ORIGINAL

IN THE SUPREME COURT OF FLORIDA

LEE COUNTY ELECTRIC
COOPERATIVE, INC.,

Appellant,

vs.

E. LEON JACOBS, JR.,
et al.,

Appellees.
_____/

981827-EC

CASE NO. SC 01-373

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION
Docket No. 981827-EC
Order No. PSC-01-0217-FOF-EC

ANSWER BRIEF OF APPELLEE SEMINOLE ELECTRIC COOPERATIVE, INC.

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STATEMENT OF THE CASE AND FACTS

The statement of the case and facts in Appellant's Initial Brief is argumentative and goes far beyond what is necessary to resolve the sole issue in this appeal. That issue is whether the Florida Public Service Commission (Commission) has subject matter jurisdiction over a wholesale rate schedule adopted by Seminole Electric Cooperative, Inc. (Seminole) such that it can hear a complaint by Lee County Electric Cooperative, Inc. (LCEC) involving that rate schedule. Seminole therefore offers this counter-statement of the case and facts.[1]

Seminole is a non-profit electric generation and transmission cooperative organized pursuant to Chapter 425, Florida Statutes. (R.46) Seminole provides electricity at wholesale to its ten owner-members, one of which is LCEC. (R.8, 46) Each of Seminole's owner-members is a distribution electric cooperative engaged in the retail sale of electricity to Florida consumers. (R.8, 46) Each owner-member has two voting representatives on Seminole's governing body, its Board of Trustees. (R. 46)

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[1] LCEC's statement of the case and facts, for example, includes almost five pages which recite LCEC's position regarding the ratemaking principles that should apply *if the Commission has jurisdiction*, and how LCEC would apply those principles to Seminole's wholesale rate schedule. (Initial Brief at 4-8) As reflected in the parties' prehearing statements, these matters are in dispute. (R.262, 270) In any event, they are not germane to the issue of the Commission's subject matter jurisdiction.

Like the other Seminole owner-members, LCEC purchases all of its power requirements from Seminole pursuant to a voluntarily negotiated wholesale power contract.[2] (R.8, 46-47) The 45-year contract between LCEC and Seminole was originally executed on May 22, 1975, and has been supplemented and amended from time to time. (R.8, 60, 71) Prior to entering the contract with Seminole, LCEC had purchased all of its electrical power requirements from Florida Power & Light Company. (R.314-315)

The rate at which owner-members purchase power from Seminole is included in a rate schedule that is incorporated by reference in the wholesale power contract as Schedule C. (R.72) Seminole has only a single class of member-consumers and the wholesale rate schedule applies uniformly to all of those members. (R.337, *see* R.25, 72) Under the contract, the rates on Schedule C can be amended from time to time by majority vote of Seminole's Board of Trustees, subject to approval by the Administrator of the federal Rural Utilities Service (formerly the Rural Electrification Administration). (R.47, 72) The contract makes no reference to any requirement for approval by the Commission. (R.47) Although Seminole has had a number of rate schedule amendments since

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[2] The contracts between Seminole and its various members are identical in all respects material to this case.

the wholesale power contract with LCEC became effective in 1975, LCEC's representatives on Seminole's Board of Trustees have never previously suggested that any of these amendments should be submitted to the Commission for further review or approval. (R.49-50)

Under the terms of the contract, Seminole's total wholesale revenue to be generated by sales to its owner-members is limited to the amount necessary (when combined with revenues from all other sources) to meet Seminole's costs of operation and maintenance, to meet the cost of purchased power and transmission services, to make payments of principal and interest on Seminole's debt, and to provide for the establishment and maintenance of reasonable reserves. (R.47, 72) In addition to meeting this overall revenue cap, all amendments to Seminole's wholesale rate schedule "shall recognize and provide for variations in the cost of providing service at differing delivery voltages, load factors, and power factors, the specific provisions therefore to be made in accordance with generally accepted ratemaking standards." (R.73)

On October 8, 1998, the Seminole Board of Trustees approved a new rate schedule applicable to all of its owner-members, Rate Schedule SECI-7, effective January 1, 1999. (R. 8, 25-34, 47) This rate schedule was approved by a vote of 17-2, with only the two LCEC representatives voting in the negative. (*See* R.143)

This rate schedule was submitted to the Rural Utilities Service and was approved by that body on or about November 20, 1998. (R.47, 80)

On December 9, 1998, LCEC filed a complaint with the Commission asking the Commission to conduct a full investigation and evidentiary hearing on Seminole's new rate schedule. (R.7, 19) Seminole moved to dismiss LCEC's complaint on the grounds that the Commission lacks jurisdiction over Seminole's wholesale rate schedules. (R.46)

The dispute on the merits, which is not germane to the jurisdictional question before the Court, is whether Rate Schedule SECI-7 reflects the application of generally accepted ratemaking principles. Suffice it to say that LCEC contends that the rate schedule does not comport with accepted ratemaking principles and improperly discourages load management and conservation. (R.9-10) Seminole contends that the rate schedule complies with the ratemaking requirements of the contract, comports with accepted ratemaking principles, and provides appropriate price signals that encourage economically efficient load management and energy conservation programs.[3] (R.274-275) Prior to the

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[3] Seminole believes that it is both unnecessary and inappropriate to address the merits of the case in this brief. To the extent that LCEC's Initial Brief includes extensive argument concerning the merits (*e.g.* pages 4-8, 20, 25), those portions of the brief should be disregarded or stricken.

Commission's ruling on the motion to dismiss, LCEC and Seminole had each prefiled extensive written testimony of their expert consultants addressing this ratemaking issue.

The Commission first considered Seminole's motion to dismiss on November 16, 1999. As the result of a 2-2 tie vote, the Commission entered its order stating that Seminole's motion to dismiss "fails for lack of support by a majority of this Commission" and that "this Order does not reflect a decision by the Commission concerning the merits of Seminole Electric Cooperative, Inc.'s motion to dismiss."[4] (R. 200, 209)

Upon the request of both Seminole and LCEC, the Commission again considered the jurisdictional issue on September 5, 2000. (R.279) At that time, the Commission voted 2-1 to grant Seminole's motion to dismiss for lack of jurisdiction.[5] (R.305) That decision was embodied in Order No. PSC-01-0217-FOF-EC, issued January 23, 2001. (App.1; R.367) LCEC's appeal followed.

