

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for declaratory statement regarding)
the effect of the Commission's orders) Docket No.: 140244-EM
approving territorial agreements in Indian) Filed: January 13, 2014
River County, by the City of Vero Beach.)
_____)

**NOTICE OF INTERVENTION BY APPEARANCE AND
ALTERNATIVE MOTION TO INTERVENE OF THE
BOARD OF COUNTY COMMISSISONERS, INDIAN RIVER COUNTY, FLORIDA**

The Board of County Commissioners, Indian River County, Florida (the “Board”), by and through its undersigned counsel and pursuant to Section 120.565, Florida Statutes, and Rules 25-22.039, 28-105.0027, 28-106.201, and 28-106.205, Florida Administrative Code (“F.A.C.”), hereby files this Notice of Intervention By Appearance (“Notice”) and Alternative Motion to Intervene (“Motion”) with the Florida Public Service Commission (“PSC” or “Commission”) regarding the Petition for Declaratory Statement (“Petition”) filed by the City of Vero Beach (“City”) in this docket. The Board is authorized by Rule 28-106.205(3) to notice its intervention in this docket by an appearance because the City’s Petition specifically names Indian River County in its requested declarations and the City is seeking to determine the substantial interests of the Board by having the PSC affect, control, or limit the 1987 franchise agreement for electric service between the Board and the City (the “Franchise” or “Franchise Agreement”) for the unincorporated areas of Indian River County (the “County”). Alternatively, because both of the City’s requested declarations propose to eviscerate the Board’s franchise authority and render the Franchise Agreement between the Board and the City irrelevant and without any legal effect or consequences, the City’s declarations seek to affect and determine the substantial interests of the Board entitling the Board to intervention. Thus, the Board hereby asks the PSC to acknowledge its notice of intervention by appearance or, alternatively, grant the Board intervention as a full party of record in order to represent its interests. In support of this Notice and Alternative Motion, the Board states:

1. Petitioner's name and address:
Board of County Commissioners, Indian River County, Florida
Administration Building A
1801 27th Street
Vero Beach, FL 32960-3365

2. All notices, orders, or other filings and documents regarding this docket should be directed to the following attorneys representing the Board in this matter:

Dylan Reingold, Esq.
County Attorney
County Attorney's Office
1801 27th Street
Vero Beach 32960-3388
Phone: (772) 226-1427
Email: dreingold@ircgov.com

Floyd R. Self, B.C.S.
Gonzalez Saggio & Harlan LLP
3411 Capital Medical Blvd.
Tallahassee, Florida 32308
Phone: (850) 702-0090
Email: floyd_self@gshllp.com

3. The County was established by an act of the Florida Legislature on June 29, 1925. Pursuant to the Constitution and laws of the State of Florida, the County is a non-charter county with home rule powers granted by Chapter 125, Florida Statutes. The County is governed by a five member Board of County Commissioners elected at large from the five districts within the County. The Board is the duly authorized "legislative and governing body" of the County with such powers of county government including, *inter alia*, the legal ability to prosecute this legal cause.¹

4. On December 19, 2014, the City filed its Petition for Declaratory Statement initiating this docket. Notice of the City's Petition was received by Board with the PSC publishing formal notice of the City's Petition in the December 23, 2014, Florida Administrative Register ("FAR"). The FAR Notice and Rule 28-105.0027(1), Florida Administrative Code, provide that a person desiring to become a party shall intervene within 21 days after publication in the FAR, or on or before January 13, 2015. By filing this Notice and Alternative Motion today, the Board has timely noticed its intervention by appearance under Rule 28-106.205(3) and, alternatively, requested intervention under Rules 25-22.039 and 28-

¹ Section 125.01(1)(b), Florida Statutes.

106.205(1), Florida Administrative Code. As is set forth herein, this Notice and Motion contains the necessary pleading requirements for such intervention by notice of appearance and by motion since the Board is named in the City's Petition and the City is proposing through its declarations to have the PSC affect and determine the substantial interests of the Board by determining that the Franchise Agreement between the Board and the City is without meaning or effect.

5. The cornerstone of the City's Petition involves the Franchise Agreement the Board approved on January 27, 1987, that granted to the City the exclusive authority to provide electric service within certain unincorporated geographic areas of the County for thirty years and which the City approved and accepted on March 5, 1987.² This Franchise Agreement by its terms also grants to the City certain property rights that permit the City to utilize the County's streets, bridges, alleys, easements, and public places for the placement of the City's electric facilities, such property rights for County property being within the exclusive domain of the Board. As Florida's courts have held, a franchise agreement involves a bargained for exchange between the grantor and grantee.³

6. On February 22, 2012, the Board properly noticed the City that it shall not renew the Franchise Agreement when it expires on March 4, 2017. It is the expiration of this Franchise Agreement, granted by the Board and freely accepted by the City, that is the sole basis for the City's Petition and which the City now is asking the PSC to render meaningless. As such, since the City is asking the PSC to construe and determine the legal standing and effect of the Board's Franchise and the Board's fundamental and exclusive right to issue electric service franchise, as a matter of law the Board's standing for intervention in this matter is unquestionably demonstrated.

