BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement by the Town of Indian River Shores Regarding the Commission's Jurisdiction to Adjudicate the Town's Constitutional Rights	)	DOCKET NO. 160013-EM FILED: JANUARY 27, 2016

THE CITY OF VERO BEACH'S RESPONSE IN OPPOSITION TO PETITION FOR DECLARATORY STATEMENT BY THE TOWN OF INDIAN RIVER SHORES

The City of Vero Beach ("Vero Beach" or the "City"), pursuant to the Notice of Declaratory Statement published in the Florida Administrative Record on January 7, 2016, pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), and subject to Vero Beach's motion to intervene in this proceeding filed concurrently herewith, hereby files this response in opposition ("Response in Opposition") to the "Petition for Declaratory Statement Before the Florida Public Service Commission" (the "Petition" or the "Town's Petition") filed by the Town of Indian River Shores (the "Town" or "Indian River Shores") with the Florida Public Service Commission ("Commission" or "PSC") on January 5, 2016.

In summary, the Commission should deny or decline to issue the Town's Petition because the Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County has decided the Town of Indian River Shores' constitutional claim, and accordingly, the Commission should not and need not issue the declaratory statement requested by the Town. The Circuit Court was fully informed as to the Town's constitutional claim – that "[the Town] has a right to be protected from the City's

exercise of extra-territorial power within the Town after expiration of the Franchise Agreement" without the Town's consent. Town of Indian River Shores v. City of Vero Beach, Case No. 312014CA000748, Order Granting in Part and Denying in Part City of Vero Beach's Motion to Dismiss Amended Complaint, slip op. at 4 (Fla. 19th Cir. November 11, 2015). Fully understanding the Town's claim, the Court recognized that "the ***PSC exercised its jurisdiction under the general law*** established by the Legislature when [the PSC] issued the ***Territorial Orders granting the City the right and obligation to provide electric service in the territorial area approved in the Territorial Orders***." Id., slip op. at 3-4 (emphasis added). The Court further recognized that "the actual relief sought by the Town amounts to an unfeasible request that the court determine what utility will provide electric service to the Town." Id., slip op. at 5. Thus, the Circuit Court held that the Town's claim for relief under the Florida Constitution was defeated by the fact that the PSC had conferred upon Vero Beach the right and obligation to serve in the areas designated in the Territorial Orders pursuant to general law, thereby rendering the City's service under the Territorial Orders clearly within the scope of an authorized exercise of extra-territorial power.

The Town's Petition is also improper because it addresses an issue that is the subject of pending judicial proceedings, i.e., Town of Indian River Shores v. City of Vero Beach, Case No. 312014CA000748 (Fla. 19th Circuit), and the Town's proper venue for addressing its jurisdictional question is an appeal of the Circuit Court's Order on Dismissal. Finally, the Town's Petition is unnecessary because there is no basis for any doubt as to the PSC's jurisdiction, and improper because it is not a request that the

Commission declare the Town's position, rights, or status under the PSC's statutes, rules, or orders. Even if the Commission were to state that it cannot interpret the Florida Constitution relative to this issue, such a declaration is unnecessary and irrelevant to the real issue, which has been decided by the Circuit Court. The Town's avenue for relief would be to appeal the Circuit Court's Order in accordance with the Florida Rules of Appellate Procedure. Accordingly, the Commission should deny or decline to issue the declaratory statement requested by the Town.

Vero Beach's Response in Opposition proceeds with a Preliminary Statement; a statement of the Historical and Factual Background to these proceedings; a section titled Legal Background – Statutes, Constitution, Orders, and Cases, which includes a listing of statutes, constitutional provisions, Commission orders, and court cases relevant to the issues discussed herein; and a section titled Legal Background – Procedural, which presents the procedural history of the Town's legal disputes with Vero Beach, including the related proceedings before the Commission involving similar disputes raised by Indian River County. The Response in Opposition then proceeds and concludes with a discussion of why the Commission should deny or decline to issue the declaratory statement requested by the Town.

PRELIMINARY STATEMENT

As used in this Response in Opposition, the following terms have the meanings shown below.

"1968 Contract" means the CONTRACT entered into by and between the City of Vero Beach and the Town of Indian River Shores on December 18, 1968. A copy of this 1968 Contract is included with this Response in Opposition as Exhibit A.

"Amended Complaint" means the Amended Complaint filed by the Town in Indian River Shores v. Vero Beach on May 18, 2015.

"County" refers to Indian River County.

"Court" or "Circuit Court" means the Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County, Florida.

"FPL" means Florida Power & Light Company.

"Franchise Agreement" means the Resolution 414 of the Town of Indian River Shores, titled A RESOLUTION GRANTING TO THE CITY OF VERO BEACH, FLORIDA, ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC FRANCHISE IN THE INCORPORATED AREAS OF THE TOWN OF INDIAN RIVER SHORES, FLORIDA; IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO; AND PROVIDING AN EFFECTIVE DATE, which was adopted by the Town on October 30, 1986 and accepted by Vero Beach on November 6, 1986. A copy of the Franchise Agreement is included with this Response in Opposition as Exhibit B.

"Indian River Shores v. Vero Beach" means the case styled Town of Indian River Shores v. City of Vero Beach, Case No. 312014CA000748 (Fla. 19th Circuit).

"Initial Complaint" means the "Complaint" filed by the Town of Indian River Shores on July 18, 2014, that initiated the judicial proceedings in Indian River Shores v. Vero Beach.

"Order on Dismissal" means the "Order Granting in Part and Denying in Part City of Vero Beach's Motion to Dismiss Amended Complaint," issued by the Circuit Court in Indian River Shores v. Vero Beach on November 11, 2015. A copy of the Order on Dismissal is included with this Response in Opposition as Exhibit C.

"Second Amended Complaint" means the "Second Amended Complaint" filed by the Town in Indian River Shores v. Vero Beach on December 1, 2015.

"Territorial Orders" means those orders of the Commission, listed in detail in the section herein on Legal Background – Statutes, Constitution, Orders, and Cases, approving the territorial agreements between Vero Beach and FPL since 1972.

Other capitalized terms have the meanings provided elsewhere herein.

HISTORICAL AND FACTUAL BACKGROUND[1]

The City of Vero Beach was initially incorporated in 1919 as the City of Vero, and reincorporated as the City of Vero Beach in 1925. Vero Beach has operated a municipal electric utility system since 1920, when it purchased the original small power plant, poles, and lines from the Vero Utilities Company. Naturally, the City's service area has grown since 1920, and during the intervening 95 years, the City has served customers inside and outside the city limits, pursuant to its own ordinances, pursuant to requests by customers living outside the city limits, pursuant to its powers under Florida Statutes, and, since at least 1972, pursuant to the Territorial Orders of the Commission approving Vero Beach's service area in territorial agreements with FPL.

Today, Vero Beach provides retail electric service in the service area described in its territorial agreement with FPL, which agreement has been approved, with amendments over time, by the Territorial Orders. Vero Beach's service area, as approved by the Commission, includes the area within the city limits, areas outside the city limits in unincorporated Indian River County, and most of the Town of Indian River Shores. On information and belief, Vero Beach asserts that it has served areas outside the city limits since the 1930s, and probably since as early as the 1920s. The earliest known documentary evidence of the City providing electric service outside the city limits is

[1] Consistent with the law of declaratory statements, Vero Beach accepts the Town's alleged facts as true. However, Vero Beach believes that the Town has omitted pertinent facts from its statement, and accordingly, the City offers the more complete exposition of the relevant history here. In addition, no legal basis exists to accept the Town's numerous legal assertions and conclusions.

found in Chapter No. 599 of Vero Beach's ordinances, enacted on October 21, 1952.[2] The ordinance prescribed a system of contributions in aid of construction ("CIAC") to apply where the City was requested to extend service outside the city limits, by which the City would furnish a transformer and all labor, and the applicant would pay a CIAC for the cost of the materials other than the transformer. The ordinance also included provisions by which the City would annually refund to the customer who paid the CIAC 25 percent of the customer's total electric purchases in the preceding year, until the entire CIAC had been refunded to the customer. This ordinance clearly shows that Vero Beach was serving outside the city limits at least as early as that year.

The Town was incorporated in June 1953. Although a detailed history of electric service in the Town is not readily available, on information and belief, Vero Beach asserts that there were at least some persons living in the Town at that time, that they were receiving electric service, and that whatever electric service was provided in the Town in those early years was provided by the Vero Beach electric system.

Although the history is unclear as to exactly when the Town itself first became a customer of the Vero Beach electric system, e.g., at the Town Hall, police station, fire station, or other such facilities, a history of the Town published on the Town's website indicates that the Town was a Vero Beach electric customer at least some time before 1972. The history states, "A new $130,000 Town Hall was dedicated December 1972,

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[2] Chapter No. 599, An Ordinance Establishing the Policy of the City of Vero Beach for Extension of the Electric Power Distribution System Outside of the Corporate Limits, October 21, 1952.

and by 1975 a $155,000 fire station was completed." Converse, C. Vaughn, and Simms, Henry F. (Ed.), "Our Town," at 2, published on the Town's website at http://www.irshores.com/Town-History.html. Given the reference to the "new" Town Hall being dedicated in 1972, it is reasonable to infer that there was an "old" Town Hall in existence sometime before 1972, and that such earlier Town Hall was receiving electric service from Vero Beach.

In November 1971, FPL and Vero Beach entered into a territorial agreement that defined the areas in the Vero Beach-Indian River County area where each would serve. In January 1972, FPL applied to the Commission to approve that original territorial agreement between FPL and Vero Beach.[3] FPL's Application was based on then-existing case law, specifically Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), cert. denied, 395 U.S. 909 (1969), which held that the Commission had the "implied power" to "approve territorial agreements which are in the public interest," and which recognized that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Id. at 307-08. In its Application, FPL asked the Commission to approve the Territorial Agreement, including the allocation of service areas, because both FPL and the City sought to avoid "needless and wasteful

[3] In re: Application of Florida Power and Light Company for Approval of a Territorial Agreement with the City of Vero Beach, PSC Docket No. 72045-EU, Order No. 5520 at 1 (August 29, 1972). The actual document filed by FPL was styled "Application of Florida Power & Light Company for Approval of a Territorial Agreement and Contract for Interchange Service with the City of Vero Beach, Florida," and that document is referred to herein as the "FPL Application."

expenditures of time and money" and "dangerous, unnecessary and uneconomical conditions" that were "not in the public interest." FPL Application at 3.

By 1972, Vero Beach had been providing electric service outside the city limits, in unincorporated areas of Indian River County, for at least 20 years, and probably for close to 50 years. In fact, FPL's Application stated that "The City served approximately 10,600 customers in 1971, more than 50% of whom were located outside the boundaries of the City." FPL's Application at 2. The Commission held a public hearing in Vero Beach on the proposed 1972 territorial agreement, at which two customers objected to being transferred from being served by FPL to the City, and two customers did not object to being transferred from the City to FPL. There is no evidence in the record of that docket that either the Town per se, or any representative or officer of the Town, participated in those proceedings. Notably in light of current events, including the pending judicial proceedings in Indian River Shores v. Vero Beach, the Commission's Order also stated the following: "No residents of Indian River Shores appeared although that is the largest area under development in which competition exists; the proposed boundary reserves this area to the city." Order No. 5520 at 2.[4]

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[4] In its Petition, the Town refers to a letter sent by the Town's Mayor, Roland B. Miller, to the Chairman of the Commission, Jess Yarborough. The Town did not include a copy of that letter with its Petition, but a copy was obtained by Vero Beach's attorneys through a public records request, and is attached to this Response in Opposition as Exhibit D. The letter speaks for itself, but the Commission will readily note that the letter makes no reference to the Town having "consented" to allow Vero Beach to provide service in the Town, nor to any permission or consent to Vero Beach's use of the Town's rights-of-way; indeed, the letter does not mention rights-of-way at all. The letter also made clear, on both pages 1 and 2 thereof, that the Town considered that the territorial agreement was "none of our concern."

The Commission duly approved the FPL-Vero Beach territorial agreement, finding that the evidence showed "a justification and need for the territorial agreement" and that the agreement should "enable the two utilities to provide the best possible utility services to the general public at a less cost" by avoiding duplicate facilities. Order No. 5520 at 2.

FPL petitioned the Commission to approve a slight modification to the territorial agreement in 1973. The 1973 amendment changed the utilities' service areas slightly, with no customers and no facilities being affected. The Commission accordingly approved the requested amendment. In re: Application of Florida Power & Light Company for Approval of a Modification of Territorial Agreement and Contract for Interchange Service with the City of Vero Beach, Florida, Docket No. 73605-EU, Order No. 6010 at 1 (January 18, 1974).

In 1974, the Legislature enacted the Grid Bill, Chapter 74-196, Laws of Florida (codified in Sections 366.015, 366.04, 366.05, 366.055, and 366.11, Florida Statutes) which among other things made the Commission's "implicit authority" over territorial agreements and territorial disputes explicit, Public Serv. Comm'n v. Fuller, 551 So. 2d 1210, 1212 (Fla. 1989), and also gave the Commission express jurisdiction over the "planning, development, and maintenance of a coordinated electric power grid throughout the state of Florida" and the "responsibility of avoiding the uneconomic duplication of facilities." Id.; Fla. Stat. § 366.04(5).

In 1980, FPL and Vero Beach again applied for approval of an amended territorial agreement. In re: Application of Florida Power & Light Company and the City of Vero Beach for Approval of an Agreement Relating to Service Areas, Docket No. 800596-EU,

Order No. 11580 (February 2, 1983). In that docket, the Commission initially issued a proposed order to approve the parties' territorial agreement in November 1981. The proposed order offered affected persons the opportunity to request a hearing, and a "timely petition was filed on behalf of 106 customers served by Vero Beach who apparently did not want to be transferred to FPL." Id. at 1. There is no record evidence of the Town having participated in the proceedings in Docket No. 800596-EU.

