

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION  
TALLAHASSEE, FLORIDA

IN RE: Complaint and petition by Lee County Electric  
Cooperative, Inc. for an investigation of the rate structure  
of Seminole Electric Cooperative, Inc.

DOCKET NO. 981827-EC

COPY

BEFORE: CHAIRMAN JOE GARCIA  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER SUSAN F. CLARK  
COMMISSIONER JULIA A. JOHNSON  
COMMISSIONER E. LEON JACOBS

PROCEEDING: AGENDA CONFERENCE

ITEM NUMBER: 9\*\*

DATE: February 16, 1999

PLACE: 4075 Esplanade Way, Room 148  
Tallahassee, Florida

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**APPEARANCES:**

RICHARD MELSON, Esquire, representing Seminole Electric Cooperative

BRUCE MAY and KATHLEEN LAKE, Esquire, representing Lee County Electric Cooperative

**STAFF RECOMMENDATION****ORAL ARGUMENT ON MOTION TO DISMISS**

On December 9, 1998, Lee County Electric Cooperative, Inc. (LCEC) filed a complaint and petition against Seminole Electric Cooperative, Inc. (Seminole) concerning its recently adopted Rate Schedule SECI-7. On January 4, 1999, Seminole timely filed a motion to dismiss LCEC's complaint and petition and requested oral argument on its motion.

At its February 2, 1999, agenda conference, the Commission voted to grant Seminole's request for oral argument on the motion to dismiss. Pursuant to the Commission's vote, oral argument will be conducted at the February 16, 1999, agenda conference. The parties have suggested that they be allowed 15 minutes each to make presentations. Considering the importance of this issue, staff believes this is a reasonable amount of time. After the oral argument, staff will file a recommendation on the motion to dismiss to be considered by the Commission at a later agenda conference.

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CHAIRMAN GARCIA: We are now on Item Number 9, if I'm not mistaken, correct? Okay. Why doesn't staff just --

COMMISSION STAFF: Just as a brief introduction, Item 9 was noticed for oral argument on Seminole Electric Cooperative's motion to dismiss Lee County Electric Cooperative's complaint in this case. I believe the parties have requested and staff has recommended that they each be allowed 15 minutes to make their presentations. And what we would like to do is following the oral arguments, take some time to digest the arguments and prepare a written recommendation for you to consider at a later agenda.

CHAIRMAN GARCIA: So, Mr. Melson, you will go first, and from what I understand, each of you are going to require the full 15 minutes. Do you want to save some for rebuttal?

MR. MELSON: I would like to save about three minutes for rebuttal, if I could, Commissioner.

CHAIRMAN GARCIA: All right. Mr. May.

MR. MAY: If we have time, we would reserve time for surrebuttal, but I'm not sure whether Ms. Lake and I will -- I think we might take up the full 15 minutes during our presentation. But to the extent we have

1 some time we would like to have the opportunity for  
2 surrebuttal.

3 CHAIRMAN GARCIA: All right. Again,  
4 Commissioners may break in and ask you questions and I  
5 won't hold that against you. Very well. Staff, is  
6 there anything else? Just go ahead and hear the  
7 arguments?

8 COMMISSION STAFF: I believe, yes.

9 CHAIRMAN GARCIA: Very good. Mr. Melson.

10 MR. MELSON: Commissioners, I'm Rick Melson  
11 representing Seminole Electric Co-op. I'm going to  
12 spend just a minute giving you a little bit of  
13 background about Seminole. This may be old news to  
14 some of you, but I would like to make sure we are all  
15 on the same page.

16 Seminole is what we call a generation and  
17 transmission cooperative. It's a non-profit  
18 corporation, it is owned and governed by its members,  
19 and it provides electricity to those members on a  
20 wholesale basis. Seminole has ten members. Each of  
21 those members is what we call a distribution co-op.  
22 The distribution co-ops, like Lee County, buy  
23 electricity from Seminole at wholesale and then they  
24 turn around and sell electricity at retail to customer  
25 members in their own individual service territories .

1           Each of Seminole's ten members has two voting  
2 boards -- two voting members on Seminole's Board of  
3 Trustees, which is the governing board of Seminole.  
4 The wholesale power arrangements between Seminole and  
5 its ten members are contractual. Each of the members  
6 has a voluntarily negotiated contract with Seminole  
7 under which the distribution co-op agrees to purchase  
8 its total capacity and energy requirements from  
9 Seminole, and it pays for that under a wholesale rate  
10 schedule that is incorporated in the agreement.

11           Now, under the terms of those contracts,  
12 Seminole's Board of Trustees has the right to amend  
13 that rate schedule from time to time subject to  
14 certain parameters. Because Seminole is a non-profit,  
15 the total rates generated by the rate schedule, for  
16 example, cannot exceed its costs plus some interest  
17 coverage factors. And because Seminole is a borrower  
18 from the Rural Utility Service, RUS, which used to be  
19 called the REA, any change in Seminole's rate  
20 schedules is subject to approval by the RUS.