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[4] At the time of this vote, there were only four sitting Commissioners. Chairman Garcia and Commissioner Jacobs voted to assert jurisdiction; Commissioners Deason and Clark voted to grant the motion to dismiss. (R.198-199)

[5] At the time of the second vote, there were only three sitting Commissioners. Commissioner Jaber joined Commissioner Deason in voting to grant the motion to dismiss. Chairman Jacobs voted to assert jurisdiction and deny the motion to dismiss. (R.305-306)

SUMMARY OF ARGUMENT

The sole issue before the Court is whether the Commission has "rate structure" jurisdiction under Section 366.04(2)(b) over a rate schedule contained in a voluntarily negotiated wholesale power purchase agreement between Seminole and LCEC, one of its ten owner-members.

The Commission determined that the rate schedule incorporated in the Seminole-LCEC agreement does not involve a "rate structure" as that term is used in Chapter 366. That determination by the agency charged with administration of the statute comes to this Court with a presumption of correctness. The presumption is particularly strong in this case since the Commission's determination is consistent with the way that Section 366.04(2)(b) has been applied since its adoption in 1974, over twenty-five years ago.

The interpretation advanced by LCEC would significantly expand the Commission's day-to-day exercise of jurisdiction. It would bring within the Commission's reach all wholesale power contracts in which either a municipally-owned utility or a cooperative is the seller. These are all transactions over which the Commission has never asserted rate structure jurisdiction.

The Commission's decision that the Seminole-LCEC agreement does not involve a question of rate structure is consistent with both the purpose and the

language of Chapter 366. The fundamental purpose of that chapter is to protect the public from potential abuses of monopoly power by regulating the relationship between a utility and its captive ratepayers; it is not to regulate contractual relationships between utilities. In this case, there is no monopoly and no captive customer in need of protection. LCEC is a voting owner-member of Seminole and voluntarily negotiated a long-term power supply arrangement with Seminole. The Commission's conclusion that the Legislature did not intend the term "rate structure" to apply to this type of contractual wholesale power rate schedule is a reasonable interpretation of the statute and should be affirmed.

LCEC argues that the Commission's interpretation is inconsistent with the additional purpose of Chapter 366 to advance energy conservation and load management. The primary provisions in Chapter 366 which address conservation, and the only ones which address load management, were added in 1980, over six years after the Commission was granted rate structure jurisdiction over electric cooperatives. The existence of those later-enacted provisions provides no useful information about the Legislature's intent in 1974 as to the scope of the Commission's rate structure jurisdiction.

The Commission's decision is a reasonable and permissible interpretation of Chapter 366 and should therefore be affirmed.

ARGUMENT

I. THE COMMISSION'S DETERMINATION OF ITS JURISDICTION IS ENTITLED TO DEFERENCE.

The construction of a statute by the administrative body responsible for its administration is entitled to great weight and should not be overturned unless it is "clearly contrary to the language of the statute," *Greyhound Lines, Inc. v. Yarborough*, 275 So.2d 1, 3 (Fla. 1973), or "clearly erroneous," *Pan Am. World Airways, Inc. v. Florida Pub. Serv. Comm'n,* 427 So.2d 716, 719 (Fla. 1983). So long as the agency's construction is reasonably defensible, this principle applies even if the courts might prefer another view of the statute. *Smith v. Crawford*, 645 So.2d 513, 521 (Fla. 1st DCA 1994) *citing Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 497 (1979).

As demonstrated in Part II of this brief, the Commission's determination that it lacks subject matter jurisdiction over Seminole's wholesale rate schedule is neither contrary to the language of Section 366.04(2)(b) nor is it clearly erroneous. It is consistent with both the purpose of Chapter 366 and with the Commission's long-standing practical implementation of that Chapter. The Commission's construction is also fully consistent with the principle that any reasonable doubt about the existence of the Commission's jurisdiction must be resolved against the

exercise thereof. *City of Cape Coral v. GAC Utils., Inc. of Fla.*, 281 So.2d 493 (Fla. 1973); *Radio Tel. Communications, Inc. v. Southeastern Tel. Co.*, 170 So.2d 577, 582 (Fla. 1964).

II. THE COMMISSION CORRECTLY DETERMINED THAT IT LACKS SUBJECT MATTER JURISDICTION OVER SEMINOLE'S WHOLESALE RATE SCHEDULE.

Seminole is an "electric utility" as defined in Section 366.02(2), Florida Statutes. This means that the Commission has limited jurisdiction over Seminole under Section 366.04(2) and other provisions of Chapter 366 which refer specifically to electric utilities. Seminole is not, however, a "public utility" as defined in Section 366.02(1). It therefore is not subject to the Commission's general ratemaking jurisdiction or to most other provisions of Chapter 366. *See* §366.11(1), Florida Statutes (2000).

LCEC's complaint sought to invoke the Commission's jurisdiction under Section 366.04(2)(b), Florida Statutes, which provides:

> (2) In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:
>
> ***
>
> (b) To prescribe a rate structure for all electric utilities.

The question the Commission resolved in ruling on Seminole's motion to dismiss was whether its power to prescribe a rate structure for electric utilities

gives it jurisdiction over a wholesale rate schedule adopted in conformance with a wholesale power contract between a rural electric cooperative and one of its owner-members. The Commission concluded that it lacks jurisdiction in that situation, holding that the Legislature did not intend for the Commission's "rate structure" jurisdiction to extend to a rural electric cooperative's wholesale rate schedule established pursuant to contract. (App.10; R.376) For the reasons set forth below, the Commission's decision was correct, and must be affirmed.

A. THE COMMISSION IS NOT COMPELLED TO EXERCISE JURISDICTION BY THE PLAIN LANGUAGE OF SECTION 366.04(2)(b).

The crux of LCEC's first argument is that the plain language of Section 366.04(2)(b) unambiguously gives the Commission jurisdiction over the rate structure of all electric utilities, hence there is no room for statutory construction and the Commission must exercise jurisdiction over Seminole's wholesale rate schedule. (Initial Brief at 13-17) While this argument has some superficial appeal, it does not withstand closer analysis.

First, LCEC does not address the fundamental question of whether a rate schedule contained in a negotiated wholesale power contract constitutes a "rate structure" as that term is used in Section 366.04(2)(b). LCEC focuses instead on the undisputed fact that Seminole is an electric utility and that the Commission has

rate structure jurisdiction over "all" electric utilities. LCEC's entire discussion of whether Seminole's rate schedule establishes a "rate structure" is limited to the bare assertion that "[t]here is also no question that Seminole's rate structure is at issue." (Initial Brief at 13) Yet the fundamental conclusion in the Commission's order is that a wholesale rate schedule established by contract between two cooperative utilities is not a "rate structure" as that term was used by the Legislature in Section 366.04(2)(b).

