BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Modification of Territorial Order Based on Changed Legal Circumstances Emanating from Article VIII, Section 2(c) of the Florida Constitution, by the Town of Indian River Shores.	)	DOCKET NO. 160049-EU FILED: MARCH 24, 2016

THE CITY OF VERO BEACH'S MOTION TO DISMISS INDIAN RIVER SHORES' PETITION FOR MODIFICATION OF TERRITORIAL ORDER AND ALTERNATIVE COMPLAINT

The City of Vero Beach ("Vero Beach" or the "City"), pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), and subject to its pending petition to intervene in this proceeding filed simultaneously herewith, hereby files this motion to dismiss ("Motion to Dismiss") the "Petition for Modification of Territorial Order Based on Changed Legal Circumstances Emanating from Article VIII, Section 2(c) of the Florida Constitution, by the Town of Indian River Shores" (the "Town's Territorial Petition," "Town's Petition," or simply the "Petition") filed by the Town of Indian River Shores (the "Town" or "Petitioner") with the Florida Public Service Commission ("Commission") on March 4, 2016.

The Florida Public Service Commission should dismiss the Petition for the following reasons.

1. The Town lacks standing, even in its status as an individual customer of Vero Beach's electric system, to bring this petition pursuant to directly applicable decisions of the Commission and the Florida Supreme Court. Moreover, pursuant to applicable Commission precedent, the Town lacks

standing to bring any action on behalf of its citizens. The Town's lack of standing is an incurable defect, and accordingly, dismissal should be with prejudice pursuant to Section 120.569(2)(c), Florida Statutes.

2. The Petition does not comply with Rule 28-106.201, F.A.C., in that it fails to include several significant pleading requirements applicable to petitions, including: (a) the required identification of disputed issues of material fact, (b) the required statement of ultimate facts alleged, (c) the required identification of the statutes, rules, or orders that the Town claims entitle it to relief, and (d) the required explanation of how the cited statutes, rules, or orders entitle the Petitioner to the relief requested. Because it is clear from the face of the Town's Petition that the Town lacks standing, and that Town cannot allege any violation by Vero Beach of a Commission statute, rule, or order, pursuant to Section 120.569(2)(c), Florida Statutes, dismissal should be with prejudice.

3. The Town's attempts to reopen the Commission's Orders approving the territorial agreement between Vero Beach and Florida Power & Light Company ("FPL") are barred by the doctrine of administrative finality. On a related point, the Town's "kitchen sink" listing of potential benefits to the Town from being served by FPL, which the Town attempts to portray as being "in the public interest," are merely pretextual grounds fabricated by the Town in its vain efforts to overcome the Florida Supreme Court's often-cited and often-repeated holding in Storey v. Mayo, that "[a]n individual

has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Lee County Elec. Co-op. v. Marks, 501 So. 2d 585, 587 (Fla. 1987) (quoting Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), cert. denied, 395 U.S. 909.)

Finally, the Commission should dismiss the Town's alternative attempt to characterize its Petition as a "complaint" against Vero Beach, again for several reasons, including the fact that the Town has failed to allege – and has no basis to allege – any violation of a Commission statute, rule, or order, as required by Rule 25-22.036(2), F.A.C.

PRELIMINARY STATEMENT

As used in this Motion to Dismiss, the following terms have the meanings shown below.

"1968 Contract" means the CONTRACT entered into by and between the City of Vero Beach and the Town of Indian River Shores on December 18, 1968. A copy of this 1968 Contract is included in the composite exhibit to the Town's Petition.

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

"County" refers to Indian River County.

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

"FPL" means Florida Power & Light Company.

"Franchise Agreement" means the Resolution 414 of the Town of Indian River Shores, titled A RESOLUTION GRANTING TO THE CITY OF VERO BEACH, FLORIDA, ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC FRANCHISE IN THE INCORPORATED AREAS OF THE TOWN OF INDIAN RIVER SHORES, FLORIDA; IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO;

AND PROVIDING AN EFFECTIVE DATE, which was adopted by the Town on October 30, 1986 and accepted by Vero Beach on November 6, 1986. A copy of the Franchise Agreement is included in the composite exhibit to the Town's Petition.

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

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

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

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

"Territorial Orders" means those orders of the Commission, listed in detail in the section herein titled Orders of the Florida Public Service Commission, approving the territorial agreements between Vero Beach and FPL since 1972.

Other capitalized terms have the meanings provided elsewhere herein.

HISTORICAL AND FACTUAL BACKGROUND[1]

The City of Vero Beach was initially incorporated in 1919 as the City of Vero, and reincorporated as the City of Vero Beach in 1925. Vero Beach has operated a municipal electric utility system since 1920, when it purchased the original small power plant, poles, and lines from the Vero Utilities Company. Naturally, Vero Beach's service area has grown since 1920, and during the intervening 95 years, Vero Beach has served

[1] Consistent with Florida law applicable to motions to dismiss, Vero Beach accepts the Town's alleged facts as true. However, Vero Beach believes that the Town has omitted pertinent facts from its statement, and accordingly, Vero Beach offers the more complete exposition of the relevant history here.

customers inside and outside the city limits, pursuant to its own ordinances, pursuant to requests by customers living outside the city limits, pursuant to its powers under Florida Statutes, and, since at least 1972, pursuant to the Territorial Orders of the Commission approving Vero Beach's service area in territorial agreements with FPL.

Today, Vero Beach provides retail electric service in the service area described in its territorial agreement with FPL, which agreement has been approved, with amendments over time, by the Territorial Orders. Vero Beach's service area, as approved by the Commission, includes the area within the city limits, areas outside the city limits in unincorporated Indian River County, and most of the Town of Indian River Shores. On information and belief, Vero Beach asserts that it has served areas outside the city limits since the 1930s, and probably since as early as the 1920s. The earliest known documentary evidence of Vero Beach providing electric service outside the city limits is found in Chapter No. 599 of Vero Beach's ordinances, enacted on October 21, 1952.[2] The ordinance prescribed a system of contributions in aid of construction ("CIAC") to apply where Vero Beach was requested to extend service outside the city limits, by which Vero Beach would furnish a transformer and all labor, and the applicant would pay a CIAC for the cost of the materials other than the transformer. The ordinance also included provisions by which Vero Beach would annually refund to the customer who paid the CIAC 25 percent of the customer's total electric purchases in the preceding year,

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

until the entire CIAC had been refunded to the customer. This ordinance clearly shows that Vero Beach was serving outside the city limits at least as early as that year.

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

Although the history is unclear as to exactly when the Town itself first became a customer of the Vero Beach electric system, e.g., at the Town Hall, police station, fire station, or other such facilities, a history of the Town published on the Town's website indicates that the Town was a Vero Beach electric customer at least some time before 1972. The history states, "A new $130,000 Town Hall was dedicated December 1972, and by 1975 a $155,000 fire station was completed." Converse, C. Vaughn, and Simms, Henry F. (Ed.), "Our Town," at 2, published on the Town's website at http://www.irshores.com/Town-History.html. Given the reference to the "new" Town Hall being dedicated in 1972, it is reasonable to infer that there was an "old" Town Hall in existence sometime before 1972, and that such earlier Town Hall was receiving electric service from Vero Beach.

In November 1971, FPL and Vero Beach entered into a territorial agreement that defined the areas in the Vero Beach-Indian River County area where each would serve. In January 1972, FPL applied to the Commission to approve that original territorial

agreement between FPL and Vero Beach.[3] FPL's Application was based on Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), cert. denied, 395 U.S. 909 (1969), which held that the Commission had the "implied power" to "approve territorial agreements which are in the public interest," and which recognized that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Id. at 307-08. In its Application, FPL asked the Commission to approve the Territorial Agreement, including the allocation of service areas, because both FPL and Vero Beach sought to avoid "needless and wasteful expenditures of time and money" and "dangerous, unnecessary and uneconomical conditions" that were "not in the public interest." FPL Application at 3.