The Commission duly held a hearing on May 5, 1982 in Vero Beach. During the course of the hearing, most of the customers were satisfied with the Commission's process and with the agreement as originally proposed by FPL and the City, and as the Commission had proposed to approve it. Id. Following the hearing, the Commission approved the new territorial agreement between FPL and the City by its Order No. 11580. In that Order, having discussed the objections of a group of customers to being transferred as provided by the new territorial agreement, the Commission concluded by stating the following:

> We believe that our decision is in the best interest of all parties concerned. Our approval of the territorial agreement serves to eliminate competition in the area; prevent duplicate lines and facilities; prevent the hazardous crossing of lines by competing utilities; and, provides for the most efficient distribution of electrical service to customers within the territory.

Order No. 11580 at 1-2. The Commission also restated the Florida Supreme Court's earlier holding that:

> An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself.

Id. at 2 (quoting Storey, 217 So. 2d at 307-08).

In sum, the Commission exercised its jurisdiction under its Grid Bill authority in Chapter 366, Florida Statutes, to approve the territorial agreement in order to prevent the uneconomic duplication of facilities and to provide for the most efficient service to the area in question.

In 1986, following on the already considerable history of the City serving outside its corporate boundaries for several decades and inside the Town for more than 30 years, Vero Beach and the Town of Indian River Shores entered into the Franchise Agreement. In 1987, Vero Beach and Indian River County also entered into a 30-year franchise agreement that was discussed in Docket No. 140142-EM and resulted in issuance of the County Order. Neither Indian River Shores nor the County had ever had a franchise agreement with the City before 1986 or 1987, respectively.

Prior to 1986, the Town never had a franchise agreement with Vero Beach, as the 1968 Contract is not a franchise agreement. Only one paragraph (paragraph 6) of the 1968 Contract addresses Vero Beach's provision of electric service, and nothing in that paragraph makes any reference to a franchise, or any reference to a franchise fee, or to "consent," or to other matters that normally comprise the subject matter of franchise agreements. The subject paragraph 6 of the 1968 Contract provides in its entirety as follows:

> 6. The City also agrees to furnish electric power to any applicant therefor within the corporate limits of the Town, from a distribution line furnished by the City and will bill each customer therefor at the rate fixed and charged from time to time for such current to persons within the corporate limits of the City, plus 10% additional thereto, and each consumer will be billed direct by the City for such service and will be

> subject to all rules and regulations of the City with regard to the disconnection of such service upon non-payment of bills so furnished.

Paragraph 7 states that the term of the 1968 Contract is 25 years and that it is "predicated upon the Town furnishing to the City all necessary easements and rights of way for the location of the facilities required under the terms of this agreement." Vero Beach's research to date has been unable to discover any such easements relating to electric facilities, although research did find certain easements that were conveyed with respect to Vero Beach's water system. Notwithstanding the Town's apparent failure to provide written easements or other documents, Vero Beach in good faith proceeded to provide electric service to customers in the Town as requested. In so doing, Vero Beach naturally and reasonably used areas adjacent to the roads in the Town.

Although facially obvious, it bears noting that the Commission's express statutory territorial jurisdiction had been in effect for more than a decade before either franchise agreement was executed, and that the Commission's jurisdiction and power to approve territorial agreements had been in effect, as upheld and approved by the Florida Supreme Court, for two decades before either franchise agreement existed. Although authorized to do so, the Town has never asked the City to collect and remit franchise fees to the Town. Pursuant to the franchise agreement between Vero Beach and the County, the City has consistently collected and remitted franchise fees to the County.

In 1987, FPL and Vero Beach again petitioned the Commission for approval of an amendment to their territorial agreement, by which FPL and the City agreed that the City

would serve a new subdivision, Grand Harbor, which straddled the existing territorial dividing line. In approving the amendment, the Commission stated the following:

> To avoid any customer confusion which may result from this situation [the new subdivision straddling the existing territorial boundary] and to ensure no disputes or duplication of facilities will occur, the City and FPL have agreed to amend the existing agreement by establishing a new territorial dividing line.
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> * * *
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> The amended agreement is consistent with the Commission's philosophy that duplication of facilities is uneconomic and that agreements eliminating duplication should be approved.

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 (February 9, 1988).

While Vero Beach believes that the information presented in paragraph 19 of the Town's Petition, relating to an offer by FPL to purchase the facilities and customer accounts of Vero Beach's electric system in the Town, is irrelevant to the Town's purported "constitutional" issue as well as irrelevant to the substantive and jurisdictional issues that the Town raises in its Petition, Vero Beach provides the following additional facts relative to those communications. After receiving the letter from FPL (Exhibit D to the Town's Petition), Vero Beach representatives met with FPL representatives to discuss their respective views of the terms of a possible transaction of the scope contemplated by FPL's letter. FPL stated its position relative to certain values, and Vero Beach's representatives respectfully explained that it was and is Vero Beach's position that any such transaction would have to keep ***all*** of Vero Beach's remaining customers (i.e., those

inside the city limits and those in the unincorporated areas of Indian River County where Vero Beach serves) whole, as compared to the base case scenario in which Vero Beach would continue to serve customers inside the Town pursuant to the Commission's Territorial Orders. Because the proposed transfer of customers in the Town would not be accompanied by corresponding reductions in several components of the fixed costs of Vero Beach's electric system, the "keep whole" value stated to FPL – approximately $65 million – was significantly greater than FPL's proposed value. Vero Beach subsequently made public documentation supporting its $65 million value. Essentially, Vero Beach viewed, and continues to view, any such transaction using the conceptual framework of the "Ratepayer Impact Measure" test, i.e., that the compensation received for the transaction would have to be sufficient to keep ***all*** of Vero Beach's remaining customers whole.

Today, pursuant to the Commission's Territorial Orders and Chapter 366, Florida Statutes, pursuant to its home rule powers, pursuant to its powers under Chapter 166 and Chapter 180, Florida Statutes, and pursuant to other legal authority, the City operates an electric utility system consisting of transmission lines and related facilities, and distribution lines and facilities (collectively the "City Electric System"), which serves approximately 34,000 customer accounts (meters), of which approximately 12,900 accounts (meters) are located within the City limits and approximately 18,400 accounts (meters) are located outside the City limits. Approximately 3,000 of the outside-the-city-limits customer accounts (meters) are located in the Town of Indian River Shores, with the balance located in unincorporated Indian River County.

Vero Beach's transmission facilities in the Town consist of a line that emanates from the mainland and runs under water and underground to connect to Vero Beach's Substation No. 9 in the Town; Vero Beach owns this substation as well as the site on which it is situated. The current transmission line was installed in 1987; there was a prior line connecting the distribution substation to Vero Beach's mainland system. Vero Beach's research to date does not indicate whether there are any formal easements or other formal documents relating to Vero Beach's rights to have its transmission line in its present location.

In the 1968 Contract, the Town committed to provide easements to accommodate Vero Beach's electric facilities. As noted above, Vero Beach's research to date has been unable to discover any such easements.

Some of Vero Beach's transmission and distribution facilities in the Town are located in County and State road rights-of-way. The majority are generally located in utility easements dedicated to the public, or to the Town, with at least one dedicated directly to Vero Beach. On information and belief, approximately 95 percent of Vero Beach's distribution lines in the Town are located in dedicated utility easements.

In reliance on the Commission's Territorial Orders issued pursuant to Chapter 366, Florida Statutes, in reliance on Chapter 366, and in exercising its home rule powers, as well as in reliance on its powers under Section 180.02(2), Florida Statutes, and other legal authority, including reliance on the fact that both Indian River Shores and Indian River County knew of and allowed Vero Beach to use their rights-of-way for decades before any franchise agreements ever existed, Vero Beach has for nearly 100 years

provided safe and reliable service to its customers both inside and outside the city limits. With respect to its service to the Town and to Vero Beach's electric customers in the Town, Vero Beach has, for the past sixty-two years, installed, operated, and maintained its electric system facilities in good faith for the purpose of providing electric service to the Town and to Vero Beach's electric customers in the Town. In fulfilling this necessary public purpose,[5] Vero Beach has invested tens of millions of dollars, borrowed tens of millions of dollars, and entered into long-term power supply projects and related contracts, involving hundreds of millions of dollars of long-term financial commitments, in order to serve all of the customers in the City's service area approved by the Commission's Territorial Orders.

LEGAL BACKGROUND–STATUTES, CONSTITUTION, ORDERS, AND CASES

Constitutional Provisions

Florida Constitution, Article VIII, section 2(c), which provides as follows:

> SECTION 2. Municipalities.—
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> * * *
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> (c) ANNEXATION. Municipal annexation of unincorporated territory, merger of municipalities, and exercise of extra-territorial powers by municipalities shall be as provided by general or special law.

Florida Statutes

[5] Underscoring the necessary public purpose aspect of the City's electric operations, the Commission should consider this quote from the letter sent by the Town's Mayor Roland Miller to PSC Chairman Yarborough in 1971, "[T]he writer entered into negotiations with the City of Vero Beach back in 1958 to furnish the Town of Indian River Shores utilities, i.e. water, power and sewer, inasmuch as ***it was a physical impossibility to develop this area without these items***." (Emphasis added.)

Section 120.565, Florida Statutes, governs petitions for declaratory statements, and provides in pertinent part as follows:

> (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.
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> (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.

Section 166.021, Florida Statutes, which implements Article VIII, section 2(c) of the Florida Constitution, provides in pertinent part as follows:

> 166.021 Powers.—
> (1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.
> (2) "Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.
> (3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:
> (a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution; . . .

The Commission's statutes applicable to the issues presented by the Town's Petition include Sections 366.02, 366.04(1), 366.04(2)(d)&(e), and 366.04(5), Florida Statutes. Section 366.02, Florida Statutes, includes municipal electric utilities, such as the Vero Beach electric system, within the Commission's jurisdiction under Chapter 366. Section 366.04, Florida Statutes, sets forth the Legislature's grant of jurisdiction to the

Commission, and Section 366.04(1) articulates the Legislature's clear mandate that the Commission's jurisdiction is exclusive and superior to that of all other state agencies, political subdivisions, and other entities, specifically including counties, providing in pertinent part as follows:

> The jurisdiction conferred upon the commission shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail.

Sections 366.04(2)(d)&(e), Florida Statutes, which set forth the Commission's jurisdiction over territorial agreements and territorial disputes, provide in pertinent part as follows:

> (2) In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:
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> * * *
>
> (d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. However, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements.
>
> (e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

Section 366.04(5), Florida Statutes, codifies the Commission's jurisdiction over the State's generation, transmission, and distribution grid, and provides in pertinent part as follows:

> (5) The commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

Orders of the Florida Public Service Commission

The Commission's Territorial Orders include the following:

In re: Application of Florida Power and Light Company for approval of a territorial agreement with the City of Vero Beach, Docket No. 72045-EU, Order No. 5520 (August 29, 1972);

In re: Application of Florida Power & Light Company for approval of a modification of territorial agreement and contract for interchange service with the City of Vero Beach, Florida, Docket No. 73605-EU, Order No. 6010 (January 18, 1974);

In re: Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas, Docket No. 800596-EU, Order No. 10382 (November 3, 1981);

In re: Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas, Docket No. 800596-EU, Order No. 11580 (February 2, 1983); and

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 (February 9, 1988).

Other relevant Commission Orders include the following:

In re: Petition for declaratory statement regarding the effect of the Commission's orders approving territorial agreements in Indian River County by the City of Vero Beach, Order

No. PSC-15-0102-DS-EM, "Declaratory Statement," (Fla. Pub. Serv. Comm'n, February 12, 2015) ("City Order");[6]

In re: Petition for declaratory statement or other relief regarding the expiration of the Vero Beach electric service Franchise Agreement by Indian River County, Order No. PSC-15-0101-DS-EM, "Order Denying Petition for Declaratory Statement," (Fla. Pub. Serv. Comm'n, February 12, 2015) ("County Order"); and

In re: Joint Petition for Approval to Amend Territorial Agreement by Progress Energy Florida, Inc. and Reedy Creek Improvement District, Order No. PSC-10-0206-PAA-EU, "Notice of Proposed Agency Action Order Approving Joint Petition for Territorial Agreement Amendment," (Fla. Pub. Serv. Comm'n, April 5, 2010) ("Reedy Creek").

Court Cases

Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), cert. denied, 395 U.S. 909 (1969).

Fla. Pub. Serv. Comm'n v. Bryson, 569 So. 2d 1253 (Fla. 1990).

Public Service Comm'n v. Fuller, 551 So. 2d 1210 (Fla. 1989).

Roemmele-Putney v. Reynolds, 106 So. 3d 78 (Fla. 3d DCA 2013).

Sutton v. Dep't of Envtl. Protection, 654 So. 2d 1047, 1049 (Fla. 5th DCA 1995).

LEGAL BACKGROUND - PROCEDURAL

As the Commission is well aware, the legal proceedings initiated by the Town and by Indian River County relating to Vero Beach's right and obligation to serve pursuant to the Commission's Territorial Orders have now been going on for more than 18 months. The following briefly summarizes the history of these proceedings.

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[6] Although directly relevant to the underlying issues presented here, Vero Beach's Petition for Declaratory Statement that resulted in the Commission's Order No. 15-0102-DS-EM was predicated on the specific facts relating to Indian River County's claims under the franchise agreement between the County and Vero Beach.

A. Proceedings Initiated by the Town of Indian River Shores

On July 18, 2014, the Town filed its Initial Complaint, which initiated the currently ongoing case of Indian River Shores v. Vero Beach. In its Initial Complaint, the Town presented four counts, as follows:

Count I – For Declaratory and Injunctive Relief Relating to the City's Unreasonable and Unjust Electric Rates;

Count II – For Declaratory Relief That The City Must Remove Its Electric Facilities from the Town Upon Imminent Expiration of the Franchise Agreement;

Count III – For Declaratory and Injunctive Relief Relating to the City's Non-Compliance with Section 366.04(7), Florida Statutes; and

Count IV – For Declaratory and Injunctive Relief Relating to the City's Violation of the Customer's Constitutional Rights.

Pursuant to the mandatory dispute resolution procedures of Chapter 164, Florida Statutes, the Town and Vero Beach, joined by Indian River County, engaged in mediation discussions regarding the Town's and the County's complaints and disputes. Unfortunately, in May 2015, the mediation reached an impasse, and on May 18, 2015, the Town filed its Amended Complaint.

