

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for declaratory statement or other )  
relief regarding the expiration of the Vero Beach ) DOCKET NO. 140142-EM  
electric service franchise agreement, by the Board )  
of County Commissioners, Indian River ) FILED: AUGUST 22, 2014  
County, Florida. )  
\_\_\_\_\_ )

**THE ORLANDO UTILITIES COMMISSION’S MOTION TO DISMISS INDIAN RIVER  
COUNTY’S PETITION FOR DECLARATORY STATEMENT AND OTHER RELIEF**

The Orlando Utilities Commission (“OUC”), pursuant to Rule 28-106.204, Florida Administrative Code (“F.A.C.”) and Order No. PSC-14-0425-PCO-EM granting OUC’s request for leave to file supplemental pleadings on or before August 22, 2014, hereby files this motion to dismiss (“Motion to Dismiss”) the “Petition for Declaratory Statement and Such Other Relief as May be Required” (the “Petition”) filed by the Board of County Commissioners, Indian River County (the “County”) with the Florida Public Service Commission (“Commission”) on July 21, 2014.

**SUMMARY OF ARGUMENTS**

The Commission should dismiss the Petition because the declaratory statements set forth in the Petition are improper and do not comply with Section 120.565, Florida Statutes, in that the Petition poses hypothetical fact scenarios rather than alleging an actual present and practical need for the requested declaratory statements, and does not allege any present controversy at issue. The Petition invites the Commission to opine not only on hypothetical jurisdictional questions, but also on contractual matters that affect the rights of the County and the City of Vero Beach (“City”), as well as third parties such as OUC. The Petition attempts to use the Petition as a means to force parties to a standing territorial agreement to negotiate changes

without allowing them to avail themselves of any remedies provided within their existing agreement.

If the Commission answers the declaratory statements in the Petition affirmatively, these statements would seriously impact entities such as OUC that invest in, operate and maintain the electric grid systems. A declaratory statement indicating that a local franchise dispute could mandate the transfer of transmission facilities, transmission service obligations and retail customers without any recourse or oversight by the Commission and without regard to an existing territorial agreement would be detrimental. It would lead to uncertainty in resource planning for the affected utilities, and could lead to the degradation or interruption of service over the integrated grid system in the State of Florida. OUC believes that any declaratory statement leading to such a conclusion would cause serious issues for transmission and generation providers in terms of planning and investing in service infrastructure and, additionally, may invite additional federal oversight at the expense of the Commission's authority. OUC supports The City of Vero Beach's Motion to Dismiss and Response in Opposition to Indian River County's Petition for Declaratory Statement and Other Relief filed in these proceedings ("Vero Motion"), and in addition, states the following in support of this Motion.

### **BACKGROUND**

OUC was created in 1923 by a Special Act of the Florida Legislature (as subsequently amended from time to time, the "Act") as a statutory utility commission within the State of Florida. OUC has full authority over the management and control of its electric generation, transmission and distribution system and has the legislative authority to offer services in Orange County, Florida and portions of Osceola County, Florida. The Act allows OUC to undertake,

among other things, the construction, operation, and maintenance of electric generation, transmission and distribution systems, and water production, transmission and distribution systems in order to meet the requirements of its customers. As the owner of transmission facilities, OUC is subject to numerous state and federal regulations regarding the installation, operation, maintenance of electric generation and transmission facilities.