By 1972, Vero Beach had been providing electric service outside the city limits, in unincorporated areas of Indian River County, for at least 20 years, and probably for close to 50 years. In fact, FPL's Application stated that "The City served approximately 10,600 customers in 1971, more than 50% of whom were located outside the boundaries of the City." FPL's Application at 2. The Commission held a public hearing in Vero Beach on the proposed 1972 territorial agreement, at which two customers objected to being transferred from being served by FPL to the City, and two customers did not object to being transferred from the City to FPL. There is no evidence in the record of that

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

docket that either the Town per se, or any representative or officer of the Town, participated in those proceedings. Notably in light of current events, including the pending judicial proceedings in Indian River Shores v. Vero Beach, the Commission's Order also stated the following: "No residents of Indian River Shores appeared although that is the largest area under development in which competition exists; the proposed boundary reserves this area to the city." Order No. 5520 at 2.[4]

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

FPL petitioned the Commission to approve a slight modification to the territorial agreement in 1973. The 1973 amendment changed the utilities' service areas slightly, with no customers and no facilities being affected. The Commission accordingly approved the requested amendment. In re: Application of Florida Power & Light Company for Approval of a Modification of Territorial Agreement and Contract for

[4] In its Petition for Declaratory Statement in Docket No. 160013-EU, the Town refers to a letter sent by the Town's Mayor, Roland B. Miller, to the Chairman of the Commission, Jess Yarborough. The Town did not include a copy of that letter with its earlier Petition, but a copy was obtained by Vero Beach's attorneys through a public records request, and is attached to this Motion to Dismiss as Exhibit C. The letter speaks for itself, but the Commission will readily note that the letter makes no reference to the Town having "consented" to allow Vero Beach to provide service in the Town, nor to any permission or consent to Vero Beach's use of the Town's rights-of-way; indeed, the letter does not mention rights-of-way at all. The letter also made clear, on both pages 1 and 2 thereof, that the Town considered that the territorial agreement was "none of our concern."

Interchange Service with the City of Vero Beach, Florida, Docket No. 73605-EU, Order No. 6010 at 1 (January 18, 1974).

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

In 1980, FPL and Vero Beach again applied for approval of an amended territorial agreement. In re: Application of Florida Power & Light Company and the City of Vero Beach for Approval of an Agreement Relating to Service Areas, Docket No. 800596-EU, Order No. 11580 (February 2, 1983). In that docket, the Commission initially issued a proposed order to approve the parties' territorial agreement in November 1981. The proposed order offered affected persons the opportunity to request a hearing, and a "timely petition was filed on behalf of 106 customers served by Vero Beach who apparently did not want to be transferred to FPL." Id. at 1. There is no record evidence of the Town having participated in the proceedings in Docket No. 800596-EU.

The Commission duly held a hearing on May 5, 1982 in Vero Beach. During the course of the hearing, most of the customers were satisfied with the Commission's process and with the agreement as originally proposed by FPL and Vero Beach, and as

the Commission had proposed to approve it. Id. Following the hearing, the Commission approved the new territorial agreement between FPL and Vero Beach by its Order No. 11580. In that Order, having discussed the objections of a group of customers to being transferred as provided by the new territorial agreement, the Commission concluded by stating the following:

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

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

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

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

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

In 1986, following on the already considerable history of Vero Beach serving outside its corporate boundaries for several decades and inside the Town for more than 30 years, Vero Beach and the Town of Indian River Shores entered into the Franchise Agreement. In 1987, Vero Beach and Indian River County also entered into a 30-year

franchise agreement. Neither Indian River Shores nor the County had ever had a franchise agreement with Vero Beach before 1986 or 1987, respectively.

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

> 6. The City also agrees to furnish electric power to any applicant therefor within the corporate limits of the Town, from a distribution line furnished by the City and will bill each customer therefor at the rate fixed and charged from time to time for such current to persons within the corporate limits of the City, plus 10% additional thereto, and each consumer will be billed direct by the City for such service and will be subject to all rules and regulations of the City with regard to the disconnection of such service upon non-payment of bills so furnished.

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

electric service to customers in the Town as requested. In so doing, Vero Beach naturally and reasonably used areas adjacent to the existing roads in the Town.

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

In 1987, FPL and Vero Beach again petitioned the Commission for approval of an amendment to their territorial agreement, by which FPL and Vero Beach agreed that the City would serve a new subdivision, Grand Harbor, which straddled the existing territorial dividing line and which, at the time, had no customers. In approving the amendment, the Commission stated the following:

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

In re: Petition of Florida Power & Light Company and the City of Vero Beach for Approval of Amendment of a Territorial Agreement, Docket No. 871090-EU, Order No. 18834 (February 9, 1988).

While Vero Beach believes that the information presented in ¶47j of the Town's Petition, relating to an offer by FPL to purchase the facilities and customer accounts of Vero Beach's electric system in the Town, is irrelevant to the Town's purported "constitutional" issue as well as irrelevant to the substantive and jurisdictional issues that the Town raises in its Petition, Vero Beach provides the following additional facts relative to those communications. After receiving the letter from FPL (a copy of which is included in the exhibits to the Town's Petition), Vero Beach representatives met with FPL representatives to discuss their respective views of the terms of a possible transaction of the scope contemplated by FPL's letter. FPL stated its position relative to certain values, and Vero Beach's representatives respectfully explained that it was and is Vero Beach's position that any such transaction would have to keep ***all*** of Vero Beach's remaining customers (i.e., those inside the city limits and those in the unincorporated areas of Indian River County where Vero Beach serves) whole, as compared to the base case scenario in which Vero Beach would continue to serve customers inside the Town pursuant to the Commission's Territorial Orders. Because the proposed transfer of customers in the Town would not be accompanied by corresponding reductions in several components of the fixed costs of Vero Beach's electric system, Vero Beach viewed, and continues to view, any such transaction using the conceptual framework of the

"Ratepayer Impact Measure" test, i.e., that the compensation received for the transaction would have to be sufficient to keep ***all*** of Vero Beach's remaining customers whole.

Today, pursuant to the Commission's Territorial Orders issued as provided by Chapter 366, Florida Statutes, pursuant to its home rule powers, pursuant to its powers under Chapter 166 and Chapter 180, Florida Statutes, and pursuant to other legal authority, Vero Beach operates an electric utility system consisting of transmission lines and related facilities, and distribution lines and facilities (collectively the "City Electric System"), which serves approximately 34,800 customer accounts (meters), of which approximately 13,200 accounts (meters) are located within the city limits and approximately 21,600 accounts (meters) are located outside the city limits. Approximately 3,000 of the outside-the-city-limits customer accounts (meters) are located in the Town of Indian River Shores, with the balance located in unincorporated Indian River County.

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

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

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

In reliance on the Commission's Territorial Orders issued as provided by Chapter 366, Florida Statutes, in reliance on Chapter 366, and in exercising its home rule powers, as well as in reliance on its powers under Section 180.02(2), Florida Statutes, and other legal authority, including reliance on the fact that both Indian River Shores and Indian River County knew of and allowed Vero Beach to use public rights-of-way for decades before any franchise agreements ever existed, Vero Beach has for nearly 100 years provided safe and reliable service to its customers both inside and outside the city limits. With respect to its service to the Town and to Vero Beach's electric customers in the Town, Vero Beach has, for the past sixty-two years, installed, operated, and maintained its electric system facilities in good faith for the purpose of providing electric service to the Town and to Vero Beach's electric customers in the Town. In fulfilling this necessary public purpose,[5] Vero Beach has invested tens of millions of dollars, borrowed

[5] Underscoring the necessary public purpose aspect of Vero Beach's electric operations, the Commission should consider this quote from the letter sent by the Town's Mayor

tens of millions of dollars, and entered into long-term power supply projects and related contracts, involving hundreds of millions of dollars of long-term financial commitments, in order to serve all of the customers in Vero Beach's service area approved by the Commission's Territorial Orders.

LEGAL BACKGROUND–STATUTES, CONSTITUTION, AND PSC ORDERS

Constitutional Provisions

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

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

Florida Statutes

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

> 166.021 Powers.—
> (1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.
> (2) "Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.

Roland Miller to PSC Chairman Yarborough in 1971, "[T]he writer entered into negotiations with the City of Vero Beach back in 1958 to furnish the Town of Indian River Shores utilities, i.e. water, power and sewer, inasmuch as ***it was a physical impossibility to develop this area without these items***." (Emphasis added.)

> (3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:
> (a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution; . . .

The Commission's statutes applicable to the issues presented by the Town's Petition include Sections 366.02, 366.04(1), 366.04(2)(d)&(e), and 366.04(5), Florida Statutes. Section 366.02, Florida Statutes, includes municipal electric utilities, such as the Vero Beach electric system, within the Commission's jurisdiction under Chapter 366. Section 366.04, Florida Statutes, sets forth the Legislature's grant of jurisdiction to the Commission, and Section 366.04(1) articulates the Legislature's clear mandate that the Commission's jurisdiction is exclusive and superior to that of all other state agencies, political subdivisions, and other entities, specifically including counties, providing in pertinent part as follows:

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

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

> (2) In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:
>
> * * *

(d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. However, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements.

(e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

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

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

Orders of the Florida Public Service Commission

The Commission's Territorial Orders include the following:

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

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

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

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

In re: Petition of Florida Power & Light Company and the City of Vero Beach for Approval of Amendment of a Territorial Agreement, Docket No. 871090-EU, Order No. 18834 (February 9, 1988).

