

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: February 18, 2016

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Cowdery) *R.M.C.*
Division of Economics (Draper) *OB P.D.*

RE: Docket No. 160013-EU – Petition for declaratory statement regarding the Florida Public Service Commission's jurisdiction to adjudicate the Town of Indian River Shores' constitutional rights.

AGENDA: 03/01/16 – Regular Agenda – Decision of Declaratory Statement – Participation is at the Commission's discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brisé

CRITICAL DATES: May not be deferred – statutory deadline for issuing final order is April 4, 2016

SPECIAL INSTRUCTIONS: None

Case Background

On January 5, 2016, the Town of Indian River Shores (Indian River Shores) filed a petition for declaratory statement (Petition). Pursuant to Rule 28-105.0024, Florida Administrative Code (F.A.C.), a Notice of Declaratory Statement was published in the January 7, 2016, edition of the Florida Administrative Register, informing interested persons of the Petition. The Petition asks the Commission to declare:

The PSC lacks the jurisdiction under Chapter 366, Florida Statutes, or any other applicable law, to interpret Article VIII, Section 2(c) of the Florida Constitution, and Section 166.021, Florida Statutes, for the purposes of adjudicating and resolving whether the Town has a constitutional right, codified in the statutes, to

Docket No. 160013-EU
Date: February 18, 2016

be protected from unconsented exercises of extra-territorial powers by Vero Beach within the Town's corporate limits.

On January 27, 2016, the City of Vero Beach (Vero Beach) filed a motion to intervene and its response in opposition to the Petition (Vero Beach's Response). On February 3, 2016, Indian River Shores filed its reply to Vero Beach's response in opposition to its petition (Indian River Shores' Reply). On February 17, 2016, intervention was granted to Vero Beach.

This recommendation addresses the Town of Indian River Shores' Petition for Declaratory Statement. Pursuant to Section 120.565(3), Florida Statutes (F.S.), a final order on the Petition for declaratory statement must be issued within 90 days, which is April 4, 2016. The Commission has jurisdiction pursuant to Section 120.565 and Chapter 366, F.S.

Discussion of Issues

Issue 1: Should the Commission issue a declaratory statement on the Town of Indian River Shores' Petition for Declaratory Statement?

Recommendation: Yes. The Commission should issue a declaratory statement on the Town of Indian River Shores' Petition for Declaratory Statement. However, the Commission should not issue the declaratory statement requested by the Petition. Instead, the Commission should declare that the Commission has the jurisdiction under Section 366.04, F.S., to determine whether Vero Beach has the authority to continue to provide electric service within the corporate limits of the Town of Indian River Shores upon expiration of the franchise agreement between the Town of Indian River Shores and the City of Vero Beach. The Commission should state that the declaratory statement will be controlling only as to the facts relied upon in this docket and not as to other, different or additional facts. (Cowdery)

Staff Analysis: Declaratory statements are governed by Section 120.565, F.S., and the Uniform Rules of Procedure in Chapter 28-105, F.A.C. Section 120.565, F.S., states, in pertinent part:

- (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.

Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

Rule 28-105.002(5), F.A.C., requires a petition for declaratory statement to include a description of how the statutory provisions or orders on which a declaratory statement is sought may substantially affect the petitioner in the petitioner's particular set of circumstances. A party seeking a declaratory statement must not only show that it is in doubt as to the existence or nonexistence of some right or status, but also that there is a bona fide, actual, present, and practical need for the declaration. *State Department of Environmental Protection v. Garcia*, 99 So. 2d 539, 544-45 (Fla. 3d DCA 2011). A declaratory statement procedure is intended to enable members of the public to definitively resolve ambiguities of law arising in the planning of their future affairs and to enable the public to secure definitive binding advice as to the applicability of

agency-enforced law to a particular set of facts. *Department of Business and Professional Regulation, Div. of Pari-Mutual Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374, 382 (Fla. 1999).

Staff recommends that, in accordance with Rule 28-105.003, F.A.C., the Commission should rely on the facts alleged in this proceeding without taking a position on the validity of those facts. If the Commission issues a declaratory statement, it will be controlling only as to the facts relied upon and not as to other, different or additional facts. As the Commission's conclusion would be limited to the facts described herein, any alteration or modification of those facts could materially affect the conclusions reached in any declaratory statement issued. If the Commission issues a declaratory statement, the Commission should state that the order will be controlling only as to the facts relied upon and not as to other, different or additional facts.

I. The Town of Indian River Shores' Petition for Declaratory Statement

A. Indian River Shores' particular circumstances and facts

The Petition states that Indian River Shores is an incorporated Florida municipality of approximately 4,000 residents in Indian River County, Florida, that was established by Chapter 29163, Laws of Florida (1953). The Petition states that Vero Beach first provided electric service to Indian River Shores' residents pursuant to a 1968 agreement that was superseded by a 1986 franchise agreement between Indian River Shores and Vero Beach (Franchise Agreement). Indian River Shores has notified Vero Beach that it will not renew the Franchise Agreement when it expires on November 6, 2016. The Petition alleges that upon expiration of the Franchise Agreement, Vero Beach will no longer have Indian River Shores' consent to furnish electricity to Indian River Shores' residents.

The Petition acknowledges that Vero Beach has been authorized to provide electric service to a portion of Indian River Shores' residents pursuant to Commission territorial orders approving territorial agreements between Vero Beach and Florida Power and Light (Territorial Orders), but believes that Vero Beach does not have the statutory authority under general or special law to provide electric service to Indian River Shores without Indian River Shores' consent as is required by Article VIII, section 2(c), Florida Constitution. The Petition states that under the Territorial Orders, FPL serves approximately 739 customers and Vero Beach serves approximately 3,500 customers located within Indian River Shores. The Petition alleges that FPL has proposed to purchase Vero Beach's electrical facilities in Indian River Shores and that such a purchase would enable Indian River Shores and its residents to receive electric service from one utility.