OUC provides service to retail electric customers within the City of Orlando and parts of Orange and Osceola Counties. In addition, OUC provides wholesale electric service to several municipal utilities inside and outside of Orange and Osceola Counties through interlocal agreements and other long-term contractual arrangements<sup>1</sup>. In order to facilitate such service offerings, OUC entered into a territorial agreement in 1995 with Duke Energy (f.k.a. Progress Energy Florida and Florida Power Corporation).<sup>2</sup> The City of Vero Beach is one of OUC's wholesale customers and OUC entered into a 20-year Agreement for Purchase and Sale of Electric Energy and Capacity, Gas Transportation Capacity and Asset Management Services with the City on April 21, 2008, pursuant to which OUC is entitled to (among other things) supply all of the power supply needed by the City, over and above what the City provides to itself through its own existing resources. The electric load that OUC's service to the City covers is both the load within the City and outside the City's boundaries, including that lying within its franchised area located in Indian River County. OUC has made long-term investments, resource planning decisions and contractual commitments based in part on its 20-year commitment to serve the City's load, both inside and outside of the City's boundaries. The Petition raises numerous hypothetical questions that impact the OUC's rights under its agreement with the City

---

<sup>1</sup> City of St. Cloud, Florida; City of Lake Worth, Florida; City of Bartow, Florida; City of Vero Beach, Florida; and, City of Winter Park, Florida.

<sup>2</sup> Territorial Agreement Between Orlando Utilities Commission and Florida Power Corporation Orange County, dated February 9, 1995.

as well as impacting operational decisions by OUC and other municipal and investor-owned utilities.

### **LEGAL BACKGROUND**

In addition to the points raised about Commission jurisdiction over territorial agreements under Sections of Chapter 366, Florida Statutes, and cited in the Vero Motion, the declaratory statements requested in the Petition may also implicate the Federal Power Act (“FPA”) if answered in the affirmative. The FPA grants the Federal Energy Regulatory Commission (“FERC”) certain jurisdiction over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. 16 U.S.C. § 824b. The FPA also gives FERC broad authority to regulate public utilities. A “public utility” is defined as “...any person who owns or operates facilities subject to the jurisdiction of the Commission . . .” 16 U.S.C. § 824(e). In addition, 16 U.S.C. § 824b(a)(1) gives the FERC approval authority over the disposition of certain transmission assets by a public utility where the value of such assets is at or above \$10,000,000<sup>3</sup>. While municipal utilities are largely exempt from regulation by FERC under the FPA<sup>4</sup>, such exemption does not pertain to, among other things, standards for the reliable operation of the Bulk Power System. 18 CFR § 39.2(a); 18 CFR pt. 40.

The Petition has requested declaratory statements that, if answered in the affirmative, would apply not only to the City and the County, but potentially to investor owned utilities and other

---

<sup>3</sup> 16 U.S.C. § 824b(a)(1) provides that “(1) No public utility shall, without first having secured an order of the Commission authorizing it to do so - (A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$10,000,000; ...”

<sup>4</sup> See 16 U.S.C. § 824f, which provides that “... No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.”

utilities that own and operate electric distribution and transmission infrastructure subject to local franchise agreements. Such affirmative declarations could lead to the conclusion that loss of underlying contractual rights (such as a franchise agreement) or property rights (such as easements or rights-of-way) will allow for the removal of critical infrastructure within the bulk power system of the state or force the transfer of ownership to any entity determined by the underlying land owner to be appropriate. For example, see the Petition at pages 30-32 where the County asks the Commission to issue the following declaratory statements:

- c. The Board will not become a “public utility” as that term is defined in Section 366.02(1), Florida Statutes, or an “electric utility” as that term is defined in Section 366.02 (2), Florida Statutes, if the Board assumes ownership of the Electric facilities and the Board leases or otherwise conveys the Electric Facilities to FPL or some other provider of electric service (e.g., a public utility, another municipality, or a cooperative) that would supply electric service through the Electric Facilities and/or other necessary equipment to customers within the geographic area of the Franchise.
- d. Once the Franchise expires, the COVB-FPL territorial agreements and boundaries approved by the PSC will become invalid as void or voidable at least with respect to the Franchise Area.
- e. Once the Franchise expires and the territorial agreements and boundaries approved by the PSC between COVB and FPL become invalid in full or in part (at least with respect to the Franchise Area), if the Board chooses to supply electric service in the geographic area described by the Franchise, there no limitations in Chapter 366 that would preclude or limit the Board’s ability to enter into a territorial agreement with FPL regarding their respective service areas within the county.
- h. Once the Franchise expires and if the territorial agreements and boundaries approved by the PSC between COVB and FPL remain valid, the PSC’s orders regarding the territorial agreements and boundaries do not limit or otherwise preclude the Board from granting an exclusive franchise to FPL or a successor electric supplier that would authorize the supply electric service to customers within the geographic area of the Franchise and for that supplier to serve customer.
- m. The PSC does not have any jurisdiction with respect to the Electric Facilities once the franchise has expired. There is no limitation or other restriction under Chapter 366 impacting a successor electric service provider from buying, leasing, or

