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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

IN 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.

BEFORE: CHAIRMAN J. TERRY DEASON
COMMISSIONER E. LEON JACOBS, JR.
COMMISSIONER LILA A. JABER

PROCEEDINGS: AGENDA CONFERENCE

ITEM NUMBER: 36

DATE: Tuesday, September 5, 2000

PLACE: 4075 Esplanade Way, Room 148
Tallahassee, Florida

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PARTICIPANTS:

COCHRAN KEATING, on behalf of the Commission Staff.

CONNIE KUMMER, Commission Staff.

BRUCE MAY, Holland & Knight, on behalf of Lee County Electric Cooperative, Inc.

RICHARD MELSON, Hopping Green Sams & Smith, on behalf of Seminole Electric Cooperative, Inc.

DAVE WHEELER, Commission Staff.

STAFF RECOMMENDATION

Issue 1: Does the Commission have jurisdiction over the subject matter of Lee County Electric Cooperative, Inc.'s complaint and petition?

Recommendation: Yes. The Commission has jurisdiction over the subject matter of Lee County Electric Cooperative, Inc.'s complaint and petition.

Issue 2: Should this docket be closed?

Recommendation: No. This docket should remain open for the Commission to consider the merits of Lee County Electric Cooperative, Inc.'s complaint and petition.

1 CHAIRMAN DEASON: Item 36.

2 MR. KEATING: Commissioners, Item 36 is
3 staff's recommendation on the issue of whether
4 the Commission has jurisdiction over the subject
5 matter of Lee County Electric Cooperative's
6 complaint and petition for an investigation of
7 Seminole Electric Cooperative's wholesale rate
8 structure.

9 The Commission has not previously exercised
10 jurisdiction over the wholesale rate structure
11 of a rural electric cooperative. This is the
12 first time that it has been asked to do so.
13 Neither the Commission nor any court has
14 determined whether the Commission has this
15 jurisdiction. Staff believes that you do have
16 this jurisdiction.

17 Upon review of the arguments that have been
18 presented and the authority cited by the
19 parties, staff believes it's clear that the
20 provisions of Chapter 366 grant the Commission
21 jurisdiction to prescribe a wholesale rate
22 structure for Seminole. Section 366.04(2)(b),
23 Florida Statutes, states that the Commission
24 shall have the power to prescribe a rate
25 structure for all electric utilities. This

1 provision does not make a distinction between
2 retail and wholesale rate structures or between
3 utilities engaged in retail sales versus
4 wholesale sales. It states that the
5 Commission's rate structure jurisdiction extends
6 to all electric utilities.

7 Section 366.02(2), Florida Statutes,
8 defines the term "electric utility" to include a
9 rural electric cooperative that owns, maintains,
10 or operates an electric generation and
11 transmission system within the state. Seminole
12 clearly fits this definition and, as it has
13 conceded, it is an electric utility as defined
14 in section 366.02(2).

15 These two provisions, given their plain
16 meaning, clearly give the Commission the
17 jurisdiction to prescribe a rate structure for a
18 rural electric cooperative such as Seminole that
19 owns, maintains, and operates a generation and
20 transmission system within the state.

21 It is well established in the law that when
22 a statute is clear and unambiguous, its plain
23 meaning must be given effect. Courts will not
24 look behind the statutory language or resort to
25 rules of statutory construction to try to

1 ascertain the Legislature's intent. There are
2 two exceptions recognized: (1) when application
3 of the plain language leads to an unreasonable
4 or ridiculous result, and (2) when there are
5 cogent reasons to believe that the language of
6 the statute does not accurately reflect
7 legislative intent. Neither of these exceptions
8 has been demonstrated in this case.

9 Just a couple more points, though.

10 First, Seminole argues that the
11 Commission's past inaction --

12 COMMISSIONER JABER: I'm sorry, Cochran.
13 What were those two things again?

14 MR. KEATING: First, when application of
15 the plain language leads to an unreasonable or a
16 ridiculous result, and second, when there are
17 cogent reasons to believe that the language of
18 the statute does not accurately reflect
19 legislative intent.

20 Seminole has argued that the Commission's
21 past inaction, that is, its past failure to
22 exercise this jurisdiction, amounts to a tacit
23 acknowledgement that the Commission lacks this
24 jurisdiction. Seminole argues that the
25 Commission cannot now abandon its practical

1 interpretation of Section 366.04(2). The case
2 law is clear, however, that agency inaction
3 cannot deprive an agency of jurisdiction
4 conferred. In other words, the Commission
5 either has jurisdiction or it doesn't have
6 jurisdiction. The Commission's past failure to
7 exercise that jurisdiction does not extinguish
8 the Commission's power to do so.

9 In summary, the provisions of Chapter 366,
10 given the plain meaning, convey jurisdiction
11 upon the Commission to review and prescribe a
12 wholesale rate structure for Seminole.

13 Now, I emphasize that this recommendation
14 seeks to answer the purely legal question of
15 whether jurisdiction has been granted to the
16 Commission. The recommendation does not and is
17 not intended to answer any policy questions of
18 how, or even if, the jurisdiction should be
19 exercised in this case or in any other case that
20 may arise, and I believe that the policy
21 question would more appropriately be answered as
22 cases arise.

23 The parties are on notice that you may in
24 your discretion allow them to participate. It
25 has been roughly 18 months since we first heard

1 oral argument on this matter, and ten months
2 since the matter was last discussed by the
3 Commission, which resulted in a deadlocked vote
4 on Seminole's motion to dismiss.

5 CHAIRMAN DEASON: And on that point, just
6 let me reiterate that this matter is a
7 three-member panel, so we will not have a tie
8 vote today, unless we defer it.

9 MR. MELSON: And reassign it.

10 CHAIRMAN DEASON: Yes.

11 Okay. Commissioners, it's your pleasure as
12 to whether you wish to hear from the parties.

13 COMMISSIONER JABER: Because I'm the
14 addition to the panel and will be splitting your
15 vote, apparently, I probably should hear a
16 little bit of argument. I should say for the
17 record that I have gone back and read the
18 transcript from the previous oral argument, so
19 keep that in mind when you make your remarks
20 today.

21 CHAIRMAN DEASON: Isn't it Lee County's
22 petition?

23 MR. MAY: It's our petition. It's --

24 CHAIRMAN DEASON: But it's their motion to
25 dismiss.

1 MR. MELSON: It was our motion to dismiss.

2 CHAIRMAN DEASON: That's right. It's all
3 coming back to me now. Mr. Melson?

4 MR. MELSON: Commissioner Jaber, I'll try
5 to be brief, although I will probably reiterate
6 some things you've read from the previous
7 argument.

8 The question that you've got to decide is
9 whether the statute gives the Commission
10 jurisdiction over Seminole's wholesale rate
11 structure when the rates and rate structure
12 established by a vote of its board of trustees
13 pursuant to a negotiated contract between
14 Seminole and its members, and where every member
15 of Seminole, including Lee County, has got equal
16 representation on that board.

17 COMMISSIONER JABER: How much is in the
18 contract? How much is negotiated?

19 MR. MELSON: In the contract? The contract
20 basically obligates the members to purchase
21 their full requirements of power from Seminole
22 for a period that I think is 45 years from
23 1975. At the time Lee County entered into that
24 contract, it had a full-requirements arrangement
25 with Florida Power & Light Company, so it

1 clearly made a choice that entering into this
2 contract with Seminole was better than
3 continuing under its prior arrangement. And the
4 contract itself spells out the procedures by
5 which rates are changed from time to time, which
6 is basically a board approval process and then
7 submission to what used to be REA, what is now
8 RUS, for its approval.

