State of Florida

Public Service Commission

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DATE: OCTOBER 7, 1999

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

FROM: DIVISION OF LEGAL SERVICES (C. KEATING) WCK [signature] for RVE
DIVISION OF ELECTRIC AND GAS (WHEELER) DW JDJ

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.

AGENDA: 10/19/99 - REGULAR AGENDA - DECISION AFTER ORAL ARGUMENT, PRIOR TO HEARING - PARTIES MAY PARTICIPATE AT COMMISSION'S DISCRETION

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\981827MD.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 by LCEC and Seminole on May 22, 1975, and subsequent amendments to that contract. The term of the contract is 45 years. At the expiration of that term, the contract remains effective until terminated on three years' notice.

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

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cooperatives. LCEC is one of Seminole's ten owner-members and is represented on Seminole's Board of Trustees.

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, but later withdrew its opposition to oral argument. By Order No. PSC-99-0380-PCO-EC, issued February 22, 1999, the Commission granted Seminole's request for oral argument, and oral argument was conducted at the Commission's February 16, 1999, agenda conference. After oral argument, the parties agreed to attempt a mediated resolution through a staff mediator not assigned to this docket. The staff-led mediation session was conducted on July 13, 1999, but did not lead to a resolution. The parties requested additional time to attempt to resolve the matter through negotiations. In September 1999, the parties informed staff that they were unable to resolve their dispute.

The issues raised by the parties 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:
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> ***
>
> (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, nor has any court.

DISCUSSION OF ISSUES

ISSUE 1: Should Seminole Electric Cooperative, Inc.'s motion to dismiss the complaint and petition of Lee County Electric Cooperative, Inc., for lack of jurisdiction be granted?

RECOMMENDATION: No. The Commission has jurisdiction over the subject matter of Lee County Electric Cooperative, Inc.'s complaint and petition. Thus, the complaint and petition state a cause of action for which the Commission may grant relief, and the motion to dismiss should be denied.

POSITION OF THE PARTIES

SEMINOLE: 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.

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, issued October 28, 1977, directed each rural electric cooperative and municipal utility to file its current rates and charges for electric service. Seminole notes that the fourteen distribution cooperatives submitted a joint response acknowledging 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 that list.

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 statute in any other manner, there is no reasonable explanation for its failure to require filings by Seminole at any time since the statute was enacted. Further, Seminole asserts that the Commission cannot now abandon its "practical interpretation" of Section 366.04(2)(b), Florida Statutes. Among other cases, Seminole cites City of St. Petersburg v. Carter, 39 So.2d 804 (Fla. 1949), which states:

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

Id., at 806.

Consistency with Other Provisions of Chapter 366. Seminole argues that Commission jurisdiction over its wholesale rate structure is inconsistent with Section 366.11, Florida Statutes, and other provisions of Chapter 366. Seminole points out that Section 366.11(1), Florida Statutes, specifically exempts from Commission jurisdiction wholesale sales by investor-owned utilities to municipal and cooperative utilities. Seminole asserts that this exemption is required because the provisions of Chapter 366 that give 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.

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: 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.

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 prescripted 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 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 vested solely in the Federal Energy Regulatory Commission (FERC). LCEC points out that in Dairyland Power Cooperative, et al., 37 F.P.C. 12 (1967), FERC's predecessor agency, the Federal Power Commission (FPC), held that it did not have jurisdiction over wholesale sales of electric cooperatives. Thus, LCEC contends that 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. Seminole argued that the existence of an express exemption in Section 366.11, Florida Statutes, for wholesale sales by investor-owned utilities, coupled with the absence of a parallel exemption for wholesale sales by cooperative and municipal electric utilities, demonstrates an implied legislative intent to exclude such sales by cooperative and municipal electric utilities from 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.

STAFF ANALYSIS: Upon review of the arguments presented and authority cited by LCEC and Seminole, staff believes that the provisions of Chapter 366, Florida Statutes, grant the Commission jurisdiction to prescribe a wholesale rate structure for Seminole. Therefore, LCEC's complaint and petition state a cause of action upon which the Commission may grant relief, and the Commission should deny Seminole's motion to dismiss.

A. Plain Language of the Statute

In its complaint and petition, LCEC requests that the Commission review Seminole's new rate schedule pursuant to the jurisdiction granted by 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:
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> ***

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

(Emphasis added). This provision does not make a distinction between retail and wholesale rate structures or between utilities engaged in retail sales and utilities engaged in wholesale sales. It states that the Commission's rate structure jurisdiction extends to all electric utilities.

Section 366.02(3), Florida Statutes defines the term "electric utility" as follows:

> (3) "Electric utility" means any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state."

