony with

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[11] Seminole may argue, as it did below, that the Rural Utility Service ("RUS") fills this regulatory gap. RUS is nothing more than a lender and reviews Seminole's rate structure only for the purpose of determining whether it will generate sufficient revenue to retire the debt. RUS has no interest in whether the rate structure is designed to promote conservation and insure reliability of the grid, nor any interest in whether the rate is fair, just and reasonable. Thus, RUS review cannot substitute for the broad review compelled by Section 366.04.

any other statute relating to the same subject matter or having the same purpose). This is particularly so when rate structure can have such an impact on the core functions of the Commission to promote conservation, ensure reliability, and provide for fair, just and reasonable rates.

Consider the alternative. If this Court affirms the Commission's narrow interpretation of its jurisdiction, LCEC will have no choice but to take its claims to Circuit Court. The contract between LCEC and Seminole requires that Seminole's rates be enacted in accordance with generally accepted rate making standards. The contract also requires that Seminole's rate structure recognize and provide for variations in the cost of providing service at different load factors. However, a rate structure that does not fairly and accurately pass through the costs of generating and transmitting electricity to the ultimate customer does not accord with proper rate making standards. Nor does it provide for variations in the cost of providing service at different load factors as required by the contract (R. 71 at Ex. 1-C at ¶ 2). A rate structure that unfairly penalizes customers that seek to reduce their on-peak demand, is not proper rate making. A rate structure that discourages conservation and encourages inefficiency is not proper rate making. A rate structure that does not accurately pass on costs of generation and transmission is not proper rate making.

Thus, if the Commission's decision to decline jurisdiction is affirmed, the

Circuit Court, instead of the Commission, will be undertaking the sort of complex rate analysis routinely undertaken by the Commission, but will be forced to conduct this review without the professional staff and long history of experience of the Commission. In essence, the Commission's inaction will result in important decisions concerning energy policy being made by Circuit Courts around the state. The Circuit Court in this case will be presented questions such as:

Is Seminole's rate structure fair, just and reasonable?

Is Seminole's rate structure in accordance with generally accepted rate making procedures?

Does Seminole's rate structure recognize and provide for variations in the cost of providing service at different load factors?

Are Seminole's fixed costs properly reflected in its demand charges?

Does Seminole's rate structure improperly capture too much of its fixed costs in the energy charge?

Does the production fixed energy charge create a disincentive to conserve electricity?

Does the three-year average feature of the production fixed energy charge create an unfair and arbitrary disconnect between current usage and historical averages?

Does Seminole's rate structure unfairly discriminate against high load factor customers?

It makes absolutely no sense for these sorts of questions to be decided by Circuit Courts around the state instead of the Commission. Comprehensive utility regulation should not be rejected in favor of piecemeal and perhaps conflicting

decisions by the various Circuit Courts. The Commission's charge is to insure a coordinated and uniform utility policy across the state, and, as the legislature has commanded, the statute should be "liberally construed" for the accomplishment to that purpose. § 366.01. This Court should find that there is no regulatory gap in the comprehensive regulatory framework and restore this case to the Commission's docket.

IV. THE COMMISSION'S PREVIOUS FAILURE TO EXERCISE JURISDICTION IS IRRELEVANT.

The Commission's decision to decline jurisdiction below was also based on the Commission's previous inactivity in the area of wholesale rate structure regulation over Seminole. Seminole spent much of its argument attempting to convince the Commission that it could not exercise such jurisdiction going forward because it had not exercised such jurisdiction in the past.

To begin with, this argument is irrelevant. An agency's statutory powers do not atrophy with disuse. Thus, failure to exercise a power cannot eliminate statutory jurisdiction that otherwise exists. This court rejected a similar argument more than eighty years ago in *State ex rel. Triay v. Burr*, 84 So. 61 (Fla. 1920), holding that an agency's historical failure to exercise jurisdiction does not affect the jurisdiction of the agency:

> When a valid statute confers a power or imposes a duty upon designated officials, a failure to exercise the power or to perform the

> duty does not affect the existence of the power or duty or curtail the right to require performance in a proper case.

84 So. at 74 (citing *Chicago, Burlington & Quincy R.R. v. Iowa,* 94 U.S. 155, 162 (1876); s*ee United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950) ("The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise."); *United States v. American Union Transp., Inc.*, 327 U.S. 437, 455 n.18 (1946) (same).

Moreover, it is a substantial overstatement to suggest that the Commission has previously made the decision not to exercise jurisdiction over the wholesale rate structures of rural electric cooperatives. As Seminole conceded, this is the first case where a party has specifically asked the Commission to exercise such jurisdiction (R. 145-46). The Commission's staff also recognized that this is a case of first impression (R. 175-76).

