

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

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.

\_\_\_\_\_ /

PROCEEDINGS: COMMISSION CONFERENCE AGENDA  
ITEM NO. 3

COMMISSIONERS  
PARTICIPATING: CHAIRMAN JULIE I. BROWN  
COMMISSIONER LISA POLAK EDGAR  
COMMISSIONER ART GRAHAM  
COMMISSIONER RONALD A. BRISÉ  
COMMISSIONER JIMMY PATRONIS

DATE: Tuesday, March 1, 2016

PLACE: Betty Easley Conference Center  
Room 148  
4075 Esplanade Way  
Tallahassee, Florida

REPORTED BY: DEBRA KRICK  
Court Reporter  
(850) 894-0828

1 P R O C E E D I N G S

2 CHAIRMAN BROWN: All right. We are going to  
3 circle back. We are moving back to Item 3, and I  
4 know we have some parties that would like to  
5 address the Commission on that item.

6 MR. MAY: It's been a while.

7 CHAIRMAN BROWN: It's been a few years.

8 We will go into the staff introduction first  
9 of the item, and then turn to the parties for -- to  
10 address the Commission.

11 Thank you. Ms. Cowdery, could you please  
12 introduce the item?

13 MS. COWDERY: Okay. Madam Chairman and  
14 Commissioners, I am Kathryn Cowdery, Office of  
15 General Counsel.

16 Item 3 is a petition for declaratory statement  
17 by the town of Indian River Shores. Staff  
18 recommends that the Commission should declare that  
19 the Commission has the jurisdiction under Section  
20 366.04, Florida Statutes, to determine whether Vero  
21 Beach has the authority to continue to provide  
22 electric service within the corporate limits of the  
23 town of Indian River Shores upon expiration of the  
24 franchise agreement between the town of Indian  
25 River Shores and the City of Vero Beach.

1           Mr. Bruce May, representing the town of Indian  
2           River Shores, and Mr. Schef Wright, representing  
3           the City of Vero Beach, are present and would like  
4           to address the Commission. Participation is at the  
5           Commission's discretion. Staff is available to  
6           answer any questions.

7           CHAIRMAN BROWN: Thank you.

8           We will start with the petitioner, Mr. May.  
9           Although, you didn't ask for oral argument, it is  
10          customary to allow you to address the Commission,  
11          and so we will grant that going forward, but if you  
12          could limit your comments to five minutes, followed  
13          by the respondent, who will have an opportunity to  
14          five minutes. So if you would like to retain some  
15          time to respond to the respondent's questions, you  
16          can do that at this time.

17          MR. MAY: Madam Chair, the Mayor of the town  
18          of Indian River Shores has driven up last night,  
19          and he would also like to briefly address the  
20          Commission if that's okay with you all.

21          CHAIRMAN BROWN: Would you like him to go  
22          first before you?

23          MR. MAY: I would like to tee the issue up and  
24          then defer to him. It may take -- you know, we  
25          have kind of tried to keep our remarks within 10

1 minutes, but I don't know if -- I was not aware  
2 that we were going to be limited to five minutes,  
3 but --

4 CHAIRMAN BROWN: We will see how it goes. We  
5 have a pretty stacked agenda today, so --

6 MR. MAY: Good morning, Madam Chair,  
7 Commissioners, I am Bruce May with the law firm of  
8 Holland & Knight. We represent the town of Indian  
9 River Shores. With me today is the Mayor of Indian  
10 River Shores, Mr. Brian Barefoot. The town  
11 manager, Mr. Stabe, also has driven up and is here  
12 today as well.

13 We are here this morning to discuss the town's  
14 petition for declaratory statement, which asked for  
15 clarity regarding your ability to address  
16 constitutional issues. We are not here to  
17 criticize staff's recommendation, and we are not  
18 here to take issue with staff's recommendation.  
19 However, there does appear to be some level of  
20 confusion as what prompted our filing. So what we  
21 would like to do is take a moment to briefly  
22 explain how we got to where we are, and the reasons  
23 why we filed the petition today, not only the  
24 constitutional reasons, which I will discuss, but  
25 also the real world implications which Mayor

1 Barefoot will briefly explain.

2 Assuming you approve your staff's  
3 recommendation, we also want to give you an idea of  
4 where we go from here. To understand why we have  
5 asked for clarity regarding your ability to address  
6 the constitutional issues, it's important for you  
7 to have a clear picture of the constitutional  
8 question that is at issue.

