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Carlotta S. Stauffer, Commission Clerk
Room 152, Gunter Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 140142-EM
Board of County Commissioners, Indian River County, Florida
Consolidated Response and Motion for Reconsideration

Dear Ms. Stauffer:

On behalf of the Board of County Commissioners, Indian River County, Florida, attached for filing in the above referenced docket is an electronic copy of the Board's Consolidated Response and Objections to The Motions to Dismiss and Other Intervenor and Amicus Curiae Substantive Responses in Opposition to the Board's Petition For Declaratory Statement, and the Board's Request For Reconsideration Of Order No. PSC-14-0423. If there are any questions regarding this matter, please contact me at 702-0090.

Thank you for your assistance with this filing.

Sincerely yours,

s/ Floyd R. Self

Floyd R. Self, B.C.S.
Counsel for Indian River County

FRS/bhs
Enclosures
cc: Dylan Reingold, Esq., County Attorney
Certificate of Service List Attached

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement or other relief regarding the expiration of the Vero Beach electric service franchise agreement, by the Board of County Commissioners, Indian River County, Florida.	)))))))	Docket No.: 140142-EM Filed: August 29, 2014

THE BOARD OF COUNTY COMMISSIONERS, INDIAN RIVER COUNTY, CONSOLIDATED RESPONSE AND OBJECTIONS TO THE MOTIONS TO DISMISS AND OTHER INTERVENOR AND AMICUS CURIAE SUBSTANTIVE RESPONSES IN OPPOSITION TO THE BOARD'S PETITION FOR DECLARATORY STATEMENT, AND THE BOARD'S REQUEST FOR RECONSIDERATION OF ORDER NO. PSC-14-0423

The Board of County Commissioners, Indian River County, Florida (the "Board"), by and through its undersigned counsel, pursuant to Rules 25-22.0376, 28-105.027, 28-106.204 and 28-106.205(1), Florida Administrative Code, Order No. PSC-14-0425-PCO-EM (August 19, 2014), and Order No. PSC-14-0425-PCO-EM (August 19, 2014), hereby files with the Florida Public Service Commission ("PSC" or "Commission") the Board's Consolidated Response and Objections to The Motions to Dismiss and Other Intervenor and Amicus Curiae Substantive Responses in Opposition to the Board's Petition For Declaratory Statement, and the Board's Request For Reconsideration Of Order No. PSC-14-0423 (the "Board Response"). **The PSC and the Board exercise concurrent responsibilities with respect to the provision of electric service within Indian River County, Florida** (the "County"), responsibilities that must be concurrently executed in cooperation with and in respect to the separate and distinct jurisdictional authority separately conferred by the Constitution of Florida and the Legislature on

the PSC, the Board, and other designated governmental agencies that share authority over electric service. The Board agrees that the PSC has been granted by the Legislature exclusive and superior jurisdiction with respect to those matters expressly reserved to the PSC in Chapter 366, such as territorial agreements. But the PSC's authority does not exist in a vacuum nor is it unlimited. The Board's Petition seeks to understand the scope and effect of the PSC's exclusive jurisdiction as it relates to and interacts with the authority and exclusive jurisdiction granted by the Florida Constitution and the Legislature to the Board for those matters reserved to the Board, such as the granting of a franchise. The motions to dismiss and the various responses and objections tend to over-simplify, overstate, misinterpret, minimize, and otherwise incorrectly apply the present facts to the applicable Florida law on territorial agreements and franchises which must be read together to give each their full effect. The Board asked its fourteen questions in order to explore, as fully as possible, how the PSC and the Board need to interact in dealing with a very unique set of circumstances that pertain to what the Board should or must do given the upcoming expiration of the City of Vero Beach ("COVB") electric service franchise (the "Franchise"). The Petition is not based upon speculation or some hypothetical situation – the exclusive electric service Franchise for certain unincorporated geographic areas of the County (the "Franchise Area"), freely bargained for and without reservation accepted by COVB on March 5, 1987, shall expire on March 5, 2017, and the Board shall not give COVB a new franchise for electric service. While this expiration is in the future, it is a real, specific, and legal event that shall occur. The questions posed by the Board must be answered now because waiting until the Franchise has expired could have significant adverse consequences. The Petition meets all the requirements for a declaratory statement, and the motions to dismiss should be denied and the other responses and objections should be denied or otherwise rejected. In addition, the Board

also seeks reconsideration of Order No. PSC-14-0423 that prematurely granted intervention to the Orlando Utilities Commission ("OUC"). Order No. PSC-14-0423 should be reconsidered and OUC's intervention as a party denied. However the Board has no objection to OUC's substantive response to the Petition being treated as an amicus curiae brief consistent with the other non-parties granted such status. In support of this Board Response and its request for reconsideration, the Board states as follows:

I. Introduction

1. On July 21, 2014, the Board filed with the PSC its request for a declaration regarding the rights, duties, and responsibilities of the Board once the electric service Franchise granted by the Board to COVB for certain unincorporated areas of the County expires on March 5, 2017, and how electric service may thereafter be provided to those County customers, including offices and departments of the Board. In the alternative, or to the extent necessary, the Board also suggested that if appropriate the PSC on its own initiative may want to initiate such proceedings as are authorized within the PSC's jurisdiction to address the territorial agreements, service boundaries, and electric grid reliability responsibilities so as to ensure the continued and uninterrupted supply of electric service throughout the County.

2. In response to the Petition, on July 23, 2014, the PSC issued its formal notice, which was published in the Florida Administrative Register on July 24, 2014. Pursuant to notice, three entities subsequently petitioned this Commission for intervention, which the Prehearing Office granted in separate orders: COVB's petition was filed on July 29, 2014, and party status was granted by Order No. 14-0409-PCO-EM (August 12, 2014); Florida Power and Light ("FPL") timely filed its petition on August 14, 2014, which was approved by Order No. 14-0424-

PCO-EM (August 19, 2014); and the Orlando Utilities Commission ("OUC") timely filed its petition on August 14, 2014, which was approved by Order No. 14-0423-PCO-EM (August 19, 2014). As will be discussed further below, while the Board has no objection to COVB and FPL being granted party status to this docket, the Board does have an objection to OUC being accorded party status which is addressed in Section V below.

