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October 17, 2002

Ms. Blanca Bayo, Director  
Commission Clerk and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

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COMMISSION  
CLERK

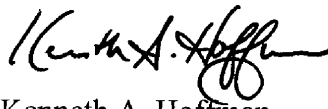
Re: Docket No. 021011-EC

Dear Ms. Bayo:

Enclosed for filing on behalf of Withlacoochee River Electric Cooperative, Inc. ("WREC") are the original and fifteen copies of WREC's Motion to Dismiss in the above-referenced docket.

Please acknowledge receipt of these documents by date-stamping the enclosed copy of this letter and returning it to the undersigned.

Sincerely,



Kenneth A. Hoffman

KAH/ri

Enclosures

cc: Parties of Record

- AUS \_\_\_\_\_
- CAF \_\_\_\_\_
- CMP \_\_\_\_\_
- COM \_\_\_\_\_
- CTR \_\_\_\_\_
- ECR \_\_\_\_\_
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DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Saddlebrook Resort Condominium Association, Inc. )  
 )  
 )  
v. )  
 )  
Withlacoochee River Electric )  
Cooperative, Inc. )  
\_\_\_\_\_ )

Docket No. 021011-EC

Filed: October 17, 2002

**WITHLACOOCHEE RIVER ELECTRIC COOPERATIVE,  
INC.'S MOTION TO DISMISS**

Withlacoochee River Electric Cooperative, Inc. ("Withlacoochee"), by and through its undersigned counsel, and pursuant to Rule 28-106.204(2), Florida Administrative Code, hereby files this Motion requesting the Florida Public Service Commission ("Commission") to dismiss the Informal Complaint of Saddlebrook Resort Condominium Association, Inc. ("Association") which initiated this docket. In support of its Motion to Dismiss, Withlacoochee states:

**INTRODUCTION**

1. Withlacoochee is a non-profit electric distribution cooperative which owns and operates an electric distribution system and provides electric retail service to customers within Pasco, Hernando and Citrus Counties, Florida.

2. Withlacoochee is not a "public utility" as defined in Section 366.02(1), Florida Statutes. Withlacoochee is a cooperative organized and existing under the Rural Electric Cooperative law, Chapter 425, Florida Statutes.

3. Saddlebrook is "an association which represents investors/owners of condominium units... located in the Saddlebrook Resort... (in) Wesley Chapel, Florida."<sup>1</sup>

\_\_\_\_\_ <sup>1</sup>Saddlebrook Complaint, at 4.

DOCUMENT NUMBER-DATE

11279 OCT 17 02

FPSC-COMMISSION CLERK

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4. On September 27, 2002, Saddlebrook filed an Informal Complaint requesting the Commission to determine “that (Saddlebrook’s) unit owners be allowed to take service from (Withlacoochee) through master meters... and reclassify (Saddlebrook’s) owners under (Withlacoochee’s) rate structure, as General Service Demand accounts rather than Residential.”<sup>2</sup> Saddlebrooks requests the Commission to order Withlacoochee to convert Saddlebrook from its current status as a residential customer to Saddlebrook’s requested status as a commercial customer. If the Commission were to grant Saddlebrook’s request, Saddlebrook would then be eligible to receive service, as a commercial customer, through master metering.

5. Saddlebrook’s Complaint attempts to create Commission authority to grant the relief requested by Saddlebrook based on the fiction that the reclassification of Saddlebrook as a commercial customer falls within the Commission’s “rate structure” jurisdiction over electric cooperatives such as Withlacoochee. Saddlebrook also attempts to support a statutory basis for Commission relief by referring to the Florida Energy Efficiency and Conservation Act (“FEECA”), Section 366.81, et. seq., Florida Statutes. Saddlebrook’s attempt to create Commission jurisdiction over its dispute with Withlacoochee is completely lacking in merit. For the reasons explained below, the Commission lacks subject matter jurisdiction over Saddlebrook’s Complaint and the Complaint must be dismissed.

### **ARGUMENT**

6. The standard to be applied in disposing of a motion to dismiss is whether the complaint, with all allegations in the complaint assumed to be true, states a cause of action upon

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<sup>2</sup>Saddlebrook Complaint, at 1.

which relief may be granted. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1<sup>st</sup> DCA 1993). Where the Commission lacks subject matter jurisdiction over the matters alleged in the complaint and the relief sought in the complaint, the complaint must be dismissed. See, e.g., In re: Complaint and Petition of John Charles Heekin against Florida Power & Light Company, 99 F.P.S.C. 5:324 (1999).

7. The Commission lacks subject matter jurisdiction over the instant Complaint and, therefore, must dismiss the Complaint with prejudice.