> "[R]ate 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.
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> (App.9; R.375) (emphasis added)

As explained by Commissioner Deason at the time he seconded the motion to grant Seminole's motion to dismiss:

> When I read this language, and I think I've indicated this earlier, to me, rate structure -- and I don't think rate structure is defined anywhere in the statute. But to me, rate structure means the structure of rates as they relate to different rate classes, and a classic example is residential, commercial, industrial, classifications of those types. And that rate structure connotes to me an offering by a utility that says these are the terms and conditions that we will provide service to you, and if you meet those terms and conditions, you will be provided the service on a nondiscriminatory basis, and it doesn't

> really apply to a situation where you have entities who have voluntarily entered into a negotiated contract.
>
> And if there are provisions within that contract which allow for the rates to change over time, I still don't think that meets the definition of a rate structure as I think it's contemplated.
>
> (R.362-363; see also, R.351-352)

In 1987, the Commission held that, in the absence of a statutory definition of rate structure, the determination of what types of charges are within the Commission's rate structure jurisdiction will be made only on a case-by-case basis.[6] *In re: Filing Requirements for Municipal Electric Authorities and Rural Electric Cooperatives,* 87 F.P.S.C. 5:303, 304 (1987).

The Commission in this case adopted an allowable construction of Section 366.04(2)(b) when it concluded that a contractually-based, uniform rate schedule that applies to the members of a single class of wholesale consumers of a generation and transmission cooperative -- each of whom is an owner-member with voting representation on the board that adopted the rate schedule -- is not a

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[6] It is worthy of note that, in 1987, it was the Florida Rural Electric Cooperative Association, of which LCEC was a member, which challenged the Commission's attempt to determine in the abstract what charges fell within its rate structure jurisdiction. The Association withdrew that challenge only when the Commission approved a stipulation calling for such matters to be considered in the context of a specific charge being levied by a specific utility. 87 F.P.S.C. 5:303, 306.

rate structure as contemplated by the Legislature in that section. As discussed in later sections of this brief, that conclusion is consistent with the fundamental purpose of Chapter 366 and with the Commission's prior exercise of its rate structure jurisdiction.

Second, LCEC's plain language argument has merit only to the extent that the language of the statute is indeed clear and unambiguous. The inherent ambiguity of the statute is demonstrated by the fact that, of the five Commissioners who considered the jurisdictional question after briefing and argument by the parties, three concluded that the statute did not give the Commission jurisdiction and two concluded that it did. In light of this difference of opinion by those charged with administration of Chapter 366, it is difficult to conclude that the language of Section 366.04(2)(b) is such a "clear and unambiguous" expression of legislative intent as to warrant application of the plain meaning rule.

B. THE COMMISSION'S DECISION IS CONSISTENT WITH THE PURPOSE OF CHAPTER 366.

The underlying purpose of Chapter 366 is to prevent potential abuses of monopoly power when the public obtains electric service from a monopoly provider. *See, City of St. Petersburg v. Carter*, 39 So.2d 804, 806 (Fla. 1949).

That purpose is not served by Commission oversight of the terms of the wholesale power contract between Seminole and its members.

LCEC is not a captive customer of a monopoly provider. LCEC's obligation to purchase its full requirements of power and energy from Seminole is the result of voluntary contractual negotiations, not the result of Seminole's right to serve some governmentally protected or defined service territory. The wholesale power contract with Seminole replaced LCEC's former agreement to obtain its full requirements from Florida Power & Light Company (FP&L) at rates which were regulated by the Federal Energy Regulatory Commission. At the time it executed the contract, LCEC presumably made the business decision that becoming an owner-member of Seminole and entering into a long-term power contract with a cooperative on whose Board it would be fully represented would be preferable to continuing its relationship with FP&L. LCEC is no more a "captive customer" than any party who enters into a long-term supply contract for any commodity. In fact, LCEC is less captive than the typical commodity purchaser, since it is one of the equity owners of the supplier and has equal and direct representation on its supplier's Board of Trustees.

Moreover, in entering into the wholesale power contract, LCEC specifically agreed to the method by which rate schedules would be adopted. That

contractual method calls for approval by Seminole's Board of Trustees, subject to written approval from the Administrator of the Rural Utilities Service. Nowhere does the contract contemplate that any aspect of the rate schedules are subject to review or approval by the Commission. Until the present case, LCEC's representatives on Seminole's Board have never suggested that Seminole was subject to any requirement to submit Board-approved rate schedules to the Commission for further review or approval. While Seminole acknowledges that the parties could not by agreement deprive the Commission of jurisdiction conferred on it by the Legislature, their past course of conduct provides at least some evidence of their understanding of the requirements of Chapter 366.

In an analogous case involving a contract between two telephone companies, this Court held that the provisions of Chapter 364 which gave the Commission jurisdiction to alter unreasonable rates or practices by a telephone company "refer to rates and practices as applied to ratepayers and do *not* confer jurisdiction upon the commission to alter the contractual relationship between telephone companies." *United Tel. Co. of Fla. v. Pub. Serv. Comm'n*, 496 So.2d 116, 119 (Fla. 1986) (emphasis in original). In reaching this conclusion, the Court relied in part on consistent federal court interpretations that comparable provisions in the Federal Power Act extended protection only to ratepaying members of the

public, not to utility companies, and in part on the constitutional principle that a state regulatory agency cannot modify or abrogate private contracts unless such action is necessary to protect the public interest. *Id.*

The Commission's determination in this case that it lacks jurisdiction over a rate schedule contained in a contract between two utilities (one of whom is an owner-member of the other) is consistent both with the Court's decision in *United Telephone* and with the fundamental purpose of Chapter 366 to protect the public from abuses of monopoly power.

LCEC contends that, in focusing on the fundamental purpose of Chapter 366 to prevent monopoly abuses, Seminole and the Commission have ignored the broader purpose introduced into that chapter by the enactment of Chapter 74-196, Laws of Florida, sometimes referred to as the "Grid Bill." LCEC argues that, since the amendment giving the Commission rate structure jurisdiction over municipal and cooperative utilities was part of the Grid Bill, its rate structure jurisdiction should be interpreted in light of other provisions of the Grid Bill which gave the Commission the power "to require electric power conservation and reliability within a coordinated grid. . . ." § 366.04(2)(c), Fla. Stat. (Initial Brief at 17-20) LCEC further argues that Seminole's rate structure runs directly contrary to the Commission's duty to encourage energy conservation programs

including load management, citing Section 366.81, Florida Statutes. (Initial Brief at 20)

LCEC gives undue emphasis to the conservation and reliability provisions of Chapter 74-196. In addition to granting the Commission certain powers with respect to rate structure and conservation and reliability, Chapter 74-196 also authorized the Commission to:

- prescribe uniform systems and classifications of accounts for electric utilities, §366.04(2)(a);
- approve territorial agreements, §366.04(2)(d); and
- resolve territorial disputes, §366.04(2)(e).

