DOCKET NO. 160013-EU

FILED JAN 05, 2016
DOCUMENT NO. 00078-16
FPSC - COMMISSION CLERK

Holland & Knight

315 South Calhoun Street, Suite 600 | Tallahassee, FL 32301 | T 850.224.7000 | F 850.224.8832
Holland & Knight LLP | www.hklaw.com

D. Bruce May, Jr.
(850) 425-5607
bruce.may@hklaw.com

January 5, 2016

VIA ELECTRONIC FILING

Ms. Carlotta Stauffer
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: New Filing - *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*

Dear Ms. Stauffer:

On behalf of the Town of Indian River Shores, attached for filing is the Petition for Declaratory Statement by the Town of Indian River Shores Regarding the Commission's Jurisdiction to Adjudicate the Town's Constitutional Rights.

Should you have any questions regarding this filing, please do not hesitate to contact me.

Sincerely,

HOLLAND & KNIGHT LLP

/s/***D. Bruce May, Jr.***

D. Bruce May, Jr.

DBM:kjg
Enclosure
cc: Kathryn G. Cowdery, Esq. (w/Encl.)
Chester Clem, Esq., Town Attorney (w/Encl.)
Mr. Robert Stabe, Town Manager (w/Encl.)
Town of Indian River Shores Town Council (w/Encl.)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement by the Town of Indian River Shores Regarding the Commission's Jurisdiction to Adjudicate the Town's Constitutional Rights
_____/

Docket No. _____

Filed: January 5, 2016

PETITION FOR DECLARATORY STATEMENT BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Pursuant to Section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code, the Town of Indian River Shores (the "Town") petitions for a declaratory statement on the limited issue of whether the Florida Public Service Commission ("PSC") has jurisdiction under Chapter 366, Florida Statutes, or any other applicable law, to adjudicate the Town's rights under Article VIII, Section 2(c) of the Florida Constitution, as further codified in Section 166.021, Florida Statutes, to be protected from unconsented exercises of extra-territorial powers by another municipality, namely the City of Vero Beach ("Vero Beach" or the "City"). The adjudication of this limited issue will require an in-depth analysis and interpretation of Article VIII, Section 2(c) of the Florida Constitution and Section 166.021, Florida Statutes, which establish constitutional constraints on a municipality's exercise of extra-territorial powers and protect a municipality from the unconstitutional exercise of extra-territorial powers by another municipality. The requested declaration is in no way intended to abrogate the PSC's ultimate authority to approve or modify territorial agreements under Chapter 366, Florida Statutes. Rather, this Petition presents a narrow and limited question regarding the PSC's jurisdiction to adjudicate and resolve threshold constitutional issues as they apply to the Town's particular circumstances. The answer to this question is needed in order for the Town to avoid costly administrative litigation by selecting the proper course of action going forward.

Procedural Background

Because of the PSC's longstanding precedent that it cannot resolve constitutional questions or interpret the Florida Constitution or Florida statutes that are outside of its jurisdiction, the Town previously sought a declaration in the Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County, in a case styled *Town of Indian River Shores v. City of Vero Beach*, Case No. 31-2014CA-000748, concerning whether Vero Beach has the statutory authority required under the Florida Constitution and Section 166.021(3)(a), Florida Statutes, to exercise extra-territorial powers within the corporate limits of the Town without the Town's consent (the "Circuit Court proceeding"). In the Circuit Court proceeding, the Town made clear that it agreed that any such determination by the Circuit Court must ultimately be brought to the PSC before any territorial agreement or any rights or obligations thereunder could be modified. The City and the PSC's counsel asserted in the Circuit Court proceeding, however, that the Circuit Court had no jurisdiction to resolve those issues, rather those issues were under the PSC's jurisdiction granted by Section 366.04, Florida Statutes. The Circuit Court accepted the PSC counsel's jurisdictional assertions and dismissed the Town's claim for declaratory relief with prejudice due to lack of jurisdiction.