The Amended Complaint presented four somewhat different counts:

Count I – For Declaratory Relief that Upon the Imminent Expiration of the Franchise Agreement the City Does Not Have the Legal Right to Provide Electric Service Within the Town, and that the Town Has the Right to Decide How Electric Service is to be Furnished to Its Inhabitants;

Count II – For Anticipatory Breach of Contract;

Count III – For Breach of Contract; and

Count IV – For Declaratory and Supplemental Relief Relating to the City's Unreasonable and Oppressive Electric Rates.

(The Town dropped its counts relating to its allegation that Vero Beach had not complied with Section 366.04(7), Florida Statutes, and also relating to the claim that a co-plaintiff customer's constitutional rights had been violated.)

On July 7, 2015, Vero Beach filed its Motion to Dismiss the Town's Amended Complaint. On July 23, 2015, the Commission filed its Amicus Curiae Memorandum of Law ("Amicus Memorandum") in support of the Commission's jurisdiction and in support of Vero Beach's right and obligation to serve pursuant to the Commission's Territorial Orders issued pursuant to Chapter 366. Although the Town opposed the Commission's motion for leave to file its Amicus Memorandum, the Circuit Court granted the Commission's motion. Oral argument on Vero Beach's Motion to Dismiss was held before the Court on August 26, 2015. Vero Beach, the Commission, and the Town all presented argument.

On November 11, 2015, the Circuit Court issued its Order on Dismissal. In summary, the Court dismissed the Town's Count I, relating to Vero Beach's right and obligation to continue serving in the Town when the Franchise Agreement expires, with prejudice. The Court also dismissed Count II with prejudice, finding that "After expiration of the Franchise Agreement, there will be no Franchise Agreement to be breached by the City" and that "the Town has not pled facts supporting any existing breach of the City's contractual obligations under the Franchise Agreement." Order on Dismissal at 6. Although Count II as filed asked the Court for "damages in the amount which the Town has been harmed by the City's refusal to acknowledge the Town's rights

upon expiration of the Franchise Agreement," the Town attempted to explain at the August 26 hearing that its real issue was its desire to be able to force Vero Beach to remove its facilities from the Town's easements and rights-of-way after the Franchise Agreement expires. Accordingly, the Court stated that "Dismissal [] of Counts I and II are without prejudice to the Town's right to file an amended complaint or separate complaint alleging other grounds for the removal or relocation of the City's electric facilities from the Town's rights-of-way and other public places after expiration of the Franchise Agreement." Counts III and IV related to Vero Beach's electric rates: the Court denied Vero Beach's motion to dismiss Count III and dismissed Count IV with prejudice, finding that the issue of rates was properly addressed under Count III.

As it relates to the issues presented in the Town's Petition, the Order on Dismissal held that:

> The City currently provides electric service to a significant portion of the Town that is within the service area described in the City's territorial agreement with Florida Power & Light ("FPL"). The territorial agreement, including subsequent amendments thereto, has been approved by the Commission in a series of Territorial Orders [footnote omitted] pursuant to its statutory authority. *See* § 366.04(2)(d), Fla. Stat. Territorial agreements merge with and become part of the Commission's orders approving them. *Public Service Com'n v, Fuller*, 551 So. 2d 1210, 1212 (Fla. 1989). Accordingly, ***the PSC exercised its jurisdiction under the general law established by the Legislature*** when it issued the ***Territorial Orders granting the City the right and obligation to provide electric service in the territorial area approved in the Territorial Orders***.
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> * * *
>
> Although artfully argued otherwise, the actual relief sought by the Town amounts to an unfeasible request that the court determine what utility will provide electric service to the Town. This determination has already been made by the PSC in the Territorial Orders. *See Fuller* at 1210-1213 (the circuit court has no jurisdiction to modify or invalidate a territorial

agreement[] approved by the PSC in the exercise of its exclusive jurisdiction).

The relief requested by the Town is squarely within the jurisdiction of the PSC. First, pursuant to the PSC's statutory authority under section 366.04(2)(d) and (e), Florida Statutes, to approve and modify territorial agreements through its territorial orders and second, pursuant to section 366.04(1), Florida Statutes, providing the PSC with jurisdiction exclusive and superior to that of the Town, and directing that the orders of the Commission shall prevail in the event of conflict. *See Fuller* at 1212.

Accordingly, the court finds that it is without subject matter jurisdiction to grant the relief requested and that Count I should be dismissed with prejudice. Although ***this Court is without jurisdiction to decide the relief requested in Count I, the Town may seek relief before the Commission*** and, if unsuccessful there, by direct appeal to the Florida Supreme Court. *Reynolds* at 80-81; *Bryson* at 1255.

Order on Dismissal at 3-4, 5-6 (emphasis added; italics in original).

Pursuant to the Order on Dismissal, on December 1, 2015, the Town filed its Second Amended Complaint, and on January 11, 2016, Vero Beach filed its Answer, Affirmative Defenses, and Counterclaim, all of which remain pending in the judicial proceedings under Indian River Shores v. Vero Beach.

B. Proceedings Initiated by Indian River County

On July 21, 2014, the County filed its "Petition for Declaratory Statement and Such Other Relief as May Be Required" (the "County's Petition"), initiating Docket No. 140142-EM. The County's Petition set forth fourteen questions and fourteen corresponding requested declarations. These are not repeated here. On July 29, 2014, Vero Beach moved to intervene, and its motion was granted by Order No. PSC-14-0409-PCO-EM. On August 14, 2014, Vero Beach filed its Motion to Dismiss and Response in Opposition to Indian River County's Petition for Declaratory Statement. The Florida

Municipal Electric Association, Inc. ("FMEA"), Tampa Electric Company ("TECO"), Duke Energy Florida ("Duke"), and the Florida Electric Cooperatives Association ("FECA") all appeared as amicus curiae, and the Orlando Utilities Commission intervened in support of Vero Beach's positions and in opposition to the declaratory statements requested by Indian River County. FPL also intervened and stated that "it is FPL's position that the Petitioner's requested declaratory statements should be dismissed or denied to the extent the declarations it seeks run counter to the Florida Public Service Commission's exclusive and superior jurisdiction over territorial matters and the planning, development, and maintenance of a coordinated power supply grid throughout Florida." FPL's Response to Petition at ¶ 3 (August 22, 2014). The County filed a response on August 29, 2014.

The Commission Staff issued a recommendation to deny the County's Petition on November 13, 2014, which was scheduled to be taken up by the Commission at its regularly scheduled agenda conference on November 25, 2014. On the morning of November 25, 2014, however, the County requested that the Commission defer consideration of the County's Petition from the PSC's November 25, 2014 Agenda Conference and further stated: "The County anticipates filing an appropriate substantive filing in this docket on or about December 1, 2014, to revise or amend its Petition in this matter." (Letter from Floyd R. Self to Carlotta S. Stauffer, Commission Clerk, PSC Document No. 06470-14 (November 25, 2014) (emphasis added). The County did not revise or amend its Petition prior to the Commission taking action on the County's Petition at its February 3, 2015 Agenda Conference.

On December 19, 2014, Vero Beach filed its Petition for Declaratory Statement ("Vero Beach's Petition") with the PSC, which was addressed in Docket No. 140244-EM. Vero Beach's Petition requested the following two declarations from the PSC:

a. Neither the existence, non-existence, nor expiration of the Franchise Agreement between Indian River County and the City has any effect on the City's right and obligation to provide retail electric service in the City's designated electric service territory approved by the Commission through its Territorial Orders.

b. The City can lawfully, and is obligated to, continue to provide retail electric service in the City's designated electric service territory, including those portions of its service territory within unincorporated Indian River County, pursuant to applicable provisions of Florida Statutes and the Commission's Territorial Orders, without regard to the existence or non-existence of a franchise agreement with Indian River County and without regard to any action that the County might take in an effort to prevent the City from continuing to serve in those areas.

The County intervened in the docket on Vero Beach's Petition. Amicus curiae status was granted to Duke, TECO, FECA, and FMEA. Duke, TECO, FECA, and FMEA all filed comments generally in support of the City's Petition.

The dockets addressing Vero Beach's Petition and the County's Petition were not formally consolidated by the Commission. However, the Commission considered Vero Beach's Petition and the County's Petition at a consolidated oral argument at its February 3, 2015 Agenda Conference. In the City Order, the PSC effectively granted Vero Beach's Petition, declaring:

> ORDERED by the Florida Public Service Commission, for the reasons stated in the body of this Order, that Vero Beach has the right and obligation to continue to provide retail electric service in the territory described in the Territorial Orders upon expiration of the Franchise Agreement.

City Order at 17. The Commission denied the County's Petition in the County Order, finding that the County's Petition failed "to meet the statutory requirements necessary to obtain a declaratory statement." County Order at 33.

The County appealed both orders to the Florida Supreme Court, where the proceedings were consolidated under Case No. 15-0504 and Case No. 15-0505, both styled Board of Commissioners of Indian River County, Florida v. Graham. Oral argument was held on December 10, 2015, and the appeals remain pending.

LEGAL STANDARDS FOR GRANTING DECLARATORY STATEMENTS

The legal standards for whether a petition for declaratory statement should be granted are set forth in Section 120.565, Florida Statutes, which provides in pertinent part as follows:

> (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.

The law applicable to when declaratory statements should or should not be granted or issued has further been developed through decisions of the Commission and of Florida's appellate courts. A party seeking a declaratory statement must show that there is an "actual present and practical need" for the requested declaratory statement, and that the declaration addresses a "present controversy." Sutton v. Dep't of Envtl. Protection,

654 So. 2d 1047, 1048 (Fla. 5th DCA 1995). "Petitions for declaratory statements are similar to petitions for declaratory judgments, and appellate courts are guided by decisions issued under the declaratory judgments statute." Id. (citing Couch v. State, 377 So. 2d 32, 33 (Fla. 1st DCA 1979)). In a declaratory judgment case, the Third District stated the following:

> [I]n order to properly invoke the jurisdiction of the circuit court, the party seeking a declaration must not only show that he is in doubt as to the existence or nonexistence of some right or status, *see Kelner v. Woody*, 399 So. 2d 35, 37 (Fla. 3rd DCA 1981); *X Corp. v. Y Person*, 622 So. 2d 1098, 1101 (Fla. 2d DCA 1993), but also that there is a bond fide, actual, present, and practical need for the declaration.

Dep't of Envtl. Protection v. Garcia, 99 So. 3d 539, 544 (2011); see also 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 (hereinafter "In Re: TECO Territorial Dispute").

As the Commission has addressed the question, the "threshold requirements" for issuance of a declaratory statement include the petitioner seeking guidance as to how the Commission's statutes and orders apply to the petitioner's particular circumstances and a demonstration as to how the petitioner's "substantial interests will be directly affected" by a requested declaration. City Order at 14 (Vero Beach met threshold requirements because it sought guidance as to how specific Commission statutes and orders applied to Vero Beach's circumstances, and stating that "Vero Beach's substantial interests will be directly affected because our declaration will determine whether its right and obligation

to continue serving . . . are affected by the expiration of" the franchise agreement between Vero Beach and Indian River County). The Commission has also noted several grounds for denying, or declining to issue, requested declaratory statements, including: incorrect legal assumptions; failure by the petitioner to describe how it may be substantially affected under a particular set of facts by applicable Commission statutes, rules, or orders; seeking a general legal advisory opinion; seeking the Commission's declaration that would determine the conduct of third persons; requesting an analysis of statutory provisions not within the Commission's authority or analysis of the Florida Constitution; and seeking a declaratory statement with respect to subject matter that is currently pending in judicial proceedings. County Order at 27-31.

DISCUSSION

The Commission should deny the Town's Petition because the Circuit Court has decided both the substantive issue as to the "actual relief sought by the Town" and, in so doing, the Court has also adjudicated the Town's constitutional claim, expressly recognizing the Town's assertion that only the Court could address its constitutional claims (Order on Dismissal at 5) but also expressly recognizing that "the PSC exercised its jurisdiction under the general law established by the Legislature when it issued the Territorial Orders granting the City [Vero Beach] the right and obligation to provide electric service in the territorial area approved in the Territorial Orders." Order on Dismissal at 2-3. This addresses the constitutional claim because the only criterion in the Florida Constitution (and Section 166.021, Florida Statutes) applicable to Vero Beach's

right to serve outside its city limits is that such action be pursuant to general or special law. Even if the Commission were to grant the Town's requested declaratory statement, the Town would be in exactly the same position it is now, i.e., with a binding order of the Circuit Court recognizing that ***the PSC has granted "Vero Beach the right and obligation to provide electric service in the territorial area approved in the Territorial Orders"*** through an ***exercise of the PSC's "jurisdiction under the general law established by the Legislature***." Order on Dismissal at 3-4 (emphasis added).

Moreover, the Commission should deny the Town's Petition because the substantive and jurisdictional issues raised by the Town remain the subject of pending judicial proceedings, namely Indian River Shores v. City of Vero Beach. The issues were presented, argued, and adjudicated – by the Court's Order on Dismissal – and are therefore subject to being appealed at the appropriate time in the ongoing and pending judicial proceedings on the Town's claims.

Further, the Town's requested declaratory statement is unnecessary because there is no legitimate doubt as to where jurisdiction over the Town's constitutional claim lies, and improper because it is not a request that the Commission declare the Town's position, rights, or status under the PSC's statutes, rules, or orders. The Town was not in doubt as to jurisdiction over its constitutional claim when it went to the Court, and the Court did not do anything to create any doubt. Moreover, contrary to the Town's suggestions, nothing in the PSC's Amicus Curiae Memorandum of Law or in the argument presented by the Commission's counsel at the hearing on Vero Beach's Motion

to Dismiss created any doubt as to the proper venue for jurisdiction over the Town's constitutional claim.

The "no jurisdiction" declaratory statements cited by the Town involved instances where the petitioners were uncertain whether they were subject to the PSC's regulation or regulatory jurisdiction under the PSC's organic statutes; the Town's petition here essentially asks the PSC to issue a declaratory statement affirming the Town's view of the Circuit Court's jurisdiction over constitutional issues. This is not an appropriate request to the Commission, but rather, where the Court issued its Order on Dismissal with explicit recognition of the Town's constitutional claims, any such jurisdictional arguments should continue to be made to the courts on appeal.