9 The town is an independent incorporated  
10 municipality under Florida's Constitution. It  
11 fundamentally believes that it has a right under  
12 the Constitution to be protected from unconsented  
13 exercises of extraterritorial power within its  
14 corporate limits by another municipality; in this  
15 case, the City of Vero Beach.

16 This is a very narrow constitutional issue.  
17 It does not involve investor-owned electric  
18 utilities. It does not involve electric  
19 cooperatives. It relates only to a municipality's  
20 limited authority to exercise territorial powers  
21 outside of its boundaries and within the corporate  
22 limits of another equally independent municipality.  
23 The issue is unique. It's one off, and it does not  
24 have industry wide implications.

25 The framers of our Constitution,

1           Commissioners, established a system of municipal  
2           government where municipalities are equally  
3           sovereign and equally independent. Article VIII,  
4           Section 2(c) of the Florida Constitution, which is  
5           the supreme law of this state, makes it clear that  
6           a municipality has no inherent home rule authority  
7           to exercise extraterritorial powers. One  
8           municipality simply cannot wield its municipal  
9           powers outside of its boundaries and within the  
10          boundaries of another equally independent  
11          municipality unless the Legislature specifically  
12          provides that municipality with that  
13          extraterritorial power in a general or special law.

14                 What that means in practical terms is that the  
15          City of St. Petersburg cannot exercise  
16          extraterritorial powers within the City of Tampa.  
17          The City of Tallahassee cannot exercise territorial  
18          powers within the City of Jacksonville, and the  
19          City of Fort Walton Beach cannot exercise  
20          extraterritorial powers within Panama City unless  
21          the Legislature specifically provides  
22          St. Petersburg, Tallahassee or Fort Walton with  
23          those specific extraterritorial powers. For the  
24          same reason, the town contends that it has a right  
25          under our constitution to be protected from

1           unconsented exercise of extraterritorial powers by  
2           Vero Beach. That contention is based on the fact  
3           that the Legislature has not specifically provided  
4           Vero Beach with the statutory authority required by  
5           the Constitution to exercise extraterritorial  
6           powers outside of its boundaries and within the  
7           town's corporate limits without the town's consent.

8           Initially, Vero Beach obtained the town's  
9           temporary consent in a written contract back in  
10          1968. That's six years before the PSC was given  
11          its jurisdiction over the service territories.  
12          That temporary consent was renewed and extended by  
13          a franchise agreement in 1986, which had a limited  
14          term of 30 years. But Vero will no longer have the  
15          town's consent to exercise extraterritorial powers  
16          within its corporate limits in November 6th of this  
17          year, when the franchise agreement expires. After  
18          that date, we contend that Vero will be in  
19          violation of Florida's Constitution if it continues  
20          to insist on exerting extraterritorial powers  
21          within the town.

22          Now, as Mayor Barefoot will briefly explain in  
23          a moment, the city's exercise of extraterritorial  
24          powers within the town is causing harm to the town  
25          and its residents. I won't belabor the point. I

1 am trying to keep it short, Madam Chair, but I will  
2 say that we contend that the City's electric  
3 utility is extracting unregulated monopoly profits  
4 from the town, diverting those unregulated monopoly  
5 profits to Vero Beach's general fund, and, thus, is  
6 forcing the town and its residents to subsidize the  
7 City's own municipal operations. The town and its  
8 residents have no recourse because they do not vote  
9 in the City elections.

10 Commissioners, it is our fundamental  
11 contention that Vero Beach is running its city on  
12 the backs the town's residents. And if it  
13 continues to do so after November 6th of this year,  
14 it will be violating the limitations on  
15 extraterritorial powers that are embodied in  
16 Florida's Constitution.

17 And that's what we sought to do when we filed  
18 the lawsuit against Vero Beach in circuit court.  
19 We filed that lawsuit over a year-and-a-half ago.  
20 The reason we filed in circuit court and not with  
21 the PSC was that a number of PSC orders and court  
22 cases suggested to us that the PSC was not in the  
23 business of construing the Constitution or  
24 adjudicating constitutional issues.

25 While we didn't file with the PSC, we

1 immediately notified you all, and your staff and  
2 your attorneys of the suit. Since that time, we  
3 have tried to your best to keep you posted on the  
4 status of that litigation each step along the way.