Other relevant Commission Orders include the following:

In re: Petition for declaratory statement regarding the effect of the Commission's orders approving territorial agreements in Indian River County by the City of Vero Beach, Docket No. 140244-EM, Order No. PSC-15-0102-DS-EM, "Declaratory Statement," (Fla. Pub. Serv. Comm'n, February 12, 2015) ("City Order");

In re: Petition for declaratory statement or other relief regarding the expiration of the Vero Beach electric service Franchise Agreement by Indian River County, Docket No. 140142-EM, Order No. PSC-15-0101-DS-EM, "Order Denying Petition for Declaratory Statement," (Fla. Pub. Serv. Comm'n, February 12, 2015) ("County Order"); and

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

LEGAL BACKGROUND - PROCEDURAL

As the Commission is well aware, the legal proceedings initiated by the Town and by Indian River County relating to Vero Beach's right and obligation to serve pursuant to the Commission's Territorial Orders have now been going on for more than 20 months. The following briefly summarizes the history of these proceedings.

A. Proceedings Initiated by the Town of Indian River Shores

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

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

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

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

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

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

The Amended Complaint presented four somewhat different counts:

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

Count II – For Anticipatory Breach of Contract;

Count III – For Breach of Contract; and

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

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

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

On November 11, 2015, the Circuit Court issued its Order on Dismissal. In summary, the Court dismissed the Town's Count I, relating to Vero Beach's right and obligation to continue serving in the Town when the Franchise Agreement expires, with prejudice. The Court also dismissed Count II with prejudice, finding that "After expiration of the Franchise Agreement, there will be no Franchise Agreement to be breached by the City" and that "the Town has not pled facts supporting any existing breach of the City's contractual obligations under the Franchise Agreement." Order on Dismissal at 6. Although Count II as filed asked the Court for "damages in the amount which the Town has been harmed by the City's refusal to acknowledge the Town's rights upon expiration of the Franchise Agreement," the Town attempted to explain at the August 26 hearing that its real issue was its desire to be able to force Vero Beach to remove its facilities from the Town's easements and rights-of-way after the Franchise Agreement expires. Accordingly, the Court stated that "Dismissal . . . of Counts I and II

are without prejudice to the Town's right to file an amended complaint or separate complaint alleging other grounds for the removal or relocation of the City's electric facilities from the Town's rights-of-way and other public places after expiration of the Franchise Agreement." Order on Dismissal at 7. Counts III and IV related to Vero Beach's electric rates: the Court denied Vero Beach's motion to dismiss Count III and dismissed Count IV with prejudice, finding that the issue of rates was properly addressed under Count III.

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

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

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

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

In January 2016, the Town filed a Petition for Declaratory Statement with the Commission asking that the Commission declare "whether [the PSC] has jurisdiction to interpret Article VIII, Section 2 (c) of the Florida Constitution and Section 166.021, Florida Statutes, for purposes of adjudicating and resolving whether the Town has a constitutional right to be protected from unconsented exercises of extra-territorial powers by Vero Beach within the Town's corporate limits." In re: Petition for Declaratory Statement by the Town of Indian River Shores Regarding the Commission's Jurisdiction to Adjudicate the Town's Constitutional Rights, Docket No. 160013-EU, Order No. PSC-16-0093-FOF-EU at 6 (hereinafter the "Town's Petition for Declaratory Statement" and "Order No. 16-0093"). The Commission declined to issue the statement requested by the Town, instead issuing the following declaration:

> ORDERED by the Florida Public Service Commission, for the reasons stated in the body of this Order, that we have 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.

Id. at 16.

The instant Petition followed.

B. Proceedings Initiated by Indian River County

On July 21, 2014, the County filed its "Petition for Declaratory Statement and Such Other Relief as May Be Required" (the "County's Petition"), initiating Docket No. 140142-EM. The County's Petition set forth fourteen questions and fourteen corresponding requested declarations. These are not repeated here. On July 29, 2014, Vero Beach moved to intervene, and its motion was granted by Order No. PSC-14-0409-PCO-EM. On August 14, 2014, Vero Beach filed its Motion to Dismiss and Response in Opposition to Indian River County's Petition for Declaratory Statement. The Florida Municipal Electric Association, Inc. ("FMEA"), Tampa Electric Company ("TECO"), Duke Energy Florida ("Duke"), and the Florida Electric Cooperatives Association ("FECA") all appeared as amicus curiae, and the Orlando Utilities Commission intervened in support of Vero Beach's positions and in opposition to the declaratory statements requested by Indian River County. FPL also intervened and stated that "it is FPL's position that the Petitioner's requested declaratory statements should be dismissed or denied to the extent the declarations it seeks run counter to the Florida Public Service Commission's exclusive and superior jurisdiction over territorial matters and the

planning, development, and maintenance of a coordinated power supply grid throughout Florida." FPL's Response to Petition at ¶ 3 (August 22, 2014). The County filed a response on August 29, 2014.

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

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

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

b. The City can lawfully, and is obligated to, continue to provide retail electric service in the City's designated electric service territory, including those portions of its service territory within unincorporated

> Indian River County, pursuant to applicable provisions of Florida Statutes and the Commission's Territorial Orders, without regard to the existence or non-existence of a franchise agreement with Indian River County and without regard to any action that the County might take in an effort to prevent the City from continuing to serve in those areas.

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

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

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

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

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

MOTION TO DISMISS

For the reasons set forth herein, the City of Vero Beach respectfully moves the Commission to enter its order dismissing the Town's Petition with prejudice.

Standard of Review

A motion to dismiss raises, as a question of law, whether the facts alleged in a petition state a cause of action. The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In considering a motion to dismiss, the Commission is confined to an examination of the pleading and any attached documents. See Posigian v. American Reliance Ins. Co., 549 So. 2d 751, 754 (Fla. 3d DCA 1989).

SUMMARY OF ARGUMENT

There is no doubt that the Town's sole purpose in filing its Petition is to obtain lower electric rates by either choosing its electric supplier or by evicting Vero Beach from its position as the supplier of retail electric service in its Commission-approved service areas within Indian River Shores pursuant to the Territorial Orders.[6] Following

[6] The Town's efforts have now spanned three complaints filed in the Circuit Court and two pleadings before this Commission, all driven by the Town's desire for lower rates. The latest evidence of this is a "guest commentary" article by the Town's Mayor Brian M. Barefoot, published in Treasure Coast Newspapers on March 19, 2016, in which the Mayor described the Town's Petition as the Town's latest step to ending what he characterizes as "the rate crisis that we have faced for so many years." A copy of the Mayor's article is attached as Exhibit B to this Motion to Dismiss.

the Florida Supreme Court's long-standing and often-applied holding in Storey v. Mayo that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself," the Town lacks standing, even as an individual customer,[7] to bring any action to reopen the Commission's long-since-approved Territorial Orders. Storey v. Mayo, 217 So. 2d at 307-08; Lee County Elec. Cooperative v. Marks, 501 So. 2d 585, 587 (Fla. 1987); In Re: Joint Petition by Tampa Electric Company, Duke Energy Florida, and Mosaic Fertilizer, LLC, for Approval of Intermittent Electric Standby Power Agreement, Docket No. 150177-EI, Order No. PSC-15-0414-PAA-EI at 3 (Fla. Pub. Serv. Comm'n, October 1, 2015); In Re: Joint Petition for Approval of Territorial Agreement in Leon and Wakulla Counties by Talquin Electric Cooperative, Inc. and Progress Energy Florida, Inc., Docket No. 040231-EU, Order No. PSC-04-1106-PAA-EU at 1 (Fla. Pub. Serv. Comm'n, November 8, 2004); see also In Re: Petition to Resolve a Territorial Dispute with Florida Power & Light Company in St. Johns County, by Jacksonville Electric Authority, Docket No. 950307-EU, Order No. PSC-96-0755-FOF-EU at 3 ("The Commission has consistently adhered to the principle set forth in Storey v. Mayo, 217 So. 2d 304, 307-08 (Fla. 1968),

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[7] Although the Town purports to assert the interests of its citizens, it has no power or legal basis to do so. See In Re: Application for a Limited Proceeding to Include Groundwater Development and Protection Costs in Rates in Martin County by Hobe Sound Water Company, Docket No. 960192-WU, Order No. 96-0768-PCO-WU (Fla. Pub. Serv. Comm'n, June 14, 1996) ("[I]ntervention is not granted to the Town [of Jupiter Island] in a representational capacity on behalf of its residents and taxpayers. There is no authority cited in the motion to support such standing to intervene, and there is nothing in Chapter 120, Florida Statutes, to authorize a Town to intervene in administrative proceedings on behalf of it taxpayers.")

and reaffirmed in Lee County Electric Cooperative v. Marks, 501 So. 2d 585 (Fla. 1987), that no person has a right to compel service from a particular utility simply because he believes it to be to his advantage." (This was the Commission order appealed to the Florida Supreme Court that resulted in the Court's Ameristeel opinion.))