3. In addition to these three intervenors, on August 14, 2014, four additional entities moved for permission for each to submit an amicus curiae brief, a memorandum of law, or other such responsive comments. While the rules do not contemplate the submission of amicus curiae filings, the Board offered no objection to these entities being permitted to file their comments with the Commission each as an amicus. By separate orders issued by the Prehearing Officer on August 19, 2014, these amici requests were also approved: Duke Energy Florida ("Duke"), Order No. 14-0421-PCO-EM; Florida Electric Cooperatives Association, Inc. ("FECA"), Order No. 14-0422-PCO-EM; Florida Municipal Electric Association, Inc. ("FMEA"), Order No. 14-0419-PCO-EM; and Tampa Electric Company ("TECO"), Order No. 14-0420-PCO-EM.

4. Hereinafter, for convenience, one or more of the above identified intervenors and/or amici entities shall be referred to as a "filer" or "filers" and the term "party" shall be reserved for an intervenor granted party status.

5. The Commission's formal notice of the Board's Petition specified that motions for intervention or petitions for administrative hearing were to be filed within 21 days of publication, or on or before August 14, 2014. No one filed a petition for administrative hearing. On August 14, COVB timely filed a Motion To Dismiss and Response In Opposition ("COVB Response"). Also timely on August 14th, Duke filed an amicus brief in support of the City of Vero Beach, FECA filed an amicus memorandum of law, and TECO filed its amicus comments.

Finally, on August 14th, in OUC's motion for intervention and FMEA's motion for amicus, both sought permission to submit their substantive comments at a later date; FPL did not make any specific assertion regarding the submission of a substantive filing.

6. In order to avoid multiple further responses to the Petition being filed on different dates, and then separate responses by the Board, the Board, intervenors, and amicus filers promptly agreed to an unopposed motion for the setting of filing dates ("Scheduling Motion") whereby FMEA, FPL, and OUC would file any substantive responses by 5:00 p.m., Friday, August 22, 2014, and the Board would file its single reply to all substantive responses made by all of the intervenors and amici curiae, including the motion to dismiss, by 5:00 p.m., Friday, August 29, 2014. The Prehearing Officer approved the Scheduling Motion on August 19, 2014, by Order No. PSC-14-0425-PCO-EM ("Scheduling Order").

7. Pursuant to the Scheduling Order, on August 22, 2014, OUC filed its motion to dismiss the Petition, FMEA filed its amicus memorandum of law, and FPL filed its response to the Petition.

8. On the basis of the filing schedule set forth in the Scheduling Order, the Board now submits its consolidated response to all of the motions to dismiss and the various responses, briefs, comments, and memoranda of law that have been submitted in this docket by the filers on or before August 22, 2014. Collectively, these various filings shall hereinafter be referred to as the "Petition Responses." As will be demonstrated below, the Petition sets forth valid and appropriate matters for a declaratory statement regarding the conduct and actions of the Board, not third parties. Thus, the two motions to dismiss should be denied and the Petition Responses should be denied or rejected.

II. General Response to the Motions to Dismiss & the Petition Responses

9. Those filers who addressed the legal standards for a declaratory statement acknowledge that the facts presented in the Petition are to be accepted as true. Indeed, no one disagreed with the facts as presented in the Petition. Several of the filers restated or provided further details regarding some of the past events, especially COVB which elaborated on the Commission's orders approving the territorial orders between COVB and FPL. COVB also provided some further detail and speculation regarding when COVB began providing electric service outside its city limits. Again, there is no disagreement between the Board and the filers regarding the existence of the territorial agreements, the PSC's orders approving them, or the fact that today COVB serves more customers outside its city limits than within. While COVB asserts that the real issue here is lower electric rates,[1] the issue is more complex given COVB's excessive and unprecedented subsidization of general government by its electric ratepayers, most of whom are not City residents and who receive no City benefits, and COVB's failure to faithfully fulfill its obligations under section 366.04(7), Florida Statutes.

10. As for the standard of review for a declaratory statement, the Board does not disagree with the basic legal standards cited in the COVB and OUC motions to dismiss.[2] While some of the Board's substantive responses to these arguments are addressed in later sections, the following paragraphs demonstrate how the requested declaratory statement fully complies with Florida law.

11. As COVB and OUC point out, there must be a demonstration of "an 'actual present need' for the requested declaratory statement, and that the declaration addresses 'a

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[1] COVB Response, at 2

[2] The OUC Motion to Dismiss essentially adopts the COVB Motion to Dismiss.

present controversy.'"[3] The Franchise is going to expire on March 5, 2017. That is a real fact that presents a present controversy since the issues associated with transitioning to a new electric service provider do not occur overnight but require years of planning and preparation. This is in part why the Franchise provided a five-year notice period in the event the Franchise would not be renewed. The Board did not seek the PSC's declaration sooner because FPL and COVB announced their agreement for FPL to purchase the entire utility, which is the preferred resolution to this matter. However, as is discussed in paragraph 12 below, when it became clear that there were problems with the sale occurring, the Board felt compelled to seek its declaration from the PSC so that it could properly prepare for the expiration of the Franchise. As this Commission is well aware from the City of Winter Park electric service franchise that expired in 2001 and which is discussed further below, transitioning to a new utility takes time and work. Given the four years it took Winter Park to get its new electric utility up and operational, seeking this declaration two-and-one-half years before the Franchise expires reflects a genuine present and practical need for the PSC's guidance. The fact that COVB felt compelled to intervene and file a 55 page response should only further demonstrate a present controversy.