21           In October of last year, Seminole's Board of  
22 Trustees voted to amend the wholesale power schedule  
23 effective the 1st of January of this year, in order to  
24 implement a new rate schedule that Seminole believes  
25 is designed to give better price signals to its

1 members. Lee County, who is here today, was the only  
2 one of Seminole's ten members who voted against that  
3 new rate schedule, although they previously had  
4 supported the adoption of a strategic plan which  
5 called for a move by Seminole to more cost-based  
6 rates.

7 In accordance with the wholesale power contract,  
8 Seminole submitted that rate schedule change to the  
9 RUS, and that rate schedule was approved by the  
10 administrator of RUS in November of last year. In  
11 December, Lee County filed a complaint with this  
12 Commission in which they asked you to require Seminole  
13 to file the rate schedule with you and asked you to  
14 investigate that rate schedule to see if it was fair  
15 and reasonable. But because the new rate schedule,  
16 new rate schedule not only made some change in the  
17 rate elements, it also reduced the overall level of  
18 rates, Lee County asked you to let that rate schedule  
19 go into effect pending any review that you might  
20 undertake.

21 In January, Seminole filed a motion to dismiss  
22 Lee County's complaint based on lack of jurisdiction,  
23 and that is really what we are here about today  
24 is to hear oral argument on the lack of jurisdiction.  
25 And that jurisdictional question, Commissioners,

1 depends on the proper interpretation of Chapter 366  
2 and the particular Section 366.042(b).

3 I think everybody agrees that you don't have  
4 ratemaking jurisdiction over Seminole, just like you  
5 don't have ratemaking jurisdiction over any of the  
6 co-ops or municipal utilities. I think everybody also  
7 agrees that you do have rate structure jurisdiction  
8 over the tariffed retail rates of the distribution  
9 co-ops, like Lee County and the municipalities.

10 The question you have got to decide today is  
11 whether that rate structure jurisdiction extends to  
12 the wholesale contractual rates reflected in a  
13 contract between two utilities. In this case,  
14 Seminole and its members. If you decide yes, you do  
15 have jurisdiction, which is what Lee County is asking  
16 you to do, then you are going to be claiming  
17 jurisdiction over Seminole's wholesale rate structure  
18 for the first time in 24 years since that statute was  
19 enacted. And the consequence of it is you are also  
20 going to be claiming jurisdiction for the first time  
21 over the wholesale rate structures of the Florida  
22 Municipal Power Agency and of every municipal utility  
23 in the state that sells power at wholesale pursuant to  
24 contract.

25 It's our position that you simply don't have that

1 jurisdiction. Why? Three main reasons. First, that  
2 jurisdiction is inconsistent with your longstanding  
3 practical interpretation of Section 366.04. Second,  
4 your longstanding interpretation is correct. That  
5 interpretation that you don't have jurisdiction is  
6 consistent with the overall purpose of Chapter 366.  
7 And, finally, sort of the black letter law principle  
8 governing your authority that if there is a doubt,  
9 reasonable doubt about jurisdiction, then you don't  
10 have it. And we believe in this case there is at  
11 least a reasonable doubt.

12 On the first point, the 24-year longstanding  
13 interpretation. 366.042(b) that gave the Commission  
14 authority over co-op and muni rate structures has been  
15 on the books since 1974, and you have consistently  
16 applied that statute in practice as though it does not  
17 give you jurisdiction over wholesale contractual  
18 rates.

19 COMMISSIONER CLARK: Let me make sure, Mr.  
20 Melson. Has this specific issue ever come up before?

21 MR. MELSON: No. There is no decision in which  
22 you have specifically considered this. But,  
23 Commissioner, the record is exactly -- the history is  
24 exactly what you would expect if you thought that you  
25 did not have jurisdiction. If you had thought you had



1 jurisdiction there have been ample opportunities over  
2 the past 24 years that would have been logical --

3 CHAIRMAN GARCIA: Simply that we didn't exercise  
4 doesn't mean we don't have it.

5 MR. MELSON: Because you don't exercise  
6 jurisdiction doesn't mean you don't have it. In this  
7 case, I think you don't have it. And I think your  
8 failure to assert it is evidence that the  
9 Commissioners who were on the Commission when that  
10 statute was passed, the staff who was here when that  
11 statute was passed never thought that it gave you  
12 jurisdiction over wholesale rate structures of munis  
13 or co-ops.

14 If you had thought that while the legislative  
15 history was fresh in your minds, you would have been  
16 conducting yourselves quite differently for the past  
17 24 years. You have never squarely addressed the  
18 issue, you have never squarely said we have  
19 jurisdiction, we don't have jurisdiction. You  
20 certainly haven't said we have got it, but we are  
21 choosing not to exercise it.

22 Commissioners, given that 24-year --

23 COMMISSIONER DEASON: Let me ask a question. Can  
24 you choose not to exercise jurisdiction? It seems to  
25 me if you've got jurisdiction you've got a duty to

1 exercise it.

2 MR. MELSON: I think in general that's right. I  
3 think you have probably chosen in some cases to which  
4 you call forebear from regulation. I think you  
5 decided as a matter of policy not to exercise  
6 jurisdiction over AT&T at one point. I think in the  
7 cellular payphone area you may have decided that you  
8 had jurisdiction but you were not going to exercise  
9 it. I don't recommend that to you. I think you  
10 either have it or you don't. I think in this case you  
11 don't.