These provisions have no relationship to the Commission's duty under other sections of the Grid Bill to require conservation and reliability within a coordinated grid; they are simply additional powers granted to the Commission as part of the same legislative enactment. Similarly, the rate structure jurisdiction is not related to the conservation and reliability provisions; it likewise has independent operation and effect.[7]

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[7] For example, in *City of Tallahassee v. Mann,* 411 So.2d 162 (Fla. 1981), this court upheld the Commission's decision that it had subject matter jurisdiction to consider the validity of a surcharge on customers located outside the city's municipal boundaries. The Commission's exercise of jurisdiction in that case had nothing to do with conservation or reliability.

LCEC's suggestion that the intent of the Grid Bill compels the Commission to construe its rate structure jurisdiction broadly in order to advance the purpose of Section 366.81, relating to energy conservation programs, ignores one important point. Section 366.81 was enacted in 1980 as part of the Florida Energy Efficiency and Conservation Act. *See* §366.80, Fla. Stat.; Chapter 80-65, Laws of Florida. That provision came six years *after* the grant to the Commission of rate structure jurisdiction. The later enactment therefore reveals nothing about the intent of the Legislature as to the original scope of the Commission's rate structure jurisdiction.[8]

In summary, the Commission's decision is consistent with the underlying purpose of Chapter 366 and is not inconsistent with the other provisions of the Grid Bill.

C. THE COMMISSION'S DECISION IS CONSISTENT WITH ITS LONG-STANDING APPLICATION OF CHAPTER 366.

LCEC argues that the Commission's previous failure to exercise jurisdiction over Seminole's wholesale rate schedules is irrelevant to this appeal. (Initial Brief at 27-31) In doing so, LCEC cites a line of cases which hold that an

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[8] The analysis by the staff of a Senate committee with respect to 1989 legislation likewise provides no useful information about the Legislature's intent in 1974. (*See* Initial Brief at page 18, footnote 7)

administrative agency's failure to exercise powers which it has clearly been granted by the Legislature does not result in the loss of those powers. Seminole concedes that *if* the Legislature had clearly and unambiguously granted the Commission jurisdiction over its wholesale rate schedules, the Commission's past inactivity would not result in forfeiture of that jurisdiction. When the existence of such jurisdiction is in question, however, the Commission's past inaction is relevant to the proper interpretation of the governing statute.

In a case closely on point, this Court held that, while an agency's long-standing practical interpretation of a statute is not binding on a court, it is a factor to be given great weight when the court is called upon to construe the statute. *City of St. Petersburg v. Carter*, 39 So.2d 804 (Fla. 1949). In that case, the Court quashed an attempt by the Commission's predecessor to assert regulatory jurisdiction over a municipal street railway system which had been in operation without such oversight for many years, stating:

> 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 Public Utilities Commission or any suggestion that such changes should have been so approved.*
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> *Id.* at 806 (emphasis added).

See also United States vs. Morton Salt Co., 338 U.S. 632, 647 (1950) (fact that powers long have been unexercised well may call for close scrutiny as to whether they exist); *Green v. Stuckey's of Fanning Springs, Inc.*, 99 So.2d 867, 868 (Fla. 1957) ("the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction 'except for the most cogent reasons, and unless clearly erroneous'"); *Walker v. State, Dep't of Transp.*, 366 So.2d 96 (Fla. 1st DCA 1979) (Department of Transportation could not abandon a long-standing interpretation of a fee payment statute and cease accepting late payments).

Although this is the first case in which this particular jurisdictional issue has been squarely presented for a Commission determination, the Commission has a twenty-five year history of taking no action to assert jurisdiction over Seminole's wholesale rate schedules, despite a number of logical opportunities to do so.

In 1977, the Commission initiated an investigation for the purpose of implementing Section 366.04(2)(b), including the task of defining the term "rate structure." *In re: General investigation as to rate structures for municipal electric systems and rural electric cooperatives*, 1 F.P.S.C. 83 (1977). In that order, the Commission directed each rural electric cooperative and municipal electric utility to file within 30 days a copy of its current rates and charges for electric service. The retail distribution cooperatives submitted a joint response to the order acknowledging the authority of the Commission over their rate structure, and subsequently filed their individual rate schedules with the Commission. (R.52) Seminole filed a separate response to the order in which it stated that the rate structure concept was not applicable to its wholesale transactions and it therefore would not be filing rates or charges with the Commission. (R.81-82) The Commission never questioned Seminole's interpretation of the statute and did not require Seminole to participate further in the docket.

The rate structure investigation was ultimately concluded by the entry of a Consent Order. *In re: General investigation as to rate structures for municipal electric systems and rural electric cooperatives*, 5 F.P.S.C. 3 (1979). In that order, the Commission stated that the rural electric cooperatives and municipal electric systems consented to the entry of an order which grandfathered their existing rate

structures and established a procedure for submission of proposed rate structure changes pending the adoption of a formal Commission rule.

In late 1985, the Commission again took action to require rate schedule filings by municipal and cooperative utilities. *In re: Filing Requirements for Municipal and Rural Electric Cooperatives,* 85 F.P.S.C. 12:401 (1985). That order included an attachment which listed the specific charges which were on file with the Commission for each jurisdictional municipal utility and rural electric cooperative. The order required each listed utility to file its rate schedule for any charge which it imposed that was not already reflected on the Commission's list. Seminole is notably absent from this list.

The history of these various Commission proceedings is consistent with only one conclusion: the Commission has never interpreted Section 366.04(2)(b) to give it jurisdiction over Seminole's wholesale rate schedules. If the Commission had interpreted the statute in any other manner, there is no reasonable explanation for its failure to have required filings by Seminole at any time during the twenty-five years since the statute was enacted.

Similar to the facts in the *City of St. Petersburg*, the wholesale electric system of Seminole has been operated by Seminole for a period of over twenty-five years and during those years "many changes have been made" in Seminole's

wholesale rate schedules "all without application for approval by the [] Commission or any suggestion that such changes should have been so approved." 39 So.2d at 806. As in that case, the Court should give great weight to the Commission's past regulatory practice in determining whether the Commission has now properly construed the extent of its jurisdiction under Chapter 366.