12. OUC somewhat more generally argues that the declaratory statement is "based on circumstances that have not occurred or that are purely hypothetical."[4] COVB specifically argues that since the sale of the COVB utility to FPL is not dead, that it is speculative and without a present need for the Commission to hear the Board's questions.[5] However, at a different point in COVB's own statement of the facts, COVB admits just opposite:

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[3] COVB Response, at 15, quoting from *Sutton v. Dep't of Envtl. Protection*, 654 So. 2d 1047, 1048 (Fla. 5th DCA 1995).
[4] OUC Motion to Dismiss, at 7.
[5] COVB Response, at 15-16.

> As events have unfolded, at the present time there are doubts as to whether the proposed sale can be consummated, because it appears that a specific condition precedent to closing the sale cannot be fulfilled. The City and FPL, however, are continuing their discussions to determine whether another path to closing the sale can be found.[6]

If a condition precedent cannot be met, then the contract as presently written cannot be fulfilled. Thus, it is not speculative for the Board to seek to address the situation where the sale will not occur because by COVB's own admission the present contract cannot be closed. The Board certainly supports and encourages any and all efforts by FPL and COVB to find "another path," but at this point in time, it is that alternative path that is speculative, and the absence of a workable contract only reinforces the urgency for the Commission to move forward with the Petition.

13. Another failed argument made by COVB is that the Petition seeks to determine the conduct of another person.[7] While eleven of the fourteen requested declarations may reference COVB by name, a complete reading of all fourteen questions establishes that those questions seek answers for what the Board should or should not do or they ask necessary prefatory legal questions. For example, Question "d" in Paragraph 7 of the Petition on page 4 basically asks, what is the legal status of the COVB-FPL territorial agreements once the franchise expires? This question does not seek to determine the conduct of COVB or FPL – rather it is asking whether the agreements or boundaries become invalid by operation of law once the Franchise expires. Whether the answer is yes or no, that answer would be true whether the Board asked the question or not. The Commission providing its legal statement on that question does not seek to determine, control, or otherwise require any conduct by COVB or FPL. The only other Petition question that does not expressly ask about the Board is Question "m" which

[6] COVB Response, at 10.
[7] COVB Response, at 18

seeks to understand the PSC's jurisdiction, if any, with respect to the electric facilities in the Franchise Area once the Franchise expires. Again, this is an informational legal question that is not determining the conduct of COVB or any other entity.

14. As far as the other questions posed by the Board in Paragraph 7 of its Petition, each and every one of the rest of them specifically ask about what the Board can or should do: Questions "a," "b," and "c" ask about the Board's status as a utility under different alternatives; Questions "e," "f," "g," and "h" ask whether there are limitations on the Board's ability to enter into territorial agreements, providing electric service, or granting a franchise to a successor electric utility; Question "i" seeks information about the Board's responsibilities, if any, regarding electric reliability issues; Question "j" asks whether section 366.04(7), Florida Statutes, has any impact on the Board's duties and responsibilities; Question "k" seeks to understand the Board's responsibilities, if any, for any of COVB's contracts; Question "l" seeks to understand the Board's duties if it grants a temporary franchise to COVB until a successor electric utility is in place; and Question "n" asks whether the PSC has the legal authority to somehow supersede the Board's decision to terminate the Franchise. A plain reading of all of the questions establishes that none of the Board's questions ask the Commission to direct, instruct, or control COVB, FPL, OUC, or any other entity.

15. The remaining legal arguments in the motions to dismiss or the Petition Responses revolve around two core issues – the PSC's territorial orders and the Franchise. As will be demonstrated in the following sections, territorial agreements exist in harmony with franchise agreements. Each plays a valuable and important role. The Board is not seeking to challenge or undermine the PSC's exclusive and superior authority with respect to territorial agreements. But, the PSC does not have a regulatory monopoly over electric utilities. The

Board possesses its own exclusive and superior authority with respect to franchises, just as DEP or FERC or other agencies or units of government may have regulatory authority over discrete parts of a utility's operation. The Board's exercise of its franchise authority is not destructive of or antagonistic to the PSC's authority over territorial agreements. Given the separate duties and responsibilities, it is clear that the PSC and the Board share concurrent authority, as distinguished from concurrent jurisdiction, regarding the supplying of electricity in the County.

III. The Board Respects the PSC's Authority Over Territorial Agreements

16. The Board is not seeking to terminate the territorial agreements between FPL and COVB nor otherwise to challenge the PSC's authority in this area. The Board agrees that the Legislature has conferred upon the PSC in Section 366.04(1), Florida Statutes, "exclusive and superior" jurisdiction over counties and other governmental entities for those matters enumerated in Chapter 366. Specifically, the statutes establish that the PSC approves territorial agreements or resolves territorial disputes that are initiated by the affected "electric utilities" or the PSC. In respect of this statutory grant, the Board did not petition the PSC to terminate or amend the orders. Rather, the Board asked a series of questions regarding the consequences of the expiration of the Franchise on the PSC's territorial orders vis a vis what the Board may or may not do. Some of those questions assume, for purposes of the inquiry, that the territorial orders may be invalid. But the Board did not ask the PSC to void or invalidate the orders, and the presentation of the question was worded only so the Board could more fully explore and understand the consequences of the Franchise expiration.

17. For example, Question "d" in paragraph 7 states:

> Once the Franchise expires, what will be the legal status of the COVB-FPL territorial agreements and boundaries approved by the PSC? Will 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)?

This question reflects one of the key issues in this matter: what is the effect of the expiration of the Franchise on the territorial agreements? The question does not affirmatively request that the PSC do anything about the orders. Rather, it only seeks the PSC's legal option as to the *effect*, if any, of the expiration of the Franchise on the territorial orders.

18. Similarly, the next two questions in paragraph 7, Questions "e" and "f," both start with the same predicate: "Once the Franchise expires and if 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), . . ." By starting with a known fact, the Franchise expiring, the Board then asks two questions based upon an assumption that the territorial agreements are invalid. Again, this is not the Board asking the PSC to invalidate the orders approving the agreements. Rather, the Board posits that ***if*** the agreements were invalid what can the Board do with respect to entering into a new territorial agreement with FPL if the Board were to become the electric utility (Question "e"), or what can the Board do with respect to granting FPL an exclusive electric service franchise (Question "f").

