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IN THE SUPREME COURT OF FLORIDA

LEE COUNTY ELECTRIC COOPERATIVE, INC., Appellant, vs. E. LEON JACOBS, JR., et al., Appellees.	)	981827 - EC **CASE NO. SC 01-373**

RESPONSE IN OPPOSITION TO MOTION FOR REHEARING

Appellee, Seminole Electric Cooperative, Inc. ("Seminole"), by and through undersigned counsel and pursuant to Fla. R. App. P. 9.330(a), hereby responds in opposition to the Motion for Rehearing filed by Appellant, Lee County Electric Cooperative, Inc. ("LCEC"):

It is well settled that the purpose of a motion for rehearing under Rule 9.330 is not to provide a medium by which counsel can "reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges . . . ." *Lawyers' Title Ins. Corp. v. Reitzes*, 631 So. 2d 1100, 1101 (Fla. 4th DCA 1993). Nonetheless, this is precisely what the LCEC has done. LCEC's Motion does exactly what Fla. R. App. P. 9.330(a) proscribes. It reargues the merits of the case in a last-ditch effort to convince the Court to change its mind.

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See, Committee Notes to Fla. R. App. P. 9.330 (Motions for rehearing "should be utilized to bring to the attention of the court point of law or fact it has overlooked or misapprehended in its decision, not to express mere disagreement with the resolution of the issues on appeal."). As discussed below, each of the points raised in the LCEC Motion were fully briefed and appropriately considered by the Court. Accordingly, LCEC's Motion should be summarily denied.

Contrary to LCEC's suggestion, the Court considered fully the issue in dispute with respect to the plain meaning of Section 366.04(2)(b), Florida Statutes, and apprehended the plain meaning of the statute. Indeed, the Court quoted the statutory provisions at issue in this cause on page 5 of its opinion. *See, Slip op.*, at 5.

Likewise, the Court understood the purpose of the statute, and specifically addressed LCEC's "regulatory gap" argument in its opinion. *See, Slip op.*, at 6-7. As LCEC acknowledges in its Motion for Rehearing, the "regulatory gap" issue was "discussed extensively in the briefs . . . ." Yet LCEC does nothing more than reargue this matter, as well, at pages 3-4 of its Motion for Rehearing. The Court fully appreciated the PSC's authority over electric utility "rate structures," but appropriately recognized and determined that the term does not encompass the contractual rate schedules at issue in this case. Not surprisingly, LCEC clearly disagrees with the Court's holding that the Legislature intended these rate schedules

to be self-governing, but LCEC's disagreement with the Court is not a basis for rehearing.

As the Court recognized and all parties agree, the standard of review in this appeal was *de novo*. *Slip op.*, at 4. Although the PSC's statutory construction was entitled to deference, the Court reviews questions of law as if it were deciding them in the first instance. *See*, Padovano, FLORIDA APPELLATE PRACTICE, at p. 128 (2001-2002 Ed.). Contrary to the implication in the assertion by LCEC in its Motion that the Court "overlook[ed]" the PSC staff's recommendation, the Court was not required to recite – much less adopt – a staff recommendation that was rejected by the Commission.[1] Under the *de novo* standard, the Court likewise was free to rely on the comments of Commissioner Deason, who presented a reasonable and logical construction of the statute. *See, Slip op.*, at 5-6.

LCEC is correct that this is a case of first impression. As Justice Wells noted in his concurring opinion, however, the statute at issue has been on the books for twenty-five years. *Slip op.*, at 8. Over those twenty-five years, the PSC has taken "no action to assert jurisdiction over Seminole's wholesale rate schedules, despite a number of logical opportunities to do so." *Answer Brief*, at 20. Thus, as Justice Wells observed, it is reasonable to assume that if the Legislature intended

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[1] We note, however, that the Court was fully apprised of the staff recommendation. *See*, Initial Brief, at 1.

the PSC to assert jurisdiction, it "would have amended the statute to expressly so state after several legislative sessions of the PSC not so doing." *Slip op.*, at 8.

Because the Court neither overlooked nor misapprehended any matter of significance in its decision, LCEC's Motion for Rehearing is without merit, and should be DENIED.

RESPECTFULLY SUBMITTED this 28th day of May, 2002.

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CERTIFICATE OF SERVICE

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