5 We also made it clear in our lawsuit that  
6 there was a PSC territorial order which stated that  
7 Vero could serve the town, and that any  
8 determination by the Court on the constitutional  
9 issue would have to be brought back to you all  
10 before any territorial order or any rights under  
11 any territorial agreement could be modified.

12 We felt at the time, Commissioners, that it  
13 would be most efficient to -- for the Court to  
14 address the constitutional issues first, and then  
15 we would proceed to the PSC for further action  
16 after the Court ruled.

17 Now, after we filed the lawsuit, the town in  
18 Vero was -- participated in mandatory mediation,  
19 which is required by law. We mediated for a year.  
20 We reached an impasse, and then we resumed the  
21 lawsuit. At that point, the City filed a motion to  
22 dismiss our constitutional claim on grounds that  
23 those claims and issues fell within the exclusive  
24 jurisdiction of the PSC.

25 Shortly thereafter, your staff -- your legal

1 staff filed a motion to participate in the court  
2 case, and argued that, because the town's  
3 constitutional claim could result in the  
4 modification of a territorial order approving the  
5 territorial agreement, that matter fell within your  
6 exclusive jurisdiction and that the Court lacked  
7 the subject matter jurisdiction to hear the claim.

8 The motion to dismiss the town's  
9 constitutional claim was argued last August,  
10 August 26th, before the Court. And as you can see  
11 from the transcript of that hearing, which we have  
12 included in our petition, we expressed concern that  
13 if the Court dismissed our constitutional claim,  
14 the PSC may not have jurisdiction to rule on that  
15 claim.

16 In response to those concerns, your attorneys  
17 assured the Court that you did have the  
18 jurisdiction to address those constitutional  
19 issues. And based on those assurances by your  
20 counsel, the Court, on November 11 of last year,  
21 dismissed the case on grounds that it did not have  
22 subject matter jurisdiction.

23 Before seeking -- you know, while the Court  
24 did not rule on the merits of our constitutional  
25 claim, it expressly stated that the town could seek

1 its relief before the PSC, and that's what we  
2 intend to do at the appropriate time, Madam Chair  
3 and Commissioners. But before seeking that relief,  
4 and before getting too far down the road in an  
5 administrative hearing, we want -- we thought it  
6 only prudent to get some clarification and guidance  
7 from you all as to your jurisdictional tools that  
8 you have in your toolbox to adjudicate these  
9 constitutional issues.

10 There is some suggestion in the staff's  
11 recommendation, which we are not going to quibble  
12 with, but there is a suggestion that we are  
13 collaterally attacking the Court's order. And  
14 that's absolutely not correct. There is no  
15 intention to collaterally attack the Court's order.  
16 That's not why we filed the petition. We are fully  
17 aware, and we fully respect, that the Court ruled  
18 that it did not have subject matter jurisdiction to  
19 address the town's constitutional claim.

20 We are also fully aware, and fully respect,  
21 that the Court expressly directed us that we could  
22 seek relief from you all at the Commission, and we  
23 intend do that. But before, again, immersing the  
24 town in a potentially costly administrative  
25 proceeding, we need to clarify some uncertainties

1 regarding the PSC's ability to address  
2 constitutional questions. Those uncertainties  
3 stemmed from a number of statements made by you in  
4 earlier orders.

5 We had particular concerns that since the PSC  
6 recently indicated to Indian River County, and more  
7 recently in filings with the Florida Supreme Court,  
8 that the agency did not have the authority to  
9 interpret the Constitution. And we tried to  
10 highlight the basis for these uncertainties in our  
11 petition.

12 Commissioners, we filed the petition before  
13 you today for one single reason, and that's to get  
14 some clarity and guidance before we proceed with a  
15 proceeding before you. To obtain that clarity, we  
16 submitted a straightforward question in order to  
17 learn about the jurisdictional tools that you all  
18 have. While your staff recommendation didn't  
19 address the specific question we asked, it does  
20 provide us with clarity and guidance as to how you  
21 will go about addressing our constitutional issues.

22 Importantly, the recommendation on pages 16  
23 and 17 clarifies and confirms that the PSC can  
24 interpret the language in Article VIII, Section  
25 2(c) of the Florida Constitution, which is the crux

1 of our constitutional claim.

2 The recommendation also rejects the City's  
3 assertions that the circuit court ruled on the  
4 merits of our constitutional the claim. As your  
5 staff points out, the circuit court never ruled on  
6 the merits of our constitutional claim, and we  
7 certainly degree with staff on that point.