Finally, the Town has not established a basis for any reasonable doubt as to its rights or position under the PSC's statutes, rules, or orders with respect to the constitutional issue that the Town has attempted to raise. Rather, the Town's requested statement is essentially for a statement of basic, generally known, and commonly recognized black-letter law in Florida, i.e., that administrative agencies, including the PSC, cannot interpret the Florida Constitution. For this reason also, the Town's Petition is unnecessary and improper, and accordingly, the Commission should deny it.

I. The Commission Should Deny the Town's Petition Because the Circuit Court Has Decided the Substantive Jurisdictional Issue Presented in the Town's Petition.

The Commission should deny the Town's Petition because the Circuit Court has decided the substantive jurisdictional and constitutional issues presented in the Petition.

The Town claims to be in doubt as to "where to go to adjudicate and enforce the rights and protections" that the Town claims are "afforded to it by the Florida Constitution." Petition at 3. The Town was not in doubt when it asked the Circuit Court to adjudicate exactly those claims in Indian River Shores v. Vero Beach, and it has no basis to be in doubt now. The Circuit Court, fully informed and cognizant of the Town's constitutional claims and arguments, expressly recognized that the PSC granted Vero Beach the right and obligation to serve in the service areas described in the Territorial Orders in an exercise of the PSC's exclusive and superior jurisdiction pursuant to the general law established by the Legislature, thereby satisfying the sole requirement of Article VIII, Section 2(c) of the Florida Constitution. The Court further saw through the Town's "artfully argued" claims in reaching its decision that "the actual relief sought by the Town amounts to an unfeasible request that the court determine what utility will provide electric service to the Town." Order on Dismissal at 5.

Accordingly, since there is no legitimate basis for the Town's supposed "doubt" as to "where to go" with its constitutional claims, the Commission need not and should not issue the requested declaratory statement. Sutton v. Dep't of Envtl. Protection, 654 So. 2d 1047, 1049 (Fla. 5th DCA 1995). In short, the Town fully and clearly asked the Circuit Court to resolve its claims, including its constitutional claim, but simply got the answer it didn't want: that the PSC had in fact "exercised its jurisdiction under the general law established by the Legislature when it issued the Territorial Orders granting the City [Vero Beach] the right and obligation to provide electric service in the territorial area approved in the Territorial Orders," Order on Dismissal at 3-4, and that the Court was

thus without jurisdiction to grant the Town the relief it wanted. Order on Dismissal at 5. The Town's proper avenue for further relief would be through an appeal of the Court's Order on Dismissal pursuant to the Florida Rules of Appellate Procedure.

A. The Court Has Decided the Substantive and Jurisdictional Issues Posed in the Town's Petition.

In its Amended Complaint, the Town asked the Circuit Court for "declaratory relief that upon the imminent expiration of the Franchise Agreement the City [Vero Beach] does not have the legal right to provide electric service within the Town, and that the Town has the right to decide how electric service is to be furnished to its inhabitants." Amended Complaint at 11. The Town also asserted a claim that, even if Vero Beach "somehow has been given the power by a current general or special law to provide extraterritorial electric service, it cannot do so in a manner that will encroach on the municipal authority of the Town." Id. at 12. The Town also raised its assertions that Vero Beach did not have the power to provide extra-territorial electric service in the Town by operation of the Florida Constitution. Id. at 3. This latter issue is referred to herein as the "Town's constitutional claim." (As noted above and in the Town's Petition, Section 166.021, Florida Statutes, implements Article VIII, section 2(c) of the Constitution.) Although the Town's Amended Complaint was less than clear on this point, at the hearing on Vero Beach's Motion to Dismiss, the Town did make clear that it was asking the Court to rule on its constitutional claim. Indian River Shores v. Vero Beach, Transcript of Hearing on Vero Beach's Motion to Dismiss (August 26, 2015) ("Hearing Transcript") at 40-41; Exhibit F to Town's Petition at 2-3, 6.

The Circuit Court was thus fully informed and cognizant of the Town's claims based on the Florida Constitution and Section 166.021, Florida Statutes. As the Court stated in the Order on Dismissal, the Court fully recognized that:

> it is the Town's position that it has a right to be protected from the City's exercise of extra-territorial power within the Town after expiration of the Franchise Agreement, but that the Town is uncertain of such rights under the terms of the Franchise Agreement, the Florida Constitution, the Municipal Home Rule Powers Act and section 180.02(2), Florida Statutes, after expiration of the Franchise Agreement. [footnote omitted] The Town maintains that only the court has the authority to address these threshold contractual, constitutional, and statutory issues because the PSC's authority is limited to issuing declarations interpreting the rules, order and statutory provisions of the Commission.

Order on Dismissal at 4-5; see also the Town's Petition at ¶ 32 (including the excerpts shown there from the transcript of the hearing before the Circuit Court on Vero Beach's Motion to Dismiss). This makes clear that the Court was indeed fully informed as to the Town's request for a ruling on its constitutional claim.[7]

Thus fully informed, the Circuit Court held as follows:

> The City currently provides electric service to a significant portion of the Town that is within the service area described in the City's territorial agreement with Florida Power & Light ("FPL"). The territorial agreement, including subsequent amendments thereto, has been approved by the Commission in a series of Territorial Orders [footnote omitted] pursuant to its statutory authority. *See* § 366.04(2)(d), Fla. Stat. Territorial agreements merge with and become part of the Commission's orders approving them. *Public Service Com'n v, Fuller*, 551 So. 2d 1210, 1212 (Fla. 1989). Accordingly, ***the PSC exercised its jurisdiction under the general law established by the Legislature*** when it issued the ***Territorial Orders granting the City the right and obligation to provide electric service in the territorial area approved in the Territorial Orders***.

[7] The Town indeed got a ruling, but it was not the ruling that it wanted; this result does not create any doubt as to where jurisdiction over that claim lies.

* * *

> Although artfully argued otherwise, the actual relief sought by the Town amounts to an unfeasible request that the court determine what utility will provide electric service to the Town. This determination has already been made by the PSC in the Territorial Orders. *See Fuller* at 1210-1213 (the circuit court has no jurisdiction to modify or invalidate a territorial agreement[] approved by the PSC in the exercise of its exclusive jurisdiction).
>
> The relief requested by the Town is squarely within the jurisdiction of the PSC. First, pursuant to the PSC's statutory authority under section 366.04(2)(d) and (e), Florida Statutes, to approve and modify territorial agreements through its territorial orders and second, pursuant to section 366.04(1), Florida Statutes, providing the PSC with jurisdiction exclusive and superior to that of the Town, and directing that the orders of the Commission shall prevail in the event of conflict. *See Fuller* at 1212.
>
> Accordingly, the court finds that it is without subject matter jurisdiction to grant the relief requested and that Count I should be dismissed with prejudice. Although ***this Court is without jurisdiction to decide the relief requested in Count I, the Town may seek relief before the Commission*** and, if unsuccessful there, by direct appeal to the Florida Supreme Court. *Reynolds* at 80-81; *Bryson* at 1255.

Order on Dismissal at 3-4, 5-6 (emphasis added).

The Town now asks the PSC to declare "whether [the PSC] has jurisdiction to interpret Article VIII, Section 2 (c) of the Florida Constitution and Section 166.021, Florida Statutes, for purposes of adjudicating and resolving whether the Town has a constitutional right to be protected from unconsented exercises of extra-territorial powers by Vero Beach within the Town's corporate limits." Town's Petition at 2-3. The Town alleges that it is "substantially affected and in need of this declaration in order to avoid costly administrative litigation by selecting the proper course of action in advance. Simply stated, the Town needs to know where to go to adjudicate and enforce the rights

and protections afforded to it by the Florida Constitution." Town's Petition at 3. The Town further states, "The Town believes that it has a right under Article VIII to be protected from unconsented exercises of extra-territorial powers by Vero Beach and that Vero Beach does not have the requisite statutory power to exercise extra-territorial powers within the Town's corporate limits without the Town's consent." Petition at ¶ 22. Finally, the Town concludes by claiming to be in doubt regarding "whether the PSC has jurisdiction to address and resolve the constitutional questions pertaining to the Town's particular set of circumstances" described in its Petition. Id. at ¶ 44.

However, because its constitutional theory grounds on the proposition that Vero Beach can only serve outside its corporate limits pursuant to "general or special law," the Town's constitutional claim was in fact decided by the Circuit Court when the Court clearly stated that Vero Beach "provide[s] electric service in the territorial area approved in the Territorial Orders," which includes "a significant portion of the Town," pursuant to the Commission's Territorial Orders that were issued through the Commission's exercise of "its jurisdiction under the general law established by the Legislature when it issued the Territorial Orders granting the City the right and obligation to provide electric service in the territorial area approved in the Territorial Orders." Order on Dismissal at 3-4.

The Constitution makes no mention of the "consent" of any municipality being required for another municipality to exercise extra-territorial powers, rather the criterion in the Constitution is simply whether the municipality exercising the power is doing so pursuant to general or special law. In its rulings cited above, the Circuit Court expressly

and explicitly recognized that Vero Beach serves pursuant to general law, namely Chapter 366, Florida Statutes, which resolved any argument about the applicability of the Florida Constitution to the Town's claim.

The Court then went on to address the Town's substantive request for relief – i.e., that upon expiration of the Franchise Agreement, Vero Beach would no longer have the legal right to provide electric service within the Town, and that the Town would thereafter have the right to decide how electric service would be supplied in the Town – as follows:

> Although artfully argued otherwise, the actual relief sought by the Town amounts to an unfeasible request that the court determine what utility will provide electric service to the Town. This determination already has been made by the PSC in the Territorial Orders.
>
> The relief requested by the Town is squarely within the jurisdiction of the PSC.
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> * * *
>
> Accordingly, the court finds that it is without subject matter jurisdiction to grant the relief requested and that Count I should be dismissed with prejudice. Although ***this Court is without jurisdiction to decide the relief requested in Count I, the Town may seek relief before the Commission*** and, if unsuccessful there, by direct appeal to the Florida Supreme Court. *Reynolds* at 80-81; *Bryson* at 1255.

Order on Dismissal at 5-6.

In short, the Court addressed ***and*** ruled on the Town's constitutional claim, when it ruled that the "***PSC exercised its jurisdiction under the general law established by the Legislature*** when it issued the ***Territorial Orders granting the City the right and obligation to provide electric service in the territorial area approved in the Territorial***

Orders," and on the Town's jurisdictional issue when it held that only the PSC could grant the "actual relief" that the Town wants, by a modification of the PSC's Territorial Orders, issued pursuant to general law, that only the PSC has the authority to modify. Order on Dismissal at 5 (citing PSC v. Fuller, 551 So. 2d 1210, 1212 (1989)). The Court then told the Town that it could seek that relief – i.e., modification of the Territorial Orders, which is the "actual relief sought by the Town" – from the PSC. The Court in no way suggested that the Town could or should seek resolution of its constitutional claim from the PSC, through a petition for declaratory statement or any other form of pleading, and thus the Court's statement that the Town can seek relief before the Commission cannot be read as creating any basis for doubt as to where jurisdiction over the Town's constitutional claim lies.

Thus, the Town's avenue for relief, if any is available, is to appeal the Circuit Court's Order on Dismissal pursuant to the Florida Rules of Appellate Procedure. The Commission should deny, or decline to issue, the declaratory statement requested by the Town.

B. Even if the Commission Issued the Town's Requested Declaratory Statement to the Effect That It Cannot Adjudicate the Town's Constitutional Claim, the Town Would be in Exactly the Same Position it is Now.

Even if the Commission were to grant the Town's requested declaratory statement, the Town would be in exactly the same position it is now, i.e., with a binding order of the Circuit Court recognizing that ***the PSC has granted "Vero Beach the right and obligation to provide electric service in the territorial area approved in the Territorial***

Orders" through an ***exercise of the PSC's "jurisdiction under the general law established by the Legislature.***" Order on Dismissal at 3-4. Therefore, there is no basis for doubt regarding the Town's rights or status, Sutton, 654 So. 2d at 1049, and accordingly, the Commission should deny or decline to issue the requested declaratory statement.

C. The Commission's Order Approving an Amendment to the Territorial Agreement Between Progress Energy Florida and Reedy Creek Improvement District Is Inapposite to Vero Beach's Right and Obligation to Serve Pursuant to the Commission's Territorial Orders and Inapplicable to the Town's Constitutional Claim.

The Town attempts to rely on Reedy Creek for the proposition that "The PSC has acknowledged that an order approving a territorial agreement between a municipal utility and an investor-owned utility does not provide a municipal utility the inherent statutory authority to serve extra-territorially outside its municipal boundaries." Town's Petition at ¶ 22. Reedy Creek is inapposite, for the simple reason that the facts in that case involved a specific legislative amendment to the Reedy Creek Improvement District's (the "District") charter that de-annexed a certain area from the District's corporate boundaries, which left the District specifically prohibited by its charter from providing service in the de-annexed area. The Commission had previously approved a similar amendment to the original territorial agreement between the District and Florida Power Corporation, predecessor to Progress Energy Florida. In Re: Joint Petition for Approval of Territorial Agreement between Florida Power Corporation and Reedy Creek Improvement District, "Notice of Proposed Agency Action Order Granting Joint Petition for Territorial Agreement," Order No. PSC-94-0580-FOF-EU (Fla. Pub. Serv. Comm'n, May 17, 1994).

As the Commission noted in its 2010 Reedy Creek Order, that amendment involved a de-annexation of area from the District's boundaries, and in Order No. PSC-94-0580, the Commission specifically "required that PEF and RCID seek our approval prior to making any permanent boundary changes," Id. at 1. Naturally, then, the 2008 legislative de-annexation of area from the District's boundaries necessitated the Commission's actions in 2010.

Nothing in the Commission's 2010 Reedy Creek order makes any reference to whether the District had or did not have authority to serve outside its boundaries pursuant to the Commission's order approving the territorial agreement between the District and Progress Energy. That question was simply not raised, and the Commission naturally followed the parties' requests to conform the territorial agreement to the District's legislatively modified boundaries.