The Petition alleges that Indian River Shores filed a lawsuit against Vero Beach in the Circuit Court case *Town of Indian River Shores v. City of Vero Beach*, Case No. 31-2014CA-000748 (Circuit Court Lawsuit), asking the Circuit Court to adjudicate the constitutional and statutory question of whether Vero Beach has the requisite statutory authority to exercise extra-territorial powers within Indian River Shores' corporate boundaries absent Indian River Shores' consent. A copy of the portion of Indian River Shores' Amended Complaint relevant to the Petition is attached as Attachment A. The Petition states that Vero Beach filed a Motion to Dismiss this issue and that legal counsel for the Commission appeared as amicus curiae in support of Vero

Beach's Motion to Dismiss, asserting that only the Commission and not the Circuit Court had jurisdiction to resolve the issues presented by Indian River Shores.

The Petition alleges that in the Circuit Court Lawsuit, Indian River Shores agreed that only the Commission can approve a modification of the territorial agreement between FPL and Vero Beach and that Vero Beach can continue to provide electric service in Indian River Shores until the Commission modifies the Territorial Order. The Petition emphasized that in the Circuit Court Lawsuit, Indian River Shores made sure that the Court and the parties understood that Indian River Shores was only asking the Court for a declaratory judgment on a threshold constitutional question as to whether Vero Beach has the requisite organic statutory authority conferred by general or special law to furnish electricity to inside the corporate boundaries of Indian River Shores without Indian River Shores' consent. The Petition states that the Circuit Court accepted the jurisdictional assertions of the Commission's counsel and dismissed Indian River Shores' request for declaratory relief with prejudice because the Circuit Court lacked jurisdiction (Court's Order of Dismissal). A copy of the Court's Order of Dismissal is attached as Attachment B.

B. Statutory provisions, orders, and rules to be applied to the facts

The Petition states that Section 366.04, F.S., appears to be the only necessary statute to consider with respect to the jurisdictional question presented. Section 366.04, F.S., states, in pertinent part:

- (1) In addition to its existing functions, the [C]ommission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service; assumption by it of liabilities or obligations as guarantor, endorser, or surety; and the issuance and sale of its securities. . . . The jurisdiction conferred upon the [C]ommission 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.
- (2) In the exercise of its jurisdiction, the [C]ommission shall have power over electric utilities for the following purposes:

* * *

- (b) To prescribe a rate structure for all electric utilities.
- (c) To require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes.
- (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 [C]ommission 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.

* * *

- (5) The [C]ommission 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.

The Petition states that the Commission orders applicable to the jurisdictional question raised are:

Commission Order No. PSC-15-0101-DS-EM, issued February 12, 2015, in Docket No., 140142-EM, *In re: Petition for Declaratory Statement or Other Relief Regarding the Expiration of the Vero Beach Electric Service Franchise Agreement, by the Board of County Commissioners, Indian River County, Florida (Indian River County Order)*; and

Commission Order No. PSC-11-0579-FOF-EI, issued December 16, 2011, in Docket No. 110001-EI, *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor (2011 Fuel Clause Order)*.

C. Description of how the Town of Indian River Shores is substantially affected

The Petition states that under its particular circumstances:

[T]here is a pressing question of whether Vero Beach can lawfully exercise extra-territorial powers within the Town's corporate limits without the Town's consent in the absence of general or special law giving Vero Beach such authority as required by the Florida Constitution.

Indian River Shores alleges that it has a right under the Florida Constitution to be protected from Vero Beach providing electric service within Indian River Shores without Indian River Shores' consent. The Petition maintains that this is a "threshold constitutional question" that must be decided before the Commission may address any issues concerning Vero Beach's Territorial

Orders, and that the Commission has no authority to address this constitutional issue. The Petition argues that the Florida Supreme Court has cautioned that, generally speaking, administrative agencies are not the appropriate forum in which to consider questions of constitutional import.

The Petition argues that the Commission's legal position taken in the Circuit Court Lawsuit that the Circuit Court lacked jurisdiction because the issues raised were within the sole and exclusive jurisdiction of the Commission appears to contradict the *Indian River County Order* and the *2011 Fuel Clause Order*. The Petition alleges that in the *Indian River County Order*, the Commission stated that it had no authority to address statutes granting local governmental home rule and police powers, or to address the powers of local governments under the Florida Constitution. The Petition further alleges that in the *2011 Fuel Clause Order*, the Commission stated that it has no authority under Chapter 366, F.S., to resolve constitutional issues.

The Petition argues that because of these contradictions and ambiguities, Indian River Shores 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." The Petition alleges that it needs to know where to go to adjudicate and enforce the rights and protections afforded to it by the Florida Constitution, and needs to know if the Commission has jurisdiction to adjudicate this constitutional issue before engaging in costly administrative proceedings. Indian River Shores states that it wants to promptly take any and all appropriate steps to assert and protect its municipal rights under the Florida Constitution. The Petition alleges that a declaration by the Commission would substantially affect Indian River Shores because it will allow Indian River Shores to plan its future conduct regarding where and how to enforce its constitutional rights. The Petition states that declaratory statements seeking clarification of the Commission's jurisdiction are an appropriate use of Section 120.565, F.S.

D. The declaratory statement requested

The Petition seeks a declaration that the Commission lacks the jurisdiction under Chapter 366, F.S., or any other applicable law, to interpret Article VIII, Section (2)(c) of the Florida Constitution, and Section 166.021, F.S., for purposes of adjudicating and resolving whether Indian River Shores has a constitutional right, codified in the statutes, to be protected from unconsented exercises of extra-territorial powers by Vero Beach within Indian River Shores' corporate limits.

II. Vero Beach's Response in Opposition to the Petition

A. Background

Vero Beach gives additional detail about the history of its providing electric service from the time of Vero Beach's inception through the present, including discussion of the Territorial Orders approving the territorial agreements between Vero Beach and FPL; the Franchise Agreement; communications between FPL and Vero Beach about negotiations for the sale of Vero Beach's utility facilities in Indian River Shores to FPL; the location of its transmission and distribution facilities in Indian River Shores; the Circuit Court Lawsuit; and the procedural background of the *Indian River County Order* and the Declaratory Statement issued on Vero Beach's Petition for Declaratory Statement in Docket No. 140244-EM, noting that Indian River

County's appeal of both orders to the Florida Supreme Court remains pending in *Board of Commissioners of Indian River County, Florida v. Graham*, consolidated Case Nos. 15-504 and 15-505.