8 Commissioners, we think the staff's  
9 recommendation gives us enough clarity and insight  
10 to proceed and present our constitutional claims to  
11 you efficiently and cost effectively in a separate  
12 pleading, and we intend to do that. But before I  
13 wrap up, Mayor Barefoot wanted to briefly address  
14 the Commission.

15 CHAIRMAN BROWN: Thank you, Mr. May. You are  
16 at 10 minutes. Just so you know, you hit it right  
17 on the dot.

18 So welcome, Mayor Bearfield. I hope it's not  
19 going to be 10 minutes, so if you could briefly  
20 address the Commission with your concerns, that  
21 would be great.

22 MAYOR BAREFOOT: I am a big believer in  
23 executive summary, so I will proceed on that basis.

24 CHAIRMAN BROWN: Thank you.

25 MAYOR BAREFOOT: Good morning, Madam Chair and

1 Commissioners. And as Mr. May said, I am Brian  
2 Barefoot, and I am the Mayor of Indian River  
3 Shores. And as a matter of background, I am not a  
4 lawyer, and I am not really a politician. And if I  
5 was, I am not sure I would admit it in this  
6 particular climate. I spent my entire career in  
7 business, 30 years in the financial services, and  
8 seven years as the president of a college in  
9 Boston.

10 I drove up here last night for one reason, and  
11 that's to speak on behalf of the residents that I  
12 represent. To them, the constitutional issue that  
13 Mr. May just described is not some esoteric legal  
14 problem or a test question on a law school exam.  
15 This is a real issue that real people are facing  
16 that's harming our residents. And our situation is  
17 very unique.

18 The territorial boundary between the Florida  
19 Power & Light and city electric system divides my  
20 community. In other words, some of our residents  
21 are served by Florida Power & Light, others are  
22 served by the City of Vero Beach, that really does  
23 make our town very unique. We are served by two  
24 different utilities, and receive vastly different  
25 service at vastly different rates with vastly

1 different regulation and oversight.

2 It's no exaggeration to say that our residents  
3 who are being forced to receive electricity from  
4 the City are being taken advantage of. Our  
5 residents have no say in how rates are set or how  
6 Vero Beach use goes the unregulated profits that it  
7 extracts from them. The City diverts those  
8 unregulated, one might say monopolistic profits, to  
9 its general funds to pay for costs that have  
10 nothing to do with operating its utility.

11 For instance, our residents are subsidizing  
12 the City's unfunded pension obligations to past and  
13 current employees whose work is totally unrelated  
14 to that of the electric utility.

15 The bottom line for our residents, we are  
16 being forced to subsidize the operations of a city  
17 that is unaccountable to them. City leaders have  
18 made it clear that the unregulated monopoly profits  
19 earned from our citizens are used to artificially  
20 depress the City's ad valorem tax rates.

21 When I talk to legislators and other community  
22 leaders around the state as to what's going on,  
23 they invariably say the same thing, that's taxation  
24 without representation. Regardless of whether you  
25 want to call it taxation without

1 representation, or as Mr. May says, the exercise of  
2 extraterritorial powers without consent, it's  
3 fundamentally unfair to our residents.

4 So I will leave you with this; I swore an oath  
5 to protect the people of my community, and I am  
6 assuming you did the same when you were elected  
7 commissioners, and I am asking for your help. When  
8 the circuit court said it didn't have jurisdiction  
9 to hear our constitutional issue, the Court made it  
10 clear that we could seek relief before this agency.  
11 We intend to take the circuit court up on its  
12 directive, and our lawyers will be filing the  
13 appropriate pleading with you shortly. So we  
14 really do need your help. But I also want you to  
15 know that there is a pathway to resolving this  
16 issue, and I am committed to exploring that option  
17 to its fullest.

18 Florida Power & Light has offered to purchase  
19 the City's utility assets in our town for what I  
20 believe to be a fair and reasonable price. We  
21 believe that initial offer could be a real catalyst  
22 to settlement, particularly since, in our view, the  
23 City has no constitutional right to serve after  
24 November of 2016 anyway.

25 FPL is willing to purchase. Our residents

1 would welcome that purchase. And the Florida  
2 Municipal Power Authority, which is one of the  
3 wholesale providers to the City of Vero Beach, has  
4 publicly stated that it would not oppose it.

5 Having a PSC regulated utility with  
6 professional and neutral oversight of utility rates  
7 as the single electric utility provider in our town  
8 would cure issues that I described above. We have  
9 made every effort to get there, but obviously we  
10 need your help.