otherwise lawfully seeking to acquire the Electric Facilities in the Franchise Area from COVB.

The issues addressed in the Petition have more far-reaching implications than just for the County and the City. The declaratory statements requested are broad and if answered affirmatively would lead to the conclusion that an underlying land owner could seriously impact the integrity of the bulk power supply system simply by choosing to terminate the underlying contractual rights (in the case of a franchise) or property rights (in the case of easements or rights-of-way) that allow the transmission provider to locate and install the equipment to provide service, all without regard to pre-approved territorial agreements, regulatory requirements or standards for grid operation. Such conclusions could lead to instability in the operation of the bulk power supply system and could invite FERC to try and expand its jurisdiction.

### **MOTION TO DISMISS**

A motion to dismiss requires the Commission to consider whether the facts alleged in the challenged petition state a cause of action. The standard the Commission must apply is whether the petition, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, states a cause of action upon which relief may be granted based on the pleading and any attached documents. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); see also Posigian v. American Reliance Ins. Co., 549 So. 2d 751, 754 (Fla. 3d DCA 1989). The Petition fails to state a proper basis under Chapter 120, Florida Statutes, upon which the declaratory statements requested by the County may be granted. The Petition therefore must be dismissed. Section 120.565, Florida Statutes, provides the following basis upon which a petition for declaratory statement may be granted:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

In addition to the basic requirements of Chapter 120, a party seeking a declaratory statement must show an "actual present and practical need" and a "present controversy" as the basis for the requested declaratory statement. Sutton v. Dep't of Env'tl. Protection, 654 So. 2d 1047, 1048 (Fla. 5th DCA 1995). A declaratory statement must not be issued if it amounts to an advisory opinion based on the possibility of legal injury from contingent, hypothetical "state of facts which have not arisen". In Re: Request for Declaratory Statement by Tampa Electric Company Regarding Territorial Dispute with City of Bartow in Polk County, Docket No. 031017-EU, Order No. PSC-04-0063-FOF-EU (Jan. 22, 2004), 2004 WL 239416 at 4 (citing Santa Rosa County v. Administration Comm'n, 661 So. 2d 1190, 1192-93 (Fla. 1995), (quoting Williams v. Howard, 329 So. 2d 277, 283 (Fla. 1976)).

As is adequately discussed in the Vero Motion at pages 42-53, the requested declarations in paragraphs 7a-7i, 7k, 7l, 7m, 57a-57i, 57k, 57l, and 57m are based on circumstances that have not occurred or that are purely hypothetical. Further, the far-reaching implications of the requested declarations make the academic exercise of the type requested in the Petition improper in an action for declaratory statements. As such, the Commission must dismiss the Petition.

### **RELIEF REQUESTED**

The Commission should dismiss the Petition as a matter of law since it requests relief in the form of a declaratory statement, but states no basis upon which the Commission may legitimately issue any such statements.

**WHEREFORE**, for the reasons set forth above, the Orlando Utilities Commission respectfully asks the Commission to dismiss the Petition for Declaratory Statement filed in this docket by Indian River County.

Respectfully submitted this 22<sup>nd</sup> day of August, 2014.