9 COMMISSIONER JABER: And the structure by
10 which rates are calculated?

11 MR. MELSON: Rates are calculated under --
12 the Commission in no event has got rate level
13 jurisdiction over Seminole. You've got only --
14 under any reading of the statute, you would have
15 only rate structure jurisdiction.

16 The contract says basically the rate level
17 is to be set to recover all of Seminole's
18 operating costs and a margin sufficient to
19 satisfy debt service, you know, interest
20 coverage requirements on its debt.

21 With regard to rate structure, there I
22 believe is a reference to accepted ratemaking
23 principles. I would have to look at the exact
24 language, but it's very general and very broad.

25 COMMISSIONER JABER: And they have two

1 votes on the Seminole board?

2 MR. MELSON: Each member has two votes on
3 the board, yes, ma'am.

4 COMMISSIONER JABER: And if they don't like
5 the terms of the contract, can they choose not
6 to sign it?

7 MR. MELSON: Well, the contract was signed
8 in 1975. They agreed in 1975 to be bound by
9 this contractual process for setting rates.

10 COMMISSIONER JABER: Have you ever
11 revisited the contract?

12 MR. MELSON: Not to my -- well, there have
13 been some amendments to the contract, but none
14 that really go to the substance of what we're
15 talking about here.

16 COMMISSIONER JABER: I'm trying to
17 understand the feasibility of the negotiated
18 contract, how it really works. Would Lee County
19 be able to ask you to renegotiate the contract?

20 MR. MELSON: I guess in theory they could.
21 As a practical matter, there are separate but,
22 my understanding is, identical contracts between
23 Seminole and each of the ten members. So as a
24 practical matter, unless Seminole -- unless one
25 of the members basically wanted to enter into

1 negotiations to terminate the contract, I'm not
2 sure how much leeway there would be for give and
3 take on specific terms.

4 COMMISSIONER JABER: So then as a practical
5 matter, are they a captive customer?

6 MR. MELSON: As a practical manner, they
7 agreed to a process by which rates would be set
8 for their full-requirements purchases from
9 Seminole. They're captive unless they negotiate
10 a termination of the contract.

11 COMMISSIONER JABER: You've got ten members
12 on your board; right?

13 MR. MELSON: Yes. There's 20 members
14 actually on the board. It's ten members. Each
15 of them has two votes.

16 COMMISSIONER JABER: So they can negotiate
17 the termination of the contract?

18 MR. MELSON: I believe there's one
19 cooperative that used to be a member of Seminole
20 that did negotiate a termination and is no
21 longer a member.

22 COMMISSIONER JABER: Okay.

23 MR. MELSON: With regards to the staff's
24 recommendation, the staff says the statute is
25 plain and unambiguous, and therefore you should

1 find that you have jurisdiction over this
2 contractual rate structure.

3 I would submit to you that there's at least
4 two reasons that we don't believe it's plain and
5 unambiguous, not the least of which is, after
6 having heard oral argument on this twice, four
7 of your colleagues split two-two. And if it was
8 plain and unambiguous, one would have expected a
9 majority vote one way or the other.

10 Second and perhaps more important is that
11 this statute has been in place since 1974. By
12 Commission action in 1977, when the legislative
13 history would have been as fresh in the
14 Commission's mind as it ever was, and again in
15 1985, the Commission took actions in which it
16 did not assert jurisdiction over Seminole's
17 wholesale rate structure. As we sit here today,
18 I can't look back 26 years and find in the
19 legislative history what the Legislature's
20 intent was. But you've had, in essence, a
21 longstanding practical interpretation of the
22 statute.

23 Now, staff is correct that your failure to
24 exercise authority that you are given doesn't
25 take that authority away. But the case law is

1 pretty clear that an agency's contemporaneous
2 interpretation of a statute that it's charged
3 with enforcing is entitled to significant weight
4 in determining what that statute means.

5 And in fact, the Supreme Court -- I'm going
6 to go back a long way -- in 1949 called the
7 Commission to task for, in essence, changing its
8 interpretation of one of its jurisdictional
9 statutes and after 30 years of not trying to
10 regulate street railways, saying that, well, our
11 statute giving us authority over railroads
12 includes street railways as well. And the Court
13 said, while it's not dispositive, one factor
14 that we're going to give significant weight in
15 interpreting that statute is what the Commission
16 has done for the past 30 years.

17 Here we're only at -- actually, I guess --
18 1974. We're now at year 26, and I would submit
19 to you that's a pretty long track record where
20 the Commission has not attempted to exercise
21 jurisdiction over these transactions.

22 The other -- if you decide the statute is
23 susceptible to interpretation, then another
24 principle you've got to apply is that where
25 there is a doubt about the Commission's

1 jurisdiction, the question of that jurisdiction
2 should be resolved in the negative. And
3 ultimately, if you believe that jurisdiction is
4 necessary, you ought to go back to the
5 Legislature and get it. And, again, here, with
6 the longstanding interpretation, the two-two
7 vote less than a year ago, I would submit to you
8 there is a reasonable doubt about jurisdiction.

9 COMMISSIONER JABER: It's not your
10 assertion that you're not an electric utility
11 pursuant to the statute. It's --

12 MR. MELSON: That's correct. We are an
13 electric utility.

14 COMMISSIONER JABER: Right. Your assertion
15 is that the statute doesn't contemplate that the
16 Commission has jurisdiction with regard to the
17 wholesale rate structure, because the statute
18 doesn't have the word "wholesale" in it.

19 MR. MELSON: Correct. The statute doesn't
20 have the word "wholesale" or the word "retail."
21 And the question is, does rate structure mean
22 retail only, does it mean wholesale only, or
23 does it mean both. And for a long period of
24 time, the Commission has applied it only to
25 retail rate structures. And we believe when you

1 look at the purpose of the statute to protect
2 monopoly customers, that an interpretation that
3 does not -- that reads it as retail and does not
4 apply it at least in the situation of a contract
5 negotiated at arm's length between utilities, it
6 was not intended to be captured.

7 COMMISSIONER JABER: Well, who could the
8 Commission have applied it to? If the wholesale
9 structure of the IOUs is regulated by FERC, and
10 therefore specifically exempted from PSC
11 jurisdiction, then who could that -- which
12 entity could that statute have applied to
13 besides Seminole?

14 MR. MELSON: Well, it applies to the
15 retail rate structures of all of the
16 distribution cooperatives and all of the
17 municipals, and it could have applied to the
18 wholesale rate structure of Seminole and all of
19 the municipals. You have never attempted -- not
20 only have you not attempted to exercise
21 jurisdiction over Seminole's wholesale rate
22 structure; you've never attempted to exercise
23 jurisdiction over sales by municipal utilities
24 to other municipals, to IOUs, and yet that is an
25 area where you're not preempted by any FERC

1 regulation.

2 COMMISSIONER JABER: But that brings us
3 back to, are you saying that the Commission's
4 inaction somehow binds us today?