Vero Beach states that it serves approximately 34,000 customer accounts, of which approximately 12,900 are located within Vero Beach city limits and approximately 3,000 are located within Indian River Shores. Vero Beach alleges that in reliance upon the Commission's Territorial Orders and other legal authority, it has provided safe and reliable electric service to all its customers for nearly 100 years, 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.

B. Vero Beach's Legal Argument

Vero Beach argues that the Petition should be denied because the Circuit Court has decided the substantive and jurisdictional issues posed in the Petition. Vero Beach alleges that Indian River Shores asked the Circuit Court to rule on Indian River Shores' constitutional claim that Vero Beach did not have the power to provide electric service in Indian River Shores because of Section 166.021, F.S., and Article VIII, section 2(c), Fla. Const., because Vero Beach can only provide electric service outside its corporate limits pursuant to general or special law. Vero Beach argues that Indian River Shores fully argued its Section 166.021, F.S., and constitutional argument before the Circuit Court and that after being fully informed, the Circuit Court specifically rejected that argument, finding 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." Vero Beach argues that the Circuit Court has adjudicated Indian River Shores' constitutional claim by expressly recognizing that Vero Beach is providing service within Indian River Shores through the Commission's exercise of its jurisdiction under the general law established by the Legislature, Chapter 366, F.S., thus meeting the requirements of the Florida Constitution.

Vero Beach also argues that the Circuit Court has decided Indian River Shores' jurisdictional issue when it held that only the Commission could grant the "actual relief" that Indian River Shores wants by modifying the Territorial Orders that have been issued pursuant to general law. Vero Beach states that the Court did not suggest that Indian River Shores could or should seek resolution of its constitutional claim from the Commission through a petition for declaratory statement or any other form of pleading, and thus the Court's statement that Indian River Shores can seek relief before the Commission cannot be read as creating any basis for doubt as to where jurisdiction over Indian River Shores' constitutional claim lies. Vero Beach states that Indian River Shores' avenue for relief, if any is available, is to appeal the Court's Order of Dismissal pursuant to the Florida Rules of Appellate Procedure.

Vero Beach argues that the Petition does not meet the requirements of showing that there is an "actual present and practical need" for the requested declaratory statement and does not address a "present controversy," citing particularly to *Sutton v. Department of Environmental Protection*, 654 So. 2d 1047, 1048 (Fla. 5th DCA 1995). Vero Beach argues that if the Commission were to issue the Petition's requested declaratory statement to the effect that the Commission cannot adjudicate Indian River Shores' constitutional claim, Indian River Shores

would be in exactly the same position it is now, that is, with a binding Circuit Court order recognizing that the Commission 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 Commission's jurisdiction under the general law established by the Legislature. Vero Beach states that for this reason, there is no basis for doubt regarding Indian River Shores' rights or status. Accordingly, Vero Beach states that the Commission should deny or decline to issue the requested declaratory statement.

Vero Beach also argues that the Commission should deny the Petition because the substantive issue presented by the Petition is, in legal fact, the subject of pending judicial proceedings in the Circuit Court Lawsuit. Vero Beach alleges that although the Circuit Court has ruled on the issues raised in the Petition, Indian River Shores retains the right to file an appeal of the Circuit Court's Order of Dismissal at the appropriate time. Therefore, Vero Beach states, the proper avenue by which Indian River Shores should seek relief lies in an appeal of a final judgment from the Circuit Court Lawsuit, and the Commission should therefore deny the Petition.

Vero Beach states that as it relates to Indian River Shores' ability to seek relief from the Commission, the Court's Order of Dismissal applies only to Indian River Shores' ability to seek the "actual relief sought by the Town" and the Court's ability to decide the relief. Vero Beach alleges that the actual relief sought by Indian River Shores was an order from the Court stating that, after the Franchise Agreement expires, Vero Beach has no right to serve in Indian River Shores and Indian River Shores may thereafter choose its electric supplier. Vero Beach states that the Court found that this relief can only be granted by the Commission through a modification of the Territorial Orders.

Vero Beach argues that there is no reasonable basis for doubt as to whether the Commission has jurisdiction over Indian River Shores' constitutional claim. Vero Beach argues that the Circuit Court decided this 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." Vero Beach argues that the Court's Order of Dismissal did not create any doubt as to the venue for jurisdiction over Indian River Shores' constitutional claim and that it did not suggest that Indian River Shores could or should seek resolution of its constitutional claim from the Commission. For this reason, Vero Beach alleges, the Court's statement that Indian River Shores can seek relief before the Commission cannot be read as creating any basis for doubt as to where jurisdiction over Indian River Shores' constitutional claim lies.

Vero Beach argues that the Commission's argument in the Circuit Court Lawsuit does not create doubt regarding the Commission's jurisdiction with respect to Indian River Shores' constitutional claims. Vero Beach argues that the Commission's argument addressed the Commission's jurisdiction with respect to the relief specifically requested by Indian River Shores in the Circuit Court Lawsuit, and further specifically recognized that the Commission will not interpret municipal powers and constitutional provisions.

Vero Beach further argues that the Petition does not meet the Section 120.565, F.S., requirements for a declaratory statement because it does not ask the Commission for a declaration as to Indian River Shores' status, rights, or obligations under the Commission's statutes, rules, or orders, but rather asks the Commission to affirm or confirm Indian River Shores' view of jurisdiction over its constitutional claim, which has already been decided by the Circuit Court. Vero Beach argues that, as in *Sutton*, Indian River Shores' rights and status, having been clearly stated by the Circuit Court, are not in doubt, and that if Indian River Shores wants the relief for which it asked the Court, it must seek the Commission's modification of the Territorial Orders, not a determination of its purported constitutional claim. Vero Beach states further that because Indian River Shores' constitutional claim has been addressed by the Circuit Court, as argued previously, there is no basis for Indian River Shores to be in doubt, and the Commission should deny the requested declaratory statement.