Seminole erroneously makes much of the Commission's early foray into wholesale rate structure regulation shortly after the passage of the Grid Bill. In 1977, the Commission initiated an investigation for the purpose of implementing Section 366.04(2)(b). *See In re: General investigation as to rate structures for municipal electric systems in rural electric cooperatives*, 77 F.P.S.C. 1:83 (1977). In that order, the Commission directed a number of rural electric cooperatives and municipal electric utilities to file a copy of their current rates and charges.

Seminole filed a response arguing that it was not subject to the

Commission's rate structure jurisdiction because it had no sales to retail consumers. In that response, Seminole incorrectly argued that the Commission had no jurisdiction over its wholesale rate structure because Section 366.04(2) "only applies to retail rate structures, as wholesale rate regulation jurisdiction is solely vested in the federal energy regulatory commission." As Seminole now acknowledges, its "advice" to the Commission was wrong when given and, up until LCEC filed its Complaint, Seminole made no effort to correct the misinformation it previously provided. Indeed, over ten years before Seminole filed its response, the Federal Power Commission, FERC's predecessor, held that it did not have jurisdiction over wholesale sales of rural electric cooperatives. *See Dairyland Power Cooperative,* 37 F.P.C. 12 (1967). Later, the United States Supreme Court confirmed that state utility commissions, like the Florida Commission, may assert jurisdiction over wholesale rates of rural electric cooperatives. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384-89 (1983) (rejecting arguments that the Federal Power Act and the Rural Electrification Act preempted such state regulation). Thus, the only ground upon which Seminole originally convinced the Commission that it had no jurisdiction has been specifically overruled by the United States Supreme Court in *Arkansas Elec. Corp.* The fact that both Seminole and the Commission may have labored under a misapprehension of the scope of the Commission's jurisdiction cannot deprive the Commission of jurisdiction clearly granted under the plain language of Section 366.04(2). *See United States v. American Union Transp., Inc.*, 327 U.S. 437, 455

n.18 (1946) (an administrative agency may be mistaken as to the scope of its authority).

[12]

Thus, the best Seminole can do is to suggest that the Commission has been inactive in this area. Until now, however, the Commission has had no reason to affirmatively test its authority over the wholesale rate structure of rural cooperatives. No other rural electric cooperative has seen the need to ask the Commission to review Seminole's wholesale rate structure. Without the invocation of its jurisdiction by a rural electric cooperative such as LCEC, the Commission was not required to test its jurisdiction. *See American Union Transp.*, 327 U.S. at 455 n.18 (an administrative agency is not ordinarily under an obligation immediately to test the limits of its jurisdiction and may await an appropriate opportunity or clear need for doing so). For the first time, the direct question has now been placed before the Commission, and now this Court. The Grid Bill supplies the answer.

Thus, whether the Commission has been inactive or not, the Grid Bill clearly gives jurisdiction to the Commission over wholesale rate structures of all utility companies including rural electric cooperatives. This Court should apply the plain

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[12] Interestingly, two years before Seminole's misleading letter to the Commission, the Commission examined the purpose of the Grid Bill and concluded that the Legislature had clearly expanded the Commission's jurisdiction to cover, for the first time, the rate structure of rural electric cooperatives. In describing its rate structure jurisdiction, the Commission made no distinction between "retail" and "wholesale" rate structure. *In re: General investigation of fuel adjustment clauses of electric companies,* Docket No. 74680-CI, Order No. 6899 (1975), 1975 Fla. PUC Lexis 171.

language of the statute and reverse the Commission's decision to decline jurisdiction.

CONCLUSION

For all of the foregoing reasons, the Commission's order rejecting the recommendations of its staff and granting the motion to dismiss should be reversed. This case should be remanded with instructions to reinstate LCEC's Complaint and to conduct appropriate regulatory proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief was furnished by U.S. Mail to: **Richard Melson, Esquire,** Hopping, Green, Sams & Smith, P.A., 123 South Calhoun Street, Tallahassee, Florida 32301; **William Cochran Keating, Esquire**, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; **Robert A. Mora, Esquire,** Allen Law Firm, Post Office Box 2111, Tampa, Florida 33601; and **Timothy Woodbury,** Seminole Electric Cooperative, Inc., Post Office Box 272000, Tampa, Florida 33688-2000 on this ____ day of May, 2001.

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CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Appellant, Lee County Electric Cooperative, certifies that this Initial Brief is typed in 14 point (proportionately spaced) Times New Roman, in

compliance with Rule 9.210 of the Florida Rules of Appellate Procedure..

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