12 CHAIRMAN GARCIA: We could make a decision not to  
13 exercise jurisdiction which would benefit your client,  
14 wouldn't it, if we have jurisdiction?

15 MR. MELSON: I think if you have jurisdiction  
16 there is --

17 CHAIRMAN GARCIA: In other words, staff could  
18 determine that that's not an issue. In other words,  
19 as a policy issue we are not going to exercise  
20 jurisdiction the way we have not. Or is the mere fact  
21 that we have jurisdiction allow Mr. May to sort of  
22 seek a mandamus ordering us to effectuate  
23 jurisdiction, is that where we are?

24 MR. MELSON: Chairman Garcia, if I were in your  
25 shoes and was faced with a complaint by a party saying

1 that you do have jurisdiction and I'm here complaining  
2 about something, I don't think I would want to be  
3 saying I've got X jurisdiction, but I'm choosing not  
4 to exercise it. I think that option may be available  
5 to you, I don't think it's a good option. I don't  
6 think you have to get there.

7 I mean, when you come back to the purpose of  
8 Chapter 364, and really all of your regulatory  
9 statutes, those statutes are designed to protect  
10 ratepayers who don't have a choice of their supplier  
11 and who don't have any input into how rates are set.  
12 And the purpose is to protect those ratepayers from  
13 potential abuses of monopoly power.

14 Here Seminole doesn't have any monopoly power  
15 over Lee County. That relationship is governed by a  
16 contract and every time there is a rate change or a  
17 proposed rate change under that contract, the change  
18 has to be approved by Seminole's Board of Trustees,  
19 and Lee County has an equal and direct vote on that  
20 board, just as all the other members of Seminole do.

21 And sort of as an aside, not only has the  
22 Commission done nothing to claim jurisdiction over the  
23 past 24 years; Lee County, which has sat on Seminole's  
24 board during that time period, has never suggested to  
25 Seminole when it adopted a rate schedule amendment

1 that it had an obligation to file that rate schedule  
2 with the Commission for approval. If Lee County  
3 believed over the past 20-some-odd years that the  
4 Commission had jurisdiction, as a fiduciary, as a  
5 member of that Board of Trustees they should have been  
6 saying, Seminole, get this thing filed with the  
7 Commission.

8 I think the actions of all the parties indicate  
9 what until this complaint was filed was the common  
10 understanding that Chapter 366 simply didn't give you  
11 jurisdiction. And in our motion to dismiss we cite to  
12 a United Telephone case in which the Supreme Court  
13 adopted essentially the view that I have just  
14 espoused, that the purpose -- you've got to look at  
15 the purpose of the statute. The purpose of the  
16 statute is to protect ratepayers. This was in the  
17 telephone context.

18 In the United case, the Commission tried to  
19 rewrite a settlement agreement between BellSouth and  
20 GTE and United Telephone on the grounds that it was  
21 not -- it constituted an unreasonable or  
22 discriminatory practice. And the court said, "Well,  
23 you've got jurisdiction under the telephone statute  
24 over unreasonable and discriminatory practices, but  
25 that jurisdiction doesn't extend to contracts between

1 telephone companies. It extends only to the people  
2 the statute was designed to protect, the end use  
3 customer." And if you apply that same principal in  
4 this case, the Commission has got jurisdiction over  
5 the rate structures that affect end use customers, it  
6 doesn't have jurisdiction over the wholesale rate  
7 structure that is set forth in a contract between two  
8 utilities.

9 I'm not going to spend a lot of time on the  
10 reasonable doubt argument. That may not be persuasive  
11 to all the Commissioners. But the court has said if  
12 there is a reasonable doubt about your jurisdiction,  
13 you shouldn't exercise it. I have been told in the  
14 past if it is a close question maybe you ought to  
15 exercise it, and then so you will get an answer from  
16 the court as to whether you've got it or not. I think  
17 in this case, even if you do the right thing and say  
18 that you don't have jurisdiction, there is a good  
19 chance that issue is going to end up in court and you  
20 will get told one way or the other. So one of the  
21 typical reasons to violate that rule, I think, doesn't  
22 exist here.

23 COMMISSIONER JOHNSON: I think Mr. Melson has  
24 referenced me disagreeing because that was a point in  
25 PW Ventures, and we were on opposite sides of that

1 issue.

2 MR. MELSON: As General Counsel, Commissioner  
3 Clark made a very cogent recommendation to the  
4 Commission which has applicability in many cases but  
5 not this one. I don't really -- so I guess the two  
6 points I have made so far, Commissioners, is it is a  
7 longstanding practical interpretation. I mean, are  
8 you going to go back to the legislature now and say we  
9 have suddenly discovered after 24 years that we have  
10 got jurisdiction over all these wholesale contracts.  
11 And, by the way, give us some additional staff and  
12 some additional money to deal with them. I mean, the  
13 reason you haven't exercised jurisdiction when it was  
14 fresh in your mind and you were writing the rules of  
15 the game, everybody understood you didn't have it.  
16 And that's consistent, that's consistent with the  
17 statute with the purpose of the chapter to protect  
18 retail customers.