11 So thank you for your time, and I will be glad  
12 to answer any questions you may have.

13 CHAIRMAN BROWN: Thank you, Mayor Bearfield.  
14 You have got, like, 20 minutes, Mr. Wright. Please  
15 use 10.

16 MR. WRIGHT: Thank you, Madam Chairman and  
17 Commissioners. And I will be shocked if I get to  
18 10. It's 10:07, almost 10:08. We will see. I  
19 don't think I -- I don't think I will use 10.  
20 Thank you very much.

21 Robert Scheffel Wright. You all know me as  
22 Scheff. I am a shareholder in the Gardner law  
23 firm, and I have the privilege of representing the  
24 City of Vero Beach in this and other matters that  
25 have come before you.

1           The Mayor and other council members would have  
2           liked to be here this morning, but they have their  
3           own full agenda at a regularly scheduled City  
4           Council meeting that is going on as we speak.

5           In summary, Commissioners, the City supports  
6           the staff's recommendation and the recommended  
7           declaratory statement as set forth in that  
8           recommendation, which is a correct statement of the  
9           Commission's jurisdiction, including how  
10          constitutional issues are handled in Florida  
11          administrative proceedings, and the Commission's  
12          jurisdiction under 366.04.

13          I believe that one key point of the staff's  
14          analysis is that the circuit's court order on  
15          dismissal did, in fact, adjudicate the issue of the  
16          Court's jurisdiction, and that the Court decided  
17          that there is not a threshold constitutional issue  
18          to be decided at the court. As staff put it, the  
19          Court's determination was a critical and necessary  
20          part of the Court's decision.

21          We believe -- I -- frankly, I have read the  
22          staff's recommendation, like, most of four times  
23          now, and the analysis is correct and thorough. I  
24          am truly impressed, to be very candid.

25          The analysis of the Commission's jurisdiction

1 to rule on the issues raised by the town and the  
2 town's ability to raise its constitutional issue,  
3 or at least talk about it, to provide support for  
4 its constitutional position in the record that  
5 might be developed, or looks like it will be  
6 developed in proceedings here, and then to raise  
7 that issue on appeal is spot on.

8 I did want to mention a couple of things in  
9 response to remarks made by Mr. May and the Mayor.

10 First, the town's suggestion that the City  
11 must have the town's consent to exercise  
12 extraterritorial powers within the town's corporate  
13 limits is not founded on any language that appears  
14 in either Article VIII of the Constitution or  
15 Section 166.021. Consent, unconsented, nothing  
16 like that appears therein.

17 The town's argument that the Legislature must  
18 somehow have specifically given Vero Beach the  
19 authority to exercise power in Indian River Shores  
20 is simply contradicted by the very provisions of  
21 166.021 and Article VIII, Section 2(c), which refer  
22 to general law. General law does not give specific  
23 municipalities the authority to do anything. It  
24 says we may exercise extraterritorial powers  
25 pursuant to general law.

1           Mr. May's suggestion that the 1968 contract  
2           somehow gave consent is not supported by the  
3           language of that contract. We quoted it  
4           extensively -- we quoted the entire provision in  
5           our responsive brief in this proceeding. There is  
6           nothing in there about consent. It's not a  
7           franchise agreement. There is nothing in there  
8           about franchise agreement.

9           The suggestion that we receive unre -- earn  
10          unregulated monopoly profits is simply misplaced.  
11          The idea that municipalities are not regulated is  
12          technically accurate in that our rates, our revenue  
13          requirements, our return are not technically  
14          regulated by the Commission the way that Florida  
15          Power & Light Company's are. However, they are  
16          subject to the regulation by the courts of Florida.  
17          This is established in clear precedent of the  
18          courts of Florida, starting with Storey V Mayo in  
19          1968, that says, if customers have a complaint  
20          about inadequate service or excessive rates, their  
21          remedy is to take their petition to the courts or  
22          to the town council.

23          This is further fleshed out by the Fourth --  
24          Fifth District Court of Appeal in Rosalind Holding  
25          Company, which simply said -- which says very

1 plainly, to prove that a utility -- a municipal  
2 utility's -- back up one step. It says, a  
3 municipal utility like any other has the right to  
4 earn a reasonable return on its investment. And  
5 they cite Hope Natural Gas and City of Logansport.