D. THE COMMISSION'S DECISION DOES NOT LEAVE AN UNINTENDED REGULATORY GAP.

The regulation of electric utilities in the United States is a mixture of federal regulation by the Federal Energy Regulatory Commission and the Rural Utilities Service, state regulation by various public service commissions, and self-governance by many municipal and consumer-owned cooperative utilities. The regulatory scheme varies depending on the nature of the utility (investor-owned, municipal or cooperative), the type of transaction (retail vs. wholesale), and the specific laws of the state in which the utility is located.

There is no issue in this case of federal preemption. The United States Supreme Court has expressly upheld the power of a state to exercise jurisdiction over the wholesale rates of rural electric cooperatives like Seminole. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n,* 461 U.S. 375 (1983). Specifically, the court held that an Arkansas statute which gave its public service

commission jurisdiction over the wholesale rates charged by an Arkansas generation cooperative to its member distribution cooperatives located primarily in Arkansas was not pre-empted by the Federal Power Act, the Rural Electrification Act, or the commerce clause of the U.S. Constitution.[9] *Id.* at 385, 389, 396. The Supreme Court reached this conclusion despite the fact that the rates of rural electric cooperatives are subject to review and approval by the Rural Utilities Service (formerly the Rural Electrification Administration). While cooperatives regulated by Rural Utilities Service (RUS) may enjoy a "freer hand" in ratemaking than their investor-owned counterparts, "it is in these areas that, by their structural nature, the cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members." *Salt River Project Agr. Dist. v. Federal Power Comm'n,* 391 F.2d 470, 473 (D.C.Cir. 1968).

The fact that the Florida Legislature *could* give the Commission authority over any aspect of Seminole's wholesale rates to its members without running

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[9] The Arkansas statute gave the commission general jurisdiction over electric cooperatives to the same extent as over investor-owned public utilities. This included full ratemaking jurisdiction, over both rate levels and rate structure. *In the Matter of Assertion of Jurisdiction, etc.,* Arkansas Public Service Commission, Docket No. U-2992, Order No. 2 at pages 1-2 (1979) (Appendix at 20-21) *affirmed Arkansas Pub. Serv. Comm'n v. Arkansas Elec. Coop. Corp.,* 618 S.W.2d 151, 152 (Ark. 1981); § 73-202.1, Ark. Stats. (1979).

afoul of federal preemption does nothing to address the question of whether the Legislature *has given* the Commission all or any part of that authority. For example, LCEC does not dispute that the Commission does not have rate level jurisdiction, as contrasted with rate structure jurisdiction, over either Seminole or LCEC.[10] Instead, Florida law leaves the setting of rate levels to the discretion of each cooperative's governing board. If one discounts the importance of RUS review and approval, as LCEC does at footnote 11 of its Initial Brief, there clearly is a so-called "regulatory gap" in rate level regulation. But it is an intentional regulatory gap. The Florida Legislature simply has chosen not to interfere with self-governance by the cooperatives on the important issue of setting their rate levels.

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[10] This Court recognized the distinction between rates and rate structure in its decision in *City of Tallahassee v. Mann*, 411 So.2d 162 (Fla. 1981), stating:

> We agree that the commission does not have jurisdiction over a municipal electric utility's rates. However, there is a clear distinction between "rates" and "rate structure" though the two concepts are related. "Rates" refers to the dollar amount charged for a particular service or an established amount of consumption. Rate structure refers to the classification system used in justifying different rates.

Id. at 163 (citations omitted).

The question in this case is not whether the Commission's determination that it lacks rate structure jurisdiction over Seminole's wholesale rate schedule leaves that rate schedule totally unregulated at the state level. Rather, the question is whether the Legislature intended for the Commission to regulate it. As discussed above, the Commission properly concluded that this type of contractual wholesale rate schedule does not involve a matter of rate structure within the meaning of Chapter 366. Any resulting regulatory gap is simply a consequence of giving effect to the Legislature's intent, and is not a justification for construing the statute in some more expansive manner. Indeed, while LCEC argues that the Legislature intended to give the Commission jurisdiction over Seminole's wholesale rate schedules, it points to no legislative history to support its contention.

LCEC also argues that, unless the Court construes Chapter 366 to close this so-called regulatory gap over Seminole's wholesale rate schedule, LCEC will be forced to go to Circuit Court to litigate all issues regarding Rate Schedule SECI 7. That is true. But it is equally true that, regardless of the construction of Section 366.04(2)(b), LCEC would be required to go to Circuit Court to resolve any issue arising under the wholesale power contract that could not be characterized as implicating rate structure, including all issues involving rate levels. There is

nothing perverse about a holding which has the effect of sending all disputes arising under the contract to a single forum.

E. LCEC'S INTERPRETATION OF CHAPTER 366 WOULD SIGNIFICANTLY EXPAND THE COMMISSION'S JURISDICTION.

LCEC's interpretation of Section 366.04(2)(b) would significantly extend the Commission's jurisdiction into areas that it has not heretofore regulated. If a contractual rate schedule negotiated between two utilities creates a rate structure subject to the Commission's jurisdiction, then the Commission would be required to exercise rate structure jurisdiction over every wholesale power contract in which a municipal or cooperative utility is a seller. This would include not only Seminole's sales to its members (at issue in this case), but also sales by any municipal utility or cooperative utility to any investor-owned utility or to any other municipal or cooperative utility. None of these transactions are regulated by the Commission today and none have been regulated at any time in the twenty-five years since Section 366.04(2)(b) was enacted.

Under LCEC's construction of Chapter 366, the only wholesale transactions that would not be subject to rate structure regulation by the Commission are wholesale sales by investor-owned utilities. Those sales are specifically exempted

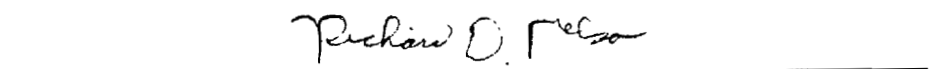
by Section 366.11(1) because they are already regulated by the Federal Energy Regulatory Commission under the Federal Power Act.

The court should be slow to interpret Section 366.04(2)(b) in a way that would bring this entire range of wholesale transactions under Commission jurisdiction for the first time in history. That is particularly true in light of the principle that any doubt about the Commission jurisdiction should be resolved against the exercise of that jurisdiction. *City of Cape Coral, supra.*

CONCLUSION

For all of the foregoing reasons, the Commission's order granting Seminole's motion to dismiss LCEC's complaint for lack of jurisdiction should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of June, 2001.