19 Now, I assume that Lee County is going to cite to  
20 you a U.S. Supreme Court case called Arkansas --

21 CHAIRMAN GARCIA: Is it possible that maybe we  
22 didn't need to exercise jurisdiction, that we thought  
23 that the market was taking care of it at the time and  
24 now we may have a different take on that?

25 MR. MELSON: Commissioner, when you are first

1 beginning to implement a statute like that, I don't  
2 see -- if you thought you had jurisdiction, I think  
3 you would have had to delve into it and find out what  
4 was going on in the market to decide whether there was  
5 a need -- to determine how much you should hands-on  
6 interfere with that process. The fact that you didn't  
7 do that kind of investigation suggests to me that you  
8 didn't think you had the jurisdiction.

9 I mean, if the statute said you had jurisdiction  
10 over resale and wholesale rate structures it would be  
11 unambiguous, we wouldn't need to be here. The statute  
12 talks about rate structure and your practical  
13 interpretation of that has been that it means retail  
14 rate structure.

15 COMMISSIONER JACOBS: Most times you would agree  
16 jurisdiction is fleshed out on a case-by-case basis.  
17 We have not delved into this whole area of wholesale  
18 before. It's fairly likely that we would not have had  
19 an opportunity to speak on that, wouldn't you agree?

20 MR. MELSON: Well, Commissioners, you have  
21 certainly been aware that municipal utilities, for  
22 example, have wholesale contracts with other  
23 utilities. Over the years you have entered orders  
24 requiring municipal utilities and the distribution  
25 co-ops to file with you any rate schedules, and you

1 have listed the particular types of rate schedules  
2 that need to be filed.

3 You have never listed anything having to do with  
4 a wholesale rate schedule. I think the operating  
5 assumption and the -- and it's a good operating  
6 assumption because it satisfies the purpose of the  
7 statute -- is that the legislature did not give you  
8 authority over wholesale rate structures.

9 Just a minute on the Arkansas Electric and then I  
10 will finish my direct presentation. That case is  
11 going to be cited for the proposition that the  
12 Commission can exercise jurisdiction over retail or  
13 wholesale rate structures of co-ops. But the holding  
14 in that case is very limited. The Supreme Court there  
15 was dealing with a case of preemption. They said if  
16 the state has given regulatory authority to its state  
17 commission, there is nothing in federal law or in the  
18 Constitution that preempts that exercise of authority.

19 But here we are back at square one. We are back  
20 at the question of has the legislature given you the  
21 authority in the first case. And if you answer that  
22 question no, you don't have jurisdiction over  
23 wholesale contractual rate structures, there is  
24 nothing in the Supreme Court case that really speaks  
25 to any of the issues in this case.



1           Commissioners, for all of the reasons I have  
2 given you, I would urge you to grant the motion to  
3 dismiss, find that you do not have jurisdiction over  
4 this wholesale rate structure, and not now attempt to  
5 engraft onto the statute something that hasn't been  
6 there for the past quarter of a century.

7           CHAIRMAN GARCIA: Thank you, Mr. Melson.

8           MR. MAY: Mr. Chairman and Commissioners, good  
9 afternoon. My name is Bruce May with the law firm of  
10 Holland and Knight here in Tallahassee, Florida,  
11 representing Lee County Electric Cooperative. With me  
12 today is Ms. Kathleen Lake with the law firm of  
13 Vincent and Elkins in Houston. Ms. Lake specializes  
14 in energy issues relative to the rural electric  
15 cooperative industry.

16           With the Chair's permission, Ms. Lake and I would  
17 like to split our 15 minutes, if it's the will of the  
18 Chair.

19           CHAIRMAN GARCIA: Surely. I will give you seven  
20 minutes apiece.

21           MR. MAY: Commissioners, Lee County, as Mr.  
22 Melson accurately pointed out, is a rural electric  
23 cooperative like Seminole, and is one of Seminole's  
24 largest customers. We are here today because Seminole  
25 has developed a new rate structure which we believe

1           unfairly discriminates against Lee County, and also it  
2           prevents Lee County from effectively implementing its  
3           conservation and load management programs which you,  
4           as the Commission, has required it to develop.  
5           Because of our concerns, we have petitioned the  
6           Commission to investigate the rate structure of  
7           Seminole under your rate structure jurisdiction for  
8           electric utilities.

9           Now, Seminole argues even though it is an  
10          electric utility under Chapter 366, you have no  
11          jurisdiction to investigate its rate structure. We  
12          disagree. The issue here is straightforward, and the  
13          issue is whether this Commission has jurisdiction to  
14          investigate the rate structure of Seminole under  
15          Section 366.042(b).

16          I think it's important to focus on that  
17          particular statutory provision. I know Seminole would  
18          like you to gloss over that, but this is the  
19          fundamental grounds on which your jurisdiction is  
20          based. In construing Section 366.042, you must employ  
21          a fundamental rule of statutory construction, and that  
22          rule is to give the plain and ordinary meaning to the  
23          terms used by the legislature in granting you  
24          jurisdiction.