19. While the Board did not itself petition for or seek the Commission's action to amend or invalidate the territorial orders, under its alternative relief the Board did suggest that the PSC is free to initiate its own proceedings if the PSC determined that the expiration of the Franchise merited further investigation. COVB's argument[8] that this type of statement is inappropriate for a declaratory statement simply misses the mark. In the course of addressing a

[8] COVB Response, at 23.

request for a declaratory statement, the Commission may become aware of facts, laws, or other conditions that may require the PSC's further investigation. Once aware of issues that raise questions, it would be irresponsible for the PSC to not take them up, regardless of how the PSC learned of them. For the Board to overtly suggest the obvious, that the PSC may want to initiate a separate proceeding to do something that is within PSC's authority and jurisdiction that cannot be done within the context of a declaratory statement if the Commission determines that the issue merits further exploration, is certainly appropriate and it does not undermine or violate the declaratory statement process.

20. While the Board readily acknowledges that the Legislature has granted to the PSC exclusive and superior jurisdiction, such jurisdiction is limited only to that which is expressly conferred upon the Commission or by necessary implication.[9] While a territorial agreement approved by the Commission may establish where an electric utility may or may not serve, the PSC's order approving a territorial agreement or resolving a territorial dispute in and of itself does not grant any authorization to actually deliver service because the PSC does not have the authority to grant property rights. In other words, a territorial order of the PSC may designate a utility with the right to serve a geographic area, but the electric utility may only serve subject to obtaining a variety of different property rights, authorizations, approvals, or permits that are obtained from local governments, other governmental authorities (such as DEP or FERC), and property owners, depending upon what is required for service.

21. It may be easier to understand this important concept of concurrent authority in the context of a PSC order approving a territorial agreement. In the last PSC order approving a territorial agreement between COVB and FPL, the cause for adjusting the boundary between

[9] *Gulf Power Co. v. Wilson*, 597 So. 2d 270 (Fla. 1992); *City of Cape Coral v. GAC Utilities*, 281 So. 2d 493 (Fla. 1973).

COVB and FPL was a new subdivision, Grand Harbor, that was then "presently under construction, which straddles the territorial dividing line, previously approved by the Commission.[10] COVB and FPL agreed that this new development should be served by COVB, and that moving the boundary line at that time would have no effect because there were "currently no customers or facilities existing in the area.[11]

22. While the Grand Harbor territorial order established which utility would have the opportunity to serve this subdivision, the order did not give COVB the immediate and unconditional authority to begin setting poles, stringing wires, burying cable, installing transformers, or placing any other equipment in the subdivision. This is because a PSC territorial order does not grant that type of authority. Depending upon the type of facilities that would be needed to serve the new development, both within the subdivision and without, COVB had to buy or lease property, obtain easements, comply with zoning regulations, and receive any necessary permits. And while Grand Harbor is a private community, because it was located in the unincorporated part of the County, COVB still needed its Franchise with the County in order to use the public streets to interconnect the Grand Harbor facilities with the rest of its system.

23. In the final analysis, the PSC unquestionably has full and complete authority and jurisdiction over territorial agreements through its orders, and the Board has not petitioned the Commission through the declaratory statement for a change in those orders. However, the Board still needs to understand the status of those orders once the Franchise expires in order to assess and prepare for what happens thereafter. As is discussed in the next section, the Board's

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[10] *In re: Petition of Florida Power & Light Company and the City of Vero Beach for Approval of Amendment of a Territorial Agreement*, Docket No. 871090-EU, Order No. 18834, "Notice of Proposed Agency Action, Order Approving Amendment to Territorial Agreement Between Florida Power & Light Company and the City of Vero Beach" (February 9, 1988). This order was also cited at page 10 of COVB's Motion to Dismiss.

[11] *Id.*

franchising authority exists concurrently with the PSC's territorial and grid responsibilities and the statutes require the Commission and the Board to work together in exercising their respective duties.

IV. The Franchise is Required for Electric Service

24. While the PSC possesses exclusive and superior authority over territorial agreements, COVB has taken that authority to the illogical extreme to argue that "the Franchise Agreement was never necessary to the City's serving in the subject areas, and the Franchise Agreement is of no effect or consequence."[12] COVB reinforces its point by emphasizing that electric service has been provided outside of the COVB corporate limits without a franchise as far back as 1952, and that such activities occurred "since as early as the 1930s, and probably since the 1920s."[13] But service prior to the Franchise is irrelevant to understanding modern utility franchise law, the County's legal authority, and how franchises and territorial agreements work concurrently together to serve the public. Contrary to COVB's extreme conclusion, the Franchise contains legally relevant terms and conditions and COVB is bound to those terms and conditions.

25. COVB's electric service within the unincorporated parts of the County without a franchise before to 1987 must be put in context. Prior to the adoption of the Florida Constitution of 1968, non-charter counties, such as Indian River County, were considered to have only such powers that the Legislature expressly delegated to them.[14] As a consequence, until 1968, non-charter counties were precluded from conveying property or franchises for the use of county

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[12] COVB Response, at 30 (emphasis in original).
[13] COVB Response, at 5.
[14] *Santa Rosa County v. Gulf Power Co.*, 635 So. 2d 96, 102 (Fla. 1st DCA 1994).

property.[15] Thus, whether COVB began providing electric service outside its corporate limits in 1952, or the 1930s, or even the 1920s, prior to the 1968 Florida Constitution the County was powerless to require a franchise as a precondition of service or use of the County's property.

26. Since the adoption of the 1968 Constitution, the Florida Supreme Court on numerous occasions has acknowledged the broad scope of home-rule authority now conferred upon non-charter counties.[16] Pursuant to this constitutional change, the specific powers enumerated in section 125.01, Florida Statutes, have been expanded and updated over the ensuing years.