The positions taken by the PSC's counsel in the Circuit Court proceeding appear to contradict other PSC orders that state that the PSC has no authority under Chapter 366 or any other applicable law over any provision of the Florida Constitution or over statutes that address local government powers such as Section 166.021. For these reasons, the Town is in doubt regarding whether the PSC in fact has jurisdiction under Chapter 366 or any other applicable law to adjudicate and resolve the threshold constitutional questions raised by the Town. Thus, the Town is in need of a declaration from the PSC regarding whether it 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. The Town is substantially affected and in need of this declaration in order to avoid costly administrative litigation by selecting the proper course of action in advance. Simply stated, the Town needs to know where to go to adjudicate and enforce the rights and protections afforded to it by the Florida Constitution.

Parties

1. The agency whose declaratory statement is sought by this Petition is as follows:

   Florida Public Service Commission
   2540 Shumard Oak Boulevard
   Tallahassee, Florida 32399-0850

2. The name, address, and telephone number of the Town are as follows:

   The Town of Indian River Shores
   Robbie Stabe, Town Manager
   6001 Highway A-1-A
   Indian River Shores, Florida 32963
   Telephone: 772-231-1771

3. All pleadings, orders and correspondence should be directed to the Town's representatives as follows:

   D. Bruce May, Jr.
   Karen Walker
   Kevin Cox
   Holland & Knight LLP
   Post Office Drawer 810
   Tallahassee, Florida 32302-0810
   Telephone: 850-224-7000
   Facsimile: 850-224-8832

   With a courtesy copy to:

Chester Clem
Town Counsel
2145 15th Avenue
Vero Beach, Florida 32960-3435
Telephone: 772-978-7676
Fax: 772-978-7675

Declaratory Statement Requested

4. Pursuant to Section 120.565, Florida Statutes, "[a]ny substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances."

5. The Town requests a limited declaratory statement that:

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

The Petitioner's Particular Circumstances

6. The Town is an incorporated Florida municipality of approximately 4,000 residents in Indian River County, Florida, and is an electric utility customer of the City.

7. Vero Beach is an incorporated Florida municipality of approximately 15,000 residents in Indian River County, Florida, and owns a municipal electric utility that currently furnishes electric utility service to the Town and other customers located within and outside the corporate limits of Vero Beach.

8. Vero Beach owns and operates, a municipal electric utility system that serves approximately 34,000 customers, of which approximately 12,000 are located within Vero Beach ("Resident Customers") and approximately 22,000 are located outside Vero Beach ("Non-

Resident Customers"). Approximately 3,500 of Vero Beach's Non-Resident Customers are located within the corporate limits of the Town.

9. The Town was established by Chapter 29163, Laws of Florida (1953) pursuant to which the Florida Legislature gave the Town powers to contract "on behalf of the inhabitants of the Town" with other utilities for the provision of electricity and grant public utility franchises of all kinds. Ch. 29163, § 2(e) and (f), Laws of Fla. (1953). The Town also possesses broad home rule powers as a municipality under Chapter 166, Florida Statutes.

10. In 1968 the Town entered into a bargained-for agreement with Vero Beach which gave Vero Beach the Town's consent to exercise certain extra-territorial powers within the corporate limits of the Town, including permission to provide electric service to residents "within the corporate limits of said Town" and to occupy and us the Town's rights-of-way and other public places, for a limited term of 25 years (the "1968 Agreement"). A copy of the 1968 Agreement is attached as Exhibit "A."

11. In 1971, Vero Beach and Florida Power & Light Company ("FPL") began negotiations regarding an agreement that called for those two parties to observe a territorial boundary between their electric systems. On November 1, 1971, FPL and Vero Beach entered into a bi-lateral Territorial Agreement which was contingent upon approval by the PSC.