25          Here, the legislature has expressly vested in you

1 the jurisdiction to prescribe rate structures for,  
2 quote, all electric utilities. Seminole concedes in  
3 its motion to dismiss that it is indeed an electric  
4 utility. The question then becomes what did the  
5 legislature mean when it granted the Commission rate  
6 structure jurisdiction over all electric utilities.  
7 We think the plain and ordinary meaning of all is  
8 found in the dictionary. All means every. It means  
9 the total extent of. And common sense tells us that  
10 all means all. It doesn't mean all but Seminole, as  
11 Seminole would you have believe.

12 Seminole would have you ignore the plain language  
13 and the plain meaning of that statutory grant of  
14 jurisdiction, and instead suggest that somehow you  
15 have adopted a longstanding policy not to regulate  
16 wholesale rate structures of Seminole. Now, I won't  
17 get into it at this point, but to the extent that  
18 there is a longstanding policy of the Commission,  
19 nowhere in your rules have you codified that  
20 longstanding policy. And under the new APA, I don't  
21 think rulemaking is a discretion. To the extent where  
22 you have a longstanding industry-wide policy, that  
23 policy should have been adopted by rule. There is  
24 nowhere in your rules where there is the distinction  
25 that somehow carves out Seminole from your regulatory

1 jurisdiction over rate structure.

2 If the Commission had meant to carve out Seminole  
3 from your rate structure jurisdiction, it certainly  
4 could have done so, yet it did not. In granting you  
5 the jurisdiction, the legislature didn't distinguish  
6 between wholesale rate structures and retail rate  
7 structures. Although in other areas of Chapter 366  
8 the legislature was very capable of making that  
9 distinction, in this particular area they did not.  
10 The fact that you have not acted in this area should  
11 in no way handcuff you right now from investigating  
12 the rate structure of Seminole.

13 In a United States Supreme Court case, American  
14 Union Transport, the Supreme Court stated, and I  
15 quote, "An administrative agency is not ordinarily  
16 under an obligation immediately to test the limits of  
17 its jurisdiction. It may await an appropriate  
18 opportunity or clear need for doing so. It may also  
19 be mistaken as to the scope of its authority."

20 This is a classic example, Commission, of  
21 misrepresentation and mistake which warrants a fresh  
22 look into your jurisdiction. In 1977, the Commission  
23 initiated an investigation into the rate structures of  
24 all municipal electric utilities and rural electric  
25 cooperatives in this state. In response to the order

1 initiating that investigation, Seminole filed a formal  
2 pleading in 1978 where it asserted, and I quote, "The  
3 only jurisdiction granted by the legislature over  
4 rural electric cooperatives was that granted by  
5 Section 366.042(b), and this was limited to rate  
6 structure and nothing else."

7 Seminole went on to state, and I quote, "This, of  
8 course, only applies to retail rate structures, as  
9 wholesale rate regulation jurisdiction is solely  
10 vested in the FERC."

11 COMMISSIONER CLARK: I didn't understand that  
12 they had wholesale jurisdiction. FERC has wholesale  
13 jurisdiction?

14 MR. MAY: I was going to get to that,  
15 Commissioner Clark. They do not. Seminole goes on in  
16 the filing to claim that since it engages in only  
17 wholesale transactions, generation and transmission,  
18 FERC has effectively preempted the Commission from  
19 asserting any type of jurisdiction over Seminole's  
20 rate structure.

21 Commissioners, I have struggled on how to  
22 characterize this filing in 1978 by Seminole. I guess  
23 the most civil way I can put it is that in 1978  
24 Seminole misled the Commission as to the scope of its  
25 jurisdiction. And for some unexplained reason, has

1 failed to correct that mistake up to today.

2 Commissioners, SEC's or Seminole's legal  
3 representation in 1978 that FERC's jurisdiction  
4 precluded you from prescribing a rate structure for  
5 Seminole was wrong when it was made and it is more  
6 wrong today. Ms. Lake is going to address the  
7 jurisdictional issues of the FERC, Commissioner Clark.

8 In the meantime, we would respectfully submit  
9 that Seminole's misstatement of the law in 1978 should  
10 not be allowed to perpetuate the notion that you lack  
11 jurisdiction to investigate the rate structure of  
12 Seminole today. And I would like now, if it pleases  
13 the Chair, to have Ms. Lake address some of the FERC  
14 issues.

15 CHAIRMAN GARCIA: Ms. Lake.

16 MS. LAKE: Good afternoon, Commissioners. As Mr.  
17 May indicated, it was quite clear in 1978 when  
18 Seminole filed its pleading with this Commission that  
19 the FERC did not, in fact, have wholesale jurisdiction  
20 over an entity such as Seminole. A decade before, the  
21 FERC's predecessor had twice ruled that rural electric  
22 cooperative borrowers such as Seminole who engaged in  
23 wholesale transactions were not subject to its  
24 jurisdiction under the Federal Power Act. One of  
25 those cases was not appealed. But the one that was,

1 that jurisdictional holding was affirmed.

