BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and petition by Lee County Electric Cooperative, Inc. for an investigation of the rate structure of Seminole Electric Cooperative, Inc.	DOCKET NO. 981827-EC ORDER NO. PSC-01-0217-FOF-EC ISSUED: January 23, 2001

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
E. LEON JACOBS, JR.
LILA A. JABER

ORDER DISMISSING COMPLAINT AND PETITION FOR LACK OF SUBJECT MATTER JURISDICTION

BY THE COMMISSION:

I. CASE BACKGROUND

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

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

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

On January 4, 1999, Seminole 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 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, this Commission granted Seminole's request for oral argument, and oral argument was conducted at our February 16, 1999, agenda conference. After oral argument, the parties agreed to attempt a mediated resolution through a 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.

At our November 16, 1999, Agenda Conference, we addressed Seminole's motion to dismiss. The motion to dismiss failed as a result of a tie vote, thus leaving the docket open for this Commission to hear and determine LCEC's complaint and petition. By Order No. PSC-99-2389-PCO-EC, issued December 7, 1999, which memorialized the vote, we stated that the tie vote did not reflect a decision on the merits of whether this Commission has jurisdiction to prescribe a wholesale rate structure for Seminole.

An administrative hearing was set for August 25, 2000, to hear and determine LCEC's complaint and petition. The parties filed

testimony, conducted some discovery, and filed prehearing statements in preparation for hearing. On August 1, 2000, the parties filed a joint motion to continue the hearing and stay further discovery pending a determination by this Commission on the issue of our subject matter jurisdiction. By Order No. PSC-00-1443-PCO-EC, issued August 9, 2000, the prehearing officer granted the parties' request to continue the hearing and stay discovery. That order stated that the jurisdictional issue would be addressed as expeditiously as possible.

Notwithstanding this Commission's previous tie vote in this docket, our jurisdiction to prescribe a wholesale rate structure for a rural electric cooperative is an issue of first impression. For the first time, we are being asked to exercise jurisdiction over the wholesale rate structure of a rural electric cooperative. As Seminole points out in its request, this 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.

This Order reflects our decision on the jurisdictional issue. Our decision is based on the parties' previous pleadings and oral argument in this docket, as well as oral argument heard at our September 5, 2000, Agenda Conference.

II. POSITIONS OF THE PARTIES

A. SEMINOLE

In its motion to dismiss, Seminole argues that this 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;
- this Commission's long-standing interpretation of subsection(2)(b);

- the context provided by the other provisions of Chapter 366, including Section 366.11; and
- the principles governing the scope of this Commission's jurisdiction.

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

Past Commission Interpretation. Seminole argues that Commission jurisdiction over its wholesale rate structure is inconsistent with our past interpretation of Section 366.04(2)(b), Florida Statutes. Seminole points out that this Commission, by Order No. 8027, issued October 28, 1977, directed each rural electric cooperative and municipal utility to file its current rates and charges for electric service. Seminole notes that the fourteen distribution cooperatives submitted a joint response acknowledging our jurisdiction over their rate structures. Seminole, however, filed a separate response in which it stated that it was not subject to this Commission's rate structure jurisdiction because Seminole had no sales at retail to customers. Seminole states that we 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 we 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 proceedings shows that this Commission has never interpreted Section 366.04(2)(b), Florida Statutes, to give us jurisdiction over Seminole's wholesale rate schedules. Seminole asserts that if we had interpreted the statute in any other manner, there is no reasonable explanation for our failure to require filings by Seminole at any time since the statute was enacted. Further, Seminole asserts that we cannot now

abandon our "practical interpretation" of Section 366.04(2)(b), Florida Statutes. Among other cases, Seminole cites City of St. Petersburg v. Carter, 39 So.2d 804 (Fla. 1949), which states:

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

Id., at 806.

Consistency with Other Provisions of Chapter 366. Seminole argues that Commission jurisdiction over its wholesale rate structure is inconsistent with Section 366.11, Florida Statutes, and other provisions of Chapter 366. Seminole points out that Section 366.11(1), Florida Statutes, specifically exempts from our 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 this 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 this Commission's jurisdiction. Seminole suggests that this means one of two things: (1) either all such transactions are subject to rate structure jurisdiction which we have failed to exercise; or (2) the Legislature never intended Section 366.04(2)(b), Florida Statutes, to confer jurisdiction over wholesale transactions so no exemption was required.

Seminole argues that the latter interpretation is the only reasonable one when Chapter 366 is considered as a whole. Seminole asserts that any other interpretation would result in this

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

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

B. LCEC

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

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

Plain Language of the Statute. LCEC argues that the plain language of Section 366.04(2)(b), Florida Statutes, compels the conclusion that this Commission has jurisdiction over Seminole's wholesale rate structure. LCEC notes that the statute does not distinguish between retail rate structures and wholesale rate

structures, nor between rate structures of utilities engaged in retail sales as opposed to wholesale sales.