(Emphasis added). Seminole is a rural electric cooperative which owns, maintains, and operates generation and transmission facilities within the state. Therefore, as it concedes, it is an "electric utility" as defined in Section 366.02(3), Florida Statutes.

These two provisions, given their plain and ordinary meaning, clearly and unambiguously convey upon the Commission the jurisdiction to prescribe a rate structure for a rural electric cooperative, such as Seminole, that owns, maintains, and operates a generation and transmission system within the state.

When a statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. City of Miami Beach v. Galbut, 626 So.2d 192, 193 (Fla. 1993); Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984). Instead, the statute's plain and ordinary meaning must be given effect unless it leads to an unreasonable or ridiculous result. Miami Beach, at 193. A departure from the plain language of a statute is permitted only when there are cogent reasons for believing that the language of the statute does not accurately reflect legislative intent. Holly, at 219. As discussed below, application of the plain language of the statute does not lead to an unreasonable or ridiculous result. As further discussed below, there has been no demonstration that the language of the statute inaccurately reflects the legislative intent.

B. Legislative Intent

Seminole argues two points related to the legislative intent behind the statutory provisions at issue: (1) Commission jurisdiction over wholesale rate structures of rural electric cooperatives is inconsistent with the purpose of Chapter 366, Florida Statutes; and (2) Commission jurisdiction over wholesale rate structures of rural electric cooperatives is inconsistent with other provisions of Chapter 366, Florida Statutes.

1. Consistency with Purpose of Chapter 366

First, Seminole argues that Commission jurisdiction over Seminole's rate structure is inconsistent with the purpose of Chapter 366, Florida Statutes. Citing City of St. Petersburg v. Carter, 39 So.2d 804 (Fla. 1949), 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, but instead, its obligation to purchase power from Seminole was the result of voluntary contractual negotiations.

In Carter, the court stated that "[t]he Florida Railroad and Public Utilities Commission was created for the purpose of protecting the general public from unreasonable and arbitrary charges that might be made by railroads and other transportation companies which may be classified as monopolies." Id, at 806. While this may be an accurate general statement of the Commission's original purpose, it clearly does not provide an exhaustive list of the Commission's purposes in 1999, much less the present purposes of Chapter 366, Florida Statutes. The Legislature's intent in making its original grant of jurisdiction to the Commission is not determinative of the Legislature's intent in making subsequent grants of authority, such as that made in Section 366.04(2)(b), Florida Statutes. It is more appropriate to look to the purpose of the statute in question to determine whether a particular construction of that statute is consistent with its purpose. Seminole, however, has not offered any argument concerning the specific purpose of Section 366.04(2)(b), Florida Statutes.

Staff notes that Section 366.04(2)(b), Florida Statutes, was enacted in 1974 as part of Chapter 74-196, Laws of Florida (the "Grid Bill"). The Grid Bill gave the Commission jurisdiction over all electric utilities, including, for the first time, rural electric cooperatives and municipal electric utilities, for the purpose of assuring an adequate and reliable source of energy for

the state. Specifically, the Commission was granted jurisdiction to oversee the planning, development, and maintenance of a coordinated electric power grid; to require electric power conservation and reliability within a coordinated grid; to prescribe a rate structure for all electric utilities; and to resolve territorial matters.

Staff acknowledges an argument could be made that the Commission's rate structure jurisdiction was intended to provide the Commission some limited measure of control over the rates charged by municipal electric utilities and rural electric cooperatives to protect captive retail customers from unreasonable charges. However, given the clear purpose of the Grid Bill - to assure an adequate and reliable source of energy for the state - it appears equally, if not more, likely that the Commission's rate structure jurisdiction was intended to ensure that rates were structured in a manner consistent with the goals of reliability and conservation. Staff notes that the allegations of LCEC's complaint and petition indicate that LCEC is concerned with Seminole's new rate structure at least in part because of its potential to harm LCEC's conservation efforts and to encourage development of uneconomic generation. This type of harm appears to clearly fall within the jurisdiction granted the Commission through the broad language of the Grid Bill. The lack of a distinction between retail and wholesale rate structures is further evidence of the broad jurisdiction granted by the Grid Bill.