On its face, nothing in the Commission's Reedy Creek order has any bearing on the Town's constitutional claim.

II. The Commission Should Deny the Town's Petition Because the Substantive Issue Presented by the Town Is the Subject of Pending Judicial Proceedings. The Proper Avenue by Which the Town Should Seek Relief Is by Appeal of the Circuit Court's Order on Dismissal.

The Commission should also deny the Town's Petition because the substantive issue presented by the Town is, in legal fact, the subject of pending judicial proceedings in Indian River Shores v. Vero Beach. As the First District stated in Padilla v. Liberty Mut. Ins. Co., 832 So. 2d 916, 919 (Fla. 1st DCA 2002):

> Where questions presented in a petition for declaratory statement are at issue in pending judicial proceedings, the administrative agency to whom the petition is addressed should refrain from issuing a declaratory statement until the proceedings in court conclude.
>
> * * *
>
> When a case is properly pending in a circuit court, a party cannot compel an agency through a declaratory statement to give opinions or decisions concerning the issues, or as to the outcome of controversies, then pending in the court.

Id. at 920.

Although the Circuit Court has ruled on the issues raised in the Town's Petition, these issues are nonetheless still part of the pending judicial proceedings because the Town retains the right to file an appeal of the Court's decision. While the Town's claim that it has a constitutional right to be protected from Vero Beach's exercise of extra-territorial powers by providing electric service within the Town's corporate limits has been dismissed with prejudice by the Circuit Court, and while that claim has been omitted from the Town's Second Amended Complaint and is thus not a claim that is ***presently*** pending for any further decision from the Circuit Court, it is nonetheless part of the Circuit Court case and subject to being appealed at the appropriate time. The Town's claim was raised in the instant court case and adjudicated in the instant court case, by the Court's dismissal with prejudice because the PSC had exercised its jurisdiction "under the general law established by the Legislature," thereby satisfying the only relevant criterion in the Florida Constitution and in Section 166.021, Florida Statutes, and thus leaving the Court without jurisdiction to grant "the actual relief sought by the Town." Therefore, the ultimate resolution of jurisdiction over the Town's constitutional claim lies

in an appeal of a final judgment from the instant court case, and the Commission should deny the requested Petition.

As it relates to the Town's ability to seek relief from the PSC, it is clear that the Circuit Court's Order on Dismissal applies only to the Town's ability to seek the "actual relief sought by the Town," and to the Court's ability to "decide the relief requested in Count I." Order on Dismissal at 5-6. This is clear because the "actual relief sought by the Town" – an order from the Court stating that, after the Franchise Agreement expires, Vero Beach has no right to serve in the Town and the Town may thereafter choose its electric supplier – can ***only*** be granted by the PSC through a modification of the Territorial Orders. As the Court articulated its holding, "Thus, the City retains its right and obligation to provide electric service within the territory described in the Territorial Orders ***unless and until the Territorial Orders are modified or terminated by the Commission***," and "***Any modification or termination of a Commission-approved territorial order must first be made by the Commission pursuant to its exclusive jurisdiction***. *Fuller* at 1212." Order on Dismissal at 3-4 (citation to Fuller in original; emphasis added).

As noted above, even if the PSC were to grant the requested declaration, the Town would be in exactly the same position it is at present, with a binding order of the Circuit Court recognizing that ***the PSC has granted Vero Beach the right and obligation to serve*** in the areas approved in the Territorial Orders, ***through an exercise of the PSC's "jurisdiction under the general law established by the Legislature***." Thus, the requested declaration would not change anything.

III. The Town's Requested Declaratory Statement Is Unnecessary and Improper.

The Town's requested declaratory statement is unnecessary because there is no legitimate doubt as to where jurisdiction over the Town's constitutional claim lies, and improper because it is not a request that the Commission declare the Town's position, rights, or status under the PSC's statutes, rules, or orders. Instead, it is a request that the PSC issue an order confirming the Town's view of what tribunal has jurisdiction over the Town's constitutional claim. There is no basis for any reasonable doubt as to Commission's jurisdiction over the Town's constitutional claim, and the "no jurisdiction" declaratory statements issued by the PSC, as well as a number of "jurisdiction found" declaratory statements issued by the PSC, simply stand for the proposition that petitioners are entitled to determinations of whether they are, or are not, subject to the PSC's regulatory requirements under the Commission's organic statutes. These jurisdictional declaratory statements do not apply to determinations as to whether the PSC or the courts have jurisdiction over claims raised under the Florida Constitution.

A. There is No Reasonable Basis for Doubt as to Whether the Commission Has or Does Not Have Jurisdiction Over the Town's Constitutional Claim.

The Town surely was not in doubt about jurisdiction over the constitutional issue when it went to the Court. As the Court observed, "The Town maintains that only the court has the authority to address these threshold contractual, constitutional, and statutory issues because the PSC's authority is limited to issuing declarations interpreting the rules, orders and statutory provisions of the Commission." Order on Dismissal at 5. And

fundamentally, the Town was at least correct about which tribunal – as between the Circuit Court and the PSC – has jurisdiction over its constitutional claim.

The Court did not rule that it was without jurisdiction to decide the Town's constitutional claim. Rather, the Court decided the Town's constitutional claim when it recognized that the "***PSC exercised its jurisdiction under the general law established by the Legislature*** when it issued the ***Territorial Orders granting the City the right and obligation to provide electric service in the territorial area approved in the Territorial Orders.***"

To recapitulate a point made above, the Court's Order on Dismissal did not create any doubt as to the venue for jurisdiction over the Town's constitutional claim. Upon holding that it was "without subject matter jurisdiction" to grant "the actual relief sought by the Town," the Court told the Town that it could seek that actual relief – i.e., modification of the Territorial Orders, which is the "actual relief sought by the Town" – from the PSC. Order on Dismissal at 5-6. The Court in no way suggested that the Town could or should seek resolution of its constitutional claim from the PSC, and thus the Court's statement that the Town can seek relief before the Commission cannot be read as creating any basis for doubt as to where jurisdiction over the Town's constitutional claim lies.

B. Neither the Commission's Amicus Curiae Memorandum of Law Nor the Statements by the Commission's Counsel at the Hearing on Vero Beach's Motion to Dismiss Create Any Doubt Regarding the Commission's Jurisdiction Over the Town's Constitutional Claim.

The Town's suggestion that the argument made by the PSC's counsel at the hearing on Vero Beach's Motion to Dismiss somehow created doubt regarding the Commission's jurisdiction with respect to the Town's constitutional claim are simply misplaced. The Town's asserts that:

> The positions taken by the PSC's counsel in the Circuit Court proceeding appear to contradict other PSC orders that state that the PSC has no authority under Chapter 366 or any other applicable law over any provision of the Florida Constitution or over statutes that address local government powers such as Section 166.021. For these reasons, the Town is in doubt regarding whether the PSC in fact has jurisdiction under Chapter 366 or any other applicable law to adjudicate and resolve the threshold constitutional questions raised by the Town.

Town's Petition at 2.

A careful reading of the hearing transcript shows these assertions to be unfounded. The Commission's counsel clearly addressed the Commission's jurisdiction with respect to the relief specifically requested in the Town's Amended Complaint, and further specifically recognized that the Commission will not interpret municipal powers and constitutional provisions. To the first point, the PSC's counsel stated the following:

> The Public Service Commission filed an amicus memorandum in this case because it is the Office of General Counsel's opinion that the Circuit Court does not have jurisdiction to issue a declaratory judgment that determines whether or not Vero Beach has the right and obligation to provide electric service in the Town of Indian River Shores.
>
> This determination has already been made by the Public Service Commission in its territorial orders, which are Exhibit E to the motion to dismiss. These orders were issued pursuant to the Public Service

> Commission's exclusive and superior jurisdiction granted to it by the Florida Legislature. It is well-established that territorial orders may only be modified by the Commission.

Hearing Transcript at 25.

Similarly and to the same effect, the PSC's counsel stated the following:

> The Town's request to the Circuit Court for a determination of whether the City of Vero Beach, upon expiration of the franchise agreement, has the right to continue to provide service in the Town of Indian River Shores as it is authorized to do by the Commission in the territorial order[s], directly interferes with the Public Service Commission's jurisdiction.

Hearing Transcript at 29-30.

The Commission's counsel further stated the following:

> Chapter 366 is general law and it gives exclusive and superior jurisdiction over service of the utility providers in the State of Florida.
>
> * * *
>
> When you look at what is being requested, their specific questions are whether upon expiration of the franchise agreement, does the Town have the right to determine how electric service should be provided to its inhabitants; and upon expiration of the franchise agreement, does the City have a legal right to provide service.
>
> These are areas that are specifically within the jurisdiction of the Commission.

Hearing Transcript at 62-63.

Nothing in these comments addressing the Commission's jurisdiction gives even a hint that the PSC might have jurisdiction over the Town's constitutional claim, and accordingly, nothing here creates any doubt as to the PSC's jurisdiction.

With respect to the Commission's counsel's statements regarding "municipal powers" and "Constitutional provisions," the Commission's counsel stated the following:

> The Town is attempting to pull in areas outside of the Commission's jurisdiction and make statements that by the Commission's own orders that we, ***we will not interpret municipal powers and Constitutional provisions as to franchise agreements and rights-of-way. Well, that is true.***
>
> And in the Indian River County order where we denied the petition for declaratory statement of Indian River County, . . . ***[t]hose issues where we made statements about not looking at 125 or the Constitutional issues were because those particular questions posed were not within our authority.*** They did not have to do with the provider of service and the territorial agreement.

Hearing Transcript at 65. The Commission counsel's statements disavowing jurisdiction over constitutional issues and other statutes could hardly be clearer.

Similarly, the Commission's arguments to the Circuit Court in its Amicus Curiae Memorandum of Law properly addressed the Commission's jurisdiction over the Town's requested relief in Count I of its Amended Complaint, namely for a declaratory judgment from the Circuit Court that, upon expiration of the Franchise Agreement, Vero Beach would no longer have the right to serve in the Town and that the Town would thereafter have the power to select the electric service supplier that would provide service in the Town. PSC's Amicus Curiae Memorandum at 2-4, 6-7. As is the case with the Commission's presentation and argument at the hearing, there is nothing in the Commission's Amicus Memorandum that creates any doubt regarding the Commission's jurisdiction with respect to the Town's constitutional claim.

In sum, nothing in the Hearing Transcript, and nothing in the Commission's Amicus Memorandum, suggests that the Commission or its counsel believes that the PSC

has jurisdiction over the Town's constitutional claim, and accordingly, nothing in the cited passages creates any doubt whatsoever as to whether the Commission might have jurisdiction over the Town's constitutional claim. Accordingly, there is no need for the requested declaratory statement because the Town's premise – that it is in doubt as to the Commission's jurisdiction – is false, and accordingly, the Commission should deny or decline to issue the requested declaratory statement. See Sutton, 654 So. 2d at 1049.

C. The Town's Requested Declaratory Statement is Improper Because It Does Not Seek a Declaration of the Town's Status or Rights Under the Commission's Statutes, Rules, or Orders.

Section 120.565(1), Florida Statutes, provides as follows:

> (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.

The declaratory statement requested by the Town does not comport with the statute. It simply does not ask the PSC for a declaration as to the Town's status, rights, or obligations under the Commission's statutes, rules, or orders, but rather asks the PSC to affirm or confirm the Town's view of jurisdiction over the Town's constitutional claim, which has already been decided by a court of competent jurisdiction. This is not an appropriate request for a declaratory statement from the Commission, and the Commission should accordingly deny, or decline to issue, the requested statement.

Of course, declaratory statements declaring whether the PSC has or does not have jurisdiction over persons or entities are entirely appropriate, and the PSC has issued a goodly number of such declaratory statements. However, those declaratory statements

related to the applicability or non-applicability of the PSC's regulatory jurisdiction to the petitioning parties under the PSC's organic statutes, e.g., Chapter 366, Florida Statutes (relating to providers of electricity and natural gas), and Chapter 364, Florida Statutes (relating to telecommunications providers). The "no jurisdiction" case cited by the Town[8] addressed whether specific provisions and requirements of the PSC's organic telecommunications statutes applied to the petitioning entities for a very specific purpose relative to their eligibility to receive federal universal service support. In Nextel/ALLTEL, the Commission granted the determinations of "no jurisdiction" based on the fact that "the Florida Legislature has expressly excluded CMRS providers [the status held by the petitioning companies] from the jurisdiction of the Commission." Order No. PSC-03-1063 at 3.

[8] In re: Petition for Declaratory Statement that NPCR, Inc. d/b/a Nextel Partners, Commercial Mobile Radio Service Provider in Florida, is not Subject to Jurisdiction of Florida Public Service Commission for Purposes of Designation as "Eligible Telecommunications Carrier," PSC Docket No. 030346-TP, and In re: Petition for Declaratory Statement that ALLTEL Communications, Inc., Commercial Mobile Radio Service Provider in Florida, is not Subject to Jurisdiction of Florida Public Service Commission for Purposes of Designation as "Eligible Telecommunications Carrier, PSC Docket No. 030413-TP, "Declaratory Statement," Order No. PSC-03-1063-DS-TP (Fla. Pub. Serv. Comm'n, September 23, 2003) 2003 WL 22238964 (2003) (hereinafter cited as "Nextel/ALLTEL").

The Commission has issued a number of other declaratory statements regarding whether entities are or are not subject to the Commission's jurisdiction under its organic statutes.[9] Again, however, all of these declaratory statements have addressed questions relating to whether the petitioners were or were not subject to the Commission's organic regulatory statutes.

To recapitulate a point made above, the Court's Order on Dismissal did not create any doubt as to the venue for jurisdiction over the Town's constitutional claim. Upon holding that it was "without subject matter jurisdiction" to grant "the actual relief sought by the Town," the Court told the Town that it could seek that relief – i.e., modification of the Territorial Orders, which is the "actual relief sought by the Town" – from the PSC.