2 Now, there was someone certainty in 1978 about  
3 the extent to which a state commission could exercise  
4 jurisdiction over an entity such as Seminole that  
5 engaged in wholesale transactions but was not  
6 regulated under the Federal Power Act. That  
7 uncertainty was resolved in 1983 by a United States  
8 Supreme Court case involving Arkansas Electric  
9 Cooperative.

10 Now, Seminole has suggested that that case has a  
11 very limited bearing here. Lee County disagrees very  
12 strongly. If you look at that case carefully, the  
13 facts involved were virtually identical to those here.  
14 Many of the facts that Seminole has asserted as  
15 reasons why this Commission as a policy matter should  
16 not be concerned about asserting jurisdiction were  
17 present there. For example, Arkansas Electric was  
18 also a member-owned and essentially self-regulating  
19 entity. Its members, like Seminole's members, had  
20 representatives on its Board of Directors. The Board  
21 of Directors, like Seminole's Board of Directors, was  
22 charged with the responsibility for setting the rates  
23 that were charged to members in connection with sales  
24 of power by Arkansas Electric.

25 All of these characteristics were present, and

1 Arkansas Electric challenged the state's assertion of  
2 jurisdiction in part on the basis of the fact that it  
3 was a member-owned self-regulating entity and the  
4 state had no real interest in imposing jurisdiction  
5 over it.

6 COMMISSIONER CLARK: Ms. Lake, let me ask you,  
7 was there legislation granting authority to, I guess,  
8 the regulatory body to assert jurisdiction.

9 MS. LAKE: Well, the legislation was similar in  
10 some respects to the legislation here. In particular,  
11 it granted the Commission jurisdiction over public  
12 utilities and made no distinction between retail or  
13 wholesale entities.

14 Arkansas Electric was conceded to fall within the  
15 definition of public utility, just as Seminole does  
16 within the definition of electric utility, and the  
17 question at issue was whether there was an implicit  
18 distinction intended between wholesale and retail.  
19 Now, the Arkansas statute did, I believe, grant  
20 broader jurisdiction over public utilities to the  
21 Arkansas Commission than is granted to this Commission  
22 over electric utilities, but that really is a  
23 distinction that does not make a difference in terms  
24 of the jurisdictional question here.

25 The Supreme Court specifically rejected Arkansas



1 Electric's argument that as a self-regulating  
2 member-owned body the state had no interest in  
3 asserting regulatory oversight. And in particular the  
4 Supreme Court mentioned two state interests which we  
5 believe are equally applicable here.

6 First, the Supreme Court noted that even  
7 member-owned essentially self-regulating entities  
8 could engage in inefficient activity, and that the  
9 state would have an interest in overseeing their  
10 activities to make sure that did not occur. And Lee  
11 County has asserted that it believes the wholesale  
12 rate structure of Seminole undermines Lee County's  
13 load management programs which this Commission has  
14 urged it to implement. In that case, Lee County  
15 believes that there is a significant state interest in  
16 being able -- having this Commission be able to review  
17 the rate structure of Seminole to assure that it does  
18 not undermine those types of policies.

19 There was a second reason that the Supreme Court  
20 pointed to when it found that there was a sufficient  
21 state interest to support assertion of jurisdiction,  
22 and that was this, the Supreme Court noted that there  
23 was a very direct and clear relationship between  
24 wholesale relationships and retail relationships, and  
25 that it was in the state's interest to be able to

1 regulate the wholesale relationship in order to assure  
2 the efficacy and make more efficient its regulation at  
3 the retail level.

4 Now, here I think it's uncontested that this  
5 Commission has rate structure jurisdiction over Lee  
6 County and its retail rates. If, as Lee County  
7 believes, Seminole's rate structure causes Lee County  
8 to bear an unduly discriminatory and disproportionate  
9 share of Seminole's costs, it necessarily follows that  
10 Lee County's retail ratepayers are bearing an unduly  
11 discriminatory and disproportionate share of those  
12 costs.

13 There is a third reason which was not discussed  
14 in the Arkansas Electric case.

15 COMMISSIONER DEASON: Ms. Lake, let me interrupt  
16 for just a second. Even though this rate is  
17 established by a contract?

18 MS. LAKE: Well, Seminole has contended that the  
19 rate is established by a contract. Lee County's view  
20 is that the contract simply establishes a process by  
21 which the Seminole Board of Directors will  
22 periodically approve new rate structures. That type  
23 of process was characterized by the Arkansas Supreme  
24 Court as one in which Arkansas Electric was not  
25 setting negotiated rates for its members, but rather

1 was directing unilaterally rates for its members. And  
2 that is Lee County's view.

3 In the contract that Lee County has with  
4 Seminole, it did not give up rights that it might have  
5 to complain to this Commission as you see sometimes in  
6 these types of contracts. It did not obligate Lee  
7 County to support before this Commission the rates and  
8 the rate structures that were imposed by Seminole's  
9 Board. As you also --

10 COMMISSIONER DEASON: If we overrule this rate  
11 structure, are we violating the contract that you have  
12 signed?

