

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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
ORDER NO. PSC-99-2389-PCO-EC
ISSUED: December 7, 1999

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

ORDER CONCERNING MOTION TO DISMISS COMPLAINT AND PETITION
FOR LACK OF SUBJECT MATTER JURISDICTION

BY THE COMMISSION:

I. CASE BACKGROUND

Lee County Electric Cooperative, Inc. (LCEC) is a non-profit electric distribution cooperative serving approximately 139,000 customers mainly in Lee County, Florida. LCEC purchases all of its power requirements from Seminole Electric Cooperative, Inc. (Seminole) pursuant to a wholesale power contract entered into by LCEC and Seminole on May 22, 1975, and subsequent amendments to that contract. The term of the contract is 45 years. At the expiration of that term, the contract remains effective until terminated on three years' notice.

Seminole is a non-profit electric generation and transmission cooperative. Seminole provides electricity at wholesale to its ten owner-members, each of which is a distribution cooperative. Seminole has no retail customers. Seminole is governed by a 30-member Board of Trustees consisting of two voting members and one alternate from each of its ten owner-member distribution cooperatives. LCEC is one of Seminole's ten owner-members and is represented on Seminole's Board of Trustees.

DOCUMENT NUMBER-DATE

14905 DEC-7 8

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PSC-RECORDS/REPORTING

On October 8, 1998, Seminole's Board of Trustees approved a new rate schedule, Rate Schedule SECI-7, and directed that it become effective and applicable to all owner-members on January 1, 1999. This rate schedule was submitted to the Rural Utilities Service (RUS) for approval on October 19, 1998, and was approved on November 20, 1998.

On December 9, 1998, LCEC filed a complaint against Seminole and petition requesting that this Commission take the following actions: (1) direct Seminole to file with this Commission its recently adopted Rate Schedule SECI-7, together with appropriate supporting documentation; and (2) conduct a full investigation and evidentiary hearing into the rate structure of Rate Schedule SECI-7 in order to determine the appropriate rate structure to be prescribed by this Commission. LCEC asserts that this new rate schedule is discriminatory, arbitrary, unfair, and unreasonable.

On January 4, 1999, Seminole timely filed a motion to dismiss LCEC's complaint and petition for lack of jurisdiction. By filing of the same date, Seminole requested oral argument on its motion to dismiss. On January 19, 1999, LCEC timely filed a memorandum in opposition to Seminole's motion to dismiss. On the same date, LCEC filed a response opposing Seminole's request for oral argument, but later withdrew its opposition to oral argument. By Order No. PSC-99-0380-PCO-EC, issued February 22, 1999, we granted Seminole's request for oral argument, and oral argument was conducted at our February 16, 1999, agenda conference. After oral argument, the parties agreed to attempt a mediated resolution through a Commission staff mediator not assigned to this docket. The staff-led mediation session was conducted on July 13, 1999, but did not lead to a resolution. The parties requested additional time to attempt to resolve the matter through negotiations. In September 1999, the parties informed us that they were unable to resolve their dispute.

The issues raised by the parties present a case of first impression. For the first time, this Commission is being asked to exercise jurisdiction over the wholesale rate structure of a rural electric cooperative. As Seminole points out in its request, we have not exercised jurisdiction over this subject matter at any time since the enactment of Section 366.04(2)(b), Florida Statutes, which provides:

(2) In the exercise of its jurisdiction, the commission shall have the power over electric utilities for the following purposes:

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

However, we have not affirmatively stated at any time that Section 366.04(2)(b), Florida Statutes, does not give us jurisdiction over the wholesale rate structures of rural electric cooperatives, nor has any court.

II. POSITIONS OF THE PARTIES

A. SEMINOLE

In its motion to dismiss, Seminole argues that we do not have jurisdiction to review and approve Seminole's wholesale rate schedules. Seminole reaches this conclusion by interpreting Section 366.04(2)(b) in light of the following:

- the purpose of Chapter 366;
- this Commission's long-standing interpretation of subsection(2)(b);
- the context provided by the other provisions of Chapter 366, including Section 366.01; and
- the principles governing the scope of this Commission's jurisdiction.