---

[9] As examples of "no jurisdiction" declaratory statements, see In Re: Petition of Seminole Fertilizer Corporation for a Declaratory Statement Concerning the Financing of a Cogeneration Facility, 90 FPSC 11:126 ("Seminole Fertilizer") (jurisdiction under Chapter 366 found not to attach to cogenerator and related consumer of energy produced by cogeneration facility); and In Re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility, "Declaratory Statement," PSC Docket No. 860725-EU, Order No. 17009 (Fla. Pub. Serv. Comm'n, December 22, 1986) ("Monsanto") (jurisdiction under Chapter 366 found not to attach to parties to a lease-financing arrangement for cogeneration equipment).

Similarly, although with different results, i.e., jurisdiction over petitioning entities was affirmed by the Commission, see In Re: Petition of PW Ventures, Inc. for a Declaratory Statement, "Order Denying Declaratory Statement," PSC Docket No. 870446-EU (Fla. Pub. Serv. Comm'n, October 22, 1987); affirmed sub nom. PW Ventures v. Nichols, 533 So. 2d 281 (Fla. 1988) (petition for declaratory statement that planned cogeneration company would not be a "public utility" under Chapter 366 denied based on PSC's determination that petitioner would, in fact, be a public utility); In re: Petition for a Declaratory Statement Concerning Financing and Ownership Structure of a Cogeneration Facility in Polk County, by Polk Power Partners, L.P., "Order Granting Petition for Declaratory Statement in the Negative," PSC Docket No. 931190-EQ (Fla. Pub. Serv. Comm'n, February 167, 1994) (petition for declaratory statement regarding "public utility" status of petitioner was granted in the negative, thus affirming PSC regulatory jurisdiction over petitioner).

Order on Dismissal at 5-6. The Court in no way suggested that the Town could or should seek resolution of its constitutional claim from the PSC, and thus the Court's statement that the Town can seek relief before the Commission cannot be read as creating any basis for doubt as to where jurisdiction over the Town's constitutional claim lies.

In contrast to the Commission's "jurisdictional" declaratory statements cited above, the Town's request here is not for a declaration of its status under the Commission's statutes, rules, or orders. Rather, it is for a declaration of known, commonly received black-letter law in Florida, i.e., that agencies, including the PSC, cannot interpret the Florida Constitution. Southern Alliance for Clean Energy v. Graham, 113 So. 3d 742, 748 (Fla. 2013) ("The PSC did not, and indeed could not, rule on the constitutionality of section 366.93, Florida Statutes (2010). *See Fla. Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 849 (Fla. 1st DCA 2002) (recognizing that administrative agencies lack [the] power to consider or determine constitutional issues).") (Citation and italics in original). See also Myers v. Hawkins, 362 So. 2d 926, 929 n.4 (Fla. 1978); In re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor, PSC Docket No. 110001-EI, Order No PSC-11-0579-FOF-EI at 11 (Fla. Pub. Serv. Comm'n, Dec. 16, 2011). Thus, the Town cannot be in doubt about this, either, and accordingly, the PSC need not and should not issue the requested declaratory statement.

In Sutton v. Dep't of Envtl. Protection, 654 So. 2d 1047, 1049 (Fla. 5th DCA 1995), the Fifth District stated the following:

> Here, there is no need for DEP to issue a declaratory statement because Sutton's rights, status, and other equitable or legal relations are not in doubt.

As in Sutton, the Town's rights and status, having been clearly stated by the Circuit Court, are not in doubt: If the Town wants the relief for which it asked the Court, it must seek the PSC's modification of the Territorial Orders, not a determination of its purported constitutional claim. Further, its constitutional claim has been addressed by the Circuit Court, where the Court expressly found that "the PSC exercised its jurisdiction under the general law established by the Legislature when it issued the Territorial Orders granting the City [Vero Beach] the right and obligation to provide electric service in the territorial area approved in the Territorial Orders," Order on Dismissal at 2-3, which addressed the Town's constitutional claim because the only criterion in the Florida Constitution (and Section 166.021, Florida Statutes) applicable to Vero Beach's right to serve outside its city limits is that such action be pursuant to general or special law. Accordingly, there is no basis for the Town to be in doubt, and the Commission should deny the requested declaratory statement.

D. The Town's Requested Declaratory Statement is Not a Proper Subject or Issue for a Declaratory Statement by the Commission.

While the Town has not made clear exactly what "costly administrative litigation" the requested declaration would enable the Town to avoid, Town's Petition at 3, or what use the Town intends to make of the requested declaration, were it to be granted, it appears that what the Town is really asking is that the PSC issue a declaratory statement that would affirm or confirm the Town's view of the jurisdictional question as to its

constitutional claim. This is not a proper question to present to the PSC, especially since a Florida court of competent jurisdiction has already decided it, and accordingly, the PSC should deny, or decline to issue, the requested declaratory statement.

CONCLUSION

As explained in the foregoing, the Town of Indian River Shores' constitutional claim has been decided by the Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County, and thus the Commission should not and need not issue the declaratory statement requested by the Town. The Town's Petition is also improper because it addresses an issue that is the subject of still-pending litigation, i.e., Indian River Shores v. Vero Beach, and the Town's proper venue for addressing its jurisdictional question is an appeal of the Circuit Court's Order on Dismissal.

Neither the Commission's Amicus Memorandum nor the argument presented by the Commission's counsel at the hearing on Vero Beach's Motion to Dismiss provide any basis for the Town's claim to be in doubt as to the PSC's possible jurisdiction over the Town's constitutional claim. While the Commission has properly issued a number of declaratory statements as to whether it has, or does not have, jurisdiction over entities under the Commission's organic statutes, these declaratory statements are inapposite to the Town's request here, which is not for any determination or declaration as to the Commission's jurisdiction over the Town under the Commission's organic statutes. Rather, the Town's request here is for a declaratory statement that would confirm the Town's view of jurisdiction over the Town's constitutional claim; that claim has already

been decided by the Circuit Court. Thus the Town's Petition is unnecessary because there is no basis for any doubt as to the PSC's jurisdiction, and improper because it is not a request that the Commission declare the Town's position, rights, or status under the PSC's statutes, rules, or orders.

WHEREFORE, based upon the foregoing, the Commission should deny, or decline to issue, the declaratory statement requested by the Town of Indian River Shores.

Respectfully submitted this 27th day of January, 2016.

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Florida Bar No. 0999695
WComent@covb.org
City Attorney
City of Vero Beach
1053 20th Place
Vero Beach, Florida 32960

Attorneys for the City of Vero Beach

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 27th day of January, 2016.

D. Bruce May, Esquire
Karen D. Walker, Esquire
Holland & Knight
315 South Calhoun Street, Suite 600
Tallahassee, Florida 32301
bruce.may@hklaw.com
karen.walker@hklaw.com

Kathryn Cowdery, Esquire
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
kcowdery@psc.state.fl.us

Robert Scheffel Wright
Attorney

PSC Docket No. 160013-EM

Exhibit A

to

City of Vero Beach's Response in Opposition to Petition for Declaratory Statement

C O N T R A C T

This agreement made and entered into this 18 day of December, 1968, by and between the CITY OF VERO BEACH, a municipal corporation of the State of Florida, hereinafter referred to as the CITY, and TOWN OF INDIAN RIVER SHORES, a municipal corporation of the State of Florida, hereinafter referred to as the TOWN;

WITNESSETH:

WHEREAS, the Town, through its Town Council has requested the City, to provide water service and electric power service to any residents within the corporate limits of said Town, desiring to obtain such service, and

WHEREAS, the City has referred said request to its consulting engineers for their study and has received a report from the consulting engineers that said proposal is advantageous to all parties concerned and have recommended its acceptance;

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements on the part of each party hereto, as hereinafter set forth, the parties hereto do hereby covenant and agree as follows:

1. The City hereby agrees to furnish water at 40 psi at the South Town-City limit line for any persons, firms or corporations desiring to receive such service within the Town Limits of said Town, and the City will make available to such users its water service to the Town Limits. The City, however, will not be responsible for any failure to so furnish such water that may be occasioned by force majeure or an act of war against the United States.

2. All facilities for water service within the Town Limits, except for the installation of water meters, will be constructed and maintained at the expense of the Town, subject to the approval of the City consulting engineers with regard to the

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&
GALLAGHER
P. O. BOX 1900
VERO BEACH, FLORIDA
32960

construction thereof, and upon completion of such facilities and approval thereof by the City's consulting engineers, the Town shall deliver by proper conveyance, title to all such facilities to the City.

3. The City will operate and maintain such water facilities, and the Town hereby gives and grants unto the City the right to perform the necessary operating and maintenance operations in connection with said water facilities within the right of way where said water facilities are located.

4. If the Town desires fire hydrants installed, the Town will purchase and install such fire hydrants, subject to the approval of the Consulting Engineers of the City and the City will furnish water to such hydrants, when connected, and for each of such hydrants so installed the Town will pay unto the City the sum of Eighty ($80.00) Dollars per year, but the City reserves the right to increase this rent if there is an increase in any hydrant charge within the City and the City will bill the Town annually for such service, during the existance of this agreement.

5. Each customer within the Town connecting to the water service of the City will be charged by the City for such water at the rate of 110% of the rates charged and fixed from time to time for water consumers within the City and such billing will be made in accordance with the rules and regulations of the City, governing the discontinuance of such service in the event of non-payment of bills therefor.

6. The City also agrees to furnish electric power to any applicant therefor within the corporate limits of the Town, from a distribution line furnished by the City and will bill each customer therefor at the rate fixed and charged from time to time for such current to persons within the corporate limits of the City, plus 10% additional thereto, and each consumer will be billed

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32960

direct by the City for such service and will be subject to all rules and regulations of the City with regard to the disconnection of such service upon non-payment of bills so furnished.

7. This agreement shall extend for a period of twenty-five (25) years from the date hereof and shall be subject to renewal at the option of the parties hereto, and is predicated upon the Town furnishing to the City all necessary easements and rights of way for the location of the facilities required under the terms of this agreement.

IN WITNESS WHEREOF the parties hereto have caused this agreement to be executed by its duly authorized officers the day and year first above written.

CITY OF VERO BEACH

By _____
Mayor

Attest: _____
City Clerk

TOWN OF INDIAN RIVER SHORES

By _____
Mayor

Attest: _____
City Clerk

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&
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P. O. BOX 1900
VERO BEACH, FLORIDA
32960

RESOLUTION NO. 2046 12-17-68

WHEREAS, the Town of Indian River Shores has, through its Town Council, made application to the City of Vero Beach, for the furninshing of water and electric current to residents within the territorial limits of said Town, and

WHEREAS, the City Council of the City of Vero Beach, has referred such application to its consulting engineers, with regard to both water and electric service, and

WHEREAS, such consulting engineers have, after due study thereof, reported to the City Council that such service is not only feasible but has recommended that the same be furnished, and that an agreement be entered into between the parties with regard thereto, and

WHEREAS, the City Council of the City of Vero Beach has given due consideration and study to the proposal, and has determined that it is advantageous to the City that such agreement should be entered into, and

WHEREAS, the City Attorney of said City has prepared an agreement, copy of which is attached hereto and marked and entered as Exhibit "A", and as such made a part hereof.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Vero Beach, that the Mayor and City Clerk of said city be and they are hereby authorized and empowered to execute said agreement, copy of which is attached hereto as Exhibit "A", and that when said agreement has been properly executed by the proper officers of said Town, and the respective corporate seals of said City and Town, affixed thereto, the said agreement shall be and become a binding agreement on the part of the City and the Town in accordance with the terms thereof.

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32960

cc: VTF
/City Clerk

C O N T R A C T

This agreement made and entered into this 18 day of December, 1968, by and between the CITY OF VERO BEACH, a municipal corporation of the State of Florida, hereinafter referred to as the CITY, and TOWN OF INDIAN RIVER SHORES, a municipal corporation of the State of Florida, hereinafter referred to as the TOWN;

WITNESSETH:

WHEREAS, the Town, through its Town Council has requested the City, to provide water service and electric power service to any residents within the corporate limits of said Town, desiring to obtain such service, and

WHEREAS, the City has referred said request to its consulting engineers for their study and has received a report from the consulting engineers that said proposal is advantageous to all parties concerned and have recommended its acceptance;

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements on the part of each party hereto, as hereinafter set forth, the parties hereto do hereby covenant and agree as follows:

1. The City hereby agrees to furnish water at 40 psi at the South Town-City limit line for any persons, firms or corporations desiring to receive such service within the Town Limits of said Town, and the City will make available to such users its water service to the Town Limits. The City, however, will not be responsible for any failure to so furnish such water that may be occasioned by force majeure or an act of war against the United States.

2. All facilities for water service within the Town Limits, except for the installation of water meters, will be constructed and maintained at the expense of the Town, subject to the approval of the City consulting engineers with regard to the

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32960

construction thereof, and upon completion of such facilities and approval thereof by the City's consulting engineers, the Town shall deliver by proper conveyance, title to all such facilities to the City.

3. The City will operate and maintain such water facilities, and the Town hereby gives and grants unto the City the right to perform the necessary operating and maintenance operations in connection with said water facilities within the right of way where said water facilities are located.

4. If the Town desires fire hydrants installed, the Town will purchase and install such fire hydrants, subject to the approval of the Consulting Engineers of the City and the City will furnish water to such hydrants, when connected, and for each of such hydrants so installed the Town will pay unto the City the sum of Eighty ($80.00) Dollars per year, but the City reserves the right to increase this rent if there is an increase in any hydrant charge within the City and the City will bill the Town annually for such service, during the existance of this agreement.

5. Each customer within the Town connecting to the water service of the City will be charged by the City for such water at the rate of 110% (115%) of the rates charged and fixed from time to time for water consumers within the City and such billing will be made in accordance with the rules and regulations of the City, governing the discontinuance of such service in the event of non-payment of bills therefor.

6. The City also agrees to furnish electric power to any applicant therefor within the corporate limits of the Town, from a distribution line furnished by the City and will bill each customer therefor at the rate fixed and charged from time to time for such current to persons within the corporate limits of the City, plus 10% additional thereto, and each consumer will be billed

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direct by the City for such service and will be subject to all rules and regulations of the City with regard to the disconnection of such service upon non-payment of bills so furnished.

