Law Offices
HOLLAND & KNIGHT LLP

315 South Calhoun Street
Suite 600
P.O. Drawer 810 (ZIP 32302-0810)
Tallahassee, Florida 32301

850-224-7000
FAX 850-224-8832
http://www.hklaw.com

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D. BRUCE MAY
850-425-5607

Internet Address:
dbmay@hklaw.com

January 19, 1999

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VIA HAND DELIVERY

Blanca S. Bayo
Director
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Florida Public Service Commission
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Lee County Electric Cooperative Docket No. 981827-EC

Dear Ms. Bayo:

Enclosed for filing on behalf of Lee County Electric Cooperative, Inc. are the original and fifteen (15) copies of the following:

1) Lee County Electric Cooperative, Inc.'s Memorandum in Opposition to Seminole's Motion to Dismiss; 00682-99
2) Response of Lee County Electric Cooperative, Inc. Opposing Request for Oral Argument; 00683-99
3) Notice of Appearance of the undersigned counsel. 00684-99

Also enclosed is a diskette containing these filings.

For our records, please acknowledge your receipt of these filings on the enclosed copy of this letter. Thank you for your consideration.

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Sincerely,

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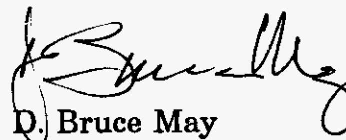
D. Bruce May

00682-99

DBM:kjg
Enclosure
cc: William Cochran Keating
David Wheeler
Parties of Record

TAL-145622

ORIGINAL

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 Filed: January 19, 1999

LEE COUNTY ELECTRIC COOPERATIVE, INC.'S MEMORANDUM IN OPPOSITION TO SEMINOLE'S MOTION TO DISMISS

Pursuant to Rules 25-22.037(2)(b) and 28-106.204(1), Florida Administrative Code, Lee County Electric Cooperative, Inc. ("LCEC") hereby responds in opposition to the Motion to Dismiss for Lack of Jurisdiction ("Motion") filed by Seminole Electric Cooperative, Inc. ("Seminole"). Contrary to the Motion's claims, the Florida Public Service Commission ("Commission") clearly has jurisdiction over LCEC's Complaint and Petition for an investigation of Seminole's rate structure ("Complaint"), notwithstanding that it is a wholesale rate structure. The Motion should therefore be denied.

I. The Statute Clearly and Unambiguously Grants The Commission Jurisdiction Over Seminole's Rate Structure

It is well established that, when a statute is clear and unambiguous, there is no occasion to inquire behind the plain language into the legislative intent, see, e.g., Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784, 785-786 (Fla. 1983); see also City of Miami Beach v. Galbut, 626 So.2d 192, 193 (Fla. 1993), or to resort to rules of statutory construction to ascertain intent. See, e.g., Citizens of the State of Florida at 786; Holly v. Auld, 450 So.2d 217, 218 (Fla. 1984). Rather, the statute's plain and ordinary meaning must be given effect unless it leads to absurd results. Miami Beach, at 193; Holly at 218. The provisions of Section 366.04 are clear and unambiguous. Giving effect to their plain and ordinary meaning compels the conclusion that the Commission has jurisdiction over the Complaint.

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Section 366.04(2)(b), Florida Statutes expressly states:

> (2) In the exercise of its jurisdiction, the commission shall have the power over electric utilities ... [t]o prescribe a rate structure for *all* electric utilities. [Emphasis added.]

Seminole admits in its motion that Seminole is an electric utility as defined in Section 366.02(2), Florida Statutes. Motion at 3. Yet Seminole urges the Commission to dismiss the Complaint and find that the unqualified grant of jurisdiction in Section 366.04(2) excludes jurisdiction over Seminole's wholesale rate structure. This position is simply untenable given the plain language of Section 366.04. For purposes of this jurisdictional grant, Section 366.04(2) does not distinguish between different types of electric utilities or electric utility rate structures. It does not give the Commission jurisdiction over *retail* rate structures, or rate structures of electric utilities engaged in *retail* sales, although in other provisions of the same chapter, for example in Section 366.11, the legislature demonstrated it was fully capable of making this type of distinction. To the contrary, Section 366.04(2) grants the Commission jurisdiction over the rate structures of *all* electric utilities. The plain and ordinary meaning of the term "all" is "the whole amount or sum of" or "every member or individual component of" the noun to which it refers. Webster's New Collegiate Dictionary, at 29 (1981). Simply put, "all" does not mean "all but some." The Commission unquestionably has jurisdiction to prescribe a rate structure for Seminole under the plain language of Section 366.04(2). The Motion must therefore be denied.