6 They go on to say that a petitioner -- it was  
7 a real estate management company, Rosalind Holding  
8 Company in the case versus Orlando Utilities  
9 Commission, the party challenging a municipal  
10 utility's rates must show that the rates are  
11 outside a zone of reasonableness, not necessarily  
12 as established by the PSC, but established it by a  
13 more objective, reasonable person standard.

14 In that case, they went on to approve what  
15 was, by the record of the case, a pretty high ROE.  
16 We have looked at our ROEs. We have had them  
17 calculated, and we believe that they are, in fact,  
18 less than the ROE earned by Florida Power & Light  
19 Company. That's a case -- that's a point for  
20 another day, probably not here, but I felt  
21 obligated on behalf of my client to address it  
22 because of what the town said.

23 Finally, I think Mr. May and I agree that the  
24 staff's recommendation has provided the  
25 clarification that the town wants. They laid out

1 in very clear detail what it is that the Commission  
2 can do, and what the town's remedy to proceed with  
3 its constitutional claim on appeal to the Florida  
4 Supreme Court is.

5 In conclusion, we support staff's  
6 recommendation, including the declaratory statement  
7 recommended by the staff, which is, of course, a  
8 very clear and appropriate statement of the  
9 Commission's jurisdiction under Section 366.04.

10 Thank you very much.

11 CHAIRMAN BROWN: Thank you.

12 And, Ms. Cowdery, it sounds like both -- all  
13 parties here, interested persons, support the staff  
14 recommendation. Would you like to follow up with  
15 any comments from what the parties have raised?

16 MS. COWDERY: My only comment may be  
17 self-evident, but the comments that were made that  
18 are going to the merits of the question are not  
19 before the Commission, and I think the parties  
20 realize that, just to avoid any contusion.

21 CHAIRMAN BROWN: Right. Okay. And with that,  
22 Commissioner Edgar has a question.

23 COMMISSIONER EDGAR: No, I do not.

24 CHAIRMAN BROWN: You do not. The light lies.

25 I do have some questions, actually,

1 Commissioner Graham, go ahead.

2 COMMISSIONER GRAHAM: I know we have given  
3 Mr. May more than his fair share of time, but I  
4 just want to hear his response to what Mr. Wright  
5 had said.

6 MR. MAY: Again, thank you, Commissioner  
7 Graham, for giving me the opportunity to briefly  
8 respond. I will respond with the full  
9 understanding of Ms. Cowdery's caution that we are  
10 getting into the merits, but I think we need to be  
11 careful here. And you will hear this again and  
12 again and again, that the Constitution says that if  
13 the City has the authority pursuant to general law,  
14 that's not what the Constitution says. He is  
15 misquoting the Constitution.

16 The Constitution makes it clear that a  
17 municipality has very broad home rule powers,  
18 except in three areas; annexation, merger and the  
19 exercise of extraterritorial powers. The only way  
20 that a municipality can exercise those powers,  
21 annexation, merger or extraterritorial powers, is  
22 as provided by general or special law.

23 The case law makes it clear that as provided  
24 by means there has to be a specific authorization  
25 by the Legislature for the municipality to exercise

1 extraterritorial powers. That's Florida Supreme  
2 Court precedent. There is precedent coming out of  
3 the Florida Attorney General's office. The only --  
4 the only general law out there that addresses this  
5 subject is the general law which the City cites in  
6 its memorandum before you, before the Supreme Court  
7 in the Indian River County matter, and that's  
8 180.02(2). And this is what it says: Any  
9 municipality may extend and execute all of its  
10 corporate powers applicable for the accomplishment  
11 of the purposes of this chapter outside of its  
12 corporate limits as hereinafter provided as may be  
13 desirable or necessary for the promotion of the  
14 public health, safety and welfare, provided,  
15 however, provided, however, and I quote, "the said  
16 corporate powers shall not extend or apply within  
17 the corporate limits of another municipality," end  
18 quote.

19 So I think it's -- as you move forward, you  
20 will hear a lot of this kind of fudging on what the  
21 Constitution says. But I would ask you, as we move  
22 forward on the merits, to pay close attention to  
23 the specific language in the Constitution and in  
24 Section 180.02(2).

25 COMMISSIONER GRAHAM: I guess the beauty of

1 all this is me not being an attorney, so I don't  
2 have to -- I can show my ignorance.