LCEC further argues that, even assuming the statute is ambiguous, the most reasonable interpretation of Section 366.04(2)(b), Florida Statutes, is that this 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 this Commission's past failure to assert jurisdiction is not determinative of whether we indeed have such jurisdiction. LCEC asserts that it is a cardinal principle of administrative law that agency inaction cannot deprive the agency of jurisdiction conferred. LCEC also submits that while agency inaction is a factor in evaluating the scope of its jurisdiction, such inaction does not compel an inference that the agency has concluded it lacks jurisdiction. Among other cases, LCEC cites United States v. Morton Salt Co., 338 U.S. 632 (1950), which states:

> The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise.

Id., at 647-48.

LCEC further argues that even if this Commission's past inaction is taken as an implicit determination that we lack jurisdiction over Seminole's wholesale rate structure, we are not precluded from now exercising such jurisdiction. LCEC asserts that this Commission's inaction may be attributed to an erroneous view of the scope of our authority. LCEC states that when Seminole took the position, in response to Order No. 8027, that it was not subject to our 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, held that it did not have jurisdiction over wholesale sales of electric cooperatives. Thus, LCEC contends that this Commission's

inaction may have been based on a misapprehension of the federal agency's jurisdiction.

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

Consistency with Other Provisions of Chapter 366. LCEC argues that Commission jurisdiction over Seminole's wholesale rate structure is consistent with Section 366.11, Florida Statutes, and other provisions of Chapter 366. Seminole argued that the existence of an express exemption in Section 366.11, Florida Statutes, for wholesale sales by investor-owned utilities, coupled with the absence of a parallel exemption for wholesale sales by cooperative and municipal electric utilities, demonstrates an implied legislative intent to exclude such sales by cooperative and municipal electric utilities from this Commission's rate structure jurisdiction. LCEC asserts, however, that Seminole has ignored the principle of statutory construction which provides that the express exemption of one thing in a statute, and silence regarding another, implies an intent not to exempt the latter. Accordingly, LCEC contends that the most reasonable interpretation of Section 366.11, Florida Statutes, is that the Legislature intentionally elected not to exempt wholesale rate structures of cooperative and municipal electric utilities.

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

Purpose of Chapter 366. LCEC argues that Commission jurisdiction is fully consistent with the purposes of Chapter 366, Florida Statutes. LCEC states that its position is analogous to

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

III. CONCLUSIONS

Based on the arguments set forth in Seminole's motion to dismiss and LCEC's memorandum in opposition to the motion to dismiss and the oral arguments heard at our September 5, 2000, Agenda Conference, we find that this Commission lacks jurisdiction over the subject matter of Lee County Electric Cooperative, Inc.'s complaint and petition.

Under Section 366.04(2)(b), Florida Statutes, this Commission has jurisdiction to prescribe a rate structure for all electric utilities. All parties agree that Seminole is an electric utility under the definition provided in Section 366.02(2), Florida Statutes. However, "rate structure" is not defined anywhere in Chapter 366, Florida Statutes. As set forth below, we find that there are cogent reasons to believe that the Legislature did not intend for our rate structure jurisdiction to extend to the wholesale rate schedule at issue in this case.

We note that this Commission's powers and duties are only those conferred expressly or impliedly by statute, and any reasonable doubt as to the existence of a particular power compels us to resolve that doubt against the exercise of such jurisdiction. City of Cape Coral v. GAC Utilities, Inc, of Florida, 281 So.2d 493 (Fla. 1973). Chapter 366, Florida Statutes, does not expressly indicate that this Commission has jurisdiction to prescribe a wholesale rate structure for a rural electric cooperative. While the statute also does not define our rate structure jurisdiction as limited to retail rate structures, this Commission has exercised its rate structure jurisdiction with respect to retail rate structures only. We acknowledge that our past inaction is not binding on us, but we believe it is a significant factor which tends to indicate that jurisdiction to prescribe a wholesale rate structure for a rural electric cooperative was not conferred on us.

Further, we believe that the Legislature did not intend our rate structure jurisdiction to apply to wholesale rates set by the terms of a negotiated contract between rural electric cooperatives. The rate schedule at issue in this case was established by action of Seminole's Board of Trustees pursuant to the terms of Seminole's contract with LCEC. LCEC voluntarily entered into this long-term contract with Seminole. As noted in the Dairyland case, cited above, rural electric cooperatives are largely self-governing entities. Thus, we find that LCEC's recourse is more appropriately within Seminole Electric Cooperative or, if it has a contract dispute, within the courts.

To be clear, our decision is not based on a distinction between our regulation of wholesale activities versus retail activities under Sections 366.04 and 366.05(7) and (8), Florida Statutes, i.e., the "Grid Bill." Rather, our decision is limited solely to the question of whether the Legislature intended for our rate structure jurisdiction to extend to a rural electric cooperative's wholesale rate schedule established pursuant to contract.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Lee County Electric Cooperative, Inc.'s complaint and petition is dismissed for lack of subject matter jurisdiction. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 23rd day of January, 2001.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

WCK

DISSENT

COMMISSIONER JACOBS dissents, as set forth below:

I disagree with the majority's findings regarding our jurisdiction under Section 366.04(2)(b), Florida Statutes. Upon review of the arguments presented and authority cited by LCEC and Seminole, I believe that the provisions of Chapter 366, Florida Statutes, grant the Commission jurisdiction to prescribe a wholesale rate structure for Seminole.