27. For example, COVB and FECA assert that Chapter 125 generally, and Section 125.01 specifically, do not enumerate the County's authority to provide electric service. COVB and FECA argue that based upon the general principle of statutory construction, that the mention of one thing excludes another, this means that the County cannot provide electric service.[17] Of course, the plain language of section 125.01(q) does not support COVB's and FECA's interpretation, since the part of the statute COVB and FECA do not quote provides, "and other essential facilities and municipal services from funds derived from service charges, special assessments, or taxes within such unit only."[18] But more importantly to COVB's and FECA's argument that the County cannot provide electric service, it is well established that the specific powers enumerated in section 125.01, "are not all-inclusive, and a non-charter county's authority comprises that which is reasonably implied or incidental to carrying out its enumerated

[15] *Id*.
[16] *Taylor v. Lee County*, 498 So. 2d 424 (Fla. 1986); *Speer v. Olson*, 367 So. 2d 207 (Fla. 1979); and *State v. Orange County*, 281 So. 2d 310 (Fla. 1973).
[17] COVB Motion, at 22 and 36 note 16; and FECA Memorandum of Law, at 7 and 8.
[18] Section 125.01(1)(q), Florida Statutes.

powers."[19] Given the County's broad grant of authority, today the only limitation on a county's implied power to act occurs if there is a general or special law clearly inconsistent with the powers delegated.[20] In this case, there are no such limitations on the County, and so the County could provide electric service consistent with the broad grant of statutory authority provided by the Legislature.

28. As for COVB's argument that it does not need the Franchise and that the Franchise is of no effect or consequence, or "is irrelevant," or has "no existence" as claimed by FECA and Duke Energy, respectively,[21] again the courts have recognized that the granting of franchise authority to counties is with purpose, effect, and consequence even in the face of the PSC's enumerated responsibilities. Thus, while the "pervasiveness of PSC regulation over electric utilities under chapter 366, Florida Statutes," may be exclusive and superior as to those enumerated PSC powers, a non-charter county's power to require franchise agreements from electric utilities has not been found inconsistent with the powers granted to the PSC.[22] The Florida Supreme Court has explained that a county's franchise agreement is not simply a unilateral imposition of a fee, but is instead a bargained for exchange in which a county relinquishes a property right.[23]

29. This bargain and exchange was central to the legal effectiveness and consequences of the City of Winter Park's electric franchise granted to Florida Power Corporation ("FPC"). Under the terms of the agreement, when FPC's franchise expired in 1971

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[19] *Santa Rosa County v. Gulf Power Co.,* 635 So. 2d 96, at 99 (Fla. 1st DCA 1994).
[20] *Id*., at 100.
[21] FECA Memorandum of Law, at 4; Duke Amicus Brief, at 4 (referencing *Public Service Commission v. Fuller*, 551 So. 2d 1210 (Fla. 1989), although this case does not mention franchise agreements).
[22] *Santa Rosa County v. Gulf Power Co*., 635 So. 2d 96 (Fla. 1st DCA 1994).
[23] *Alachua County v. State*, 737 So. 2d 1065, 1068-69 (Fla. 1999). Duke has acknowledged this "bargained for exchange" element as a basis for the payment of fees but not as a basis for the right to serve. Duke Amicus Brief, at 4.

Winter Park had the bargained for right to purchase the electric facilities and to itself provide electric service within its city.

30. On an appeal involving whether FPC remained liable for the franchise fee after the franchise expired and while FPC continued to provide electric service on a holdover basis until a new utility was established, the Supreme Court noted that the electric franchise granted to FPC provided for the "right, privilege and franchise to construct, operate and maintain in the said City of Winter Park, all electric facilities."[24] The court continued,

> Thus, during its effective period, the franchise agreement constituted a permissible bargained-for exchange pursuant to which FPC ceded six percent of revenues in exchange for access to the City's rights-of-way, the monopoly electricity franchise, and the City's corresponding relinquishment of its power to provide electric service in the community.[25]

31. Similar to the Winter Park situation, COVB's Franchise from the Board contains virtually the same bargained for exchange – the Board gave to COVB the right to access and use the County's streets, alleys, bridges, easements, and other public property along with an exclusive right to provide electricity in exchange for which COVB collects and remits a franchise fee. While the COVB Franchise does not include a right for the County to purchase the facilities at the end of the Franchise period, the City's purchase option was irrelevant as to the bargained for benefits the utility received from the franchise.

32. In addition to the exchange of benefits in a franchise, the Supreme Court recognized that franchises can expire and that with the expiration of the franchise the benefits of the franchise will also expire.[26]

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[24] *Florida Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1240 (Fla. 2004) (quoting from the franchise).
[25] *Id.*
[26] *Id*., at 1242.

33. The importance the court placed on the franchise and the right it conveyed to provide electric service within Winter Park occurred notwithstanding the utility's authority from the PSC to serve the Winter Park area. Critically, in the face of the expired franchise, this Commission did not tell Winter Park that its franchise with FPC was without effect. In the face of the expired franchise, this Commission did not tell Winter Park that FPC was the authorized electric service provider and that FPC would continue to serve its customers. In the face of the expired franchise, this Commission did not tell Winter Park that it would be uneconomic for the city to duplicate FPC's facilities. In the face of the expired franchise, this Commission did not tell Winter Park that it could not purchase FPC's facilities. In the face of the expired franchise, this Commission did not tell Winter Park that it could not be the electric utility. Throughout the process the PSC recognized the concurrent authority of Winter Park and accepted the fact that when the franchise expired, if the parties could not negotiate a successor franchise, then the PSC-designated electric utility would no longer be the electric utility for that area.