II. The Most Reasonable Interpretation of Any Statutory Ambiguity Requires the Commission to Find It Has Jurisdiction

Even assuming, *arguendo*, that Section 366.04(2) is ambiguous, the Commission must reject the Motion's tortured interpretation of Section 366.04(2). Contrary to the Motion's assertions, neither the Commission's past actions, nor other provisions of Chapter 366 support or require the conclusion that the Commission lacks jurisdiction over the wholesale rate structure of Seminole.

A. The Commission's Past Inaction is Not Determinative

Seminole argues that the Commission's past failure to assert jurisdiction is indicative of its determination that it lacked jurisdiction under Section 366.04(2). Seminole also asserts this precludes a contrary result now. Neither position is correct.

The Motion cites numerous instances from the past in which the Commission failed to act on an opportunity to assert jurisdiction under Section 366.04(2) over Seminole's rate structure. None of these instances, however, involves an affirmative determination by the Commission that it lacks such jurisdiction.[1] It is a cardinal principle of administrative law that agency inaction cannot deprive the agency of jurisdiction conferred. See, e.g., United States v. Morton Salt Co., 338 U.S. 632 (1950); United States v. American Union Transport, 327 U.S. 437 (1946); State ex rel Triay v. Burr, 84 So. 61 (Fla. 1920). Further, while such inaction is a factor to consider in evaluating the scope of the agency's jurisdiction, it does not compel an inference that the agency has concluded it lacks jurisdiction. United States v. American Union Transport, 327 U.S. at 454. Nor does it decide the question of the scope of the agency's authority.

> 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 prescripted by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns.

United States v. Morton Salt Co., 338 U.S. 632, 647-48.

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[1]The Commission's determination in Order No. 6899 that Section 366.04(2) does not confer *ratemaking* jurisdiction over electric cooperatives is predicated on a distinction drawn between ratemaking and rate structure, not a distinction between wholesale and retail rate structures. It is therefore inapposite here, since LCEC does not contend the Commission has general ratemaking authority under the Section. Rather, LCEC submits the Commission has jurisdiction under Section 366.04(2) to prescribe a *rate structure* for Seminole.

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LCEC submits the Motion incorrectly characterizes the Commission's past inaction as an implicit determination that it lacks jurisdiction over Seminole's rate structure. Even if this assertion is correct, however, the Commission clearly is not precluded by its past inaction from now exercising jurisdiction over Seminole's rate structure under Section 366.04(2).

> An administrative agency is not ordinarily under an obligation immediately to test the limits of its jurisdiction. It may await an appropriate opportunity or clear need for doing so. *It may also be mistaken as to the scope of its authority.*

United States v. American Union Transport, 327 U.S. at 454, n.18 [emphasis added].

An erroneous view of the scope of its authority may in fact have contributed to the Commission's inaction in this area. As the Motion states, in 1978, Seminole submitted a response to the Commission's order directing each rural electric cooperative to file its current rates, in which Seminole took the position it was not subject to the Commission's rate structure jurisdiction. Seminole notes the Commission never questioned this interpretation. Examination of Seminole's 1978 response, however, reveals that Seminole's jurisdictional position was solely predicated on the assertion that Section 366.04(2) "only applies to retail rate structures, as wholesale rate regulation jurisdiction is solely vested in the Federal Energy Regulatory Commission." Exhibit 3 to Motion, at 1. Of course, it is this expansive view of preemptive federal jurisdiction that was subsequently overturned by the United States Supreme Court. In Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983), the Court upheld the Arkansas Commission's decision to assert jurisdiction over a wholesale electric cooperative. In so holding, the Court rejected arguments that the Federal Power Act and the Rural Electrification Act preempted such state regulation. Id. at 384-89. Indeed, some years before Seminole filed its response interpreting Section 366.04(2), the FERC's predecessor had held it did *not* have jurisdiction over wholesale sales of

electric cooperatives. See Dairyland Power Cooperative, et al., 37 F.P.C. 12 (1967).[2] That both Seminole and the Commission may have labored under a misapprehension of the scope of the Commission's jurisdiction over rate structures does not deprive the Commission of jurisdiction clearly granted under the plain language of Section 366.04(2).

The Motion asserts that the Commission cannot now change its long-standing practical interpretation of the scope of its authority under Section 366.04(2). Motion at 9. This is not correct. An administrative agency is not bound by an initial statutory interpretation, but may subsequently effect a differing construction so long as it is consistent with a reasonable construction of the statute and the agency provides adequate notice and a rational explanation for the change. See Department of Administration, Division of Retirement v. Albanese, 445 So.2d 639, 642 (Fla. 1st DCA 1984). "Such flexibility is necessary to permit changes in agency policy permissible under a view of the statute broadly conceived in light of subsequent experience." Id.