The Town can show no injury in fact, and it has not even alleged any injury in fact that would be cognizable under the Commission's applicable statutes and rules. The Town's alleged injury to its purported constitutional right to be protected from Vero Beach serving in the Town without the Town's "consent" is at best speculative: Nothing in the Commission's relevant statutes has anything to do with "consent," and "consent" is not mentioned in any of the constitutional or statutory provisions cited by the Town. Further still, "consent" is not mentioned in any of the territorial agreements between Vero Beach and FPL, and "consent" is not mentioned in any of the Territorial Orders as being relevant to the Commission's approval of those agreements. Finally, the Town never raised any issue of consent or any allegation of unconstitutionality when, over the past 63 years, it suited the Town's interests to request and obtain electric service to support the Town's development and economy.

Moreover, the Town's ***real*** claimed "injury" – higher electric rates – is not within the zone of interests to be protected by the Commission's territorial and Grid Bill statutes. The Town's alleged ground for reopening the Territorial Orders – changed legal circumstances based on the expiration of the current franchise agreement between the Town and Vero Beach, see Town's Petition at 1, 2, and 13 – is not within the scope of the Commission's statutes. Moreover, the Town's alleged "changed circumstance" – that

Vero Beach can no longer legally serve in the Town because it will lack the Town's "consent" after expiration of the Franchise Agreement – is likewise outside the zone of interests to be protected by territorial proceedings and Territorial Orders issued by the Commission pursuant to Sections 366.04(2) and 366.04(5), Florida Statutes. Accordingly, the Commission should dismiss the Town's Petition.

The Town's "consent" theory is spurious and irrelevant. Neither Article VIII of the Florida Constitution, nor Section 166.021, Florida Statutes, nor Section 180.02, Florida Statutes, says anything about "consent" being either necessary or sufficient to overcome those laws' provisions regarding the exercise of municipal powers. The obvious fact is that Vero Beach has, in good faith and at the invitation of the Town and its citizens who have been and are Vero Beach's electric customers, expended tens of millions of dollars and incurred tens of millions of dollars of obligations over the past 63 years to serve Indian River Shores, when it suited Indian River Shores and its citizens for Vero Beach to do so, and now, following changes in rate relationships driven by changes in U.S. and world energy prices, the Town wants to simply bolt the check and tell Vero Beach – and all of Vero Beach's customers outside Indian River Shores – "we changed our minds." If the Town ever had a "constitutional right" to be protected against Vero Beach's exercise of its powers in providing electric service in the Town, the Town waived such right long, long ago. The Town never raised the issue of "consent" or whether Vero Beach had the constitutional authority to provide service in the Town, not in 1953, not in 1968, not in any of the Commission proceedings that led to the Territorial Orders, not in 1986, and not in any other year preceding 2014.

The Commission should also dismiss the Town's Petition because it fails to comply with the requirements of Rule 28-106.201, F.A.C., in several material respects, including that it fails to include or address several significant pleading elements applicable to petitions, including: (a) the required identification of disputed issues of material fact, (b) the required statement of ultimate facts alleged, (c) the required identification of the statutes, rules, or orders that the Town claims entitle it to relief, and (d) the required explanation of how the cited statutes, rules, or orders entitle the Petitioner to the relief requested. Because it appears from the face of the Town's Petition that the Town cannot establish standing, dismissal should be with prejudice pursuant to Section 120.569(2)(c), Florida Statutes.

Still further, the Commission should dismiss the Town's Petition based on the doctrine of administrative finality. The Commission's Territorial Orders were issued over a period of 16 years, from 1972 to 1988, in PSC proceedings in which neither the Town nor any representative of the Town nor any residents of the Town elected to appear, and Vero Beach has relied on those Orders in good faith for the past 44 years. The Commission's Territorial Orders have thus long since passed beyond the Commission's power to reopen them. Again, the Town's purported "changed circumstance" has nothing whatsoever to do with the Commission's statutory jurisdiction regarding territorial matters and its related Grid Bill jurisdiction, specifically Sections 366.04(2)(d)-(e) and 366.04(5), Florida Statutes, nor does it have anything to do with the circumstances upon which the Commission based its decisions to approve the territorial agreements between FPL and Vero Beach and to issue the Territorial Orders. Therefore,

this alleged changed circumstance affords no basis for reopening or modifying the Territorial Orders.

The Town's "kitchen sink" of purported "public interest benefits" (Petition ¶¶47a-j) are merely pretextual claims (many of which Vero Beach disputes) fabricated by the Town in its efforts to overcome the Commission's and the Florida Supreme Court's long-standing and consistently followed doctrine, first announced in Storey v. Mayo, and followed extensively over the past half-century, that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Id. at 307-08. Indeed, all of the items in its "laundry list," which specifically includes rates (Petition at ¶47g), are solely for the advantage of the Town. Moreover, the public interest criteria at issue in territorial matters are those set forth in Sections 366.04(2)(d)-(e) and 366.04(5), Florida Statutes, not the interests that the Town asserts here for itself, and which it improperly attempts to assert for its citizens.[8] Therefore, applying the Florida Supreme Court's holding in Storey v. Mayo, the Town's Petition should be dismissed.

The Town's alternative attempt to assert a "complaint" should be dismissed for the above reasons, including lack of standing, and also because the Town has utterly failed to

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[8] See In Re: Application for a Limited Proceeding to Include Groundwater Development and Protection Costs in Rates in Martin County by Hobe Sound Water Company ("[I]ntervention is not granted to the Town [of Jupiter Island] in a representational capacity on behalf of its residents and taxpayers. There is no authority cited in the motion to support such standing to intervene, and there is nothing in Chapter 120, Florida Statutes, to authorize a Town to intervene in administrative proceedings on behalf of it taxpayers.")

allege any violation of a Commission statute, rule, or order, which by Rule 25-22.036(2), F.A.C., must form the basis for a complaint.

I. The Town Lacks Standing to Bring Its Petition.

Only persons whose substantial interests may or will be affected by action of the Commission may file a petition for an administrative hearing. Ameristeel Corp. v. Clark, 691 So. 2d 473, 477 (Fla. 1997) (citing Fla. Stat. § 120.57). To establish standing to initiate an administrative proceeding, a petitioner must demonstrate: (1) that the petitioner will suffer an injury in fact that is of sufficient immediacy to entitle the petitioner to a section 120.57 hearing, and (2) that the petitioner's substantial injury is of a type or nature against which the proceeding is designed to protect. Agrico Chemical Co. v. Dep't of Envt'l Reg'n, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). The first prong of the test for standing deals with the degree of injury, and the second deals with the nature of the injury. Id.

The Town lacks standing because its Petition does not meet either the "injury in fact" test or the "zone of interest" test under Agrico, as applied and followed by the Commission and the Florida Supreme Court in Ameristeel and many other cases.[9] The Town's claimed injury to its purported "constitutional right" to be protected from Vero Beach's providing service in the Town without the Town's consent is not an injury at all – it is only an injury in the Town's eyes because Vero Beach's rates are higher than FPL's. Assuming that the Commission's Territorial Orders remain in effect, the Town

[9] It is notable that the Town's Petition does not once cite either Agrico or Ameristeel.

will simply continue to be served by Vero Beach. The Town's ***real*** claimed "injury" – higher electric rates – is speculative; electric rates change. The Town's asserted "changed circumstance" – expiration of a franchise agreement, which the Town claims nullifies Vero Beach's legal power to provide service in the Town – likewise does not create any injury in fact: the Town has received electric service from Vero Beach for more than 60 years, without the Town's consent for at least part of that time, even in the Town's view (and without the Town's consent for the entire time in Vero Beach's view). As the Commission found and the Court affirmed with respect to Ameristeel Corporation, a customer of one of the utilities in the Ameristeel proceedings, continuing to receive electric service from the same supplier does not constitute an injury in fact. Ameristeel, 691 So. 2d at 477-78.

Rates are not within the zone of interests protected by the Territorial Orders or by the Commission's statutes applicable to territorial matters or its related Grid Bill statutes that are designed to protect the reliability of the grid and protect against the uneconomic duplication of facilities. Neither is "consent" or lack of consent or expiration of a franchise agreement or the alleged exercise of extra-territorial powers by Vero Beach within the scope of either Section 366.04(2) or Section 366.04(5), Florida Statutes.

Moreover, the Town has not asserted any changes in circumstances that are cognizable under the Commission's territorial statutes, Sections 366.04(2)(d)-(e), Florida Statutes, nor any change in circumstances relevant to the Commission's integrally related Grid Bill mandates under Section 366.04(5), Florida Statutes, that would provide grounds to revisit or amend the Territorial Orders.