34. Further, subsequent to the Florida Supreme Court's 2004 *Winter Park* decision, as the parties worked toward completing the sale and transfer of facilities to Winter Park and establishment of a Winter Park electric utility, the PSC continued to work concurrently to give effect to the consequences of the expired franchise. In 2005, the PSC formally relieved Progress Energy (FPC's successor) of its obligations to provide electric service in Winter Park, which it had been serving since 1927.[27] In an Attorney General Opinion that relied heavily on information from the PSC Staff, the Attorney General opined that the City of Winter Park did not

[27] Docket No. 050117, *In re: Petition to relieve Progress Energy Florida, Inc. of the statutory obligation to provide electrical service to certain customers within the City of Winter Park, pursuant to Section 364.03 and 366.04, F.*S., Order No. PSC-05-0453 (April 28, 2005) (Proposed Agency Action Order Relieving Progress Energy Florida, Inc. Of The Obligation To Provide Retail Electric Service To Certain Customers Within The City Of Winter Park), *consummated by* Order No. PSC-05-0568 (May 23, 2005).

need the PSC's approval for the actual transfer of the electric facilities to the city.[28] Indeed, in the later PSC decision approving the relinquishment of Progress Energy's obligation to serve, the order is silent as to any authorization or approval for Winter Park's acquisition of facilities or its commencement of service as an electric utility. While there was no territorial order that needed to be revoked or modified in 2005, an actual territorial agreement between Winter Park and Duke was not approved by the PSC until this year.[29]

35. The Winter Park transition and related proceedings refute a number of assertions made by COVB and other filers. If the franchise was meaningless, then an option to purchase the electric facilities would also be meaningless. But as the courts have held, an option to purchase is not the only enforceable term of a franchise. Likewise, the existence of a purchase option cannot be the only term that would make the expiration of a franchise enforceable.

36. The Franchise was a bargained for exchange between the Board and COVB. If COVB believed that it had an unlimited right to serve customers in the unincorporated areas of the County solely on the basis of the territorial agreements between COVB and FPL, then it would not have voluntarily entered into the Franchise. And yet it did. And now COVB is before this Commission trying to argue that the Franchise is meaningless and without any meaning or purpose. The Commission should call COVB's argument what it is – an argument without merit – and deny the motion to dismiss and COVB's remaining responses.

37. Several of the filers attempt to argue that utilities cannot be evicted at the end of their franchise period if not renewed. FECA claims that if at the end of a franchise the utility had

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[28] Florida AGO 2005-14 (March 3, 2005). The Attorney General noted that unlike section 367.071(1), Florida Statutes, which specifically required PSC approval for the sale or transfer of water and wastewater system facilities, Chapter 366 did not contain any similar language.

[29] Docket No. 130267, *In re: Joint petition for approval of territorial agreement in Orange County by the City of Winter Park and Duke Energy Florida, Inc.*, Order No. PSC-14-0108 (February 24, 2014) (Notice of Proposed Agency Action Order Approving Territorial Agreement), consummated by Order No. PSC-14-0138 (March 21, 2014).

to remove its facilities or be evicted then local governments could "extort unlimited fees and other concessions" from those utilities. But the courts have already put rules in place to prevent that from occurring. Here, the reality of the situation is actually the opposite – the lack of any regulatory oversight of COVB's service in the unincorporated areas of the County has enabled COVB to extort unreasonable rates that are used to subsidize the City's general government without any return to the non-City residents.

38. Overall, the Petition Responses that discuss the potential for eviction at the end of the franchise term seem to act as if the end of the franchise is an unknown event. FECA said it would become a "guessing game" if local governments could evict at the end of the franchise.[30] OUC implies that eviction at the end of a franchise would interfere with a utility's underlying power and services contracts.[31] But since these utilities freely execute franchise agreements, from the start each utility knows the terms and conditions for that franchise, including its termination date. Utilities are sophisticated contracting parties. To be making contractual commitments without regard to the underlying property rights associated with a franchise would be irresponsible. A utility would not construct a power plant on a piece of property that it was leasing for only 30 years. Certainly the type of utility infrastructure being placed pursuant to a franchise is not the same as a power plant, but the legal point is the same. This is exactly the type of situation that calls for a regulatory out clause. It is worth repeating again, the COVB Franchise provided a five year advance notification regarding renewal or termination. The result is chaotic only if you don't act responsibly.

39. In that bargained for exchange in which a utility gets a franchise, the utility obtains a real and valuable property right. But even within the context of a franchise agreement,

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[30] FECA Amicus Memorandum, at 3.
[31] OUC Motion to Dismiss, at 6.

it is not an unlimited right. For example, under sections 337.401-.406, Florida Statutes, governmental authorities are granted broad powers with respect to the location and relocation of utility facilities along roadways, including the ability to deny use. This is another example of concurrent authority – there may be a territorial agreement in place assigning the right to serve to a particular utility, but that territorial order does not trump this authority.

40. And what if there is no territorial order? As the Florida Supreme Court has recognized, the PSC's authority over territorial boundaries is limited to approving territorial agreements or resolving territorial disputes. The PSC's guiding light in such cases is the "statutory mandate to avoid further uneconomic duplication of facilities."[32] As the court recognized, this could mean the PSC does not have to grant or set a territorial boundary arising from an agreement or a dispute.[33] Thus, in the absence of a territorial order, the only explicit authorization for a utility to operate in an area may be pursuant to a franchise. If that is the case, does a subsequent territorial agreement suddenly render a once valuable franchise meaningless?