III. Indian River Shores' Reply

Indian River Shores argues that the Circuit Court dismissed its constitutional claim for lack of subject matter jurisdiction and not on the merits. Indian River Shores argues that Florida law makes clear that a dismissal for lack of jurisdiction is not an adjudication on the merits. Indian River Shores points to the Court's Order of Dismissal that states:

[a]lthough 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.

Indian River Shores also states that Vero Beach's motion to dismiss was based only on grounds that the Circuit Court lacked jurisdiction because the Commission has exclusive and superior jurisdiction; the Commission has primary jurisdiction over the subject matter; and Indian River Shores failed to exhaust its administrative remedies by not going to the Commission first.

Indian River Shores argues that at hearing before the Circuit Court, Commission counsel stated that the Office of General Counsel would recommend to the Commission that a declaratory statement be issued if Indian River Shores were to ask the Commission the same questions it asked the Court. Indian River Shores acknowledges, however, that it has not brought those questions to the Commission, and, instead, is asking only that the Commission issue a declaration on the Commission's jurisdiction to adjudicate Indian River Shores' constitutional rights. Staff notes that because the merits of the questions before the Circuit Court - whether, upon expiration of the Franchise Agreement, Indian River Shores can choose an electric provider and Vero Beach has no right to provide service in Indian River Shores - are not before the Commission, the parties' arguments on the merits of these questions (Petition, pp. 8-10; Vero Beach's Response, pp. 39-40; Indian River Shores' Reply, pp.7-9) are irrelevant to the Petition and are not discussed.

Indian River Shores restates its position that there needs to be an adjudication on its threshold constitutional argument of whether has a constitutional right to be protected from unconsented exercises of extra-territorial power by Vero Beach. Indian River Shores argues that after that decision is made "[i]n an appropriate proceeding, the PSC will need to consider that the

Legislature has not granted Vero Beach extra-territorial power to serve within the boundaries of the Town just as the PSC did for [Reedy Creek Improvement District].”

Indian River Shores also argues that its requested declaratory statement would not improperly interfere with or preempt legal issues in a pending judicial proceeding. Indian River Shores argues that a party whose claim is dismissed with prejudice is not barred from seeking relief as to the claim dismissed on jurisdictional grounds in a separate cause or court having jurisdiction. Indian River Shores points out that the Circuit Court advised that it could seek relief from the Commission.

Indian River Shores argues that Vero Beach’s reliance on *Padilla v. Liberty Mutual Insurance Company*, 832 So. 2d 916 (Fla. 1st DCA 2002), is misplaced. Indian River Shores argues that it is not attempting to obtain administrative preemption over legal issues pending in a court proceeding because the Circuit Court has already ruled that it does not have jurisdiction. Indian River Shores states that Vero Beach is correct that Indian River Shores retains an appellate right to appeal the Court’s Order of Dismissal, but even if that could be considered a “pending issue,” Vero Beach expressly argued in the Circuit Court that the Commission must be allowed to declare its own jurisdiction, and that is what the Petition is requesting.

Finally, Indian River Shores argues that Vero Beach’s opposition should be rejected because it improperly injects other issues and alleged factual omissions that contradict Rule 25-22.039, F.A.C., that requires that intervenors take the case as they find it. Indian River Shores states that the Petition is limited to Indian River Shores’ particular circumstances as set forth in the Petition, not as to Vero Beach’s circumstances. Indian River Shores alleges that Vero Beach’s Response admits that the Commission does not have jurisdiction to rule on constitutional claims. Indian River Shores further argues that Vero Beach’s Response and motion to intervene fail to clearly articulate Vero Beach’s substantial interest in the narrow jurisdictional question presented by Indian River Shores and that Vero Beach has nothing to add to this proceeding since there are no disputed facts involved.

IV. Staff’s Analysis and Recommendation

A. The Circuit Court Lawsuit

Indian River Shores’ Amended Complaint in the Circuit Court Lawsuit asked the Court to:

Declare that upon expiration of the Franchise Agreement the Town has the right to determine how electric service should be provided to its inhabitants, which includes either through direct provision of service or by contracting with other utility providers of its choosing; and

Declare that upon expiration of the Franchise Agreement the City has no legal right to provide extra-territorial electric service to customers residing within the corporate limits of the Town.

(Attachment A, p. 25). In support of these requested declarations, Indian River Shores argued to the Circuit Court that Article VIII, Section 2(c), Florida Constitution, and Sections 166.021(3)(a)

and 180.02(2), F.S., require that Vero Beach must have authority provided by general or special law in order to provide electric service in Indian River Shores, and that the Commission's Territorial Orders do not grant this authority. Indian River Shores also argued that if the Circuit Court were to rule in its favor, the Commission's Territorial Orders granting Vero Beach the right and obligation to provide service within Indian River Shores should "simply be conformed to the Court's order."

Vero Beach moved to dismiss Indian River Shores' request for the Circuit Court to declare that upon expiration of the Franchise Agreement, Vero Beach no longer has a right to provide service within the corporate limits of Indian River Shores and that Indian River Shores has the right to determine its service provide. Vero Beach argued that the Circuit Court lacks jurisdiction and the Commission has sole jurisdiction to decide these questions. The Commission, participating as amicus curiae, supported Vero Beach's motion to dismiss, arguing that the Commission has sole and exclusive jurisdiction to decides these questions. The Court granted the motion to dismiss, finding, in part:

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.

* * *

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. [fn. 4 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. . . .

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 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 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.

(Attachment B, pp. 27-31)

In response to the Petition, Vero Beach argues that the Circuit Court reached the merits whether Vero Beach has authority to provide electric service upon expiration of the Franchise Agreement. Staff disagrees with Vero Beach's argument. The Court's Order of Dismissal, although deciding the issue of subject matter jurisdiction on the merits, did not make a ruling on the merits of the requested declarations. Dismissal of a case for lack of subject matter jurisdiction does not decide the actual substantive issues raised. *See, e.g., Neapolitan Enters., LLC v. City of Naples*, 2016 Fla. App. LEXIS 1183 (Fla. 2d DCA 2016)(citing to Fla. R. Civ. P. 1.420(b)).