A. The Town's Petition Fails the Injury in Fact Prong of Agrico.

The first prong of the Agrico standing test is that the petitioner (or would-be complainant or intervenor in a Commission proceeding) must show that the petitioner would suffer an injury in fact of sufficient immediacy to entitle it to a hearing. Ameristeel, 691 So. 2d at 477-78, Agrico, 406 So. 2d at 477. The Town's repeatedly asserted interest in lower electric rates (see, e.g., Petition at ¶¶ 21, 22, 23, 47g) – its ***real*** issue in these ongoing proceedings – does not constitute an injury in fact of sufficient immediacy to establish grounds for standing. Ameristeel, 691 So. 2d at 477; International Jai-Alai Players Ass'n v. Florida Pari-Mutuel Comm'n, 561 So. 2d 1224, 1225-26 (Fla. 3rd DCA 1990); Florida Soc'y of Ophthalmology v. State Board of Optometry, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988). Like Ameristeel Corporation in the Ameristeel proceedings, the Town has been a customer of Vero Beach for most, perhaps all, of the past 63 years, and continuing to receive electric service from the same supplier does not constitute an injury in fact. Ameristeel, 691 So. 2d at 477-78.

Similarly, the Town's claimed violation of its constitutional rights fails the injury in fact prong of Agrico because it is speculative and affords no ground for Commission action to modify long-standing Territorial Orders. The Town never asserted any such rights before 2014 or 2015, when the potential sale of Vero Beach's electric system to FPL encountered an apparently insurmountable roadblock in the form of a failure of a condition precedent to that transaction that neither FPL nor Vero Beach has been able to cure. Would the Town assert this "constitutional" violation or infringement on its rights if Vero Beach's rates were lower than FPL's? Hardly.

Further, the Town has not even alleged any injury in fact – speculative or otherwise – relative to any of the statutory criteria upon which the Territorial Orders were based. Sections 366.04(2)(d), Florida Statutes, contains no criteria. Section 366.04(2)(e), Florida Statutes addresses the criteria applicable in resolving territorial disputes[10] as follows:

> In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

The Town has alleged no injury in fact relative to any of these criteria, and does not even discuss them in its Petition.

The criteria that the Commission is to consider pursuant to Rule 25-6.0440, F.A.C., for approving territorial agreements, relate to the reasonableness of the purchase price of any facilities being transferred, potential impacts on reliability, and the elimination of the potential uneconomic duplication of facilities. The criteria that the Commission considers pursuant to Rule 25-6.0441, F.A.C., in resolving territorial disputes, include the competing utilities' ability to provide service, the nature of the disputed area, degree of urbanization, the cost for each of the competing utilities "to provide distribution and subtransmission facilities to the disputed area presently and in the future," and "customer preference if all other factors are substantially equal." The

[10] Of course, there is no territorial dispute between or among any utilities at issue in this proceeding.

Town's Petition alleges no injury in fact relative to these Rules; in fact, the Town's Petition does not even cite them.

Of course, there is no territorial dispute here, and there are no issues relative to the Rules' criteria except perhaps customer preference. The Town has not alleged any injury in fact relative to these criteria, nor any changed circumstances relative to the criteria, except perhaps that, as regarding the "customer preference" criterion referenced in Rule 25-6.0441(2)(d), F.A.C., the Town has changed its mind because as things have evolved, FPL's rates are less than Vero Beach's rates. And again, as the Commission and the Florida Supreme Court have recognized on many occasions, customer preference – particularly for lower rates, but for other factors as well – is not cognizable as a matter of law. Storey v. Mayo, 217 So. 2d at 307-08; Lee County Elec. Coop. v. Marks, 501 So. 2d 585, 587 (Fla. 1987); In Re: Joint Petition by Tampa Electric Company, Duke Energy Florida, and Mosaic Fertilizer, LLC, for Approval of Intermittent Electric Standby Power Agreement, Docket No. 150177-EI, Order No. PSC-15-0414-PAA-EI at 3 (Fla. Pub. Serv. Comm'n, October 1, 2015); In Re: Joint Petition for Approval of Territorial Agreement in Leon and Wakulla Counties by Talquin Electric Cooperative, Inc. and Progress Energy Florida, Inc., Docket No. 040231-EU, Order No. PSC-04-1106-PAA-EU at 1 (Fla. Pub. Serv. Comm'n, November 8, 2004); see also In Re: Petition to Resolve a Territorial Dispute with Florida Power & Light Company in St. Johns County, by Jacksonville Electric Authority, Docket No. 950307-EU, Order No. PSC-96-0755-FOF-EU at 3.

Similarly, Section 366.04(5), Florida Statutes, imposes upon the Commission the "statutory mandate to avoid 'further uneconomic duplication of generation, transmission, and distribution facilities." Ameristeel, 691 So. 2d at 478 (citing Gainesville-Alachua County Reg'l Elec., Water & Sewer Utils. Bd. v. Clay Elec. Coop., Inc., 340 So. 2d 1159, 1162 (Fla. 1976)); Lee County Elec. Coop. v. Marks, 501 So. 2d 585, 587 (Fla. 1987) (recognizing "the PSC's duty to police 'the planning, development, and maintenance of a coordinated electric power grid through Florida to assure . . . the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities"). The Town has alleged no injury in fact relative to Section 366.04(5), Florida Statutes, either.

The Town's efforts here can be summed up as follows. After requesting and obtaining electric service from Vero Beach to support, facilitate, enjoy, and benefit from the Town's development, after inviting Vero Beach into its corporate limits since 1953, after never appearing in any of the Commission's proceedings to review and approve the territorial agreements between Vero Beach and FPL and to issue the Territorial Orders, after sitting silently by while Vero Beach expended tens of millions of dollars and incurred tens of millions of dollars of long-term obligations to anticipate, plan for, and make all commitments necessary to provide reliable service to all of Vero Beach's customers, including the Town and customers in the Town, the Town of Indian River Shores now wants to tell Vero Beach and all of Vero Beach's electric customers, the following: "Never mind. We don't care about you, or about the fixed costs that Vero Beach incurred to serve the Town and its citizens. We're going to do everything in our power to bolt the checks that we asked Vero Beach to write and we don't care what

happens to you or your other customers who will have to pay for everything after we're gone."

B. The Town's Petition Fails the Zone of Interest Prong of Agrico.

In addition to asserting an injury in fact of sufficient immediacy to warrant a hearing pursuant to Section 120.57(1), Florida Statutes, to establish standing, which the Town failed to do, a would-be petitioner must also identify an injury that is within the zone of interests to be protected by the statutes involved in the proceeding. Agrico, 406 So. 2d at 477, Ameristeel, 691 So. 2d at 478. In this instance, the Town's alleged injuries are clearly outside the zone of interests to be protected by the Commission's territorial and related Grid Bill statutes, namely Sections 366.04(2)(d)-(e) and 366.04(5), Florida Statutes, and the Commission's rules applicable to territorial disputes or agreements; the Town barely even mentioned the statutory sections in its Petition, and failed entirely to cite the relevant Commission rules. Not only are the Town's alleged injuries outside the zone of interests protected by the Commission's territorial statutes and the Territorial Orders, the Town has also failed to allege any injury to any of the interests protected by the Commission's applicable statutes.

Since the Town has failed to cite any injury within the zone of interests protected by the Commission's territorial statutes and rules, it is equally clear that the Town has not identified any changed circumstance that is cognizable under the statutes. The Town's "consent" theory is spurious and irrelevant: there is nothing in any of the Commission's statutes or rules relating to consent, and nothing regarding consent in either the territorial agreements between FPL and Vero Beach or in the Territorial Orders; accordingly, any

change in circumstances relating to the Town's consent affords no basis to reopen the Territorial Orders.

The Town has not alleged any injury with respect to any of the criteria cognizable under 366.04(2)(d)-(e) or 366.04(5), Florida Statutes. The Town has not alleged any injury in fact relating to Vero Beach's ability to serve, or to the adequacy and reliability of Vero Beach's service, or to the avoidance of uneconomic duplication of facilities. Similarly, the Town has not alleged any injury in fact relative to the criteria set forth in Commission Rule 25-6.0441, F.A.C.

Accordingly, the Town's Petition also fails the zone of interest prong of the Agrico standing test, and thus the Commission should dismiss the Town's Petition.

C. The Town Has Not Alleged Any Changed Circumstances That Would Provide Statutorily Cognizable Grounds to Modify the Territorial Orders.

Any injury in fact that would give rise to modifying any Commission territorial order would necessarily have to be an injury cognizable under applicable Commission statutes. The Town has not only failed to allege any such injury, it has ***also*** failed to allege any ***changed circumstances*** that are cognizable under either the Commission's statutes or rules, or any changed circumstances relevant to the Commission's consideration and approval of the Vero Beach-FPL territorial agreements through the Commission's Territorial Orders.