12. Prior to the approving the Territorial Agreement, the PSC formally contacted the Town to inquire regarding the Town's position on Vero Beach providing electric service within the Town's corporate limits. In response to the PSC's inquiry, the mayor of the Town advised the chairman of the PSC in writing that the Town had entered into the 1968 Agreement with Vero Beach and thereby consented to Vero Beach providing electric and water service within the corporate limits of the Town for a period of 25 years.

13. In 1972, the PSC approved the bi-lateral Territorial Agreement entered between Vero Beach and FPL. *In re: Application of Florida Power and Light Co. for approval of a territorial agreement with the City of Vero Beach,* Order No. 5520, Docket 40045-EU (Aug. 29, 1972). The PSC's Order approving the Territorial Agreement and Orders approving its subsequent amendment are attached as hereto as Composite Exhibit "B".

14. In 1986, the Town entered into another bargained-for agreement with Vero Beach which superseded the 1968 Agreement and again gave Vero Beach the Town's consent for Vero Beach to exercise certain extra-territorial powers within the Town's corporate limits, including giving Vero Beach an exclusive 30-year franchise (the "Franchise") to provide electric service to certain parts of the Town. A copy of the 1986 Franchise Agreement (the "Franchise Agreement") is attached hereto as Exhibit "C".

15. As reflected in Composite Exhibit "B" to this Petition, the Territorial Agreement has been periodically amended by Vero Beach and FPL, and such amendments have been approved by the PSC. Since the inception of the Territorial Agreement in 1972, and through the course of these amendments, Vero Beach has had the Town's express written consent to exercise extra-territorial powers within the Town by virtue of the 1968 Agreement and the Franchise Agreement.

16. The Franchise Agreement between the Town and Vero Beach has a limited term of thirty (30) years, has no automatic or mandatory renewal provisions, and is scheduled to expire on November 6, 2016.

17. By certified letter dated July 18, 2014, the Town notified Vero Beach that the Town will not renew Vero Beach's Franchise, and that upon expiration of the Franchise Agreement Vero Beach will no longer have the Town's consent to exercise extra-territorial powers with the Town,

including furnishing electricity to the Town's residents or occupying or using the Town's rights-of-way and other public areas.

18. Under the Territorial Agreement, as amended, the Town currently straddles the territorial boundary line which divides the respective service areas of FPL and Vero Beach. As a result, electric utility service within the Town is fragmented -- FPL serves that portion of the Town lying north of Old Winter Beach Road (approximately 739 customers), while Vero Beach serves that portion of the Town lying south of Old Winter Beach Road (approximately 3,500 customers).

19. In August of 2015, FPL proposed to purchase Vero Beach's electrical facilities in the Town (*See* Exhibit "D") and has stated that it is ready, willing and able to serve all of the customers within the Town upon such purchase and modification of the Territorial Order approving the Territorial Agreement. The purchase by FPL of Vero Beach's electrical facilities in the Town would eliminate the fragmented electric service within the Town and enable the Town and its residents to receive electric service from one utility.

20. The Town does not dispute that Vero Beach has been authorized to provide electric service to a portion of the Town pursuant to the Territorial Agreement approved by the PSC, but believes that Vero Beach does not have the statutory authority under general or special law to exercise extra-territorial powers within the corporate limits of the Town without the Town's consent as is required by Article VIII, Section 2(c) of the Florida Constitution. Moreover, Vero Beach will no longer have the Town's consent when the Franchise Agreement expires on November 6, 2016.

21. This Petition does not address or seek a determination of whether the PSC should modify the Territorial Order, and the Town fully acknowledges that any modification of the Territorial Order remains subject to the PSC's authority. The sole and only question raised in this

Petition is whether the PSC *has the jurisdiction* under Chapter 366, Florida Statutes or any other applicable law, to interpret Article VIII, Section 2(c) of the Florida Constitution and Section 166.021, Florida Statutes, for purpose of adjudicating whether the Town has a constitutional right to be protected from unconsented exercises of extra-territorial powers by Vero Beach within the corporate limits of the Town.