Purpose of Chapter 366. Seminole argues that Commission jurisdiction over its wholesale rate structure is not supported by the purpose of Chapter 366, Florida Statutes. Seminole asserts that the underlying purpose of Chapter 366 is to prevent potential abuses of monopoly power when the public obtains electric service from a monopoly provider. Seminole points out that LCEC is not a captive customer of a monopoly provider; rather, LCEC obligated itself to purchase its full power and energy requirements from Seminole through voluntary negotiations. Seminole also points out that LCEC agreed, in its contract with Seminole, to the method by which rates, terms, and conditions would be determined; namely, by action of the Board of Trustees (on which LCEC is represented), subject to approval by the Administrator of the RUS.

Past Commission Interpretation. Seminole argues that Commission jurisdiction over its wholesale rate structure is

inconsistent with this Commission's past interpretation of Section 366.04(2)(b), Florida Statutes. Seminole points out that this Commission, by Order No. 8027, issued October 28, 1977, directed each rural electric cooperative and municipal utility to file its current rates and charges for electric service. Seminole notes that the fourteen distribution cooperatives submitted a joint response acknowledging our jurisdiction over their rate structures. Seminole, however, filed a separate response in which it stated that it was not subject to our rate structure jurisdiction because Seminole had no sales at retail to customers. Seminole states that this Commission did not question Seminole's interpretation of the statute and did not require Seminole to participate further in the docket. Seminole also notes that in 1985, when this Commission issued an order requiring each municipal utility and rural electric cooperative listed in the order to file current rate schedules, Seminole was not included on that list.

Seminole contends that the history of these Commission proceedings shows that we have never interpreted Section 366.04(2)(b), Florida Statutes, to give us jurisdiction over Seminole's wholesale rate schedules. Seminole asserts that if we had interpreted the statute in any other manner, there is no reasonable explanation for our failure to require filings by Seminole at any time since the statute was enacted. Further, Seminole asserts that we cannot now abandon our "practical interpretation" of Section 366.04(2)(b), Florida Statutes. Among other cases, Seminole cites City of St. Petersburg v. Carter, 39 So.2d 804 (Fla. 1949), which states:

The construction placed actually or by conduct upon a statute by an administrative board is, of course, not binding upon the courts. However, it is often persuasive and great weight should be given to it. Some significance must be attached to the fact that this is the first instance which has come to our attention where the Florida Railroad and Public Utilities Commission has attempted to assert jurisdiction by regulating the operation of a municipally owned street railway system. . . The transportation system of the City of St. Petersburg has been operated by said city for a period of thirty years. During all these years many changes have been made in the rates, schedules and routes, all without application for approval by the Florida Railroad and Utilities Commission or any suggestion that such changes should have been approved.

Id., at 806.

Consistency with Other Provisions of Chapter 366. Seminole argues that Commission jurisdiction over its wholesale rate structure is inconsistent with Section 366.11, Florida Statutes, and other provisions of Chapter 366. Seminole points out that Section 366.11(1), Florida Statutes, specifically exempts from Commission jurisdiction wholesale sales by investor-owned utilities to municipal and cooperative utilities. Seminole asserts that this exemption is required because the provisions of Chapter 366 that give us ratemaking authority over investor-owned utilities do not explicitly distinguish retail sales from wholesale sales. Seminole notes that, in contrast, Section 366.11(1), Florida Statutes, does not specifically exempt wholesale sales by municipal and cooperative utilities from Commission jurisdiction. Seminole suggests that this means one of two things: (1) either all such transactions are subject to rate structure jurisdiction which this Commission has failed to exercise; or (2) the Legislature never intended Section 366.04(2)(b), Florida Statutes, to confer jurisdiction over wholesale transactions so no exemption was required.

