



Public Service Commission

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DATE: JANUARY 21, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (C. KEATING) *WAL*
DIVISION OF ELECTRIC AND GAS (WHEELER) *JAW*

RE: DOCKET NO. 981827-EC - COMPLAINT AND PETITION BY LEE COUNTY ELECTRIC COOPERATIVE, INC. FOR AN INVESTIGATION OF THE RATE STRUCTURE OF SEMINOLE ELECTRIC COOPERATIVE, INC. *RVE*

AGENDA: 02/02/99 - REGULAR AGENDA - REQUEST FOR ORAL ARGUMENT - PARTIES MAY PARTICIPATE *JDJ*

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\981827OA.RCM

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 on May 22, 1975, between LCEC and Seminole. 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.

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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 the Commission take the following actions: (1) direct Seminole to file with the 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 the 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.

This recommendation addresses only the issue of whether oral argument is appropriate in this matter. If Seminole's request for oral argument is granted, staff will prepare a separate written recommendation on the merits of Seminole's motion to dismiss after oral argument is conducted.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Seminole Electric Cooperative, Inc.'s request for oral argument on its motion to dismiss the complaint and petition of Lee County Electric Cooperative, Inc.?

RECOMMENDATION: Yes. The Commission should grant Seminole Electric Cooperative, Inc.'s request for oral argument. Oral argument will assist the Commission in comprehending and evaluating the complex and important issue of whether the Commission has jurisdiction to review the wholesale rate structures of rural electric cooperatives. Oral argument should be heard at the Commission's next regularly-scheduled agenda conference on February 16, 1999.

STAFF ANALYSIS: Pursuant to Rule 25-22.058, Florida Administrative Code, a request for oral argument must state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. As grounds for its request, Seminole states that LCEC's complaint and petition seek to have the Commission abandon its long-standing application of Section 366.04(2)(b), Florida Statutes, and, for the first time in over 24 years since the statute was enacted, claim jurisdiction over wholesale power contracts between Seminole and its members, such as LCEC. Seminole further states that such a result would have far-reaching implications not only for itself but also for the regulation of wholesale power transactions by all cooperative and municipal utilities.

LCEC, in its response opposing Seminole's request for oral argument, contends that the issue of whether the Commission has rate structure jurisdiction over Seminole's wholesale rates is not so complex or of such consequence as to require oral argument. LCEC contends that Section 366.04(2)(b), Florida Statutes, gives the Commission clear and unambiguous authority to prescribe a rate structure for Seminole and that granting LCEC's petition need not have the far-reaching implications suggested by Seminole. LCEC further asserts that oral argument will result in the unnecessary expenditure of Commission resources and wasteful delay in the review of LCEC's complaint and petition. LCEC even asserts that Seminole is attempting to distract the Commission from applying the plain language of Section 366.04(2)(b).

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Staff recommends that the Commission grant Seminole's request for oral argument on its motion to dismiss. The issues raised by the parties clearly present a case of first impression. For the first time, the Commission is being asked to exercise jurisdiction over the wholesale rate structure of a rural electric cooperative. As Seminole points out in its request, the Commission has 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, the Commission has not affirmatively stated at any time that Section 366.04(2)(b), Florida Statutes, does not give it jurisdiction over the wholesale rate structures of rural electric cooperatives.

Staff disagrees with LCEC's suggestion that the Commission's jurisdiction over this matter is so clear and unambiguous as to make oral argument unnecessary. Both parties present reasonable arguments on the merits, as presented in part below, which make clear the complexity and importance of this issue and, thus, underscore the usefulness of oral argument.

Seminole's Motion to Dismiss

In its motion to dismiss, Seminole argues that the Commission does 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;
- the 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 the Commission's jurisdiction.

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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 the Commission's past interpretation of Section 366.04(2)(b), Florida Statutes. Seminole points out that the Commission, by Order No. 8027, 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 the Commission's jurisdiction over their rate structures. Seminole, however, filed a separate response in which it stated that it was not subject to the Commission's rate structure jurisdiction because Seminole had no sales at retail to customers. Seminole states that the 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 the 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 the list contained in the order.