Moreover, even the cases the Motion cites do not support Seminole's position in light of the circumstances here.[3] In this case, several cogent reasons support Commission assertion of jurisdiction over Seminole's rate structure, despite the Commission's past inaction. The existing "interpretation" flies in the face of the plain statutory language, and may originally have been predicated on an erroneous view of federal preemption. In addition, dramatic changes have occurred in power

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[2]The United States Court of Appeals for the D.C. Circuit later affirmed this view in another case pre-dating Seminole's response. See Salt River Project Agricultural Improvement and Power District v. FPC, et al., 391 F.2d 470 (D.C. Cir. 1968).

[3]Two of the cases cited, Green v. Stuckey's of Fanning Springs and City of St. Petersburg v. Carter, simply stand for the proposition, which is not in dispute here, that an administrative agency's interpretation of its governing statute is entitled to deference and cannot be lightly altered by the courts. The third, Walker v. State Department of Transportation, involved a situation in which the agency altered a long-standing practice without adequate notice. None holds that an agency interpretation should not be changed, regardless of the circumstances.

markets, including the development of a competitive wholesale market and increasing competitive pressures in retail markets, that warrant greater Commission oversight to protect against abuse.

B. Jurisdiction is Consistent With the Other Provisions of the Chapter

Seminole also asserts jurisdiction is inconsistent with Section 366.11 and other related statutory provisions. In support, Seminole argues the existence of an express exemption in Section 366.11 for wholesale sales by public utilities, and the absence of a parallel exemption for wholesale sales by electric cooperatives and municipalities, demonstrates an implied legislative intent that such sales by electric cooperatives were not within the scope of the rate structure statute. This ignores a commonly accepted principle of statutory construction: the express exemption of one thing in a statute, and silence regarding another, implies an intent not to exempt the latter. PW Ventures Inc. v. Nichols, 533 So.2d 281, 283 (Fla. 1988), citing Thayer v. State, 335 So.2d 815 (Fla. 1976). As stated by the United States Supreme Court, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983). See also, Beach v. Great Western Bank, 692 So.2d 146, 151 (Fla. 1997); Dept. of Health and Rehabilitative Services v. Hartsfield, 443 So.2d 322, 324 (Fla. 1st DCA 1983).

Thus, in PW Ventures, the Florida Supreme Court interpreted the scope of the definition of "public utility" under Section 366.02(1), and found the inclusion of an express exemption for direct sales to industrial customers by gas pipeline companies, and the omission of a similar exemption for suppliers of electricity, implied such an exemption was *not* intended. PW Ventures Inc. at 282-283 (Fla. 1988). It did not find the exemption for such electric providers was left out because they were never encompassed by the definition in the first place. Contrary to the Motion, the most reasonable

interpretation of Section 366.11 is that it demonstrates the legislature understood how to exempt certain wholesale matters, and elected not to exempt wholesale rate structures of electric utilities.

Moreover, LCEC's view of the Commission's jurisdiction is consistent with other provisions of Chapter 366. For example, as noted, Section 366.02(1) exempts from the definition of public utility natural gas pipelines making only sales at wholesale. In contrast, no similar wholesale exemption is included in the definition of electric utility set forth in Section 366.02(2). Further, this definition includes electric cooperatives that own, maintain, or operate "an electric generation, transmission, *or* distribution system within the state." (Emphasis added.) Use of the disjunctive indicates a rural cooperative owning or operating only transmission facilities would fall within the definition, even though such an entity would be unlikely to be engaged solely in retail activity.

C. Commission Jurisdiction Does Not Lead to Absurd or Unreasonable Results

Nor does jurisdiction over wholesale rate structures of electric utilities lead to illogical results or unreasonably expansive Commission jurisdiction. Numerous other state commissions exercise jurisdiction over electric cooperatives, including cooperatives who provide wholesale service to their members. See G&T Accounting and Finance Association Annual Directory (June, 1998). Clearly, there is a legitimate state interest in such oversight. In its opinion affirming state jurisdiction in Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, the United States Supreme Court recognized that cooperatives' self-governing method of ownership did not preclude such entities from engaging "in economically inefficient behavior . . . ." 461 U.S. 375, 394. See also, Cajun Electric Power Cooperative, Inc., et al. v. Louisiana Public Service Commission, 544 So.2d 362 (La. 1989) (plenary jurisdiction over "public utilities" included jurisdiction over wholesale electric cooperative, despite its customer-owned status).