Again, the Commission's statutes and rules applicable to territorial agreements and territorial disputes address the ability of competing utilities to provide reliable service, their costs to provide service, and the avoidance of the uneconomic duplication

of distribution and subtransmission facilities. The Town has not alleged any changes in the circumstances relating to any of these criteria or factors, and accordingly, the Commission should dismiss the Petition.

Of course, it is obvious from the Town's many pleadings on the subject of Vero Beach's rates, and from the Town's Mayor's article published on March 19, 2016 (Exhibit B hereto), that the Town's efforts have been and continue to be aimed solely at obtaining lower electric rates. As the Town's Mayor Brian Barefoot stated it less than a week before this motion to dismiss was filed, the Town's goal is lower rates – "ending the electric rate crisis [the Town] have faced for so many years," the latest of which efforts is, according to its Mayor, the Petition that initiated this docket. Again, there is no change in circumstances relevant to or cognizable under the Commission's statutes or rules, and the Commission should dismiss the Petition.

The Town's "consent" – even if it existed, which Vero Beach disputes – has nothing to do with either the statutes or the Commission's rules applicable to territorial agreements or territorial disputes.[11] The Town's consent – even if it existed – never had anything to do with any of the territorial agreements between FPL and Vero Beach, and it never had anything to do with the Territorial Orders that Town asks the Commission to modify. Again, neither the Town nor any official or other representative of the Town nor any citizens of the Town ever made an appearance in any of the proceedings conducted by the Commission that led to the issuance of the Territorial Orders. There is nothing

[11] Nor does the suggestion of "consent" being required appear in Article VIII, Section 2(c) of the Florida Constitution, in Section 166.021, Florida Statutes, or in Section 180.02, Florida Statutes.

about consent in Chapter 366, Florida Statutes, there is nothing about consent in any of the territorial agreements between Vero Beach and FPL, and there is nothing about consent in any of the Territorial Orders issued by the Commission approving those agreements.

In short, the Town's claim of changed circumstances refers to a "changed circumstance" that has nothing to do with, and never had anything to do with, the Commission's consideration and approval of the Vero Beach-FPL territorial agreements or with the Commission's issuance of the Territorial Orders. This "change in circumstances" is immaterial to the issues within the Commission's jurisdiction and cannot provide grounds to revisit or modify the Commission's Territorial Orders. Accordingly, the Commission should dismiss the Town's Petition.

D. The Town Lacks Standing to Bring Any Action on Behalf of its Citizens.

Although the Town purports to assert the interests of its citizens, it has no power or legal basis to do so. See In Re: Application for a Limited Proceeding to Include Groundwater Development and Protection Costs in Rates in Martin County by Hobe Sound Water Company, Docket No. 960192-WU, Order No. 96-0768-PCO-WU (Fla. Pub. Serv. Comm'n, June 14, 1996) ("[I]ntervention is not granted to the Town [of Jupiter Island] in a representational capacity on behalf of its residents and taxpayers. There is no authority cited in the motion to support such standing to intervene, and there is nothing in Chapter 120, Florida Statutes, to authorize a Town to intervene in administrative proceedings on behalf of it taxpayers.") The Commission should reject

the Town's improper attempt to assert any interests in a representative capacity on behalf of its residents.

II. The Town's Petition Should Be Dismissed for Failure to Comply With Applicable Pleading Requirements.

The Town's Petition purports to be filed pursuant to Section 120.57, Florida Statutes. (Petition at 1.) However, the Petition clearly fails to meet the minimum requirements for a petition filed pursuant to Section 120.57, Florida Statutes, and, thus should be dismissed.

Section 120.569(2)(c), Florida Statutes, provides:

> Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b). Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. **A petition shall be dismissed if it is not in substantial compliance with these requirements** or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.

(Emphasis supplied.)

Rule 28-106.201(2), F.A.C., establishes the minimum pleading requirements for a legally sufficient petition for administrative hearing filed with the Commission. Rule 28-106.201(2), F.A.C., provides:

> (2) All petitions filed under these rules shall contain:
>
> (a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, any e-mail address, any facsimile number, and telephone number of the petitioner, if the petitioner is not represented by an attorney or a qualified representative; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination;

(c) A statement of when and how the petitioner received notice of the agency decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;

(f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and

(g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

The Town's Petition fails to comply with the mandatory pleading requirements of Rule 28-106.201(2), F.A.C., because the Petition fails to include:

a) a statement of all disputed issues of material fact;

b) a concise statement of the ultimate facts alleged, including the specific facts the Petitioner contends warrants reversal or modification of the agency's action; and

c) a statement of the specific rules or statutes the Petitioner contends require reversal or modification of the agency's action, including how the alleged facts relate to the specific rules or statutes.

Each enumerated pleading deficiency will be addressed separately below.

A. The Petition Contains No Statement of Disputed Issues of Material Fact.

Rule 28-106.201(2)(d), F.A.C., requires that a petition for administrative hearing include "a statement of all disputed issues of material fact." The Petition contains no clear statement of all the facts in dispute in this proceeding. Instead, the Petition includes several sections containing factual allegations. First, the Petition contains a section under the heading "Material Facts" which includes facts, many of which are irrelevant to this proceeding, and many of which the City will dispute. Petition at ¶¶ 9-36. In addition, the Petition contains a section under the heading "The Requested Modification" that includes numerous additional factual allegations, many of which the City will dispute. See Petition at ¶ 47. It is unclear whether the factual allegations set forth in the "Requested Modification" section of the Town's Petition are disputed issues of material fact. Thus, the Petition fails to properly identify the disputed issues of material fact and should, accordingly, be dismissed.

B. The Petition Contains No Concise Statement of the Ultimate Facts Alleged.

Rule 28-106.201(2)(e), F.A.C., requires that a petition for administrative hearing under Section 120.57, F.S., include "a concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action." The Town's Petition includes no section that meets the

requirements of Rule 28-106.201(2)(e), F.A.C. Accordingly, the Petition should be dismissed.

C. The Petition Contains No Statement of Specific Rules or Statutes Requiring Commission Action.

Rule 28-102.201(2)(f), F.A.C., requires that petition for administrative hearing under Section 120.57, F.S., include "a statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes." The Petition invokes the Commission's jurisdiction pursuant to Section 366.04, F.S. Petition at 1, 20. However, there is absolutely no explanation in the Petition as to how the facts alleged in the Petition relate to the Commission's jurisdiction under Section 366.04, Florida Statutes. In fact, as explained in this Motion to Dismiss, the Town has not included such explanation because the Town has no interest that falls within the zone of interest of Section 366.04, F.S. Leaving aside the standing issue, the Town's failure to include such an explanation in the Petition requires that the Petition be dismissed.

In summary, the Commission should dismiss the Town's Petition for failing to meet the applicable and mandatory pleading requirements of Rule 28-102.201(2), F.A.C. Moreover, because the Town lacks standing, and also because the Town cannot allege any violation by Vero Beach of any Commission statute, rule, or order, dismissal should be with prejudice pursuant to Section 120.569(2)(c), Florida Statutes.

III. The Town's Petition is Barred by Florida's Doctrine of Administrative Finality Because No Relevant Facts Have Changed Since the Commission Issued the Territorial Orders.

Florida's doctrine of administrative finality is one of fairness, holding that parties to the Commission's orders may rely on them. While under certain circumstances, the Commission may reconsider final orders, such circumstances are not present here. The Town's principal "changed circumstance" – the expiration of the Franchise Agreement – has nothing to do with the Commission's statutory mandates under Sections 366.04(2) or 366.04(5), Florida Statutes, nor anything to do with the bases for the Commission's approvals of the Vero Beach-FPL territorial agreements in the Territorial Orders, and the Town's "kitchen sink" full of alleged "public interest" benefits are merely – and clearly – trumped-up claims (many of which Vero Beach disputes in any event) that are solely for the benefit of the Town.

If the Commission declines to grant Vero Beach's Motion to Dismiss, then Vero Beach will vigorously defend all of the false and spurious factual allegations in the Town's Petition, not only for the benefit of Vero Beach per se, but de facto for the protection of all of Vero Beach's other electric customers.

A. The Town's Petition Is Barred By Administrative Finality Because No Facts Have Changed That Are Cognizable Under the Commission's Relevant Statutes.

As the Commission held in 1992, "The doctrine of administrative finality is one of fairness. It is based on the premise that the parties, as well as the public, may rely on Commission decisions." In re: Implementation of Rules Regarding Cogeneration and Small Power Production, Docket No. 910603-EQ, Order No. 25668, 92 F.P.S.C. 2:24, 38.