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I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 29th day of June, 2001, to the following:

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Counsel for Appellee, Seminole Electric Cooperative, Inc., hereby certifies that this Answer Brief is typed in Times New Roman 14-point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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APPENDIX

INDEX TO APPENDIX

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:
>
> ***
>
> (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:
>
> ***
>
> (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.

ARKANSAS
PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE ASSERTION OF JURISDICTION BY THE COMMISSION OVER THE RATES AND CHARGES OF ARKANSAS ELECTRIC COOPERATIVE CORPORATION TO ITS MEMBER COOPERATIVES AND THE ADOPTION OF RULES OF PROCEDURE TO PROCESS APPLICATIONS FOR CHANGES IN SUCH RATES AND CHARGES	)	DOCKET NO. U-2992 ORDER NO. 7

O R D E R

NORTON, Chairman:

Volume 13, pp. 207-212

On the 11th of December, 1978, the Commission gave notice that it would consider whether it had jurisdiction over the rates and charges of the Arkansas Electric Cooperative Corporation for electricity furnished its member cooperatives in the State of Arkansas.

Comments on the issue were received and a public hearing on the matter was held January 22, 1979. Those filing comments were AECC and some of its members. The Commission Staff filed a brief supporting Commission jurisdiction and AECC filed a brief in opposition. The factual setting is relatively simple. AECC is a cooperative organized pursuant to Act 342 of 1937, the members of which are seventeen other cooperatives organized under the same Act. AECC furnishes power to its members, through its own generation facilities and through purchases from other suppliers. AECC also delivers, on an irregular sale or exchange basis, some power to such other suppliers. We presume that some amount of AECC's purchased power originates outside the State and that some of the power it delivers to other suppliers is by them transmitted beyond this State. The arguments raised are exclusively legal, revolving around a few decisions of the United States Supreme Court concerning the Commerce Clause of the Federal Constitution and the Federal Power Act. We have analyzed the issues, evaluated the arguments, studied the cases, and concluded that the questioned jurisdiction exists.

I.

The relevant Arkansas statutes impose upon this Commission jurisdiction over the rates and charges of AECC. Ark. Stat. Ann. §73-201(A) defines the term "corporation" for purposes of utility regulation to include "an electric cooperative corporation providing service for charge or compensation in any area or from any facility for which the Commission has, or hereafter grants, a certificate of convenience and necessity." Such certificates exist for AECC.

Ark. Stat. Ann. §73-202(a) vests this Commission with "sole and exclusive jurisdiction" and authority to determine the rates to be charged by "electric, gas, telephone or sewer public utilities" and defines that term to include corporations "producing, generating, transmitting, delivering or furnishing electricity ... to any other person or corporation for resale or distribution to, or for, the public for compensation ...," which is the business of AECC.

Finally, though perhaps unnecessarily, Ark. Stat. Ann. §73-202.1 provides:

> Electric Cooperative Corporations generating, manufacturing, purchasing, acquiring, transmitting, distributing, selling, furnishing and disposing of electric power and energy in this State pursuant to Act 324 of 1937 as amended [Ark. Stats. (1947) Sections 77-1101 to 77-1136] shall be subject to the general jurisdiction of the Arkansas Public Service Commission in the same manner and to the same extent as now or hereafter, provided by law for the regulation, supervision or control of public utilities, except as provided herein.

The exceptions involve loans from appropriate agencies of the United States and the accounting and fiscal requirements of those agencies.

AECC is an electric cooperative corporation. As mentioned above, AECC's business, indeed its very reason for existence, is the generation, purchase and transmission of electricity for and to its members, seventeen Arkansas electricity distribution cooperatives, who retail the electricity to their members in this State. As a matter of State law, then, AECC's status and activities bring it squarely within the ratemaking authority of this Commission.

II.

An inquiry into State law, however, does not end this matter, for AECC contends its rates are beyond our jurisdiction by dint of superseding (or otherwise conflicting and controlling) Federal law. In support of this contention, AECC cites us three cases which, it says, "have established the principle that jurisdiction over wholesale rates is exclusively a Federal matter." Staff, in its brief, states that the cases cited are generally inapplicable to the situation at hand. We do not totally agree with either position.

The first case relied upon is Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Company, 273 U. S. 83 (1927). The Rhode Island PUC had allowed a Rhode Island electric utility, the Narragansett Company, to increase its rates to a wholesale customer in Massachusetts, the Attleboro Company, for electricity furnished at the state border over connecting transmission lines. The Supreme Court held the rate increase unconstitutional as an attempt by Rhode Island to place a direct burden upon interstate commerce prohibited by the Commerce Clause itself rather than by a Federal statute bolstered by the Supremacy Clause. This reasoning was essential to the result because Congress had been silent upon the subject of interstate wholesale sales of electricity.

That silence continued until 1935 when enactment of the Federal Power Act granted to the Federal Power Commission regulatory jurisdiction over energy wholesaling in interstate commerce. The Supreme Court was called upon to interpret this Act in Federal Power Commission v. Southern California Edison Company, 376 U. S.

205 (1964) (the Colton case), the second decision from which AECC claims support. The City of Colton, California, purchased all of its electricity at wholesale from Edison and resold it at retail to the consumers in the area. Edison sold power only in California, and generated the bulk of its electricity. A small part of the electricity sold by Edison originated in other states and presumably ended up in Colton. The California Public Service Commission had regulated the Edison sales to Colton in the past, but, after the Public Service Commission's approval of a second rate increase, Colton petitioned the Federal Power Commission for a determination of jurisdiction over the sales. The Federal Power Commission decided that it had jurisdiction pursuant to Section 201(b) of the Federal Power Act, 16 U.S.C. §824(b). The Supreme Court, on appeal, determined that the FPC had exclusive jurisdiction over wholesale sales of electricity in interstate commerce. As the Court said, "...201(b) grants the FPC jurisdiction of all sales of electric energy at wholesale in interstate commerce not expressly exempted by the Act itself," 376 U.S. at 210. Thus, where the FPC regulates, the states may not.

The problem with this decision, for our present purposes, is that, at bottom, it merely interprets and applies the Federal Power Act. As Staff so aptly points out, the FPC recognized three years after the Colton case that the Federal Power Act does not apply to cooperatives financed by the Rural Electrification Administration, such as AECC and its members. They are exempt from FPC regulation. Re Dairyland Cooperative, 67 PUR 3d 340 (1967). Most of the rationale for this decision was examined and confirmed in a similar case by the United States Court of Appeals for the District of Columbia Circuit. Salt River Project Agricultural Improvement and Power District v. Federal Power Commission, 129 U. S. App. D. C. 117, 391 F.2d 470 (1968), cert. denied sub nom. Arkansas Valley G & E, Inc. v. Federal Power Commission, 393 U. S. 857 (1968). We, too, defer generally to the wisdom of the agency charged with administering the Federal Power Act on a question of its application. See, e.g., Udall v. Tallman, 380 U. S. 1 (1965). The Colton case, then, is of little or no aid in our present decision.