5 MR. MELSON: I'm saying -- I'm not saying
6 you're bound today. I'm saying it's the best
7 evidence of what the Commission thought the
8 statute meant when it was new. And, you know,
9 the Legislature has done nothing in the interim
10 to tell you you're wrong, to tell you there's
11 something out there that you ought to be
12 regulating that you're not. I think if you --

13 COMMISSIONER JABER: I guess what I'm
14 trying to get to is, who else besides Seminole
15 would really challenge our exerting
16 jurisdiction?

17 MR. MELSON: A municipal, if you attempted
18 to exert jurisdiction over wholesale
19 transactions by municipal utilities. And
20 there's a bundle of them in the state.

21 COMMISSIONER JABER: Didn't we -- staff,
22 help me out with this. Didn't we some years
23 back require that tariffs be filed with respect
24 to wholesale rate structures, and municipals did
25 in fact file tariffs?

1 MR. KEATING: Yes. It's my understanding
2 that was approximately in the late 1970s, the
3 first time we required it. In sorting out what
4 our rate structure jurisdiction meant,
5 eventually those proceedings led to us requiring
6 municipals and co-ops to file their tariffs with
7 us.

8 COMMISSIONER JABER: Their wholesale --

9 CHAIRMAN DEASON: That was the retail
10 tariffs?

11 MR. MELSON: Retail.

12 MR. KEATING: I don't know if we -- in
13 requesting them to make that filing, I don't
14 know if we distinguished between retail and
15 wholesale. And I think what Mr. Melson is
16 referring to, in 1977, roughly that time frame,
17 in response to our first request that the
18 tariffs be filed, Seminole filed a response and
19 essentially said, "We don't think the Commission
20 has jurisdiction. We're not going to file it."

21 Now, there's nothing -- looking back in the
22 Commission's records, there's no response to
23 that from the Commission. And I would disagree
24 with Mr. Melson's characterization of that as
25 the agency's contemporaneous interpretation of

1 its jurisdiction, because there was no express
2 interpretation provided by the Commission.

3 I can't explain why there was none,
4 though, except to say that it wasn't until 1984
5 when in the Supreme Court case, given a similar
6 set of facts, a generation and transmission
7 cooperative in Arkansas with distribution member
8 cooperatives within the State of Arkansas, the
9 U.S. Supreme Court found that state regulation
10 of wholesale electric cooperatives was not
11 preempted by federal law, and also does not
12 constitute an unconstitutional burden on
13 interstate commerce. So it could be that we
14 believed in 1977 that we did not have
15 jurisdiction, and that may have been cleared up
16 by the U.S. Supreme Court case in 1984.

17 COMMISSIONER JABER: Okay. Because
18 Seminole did in fact send a letter letting you
19 know what their position was, and as far as you
20 know, the Commission never responded to that
21 letter.

22 MR. KEATING: That's correct.

23 MR. WHEELER: And just to clarify, at this
24 point we do require filing of any wholesale
25 tariffs with us. We do not keep books on them.

1 We don't review them at present.

2 COMMISSIONER JABER: And tell me why you do
3 not.

4 MR. WHEELER: I couldn't tell you why we do
5 not. You mean in terms of --

6 COMMISSIONER JABER: Wholesale rate
7 structure for municipalities. Well, do they
8 provide wholesale service?

9 MR. MELSON: They sell pursuant to
10 wholesale contracts to other utilities.

11 CHAIRMAN DEASON: Well, let me ask this
12 question at this point, and I think maybe -- we
13 may be able to give some clarity to it. I'm not
14 sure. But when you talk about a wholesale rate
15 structure, I've never seen a wholesale rate
16 structure. Wholesale is done by contract.
17 That's the normal case. I'm not sure that there
18 are wholesale tariffs out there for Seminole or
19 for the municipalities, because it's not
20 something that FERC has jurisdiction over. Is
21 that correct?

22 MR. MAY: We have a wholesale rate
23 schedule, a wholesale rate structure, Lee County
24 Electric Cooperative does, with Seminole
25 Electric Cooperative, and that indeed has been

1 filed with the Commission and with the
2 Commission staff, and it's structured very
3 similarly, formatted very similarly to your
4 other FERC type filing tariffs.

5 CHAIRMAN DEASON: You have a tariff on
6 file with this agency?

7 MR. MAY: It has been filed as part of this
8 lawsuit.

9 CHAIRMAN DEASON: When was that filed?

10 MR. MAY: It was filed as part of the
11 exhibits to the testimony.

12 CHAIRMAN DEASON: No, I'm talking about --
13 when did you devise this tariff? When was this
14 tariff created, and when was it first filed with
15 the Commission?

16 MR. MAY: It was -- well, going back, when
17 Seminole altered its rate structure,
18 restructured and redesigned its rates, that was
19 when Lee County Electric Cooperative complained
20 to the Commission that that revision to the rate
21 structure violated basic ratemaking standards.
22 And we filed --

23 CHAIRMAN DEASON: Was it a revision to the
24 structure or a revision to the contract?

25 MR. MAY: It was a revision to the rate

1 schedule.

2 MR. MELSON: The rate schedule is an
3 attachment to the contract.

4 CHAIRMAN DEASON: Okay.

5 COMMISSIONER JABER: Okay.

6 MR. MAY: I think part of the -- there was
7 a question raised by Commissioner Jaber as to
8 the contract itself. In 1984, after the United
9 States Supreme Court made it clear that
10 regulatory agencies like the Florida Public
11 Service Commission, indeed, the Arkansas Public
12 Service Commission could regulate the rate
13 structures of wholesale co-ops without any
14 preemption on the federal level, after that
15 decision was rendered, the parties entered into
16 an amendment to the wholesale power contract
17 dated 1984 which set forth the standards by
18 which the rate structure would be established.

19 And I quote. It says, "In establishing
20 rate structure, the revision shall recognize and
21 provide for variations in the cost of providing
22 service at differing delivery voltages, load
23 factors, and power factors, the specific
24 provisions thereof to be made in accordance with
25 generally accepted ratemaking standards."

1 And it's our position that this contract
2 doesn't prohibit in any way us as Lee County
3 from coming to you as a Commission and
4 challenging that rate structure. Indeed, many
5 wholesale power contracts in the industry have
6 that provision, and a full-requirements contract
7 would prohibit the entity taking the power from
8 coming in to the regulatory body and challenging
9 that. This contract doesn't have that
10 restriction. It doesn't require Lee County to
11 waive that right.

12 COMMISSIONER JABER: If Seminole had never
13 changed their rates, you wouldn't be before the
14 Commission arguing that we have jurisdiction
15 over Seminole's rate structure; correct?

16 MR. MAY: We would not have complained. We
17 fully believe that the Commission has
18 jurisdiction over the rate structure. We would
19 not have filed a formal complaint, because we
20 would have been satisfied with the previous way
21 that the rates were structured, which we believe
22 were in accordance with fundamental ratemaking
23 and rate structure standards.

24 COMMISSIONER JABER: Because it's a
25 negotiated contract, why isn't the appropriate

1 course of action a Circuit Court action?

2 MR. MAY: Number one, we believe that the
3 statutory language is clear, the statute itself.

4 COMMISSIONER JABER: Mr. Melson, we may
5 have interrupted you. I don't know if you were
6 done.

7 CHAIRMAN DEASON: We may have. I think we
8 interrupted, but --

9 MR. MELSON: I can catch up. I'm taking
10 notes.

11 MR. MAY: The statute itself is clear. And
12 this is part of your grid bill authority. It's
13 Section 366.04(2)(b), and it says that in the
14 exercise of its jurisdiction, the Commission
15 shall have the power over electric utilities for
16 the following purposes, and in (b) it says, "To
17 prescribe a rate structure for all electric
18 utilities."