By its express provisions, Section 366.11 exempts rural electric cooperatives from the full panoply of Commission regulation, vesting the Commission only with the carefully circumscribed authority set forth in specific referenced Sections, including Section 366.04. Plainly, Seminole's assertion that denial of its Motion will result in the Commission exercising more jurisdiction over rural cooperatives than it does over investor owned utilities is not correct. The Motion is similarly incorrect when it implies the Commission would have jurisdiction over all aspects of all wholesale sales by cooperatives and municipalities, Motion at 12, since jurisdiction under Section 366.04(2) is limited to "rate structures," such as that implemented by Seminole's Rate Schedule SECI- 7. Moreover, in appropriate circumstances the Commission need not exercise its jurisdiction in a burdensome or unduly intrusive manner. For example, the Commission might give blanket approval to rate structures that are the subject of specific negotiation and agreement between the parties, subject to conditions designed to ensure that other customers do not subsidize such transactions.[4]

Finally, Commission jurisdiction over wholesale rate structures fills a regulatory gap not applicable to wholesale transactions of investor-owned utilities regulated by the FERC. Because Seminole is a Rural Utilities Services borrower, the FERC does not regulate Seminole's wholesale sales, as it does those of investor-owned utilities. See Salt River Project Agricultural Improvement and Power District, et al. v. FPC, 391 F.2d 470 (D.C. Cir. 1968); Dairyland Power Cooperative, et al., 37 F.P.C. 12 (1967). Thus, it is left to the Commission to exercise the jurisdiction over Seminole's rate structure granted in Section 366.04(2) to protect against establishment of unfair and unreasonable rate structures.

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[4]The FERC has implemented this type of light-handed approach regarding market rate authorizations granted to power marketers, see, e.g., Heartland Energy Servs., Inc., 68 F.E.R.C. ¶ 61,223 (1994), and rates negotiated by interstate pipelines. See Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, and Regulation of Negotiated Transportation Services of Natural Gas Pipelines, 61 FR 4633 (Feb. 7, 1996), 74 F.E.R.C. ¶ 61,076, at 61,240-42 (1996).

In summary, the Motion's proffered interpretation is simply untenable. In a chapter replete with express exemptions and other references to distinctions between retail and wholesale activities, the absence of such a distinction or exemption in Section 366.04(2) cannot reasonably be understood in any way other than to confer jurisdiction over both wholesale and retail rate structures. This interpretation of Section 366.04(2) is even more compelling in light of Section 366.01, which directs that the Chapter's provisions "be liberally construed." There simply is no reasonable doubt about the Commission's jurisdiction under Section 366.04(2) that must be resolved against the Commission. Thus, the precedents Seminole cites in this regard are inapposite.

III. Commission Jurisdiction Fully Accords with the Purpose of Chapter 366

Seminole urges that jurisdiction here is contrary to the purpose of Chapter 366, in essence, because of the contractual relationship between LCEC and its wholesale supplier, Seminole. This is incorrect.

Although the origins of its relationship with Seminole are contractual, LCEC's position today is analogous to that of any captive ratepayer. As Seminole admits, Motion at 4, LCEC is required under its wholesale contract to purchase its supply from Seminole--while LCEC is a member of Seminole, the contract does not permit LCEC to pursue more cost-effective wholesale supply alternatives in today's restructured and more competitive wholesale market. The rate structure of which LCEC complains is unilaterally imposed by Seminole. It is not a negotiated rate structure agreed to by LCEC.[5] The fact that LCEC may have the ability as a Seminole board member to cast

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[5]In these respects, the facts here are virtually the same as those present in the Arkansas Electric case. As the Arkansas Supreme Court observed in upholding state jurisdiction, "[i]t is conceded that [the cooperative's members] must buy the power and that the rate is determined by [the cooperative]. It is not a negotiated rate . . . ." Arkansas Public Service Commission v. Arkansas Electric Cooperative Corp., 618 S.W.2d 151, 151-52 (Ark. 1981), aff'd Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983).

two of 20 votes respecting adoption of the rate schedule is irrelevant. LCEC has no power to block adoption of a rate structure, such as that reflected in Rate Schedule SECI-7, which unfairly disadvantages LCEC to the benefit of other members, and poorly positions LCEC for competition. Thus, without the protection afforded by Commission review under Section 366.04(2), LCEC is subject to exactly the type of potential for abuse of power to which the statute is directed.[6]