Yet, it is argued that if we are to follow the FPC's Dairyland reasoning, then we must conclude, as that agency did, that REA cooperatives are "government instrumentalities" and exempt as such from Public Service Commission regulation. As was the Colton case, Dairyland is a decision interpreting the Federal Power Act. That Act contains a provision expressly exempting government instrumentalities from FPC jurisdiction. 16 U.S.C. §824(f). The body of law applicable to this Commission does not. Therefore, the government instrumentality exemption is as inapplicable to the instant problem as the Colton case.

Furthermore, while we respect the judgment of the FPC in its application of the government instrumentality exemption of the Federal Power Act, we do not believe that declaration applies to cooperatives for any and all purposes. Thus, even if a similar government instrumentality exemption could be inferred from our Act 324 of 1935 and 234 of 1967, we would not be compelled to the conclusion that AECC is such an entity. See, however, Alabama Power Company v. Alabama Electric Cooperative, Incorporated, 394 F.2d 672 (5th Cir. 1968).

AECC ultimately directs our attention to Tri-State Generation & Transmission Association, Incorporated v. Public Service Commission of Wyoming, 412 F.2d 115 (10th Cir. 1969). Tri-State was a cooperative whose members were twenty-eight other cooperatives in Colorado, Wyoming, and Nebraska. Its sole function was to purchase power wholesale from the Bureau of Reclamation which was in turn transported over Bureau facilities to Tri-State's members whom it then billed. To defray an REA loan obtain to build transmission lines, Tri-State increased its contract prices to its members; the Wyoming members attempted to file their new contracts with the Wyoming Public Service Commission and were rebuffed. The Commission gave the members to understand that the contracts would not take effect, presumably for ratemaking purposes, until the Commission had revieved them and that, in the absence of a formal application, it had no information or data on which to base a ruling. The Wyoming cooperatives, as a result, did not pay Tri-State's increased rate.[1] Tri-State sought injunctive relief:

> Its case is based upon the proposition that the services it performs are in interstate commerce and the charges made are for transactions in commerce over which the Wyoming Commission has no jurisdiction.

412 F.2d at 117. However, at the appellate level at least, the judicial process refined the issue:

> ... the real question here presented is not whether the Wyoming Commission has acted under unconstitutional statutes but whether its action has interfered with interstate commerce to such an extent as to justify favorable injunctive relief for Tri-State.

412 F.2d at 117. Unlike the District Court, the Court of Appeals determined that Tri-State was in fact engaged in interstate commerce and that the Commission "effectively prevented the Wyoming utilities from paying their contractual obligations to Tri-State," at 119, which at the time of the appellate decision, though not initially, imposed a burden upon interstate commerce sufficient to justify injunctive relief.

That result is not only remarkable on its face, but serves to distinguish Tri-State from the present case. The Circuit Court ruled that the District Court's decision denying relief to the cooperative was correct when made. Then it ruled that, due

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[1] The Tenth Circuit's encapsulation of the facts does not reveal whether the cooperatives ever filed the formal application required by the Public Service Commission. As the dissent in Tri-State is based in part upon the existence of adequate state remedies, it may be gathered that they did not.

to lapse of time," the District Court decision had become wrong by the time of the appellate court decision. "It is indisputable that the present hardship of withholding monies from Tri-State for a period of over two years now constitutes a severe impact upon interstate commerce and that injunctive relief must be immediately given," at 119.

Fortunately, we are not called upon to accept this line of remedial reasoning.[3] It does, however, emphasize the real point of the Tenth Circuit's decision. That court was not faced with the situation we have here. All the Tenth Circuit decided was that the Wyoming Commission's action eventually, "due to lapse of time," became an enjoinable imposition upon interstate commerce. Jurisdictional questions such as ours were not at issue. Furthermore, the problem we now consider does not require us to take steps such as the Wyoming Commission took in Tri-State, and, even if it did, that case plainly states that that state action did not initially require judicial intervention by virtue of burdening commerce. Thus, even if we were to adopt the reasoning of the Court of Appeals in Tri-State, we would not be led to conclude that jurisdiction of this Commission over NECC would unconstitutionally interfere with interstate commerce.

Furthermore, Tri-State is factually distinct from the present case. As its name implies, the cooperative there obviously served members across state lines with power acquired from yet another entity across state lines. The Wyoming Commission effectively prohibited Wyoming cooperatives (at least in the view of the cooperatives) from paying for a cost of transmitting that power. Here NECC not only purchases power but generates it also. In other words, it not only re-wholesales as did Tri-State, but it wholesales as well, and serves its members entirely within this State, quite unlike Tri-State. Also, merely by recognizing jurisdiction over NECC, we do not affect interstate transmission as Wyoming did, nor do we nullify NECC's ability to pass on the cost of purchased power to its members, as Wyoming seemingly did or was perceived by the Court of Appeals to have potentially done.

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[3] The Circuit Court relied upon the Permian Basin Area Rate Cases, 390 U.S. 747 (1968) and its own opinion in Brotherhood of Railroad Trainmen v. Denver & R.G.W.R. Co., [illegible] F.2d 333, cert. denied [illegible] U.S. 1013, as support for its change of the trial court's once-correct decision. In the second case, a statutory change during the pendency of the appeal required a different result, and in the Permian decision, the Supreme Court referred to the passage of time as a justification for undertaking decision of an issue that it customarily would have remanded. This seems to us to be quite different than reliance upon a lapse of time as the reason for making a decision in a certain way. We trust the Court meant to refer to events occurring during the lapse of time as the basis for its decision, at any rate, the case is not persuasively analogous to the present one.

In candor, we should add that, for the reasons stated in the dissent therefrom, we do not think Tri-State was correctly decided. However, that opinion matters little to our determination because, as explained above, that case is not sufficiently like this one to be of authority.

III.

AECC also makes an argument that our assertion of jurisdiction would lead to double regulation, by this agency and the Rural Electrification Administration, and that that result is unlawful. We cannot accept this argument because we do not believe that overlapping regulation, even though inconvenient, is per se illegal. If the exercise of jurisdiction by this Commission were to conflict with statutes or valid regulations administered by the REA, we expect that the Commission would be required to give way; but we see no such conflict, overt or subtle, inevitable or potential, as the relative roles of the two agencies now stand. We do not believe that the REA was intended, as this Commission is, to regulate rates of cooperatives nor do we believe that it does.