While agencies do have some inherent power to reconsider final orders which are still under their control, the decisions of the Florida Supreme Court "clearly say that this inherent authority to modify is a limited one." Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 338 (Fla. 1966). As the Court in Peoples Gas stated, "orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decisions of such an agency as being final and dispositive of the rights and issues involved therein." Id. at 339.

The Court in Peoples Gas went on to state the following:

> [T]he commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public. However, this power may only be exercised after proper notice and hearing, and upon a specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified.

Id.

At best, the "changed circumstance" upon which the Town bases its Petition – the expiration of the Franchise Agreement and the Town's assertion that such expiration withdraws the Town's "consent" for the City to operate in the Town's limits – is simply irrelevant to the statutory criteria and factors that the Commission considers in ruling on territorial matters. There is nothing about "consent" in Sections 366.04(2) or 366.04(5), Florida Statutes, there is nothing about "consent" in any of the territorial agreements

between FPL and Vero Beach approved by the Territorial Orders, and there is no reference to or mention of "consent" in any of the Territorial Orders themselves. In other words, the Town's "consent" was never relevant to the Commission's consideration of the territorial agreements and its issuance of the Territorial Orders, and the existence or non-existence of the 1968 Contract or the 1986 Franchise Agreement was, likewise, never relevant to the territorial agreements or the Territorial Orders.[12] This is for the obvious reason that the Town's "consent" – even if it existed – is irrelevant to the Commission's ***statutes*** and to "the PSC's duty to police 'the planning, development, and maintenance of a coordinated electric power grid through Florida to assure . . . the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities." Lee County Elec. Coop. v. Marks, 501 So. 2d 585, 587 (Fla. 1987).

The Town has not alleged any change in circumstances relevant to the statutory criteria. Indeed, there are none. Vero Beach has built out its electric distribution facilities in its Commission-approved service areas, including its facilities in the Town, with no uneconomic duplication of such facilities, and Vero Beach has provided and continues to provide safe, adequate, and reliable service to all of its customers. The only thing that has changed is the relationships between the rates of Vero Beach and the rates of FPL; this is not cognizable under either the Commission's territorial statutes or its general Grid Bill authority. Ameristeel, 691 So. 2d at 478; Storey v. Mayo, 217 So. 2d at 307-08. And the Commission will, of course, note that neither the Town nor any resident

[12] Neither the territorial agreements nor the Territorial Orders even mention the 1968 Contract or the 1986 Franchise Agreement.

of the Town ever cared enough about any of the Commission's statutory criteria to make an appearance in any of the dockets in which the Territorial Orders were issued or to testify or speak at any of the Commission's hearings held in those dockets in Indian River County.

Moreover, in its Territorial Orders, the Commission specifically found that each version of the Vero Beach-FPL territorial agreement was in the public interest, based principally upon the Commission's Court-approved policy and mandate – both before and after the Grid Bill was enacted – to approve territorial agreements that are in the public interest, by avoiding the uneconomic duplication of facilities. In re: Application of Florida Power and Light Company for Approval of a Territorial Agreement with the City of Vero Beach, Docket No. 72045-EU, Order No. 5520 at 1-2 ("This application was filed as the result of the implied power obtained by the Commission in judicial decisions culminating in Storey v. Mayo, . . . which makes it abundantly clear that the Commission has the power to approve territorial agreements which are in the public interest. . . . [T]he Commission finds that the evidence presented shows a justification and need for the territorial agreement; and, that the approval of this agreement should better enable the two utilities to provide the best possible utility services to the general public at a less cost as the result of the removal of duplicate facilities."); In re: Application of FPL and the City of Vero Beach for Approval of an Agreement Relative to Service Areas, Docket No. 800596-EU, Order No. 10382 (Nov. 3, 1981) at 2 ("Approval of this territorial agreement should assist in the avoidance of uneconomic duplication of facilities on the part of the parties, thereby providing economic benefits to the customers of each. Additionally, the

new territorial boundary will better conform to natural or permanent landmarks and to present land development. Thus, the proposed territorial agreement should result in higher quality electric service to the customers of both parties.") In re: Petition of Florida Power & Light Company and the City of Vero Beach for Approval of Amendment of a Territorial Agreement, Docket No. 871090-EU, Order No 18834 at 1 ("The amended agreement is consistent with the Commission's philosophy that duplication of facilities is uneconomic and that agreements eliminating duplication should be approved. Having reviewed all the documents filed in the docket, we find that it is in the best interest of the public and the utilities to approve . . . the amendment to the territorial agreement.") Nothing has changed in this regard, there is no uneconomic duplication of facilities and no threat of any such duplication, and there is therefore no statutorily cognizable basis to reopen or modify the Territorial Orders. Accordingly, the Commission should dismiss the Town's Petition.

The other factors included in the Town's kitchen sink listing in ¶¶47-48 of its Petition (pages 19-20) have nothing to do with the Commission's territorial jurisdiction under 366.04(2) and nothing substantial to do with the Commission's jurisdiction under 366.04(5), Florida Statutes. (If the Town wants to attempt to allege facts that it would contend support a finding that Vero Beach's service is so much less reliable than FPL's as to warrant amending the Territorial Orders, and demand a hearing on that basis, it is welcome to try. Vero Beach's reliability is excellent and strongly believes that the ***facts*** will clearly demonstrate that any such assertion or argument by the Town would be in bad faith.)

The Town's public interest claims are merely – and clearly – pretextual claims (apparently designed to shoehorn the Town's claims into the ambit of Peoples Gas v. Mason) based solely on the ***Town's*** interests, and not on the general "public interest," and are therefore barred by Storey v. Mayo. In this regard, the Commission will note its statement regarding the public interest in another territorial case where a transfer of customers was proposed. In In Re: Joint Petition for Approval of Territorial Agreement in Leon and Wakulla Counties by Talquin Electric Cooperative, Inc. and Progress Energy Florida, Inc., the Commission articulated its "longstanding Commission policy concerning the approval of territorial agreements," stating as follows:

> Our decision on whether or not to approve a territorial agreement is based on the effect the agreement will have on all affected customers, not just on whether transferred customers will benefit.

Docket No. 040231-EU, Order No. PSC-04-1106-PAA-EU at 2-3 (citing In Re: Joint Motion for Approval of Territorial Agreement and Dismissal of Territorial Dispute, Docket No. 891245-EU, Order No. 92-1071-FOF-EU at 3 (Fla. Pub. Serv. Comm'n September 28, 1992)). The transfer in that Talquin-Progress case was proposed by the utilities involved, not by customers, but the public interest principle is the same.

The Town's purported "public interest" benefits completely ignore the impacts on the 32,000 customers served by Vero Beach's Electric Utility System outside the Town; it is facially obvious that in floating ***its*** purported "public interest" issues, ***the Town is only concerned about itself***, contrary to the Supreme Court's holding in Storey v. Mayo, and likewise contrary to the "longstanding Commission policy" reiterated by the Commission in the Talquin-Progress territorial agreement docket cited above. The

Commission should apply Storey v. Mayo and its many cases adhering to the Supreme Court's holding in that case and should accordingly dismiss the Town's Petition on the basis of administrative finality.

If the Commission does not grant Vero Beach's Motion to Dismiss, Vero Beach respectfully points out that it will demand strict proof of each and every factual assertion set forth in the Town's Petition, and that it will insist on all of its rights pursuant to Chapter 120, Florida Statutes, to protect the interests of the City, which, while Vero Beach does not assert standing in the capacity of parens patriae, will also protect the interests of all of the City's electric customers from the Town's efforts to bolt the check and shift costs onto the City and its other customers.

IV. The Town's Alternative Assertion of a "Complaint" Against Vero Beach Should be Dismissed Because the Town Has Failed to Allege Any Violation by Vero Beach of Any Commission Statute, Rule, or Order.

The Petition also attempts to invoke the Commission's jurisdiction to hear complaints. Petition at 1, 20. The sum total of the Town's purported "complaint" is as follows:

> Alternatively, the Town – as a current electric customer of the City – requests that the Commission treat this petition as a Complaint against the City and to modify its Order approving the City's service within the Town for the reasons set forth above.

Petition at 1. As explained briefly here, the Town's attempts utterly and obviously fail to satisfy the pleading requirements applicable to complaints, and accordingly, the Commission should dismiss the Town's improper complaint request as well.

Commission Rule 25-22.036, F.A.C., which governs the filing of complaints to the Commission, provides in its entirety as follows:

> **25-22.036 Initiation of Formal Proceedings.**
> (1) Application. An application is appropriate when a person seeks authority from the Commission to engage in an activity subject to Commission jurisdiction.
> (2) Complaints. A complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order.
> (3) Form and Content.
> (a) Application. An application shall be governed by the statute or rules applicable to applications for authority. In the absence of a specific form and content, the application shall conform to this rule.
> (b) Complaint. Each complaint, in addition to the requirements of paragraph (3)(a) above shall also contain:
> 1. The rule, order, or statute that has been violated;
> 2. The actions that constitute the violation;
> 3. The name and address of the person against whom the complaint is lodged;
> 4. The specific relief requested, including any penalty sought.