2. Consistency with Other Provisions of Chapter 366

Second, Seminole argues that Commission jurisdiction over Seminole's rate structure is inconsistent with Section 366.11, Florida Statutes, and other provisions of Chapter 366, Florida Statutes. Seminole notes that Section 366.11(1), Florida Statutes, specifically exempts from Commission jurisdiction wholesale power sales by investor-owned utilities to municipal and cooperative electric utilities. Seminoles asserts that this exemption is required because those provisions of Chapter 366 which give the Commission ratemaking authority over investor-owned utilities do not explicitly distinguish retail sales from wholesale sales. Seminole also notes that Section 366.11(1), Florida Statutes, does not specifically exempt wholesale sales by municipal and cooperative electric utilities from Commission jurisdiction. Seminole asserts that the lack of an exemption can be interpreted two ways: (1) all such transactions are subject to the Commission's rate structure jurisdiction; or (2) the Legislature never intended or expected Section 366.04(2)(b), Florida Statutes, to confer jurisdiction over wholesale transactions, so no exemption was

required. Seminole concludes that the latter is the only reasonable interpretation when Chapter 366, Florida Statutes, is considered as a whole, because any other interpretation would result in the Commission exercising more jurisdiction over wholesale sales by municipal and cooperative electric utilities than over wholesale sales by investor-owned utilities. Seminole contends that this would be an illogical result.

Staff disagrees. As LCEC argued, it is a commonly accepted principle of statutory construction that 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). Applying the principle to this case, the most reasonable interpretation of Section 366.11(1), Florida Statutes, is that the Legislature knew how to exempt specific wholesale matters from Commission jurisdiction but chose not to exempt wholesale sales by municipal and cooperative electric utilities. This interpretation is consistent with the plain language used by the Legislature in Sections 366.02(3) and 366.04(2)(b), Florida Statutes, as discussed above. Further, the specific exemption for wholesale sales by investor-owned utilities is consistent with the Federal Energy Regulatory Commission's (FERC) jurisdiction over such sales. Likewise, the lack of an exemption for wholesale sales by municipal and cooperative electric utilities is consistent with FERC's lack of jurisdiction over such sales, as discussed below. Staff sees nothing unreasonable or ridiculous about this interpretation.

In summary, Seminole has not demonstrated that the plain language of the statute inaccurately reflects the Legislature's intent or that application of the plain language leads to an unreasonable or ridiculous result. Instead, it appears that Commission jurisdiction over wholesale rate structures of rural electric cooperatives and municipal electric utilities is consistent with the purposes of the Grid Bill and with the provisions of Chapter 366, Florida Statutes.

C. Commission's Past Inaction

As previously stated, the Commission has not exercised jurisdiction over the wholesale rate structure of a rural electric cooperative or municipal electric utility at any time since the enactment of Section 366.04(2)(b), Florida Statutes. 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, nor has any court.

Seminole contends that the Commission, by its past inaction, has tacitly acknowledged that it lacks such jurisdiction and cannot now abandon its "practical interpretation" of Section 366.04(2)(b), Florida Statutes. LCEC argues that the Commission's past inaction does not amount to a determination that the Commission lacks jurisdiction. Even assuming that the Commission's past inaction does amount to a tacit determination on jurisdiction, LCEC argues that the Commission is not bound by that determination.

Staff agrees with LCEC's analysis. As LCEC points out, agency inaction cannot deprive an agency of jurisdiction conferred. See, e.g., State ex rel Triay v. Burr, 84 So. 61, 74 (Fla. 1920); United States v. Morton Salt Co., 338 U.S. 632, 647 (1950); United States v. American Union Transport, 327 U.S. 437, 454, n.18 (1946). In State ex rel Triay v. Burr, the Florida Supreme Court spoke on this subject:

> When a valid statute confers a power or imposes a duty upon designated officials, a failure to exercise the power or perform the duty does not affect the existence of the power or duty or curtail the right to require performance in a proper case.

Id, at 74. Further, while an agency's failure to exercise a power may be significant as a factor in evaluating whether that power was actually conferred, it alone does not extinguish that power or compel an inference that the agency has concluded it lacks jurisdiction. United States v. American Union Transport, at 454, n.18. In this case, the jurisdiction granted by the plain language of Chapter 366, Florida Statutes, cannot be extinguished or outweighed by the Commission's past inaction.

Even assuming that the Commission's past inaction does amount to an implicit determination on jurisdiction, the Commission is not precluded by its past inaction from exercising jurisdiction over Seminole's rate structure. In United States v. American Union Transport, the court stated:

> 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.

Id, at 454, n.18. LCEC asserts that the Commission may have misapprehended the scope of its authority when it failed to require Seminole to file its tariffs along with the distribution

cooperatives in 1978. While one can only speculate as to the rationale, if any, behind the Commission's past inaction, staff believes that LCEC's argument is reasonable. In 1967, the Federal Power Commission, FERC's predecessor, disavowed jurisdiction over the wholesale sales of cooperatives, Dairyland Power Cooperative, et al., 37 F.P.C. 12 (1967), but it was not until 1983 that the U.S. Supreme Court held in Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983), that state regulation of wholesale electric cooperatives was not preempted by federal law and may not constitute an unconstitutional burden on interstate commerce. Staff also suggests that the Commission has not had the clear need yet to exercise its jurisdiction.