41. In the final analysis, franchises have meaning and purpose, and the PSC must reconcile its exclusive jurisdiction with the Board's exclusive jurisdiction to grant franchises. A franchise is not meaningless nor is it solely a mechanism for paying a fee to the franchise authority. It is, as the Supreme Court said, a bargained for exchange. To say that a utility may hold over after a franchise has expired is just as repugnant as the unilaterally imposed franchise fee rejected by the Supreme Court.[34] The public interest is a broad mandate that controls both the PSC and the Board in their respective decision-making. This is not a case of customers willy nilly wanting to be served by a different utility because they don't like the current rates. There is

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[32] *Gulf Coast Elec. Co-op., Inc. v. Johnson*, 727 So. 2d 259, 264 (Fla. 1999).
[33] *Id.*
[34] *Santa Rosa County v. Gulf Power Co.,* 635 So. 2d 96 (Fla. 1st DCA 1994).

no guarantee what another utility's rates may be in the future. Rather, the Board has made the fundamental public interest determination that in the totality of the circumstances – not just rates, but the massive general government subsidization flowing from electric ratepayers to the City and the lack of representation through the legislatively required but ignored utility authority – the public interest is not served by having COVB continue to serve the citizens in the unincorporated parts of the County. These citizen ratepayers are monopoly hostages with absolutely no forum for relief from the PSC or the City. If the PSC made the same type of public interest investigation it would come to the same conclusion – COVB is done at the end of the Franchise. Given the Board's decision, the PSC should proceed to answer the questions posed by the declaratory statement. With those responses, the Board and PSC can work together to transition electric service to a worthy successor.

V. Reconsideration & Objection to OUC Intervention

42. On August 14, 2014, OUC timely petitioned this Commission to intervene as a party of record. Five days later, on August 19, 2014, the Prehearing Officer issued Order No. PSC-14-0422 granting OUC's request. The Commission should reconsider its order granting OUC's intervention because the Commission issued its order prior to the seven-day time permitted by Rule 28-105.0027(3), Florida Administrative Code, and the Board was planning on filing its objection to OUC's proposed intervention; and, (2) OUC's allegations are insufficient and fail to demonstrate how its substantial interest will be affected by the disposition of the declaratory statement requested by the Board. The Board has no objection to OUC participating in this docket as an amicus curiae and for its motion to dismiss to be treated as its amicus curiae

brief. In further support of this reconsideration and denial of intervention the Board provides the following analysis and argument.

43. Order No. PSC-14-0422 provides that motions for reconsideration are to be filed within 10 days or the order's filing, and so this filing is timely.

44. The standard of review for a motion for reconsideration is well settled by this Commission. Essentially the motion must identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order.[35] The alleged overlooked fact or law must be such that if it was considered, the Commission would reach a different decision than the decision in the order.[36]

45. In the instant situation, the basis for the Board's reconsideration is simple: the Commission prematurely issued its order before the time allowed by the rules for responses in opposition had run. Rule 28-105.0027(3), Florida Administrative Code, very clearly provides that those parties that wish to oppose the motion are entitled to do so within seven days. In view of the Commission issuing its order early, the Commission should hereby reconsider its order and address the Board's response in opposition not within the context of its reconsideration rule but rather as it would an original, timely filed response to OUC's motion for intervention.

46. As for the merits of OUC's intervention, Rule 28.105.0027, Florida Administrative Code, provides that persons "whose substantial interest will be affected by the disposition of the declaratory statement and who desire to become parties" may move for leave to intervene. Such a motion must include:

> Allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to

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[35] *Stewart Bonded Warehouse. Inc. v. Bevis,* 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); and *Pingree v. Quaintance,* 394 So. 2d 161 (Fla. 1st DCA 1981).
[36] *See Diamond Cab Co. v. King*, 126 So. 2d 889 (Fla. 1962).

> agency rule, or that the substantial interests of the intervenor are subject to determination or will be affected by the declaratory statement.[37]

47. The well-established standard for such interventions are set forth in the two prong test set forth in *Agrico Chemical Co. v. Department of Environmental Regulation*.[38] In *Agrico,* the court determined that to demonstrate standing to intervene in an agency matter, a petitioner must demonstrate (1) that the petitioner will suffer injury in fact, which is of sufficient immediacy to entitle the petitioner to a section 120.57 hearing, and (2) that the petitioner's substantial injury is of a type or nature which the proceeding is designed to protect.[39] The test requires a showing of an injury that is not merely possible, hypothetical, or conjectural and is of a degree that is not substantial. Furthermore, the proceeding must be "designed to protect" the injury.[40] OUC fails each requirement.

48. On its face, OUC's Motion does not state what its injuries are or would be if the Commission granted the declaratory statement as requested by the Board. The pleading also never states how a declaratory statement proceeding is designed to protect its interests. OUC not only fails to connect the dots to the *Agrico* requirements, it does not even make any statement that can be reasonably connected to the *Agrico* requirements. Indeed, OUC does not mention *Agrico* and thus it does not tell the PSC how its situation complies with the *Agrico* test. A naked "Statement of Affected Interests" is not a prima facie case of compliance with *Agrico*. On this basis alone the Commission can and should deny the requested intervention.

49. Turning to the conclusory information OUC does offer in its Motion only reinforces OUC's failure to meet either of the *Agrico* requirements.

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[37] Rule 28.105.0027(2)(c), Florida Administrative Code
[38] 406 So. 2d 478 (Fla. 2nd DCA 1981)
[39] 406 So. 2d at 482.
[40] *Id.*

50. First, there is no injury in fact from the requested declarations by the Board. In OUC's "Statement of Affected Interests" section, at paragraphs 5-7, OUC identifies itself as an electric utility and summarizes its business operations and relationships with other utilities. Paragraph 8 makes a very broad and general statement about how OUC relies upon the enforceability of its interlocal agreements and service contracts. The Board does not dispute these facts, but these self-serving statements do not provide any information regarding how OUC's substantial interests are at risk in this docket.

51. In the paragraphs 9 and 10, OUC identifies the existence of its 20-year contract with COVB. These fact statement paragraphs do not describe any injury to OUC.