Vero Beach is subject to the Commission's territorial jurisdiction pursuant to Section 366.04(2)(d)-(e), Florida Statutes, and likewise subject to the Commission's "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" under Section 366.04(5), Florida Statutes. However, the Town has not alleged any violation by Vero Beach of any of the foregoing statutes, or of any of the Commission's rules implementing those statutes, or of any provision of any of the Territorial Orders, or of any other Commission statute, rule, or order. The Town has not identified the actions by Vero

Beach that it might suggest constitute any such violation. The Town has alleged no facts that would establish any such violation and has not identified any Commission statute, rule, or order that Vero Beach has allegedly violated. The Town did identify Vero Beach as the party against whom its purported complaint is filed[13] and did, as its prayer for relief, ask that the Territorial Orders be modified. (Of course, Vero Beach would strenuously dispute that the Town's requested relief is made pursuant to a lawful request, as well as dispute the Town's assertion that it might be entitled to any such relief.)

The Town's throw-away alternative request that the Commission treat its Petition as a Complaint is baseless and utterly fails to satisfy the requirements of the Commission's applicable rules. Accordingly, the Commission should also dismiss the Town's alternative "Complaint."

CONCLUSION AND RELIEF REQUESTED

The Commission should dismiss the Town's Petition, including its asserted alternative "Complaint," for the following reasons:

1. the Town lacks standing to bring its Petition because the Town has alleged no facts that constitute any cognizable injury in fact or any injury within the zone of interests to be protected by the Commission's statutes applicable to territorial matters and its related Grid Bill jurisdiction;
2. the Town's alleged "changed circumstances" have nothing to do with the Commission's territorial statutes or rules, or with either the territorial

[13] Though the Town purported to file its complaint against Vero Beach, the Town did not serve Vero Beach with its complaint. Instead, the Town provided a "courtesy copy" by email.

agreements or the Territorial Orders that the Town wants the Commission to modify;

3. the Town has failed to meet the pleading requirements of Rule 28-106.201, F.A.C. ;

4. the Town's request is barred by Florida's doctrine of administrative finality; and

5. the Town has utterly failed to comply with the pleading requirements of Rule 25-22.036, F.A.C., applicable to complaints.

If the Commission does not grant Vero Beach's Motion to Dismiss, Vero Beach respectfully points out that it will demand strict proof of each and every factual assertion set forth in the Town's Petition, and that it will insist on all of its rights pursuant to Chapter 120, Florida Statutes, to protect the interests of the City, which, while Vero Beach does not assert standing in the capacity of parens patriae, will also protect the interests of all of the City's electric customers from the Town's efforts to bolt the check and shift costs onto the City and its other customers.

WHEREFORE, for the reasons set forth above, the City of Vero Beach respectfully asks the Commission to DISMISS WITH PREJUDICE the Petition filed in this docket by the Town of Indian River Shores.

Respectfully submitted this 24th day of March, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, by electronic delivery, on this 24th day of March, 2016.

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PSC Docket No. 160049-EU

Exhibit A

to

City of Vero Beach's Motion to Dismiss
Petition of Town of Indian River Shores

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

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

TOWN OF INDIAN RIVER SHORES,
a Florida municipality,

Plaintiffs,

v.

CITY OF VERO BEACH,
a Florida municipality,

Defendant.
_____/

CASE NO. 312014CA000748

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

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

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

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

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

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

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

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[2] Ch. 74-196, § 1, Laws of Florida.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

/s/ Cynthia L. Cox

CYNTHIA L. COX, CIRCUIT JUDGE

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PSC Docket No. 160049-EU

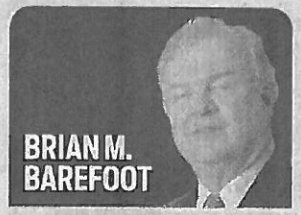
Exhibit B

to

City of Vero Beach's Motion to Dismiss
Petition of Town of Indian River Shores

COMMENTARY

Shores is working toward an electric rate, service solution



GUEST COLUMNIST

On March 4, the town of Indian River Shores took another step toward ending the electric rate crisis we have faced for so many years, asking the Florida Public Service Commission to modify a territorial order it last issued more than 28 years ago and consolidate electric utility service in our town under one provider — Florida Power & Light Co.

I want to make sure residents in our town, as well as everyone currently served by the Vero Beach electric utility, understand why we took this step, and why I continue to believe another solution exists that could be a win-win for both our town and the city.

Indian River Shores is in a unique and unenviable position in that the territorial boundary between Vero Beach Electric and Florida Power & Light Co. divides our community. Some of our residents are served by FPL while others are served by the city. And the service each group receives is vastly different.

Clearly rates are a major difference, with residents served by the city paying 20 to 30 percent more for their electric service for many years. But the service differences go well beyond rates.

Our residents who are served by FPL have much better reliability. They have access to energy conservation programs that the city does not offer. They have "smart meters" that allow them to take greater control of their bills. And, those residents served by FPL are formally represented by the Florida Office of Public Counsel before the PSC, the agency that closely regulates FPL's service and rates.

Our residents served by the city, however, pay much higher rates, for much poorer service, to a city that offers no accountability or representation and which uses the profits earned from our residents to subsidize its tax rates and other operations wholly unrelated to the electric utility.

Once our franchise agreement with Vero Beach ends in November, the city will no longer have our consent to encroach within the municipal boundaries of our town and exercise what are known as "extraterritorial powers" — namely, the provision of electric service.

> "I strongly believe there is a solution that avoids costly legal expense and provides substantial compensation to the city."

In fact, we believe if the city continues to insist on exercising its municipal powers within our town without our consent, the city will be in direct violation of the Florida Constitution. To comply with the constitution, we have asked the PSC to amend the service territory boundary so that all residents in our town can receive service from FPL.

The service territory boundary has been modified before to address a similar situation in which a particular subdivision "straddled the territorial dividing line," causing "customer confusion" and other problems. These issues are no less applicable today, given that the territorial boundary bisects our town and results in citizens and neighbors receiving vastly different service at vastly different rates.

While we are fully prepared to argue our case before the PSC, I strongly believe there is a solution that avoids costly legal expense and provides substantial compensation to the city. FPL has made a significant cash offer to purchase the city's utility assets in our town, and a review conducted by our utility rate consultant (a former chairman of the PSC) shows this cash offer should be large enough to cover the city's alleged "costs" in losing our citizens as customers and actually improve the city's budgetary outlook.

I believe FPL's initial offer is large enough to at least warrant continued negotiations. It is my hope that Vero Beach will choose to investigate this option further. Continued and prolonged litigation is in neither party's interest, but the town should and will do what it needs to protect the interests of its residents.

Brian Barefoot is mayor of Indian River Shores.

SAN FRANCISCO CHRONICLE

Government 'gets medieval' to collect fines

My car was towed from an area near a train station in San Francisco last month. I had parked in front of a small "No Parking" sign that I had not seen. It cost me $350.

At least I could afford to pay to get my car back. California is filled with people who are one traffic ticket away from losing their means of independent transportation. On paper, the fine is, say, $100, but with surcharges, it adds up to a lot more. According to the Judicial Council of California, in 2013, more people had their licenses suspended for not paying fines than for drunken driving.

"For a lot of people, the car is the only asset they own in this whole damn world," noted Mike Herald of the Western Center on Law & Poverty. "When you take their car, you're taking the thing that helps them make money."

Herald co-authored a report about how traffic courts drive inequality that helped prompt Gov. Jerry Brown institute an 18-month amnesty

PSC Docket No. 160049-EU

Exhibit C

to

City of Vero Beach's Motion to Dismiss
Petition of Town of Indian River Shores

TOWN OF INDIAN RIVER SHORES, FLORIDA

November 11, 1971

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

Dear Jesse:

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

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

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

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

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

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

Yours truly,

ROLAND B. MILLER
Mayor

RBM:br
Copies to:
Councilmen, IRS
Mr. G. Johnston, Atty.
Mr. R. F. Lloyd
Mr. James Vocelle, Atty.
Mr. Joseph C. Thomas
935 Pebble Lane, IRS

Mrs. Winnie Lich
946 Pebble Lane, IRS

Mr. Edwin Eickman
926 Surf Lane, IRS

Mr. Ruel B. George
955 Reef Lane, IRS

Mrs. Mary Louise Brightwell
946 Reef Lane, IRS

Mr. Earl Groth
99 Royal Palm Blvd.

(All of Vero Beach, Fla.)