7. This agreement shall extend for a period of twenty-five (25) years from the date hereof and shall be subject to renewal at the option of the parties hereto, and is predicated upon the Town furnishing to the City all necessary easements and rights of way for the location of the facilities required under the terms of this agreement.

IN WITNESS WHEREOF the parties hereto have caused this agreement to be executed by its duly authorized officers the day and year first above written.

CITY OF VERO BEACH

By _____
Mayor

Attest: _____
City Clerk

TOWN OF INDIAN RIVER SHORES

By _____
Mayor

Attest: _____
City Clerk

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VERO BEACH, FLORIDA
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PSC Docket No. 160013-EM

Exhibit B

to

City of Vero Beach's Response in Opposition to Petition for Declaratory Statement

RESOLUTION *414*

A RESOLUTION GRANTING TO THE CITY OF VERO BEACH, FLORIDA, ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC FRANCHISE IN THE INCORPORATED AREAS OF THE TOWN OF INDIAN RIVER SHORES, FLORIDA; IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO; AND PROVIDING AN EFFECTIVE DATE.

BE IT RESOLVED by the Board of the Town of Indian River Shores , Indian River County, Florida, as follows:

Section 1. That there is hereby granted to the City of Vero Beach, Florida (herein called "Grantee"), its successors and assigns, the sole and exclusive right, privilege or franchise to construct, maintain, and operate an electric system in, under, upon, over and across the present and future streets, alleys, bridges, easements and other public places throughout all the incorporated areas of the Town of Indian River Shores, Florida, (herein called the "Grantor"), lying south of Winter Beach Road, as such incorporated limits were defined on January 1, 1986, and its successors, in accordance with established practices with respect to electric system construction and maintenance, for a period of thirty (30) years from the date of acceptance hereof. Such electric system shall consist of electric facilities (including poles, fixtures, conduits, wires, meters, cable, etc., and, for electric system use, telephone lines) for the purpose of supplying electricity to Grantor, and its successors, the inhabitants thereof, and persons and corporations beyond the limits thereof.

Section 2. Upon acceptance of this franchise, Grantee agrees to provide such areas with electric service.

All of the electric facilities of the Grantee shall be constructed, maintained and operated in accordance with the applicable regulations of the Federal Government and the State of Florida and the quantity and quality of electric service delivered and sold shall at all times be and remain not inferior to the applicable standards for such service and other applicable rules, regulations and standards now or hereafter adopted by the Federal

Government and the State of Florida. The Grantee shall supply all electric power and energy to consumers through meters which shall accurately measure the amount of power and energy supplied in accordance with normally accepted utility standards.

Section 3. That the facilities shall be so located or relocated and so constructed as to interfere as little as practicable with traffic over said streets, alleys, bridges, and public places, and with reasonable egress from and ingress to abutting property. The location or relocation of all facilities shall be made under the supervision and with the approval of such representatives as the governing body of Grantor may designate for the purpose, but not so as unreasonably to interfere with the proper operation of Grantee's facilities and service. That when any portion of a street is excavated by Grantee in the location or relocation of any of its facilities, the portion of the street so excavated shall, within a reasonable time and as early as practicable after such excavation, be replaced by the Grantee at its expense, and in as good condition as it was at the time of such excavation. Provided, however, that nothing herein contained shall be construed to make the Grantor liable to the Grantee for any cost or expense in connection with the construction, reconstruction, repair or relocation of Grantee's facilities in streets, highways and other public places made necessary by the widening, grading, paving or otherwise improving by said Grantor, of any of the present and future streets, avenues, alleys, bridges, highways, easements and other public places used or occupied by the Grantee, except, however, Grantee shall be entitled to reimbursement of its costs as may be provided by law.

Section 4. That Grantor shall in no way be liable or responsible for any accident or damage that may occur in the construction, operation or maintenance by Grantee of its facilities hereunder, and the acceptance of this Resolution shall be deemed an agreement on the part of Grantee to indemnify Grantor and hold it harmless against any and all liability, loss, cost, damage, or expense, which may accrue to Grantor by reason of the neglect, default or misconduct of Grantee in the construction, operation or maintenance of its facilities hereunder.

Section 5. That all rates and rules and regulations established by Grantee from time to time shall be reasonable and Grantee's rates for electric service shall at all times be subject to such regulation as may be provided by State law. The Outside City Limit Surcharge levied by the Grantee on electric rates is as governed by state regulations and may not be changed unless and until such state regulations are changed and even in that event such charges shall not be increased from the present ten (10%) per cent above the prevailing City of Vero Beach base rates without a supporting cost of service study, in order to assure that such an increase is reasonable and not arbitrary and/or capricious.

The right to regulate electric rates, impact fees, service policies or other rules or regulations or the construction, operation and maintenance of the electric system is vested solely in the Grantee except as may be otherwise provided by applicable laws of the Federal Government or the State of Florida.

Section 6. Prior to the imposition of any franchise fee and/or utility tax by the Grantor, the Grantor shall give a minimum of sixty (60) days notice to the Grantee of the imposition of such fee and/or tax. Such fee and/or tax shall be initiated only upon passage of an appropriate ordinance in accordance with Florida Statutes. Such fee and/or tax shall be a percentage of gross revenues from the sale of electric power and energy to customers within the franchise area as defined herein. Said fee and/or tax, at the option of the Grantee, may be shown as an additional charge on affected utility bills. The franchise fee, if imposed, shall not exceed six (6%) per cent of applicable gross revenues. The utility tax, if imposed, shall be in accordance with applicable State Statutes.

Section 7. Payments of the amount to be paid to Grantor by Grantee under the terms of Section 6 hereof shall be made in monthly installments. Such monthly payments shall be rendered twenty (20) days after the monthly collection period. The Grantor agrees to hold the Grantee harmless from any damages or suits resulting directly or indirectly as a result of the

collection of such fees and/or taxes, pursuant to Sections 6 and 7 hereof and the Grantor shall defend any and all suits filed against the Grantee based on the collection of such moneys.

Section 8. As further consideration of this franchise, the Grantor agrees not to engage in or permit any person other than the Grantee to engage in the business of distributing and selling electric power and energy during the life of this franchise or any extension thereof in competition with the Grantee, its successors and assigns.

Additionally, the Grantee shall have the authority to enter into Developer Agreements with the developers of real estate projects and other consumers within the franchise territory, which agreements may include, but not be limited to provisions relating to;

(1) advance payment of contributions in aid of construction to finance system expansion and/or extension,

(2) revenue guarantees or other such arrangements as may make the expansion/extension self supporting,

(3) capacity reservation fees,

(4) prorata allocations of plant expansion/line extension charges between two or more developers.

Developer Agreements entered into by the Grantee shall be fair, just and non-discriminatory.

Section 9. That failure on the part of Grantee to comply in any substantial respect with any of the provisions of this Resolution, shall be grounds for a forfeiture of this grant, but no such forfeiture shall take effect, if the reasonableness or propriety thereof is protested by Grantee, until a court of competent jurisdiction (with right of appeal in either party) shall have found that Grantee has failed to comply in a substantial respect with any of the provisions of this franchise, and the Grantee shall have six (6) months after final determination of the question, to make good the default, before a forfeiture shall result, with the right in Grantor at its discretion to grant such additional time to Grantee for compliance as necessities in the case require; provided, however, that the

provisions of this Section shall not be construed as impairing any alternative right or rights which the Grantor may have with respect to the forfeiture of franchises under the Constitution or the general laws of Florida or the Charter of the Grantor.

Section 10. That if any Section, paragraph, sentence, clause, term, word or other portion of this Resolution shall be held to be invalid, the remainder of this Resolution shall not be affected.

Section 11. As a condition precedent to the taking effect of this grant, Grantee shall have filed its acceptance hereof with the Grantor's Clerk within sixty (60) days after adoption. This Resolution shall take effect on the date upon which Grantee files its acceptance.

Section 12. The franchise territory may be expanded to include additional lands in the Town or in the vicinity of the Town limits, as they were defined on January 1, 1986, provided such lands are lawfully annexed into the Town limits and the Grantee specifically, in writing, approves of such addition(s) to its service territory and the Public Service Commission of the State of Florida approves of such change(s) in service boundaries.

Section 13. This Franchise supersedes, with respect to electric only, the Agreement adopted December 18, 1968 for providing Water and Electric Service to the Town of Indian River Shores by the City of Vero Beach.

Section 14. This franchise is subject to renewal upon the agreement of both parties. In the event the Grantee desires to renew this franchise, then a five year notice of that intention to the Grantor shall be required. Should the Grantor wish to renew this franchise, the same five year notice to the Grantee from the Grantor shall be required and in no event will the franchise be terminated prior to the initial thirty (30) year period, except as provided for in Section 9 hereof.

Section 15. Provisions herein to the contrary notwithstanding, the Grantee shall not be liable for the non-performance or delay in performance of any of its obligations undertaken pursuant to the terms of this franchise, where said

failure or delay is due to causes beyond the Grantee's control including, without limitation, "Acts of God", unavoidable casualties, and labor disputes.

DONE and ADOPTED in regular session, this 30th day of October, 1986.

ACCEPTED:

CITY OF VERO BEACH

By: _____
Mayor

Date: 6 Nov. 1986

Attest _____
City Clerk

TOWN COUNCIL
TOWN OF INDIAN RIVER SHORES

By: _____
Mayor

Attest: _____
Town Clerk

Resolution 414-Electric

PSC Docket No. 160013-EM

Exhibit C

to

City of Vero Beach's Response in Opposition to Petition for Declaratory Statement

Filing # 34345467 E-Filed 11/11/2015 06:05:00 PM

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

TOWN OF INDIAN RIVER SHORES,
a Florida municipality,

Plaintiffs,

v.

CITY OF VERO BEACH,
a Florida municipality,

Defendant.
_____/

CASE NO. 312014CA000748

ORDER GRANTING IN PART AND DENYING IN PART CITY OF VERO BEACH'S MOTION TO DISMISS AMENDED COMPLAINT

THIS CAUSE came before the Court for hearing on August 26, 2015 on The City of Vero Beach's motion to dismiss amended complaint, and the Court, having considered the motion, the plaintiff's response thereto, and comments of the General Counsel for the Florida Public Service Commission,[1] heard argument of counsel, and being otherwise duly advised in the premises, finds and decides as follows:

On May 18, 2015, plaintiff Town of Indian River Shores (the "Town") filed an amended complaint against the City of Vero Beach (the "City") which included four separate causes of action, all of which the City now moves to dismiss. The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. *Provence v. Palm Beach Taverns, Inc.*, 676 So.

[1] The Florida Public Service Commission participated as an amicus curiae in this matter.

2d 1022 (Fla. 4th DCA 1996). "In order to state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief. A court may not go beyond the four corners of the complaint and must accept the facts alleged therein and exhibits attached as true. All reasonable inferences must be drawn in favor of the pleader." *Taylor v. City of Riviera Beach,* 801 So.2d 259, 262 (Fla. 4th DCA 2001) (citations omitted). "Whether the allegations of the complaint are sufficient to state a cause of action is a question of law." *Della Ratta v. Della Ratta*, 927 So. 2d 1055, 1058 (Fla. 4th DCA 2006).

Count I for Declaratory Relief that Upon the Imminent Expiration of the Franchise Agreement the City Does Not Have the Legal Right to Provide Electric Service Within the Town, and that the Town Has the Right to Decide How Electric Service Is to Be Furnished to Its Inhabitants. The City contends that Count I should be dismissed because the declaratory relief requested lies within the exclusive and superior jurisdiction of the Florida Public Service Commission (the "Commission" or "PSC"), and therefore this Court is without subject matter jurisdiction to decide the matter. Accordingly, the issue to be decided in Count I is not whether the Town will succeed in obtaining the specific relief it seeks but whether this court has jurisdiction to grant the relief requested by the Town.

In 1974, the Florida Legislature enacted the Grid Bill[2] which gave the PSC jurisdiction over municipally-owned utilities for the first time. The Grid Bill also clarified and codified in Chapter 366 of the Florida Statutes the PSC's jurisdiction to define and control the service areas of electric utilities in Florida. Pursuant to section 366.04(2),

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[2] Ch. 74-196, § 1, Laws of Florida.

Florida Statutes, the PSC has power over electric utilities to approve territorial agreements between and among municipal electric utilities and other electric utilities under its jurisdiction and to resolve territorial disputes. § 366.04(2)(d) and (e), Fla. Stat. Additionally, pursuant to Section 366.04(5), the PSC has jurisdiction over "the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities." Section 366.04(1), provides that the jurisdiction conferred by the Legislature upon the PSC "shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the [C]ommission shall in each instance prevail."

The City currently provides electric service to a significant portion of the Town that is within the service area described in the City's territorial agreement with Florida Power & Light ("FPL"). The territorial agreement, including subsequent amendments thereto, has been approved by the Commission in a series of Territorial Orders[3] pursuant to its statutory authority. *See* § 366.04(2)(d), Fla. Stat. Territorial agreements merge with and become part of the Commission's orders approving them. *Public Service Com'n v. Fuller*, 551 So. 2d 1210, 1212 (Fla. 1989). Accordingly, the PSC exercised its jurisdiction under the general law established by the Legislature when it issued the Territorial Orders

[3] Copies of the PSC's Territorial Orders are attached to the City's motion to dismiss as Composite Exhibit "E."

granting the City the right and obligation to provide electric service in the territorial area approved in the Territorial Orders.

The PSC has the authority to approve and enforce territorial agreements so that it may carry out its express statutory purpose of avoiding the uneconomical duplication of facilities and its duty to consider the impact of such decisions on the planning, development, and maintenance of a coordinated electric power grid in Florida. *Fuller* at 1212; § 366.04(5), Fla. Stat. This statutory authority granted to the PSC is not subject to local regulation. *Roemmele-Putney v. Reynolds*, 106 So. 3d 78, 81 (Fla. 3d DCA 2013) (stating that PSC's statutory authority would be eviscerated if initially subject to local governmental regulation). Any modification or termination of a Commission-approved territorial order must first be made by the Commission pursuant to its exclusive jurisdiction. *Fuller* at 1212. Thus, the City retains its right and obligation to provide electric service within the territory described in the Territorial Orders unless and until the Territorial Orders are modified or terminated by the Commission.