The Circuit Court's finding that Indian River Shores may "seek relief before the Commission" referred to Indian River Shores' request for declarations that upon expiration of the Franchise Agreement (1) Indian River Shores has the right to determine how electric service should be provided to its inhabitants and (2) Vero Beach has no legal right to provide electric service in Indian River Shores. The Circuit Court recognized that these questions are under the Commission's jurisdiction to decide if brought to the Commission in a future, appropriate proceeding. However, the Petition does not ask these questions.

The Circuit Court did not invite Indian River Shores to relitigate at the Commission the Court's Order of Dismissal for lack of subject matter jurisdiction. But the Petition does just that. The Petition asks the Commission to conclude that a threshold constitutional issue exists that the Commission does not have jurisdiction to decide and that the Circuit Court must hear this

argument before the Commission may address a territorial dispute concerning Vero Beach's authority to provide electric service in Indian River Shores. The Court's Order of Dismissal rejected this argument.

B. The Petition's allegations of doubt are sufficient to meet the requirements for issuance of a declaratory statement

The Petition asks the Commission to declare:

[T]he PSC lacks the jurisdiction under Chapter 366, Florida Statutes, or any other applicable law, 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, codified in the statutes, to be protected from unconsented exercises of extra-territorial powers by Vero Beach within the Town's corporate limits.

Section 166.021(3)(a), F.S., provides that pursuant to the Florida Constitution, each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, but not including the subject of "exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution." Article VIII, Section 2(c), states that exercise of extra-territorial powers by municipalities shall be as provided by general or special law.

Indian River Shores' requested declaration must be read in conjunction with the particular circumstances and substantial interests alleged by Indian River Shores, as required by subsections 120.565(1) and (2), F.S., and Rules 28-105.001 and 28-105.002, F.A.C. Based on the facts set forth in the Petition, "extra-territorial powers" in the context of Indian River Shores' question means Vero Beach's authority to provide electric service within Indian River Shores' corporate limits. Indian River Shores filed the Petition as part of its overall position that when the Franchise Agreement expires on November 6, 2016, Vero Beach will no longer have the authority to provide electric service in Indian River Shores and Indian River Shores will have the authority to choose a new service provider. Indian River Shores' legal theory for this position is that without Indian River Shores' consent, Vero Beach is not authorized by the Territorial Orders or any general or special law to provide electric service in Indian River Shores as is required by Section 166.021, F.S., and the Florida Constitution.

The essential question raised by the Petition, whether Vero Beach has the right and obligation to continue to provide electric service within Indian River Shores upon expiration of the Franchise Agreement, is within the sole, exclusive jurisdiction of the Commission to answer in approving territorial orders or resolving territorial disputes pursuant to Section 366.04, F.S. Pursuant to Section 366.04(2), F.S., the Commission has the power to approve territorial agreements between municipal electric utilities, and to resolve any territorial dispute between municipal electric utilities and other electric utilities under the Commission's jurisdiction. Section 366.04(5), F.S., gives the Commission 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), F.S., states that the jurisdiction conferred upon the Commission shall be exclusive and superior to that of all other political subdivisions, including municipalities, and, in case of conflict therewith, all lawful acts and orders of the Commission shall in each instance prevail.

Consistent with Section 366.04, F.S., the Circuit Court appropriately found that it did not have jurisdiction to address Indian River Shores' constitutional argument because Indian River Shores' requested relief amounted to "an unfeasible request that the court determine what utility will provide electric service to the Town" and that the "relief requested by the Town is squarely within the jurisdiction of the PSC." The Circuit Court appropriately rejected Indian River Shores' argument that there is a threshold constitutional issue requiring Circuit Court resolution. However, Indian River Shores' Petition questions the Circuit Court's ruling.

To the extent that the Petition is asking the Commission to determine whether there is a threshold constitutional issue for the Circuit Court to decide, it appears that there is no actual present and practical need for a declaratory statement because the Circuit Court has already decided there is not a threshold constitutional issue. *See Sutton*, 654 So. 2d at 1048 (affirming DEP's dismissal of a petition for declaratory statement because petitioner's rights, status, or other equitable or legal relations were not in doubt since petitioner was given the relief requested through the administrative hearing process). Further, to the extent the Petition is asking the Commission to evaluate the correctness of the Circuit Court's decision that the Commission, not the Circuit Court, has sole jurisdiction to address the constitutional argument raised, the Petition amounts to a request for an advisory opinion. There is no doubt concerning the Circuit Court's decision that it lacks jurisdiction. To the extent that the Petition is in any manner relitigating the questions addressed in the Court's Order of Dismissal, Vero Beach and Indian River Shores agree that Indian River Shores' remedy for challenging the Circuit Court's Order of Dismissal is an appeal to the Third District Court of Appeal. *See Garcia*, 99 So. 3d at 544 (disapproving use of a declaratory action as an "end run" around the Florida Rules of Appellate Procedure).

Subject matter jurisdiction was fully and fairly litigated by the parties before the Circuit Court. The Court's determination on the issue of jurisdiction was a critical and necessary part of resolution since it meant the Circuit Court was without jurisdiction to proceed on the merits of Indian River Shores' requested declarations. Under these circumstances, collateral estoppel acts as a bar to Indian River Shores from relitigating the issue of the Circuit Court's subject matter jurisdiction. *See Marquardt v. State*, 145 So. 3d 464, 481 (Fla. 2015)(identifying the elements of collateral estoppel); and *North Georgia Elec. Membership Corp. v. City of Calhoun*, 989 F.2d 429 (11th Cir. 1993)(stating that dismissal of a complaint for lack of jurisdiction adjudicates the court's jurisdiction and bars relitigation of the jurisdictional question).

The Commission has recognized that collateral estoppel may apply in its proceedings. *See Order Denying Request for Formal Hearing and Request for Deferral etc.*, issued March 11, 1996, Order No. PSC-96-0350-FOF-WS, Docket No. 921098-WS, *In re: Applications for certificates by Turkey Creek Utilities* (where, in denying a request for deferral, the Commission found that the defenses of collateral estoppel and res judicata appeared applicable because the same question had already been ruled upon by the Commission and affirmed by the First District Court of Appeal). *See also Zimmerman v. Office of Insurance Regulation*, 944 So. 2d 1163, 1166-69 (Fla. 4th DCA 2006)(holding that the appellate court's ruling on appeal from the circuit court

collaterally estopped petitioner from relitigating the same arguments involving the same parties at the administrative agency).