7. It must also be noted that the Board has pending its own Petition for Declaratory Statement in PSC Docket No. 140142-EM. The subject of Docket No. 140142 is the same Franchise

² Board of Indian River County, Florida, Resolution 87-12.

³ *City of Indian Harbour Beach v. City of Melbourne*, 265 So.2d 422, 424-25 (Fla. 4th DCA 1972).

Agreement that motivates the City to initiate this proceeding. Furthermore, the City sought, and without any objection from the Board, was granted intervention in Docket No. 140142, where the City has advocated the same position in arguing against the Board's declarations as it is now affirmatively seeking to obtain in this docket. As a matter of simple justice and fairness, since these different declarations spring all from the same issue – the expiration of the Franchise Agreement – if it is appropriate for the City to be granted intervenor status in Docket No. 140142, then it is equally appropriate for the Board to be a party to this docket.

8. Turning to the specifics of the City's Petition, both of the requested declarations specifically name Indian River County and the Franchise Agreement between the parties. In specifically naming the Franchise Agreement between the Board and the City, the City is specifically seeking to have the Franchise Agreement declared meaningless and without any legal effect: "Neither the existence, non-existence, nor expiration of the Franchise Agreement between Indian River County and the City has any effect . . ." ⁴ and "without regard to the existence or non-existence of a franchise agreement with Indian River County . . ." ⁵ Similarly, much of the discussion in the Petition revolves around the Franchise Agreement between the Board and the City and the City's arguments as to why the PSC should find the Franchise Agreement without any legal effect or purpose. The City's own statements in its Petition demonstrate the Board's party status by notice of intervention, and not requesting leave to intervene, as "[s]pecifically named persons, whose substantial interests are being determined in the proceeding." Accordingly, the Board hereby notices its intervention by appearance and its participation in this matter as a party of record with all associated rights, duties, and responsibilities.

9. As an alternative to the Board's notice of intervention by appearance, the Board also

⁴ City Petition, Requested Declaration "a", page 3.

⁵ City Petition, Requested Declaration "b", page 3.

fulfills all of the other requirements for intervention by motion. If anything is clear from the City's Petition it is that the City is seeking to have the PSC determine the Board's substantial interests by invalidating the Board's exclusive authority to issue electric service franchise for the unincorporated areas of the County. The City specifically states at page 2 of its Petition that its cause for seeking a declaratory statement from the PSC is in fact the Board's own petition for declaratory statement presently pending in Docket No. 140142. As will be discussed in the Board's substantive response to the Petition, the City's requested declarations are outside the scope of the PSC's authority. But the fact that the City relies on the Board's declaratory statement petition in Docket No. 140142 to now seek its own declarations, without even knowing how the PSC will dispose of the Board's declaratory statement which the City has argued against, only further demonstrates that any attempt by the City in this docket to collaterally attack, clarify, explain, reconsider, void, override, or take any other action with respect to the order the PSC may issue in Docket No. 140142 can and will impact the Board's substantial interests.

10. As a further assertion regarding the City's need for its Petition, the City states on page 2 of its Petition that "Indian River County now threatens to attempt to evict the City from serving in the City's Commission-approved service areas in unincorporated Indian River County upon the expiration of an existing franchise agreement . . . between the County and the City in 2017." The Petition further asserts at page 2 that "the expiration of that Franchise Agreement has no legal effect on the City's right and obligation to serve in its Commission-approved service areas, . . ." Again, these statements about the Board and the expiration of the Franchise Agreement reflect the City's intent to have the PSC void or overrule the Franchise Agreement, demonstrating that any action by the PSC in this docket will be affecting the substantial interests of the Board.

11. Finally, both of the City's requested declarations on page 3 specifically and directly

seek to eviscerate the Board's legal authority, established by the Florida Legislature, to issue franchises and the City further seeks a legal opinion from the PSC regarding the effect of the expiration of the Board's Franchise to the City. While the Board's separate response being filed today substantively addresses the City's requested declarations, these declarations facially and substantively demonstrate that any action by the PSC on these requests shall affect and determine the substantial interests of the Board meriting intervention. Indeed, the City's Petition is nothing more than an attempt by the City to usurp the rights of the Board and the citizens of Indian River County of the home rule powers granted by the people of Florida through the Florida Constitution and the Florida Legislature to the Board. These statements by the City also reinforce the Board's entitlement to notice its intervention under Rule 28-106.205(3) since Indian River County is a specifically named party in the requested declarations.

12. In paragraphs 6 through 16, the City makes a number of statements it describes as historical and factual background information. Again, many of these alleged facts involve the Board's actions and the Board's legal authority with respect to franchises. While the PSC must accept as true the "facts" set forth by the City, the Board in its substantive response separately filed today sets forth the errors and omissions regarding the City's legal analysis of the Board's authority under Florida law. Since these are not facts but legal authority, interpretations, and conclusions, and since the Board is in the best position to advise the PSC regarding the Board's legal authority under Florida law as a noncharter county government, it is appropriate and necessary for the PSC to hear directly from the Board through its intervention on these vitally important matters.