/s/ W. CHRISTOPHER BROWDER

W. Christopher Browder

Florida Bar No. 883212

cbrowder@ouc.com

Orlando Utilities Commission

100 W. Anderson Street

Orlando, Florida 32801

(407) 434-2167 Telephone

(407) 434-2220 Facsimile

Attorney for the Orlando Utilities Commission



## CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Motion to Intervene and Motion for Leave to File Supplemental Pleadings has been furnished by electronic mail and U.S. Mail this 22<sup>nd</sup> day of August, 2014 to the following:

Kathryn Cowdery  
Florida Public Service Commission  
Division of Legal Services  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399  
[kcowdery@psc.state.fl.us](mailto:kcowdery@psc.state.fl.us)

Robert Scheffel Wright  
John T. LaVia, III  
Gardner, Bist, Wiener, Wadsworth,

Bowden, Bush, Dee, LaVia & Wright, P.A.  
1300 Thomaswood Dr.  
Tallahassee, Florida 32308  
[schef@gblegal.com](mailto:schef@gblegal.com)  
[jlavia@gblegal.com](mailto:jlavia@gblegal.com)

Wayne R. Coment, City Attorney  
City of Vero Beach  
P.O. Box 1389  
Vero Beach, Florida 32961-1389  
[wcoment@covb.org](mailto:wcoment@covb.org)

Ausley Law Firm  
James D. Beasley  
P.O. Box 391  
Tallahassee, FL 32302  
[jbeasley@ausley.com](mailto:jbeasley@ausley.com)

Florida Electric Cooperatives  
Association, Inc.  
William B. Willingham/Michelle Hershel  
2916 Apalachee Parkway  
Tallahassee, FL 32301  
[fecabill@embarqmail.com](mailto:fecabill@embarqmail.com)

Florida Power & Light Company  
Kenneth Hoffman  
215 South Monroe Street, Suite 810

Dylan Reingold, Esq.  
County Attorney's Office  
1801 27th St.  
Vero Beach, Florida 32960-3388  
[dreingold@ircgov.com](mailto:dreingold@ircgov.com)

Floyd R. Self, B.C.S.  
Gonzalez Saggio & Harlan LLP  
3411 Capital Medical Blvd.  
Tallahassee, Florida 32308  
[floyd\\_self@gshllp.com](mailto:floyd_self@gshllp.com)

Board of County Commissioners,  
Indian River County  
Administration Bldg. A  
1801 27<sup>th</sup> Street  
Vero Beach, FL 32960-3365

Duke Energy  
Matthew R. Bernier  
106 East College Avenue  
Tallahassee, FL 32301  
[Matthew.bernier@duke-energy.com](mailto:Matthew.bernier@duke-energy.com)

Florida Municipal Electric Association, Inc.  
Barry J. Moline  
P.O. Box 10114  
Tallahassee, FL 32302-2114  
[bmoline@publicpower.com](mailto:bmoline@publicpower.com)

Kissimmee Utility Authority  
Arthur J. "Grant" Lacerte, Jr.  
P.O. Box 423219

Tallahassee, FL 32301-1858  
[Ken.Hoffman@fpl.com](mailto:Ken.Hoffman@fpl.com)

Florida Power & Light Company  
Jessica Cano/Patrick Bryan  
700 Universe Blvd.  
Juno Beach, FL 33408  
[Jessica.Cano@fpl.com](mailto:Jessica.Cano@fpl.com)

J. R. Kelly, Esquire, Public Counsel  
Office of the Public Counsel  
c/o The Florida Legislature  
111 West Madison Street, Room 812  
Tallahassee, FL 32399-1400  
[Kelly.jr@leg.state.fl.us](mailto:Kelly.jr@leg.state.fl.us)

Kissimmee, FL 34742-3219  
[glacerte@kua.com](mailto:glacerte@kua.com)

Tampa Electric Company  
Regulatory Affairs  
P.O. Box 111  
Tampa, FL 33602  
[regdept@tecoenergy.com](mailto:regdept@tecoenergy.com)

/s/ W. CHRISTOPHER BROWDER, ESQUIRE  
Attorney