Staff disagrees with Seminole's contention that the Commission cannot now abandon its "practical interpretation" of Section 366.04(2)(b), Florida Statutes. First, this contention is clearly inconsistent with the principle, stated above, that an agency's failure to exercise power conferred upon it does not affect the existence of that power. Second, none of the cases cited by Seminole hold that an agency cannot, under any circumstance, change its interpretation, explicit or implicit, of its governing statute. The cases cited by Seminole stand for the proposition that an agency's construction of its governing statute is persuasive and should be given great weight, but is not controlling. See, Carter, at 806; Walker v. State Department of Transportation, 366 So.2d 96 (Fla 1st DCA 1979); Green v. Stuckey's of Fanning Springs, 99 So.2d 867 (Fla. 1957).

D. Reasonable Doubt as to Commission Jurisdiction

Seminole points out that the Commission is a creature of statute and may exercise only those powers conferred expressly or impliedly by statute. 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 asserts that any reasonable doubt about the existence of the Commission's jurisdiction must be resolved against the exercise of such jurisdiction. Seminole contends that there is certainly reasonable doubt about the Legislature's intent to grant the Commission authority over the wholesale rate structures of municipal and cooperative electric utilities.

Based on our analysis set forth above, staff believes that there is no reasonable doubt about the existence of the jurisdiction conferred upon the Commission in Section 366.04(2)(b), Florida Statutes. Rather, the provisions of Chapter 366, Florida

Statutes, given their plain and ordinary meaning, clearly and unambiguously convey jurisdiction upon the Commission to prescribe a rate structure for all electric utilities, including rural electric cooperatives engaged in the generation and transmission of electricity in the state of Florida. Staff notes that a determination by the Commission that it has subject matter jurisdiction will not be overturned unless it is found to be clearly erroneous. Action Group v. Deason, 615 So.2d 683, 684 (Fla. 1993).

E. Conclusion

The provisions of Chapter 366, Florida Statutes, given their plain and ordinary meaning, clearly convey jurisdiction upon the Commission to prescribe a wholesale rate structure for rural electric cooperatives, such as Seminole. Seminole has not demonstrated that the plain language of the statute inaccurately reflects the Legislature's intent or that application of the plain language leads to a ridiculous or unreasonable result. Further, the Commission, by not exercising this jurisdiction in the past, has in no way forfeited its authority to do so now. Therefore, staff concludes that LCEC's complaint and petition state a cause of action upon which the Commission may grant relief and recommends that the Commission deny Seminole's motion to dismiss.

F. Contract Not a Bar to Commission Jurisdiction

Finally, Seminole suggests that the Commission is precluded from asserting jurisdiction in this case by the Florida Supreme Court's decision in United Telephone Company v. Public Service Commission, 496 So.2d 116 (Fla. 1986). Seminole states that the Court held that the provisions of Chapter 364, Florida Statutes, which gave the Commission jurisdiction to alter unreasonable rates or practices by a telephone company, referred to rates and practices as applied to ratepayers but did not confer jurisdiction to alter the contractual relationship between telephone companies. Based on the Court's opinion, Seminole argues that the Commission is precluded from asserting jurisdiction over contracts between utilities, including the wholesale power contract between Seminole and LCEC.

Staff believes that Seminole's interpretation of the Court's opinion is inaccurate. In United Telephone, the Court examined Chapter 364, Florida Statutes, to determine if any of its provisions gave the Commission jurisdiction to alter the contracts in question. Finding none, the Court held that the Commission lacked jurisdiction to alter the contracts. The Court did not,

however, hold that the Commission is precluded from asserting jurisdiction over contracts between utilities per se. Rather, the Court simply held that no provision of Chapter 364, Florida Statutes, gave the Commission jurisdiction over the subject matter of the contracts that it attempted to alter.

As stated above, the provisions of Chapter 366, Florida Statutes, convey jurisdiction upon the Commission to prescribe a wholesale rate structure for rural electric cooperatives. Thus, the United Telephone opinion is not on point. Further, as LCEC points out, private parties cannot by agreement deprive an agency of the jurisdiction conferred upon it. See, South Lake Worth Inlet Dist. v. Town of Ocean Ridge, 633 So.2d 79, 89 (Fla. 4th DCA 1994).

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.

STAFF ANALYSIS: If Seminole's motion to dismiss is denied, this docket should remain open for the Commission to consider the merits of Lee County Electric Cooperative, Inc.'s complaint and petition.