3 You keep on speaking of this as being a  
4 municipality, but the reality is, this is a utility  
5 that we are talking about. Now, aren't we  
6 looking -- aren't we talking about apples and  
7 oranges here? Because you keep talking about what  
8 a municipality can and cannot do, but the question  
9 is what can a utility do? I mean, let's just  
10 picture Vero Beach as being a private utility. How  
11 does that change?

12 MR. MAY: It would change a lot, because the  
13 extraterritorial powers concept only applies to  
14 municipalities. There is no similar constitutional  
15 prohibition for an investor-owned electric utility  
16 or a rural electric cooperative. This is purely an  
17 issue of constitution -- it's a constitutional  
18 issue, Commissioner Graham, that pertains solely to  
19 municipalities.

20 And again, the framers of our Constitution  
21 made it very clear, that while municipalities have  
22 inherent, broad inherent home rule powers, they do  
23 not have inherent home rule powers to exercise  
24 extraterritorial powers within the corporate limits  
25 of another municipality.

1           Now, this munic-- this utility, while it does  
2           provide utility service, it is owned and operated  
3           and managed by the City of Vero Beach. It is a  
4           municipality. It is an arm of the municipality.  
5           And it is -- this is getting into the merits, but  
6           we will show that they are using this arm of the  
7           municipality to extract unregulated monopoly  
8           profits as a surrogate for ad valorem taxes. They  
9           have said -- they have said it publicly, that if  
10          they lost the shores, they would have to increase  
11          their ad valorem taxes to the people in Vero Beach  
12          by \$2 million a year.

13           CHAIRMAN BROWN: Mr. May, can we keep to the  
14          merits of the petition?

15           COMMISSIONER GRAHAM: Good enough.

16           CHAIRMAN BROWN: Thanks. Thank you.

17           Commissioners, any other questions?

18           Okay. I do have a few, just follow-up  
19          questions from some of the comments Mr. May made  
20          about how you plan on proceeding.

21           This has obviously been a protracted, arduous  
22          process. We know it's going to continue. I guess  
23          I have two questions, maybe one for Mr. Wright,  
24          about where City of Vero Beach is with regard to  
25          the negotiations to see, from our perspective, how

1 long the protracted process is going to be, and  
2 then -- but from Mr. May specifically, what your  
3 next steps are to address the actual factual  
4 question that you didn't really address in the  
5 petition, and the merits of the questions raised,  
6 are you going to come back with a territorial  
7 dispute? Are you going to come back with another  
8 petition for a dec statement seeking clarity?  
9 Starting with you first.

10 MR. MAY: We -- I guess I am a little hesitant  
11 to reveal legal strategies at this time, but I  
12 will -- I will tell you --

13 CHAIRMAN BROWN: You did infer that there was  
14 more to the process, though.

15 MR. MAY: Yeah, there -- I did, and that's a  
16 fair question.

17 Here is what we intend do; we will not be  
18 seeking a declaratory statement again. I think we  
19 got the clarity that we need there. We are going  
20 to be filing, probably later today or tomorrow,  
21 depending on whether you -- we are going to be  
22 filing an appropriate pleading to present these  
23 constitutional issues to you.

24 The Florida Supreme Court has repeatedly said  
25 that an interested member of the public can

1 petition the Commission to revisit and modify a  
2 territorial order based on the doctrine of changed  
3 circumstances. We think that there are numerous  
4 changed circumstances, particularly changed legal  
5 consequences that have occurred. And the last time  
6 I checked, Madam Chair, Commissioners, the last  
7 time you looked at this territorial agreement was  
8 about 29 years ago. So we will be filing something  
9 in the very near future.

10 CHAIRMAN BROWN: Okay. So we are going to see  
11 more of this.

12 And, Mr. Wright, since the door is kind of  
13 opened on the negotiations, could you just tell us  
14 where the City of Vero Beach is with negotiations  
15 on with Florida Power & Light to buy the assets?

16 MR. WRIGHT: Certainly, Madam Chairman.

17 We have suggested -- we initially suggested a  
18 number to the town. We have subsequently met with  
19 him them. And following that meeting, we are  
20 looking again, drilling down into the details of  
21 the value that we suggested and are awaiting some  
22 additional information regarding projected  
23 long-term bulk power supply costs that are a  
24 necessary component of that calculation, because  
25 our basic position, and we said this in our

1 response to their petition here. Our basic  
2 position is that we will entertain an offer to buy  
3 out our interests there at a price and compensation  
4 package that includes all necessary protections for  
5 the City, the City's residents and all of our other  
6 customers, including the significant number of  
7 customers in unincorporated Indian River County,  
8 that keeps all of these customers whole.