19 You know, in our view, that's patently
20 clear. There is no ambiguity there. When the
21 Legislature described the universe of utilities
22 that was subject to your rate structure
23 jurisdiction, it did so in the broadest, most
24 inclusive way possible. It used the adjective
25 "all." And I would submit to you,

1 Commissioners, that when the Legislature uses
2 the adjective "all," it does so deliberately and
3 purposely to capture every electric utility
4 operating in the state unless preempted by
5 federal law. And there's nothing in federal law
6 that prohibits or preempts you as a Commission
7 from regulating the rate structure of Seminole
8 Electric Cooperative.

9 We're not here today to argue the
10 municipality argument. We're here today to
11 argue that you as a Commission have the
12 jurisdiction, the clear jurisdiction to regulate
13 the rate structure of Seminole Electric
14 Cooperative pursuant to this statute and
15 pursuant to the United States Supreme Court
16 decision in the Arkansas case.

17 COMMISSIONER JABER: Help me understand
18 this, because it's not that I want to argue the
19 municipal argument either. But just for
20 purposes of analogy, we don't have jurisdiction
21 over IOUs with respect to wholesale rates. Why
22 would we use our jurisdiction for a co-op's
23 wholesale rates when, in theory, the co-op
24 should manage itself, and the appropriate
25 recourse, similar to a municipality, would be in

1 front of the board? Address that argument for
2 me.

3 MR. MAY: well, that's a very interesting
4 argument and a good question, but that question
5 was squarely addressed by the United States
6 Supreme Court in the Arkansas case. why should
7 the Arkansas Public Service Commission take time
8 to regulate the wholesale rate structure? And
9 the Court gave two fundamental policy reasons.
10 One is that a self-regulating entity like
11 Seminole Electric Cooperative could very well
12 engage in economic inefficiencies.

13 Just because you're self-regulating doesn't
14 mean that you're making the right decision. For
15 instance, just because the majority of a board
16 or the majority of a voting body decides to do X
17 or decides to promulgate a standard, that
18 doesn't make that standard fair, just, and
19 reasonable. There are instances where there is
20 a tyranny of the majority, where just because
21 the majority says something doesn't make that
22 something right.

23 That's why we need you as a regulatory body
24 to step in with your expertise and to delineate
25 what's proper rate structure and what's not.

1 Your staff certainly has that capacity. It has
2 that experience. It's not going to unduly and
3 overly tax staff. They're prepared to do it.
4 And we would submit that you have the capacity
5 and the jurisdiction to allow that to occur.

6 COMMISSIONER JABER: But why shouldn't it
7 be FERC?

8 MR. MAY: FERC has made it clear, and the
9 Federal Power Act has been interpreted that FERC
10 doesn't have the jurisdiction over Seminole's
11 wholesale rates. That case was decided in a
12 FERC case called Dairy Land, and it was a 1970
13 -- actually, it was a -- I think it was a 1973
14 case. It might have been earlier. But
15 ultimately that decision was affirmed by the
16 courts. And again, FERC has made it clear that
17 it doesn't have that jurisdiction.

18 The second policy argument that the Supreme
19 Court recognized, aside from the fact that
20 self-regulating entities aren't necessarily
21 right all the time, is that there is an
22 interrelationship between wholesale rate
23 structure and retail rate structure. You as a
24 Commission certainly have the authority to
25 regulate the rate structure of retail serving

1 electric cooperatives in this state. There's no
2 dispute between Mr. Melson and myself or his
3 client and my client on that issue.

4 But if you look at it closely, if you have
5 an infirmity, if you have a flaw in the
6 wholesale rate structure in an all-requirements
7 contract, that flaw could very well be
8 perpetuated, replicated, and in fact compounded
9 on the retail level.

10 And if you as an agency are going to try to
11 get to the heart of a rate structure problem on
12 the retail level, you have to go to the core of
13 the problem. You have to go to where the
14 problem -- you have to be able to go to where
15 the problem originates. It's like putting a
16 Band-Aid on cancer. Unless you go to the cancer
17 and extricate it, you're not going to solve the
18 problem. And by simply saying, "well, we have
19 rate structure jurisdiction on the retail level,
20 but we're not going to have it on the wholesale
21 level," I believe unnecessarily handcuffs you
22 from doing the job that the Legislature charged
23 you with.

24 COMMISSIONER JABER: Let's think ahead five
25 years. Let's say that the RTO proposal comes to

1 fruition. Seminole probably will be
2 participating in that one way or the other,
3 which means Lee County would be participating in
4 that as a member of Seminole's board. Your
5 interpretation of the statute would have us
6 regulating Seminole with respect to wholesale
7 rates as it participates in the RTO process, but
8 for IOUs we're not going to be doing that.

9 MR. MAY: But there is no regulatory gap
10 with respect to the IOUs. The IOUs' wholesale
11 rate structure --

12 COMMISSIONER JABER: Well, I guess I'm
13 just thinking from a matter of strategy or --

14 MR. MAY: Sure.

15 COMMISSIONER JABER: -- benefits to Lee
16 County. It can't be beneficial to Lee County to
17 have Seminole be regulated by the PSC when
18 there's an active competitive market that's
19 supposed to be created out of the RTO proposal.

20 MR. MAY: Correct. But we're not talking,
21 Commissioner Jaber, on earnings based regulation
22 or cost of service based regulation. We're
23 talking now in terms of rate structure
24 jurisdiction. And what that does, we believe it
25 provides a regulatory body, an independent

1 regulatory dobdy, to sit and to arbitrate
2 disputes where we believe we're being treated
3 unfairly, where we as a customer are being
4 singled out because of our certain load factors
5 and being charged or being allocated
6 unreasonable amounts or unfair amounts of their
7 cost of doing business.

8 COMMISSIONER JABER: We wouldn't be
9 exerting or claiming our jurisdiction, though,
10 just for reviewing your complaint and
11 arbitrating your complaint. We would actually
12 be reviewing the rate structure --

13 MR. MAY: Sure.

14 COMMISSIONER JABER: -- and how the rates
15 were calculated.

16 MR. MAY: And I think that there is another
17 public policy issue --

18 COMMISSIONER JABER: And perhaps finding
19 that the rate structure would allow Seminole to
20 increase its rates further.

21 MR. MAY: Absolutely. And we're willing to
22 take that risk, because we have the confidence
23 in you as a regulating entity, and your staff,
24 to look at things fairly.

25 One other issue I think that's important to

1 note is that this jurisdictional grant here is
2 part of your grid bill authority. There's
3 nothing in that statute that a differentiates
4 between wholesale and retail rate structure.

5 Now, the Legislature was fully capable of
6 making that retail/wholesale distinction, and
7 has done that, for instance, in FEECA. Your
8 FEECA jurisdiction only extends to retail
9 serving utilities. So the Legislature was fully
10 capable of making a distinction between
11 wholesale and retail, but it chose not to.

12 COMMISSIONER JABER: And how do we know
13 that's not because co-ops are self-managing and
14 self-regulating, and in theory, the members can
15 go to the board?