Indian River Shores, however, alleges that it is in doubt as to where to bring its constitutional argument because it perceives conflict between the Court's Order of Dismissal and the Commission's decisions in *Indian River County Order* and the *2011 Fuel Clause Order* that the Petition alleges stand for the proposition that the Commission has no jurisdiction to decide constitutional issues. The purpose of a declaratory statement is to resolve ambiguities of law as applied to a petitioner's specific circumstances. *Investment Corp.*, 747 So. 2d at 382.

In *Citizens v. Fla. PSC*, 164 So. 3d 58, 64 (Fla. 1st DCA 2015), the Court held that where contradictory orders of an agency make applicability of statutes or rules an administrative agency enforces uncertain as to particular circumstances, a declaratory statement may well be appropriate for clarification of the petitioner's rights, duties, and privileges. In *Citizens v. Fla. PSC*, the Court found that the Office of Public Counsel was entitled to a declaratory statement because it had alleged that its discovery rights acknowledged by the Commission in past cases had "arguably" been terminated or restricted by a later order, and thus that its discovery rights were subject to doubt and uncertainty. Similarly, although not alleging conflict between Commission orders, the Petition is alleging that the Commission in *Town of Indian River Shores* took a legal position concerning its ability to interpret statutory and constitutional provisions in a declaratory statement that conflicts with two prior Commission orders. Staff believes that under *Citizens v. Fla. PSC*, the Petition's allegations are sufficient to meet the requirements for issuance of a declaratory statement for purposes of giving the Commission's opinion explaining why the Court's Order of Dismissal does not conflict with the *Indian River County Order* and the *2011 Fuel Clause Order*.

Indian River Shores' argument that there is a threshold constitutional issue that must be determined by the Circuit Court is based on caselaw that stands for the proposition that an administrative agency does not have the authority to determine whether a statute or rule is unconstitutional, based on the separation of powers provision of Article II, Section 3 of the Florida Constitution. Staff agrees with these cases. However, the Petition is not challenging the constitutionality of a statute, rule, or Commission action. For this reason, the Petition's arguments and citation to *Gulf Pines Memorial Park v. Oaklawn Memorial Park*, 361 So. 2d 695 (Fla. 1978), and *Department of Revenue v. Young American Builders*, 330 So. 2d 864 (Fla. 1st DCA 1976), are not on point. Indian River Shores' framing of its argument as a "constitutional issue" is insufficient in and of itself to divest the Commission of jurisdiction under Section 366.04, F.S., to determine questions concerning territorial agreements and territorial orders. The mere assertion of constitutional questions does not automatically entitle a party to bypass administrative channels. *Gulf Pines*, 361 So. 2d at 699.

There is no separation of powers prohibition against the Commission, in a proper proceeding, interpreting the phrase "as provided by general or special law," as used in Article VIII, Section 2(c), Fla. Const., for the purpose of determining whether Vero Beach has authority to continue to provide electric service within Indian River Shores upon expiration of the Franchise Agreement. *See Communications Workers, Local 3170 v. City of Gainesville*, 697 So. 2d 167, 170 (Fla. 1st DCA 1997)(stating that administrative law judges and PERC Commissioners not purporting to

invalidate legislative enactments do not usurp judicial prerogatives by deciding – in the first instance - the constitutional issues that arise in cases properly before them); Order No. PSC-99-0535-FOF-EM, 1999 Fla. PUC LEXIS 534 *48, issued March 22, 1999, Docket No. 981042-EM, *In re: Joint petition for determination of need by City of New Smyrna Beach et al.* (where the Commission found that a challenge to the constitutionality of interpreting Section 403.519, F.S., “clearly falls squarely within our administrative expertise.”) In this regard, *Myers v. Hawkins*, 362 So. 2d 926, 929 (Fla. 1978), cited in the Petition, does not support Indian River Shores’ argument because in that case the Florida Supreme Court acknowledged the Florida Commission on Ethics’ authority to interpret the term “judicial forum” in the Florida Constitution.

There would also be no prohibition against the Commission interpreting the language of Section 166.021, F.S., in a proper proceeding concerning the Territorial Orders between Vero Beach and FPL. The Commission, under its Section 366.04, F.S., jurisdiction over territorial agreements, has properly and necessarily interpreted in a Section 120.569 and 120.57, F.S., proceeding, statutory provisions that are not under its authority to enforce or implement. In resolving territorial disputes involving electric cooperatives, the Commission has interpreted Chapter 425, F.S., the Rural Electric Cooperative Law. See *Choctawhatchee Elec. Coop. v. Graham*, 132 So. 3d 208, 211, n. 1 (Fla. 2014); *Escambia River Elec. Coop. v. Fla. Public Serv. Com.*, 421 So. 2d 1384 (Fla. 1982)(where the Commission interpreted Section 425.04, F.S., in resolving the territorial dispute); and *Gainesville-Alachua County Regional Electric, Water & Sewer Utilities Board v. Clay Electric Cooperative, Inc.*, 340 So. 2d 1159 (Fla. 1976)(where the Commission’s order on appeal interpreted the definition of “rural area” under Section 425.03(1), F.S.). The Commission’s interpretation of the phrase “general or special law” as used in Section 166.021, F.S., and the Florida Constitution, in the context of a territorial dispute or question involving a municipality, would be analogous to the Commission’s interpretation of the definition of “rural area” under Chapter 425, F.S., in a territorial dispute involving an electric cooperative.