The Town contends that it is not – as the City argues – collaterally attacking the PSC's exclusive and superior jurisdiction and lawful Territorial Orders issued in the exercise of its jurisdiction. Rather, it is the Town's position that it has a right to be protected from the City's exercise of extra-territorial power within the Town after expiration of the Franchise Agreement, but that the Town is uncertain of such rights under the terms of the Franchise Agreement, the Florida Constitution, the Municipal Home Rule Powers Act and section 180.02(2), Florida Statutes, after expiration of the Franchise Agreement.[4]

[4] At the hearing, the Town also stated that it seeks a declaration from the court that after expiration of the Franchise Agreement, the Town has the authority to choose what utility

The Town maintains that only the court has the authority to address these threshold contractual, constitutional, and statutory issues because the PSC's authority is limited to issuing declarations interpreting the rules, orders and statutory provisions of the Commission. The Town thus contends that it is not seeking to challenge the PSC's authority under Chapter 366 or seeking any modification of the territorial agreement between the City and FPL. In addition, the Town at hearing argued – and the City agreed – that how expiration of the Franchise Agreement affects the continuing use of the Town's rights-of-way is not a matter within the jurisdiction of the PSC.

Although artfully argued otherwise, the actual relief sought by the Town amounts to an unfeasible request that the court determine what utility will provide electric service to the Town. This determination already has been made by the PSC in the Territorial Orders. *See Fuller* at 1210-13 (the circuit court has no jurisdiction to modify or invalidate a territorial agreements approved by the PSC in the exercise of its exclusive jurisdiction).

The relief requested by the Town is squarely within the jurisdiction of the PSC. First, pursuant to the PSC's statutory authority under section 366.04(2)(d) and (e), Florida Statutes, to approve and modify territorial agreements through its territorial orders and second, pursuant to section 366.04(1), Florida Statutes, providing the PSC with jurisdiction exclusive and superior to that of the Town, and directing that the orders of the Commission shall prevail in the event of conflict. *See Fuller* at 1212.

Accordingly, the court finds that it is without subject matter jurisdiction to grant the relief requested and that Count I should be dismissed with prejudice. Although this Court

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will provide electric service to the Town pursuant to its powers under Chapter 29163, the special act creating the Town.

is without jurisdiction to decide the relief requested in Count I, the Town may seek relief before the Commission and, if unsuccessful there, by direct appeal to the Florida Supreme Court. *Reynolds* at 80-81; *Bryson* at 1255.

Count II for Anticipatory Breach. In Count II, the Town alleges that the City has breached the Franchise Agreement by 1) "repudiating its obligation to recognize the expiration of the Franchise Agreement on November 6, 2016 and asserting it will continue to assert extra-territorial monopoly powers and extracting monopoly profits ... following the expiration of the Franchise Agreement" and 2) "asserting its electric facilities will continue to occupy the Town's rights-of-way and other public areas after the Franchise Agreement expires."

After expiration of the Franchise Agreement, there will be no Franchise Agreement to be breached by the City through the purported assertion of extra-territorial powers and continued occupation of the Town's rights-of-way and other public areas. Or as the City more succinctly argues: There will be nothing to breach. Furthermore, the Town has not pled facts supporting any existing breach of the City's contractual obligations under the Franchise Agreement attached to the amended complaint. The Franchise Agreement does not address the effect of its expiration and there are no provisions in the Franchise Agreement which call for the City to remove or relocate its electric facilities or cease providing electric service to the Town upon expiration.

For the reasons stated above, the Court finds that Count II for anticipatory breach fails to state a cause of action and should be dismissed with prejudice. *See Jaffer v. Chase Home Fin., LLC*, 155 So. 3d 1199, 1202 (Fla. 4th DCA 2015) (if document attached to complaint conclusively negates a claim, the plain language of document will control

and may be basis for dismissal); *Kairalla v. John D. and Catherine T. MacArthur Foundation,* 534 So.2d 774, 775 (Fla. 4th DCA 1988) (dismissal with prejudice is appropriate where it is apparent the pleading cannot be amended to state a cause of action).

Dismissal, however, of Counts I and II are without prejudice to the Town's right to file an amended complaint or separate complaint alleging other grounds for the removal or relocation of the City's electric facilities from the Town's rights-of-way and other public areas after expiration of the Franchise Agreement.

Count III for Breach of Contract. The Town alleges that the City has breached the Franchise Agreement by failing to furnish electric services to the Town in accordance with accepted electric utility standards and charge only reasonable rates as provided in the Franchise Agreement, and that the Town has been harmed by the breach. The Town seeks an award of damages in an amount reflecting the difference between the amount the City has charged the Town and the amount the Town would have paid if such rates had been reasonable. The Town has set forth a cause of action for breach of contract, and the City's motion to dismiss should be denied as to Count III.

Count IV for Declaratory and Supplemental Relief Relating to the City's Unreasonable and Oppressive Electric Rates. The Town seeks a declaration that the City's utility rates are "unreasonable, oppressive, and inequitable in violation of the special act creating the [Town] and common law."[5] It additionally seeks an award of supplemental

[5] The amended complaint alleges a violation of the special act creating the *City* and the court assumes a scrivener's error was made. The *Town's* authority with respect to utilities granted by the special act creating the Town, Chapter 29163, Laws of Florida, are alleged in paragraphs 15 and 16 of the amended complaint.

relief in the form of a refund of any payment of rates that were made in excess of what was reasonable as well as a referral of factual questions related to the City's utility management practices to a jury.

At the hearing, the City argued that Count IV should be dismissed because the Town has failed to join indispensable parties, presumably Town residents, whose rights would be affected by any declaration. Although residents of the Town have an interest in the subject matter of the litigation, they are not indispensable parties whose inclusion in the litigation would be required for a complete and efficient resolution of the controversy between the Town and the City. *See Gonzales v. MI Temps of Florida Corp.*, 664 So. 2d 17, 18 (Fla. 4th DCA 1995).

The City also contends that the Town has failed to state a cause of action for declaratory relief. The test of the sufficiency of a complaint for declaratory action is not whether the complaint shows that plaintiff will succeed in getting a declaration of right in accordance with its theory and contention, but whether it is entitled to a declaration of rights at all. *Modernage Furniture Corp. v. Miami Rug Co.,* 84 So.2d 916 (Fla.1955); *see also Mills v. Ball,* 344 So.2d 635, 638 (Fla. 1st DCA 1977). The party seeking a declaration under Declaratory Judgment Act must show the existence or nonexistence of some right or status and that there is a bona fide, actual, present, and practical need for the declaration. § 86,021, Fla. Stat.; *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n*, 201 So. 2d 750, 752-53 (Fla. 4th DCA 1968). The moving party must also show that it is in doubt as to the existence or nonexistence of some right or status and that it is entitled to have that doubt removed. § 86.011(1); *Kelner v. Woody*, 399 So. 2d 35, 37 (Fla. 3d DCA 1981) (citations omitted).

Count IV of the amended complaint states that the City has a legal duty to charge only reasonable electric rates for the electric services that it provides pursuant to the Franchise Agreement and its legal duty as described in Paragraph 38 of the amended complaint. However, the Town does not allege any doubt as to its rights under Section 5 of the Franchise Agreement providing that the City's rates for electric utilities shall be reasonable. Additionally, the Town has failed to identify any provision of the Franchise Agreement in doubt or in need of construction. To the contrary, the Town has expressly alleged that the City has breached its clear duty under the explicit terms of the Franchise Agreement by charging rates that are unreasonable and that the "Town has a clear legal right to pay only those electric rates which are reasonable, just, and equitable ...". The Town shows a similar absence of doubt in its allegations related to the City's utility management decisions set forth in Paragraph 38 of the amended complaint.[6] Nor does the Town assert any doubt as to Chapter 29163, Laws of Florida, the special law creating the Town, or as to the Town's powers with respect to utilities under Chapter 29163. Under these circumstances, where the face of the amended complaint demonstrates there is no doubt, dismissal of a claim for declaratory relief is proper. *Kelner* at 37-38.

More significantly, in requesting a declaration that the unreasonable rates charged by the City are in violation of the special act creating the Town, the Town is not seeking a declaration as to any rights or status; rather, the Town seeks a declaration that the City's actions are unlawful – an issue properly determined in an action at law and which

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[6] The same can be said for the Town's assertion in response to the motion to dismiss that, independent of the City's contractual duty, Florida law is clear that a municipal electric utility has an inherent duty to its customers to operate and manage its electric utility with the same prudence and sound fiscal management required of investor-owned utilities.

is appropriately raised in Count III for breach of contract. Determination of the breach of contract claim in Count III involves the same factual dispute as the claim for declaratory relief in Count IV, namely whether the City's utility rates are unreasonable and, if so, to what extent.

Although the Declaratory Judgment Act is to be liberally construed, *see* § 86.010, Fla. Stat., granting a declaratory judgment remains discretionary with the court and is not the right of a litigant as a matter of course. *Kelner v. Woody*, 399 So. 2d 35, 37 (Fla. 3d DCA 1981); *N. Shore Bank v. Town of Surfside*, 72 So. 2d 659, 661-62 (Fla. 1954). "[A] trial court should not entertain an action for declaratory judgment on issues which are properly raised in other counts of the pleadings and already before the court, through which the plaintiff can secure full, adequate and complete relief." *McIntosh v. Harbour Club Villas,* 468 So. 2d 1075, 1080–81 (Fla. 3d DCA 1985) (Nesbitt, J. specially concurring); *see Taylor v. Cooper*, 60 So. 2d 534, 535-36 (Fla. 1952).

Because the Town's claim for declaratory relief is subsumed within its claim for breach of contract, Count IV for declaratory relief should be dismissed with prejudice. *See Taylor* at 535-36; *see also Perret v. Wyndam Vacation Resorts, Inc.*, 889 F. Supp. 2d 133, 1346-47 (S.D. Fla. 2012) (where declaration sought is essentially the same as relief sought in plaintiff's other claims, claim for declaratory relief is dismissed with prejudice).

IT IS THUS ORDERED AND ADJUDGED that defendant City of Vero Beach's motion to dismiss amended complaint is granted in part and denied in part as follows:

1. The motion to dismiss is GRANTED as to Count I for declaratory relief, Count II for anticipatory breach and Count IV for declaratory relief, which particular

counts as plead are hereby dismissed with prejudice. Plaintiff shall have 20 days leave to file an amended complaint (alleging other grounds for the removal or relocation of the City's electric facilities from the Town's rights-of-way and other public areas after expiration of the Franchise Agreement).

2. The motion to dismiss is DENIED as to Count III for breach of contract. Defendant City of Vero Beach shall have the later of 20 days from the date of this Order or 40 days from the Plaintiff's filing of a second amended complaint in which to file a responsive pleading.

DONE AND ORDERED this 11th day of November, 2015 at Vero Beach in Indian River County, Florida.

/s/ Cynthia L. Cox

CYNTHIA L. COX, CIRCUIT JUDGE

Copies furnished to:
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PSC Docket No. 160013-EM

Exhibit D

to

City of Vero Beach's Response in Opposition to Petition for Declaratory Statement

TOWN OF INDIAN RIVER SHORES, FLORIDA

November 11, 1971

Mr. Jesse Yarbrough
Chairman
Florida Public Service Commission
700 South Adam Street
Tallahassee, Florida 32301

Dear Jesse:

Please be advised that the writer was contacted by your Mr. Al C. Avery with regards to the City of Vero Beach and Florida Power and Light Company territorial agreement and tie line and, as I told Mr. Avery, the Town of Indian River Shores is in no way concerned with any agreement between these two parties as it is actually none of our concern.

For the Florida Public Service Commission's information, the writer entered into negotiations with the City of Vero Beach back in 1958 to furnish the Town of Indian River Shores utilities, i.e. water, power and sewer, inasmuch as it was a physical impossibility to develop this area without these items. On the 18th. day of December 1968 the Town of Indian River Shores signed an agreement with the City of Vero Beach for twenty five (25) years with an option for renewal of another twenty five (25) years for power and water to be furnished to the Town of Indian River Shores. Never at any time did the Town of Indian River Shores enter into an agreement with the Florida Power and Light Company.

With reference to a letter written to the Florida Public Service Commission by Mr. Joseph C. Thomas, 935 Pebble Lane, Indian River Shores, Vero Beach, Florida, I am at a loss to understand why Mr. Thomas did not check with the Town officials to get this background information as he has only been here a year or so and is in no way familiar with what has transpired in the past and he would be better informed if he had checked with us with regard to this item.

After we had signed an agreement with the City of Vero Beach, the owners and developers of the Pebble Beach Subdivision, in which Mr. Thomas lives, headed by Mr. William Van Busch, petitioned the Town of Indian River

Shores to take them into our Town limits so they could secure city water in order for the land to be developed. This we did at the time strictly as an accommodation to these people so they could tie on to our water facilities. I say again, why Mr. Thomas hasn't checked further into the background of this situation, I am at a loss to understand. As for him not being consulted and heard on the City of Vero Beach and Florida Power and Light Agreement, we are not concerned with it and there was no reason for him to be concerned with it as frankly it was none of our concern.

In the event that you should have a public hearing on this matter please be advised the Town of Indian River Shores will be more than glad to attend and furnish you with any information that you desire. I am sure you have a copy of our utility contract with the City of Vero Beach and if you need any further information please advise.

Yours truly,

ROLAND B. MILLER
Mayor

RBM:br
Copies to:
Councilmen, IRS
Mr. G. Johnston, Atty.
Mr. R. F. Lloyd
Mr. James Vocelle, Atty.
Mr. Joseph C. Thomas
935 Pebble Lane, IRS
Mrs. Winnie Lich
946 Pebble Lane, IRS
Mr. Edwin Eickman
926 Surf Lane, IRS
Mr. Ruel B. George
955 Reef Lane, IRS
Mrs. Mary Louise Brightwell
946 Reef Lane, IRS
Mr. Earl Groth
99 Royal Palm Blvd.
(All of Vero Beach, Fla.)