A. Plain Language of the Statute

In its complaint and petition, LCEC requests that we 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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> ***
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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 our rate structure jurisdiction extends to all electric utilities.

Section 366.02(2), 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. Seminole concedes it is an "electric utility" as defined in Section 366.02(2), Florida Statutes.

Sections 366.04(2)(b) and 366.02(2), Florida Statutes, given their plain and ordinary meaning, clearly and unambiguously convey

upon this 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. I find that application of the plain language of the statute does not lead to an unreasonable or ridiculous result. Further, I find 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 this Commission's original purpose, it clearly does not provide an exhaustive list of this Commission's purposes in 2000, much less the present purposes of Chapter 366, Florida Statutes. The Legislature's intent in making its original grant of jurisdiction to this 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.

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 this 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, we were 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.

An argument could be made that our rate structure jurisdiction was intended to provide us 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 our rate structure jurisdiction was intended to ensure that rates were structured in a manner consistent with the goals of reliability and conservation. 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 to this 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. Seminole asserts that this exemption is required because those provisions of Chapter 366 which give this 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 this 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 this 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.

I am not persuaded by Seminole's argument. First, Seminole's premise that Section 366.11(1), Florida Statutes, exempts from our jurisdiction wholesale power sales by investor-owned utilities to municipal and cooperative electric utilities is incorrect. Section 366.11(1), Florida Statutes, provides in pertinent part:

> No other provision of this chapter shall apply in any manner, <u>other than as specified in ss. 366.04, 366.05(7) and (8)</u>, 366.051, 366.055, 366.093, 366.095, 366.14, and 366.80-366.85, . . . to the sale of electricity, manufactured gas, or natural gas at wholesale by any public utility to, and the purchase by, any municipality or cooperative under or pursuant to any contracts . . . when such municipality or cooperative is engaged in the sale and distribution of electricity or manufactured or natural gas, or to the rates provided for in such contracts.

(Emphasis supplied.) Clearly, the limited exemption in Section 366.11(1), Florida Statutes, is not intended to diminish our jurisdiction over electric utilities pursuant to the Grid Bill, which includes the jurisdiction granted in Sections 366.04 and 366.05(7) and (8), Florida Statutes, although that juridiction may be preempted by FERC.

Second, as LCEC noted, 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, read together with the statutes listed therein, including Section 366.04, Florida Statutes, is that the Legislature knew how to exempt wholesale matters from certain aspects of this Commission's jurisdiction but chose not to exempt wholesale sales in their entirety. This interpretation is consistent with the plain language used by the Legislature in Sections 366.02(2) and 366.04(2)(b), Florida Statutes, as discussed above. Further, 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. There is 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 our 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 noted in the majority opinion, this 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, we have not affirmatively stated at any time that Section 366.04(2)(b), Florida Statutes, does not give us jurisdiction over the wholesale rate structures of rural electric cooperatives, nor has any court.

Seminole contends that by our past inaction we have tacitly acknowledged that we lack such jurisdiction and cannot now abandon our "practical interpretation" of Section 366.04(2)(b), Florida Statutes. LCEC argues that our past inaction does not amount to a determination that we lack jurisdiction. Even assuming that our past inaction does amount to a tacit determination on jurisdiction, LCEC argues that we are not bound by that determination.

I am persuaded by 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 this Commission's past inaction.

Even assuming that our past inaction does amount to an implicit determination on jurisdiction, this 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 we may have misapprehended the scope of our authority when we failed to require Seminole to file its tariffs along with the distribution cooperatives in 1978.

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. In addition, there is no indication that this Commission has had a clear need yet to exercise jurisdiction in this area.

I am not persuaded by Seminole's contention that we cannot now abandon our "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 this 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 this 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 this Commission authority over the wholesale rate structures of municipal and cooperative electric utilities.

Based on the analysis set forth above, I find no reasonable doubt about the existence of the jurisdiction conferred upon this 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 us 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.

E. Conclusion

The provisions of Chapter 366, Florida Statutes, given their plain and ordinary meaning, clearly convey jurisdiction upon this 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, by not exercising this jurisdiction in the past, this Commission has in no way forfeited its authority to do so now. Therefore, I believe that this Commission has jurisdiction over the subject matter of LCEC's complaint and petition. Further, I believe that the exercise of this jurisdiction is reasonable and appropriate in this case, especially in view of the clear absence of preemption at the Federal level.

F. Contract Not a Bar to Commission Jurisdiction

Finally, Seminole suggests that this 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 us 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 we are precluded from asserting jurisdiction over contracts between utilities, including the wholesale power contract between Seminole and LCEC.

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 us jurisdiction to alter the contracts in question. Finding none, the Court held that this Commission lacked jurisdiction to alter the contracts. The Court did not, however, hold that we are precluded from asserting jurisdiction over contracts between utilities per se. Rather, the Court simply held that no provision of Chapter

364, Florida Statutes, gave us jurisdiction over the subject matter of the contracts that it attempted to alter.

As stated above, I find that 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).

For these reasons, I dissent from the majority's decision.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.