13 MS. LAKE: No.

14 COMMISSIONER DEASON: Why not?

15 MS. LAKE: Well, because as I said, the contract  
16 does not establish particular rates. The contract  
17 does not require Lee County to support those rates  
18 before this Commission, and the contract does not  
19 require Lee County to waive the rights that it may  
20 have before this Commission.

21 As I was saying, there is a third reason that is  
22 not discussed in the Arkansas Electric case, which Lee  
23 County believes makes it imperative for this  
24 Commission to retain the jurisdiction that Lee County  
25 believes it has over wholesale rate structures. And

1           that is this, it is clear that the FERC does not  
2           regulate the wholesale activities of Seminole.  
3           Seminole is a borrower of the Rural Utility Service,  
4           and as such the RUS does approve the rates established  
5           by Seminole. But as the Supreme Court noted in the  
6           Arkansas Electric case, that regulatory oversight is  
7           conducted from the perspective of a lender.

8           The RUS is not charged with protecting the public  
9           interest. And so if this Commission decides that it  
10          does not have jurisdiction over the wholesale rate  
11          structure of Seminole, there will be no regulatory  
12          body charged with protection of the public interest  
13          that will be reviewing Seminole's rate structure.  
14          There will be a regulatory gap created, and it would  
15          be created at a particularly difficult time when we  
16          have a lot of change, there are a lot of uncertainties  
17          about how competition may effect important state  
18          interests, such as load management policies and  
19          conservation.

20          CHAIRMAN GARCIA: Ms. Lake, I ask you the same  
21          question I asked Mr. Melson. What if we decided that  
22          we had jurisdiction and we just didn't want to assert  
23          it in this case. Where would that put us or what  
24          position would that put you in?

25          MS. LAKE: Well, I think in light of the fact

1 that Lee County has filed a complaint, if you decided  
2 that you had jurisdiction you would have to deal with  
3 that complaint in some way. You couldn't simply say  
4 you weren't going to assert it. There would have to  
5 be, in my judgment, some reason why you judge the  
6 complaint not to be something that required some  
7 investigation.

8 CHAIRMAN GARCIA: Okay.

9 MS. LAKE: In closing, Lee County would suggest  
10 that this is a very inauspicious time for the  
11 Commission to deprive itself of one aspect of the  
12 regulatory oversight that it now has. You don't know  
13 how competition may affect important state interests.  
14 And if you do not retain the ability to review  
15 wholesale rate structures, you will not retain the  
16 ability to make sure that those do not undermine  
17 states policies and that those do not perpetuate at  
18 the retail level inappropriate and unfair  
19 discrimination.

20 CHAIRMAN GARCIA: Thank you. Mr. Melson, you  
21 have three minutes.

22 MR. MELSON: Let me respond briefly to several  
23 points. Commissioner Deason, you asked would it be an  
24 interference with the contract. Absolutely. And we  
25 think it's the kind of interference that the Supreme

1 Court in the United Telephone case involving  
2 settlement contracts said you couldn't do. The  
3 legislature has enacted a statute to protect  
4 ratepayers. You can interfere in contracts with  
5 ratepayers, but you can't interfere in contracts  
6 between utilities.

7 I would like to go back to the Arkansas case for  
8 just a minute. The Supreme Court in that case was  
9 considering only the preemption issue. The U.S.  
10 Supreme Court was taking as a given that under state  
11 law the Arkansas Commission had jurisdiction. That  
12 was not the issue on appeal. The dicta in the case  
13 involving the case might have an interest in this  
14 aspect of regulation or another was in the context of  
15 a commerce clause analysis where the court was saying  
16 there is a state interest that essentially keeps --  
17 simply prevents an interference with interstate  
18 commerce if a state has through its legislature chosen  
19 to exercise that authority.

20 And the statute in Arkansas referred both to  
21 distribution to the public, it also referred to  
22 resale. It's the same definition in Arkansas that  
23 applied to all public utilities, investor-owned or  
24 co-ops. It's quite a different statute than we have  
25 got in Florida, so I don't think -- I repeat to you, I

1 don't think there is anything in the Arkansas case  
2 that helps answer the question you are facing.

3 Seminole's arguments that the Commission does not  
4 have jurisdiction were characterized as policy reasons  
5 that we are giving you not to exercise it. I hope I  
6 haven't left that misimpression. What we are giving  
7 you is the policy reasons we think the legislature  
8 didn't give you that authority, and that your 24-year  
9 construction where you have not exercised it was  
10 consistent with the legislative policy.

11 Mr. May pointed to a statement in a pleading  
12 Seminole filed with the Commission in 1977 where we  
13 said FERC had jurisdiction, that's what the pleading  
14 said. FERC at that point did not have jurisdiction.  
15 I wish that hadn't been said. I don't think it was  
16 the sole basis of that pleading, and I certainly  
17 wouldn't think that the Commission for 24 years has  
18 been not exercising jurisdiction over Seminole and has  
19 not been exercising jurisdiction over wholesale rates  
20 of municipal utilities because of one sentence in a  
21 Seminole pleading in 1979.