16 MR. MAY: well, I think the fundamental
17 rules of statutory construction -- if the
18 Legislature showed it was capable of making a
19 distinction in one instance and didn't
20 distinguish in the other, then that was done
21 purposely.

22 COMMISSIONER JABER: All right. We
23 interrupted Mr. Melson. I don't know if he's
24 got anything else to say.

25 MR. MELSON: I've written down five either

1 questions that need to be answered or points
2 that I would like to respond to very briefly.

3 When Mr. May read from the contract, I
4 believe he may inadvertently have used the term
5 "rate structure." What the contract says is the
6 initial schedule C, which is the rate schedule,
7 and all subsequent amendments and revisions
8 shall do thus. So the word "rate structure"
9 does not appear in the contract.

10 And, Commissioner Deason, I would submit to
11 you that Seminole doesn't have a rate structure
12 in the sense that you normally think of one.
13 We've got one class of customers, our members,
14 and they all pay under a single structure.

15 Second --

16 CHAIRMAN DEASON: Let me ask a question at
17 this point. When I hear the term "rate
18 structure," what it means to me is like a tariff
19 that's out there that's offered to anybody that
20 meets the criteria within the tariff, that they
21 have the right to expect that service at that
22 specified rate, nondiscriminatory. If you meet
23 the requirements, regardless of who you are, you
24 can expect it. And it seems to me that under
25 the Seminole contract that another entity out

1 there cannot just come to Seminole and say, "You
2 have a rate schedule out there, and I want
3 service at that rate provided to me. I want
4 your wholesale service at that rate. Provide it
5 to me."

6 MR. MELSON: That's correct. It's not a
7 tariff. It is -- it's an attachment to a
8 contract. So in that sense of rate structure,
9 it is not a rate structure.

10 I have to tell you, though, that your rule
11 on rate structure has got a definition where
12 arguably this rate schedule would be a rate
13 structure as you've defined it in your rules.

14 CHAIRMAN DEASON: Okay. What rule is
15 that?

16 MR. KEATING: I've got it handy if --

17 MR. MELSON: 25-9.050(7). "Rate structure
18 refers to the classification system used in
19 justifying different rates, and more
20 specifically, to the rate relationship between
21 various customer classes, as well as the rate
22 relationship between members of a customer
23 class."

24 I think Seminole has got only a single
25 customer class, but this would appear to pick up

1 any variations in rate relationship between
2 members of that class.

3 CHAIRMAN DEASON: Okay. Thank you.

4 MR. MELSON: Mr. May also talked to you a
5 little bit about the U.S. Supreme Court case
6 involving Arkansas. Let me point out, the issue
7 the Court had to decide in that case was whether
8 federal law preempted a state law that clearly
9 gave a state commission rate level jurisdiction.
10 And the answer was no, we do not preempt.

11 We're not here today arguing that the
12 Commission is preempted in any way by federal
13 law. We're saying look to your state law.
14 Unlike Arkansas, which had clear state law
15 granting jurisdiction, your state law does not
16 grant that jurisdiction. So the preemption
17 argument and all of the dicta in the Arkansas
18 case really doesn't have any bearing on the
19 issue you've got to decide today.

20 COMMISSIONER JABER: Mr. Melson, could you
21 address PW Ventures for me and why you don't
22 think this is -- or at least PW is controlling
23 in this instance?

24 MR. MELSON: I lost PW Ventures, so I don't
25 refer to it very often.

1 COMMISSIONER JABER: Let me back up and
2 give you some historical perspective. To the
3 degree there's an argument that the regulation
4 of IOUs with respect to wholesale rates is
5 exempt from state jurisdiction and regulated by
6 FERC, then why -- what's wrong with the notion
7 that that silence with respect to state
8 jurisdiction and Seminole Electric says that we
9 should have jurisdiction over Seminole? PW
10 Ventures is the case that says silence in a
11 statute means that -- silence with respect to an
12 exemption means that the Commission has
13 jurisdiction. I'm summarizing off the top --

14 MR. MELSON: Yes. And I'm trying to
15 remember PW Ventures, and I think the question
16 there was whether there were exemptions for some
17 types of transactions and not others. And my
18 recollection is that the Court drew an analogy
19 to an exemption that was provided for gas
20 utilities and said a similar exemption could
21 have been provided for electric utilities, but
22 was not.

23 We're not dealing here with an exemption
24 provision. We're dealing with a provision that
25 grants authority, and the question is how to

1 interpret that grant. I'm not saying there's a
2 specific exemption that we're within. I'm
3 saying yes, to prescribe a rate structure for
4 all electric utilities. We are an electric
5 utility. But it doesn't say to prescribe all
6 rate structures.

7 So I think we come back to the question, in
8 Seminole's view, does rate structure as used in
9 that statute mean retail rate structure, which
10 we believe it does, or does it mean something
11 broader which you have not interpreted it to
12 mean in the past.

13 COMMISSIONER JABER: Is there anything in
14 the statute that would definitively lead us to
15 the conclusion that that provision in the
16 statute only applies to retail rate structure?

17 MR. MELSON: No.

18 MR. MAY: Commissioner Jaber, if I may add
19 one thing just to finish a thought here. As
20 I've said, this is part of your grid bill
21 authority. And the term electric utilities --
22 when you exercise your grid bill, you've
23 certainly exercised your grid bill authority to
24 utilities other than retail serving utilities.
25 By following Seminole's suggestion and adopting

1 this implicit retail versus wholesale
2 distinction here, I think it's a dangerous
3 precedent to establish at this point in time to
4 limit your grid bill authority in that fashion.

5 COMMISSIONER JABER: Staff?

6 MR. MELSON: Commissioner Jaber, if I might
7 finish, I've got two more quick points I would
8 like to make.

9 One, you asked would Lee County be here
10 today if they weren't dissatisfied with the
11 change in the rate structure, and I think
12 Mr. May said no, they wouldn't. I would point
13 out to you that if the Commission has wholesale
14 rate structure jurisdiction and Lee County
15 believes that they do, I'm surprised that as a
16 member of Seminole's board they have not
17 suggested to the board at some time during the
18 past 25 years that, you know, Seminole, you
19 really ought to be filing this rate schedule
20 with the Commission. The first time this
21 position was developed was when we got to rate
22 schedule number 7, and for the first time, Lee
23 County didn't like the result.

24 And finally, there has been a mention of a
25 regulatory gap. Do recall that Seminole's rate

1 schedules have to be submitted to RUS for
2 approval. Granted, they do not look at the rate
3 structure or rate level with the same degree of
4 scrutiny that FERC might or that you might, but
5 it is not an absence of regulatory
6 jurisdiction. In fact, it's the existence of
7 RUS that is the reason that FERC interpreted its
8 Federal Power Act not to pick up co-ops, because
9 they were regulated by another agency.

10 COMMISSIONER JABER: Mr. May, that is
11 troubling to me that for all these years, Lee
12 County didn't suggest that Seminole file a
13 contract with us similar to developer agreements
14 that get filed here. It is perhaps not binding
15 that the Commission and Lee County didn't take
16 action for the last 20 years, but certainly it's
17 telling, maybe.