8. As a creature of statute, “the Commission’s powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State.” City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So.2d 493, 496 (Fla. 1973). Withlacoochee is an “electric utility” as defined by Section 366.02(2), Florida Statutes. The Commission has limited statutory jurisdiction and authority over Withlacoochee.<sup>3</sup> As Saddlebrook notes in its Complaint, that authority includes the power, under Section 366.04(2)(b), Florida Statutes, “[t]o prescribe a rate structure for all electric utilities.” Saddlebrook attempts to manufacture Commission jurisdiction in this case by attempting to cast Withlacoochee’s refusal to reclassify Saddlebrook as a commercial customer (eligible for master metering) as a “rate structure” dispute.<sup>4</sup>

9. It is undisputed that the Commission has “rate structure” jurisdiction over electric utilities pursuant to Section 366.04(2)(b), Florida Statutes. In City of Tallahassee v. Mann, 411 So.2d 162, 163 (Fla. 1981), the Florida Supreme Court clarified what is meant by the term “rate structure” under Chapter 366:

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<sup>3</sup>See Fla. Stat. §366,11.

<sup>4</sup>Saddlebrook Complaint, at 2.

There is a clear distinction between “rates” and “rate structure” though the two concepts are related. “Rates” refers to the dollar amount charged for a particular service or an established amount of consumption. Rate structure refers to the classification system used in justifying different rates.

The Commission’s statutory authority over a cooperative’s rate structure is the authority to review the different rate classes utilized by the cooperative for the purpose of establishing retail rates and to insure that the rates applicable to the different classes are justified. This historical application of the term “rate structure,” a term not defined under Chapter 366, Florida Statutes, was reiterated recently by Commissioner Deason in a dispute between Lee County Electric Cooperative, Inc. and Seminole Electric Cooperative, Inc. in a Commission decision that was affirmed by the Florida Supreme Court. The court quoted, with approval, Commissioner Deason’s definition of the term “rate structure”:

... rate structure means the structure of rates as they relate to different rate classes, and a classic example is residential, commercial, industrial, classifications of those types. And that rate structure connotes to me an offering by a utility that says these are the terms and conditions that we will provide service to you, and if you meet those terms and conditions, you will be provided the service on a non-discriminatory basis....

Lee County Electric Cooperative, Inc. v. Jacobs, 820 So.2d 297, 300 (Fla. 2002).

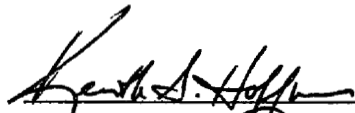
10. The notion that the Commission’s rate structure authority over a cooperative authorizes the Commission to order a cooperative to reclassify a residential customer as a commercial customer has no basis in Chapter 366, Florida Statutes, and is totally inconsistent with the meaning and application of the term “rate structure” by this Commission and the Florida Supreme Court. Accordingly, the Commission lacks the subject matter jurisdiction to grant the relief sought by Saddlebrook and the Complaint must be dismissed.

11. In addition, Saddlebrook makes a second attempt at creating Commission jurisdiction by arguing in its Complaint that the Commission has jurisdiction over this master metering dispute pursuant to the FEECA statutes. Saddlebrook's argument has no merit.

12. The Commission's limited authority under FEECA is further constrained in the context of an electric cooperative such as Withlacoochee over whom the Commission has only limited jurisdiction. Saddlebrook's Complaint fails to acknowledge that Withlacoochee is not subject to FEECA. Withlacoochee is not a "utility" as defined for purposes of FEECA. See Section 366.82(1), Florida Statutes. Accordingly, there is no relief available to Saddlebrook against Withlacoochee under FEECA.<sup>5</sup>

WHEREFORE, because the Commission lacks subject matter jurisdiction over the Complaint, Withlacoochee respectfully requests the Commission to enter an order dismissing the Complaint filed by Saddlebrook with prejudice and closing this docket.

Respectfully submitted,

  
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KENNETH A. HOFFMAN, ESQ.  
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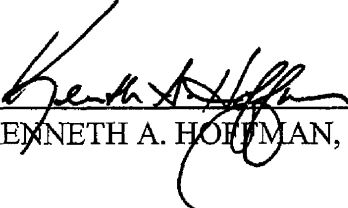
<sup>5</sup>Although the Commission has no jurisdiction over Withlacoochee under FEECA, the notion that conservation goals in general will be promoted by replacing individual meters with master meters is counter-intuitive, defies logic and is completely inconsistent with the purposes for promulgating the Commission's individual metering rule requirement, applicable to "public utilities," set forth in Rule 25-6.049(5)(a), Florida Administrative Code.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of Withlacoochee River Electric Cooperative, Inc.'s Motion to Dismiss was furnished by telecopier and U. S. Mail to the following this 17<sup>th</sup> day of October, 2002:

Marc D. Mazo  
14252 Puffin Court  
Clearwater, Florida 33762

Harold McLean, General Counsel  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

  
\_\_\_\_\_  
KENNETH A. HOFFMAN, ESQ.

Withlacoochee/saddlebrookmotiontodismiss