22 Ms. Lake also pointed out --

23 COMMISSIONER CLARK: I thought it has been fairly  
24 common knowledge for awhile now that FERC does not  
25 have jurisdiction over municipals and co-ops. And, in

1 fact, it's a part of the issue that are trying to be  
2 resolved in proposed federal legislation on  
3 deregulation. I mean, hasn't it been common knowledge  
4 for awhile?

5 MR. MELSON: I think it has been common knowledge  
6 amongst people in the industry. But the reason FERC  
7 said it did not have jurisdiction was because of the  
8 Rural Electrification Act, and they said essentially  
9 Congress has set up two schemes, one scheme for co-ops  
10 under the Rural Electrification Act, another scheme  
11 for other utilities, and we are not going to interfere  
12 with what the RUS is doing, which was then the REA.

13 In any event --

14 COMMISSIONER CLARK: Are you saying the issue of  
15 whether FERC had jurisdiction came before FERC and  
16 they concluded they didn't?

17 MR. MELSON: Correct. And they concluded that  
18 prior to 1979, prior to the time Seminole filed this  
19 pleading in one of your early docket. The Supreme  
20 Court didn't answer until a number of years later  
21 whether the RUS/REA jurisdiction preempted. That was  
22 what the Arkansas case dealt with in 1983. So at  
23 least for 16 years it has been clear that the state is  
24 not preempted if the legislature gave the Commission  
25 authority. And our point here is the Florida



1           Legislature simply has not given you that authority.  
2           And to try to change your interpretation now if you  
3           believe there are policy reasons today that you ought  
4           to have that authority, then someone should go to the  
5           legislature. You should not be construing the statute  
6           in a way it was never intended to operate.

7           CHAIRMAN GARCIA: Thank you, Mr. Melson. Is  
8           there anything else from staff?

9           MR. MAY: Mr. Chairman, I thought I had reserved  
10          one minute.

11          MR. MAY: Yes, but Ms. Lake had taken it up. But  
12          go ahead, Mr. May.

13          MR. MAY: Mr. Melson's cites kind of lays out a  
14          parade of horrors as to what would happen if the  
15          Commission asserted jurisdiction, and focuses on the  
16          United Telephone case. I think there is a bright line  
17          distinction between the United Telephone case and what  
18          is happening here. The United Telephone case, if you  
19          recall, involved a situation where BellSouth  
20          experienced a revenue shortfall and requested a rate  
21          increase. You denied that rate increase, but then  
22          went back and allowed BellSouth -- rewrote the  
23          separations and settlement agreement, and allowed  
24          BellSouth to withdraw \$19 million from a pool of  
25          revenue.

1           In that case you specifically went back and  
2           rewrote a private contractual agreement among two  
3           telephone companies. There was a question under  
4           Chapter 364 of the Telecommunications Statute whether  
5           you had authority to do that. It in no way involved  
6           the express statutory jurisdiction granted in 366.042.  
7           That makes no distinction between electric utilities;  
8           wholesale electric utilities, retail electric  
9           utilities. The legislature was clear. Electric  
10          utilities means electric utilities.

11          The second thing is Mr. Melson suggested that  
12          there is some of kind of impairment of contracts. I  
13          would ask you to look very closely at the agreements  
14          which are attached to his motion to dismiss. There is  
15          nothing in there that requires us to waive our right  
16          to come back before you and contest rate structure  
17          jurisdiction.

18          Finally, Mr. Melson says his client's  
19          misstatement in 1978 was simply a sentence. I  
20          respectfully disagree. If you go back and look at the  
21          entire basis of that response to your jurisdiction, it  
22          is based on the fundamental premise that FERC has  
23          preempted you, as a commission, from coming in and  
24          regulating. And I think that mistake has been  
25          perpetuated for the last 16 years. And I would

1 respectfully submit that that mistake be clarified now  
2 and you assert the jurisdiction that is rightfully  
3 yours. Thank you.

4 CHAIRMAN GARCIA: Thank you. That concludes Item  
5 Number 9. And I think we go back to a panel. I just  
6 want to suggest that, Mr. Talbott, and maybe we can  
7 work it out with the Public Counsel's office, when we  
8 have cases where there are citizens and particularly  
9 citizens who have traveled a long distance, maybe we  
10 can make an exception and take them up earlier. And I  
11 know today was an exception because we went relatively  
12 long on one item, but maybe in the future we can try  
13 to address that.

14 And, staff, could you come see me about this.  
15 And the only, I guess, direction that strikes me is  
16 that whichever way we decide, let's not give away  
17 jurisdiction if we don't have to make a decision on  
18 this particular issue.

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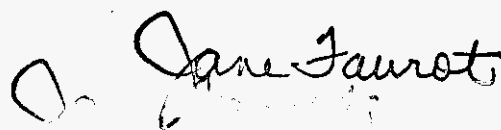
STATE OF FLORIDA )

COUNTY OF LEON )

I, JANE FAUROT, RPR, do hereby certify that the foregoing proceeding was transcribed from cassette tape, and the foregoing pages number 1 through 35 are a true and correct record of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 14<sup>th</sup> day of April, 1999.



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