18 MR. MAY: If you look historically at why
19 Lee County has not come before you in the past,
20 I think the answer is very clear. Historically
21 -- without getting too far into the merits of
22 the rate structure issue, historically Seminole
23 has recovered most of its fixed costs through
24 traditional demand charges. When they adopted
25 SECI-7, they tilted the rates so that they

1 started collecting, we believe, a
2 disproportionate amount of fixed costs through
3 an energy charge component with a ratchet. That
4 is when we thought, "This has gone too far.
5 There's a rate structure problem. There's rate
6 discrimination, and we're going to bring our
7 cause of action to the Commission for redress."
8 It's not that we sat on our hands. We just
9 never had the opportunity, nor did we have the
10 dispute that precipitated or prompted us to come
11 before the Public Service Commission for relief.

12 Now, Mr. Melson had indicated that there's
13 a longstanding policy not to regulate the
14 wholesale rate structure. I respectfully
15 disagree. This is an issue of first impression,
16 as Mr. Keating had indicated. This issue has
17 never been before you. So I've asked myself,
18 why hasn't the Commission exercised
19 jurisdiction, and I think there's two plausible
20 answers.

21 One, as I just indicated, there has never
22 been an occasion where Seminole has dramatically
23 restructured its rates that would cause one of
24 its member companies to come before you and
25 complain.

1 The other is that when staff back in 1977
2 had first asked Seminole to file rate tariffs,
3 Seminole responded in writing with a letter to
4 the staff, or to the Commission, a formal
5 pleading, which indicated that the Commission's
6 rate structure jurisdiction only extended over
7 retail. And it said -- and I've highlighted a
8 portion. "This, of course, only applies to
9 retail rate structure, as wholesale rate
10 regulation jurisdiction is solely vested in the
11 Federal Energy Regulatory Commission."

12 That was a misstatement of the law when
13 Seminole filed that with the Commission in the
14 1970s. And I would respectfully request that
15 you not allow that misstatement to --

16 COMMISSIONER JABER: Only with respect to
17 Seminole.

18 MR. MAY: That's correct. But their entire
19 pleading, their entire response to the staff's
20 request that they comply was based on the
21 premise that FERC had preempted the field. And
22 that was wrong then, and it's even more wrong
23 now with the Arkansas case.

24 COMMISSIONER JABER: Staff, if we find that
25 we do have jurisdiction over Seminole's

1 wholesale rate structure, is Seminole Electric
2 the only entity that we would have jurisdiction
3 over?

4 MR. KEATING: I think we would be looking
5 -- we would be saying that we have jurisdiction
6 over the wholesale rate structure of rural
7 electric cooperatives, and I believe that we
8 would also be including municipal electric
9 utilities. I think they would fall within that
10 same grant of jurisdiction.

11 COMMISSIONER JABER: To the degree they're
12 providing wholesale service.

13 MR. KEATING: Correct.

14 CHAIRMAN DEASON: Let me ask a follow-up.
15 If a municipality enters into a contract to
16 provide wholesale power to another entity, we
17 would have rate structure jurisdiction over that
18 contract?

19 MR. KEATING: I think the jurisdiction is
20 there, whether we decide as a practical matter
21 or a policy matter. But the fact that they've
22 entered into a contract, the parties to that
23 contract should be bound, I think that's another
24 question. I think the staff analysis goes to
25 purely the legal issue as to whether in the

1 Florida Statutes, whether the Legislature has
2 granted us jurisdiction over this particular
3 piece of the pie. I think that jurisdiction is
4 there --

5 COMMISSIONER JABER: Wait a minute. Let me
6 understand that. Hang on, Cochran. Let me
7 understand that.

8 With respect to other industries, when
9 we've said we have jurisdiction over rate
10 structure and rates, we have undone contracts.
11 Are we prepared to do that?

12 See, to me, if we find that that statute
13 applies to Seminole, then it applies all the
14 way, not just for complaints or disputes or
15 interpretation of contracts. Are we prepared to
16 undo a contract if we find the rate structure
17 inappropriate?

18 MR. KEATING: I don't think we have to. I
19 haven't addressed the policy issues, the
20 implications of whether -- if the Commission
21 finds we have jurisdiction, what do we do with
22 it. I haven't addressed that in the
23 recommendation. I've solely addressed the
24 question of whether that jurisdiction is there,
25 not what we would do with it. As a policy

1 matter, I'm not sure what we would do with that
2 jurisdiction.

3 MR. MAY: But in reviewing the rate
4 structure, the Commission has traditionally used
5 a standard of is the rate structure fair, just,
6 and reasonable. Now, what is fair, what is
7 just, and what is reasonable I think is a
8 factually dependent issue. It depends on -- you
9 know, it depends on the parties. It depends on
10 the structure of the relationship. It depends
11 on what has been complained of and what has not
12 been complained of.

13 So I agree with Mr. Keating. I think the
14 issues are separate. Today we're asking you to
15 acknowledge your jurisdiction. How you exercise
16 that jurisdiction, whether you find Seminole's
17 rates fair, just, and reasonable is an issue for
18 another day.

19 COMMISSIONER JABER: Mr. Melson, do you
20 agree that if we have jurisdiction over
21 Seminole, that we could actually review the
22 contract and find that the rate structure is
23 inappropriate?

24 MR. MELSON: If you rule you've got rate
25 structure jurisdiction, yes, you would have the

1 ability to say this rate structure is not fair,
2 just, and reasonable. And under the statute, if
3 you determined that that statute applied, you
4 would have the ability to prescribe a rate
5 structure which you would not have that you have
6 for the IOUs, is the ability to say -- you've
7 got to take Seminole's revenue requirements.
8 You don't have a say about what that revenue
9 requirement is, but you would have the ability
10 to design a structure to recover that revenue
11 requirement.

12 COMMISSIONER JABER: Commissioners, I would
13 love to hear some input from you all. I can
14 tell you the statute to me has been a concern,
15 because it's not -- it plainly says to prescribe
16 a rate structure for all electric utilities, and
17 I completely understand that Seminole Electric
18 fits the definition of electric utilities. The
19 difficulty I'm having is that rate structure
20 isn't defined one way or the other, wholesale
21 versus retail.

22 And I go back to Mr. Keating's opening,
23 when you said you don't apply the plain meaning
24 rule if the result leads to an unreasonable or
25 ridiculous result. In my mind -- and perhaps

1 you can help me get there, Cochran. In my mind,
2 I don't understand why Seminole would be treated
3 in a fashion unlike the IOUs. Now, granted,
4 we've got an exemption with respect to the IOUs,
5 and clearly they're under FERC jurisdiction.
6 But help me understand why the cooperative isn't
7 self-regulating and why that isn't enough.

8 MR. KEATING: I guess I would just go back
9 to the Supreme Court case that came out, the
10 Arkansas decision, where the Supreme Court, as
11 Mr. May mentioned earlier, said that sometimes a
12 cooperative may take actions that are
13 economically inefficient.

14 COMMISSIONER JABER: But isn't the recourse
15 then to go back to the cooperative and get rid
16 of the board, or to get out of the contract, or
17 fire the board of directors? I don't know.
18 What's the recourse with cooperatives?

19 MR. WHEELER: Well, I think you could make
20 that argument for retail cooperatives as well.
21 Why do we have rate jurisdiction over -- rate
22 structure jurisdiction over retail cooperatives
23 when they are self-governing as well, you know,
24 through electing the board of directors?

25 COMMISSIONER JABER: Commissioners?

1 CHAIRMAN DEASON: Well, I'll be happy to
2 share my thoughts on it. I voted originally to
3 grant the motion to dismiss, because I felt like
4 we did not have jurisdiction. That's still my
5 position.