9 So that's where it stand. I -- frankly, I had  
10 expected to have the follow-up information by  
11 today, but it's in an internal review process  
12 somewhere else.

13 The deal with the bulk power supply cost is a  
14 significant portion of those are fixed costs if we  
15 no lodger were to sell power to the shores,  
16 those -- the fixed costs component would have to be  
17 respread to all our remaining customers. Energy --  
18 a reduction in energy sales is a kWh per kWh wash.  
19 That's not the issue, but there are fixed capacity  
20 and other charges that would have to be respread,  
21 and that's what we are looking at, in addition to  
22 several other components of the fixed cost of our  
23 cost structure that would have to be respread to  
24 all other customers.

25 CHAIRMAN BROWN: Thank you. And I know we

1 don't have purview over your taxpayers' dollars,  
2 Mayor, and the rest of the parties here, but I do  
3 want to emphasize that this is protracted, and it  
4 seems that there are a lot of taxpayer dollars  
5 being spent on this litigation and the crux of it,  
6 and would just caution you, and advise you, just as  
7 from our perspective, that we are obviously putting  
8 our resources, our Commission staff resources as  
9 well to the issues that you are requesting, and  
10 just to be cognizant and sensitive to the taxpayer  
11 dollars.

12 MR. MAY: Madam Chair, we are very cognizant  
13 of that, and we will be filing what we believe to  
14 be a very narrowly drawn petition that hopefully we  
15 can get this answer that we desperately need as soon  
16 as possible.

17 CHAIRMAN BROWN: Thank you.

18 MR. WRIGHT: I would like to assure you that  
19 the City of Vero Beach is very sensitive to the  
20 amount of money we are having to spend defending  
21 ourselves against the actions filed by Indian River  
22 County and the town of Indian River Shores.

23 CHAIRMAN BROWN: Thank you. I hope the  
24 message is conveyed.

25 MAYOR BAREFOOT: The message -- if I can just

1 say one last thing. We are very aware of it. We  
2 are a small town. It's been expensive. But I can  
3 also tell you that if the residents of the shores,  
4 who are now served by the City of Vero Beach, had  
5 Florida Power & Light as its provider, it would be  
6 \$2 million a year less in what we are now -- our  
7 residents are now being charged, that portion of  
8 the town that's served by the City. We are not  
9 going to spend \$2 million, but even if we did, it's  
10 a break even. We really have nothing to lose  
11 without your help.

12 Thank you.

13 CHAIRMAN BROWN: Thank you, Mayor.

14 Commissioner Edgar.

15 COMMISSIONER EDGAR: Thank you, Madam Chair.

16 Just recognizing the discussion that we have  
17 had and, again, acknowledging that there are a  
18 number of issues involved in the larger issues  
19 around all of this, some of which may be in our  
20 purview, and many of which, by law, are -- will be  
21 considered in other forums.

22 But I would also like to join the parties in  
23 commending our staff for the legal analysis on the  
24 much more narrow issue that is before us today. I  
25 look forward to whatever further discussions occur,

1 but for the item today I would move that we approve  
2 the staff recommendation.

3 CHAIRMAN BROWN: Is there a second?

4 COMMISSIONER PATRONIS: Second.

5 CHAIRMAN BROWN: Any further discussion?

6 All those in favor, say aye.

7 (Vote taken.)

8 CHAIRMAN BROWN: All right. The motion  
9 passes.

10 Thank you for joining us today.

11 MR. MAY: Thank you.

12 CHAIRMAN BROWN: Thank you.

13 (Agenda item concluded.)

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE OF REPORTER

STATE OF FLORIDA     )  
COUNTY OF LEON        )

I, DEBRA KRICK, Court Reporter, do hereby  
certify that the foregoing proceeding was heard at the  
time and place herein stated.

IT IS FURTHER CERTIFIED that I  
stenographically reported the said proceedings; that the  
same has been transcribed under my direct supervision;  
and that this transcript constitutes a true  
transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative,  
employee, attorney or counsel of any of the parties, nor  
am I a relative or employee of any of the parties'  
attorney or counsel connected with the action, nor am I  
financially interested in the action.

DATED this 10th day of MARCH     , 2016.




---

DEBRA R. KRICK  
NOTARY PUBLIC  
COMMISSION #EE212307  
EXPIRES JULY 13, 2016