13. In paragraph 20 the City asserts that the PSC's authority under Chapter 366 is superior in every way to the Board's authority. As the Board addresses in its substantive response, the PSC certainly has exclusive and superior jurisdiction with respect to those matters specifically enumerated in Chapter 366. But Chapter 366 does not include any authority to grant or override local

government franchises. The PSC's authority under Chapter 366 to approve territorial agreements does not include any authority to convey or transfer real property rights, one of the bargained for rights granted by the Board to the City through the Franchise Agreement. Chapter 366 and the PSC's authority under the Grid bill certainly provide measures to preclude uneconomic duplication of facilities, but such PSC authority does not include issues associated with successive service providers. Finally, nothing in Chapter 366 grants to the PSC the authority to abrogate the Board's authority to issue electric service franchises. Thus, any action in this docket that attempts to venture into the areas sought by the City can and will affect and determine the substantial interests of the Board. The only way to fairly and legally address the City's declarations is through the Board's participation.

14. The "Analysis and Discussion" set forth in paragraphs 22 through 38 shall be addressed in the Board's separate substantive response also being filed today. For intervention purposes, the essence of this section is that the City is seeking a statement from the PSC that the Board's franchise authority and the Franchise Agreement are without meaning or purpose. The City wants the PSC to tell the Board that the City's electric service authority is absolute, in perpetuity, and superior in every way to the Board's statutory authority. This direct attack on the authority of the Board must be rejected and requires the Board's direct involvement in order to protect its substantial interests.

15. Pursuant to Rule 25-22.039, which incorporates Rule 28-106.201(2), the prior paragraphs address the requirements of Rule 28-106.201(2)(a)-(c). Pursuant to Rule 28-106.201(2)(d), the Board states that there are not any disputed issues of material fact because Section 120.565, Florida Statutes, provides that the declaratory statement applies to the petitioner's "particular set of circumstances." With regard to Rule 28-106.201(2)(e), the Board believes that the City's position is legally wrong and outside the authority of this Commission because the City is attempting to have the PSC determine the conduct of another person, in violation of Rule 28-105(1), by having the PSC

invalidate the Franchise Agreement and conveying private and public property rights which are not within the PSC's grant of authority in Chapter 366. Pursuant to Rule 28-106.201(2)(f), Chapter 366 demonstrates that the PSC has no statutory authority – exclusive, concurrent, or otherwise – with respect to franchises and certainly no authority to render meaningless the Board's franchise authority. As is required by Rule 28-106.201(2)(g), the City's two declarations be denied.

16. The requirement of Rule 28-106.205(2) have been complied with in the preceding paragraphs except for the statement required by Rule 28-106.205(5)(d)-(e). In this regard, counsel for the Board has conferred with counsel for the City, the only party of record, and counsel for the City has provided the following statement: “Without having seen the County's motion or petition to intervene, the City does not support intervention by Indian River County in PSC Docket No. 140244-EM. The City reserves all rights to object to any motion or petition by the County to intervene in that docket, and, once we have had the opportunity to review the County's pleading, the City may file a response.”

WHEREFORE, the Board of County Commissioners, Indian River County, Florida, respectfully requests that the Florida Public Service Commission acknowledge the Board's Notice of Intervention by Appearance or, alternatively, grant the Board's Motion to Intervene.

Respectfully submitted,

Dylan Reingold, Esq.
County Attorney
County Attorney's Office
1801 27th Street
Vero Beach 32960-3388
Phone: (772) 226-1427

s/ Floyd R. Self

Floyd R. Self, B.C.S.
floyd_self@gshllp.com
Gonzalez Saggio & Harlan LLP
3411 Capital Medical Blvd.
Tallahassee, Florida 32308
Phone: (850) 702-0090

Counsel for the Board of County Commissioners, Indian River County, Florida

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 the 13th day of January, 2015.

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| <p>Kathryn Cowdery, Esquire Florida Public Service Commission Division of Legal Services 2540 Shumard Oak Boulevard Tallahassee, Florida 32399 kcowdery@psc.state.fl.us</p> | <p>Dylan Reingold, Esquire, County Attorney Office of the County Attorney Indian River County 1801 27th Street Vero Beach, FL 32960-3388 dreingold@ircgov.com</p> |
| <p>Wayne R. Coment City Attorney City of Vero Beach 1053 20th Place Vero Beach, Florida 32960 WComent@covb.org</p> | <p>Robert Scheffel Wright John T. LaVia, III Gardner, Bist, Wiener, Wadsworth, Bowden, Bush, Dee, La Via & Wright, P .A. 1300 Thomaswood Drive Tallahassee, Florida 32308 schef@gbwlegal.com jlavia@gbwlegal.com</p> |

By:

s/ Floyd R. Self

Floyd R. Self, B.C.S.
floyd_self@gshllp.com
Gonzalez Saggio & Harlan LLP
3411 Capital Medical Blvd.
Tallahassee, Florida 32308
Phone: (850) 702-0090