6 Granted, it's not crystal clear one way or
7 the other. But I just put myself in the
8 position of what is a reasonable interpretation
9 of the statute. And to me, when it said
10 prescribe a rate structure for all electric
11 utilities, what I sincerely believe the
12 Legislature meant was that it wanted the Public
13 Service Commission to exercise its jurisdiction
14 over retail rate structures for all utilities,
15 including municipals and co-ops, and that when
16 they used the term "all electric utilities," it
17 did not mean that it would apply to a
18 wholesale-only entity utility like Seminole.

19 Now, I know there are arguments, and
20 Mr. May makes very valid arguments as to why
21 there could be a contrary interpretation. But
22 to me, that's what I thought the Legislature did
23 when they used that terminology. They wanted to
24 make it clear that we did -- even though we did
25 not have ratemaking authority over municipals

1 and co-ops, they wanted to make it clear that we
2 did have rate structure jurisdiction over those
3 entities for their retail rate structures.

4 And to me, that's what a rate structure
5 is. Rate structure is not defined, but I think
6 that it was the common interpretation that a
7 rate structure was for retail rates, and it was
8 of a tariff nature, and that it did not apply to
9 entities that voluntarily entered into a
10 contractual agreement as to what they would pay
11 for wholesale power.

12 That's my position in a nutshell.

13 MR. KEATING: Commissioners, if I could
14 briefly respond to some of the comments that
15 Chairman Deason had. I just wanted to point out
16 that when the grid bill was enacted, it didn't
17 originally say all electric utilities. It said
18 rural electric cooperatives and municipal
19 electric utilities. There was still no
20 distinction of retail/wholesale. It was in 1989
21 when that phrase was changed to the term "all
22 electric utilities" and the definition of
23 electric utility was added to 366.02(2). That
24 definition extends to municipal electric
25 utilities, investor-owned utilities, rural

1 electric cooperatives that own, maintain, or
2 operate an electric generation, transmission, or
3 distribution system within the state. And I
4 think at that point, that's some evidence of the
5 Legislature's intent to broaden the types of
6 electric utilities that they intended to include
7 in their grid bill.

8 CHAIRMAN DEASON: I would submit that if
9 that's what they wanted, it would have been a
10 lot easier for them just to have inserted the
11 term "wholesale."

12 MR. KEATING: I would agree.

13 CHAIRMAN DEASON: And not have that
14 convoluted interpretation. I understand that's
15 what the words say, but sometimes you've got to
16 sit back and say, "what did they mean?"

17 MR. MAY: Chairman Deason, just one further
18 final point. From our perspective, if you start
19 parsing through the grid bill and imposing a
20 retail versus wholesale distinction there that
21 the grid bill only applies to retail serving
22 electric utilities, I think you run a risk --

23 COMMISSIONER JABER: I don't think we're
24 saying that, Mr. May. I think for purposes of
25 interpreting that one provision with respect to

1 rate structure, there is a distinction that
2 needs to be made, because I think what we've
3 done the last 20 years by not imposing
4 jurisdiction on Seminole Electric has allowed
5 the grid bill to work relatively fine. I'm sure
6 there are people who would argue with that, but
7 that hasn't had an effect on the entire grid
8 bill. So perhaps I should make myself clear
9 that I am only looking at (2)(b) and not
10 commenting on whether there needs to be a
11 distinction between wholesale versus retail with
12 respect to the entire grid bill.

13 MR. MAY: Okay. But just to repeat myself,
14 I guess, the statutes talks in terms of electric
15 utilities. 366.04 applies to electric
16 utilities. And I think you'll find yourself in
17 an awkward position to say what the Legislature
18 intended was for purposes of 366.04(a) and (c)
19 and (d), it meant all electric utilities, but
20 just for (b) it meant retail serving electric
21 utilities.

22 I just wanted to caution you, I think
23 you're proceeding into some thin ice on that
24 one, that legislative interpretation. And
25 that's our opinion, of course, but I did want to

1 bring that to your attention.

2 COMMISSIONER JABER: Mr. Melson, how would
3 you respond to that?

4 MR. MELSON: I don't think you're saying
5 that wholesale serving electric utilities are
6 not subject to (2)(b). You're saying wholesale
7 rate structures are not.

8 Municipals are, in essence, both retail and
9 wholesale serving electric utilities, and you
10 regulate the retail rate structure, not the
11 wholesale rate structure. I don't think you're
12 doing any violence to the definition of electric
13 utility.

14 MR. KEATING: I would --

15 COMMISSIONER JACOBS: Well, it's -- I am
16 convinced that the statute is pretty clear, and
17 I think it reflects the Legislature's intent. I
18 think it's an interesting point, or actually,
19 two points, the one just raised by Mr. May that
20 it would have required a pretty extensive
21 analysis for the Legislature to go and parcel
22 out where it wanted us to act with regard to the
23 overall jurisdiction in this area, particularly
24 with regard to how we deal with the electrics
25 and municipalities, those where we traditionally

1 did not have full rate jurisdiction. And I
2 would have expected that the Legislature would
3 have been very clear had it wanted to apply some
4 varying areas of jurisdiction with regard to
5 those entities, because we have historically not
6 had full jurisdiction over them. So the fact
7 that the statute is silent to that is in my mind
8 very important.

9 And then when you look at the standard that
10 does come out of PW Ventures, where it says that
11 the express exemption of one thing in the
12 statute and the silence regarding another
13 implies an intent not to exempt the latter, that
14 in my mind is a strong statement from the courts
15 that we have the latitude to take that silence
16 in the statute and give it its due weight.

17 It might be easier if were to take this
18 exemption, but I think -- I feel confident that
19 it's absolutely consistent in interpreting the
20 statute to not have exempted wholesale rate
21 structures.

22 COMMISSIONER JABER: Now --

23 CHAIRMAN DEASON: Let me ask one quick
24 question. I'm just looking at the statute here.
25 And we're primarily concerned with 366.04(2)(b),

1 but (2)(a) says, "To prescribe uniform systems
2 and classifications of accounts." Does that
3 mean then if we would be -- we would be
4 requiring seminole to come to the Commission and
5 to have their accounting system, their accounts
6 and classifications approved by the Commission,
7 and we would be monitoring their accounting? Is
8 that what that means?

9 MR. MAY: I think you have to read that --

10 COMMISSIONER JABER: Because that's what I
11 believe --

12 MR. MAY: I think you have to read that in
13 the context of whether it's preempted by law. I
14 think the Rural Electrification Association -- I
15 guess it's the RUS now -- has their own system
16 of accounts, which has been determined to
17 preempt state regulatory commissions.

18 COMMISSIONER JABER: See, Mr. May, that's
19 what I have a problem with. I want -- if we
20 have jurisdiction, then we have jurisdiction.
21 That's not just over your complaint. What I was
22 going to ask staff is, the way you've worded
23 your issue makes it sound like you just want us
24 to assert jurisdiction over what's in the
25 petition and the complaint. And I think if we

1 find that we have jurisdiction over the
2 wholesale rate structure, that's everything as
3 it relates to that issue.