The law as applied in the Court’s Order of Dismissal does not conflict with the *2011 Fuel Clause Order*. The Commission’s support of the motion to dismiss for lack of jurisdiction in the Circuit Court Lawsuit is consistent with the *2011 Fuel Clause Order*. The issue in the Circuit Court Lawsuit was whether the Circuit Court or the Commission had jurisdiction to answer the questions raised to the Court. The issue raised in the *2011 Fuel Clause Order* did not involve the issue of circuit court jurisdiction over constitutional questions. In the *2011 Fuel Clause Order*, the consumer intervenors argued that allowance of recovery of certain fuel costs violated the Florida Constitution by taking consumers’ property without due process of law. Even though this constitutional question could not be addressed by the Commission, the docket was, nonetheless, heard by the Commission, with the Commission recognizing the intervenors’ ability to raise their constitutional issue on appeal. In a proceeding concerning Vero Beach’s Territorial Orders, the Commission would not need to reach any questions of Indian River Shores’ constitutional rights in order to make a decision and issue a final order. As the Commission stated in the *2011 Fuel Clause Order*:

Consumer Intervenors have been given the opportunity, in this docket, to prepare a record upon which the Supreme Court can consider the constitutional issues *de novo*. [citation omitted] Thus in accordance with *Key Haven* and the cited cases,

we decline to determine the constitutional issues raised by the Consumer Intervenor. The issue of whether we can allow recovery of fuel costs, subject to refund, prior to a determination of prudence, can be resolved without resorting to a determination of the constitutional claims.

An adversely affected party can raise its constitutional issues on appeal, having had the opportunity to provide support for its position on the record of the agency proceeding. *See Key Haven Associated Enterprises. v. Board of Trustees*, 427 So. 2d 153, 157-58 (Fla. 1983)(finding that the aggrieved party could complete the administrative process and then challenge the statute's facial constitutionality in the district court of appeal); *Florida Hospital Adventist Health v. Agency of Health Case Administration*, 823 So. 2d 844 (Fla. 1st DCA 2002)(holding that a person appealing an agency order could raise for first time on appeal the issue that the agency's statutory interpretation was unconstitutional as applied); and *Rice v. Department of Health & Rehabilitative Services*, 386 So. 2d 844, 848-50 (Fla. 1st DCA 1980)(where the Court remanded the case to the agency to conduct a Section 120.57, F.S., hearing in order for there to be the necessary record to allow the appellate court to resolve the claim of statutory unconstitutionality). Both the Court's Order of Dismissal and the *2011 Fuel Clause Order* are consistent with the requirement of exhaustion of administrative remedies. *Key Haven*, 427 So. 2d at 158.

Likewise, the Court's Order of Dismissal does not conflict with the *Indian River County Order*. The context in which the Commission declined to interpret Chapter 125, F.S., and Florida constitutional provisions in the *Indian River County Order* was a Section 120.565, F.S., declaratory statement proceeding where Indian River County (County) raised 16 declaratory statement questions. Based on the parameters for the issuance of declaratory statements found in Section 120.565, F.S., and Chapter 25-28.105, F.A.C., the Commission found the Petition was not proper for a declaratory statement because the questions posed were hypothetical, did not present a present ascertained set of facts, were based on an incorrect legal conclusion, asked for a declaration determining the conduct of third parties, and that questions concerning the County's rights-of-way and interpretation of the County's franchise agreement with Vero Beach were not subject to the Commission's jurisdiction. The Commission did not decide the *Indian River County Order* on the basis that a "threshold constitutional issue" existed that had to be decided by a circuit court before the Commission could address whether Vero Beach had the right to continue to provide electric service in the County upon expiration of the franchise agreement between Vero Beach and Indian River County.

Even though Indian River Shores frames its argument as a constitutional question, the actual relief it seeks is a determination of what utility will provide electric service to Indian River Shores customers upon expiration of the Franchise Agreement. Who is authorized to provide electric service to Indian River Shores has been determined in the Territorial Orders. Any modification to the Territorial Orders is within the Commission's exclusive and superior jurisdiction. If a proceeding were held before the Commission on a territorial dispute and Indian River Shores was an adversely affected party, it could raise its constitutional rights arguments on appeal to the Florida Supreme Court. This statement, however, should in no way be construed as a predetermination that Indian River Shores would meet the requirements of Chapter 120, F.S.,

and Chapter 366, F.S., entitling it to a hearing before the Commission or an appeal of a Commission final order to the appellate court.

V. Conclusion

The Petition asks that the Commission make the following declaration:

The Commission lacks the jurisdiction under Chapter 366, F.S., or any other applicable law, to interpret Article VIII, Section (2)(c) of the Florida Constitution, and Section 166.021, F.S., for purposes of adjudicating and resolving whether the Town has a constitutional right, codified in the statutes, to be protected from unconsented exercises of extra-territorial powers by Vero Beach within the Town's corporate limits.

For the reasons set forth above, staff recommends the Commission should issue a declaratory statement on the Town of Indian River Shores' Petition for Declaratory Statement. However, the Commission should not issue the declaratory statement requested by the Petition. Instead, the Commission should declare that the Commission has the jurisdiction under Section 366.04, F.S., to determine whether Vero Beach has the authority to continue to provide electric service within the corporate limits of the Town of Indian River Shores upon expiration of the franchise agreement between the Town of Indian River Shores and the City of Vero Beach. The Commission should state that the declaratory statement will be controlling only as to the facts relied upon in this docket and not as to other, different or additional facts.

Issue 2: Should this docket be closed?

Recommendation: Yes, the docket should be closed (Cowdery)

Staff Analysis: Whether the Commission grants or denies the Town's Petition, in whole, or in part, a final order must be issued by April 4, 2016. Upon issuance of the final order, no further action will be necessary, and the docket should be closed.

Filing # 27415858 E-Filed 05/18/2015 03:15:12 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,

Plaintiff,

CASE NO.: 2014-CA-000748

v.

CITY OF VERO BEACH, a Florida
municipality,

Defendant.

AMENDED COMPLAINT

Plaintiff, TOWN OF INDIAN RIVER SHORES ("Plaintiff" or "Town"), by and through its undersigned attorneys, sues Defendant, CITY OF VERO BEACH ("Defendant" or "City").

JURISDICTION AND VENUE

1. This is an action for declaratory and supplemental relief as well as damages based on a rare situation in which one municipality -- the City -- seeks to exert extra-territorial monopoly powers and extract monopoly profits within the corporate limits of another municipality -- the Town -- without the Town's consent.
2. This is an action for declaratory and supplemental relief, involving an amount in controversy in excess of \$15,000, over which this Court has jurisdiction pursuant to Section 26.012(2)(a) and (c) and Chapter 86, Florida Statutes.
3. This is also an action for damages in excess of \$15,000 over which this Court has jurisdiction pursuant to Section 26.012(2)(a), Florida Statutes.