Staff's brief draws convincingly upon the legislative history of the Rural Electrification Act, 7 U.S.C. 2901, et seq., to show that ratemaking for cooperatives was not a function entrusted to the REA, but was meant to be left to the states. AECC responds by arguing that the legislative history relates to retail rates. "At that time no one had envisioned G&T [generation and transmission] cooperatives with wholesale rates." Brief of AECC at 3-4. We are not satisfied that that statement is accurate, since it purports to show what members of Congress were not thinking and, as such, faces even greater obstacles than most attempts to prove a negative. We note, too, that the Rural Electrification Act requires state consent as a prerequisite of a loan "for the construction, operation, or enlargement of any generating plant," which indicates to us that cooperative generation was envisioned after all.

Furthermore, the positive legislative testimony and remarks that do exist bear no limitation to retail rates. The Act itself is silent upon the subject of rates. It speaks essentially of loans and, as mentioned above, for some loans it not only contemplates but mandates the exercise of dual authority. Finally, if we were to accept the proposition that Congress did not envision wholesale cooperatives, we could only conclude that Congress could not have meant to give the REA jurisdiction over them. Consequently, there could be no conflict with our jurisdiction.

AECC next refers us to its contract with its members. The REA, it is said, exercises rate jurisdiction by requiring a clause in the contract that requires the seller cooperative to review its rate at least once a year and to revise it if necessary "so that it shall produce revenues which shall be sufficient, but only sufficient ... to meet the cost of the operation and maintenance," purchased power, transmission, debt service and retirement and "to provide for the establishment and maintenance of

reasonable reserves."[3] The selling cooperative is required to give at least thirty and no more than forty-five days' notice of a rate revision to the members and the REA. The contract goes on to state that "no such revision shall be effective unless approved in writing by the Administrator" of the REA.

While we are not convinced that the full sweep of that clause is within the authority of the Administrator,[4] we need not cross that bridge today. This clause in and of itself does not pose a conflict between jurisdictions since the ends sought to be served are in both precisely the same and, given the Administrator's time constraints (if, in fact, the notice "deadline" applies to him, the clause being unspecific on that point), those ends may be better served by complementary regulation.

IV.

We are left, then, with a state statutory command that we assume jurisdiction over NECC's rates and charges and corresponding Congressional silence. In the absence of a square conflict, we must return to Attleboro and be guided by the analysis there.

In deciding whether Rhode Island had the authority to establish a rate for the Narragansett Company's interstate sales to the Attleboro Company, the Court reviewed two earlier cases, Missouri v. Kansas Gas Company, 265 U. S. 298 (1924) and Pennsylvania Gas Company v. Public Service Commission, 252 U. S. 23 (1920). In the latter decision, the Court had held that New York might regulate the price of gas piped into that state from Pennsylvania and sold there at retail by the same company. In Attleboro, the Court characterized this earlier case as holding that while a state may not directly impinge upon interstate commerce it may, when Congress is silent, indirectly regulate such commerce in the local interest; that what New York had covered, though part of an interstate transmission, was essentially local in nature, "and that such 'local service' was not of a character which required general and uniform regulation of rates by Congressional action, even if the local rates might 'affect' the interstate business of the Company. Attleboro, 273 U. S. at 30.

In contrast, the Kansas Gas case involved a company that transported gas from Oklahoma into Kansas and Missouri, selling it there to distribution utilities. The Court concluded that regulation of the transporting company's rate by Missouri was a direct burden upon interstate commerce forbidden by the Commerce Clause itself. The Court reasoned that the sale and delivery of

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[3]This is hardly surprising, since NECC is statutorily bound to a non-profit status.

[4]We have some doubt that the purview of his office extends beyond an authority to assure that the rate produces revenue sufficient to repay the REA's loan.

Oklahoma gas in Missouri was "an inseparable part of a transaction in interstate commerce -- not local, but essentially national in character ...", Kansas Gas, 265 U. S. at 309; "Where the transportation, sale and delivery constitutes an unbroken chain, fundamentally interstate from beginning to end," Attleboro at 89, the transaction admits only of uniform national regulation.

The Attleboro Court summarized the central thrust of the decision as:

> The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character ...

273 U. S. at 90, and explained that, if Rhode Island could set a rate for the Narragansett Company to protect customers in that state, Massachusetts could do the converse to protect the Attleboro Company's customers. "Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either state, but is essentially national in character," at 90.

Applying this train of reasoning to the instant case, it seems to us that the rates and charges of AECC that could effectively be regulated by this Commission are for transactions essentially local in character.[5] Unlike Kansas Gas, which sold in an open interstate market, AECC exists to serve its members. Its transactions with them do not constitute "an unbroken chain, fundamentally interstate from beginning to end." Those transactions begin and end here in Arkansas. This service is hardly "of the character which require(s) general and uniform regulation of rates by Congressional action." Unlike the Narragansett Company, AECC does not serve customers in other states whose authorities might retaliate, to the detriment of interstate commerce. Unlike Rhode Island, this Commission does not seek to regulate, nor to we read our statutes as requiring us to regulate, interstate transactions of AECC, if there be any. If our regulation of rates charged to local customers has an "effect" upon interstate commerce, it can only be incidental, given a continuation of the present circumstances and policies of the company, which there is no reason not to expect. (That issue, however, can properly be dealt with only when and if it arises.) Nor does it matter what AECC's transactions with its members may be characterized as wholesale, for, as the Court said in Attleboro, the test "is not the character of the general business ... but whether the particular business which is regulated is essentially local or national in character." The particular business this Commission

[5] This Commission would not attempt to regulate the rate at which AECC purchases power in interstate commerce and that rate, of course, must act as a base for the price at which it resells that power to its members.

must regulate, between AECC and its members, is decidedly local, having its paramount impacts and consequences in Arkansas and having little or no relation to any other place.

As a result we must obey the direction of our statutes. Henceforth, AECC should regard itself as subject to the jurisdiction of this Commission and within thirty days shall file with the Secretary its schedules and tariffs for approval pursuant to applicable law.

BY ORDER OF THE COMMISSION

This 2nd day of November, 1979.

H. H. Morton, Jr., Chairman

Robert C. Downie, Commissioner

John C. Pickett, Commissioner

Cheryl Dyke
Secretary to Commission