Seminole argues that the latter interpretation is the only reasonable one when Chapter 366 is considered as a whole. Seminole asserts that any other interpretation would result in this Commission exercising rate structure jurisdiction over all wholesale power transactions in which a municipal or cooperative utility is a seller -- a category of transactions that no one has ever claimed we have jurisdiction to regulate. Further, Seminole asserts that any other interpretation would result in this Commission exercising more jurisdiction over wholesale sales by cooperative and municipal utilities than over wholesale sales by investor-owned utilities. Seminole states that nothing in the purpose of Chapter 366 "compels such an illogical result."

Principles Governing Scope of Jurisdiction. Citing City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So.2d 493 (Fla. 1973) and Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 170 So.2d 577, 582 (Fla. 1964), Seminole argues that any reasonable doubt about the existence of this Commission's jurisdiction must be resolved against the exercise of such jurisdiction. Seminole asserts that if we fail to dismiss LCEC's complaint, we will be de facto claiming jurisdiction for the first time over all wholesale power transactions in which a municipal or cooperative utility is a seller. Seminole contends that there is

certainly reasonable doubt about the Legislature's intent to grant us authority over this entire class of wholesale transactions.

B. LCEC

In its memorandum in opposition, LCEC asserts that this Commission does have jurisdiction to consider its complaint and petition under Section 366.04(2)(b). LCEC bases its position on four main arguments:

- the plain language of the statute compels a finding of jurisdiction;
- this Commission's past failure to exercise jurisdiction does not remove that jurisdiction;
- jurisdiction is consistent with Section 366.11, Florida Statutes, and other provisions of Chapter 366; and
- jurisdiction is consistent with the purposes of Chapter 366.

Plain Language of the Statute. LCEC argues that the plain language of Section 366.04(2)(b), Florida Statutes, compels the conclusion that this Commission has jurisdiction over Seminole's wholesale rate structure. LCEC notes that the statute does not distinguish between retail rate structures and wholesale rate structures, nor between rate structures of utilities engaged in retail sales as opposed to wholesale sales.

LCEC further argues that, even assuming the statute is ambiguous, the most reasonable interpretation of Section 366.04(2)(b), Florida Statutes, is that we have jurisdiction in this matter. LCEC asserts that its interpretation of Section 366.04(2)(b), Florida Statutes, as detailed below, is especially compelling in light of Section 366.01, Florida Statutes, which directs that the provisions of Chapter 366 be liberally construed.

Past Failure to Exercise Jurisdiction. LCEC argues that our past failure to assert jurisdiction is not determinative of whether we indeed have such jurisdiction. LCEC asserts that it is a cardinal principle of administrative law that agency inaction cannot deprive the agency of jurisdiction conferred. LCEC also submits that while agency inaction is a factor in evaluating the scope of its jurisdiction, such inaction does not compel an inference that the agency has concluded it lacks jurisdiction. Among other cases, LCEC cites United States v. Morton Salt Co., 338 U.S. 632 (1950), which states:

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 prescribed by an unchallenged exercise.

Id., at 647-48.

LCEC further argues that even if our past inaction is taken as an implicit determination that we lack jurisdiction over Seminole's wholesale rate structure, we are not precluded from now exercising such jurisdiction. LCEC asserts that this Commission's inaction may be attributed to an erroneous view of the scope of its authority. LCEC states that when Seminole took the position, in response to Order No. 8027, that it was not subject to this Commission's rate structure jurisdiction, its position was solely predicated on wholesale rate regulation jurisdiction being vested solely in the Federal Energy Regulatory Commission (FERC). LCEC points out that in Dairyland Power Cooperative, et al., 37 F.P.C. 12 (1967), FERC's predecessor agency, the Federal Power Commission (FPC), held that it did not have jurisdiction over wholesale sales of electric cooperatives. Thus, LCEC contends that our inaction may have been based on a misapprehension of the federal agency's jurisdiction.