Exhibit "A"

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

41. This count is an action for declaratory relief by the Town against the City regarding the Town's rights and obligations under its Home Rule Powers, under the special act creating the Town, and under the Franchise Agreement.

42. The Town adopts paragraphs 1 through 40 as if set forth fully herein.

43. The City has no inherent Home Rule power to provide extra-territorial electric service within the municipal boundaries of the Town.

44. In order for the Town to exercise extra-territorial powers and provide electric service within the corporate limits of the Town, such extra-territorial powers must have been clearly granted to the City by a general or special law passed by the Florida Legislature.

45. Nothing in the City Charter or in any current general or special law grants the City the power to provide extra-territorial electric service within the Town.

46. The City's power to provide extra-territorial electric utility service within the Town is derived directly from the Town's contractual agreement reflected in the Franchise Agreement.

47. The City acknowledges in its Ordinances that "the Town of Indian River Shores receives utility services from the City of Vero Beach under a franchise." City of Vero Beach, Fla. Code § 2.102.

48. The Franchise Agreement provides the permission under which the City is currently providing extra-territorial electric service in the Town. However, the City will no longer have that permission when its Franchise expires on November 6, 2016.

49. Under Florida law a Franchise is a privilege, not a right, and the City has no right to continue furnishing extra-territorial electric service to the Town's inhabitants after the Franchise Agreement expires unless the Town otherwise grants the City such permission.

50. Although the City has entered into a bi-lateral territorial agreement with FPL that currently envisions that the City will provide electric service to a portion of the Town, and the PSC has approved that territorial agreement pursuant to that agency's regulatory authority under Chapter 366, Florida Statutes, the PSC's administrative order approving the territorial agreement between the City and FPL is not a general or special law passed by the Legislature that grants the City the extra-territorial power to provide extra-territorial electric service within the corporate limits of the Town.

51. Assuming arguendo that the City somehow has been given the power by a current general or special law to provide extra-territorial electric service, it cannot do so in a manner that will encroach on the municipal authority of the Town. As a municipality, the Town has retained the right to provide electric services within its corporate limits as those limits existed on July 1, 1974 without competition. In addition, as a municipality, the Town has retained the authority to decide which electric utilities, if any, may possess a franchise for providing such services.

52. Thus, nothing in the territorial agreement or the PSC approval thereof impedes the prosecution of this Amended Complaint wherein the Town seeks a judgment enforcing the Town's express powers to provide its inhabitants with electric service and deny another municipality permission to furnish extra-territorial electric service within the Town at the expiration of a freely bargained-for franchise agreement.

53. The Town is not seeking to challenge the PSC's authority under Section 366.04, Florida Statutes, to coordinate the statewide electric grid through its consideration and approval of

territorial agreements. Rather, upon the Court's declaration that the City does not have the statutory powers to provide extra-territorial electric service within the Town without the Town's consent and that the Town has the right to decide how electric service is to be furnished to its inhabitants, the PSC's order approving the territorial agreement should simply be conformed to the Court's order. This would be consistent with the territorial agreement which expressly acknowledges the service area boundaries described therein may be terminated or modified by a court of law.

54. The Town has elected not to renew the Franchise Agreement with the City because the City continues to mismanage its electric utility and to charge the Town and its citizens unreasonable and oppressive electric rates.

55. Pursuant to its Home Rule and express statutory powers, the Town has the legal right to decide how electric service should be furnished to its inhabitants when the Franchise Agreement expires on November 6, 2016.

56. There is nothing in the Franchise Agreement or in the Special Act creating the Town that prohibits or in any way restricts the Town's right to furnish electricity itself or by contract with another utility once the Franchise Agreement expires. Quite the opposite, the Town's Special Act gives it the express authority, and the responsibility, to determine how electric service should be provided to its inhabitants, whether by providing the electricity itself or by contracting with another utility to do so.

57. The City has indicated that it will not cease providing electricity to the Town or allow the Town to furnish its own electric service or contract with other utilities for such electric service when the City's Franchise expires.

58. The Town needs to act now to ensure that the Town is able to exercise its statutory authority to determine how electric service will be provided to its inhabitants when the Franchise Agreement expires and that it does so in an orderly and efficient manner so that electric utility service, other than from the City, will be available to serve the Town and its citizens when the City's Franchise expires. Therefore, the Town needs the requested declaratory relief in advance of the Franchise Agreement's actual expiration in order to provide a sufficient transition period and protect its citizens from service interruptions.

59. Thus, there exists a present, actual, and justifiable controversy between Town and the City, requiring a declaration of rights, not merely the giving of legal advice.

WHEREFORE, the Town requests this Court:

- (1) Declare that upon expiration of the Franchise Agreement the Town has the right to determine how electric service should be provided to its inhabitants, which includes either through direct provision of service or by contracting with other utility providers of its choosing;
- (2) Declare that upon expiration of the Franchise Agreement the City has no legal right to provide extra-territorial electric service to customers residing within the corporate limits of the Town; and
- (3) Grant the Town such other and further relief as the Court deems proper under the circumstances.

COUNT II

For Anticipatory Breach of Contract

60. This count is an action by the Town seeking damages in excess of \$15,000 from the City for anticipatory breach of contract.

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,

CASE NO. 312014CA000748

Plaintiffs,

v.

CITY OF VERO BEACH,
a Florida municipality,

Defendant.

_____ /

**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 Bill² 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),

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 Orders³ 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

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

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:
Bruce May – Bruce.may@hklaw.com
Karen Walker – Karen.walker@hklaw.com
Kevin Cox – Kevin.cox@hklaw.com
John Frost – jfrost1985@aol.com
Nicholas T. Zbrzezny – nzbrzezny@fvdblaw.com
Wayne Coment – cityatty@covb.org
Robert Scheffel Wright – schef@gbwlegal.com
Kathryn G.W. Cowdery – kcowdery@psc.state.fl.us
Samantha M. Cibula – scibula@psc.state.fl.us