Seminole contends that the history of these Commission proceedings shows that the Commission has never interpreted Section 366.04(2)(b), Florida Statutes, to give it jurisdiction over Seminole's wholesale rate schedules. Seminole asserts that if the Commission had interpreted the statutes in any other manner, there is no reasonable explanation for its failure to require filings by Seminole at any time since the statutes was enacted. Further, Seminole asserts that the Commission cannot now abandon its "practical interpretation" of Section 366.04(2)(b), Florida

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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 the Commission 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 the 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.

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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 the 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 the Commission has jurisdiction to regulate. Further, Seminole asserts that any other interpretation would result in the 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 the Commission's jurisdiction must be resolved against the exercise of such jurisdiction. Seminole asserts that if the Commission fails to dismiss LCEC's complaint, it 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 the Commission authority over this entire class of wholesale transactions.

LCEC's Memorandum in Opposition

In its memorandum in opposition, LCEC asserts that the 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;
- the 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.

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Plain Language of the Statute. LCEC argues that the plain language of Section 366.04(2)(b), Florida Statutes, compels the conclusion that the 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 the Commission has 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 the Commission's past failure to assert jurisdiction is not determinative of whether the Commission indeed has 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 the Commission's past inaction is taken as an implicit determination that it lacks jurisdiction over Seminole's wholesale rate structure, the Commission is not precluded from now exercising such jurisdiction. LCEC asserts that the Commission's inaction may be attributed to an erroneous view of the scope of its authority. LCEC states that

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when Seminole took the position, in response to Order No. 8027, that it was not subject to the Commission's rate structure jurisdiction, its position was solely predicated on wholesale rate regulation jurisdiction being solely vested in the Federal Energy Regulatory Commission (FERC). LCEC cites a case in which FERC's predecessor agency, the Federal Power Agency (FPC), held that it did not have jurisdiction over wholesale sales of electric cooperatives. Thus, LCEC contends that the Commission's inaction may have been based on a misapprehension of the federal agency's jurisdiction.

LCEC also challenges Seminole's argument that the 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. LCEC notes Seminole's argument 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 the 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.

Additional Considerations

In addition to the arguments raised by the parties, staff is concerned by LCEC's allegation that Seminole, through its new rate schedule, has reduced its demand charge and shifted "a significant portion" of its demand-related costs to a Production Fixed Energy Charge allocated on the basis of 3-year historical kWh usage. LCEC contends that this new rate schedule may not track costs of service and, thus, may frustrate conservation goals. Further, LCEC contends that the new rate schedule will place LCEC's load management program in jeopardy by discouraging demand-side initiatives. Accepting these contentions as true, staff believes that LCEC's complaint and petition raise a question of whether the Commission may have jurisdiction over this matter under Section 366.04(2)(c), Florida Statutes, which provides:

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

(c) To require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes.

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In addition, LCEC alleges that it appears Seminole is using its new rate schedule to reinforce and create a need for generation capacity and to eliminate viable alternatives to the installation of generating facilities, i.e., demand-side initiatives. Staff believes that this allegation raises the issue of whether the Commission has jurisdiction over this matter under Section 366.04(5), Florida Statutes, which provides:

(5) The commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

Conclusion

In conclusion, staff believes that the Commission's comprehension and evaluation of the jurisdictional issue raised in this docket would be greatly assisted by oral argument on this matter. As a case of first impression, the importance of the Commission's determination on this issue cannot be overstated. Further, the complexity of this issue is clearly evidenced by the parties' arguments. Contrary to LCEC's assertion, any minor delay in the review of LCEC's complaint and petition caused by hearing argument on this important issue will most certainly not be wasteful, but instead will be a valuable use of the Commission's time. Staff recommends that oral argument be heard at the Commission's next regularly-scheduled agenda conference on February 16, 1999.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending the Commission's disposition of Seminole Electric Cooperative, Inc.'s motion to dismiss the complaint and petition of Lee County Electric Cooperative, Inc.

STAFF ANALYSIS: This docket should remain open pending the Commission's disposition of Seminole Electric Cooperative, Inc.'s motion to dismiss the complaint and petition of Lee County Electric Cooperative, Inc.