52. Paragraph 11 quotes from page 28 of the Board's Petition, which is part of the Board's argument for how the Board would like for the PSC to answer Question "k" from page 7 of its Petition. But neither the language of Question "k" on page 7 nor the Board's preferred answer to this question on page 32 mentions OUC by name. A mere reference to OUC by name in its argument does not by itself convey standing. The fact that OUC may have a business relationship with COVB demonstrates no injury to OUC, especially since OUC does not explicitly claim an injury. Indeed, the question posed by the Board in the Petition at Question "k" regarding COVB's contracts does nothing to threaten those contacts. The request by the Board seeks to clarify the Board's obligations in light of these contracts. Importantly, the request does not seek to limit the contractual obligations by and between COVB and OUC. As explicitly stated, the Board is asking whether "the termination of the Franchise is without consequence ***to the Board***" (emphasis added.) Regardless of how the PSC answers this question, whether it is yes or no, there is no injury to OUC from the PSC answering the question. To the extent OUC wants to argue that it may be injured, since the terms and conditions of the COVB-

OUC contracts are not within the scope of the declaratory statement, any injury would be so wildly speculative as to fail the *Agrico* standard for immediacy. A mere business relationship with COVB is not an injury in fact of sufficient immediacy as to merit intervention in this declaratory statement. By any construct or analysis, OUC's sole interest in telling the Commission about its contract with COVB is to protect its economic interests, which is not recognized as a substantial interest for purposes of *Agrico*.[41]

53. In paragraph 12, OUC claims that any decision in this docket "will materially impact the enforceability of Territorial Agreements, generally, or OUC's agreements with the City, specifically." First, OUC does not have a territorial agreement with COVB, so there is no way this proceeding can impact OUC's territorial agreements. Second, as the Board has demonstrated above, which it incorporates herein by reference, the Board is not challenging or seeking through its Petition to in any manner overturn any territorial agreement, let alone OUC territorial agreements. This is not a rulemaking or some type of generic investigation on territorial agreements, and so this docket is not establishing any rule of general applicability and thus without any consequence to territorial agreements that have been approved by the Commission. The Board's request for a Declaratory Statement is solely for the purpose of understanding the Board's obligations, rights, and responsibilities which do not impose any duty on OUC. There is no injury to OUC in that.

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[41] *Village Park Mobile Home Ass'n, Inc. v. State, Dep't of Bus. Regulation*, 506 So. 2d 426, 433 (Fla. 1st DCA 1987 (allegations regarding the effect of the outcome of an agency proceeding on the sales and profits of the intervener insufficient to confer standing); *International Jai-Alai Players Assoc. v. Florida Pari-Mutual Commission*, 561 So. 2d 1224, at 1225, 1226 (Fla. 3rd DCA 1990 (claim that change in Jai-Alai schedule would indirectly affect economic interests of Jai-Alai Players "is far too remote and speculative in nature to qualify under the first prong of the Agrico standing test.").

54. The second prong of the *Agrico* test is equally undemonstrated on its face or in substance as OUC has not provided any statement or argument regarding how this declaratory statement proceeding is designed to protect OUC's interests.

55. Since OUC did not connect any of its "Statement of Substantial Interests" to the specific requirements of *Agrico*, we can only guess how OUC meets the second prong of *Agrico*. Read in the most favorable possible light, paragraphs 5, 6, 7, and 8 are irrelevant to this prong since they are just informational statements about OUC. At best, OUC's statements in paragraphs 9, 10, and 11 regarding its 20 year contract with OUC might together be construed as saying that OUC is concerned that the PSC might do something in answering the Board's questions that adversely impacts OUC. If that is what OUC is inartfully saying, then just as this declaratory statement proceeding is not asking for the PSC's opinion regarding the OUC contracts, this is not a proceeding designed to protect COVB's future performance under those contracts. Likewise, if OUC is complaining that a nonrenewal of the COVB franchise could threaten its contracts with COVB, then that is a failure of OUC to conduct its due diligence regarding the term of COVB's Franchise, which is a risk and a problem OUC created, and that also cannot be solved in this docket.

56. Finally, it may be possible to argue that paragraph 12 might constitute a claim that the PSC not do anything to adversely impact OUC's territorial agreements with Duke. Given the fact that this is a declaratory statement proceeding and not a generic docket on territorial agreements, not a rulemaking on territorial agreements, and not a docket addressing the OUC-Duke territorial agreement, it is simply not possible to imagine how the Board's declaratory statement proceeding is designed to protect, OUC's territorial agreement interests.

57. OUC is attempting to gain access to a discreet request for a Declaratory Statement without meeting any of the prerequisites for party status. OUC did not even take the time to provide the Commission with any description of a substantial interest, much less a valid substantial interest that is directly and immediately impacted by the Board's request for a Declaratory Statement. OUC offers no explanation regarding how there is identifiable injury in fact as a result of this proceeding or how this proceeding can protect that interest. The Board respectfully requests that the PSC reconsider its decision and deny OUC's motion to intervene. In rejecting OUC's party status, the Board has no objection to allowing OUC to participate in this matter as an amicus curiae and to treat its response to the petition as an amicus brief.

VI. Conclusions and Relief

58. Based upon the foregoing, the Petition seeks valid and appropriate declarations from the Commission regarding a present, actual, and critically important group of issues to the Board and especially the citizens of Indian River County. The Board respectfully requests that the Commission deny the motions to dismiss and the various responses, briefs, comments, and memoranda of law that have been submitted to the extent they seek to object to or limit the declaratory statement requested by the Board. Further, the PSC should reconsider and then deny OUC's request for intervention. In denying party status to OUC, the Board has no objection to the Commission treating OUC's substantive response as an amicus curiae submission. The consequences of granting the declaratory statement as requested will enable the PSC and the Board to fulfill their concurrent responsibilities to all of the citizens of Indian River County, and the Board reiterates its pledge to work with the PSC in a constructive manner to facilitate the transition to a new electric service provider once the Franchise expires in 2017.

WHEREFORE, the Board of County Commissioners, Indian River County, Florida, respectfully requests that the Florida Public Service Commission grant its declaratory statement petition as set forth therein and as further discussed and elaborated upon herein so that the County may exercise its concurrent authority to properly plan for and address the continued availability of affordable and reliable electric service to itself and other customers upon the expiration of the City of Vero Beach Franchise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, by electronic delivery, on this 29th day of August, 2014.

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