LCEC also challenges Seminole's argument that this Commission cannot now change its long-standing practical interpretation of the scope of its authority under Section 366.04(2)(b), Florida Statutes. LCEC, citing Department of Administration, Division of Retirement v. Albanese, 445 So.2d 639 (Fla. 1st DCA 1984), asserts that an administrative agency is not bound by an initial statutory interpretation and may effect a different construction so long as it is consistent with a reasonable construction of the statute and the agency provides adequate notice and a rational explanation of the change.

Consistency with Other Provisions of Chapter 366. LCEC argues that Commission jurisdiction over Seminole's wholesale rate structure is consistent with Section 366.11, Florida Statutes, and other provisions of Chapter 366. Seminole argued that the existence of an express exemption in Section 366.11, Florida Statutes, for wholesale sales by investor-owned utilities, coupled with the absence of a parallel exemption for wholesale sales by cooperative and municipal electric utilities, demonstrates an implied legislative intent to exclude such sales by cooperative and

municipal electric utilities from this Commission's rate structure jurisdiction. LCEC asserts, however, that Seminole has ignored the principle of statutory construction which provides that the express exemption of one thing in a statute, and silence regarding another, implies an intent not to exempt the latter. Accordingly, LCEC contends that the most reasonable interpretation of Section 366.11, Florida Statutes, is that the Legislature intentionally elected not to exempt wholesale rate structures of cooperative and municipal electric utilities.

Further, LCEC argues that Commission jurisdiction over Seminole's wholesale rate structure is not an absurd or unreasonable interpretation of Chapter 366, Florida Statutes. LCEC asserts that Commission jurisdiction over the wholesale rate structures of cooperative and municipal electric utilities would fill a regulatory gap not applicable to wholesale transactions of investor-owned utilities regulated by FERC. LCEC states that Commission jurisdiction is necessary to protect against the establishment of unfair and unreasonable rate structures.

Purpose of Chapter 366. LCEC argues that Commission jurisdiction is fully consistent with the purposes of Chapter 366, Florida Statutes. LCEC states that its position is analogous to that of any retail ratepayer in that the rate structure under which it purchases power is unilaterally imposed by Seminole and is not negotiated. LCEC also claims that the interests of its retail ratepayers are impacted by Seminole's rate structure because, under the new rate structure, LCEC will not be able to continue offering the level of credits currently available for its interruptible customers. Lastly, LCEC asserts that despite the contractual relationship between itself and Seminole, private parties cannot by contract deprive an agency of the jurisdiction granted to it.

III. FINDINGS

Seminole's motion to dismiss fails because it not supported by a majority of this Commission. This outcome is the result of a tie vote on the motion to dismiss and does not reflect a decision on the merits of whether this Commission has jurisdiction to prescribe a wholesale rate structure for Seminole. Because the motion to dismiss fails, this docket shall remain open for us to hear and determine LCEC's complaint and petition.

Based on the foregoing, it is hereby

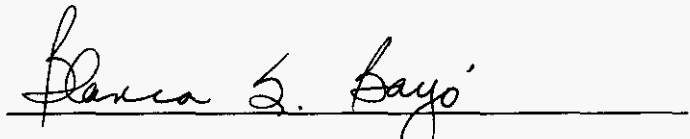
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ORDERED by the Florida Public Service Commission that Seminole Electric Cooperative, Inc.'s motion to dismiss the complaint and petition of Lee County Electric Cooperative, Inc., fails for lack of support by a majority of this Commission. It is further

ORDERED that this Order does not reflect a decision by this Commission concerning the merits of Seminole Electric Cooperative, Inc.'s motion to dismiss. It is further

ORDERED that this docket shall remain open for consideration of the complaint and petition of Lee County Electric Cooperative, Inc.

By ORDER of the Florida Public Service Commission this 7th day of December, 1999.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

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Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.