4 COMMISSIONER JACOBS: well, didn't we just
5 have a complaint? was it the City of
6 Tallahassee? I can't recall. Do you recall?
7 Not this case, but there was -- I seem to recall
8 another rate structure dispute, and we gave
9 consideration to exactly what the scope of our
10 authority was. And I seem to recall that in
11 that instance, we gave some pretty good analysis
12 to the limits to which we should go, and it did
13 not go to the full analysis of makeup of rates,
14 but the relationship among classes of customers,
15 as I recall. And I am remiss, because I can't
16 remember the case. Maybe here's some help
17 coming.

18 MS. KUMMER: Commissioner, the only rate
19 structure cases we've brought before you have
20 been retail.

21 COMMISSIONER JACOBS: That's exactly my
22 point. so we would anticipate the same analysis
23 as we have undertaken it in retail rate
24 structure disputes. We would anticipate that
25 same scope in a wholesale rate structure

1 dispute, would we not?

2 MS. KUMMER: The basic analytical procedure
3 would be similar, but I think Chairman Deason
4 made a point that Seminole only has one class of
5 customers. You don't have a residential or
6 commercial and industrial. You have one class.

7 Now, it's true that we do have the rule for
8 discrimination within rate classes, but that's a
9 pretty difficult issue to argue. But typically,
10 as we have thought of rate structure, it is
11 among rate classes, and in this case, there's
12 only one.

13 COMMISSIONER JACOBS: That's a different
14 point, whether or not it's practical to apply
15 the jurisdiction here.

16 MS. KUMMER: But we have only brought
17 retail rate structure classes to you.

18 CHAIRMAN DEASON: Okay. Now is a good
19 time to take a break. We're going to take ten
20 minutes.

21 (Short recess.)

22 CHAIRMAN DEASON: Call the agenda back to
23 order. We're on Item 36, and I believe we have
24 concluded oral argument. And, Commissioners,
25 questions or a motion?

1 COMMISSIONER JABER: Mr. Chairman, I can
2 actually make a motion. But let me tell you
3 that I have considered whether I need to go back
4 and digest any of these comments, and the answer
5 to that question is I do not. I am ready to
6 make a motion, which is to deny staff.

7 And I want to be clear about why my
8 recommendation or my motion is that we do not
9 have jurisdiction over Seminole Electric
10 Cooperative's wholesale rate structure, and that
11 is, the statute in my mind does not make
12 Seminole Electric clearly jurisdictional. And
13 if I were to take the plain meaning rule, I
14 think that it would not be consistent with how
15 we've treated IOUs with respect to wholesale
16 rate structure. And I recognize that there is a
17 specific exemption for the Florida IOUs, but I
18 believe -- it's my belief that Seminole Electric
19 would not be jurisdictional because they are a
20 co-op, and I think the recourse would be within
21 the co-op and/or the court, because there's a
22 negotiated contract.

23 So want to be clear with respect to my
24 interpretation and the reason that I've made
25 that motion, which is to deny staff.

1 CHAIRMAN DEASON: Okay. Just bear with me
2 for a moment. I want to make sure that I
3 understand clearly what the basis of the motion
4 is. Can you just repeat that again for me,
5 please?

6 COMMISSIONER JABER: I'll try. I think
7 that 366 -- let me make sure we have the right
8 cite -- .04(2)(b) is not clear with respect to
9 rate structure jurisdiction over Seminole
10 Electric Co-op. I think that Seminole Electric
11 Co-op is self-governing, self-regulating.

12 CHAIRMAN DEASON: Let me just interrupt.
13 But you do agree that Seminole Electric Co-op is
14 an electric utility?

15 COMMISSIONER JABER: Yes.

16 CHAIRMAN DEASON: Okay.

17 COMMISSIONER JABER: Yes. The
18 inconsistency in my mind, Commissioners, is with
19 respect to the sentence as it relates to rate
20 structure. I think that it would be reading
21 into the statute to insert the word
22 "wholesale." I've read that statute to apply to
23 retail rate structure. And I think, although
24 the Commission's past inaction is not binding --
25 I acknowledge that. I think the case law is

1 clear in that regard. The Commission's inaction
2 is illustrative, or perhaps -- I think there is
3 a reason we haven't exerted that kind of
4 jurisdiction over Seminole Electric Co-op.

5 CHAIRMAN DEASON: Okay. Well, let me say
6 that I agree with you. When I read this
7 language, and I think I've indicated this
8 earlier, to me, rate structure -- and I don't
9 think rate structure is defined anywhere in the
10 statute. But to me, rate structure means the
11 structure of the rates as they relate to
12 different rate classes, and a classic example is
13 residential, commercial, industrial,
14 classifications of those types. And that rate
15 structure connotes to me an offering by a
16 utility that says these are the terms and
17 conditions that we will provide service to you,
18 and if you meet these terms and conditions, you
19 will be provided the service on a
20 nondiscriminatory basis, and it doesn't really
21 apply to a situation where you have entities who
22 have voluntarily entered into a negotiated
23 contract.

24 And if there are provisions within that
25 contract which allow for the rates to change

1 over time, I still don't think that that meets
2 the definition of a rate structure as I think
3 it's contemplated. And for that reason, I do
4 not think the Commission has jurisdiction to
5 prescribe rate structure on a wholesale basis
6 when that was from the result of a contractual
7 negotiated situation between the parties.

8 Now, we do have a motion, and I don't know
9 if we're going to have a second. I may have to
10 pass the gavel, but there is a motion.

11 COMMISSIONER JACOBS: I believe I'll take
12 it.

13 CHAIRMAN DEASON: I'll pass the gavel.
14 I'll second the motion.

15 COMMISSIONER JACOBS: Okay. It has been
16 moved and seconded to deny staff.

17 I've already offered my explanation and my
18 view on this, and it's primarily looking at a
19 very narrow interpretation of the statutes and
20 what would be the logical legislative intent
21 behind that. So having said that, all in favor
22 of the motion say "aye."

23 COMMISSIONER JABER: Aye.

24 CHAIRMAN DEASON: Aye.

25 COMMISSIONER JACOBS: All opposed? Nay.

1 show it approved by a two-to-one vote.

2 CHAIRMAN DEASON: Okay. Thank you.

3 Okay. That concludes Item 36.

4 MR. KEATING: Commissioners, we will need
5 to I guess close the docket based on that vote.
6 Staff's recommendation on Issue 2 on closing the
7 docket was that if Issue 1 was approved, the
8 docket should remain open. Because it was not
9 approved, I suppose we would close the docket,
10 with the customary amount of time to allow time
11 for filing an appeal.

12 CHAIRMAN DEASON: Yes, I think that's
13 correct.

14 You may want to circulate this order. I
15 think I want to take a look at it before you
16 issue it.

17 MR. KEATING: I will.

18 CHAIRMAN DEASON: Okay. Very good. That
19 concludes Item 36.

20 I want to thank the parties for being so
21 well prepared for the third time. I guess
22 practice makes perfect. While it was not an
23 easy question to answer, the arguments on both
24 sides, I congratulate you on presenting very
25 well reasoned argument. And it was a difficult

1 issue, and it would have been even more
2 difficult had you all not been so well prepared
3 in making your arguments. It's much
4 appreciated.

5 (Conclusion of consideration of Item 36.)
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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, MARY ALLEN NEEL, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter transcribed under my supervision; and that the foregoing pages numbered 1 through 59 are a true and correct transcription of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, or relative or employee of such attorney or counsel, or financially interested in the action.

DATED THIS 12th day of September, 2000.


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