It is also disingenuous to suggest, as does the Motion, that retail ratepayer interests are not affected by Seminole's rate structure, simply because it supplies LCEC under a wholesale contract. Clearly, LCEC's retail ratepayers are impacted by Seminole's rate structure. Indeed, as described in its Complaint, one of the most troubling aspects to LCEC of Seminole's proposed rate structure is that it will prevent LCEC from continuing to offer the level of credits currently available under its interruptible service tariff for commercial and industrial customers.[7]

Finally, the parties' failure in their contract to expressly contemplate Commission review of Seminole's rate structure, and LCEC's acquiescence in previous Seminole rate structures are both facts irrelevant to a determination of the scope of the Commission's jurisdiction under Section 366.04(2). Private parties cannot by contract deprive an agency, such as the Commission, of the jurisdiction granted to it. See South Lake Worth Inlet District v. Town of Ocean Ridge, 633 So.2d

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[6]Certainly, the contractual basis of LCEC's relationship with Seminole, and Seminole's status as a cooperative are not completely irrelevant to the type of jurisdiction appropriately exercised by the Commission. However, the unique aspects of this type of relationship are recognized by the fact that Section 366.11 exempts such transactions from the full blown "rate-of- return" jurisdiction of the Commission over public utilities, and provides instead the more limited oversight role set forth in Section 366.04(2).

[7]In Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983), the U.S. Supreme Court noted, as one of the justifications supporting the state commission's jurisdiction over Arkansas Electric's wholesale rates, that such regulation would facilitate the state commission's regulation of members' retail rates, which were dependent, in part, on such wholesale rates. Id. at 395 n.17.

79, 89 (Fla. 4th DCA 1994); cf. United Telephone Company of Florida v. Public Service Commission, 496 So.2d 116, 118 (Fla. 1986) (parties to contract cannot confer jurisdiction).

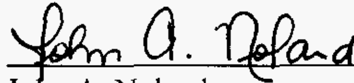
LCEC submits that exercise of Commission jurisdiction as requested in the Complaint is fully consistent with--indeed, it is required to fulfill--the protective purposes of Chapter 366. The Motion must therefore be denied. The Commission must instead hold that the clear and unambiguous language of Section 366.04(2) gives the Commission jurisdiction over the rate structure of Seminole.

IV. Conclusion

The plain and unambiguous language of Section 366.04(2) undeniably gives the Commission jurisdiction to investigate and prescribe a wholesale rate structure for Seminole. For all of the reasons set forth above, the Motion's arguments to the contrary must fail. The Commission should firmly reject the strained and unreasonable construction of Section 366.04(2) that Seminole advocates, and deny the Motion.

WHEREFORE, for the foregoing reasons, LCEC urges the Commission to deny Seminole's motion to dismiss the Complaint for lack of jurisdiction.

RESPECTFULLY SUBMITTED this 18th day of January, 1999.



John A. Noland
Florida Bar No. 175179
Henderson, Franklin, Starnes & Holt, P.A.
1715 Monroe Street
P.O. Box 280
Fort Myers, FL 33902-0280
(941) 334-4121

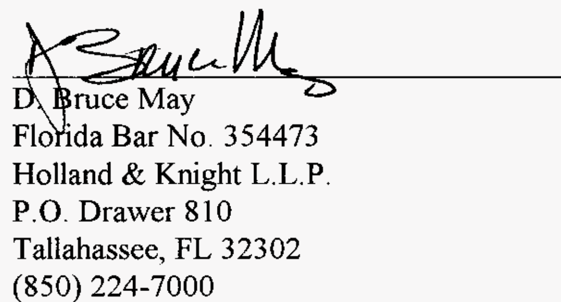
Donald L. Howell
Texas Bar No. 10098000
Kathleen C. Lake
Texas Bar No. 11830800
Vinson & Elkins L.L.P.
1001 Fannin, Suite 2300
Houston, TX 77002-6760
(713) 758-2222

D. Bruce May
Florida Bar No. 354473
Holland & Knight L.L.P.
P.O. Drawer 810
Tallahassee, FL 32302
(850) 224-7000

Attorneys for Lee County Electric Cooperative, Inc.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Richard D. Melson, Esquire, P.O. Box 6526, Tallahassee, FL 32314; Robert A. Mora, Esquire, P.O. Box 2111, Tampa, FL 33601; and Timothy S. Woodbury, V.P., Corporate Planning, Seminole Electric Cooperative, Inc., P.O. Box 272000, Tampa, FL 33688-2000, by regular U.S. Mail this 19th day of January, 1999.



D. Bruce May
Florida Bar No. 354473
Holland & Knight L.L.P.
P.O. Drawer 810
Tallahassee, FL 32302
(850) 224-7000

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