22. The Town believes that it has a right under Article VIII, Section 2(c) of the Florida Constitution to be protected from unconsented exercises of extra-territorial powers by Vero Beach and that Vero Beach does not have the requisite statutory power to exercise extra-territorial powers within the corporate limits of the Town without the Town's consent. Article VIII, Section 2(c) of the Florida Constitution makes it clear that a municipality has no inherent authority to exercise extra-territorial powers; instead, the "exercise of extra-territorial powers by municipalities shall be as provided by general or special law." This constitutional constraint on a municipality's extra-territorial municipal powers has been further codified in Section 166.021(3)(a), Florida Statutes, which states that "[t]he subjects of annexation, merger, and exercise of extraterritorial power … require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution." No general or special law currently authorizes Vero Beach to exercise extra-territorial powers within the corporate limits of the Town without the Town's consent.

23. The PSC has acknowledged that an order approving a territorial agreement between a municipal utility and an investor-owned utility does not provide a municipal utility the inherent statutory authority to serve extra-territorially outside its municipal boundaries. *See In re: Joint petition for approval to amend territorial agreement between Progress Energy Florida, Inc. and Reedy Creek Improvement District*, Order No. PSC-10-0206-PAA-EU, 10 F.P.S.C. 4:23 (Apr. 5, 2010). The original territorial agreement in that proceeding was approved by the PSC in 1987 and

provided Reedy Creek Improvement District ("RCID"), a special district that the PSC regulates as a municipal utility, with the exclusive right to serve a development area. However, when the development area was de-annexed from the RCID political boundary in 2008, the PSC saw the need to modify the territorial agreement because "pursuant to its charter, RCID cannot furnish retail electric power outside of its boundary." *Id.* at 2. Consequently, the PSC modified the territorial agreement by placing the pertinent area within Progress Energy's service territory. *Id.* at 3. By so ruling the PSC recognized that its earlier administrative order approving the original territorial agreement did not grant the municipal utility the statutory authority to exercise extra-territorial powers outside its municipal limits. In *Reedy Creek* there was no dispute that RCID lacked authority to serve extra-territorially outside of its corporate boundaries. Thus, unlike the situation here, there was no need for a party to seek an adjudication as to its entitlement under Florida's Constitution or Section 166.021, Florida Statutes, to be protected from extra-territorial encroachments by another municipality.

24. There is no special or general law that currently authorizes Vero Beach to exercise extraterritorial powers within the Town's boundaries without the Town's consent.[1] Vero Beach has previously cited Section 180.02(2), Florida Statutes, for its purported municipal power to provide extra-territorial electric service "outside of its corporate limits" in unincorporated areas of Indian River County. *See* Vero Beach's filing on August 14, 2014, in Docket No. 140142-EM, at page 36. However, Section 180.02(2) cannot authorize Vero Beach's provision of extra-territorial electric service in the Town because that same section further provides that "said corporate powers shall **not** extend or apply within the corporate limits of another municipality." (emphasis added).

[1] Not only is there no statutory provision that authorizes Vero Beach to exercise extra-territorial powers in the Town, but the charter under which Vero Beach is organized, and which was enacted by referendum election on March 9, 1982, also fails to provide Vero Beach with authority to exercise extra-territorial powers within the Town without the Town's consent.

Thus, Section 180.02(2) is entirely consistent with the restrictions on extra-territorial municipal powers as set forth in Article VIII, Section 2(c) of the Florida Constitution, and as further codified in Section 166.021, Florida Statutes.

25. For all these reasons, the Town believes that Vero Beach has no inherent statutory authority to exert extra-territorial powers within the corporate limits of the Town -- an equally independent municipality -- without the Town's consent. That consent will expire on November 6, 2016 when Franchise Agreement expires. Thus, there is a pressing question of whether Vero Beach can lawfully exercise extra-territorial powers within the Town's corporate limits without the Town's consent in the absence of general or special law giving Vero Beach such authority as required by the Florida Constitution. The Town needs to know if the PSC has jurisdiction to adjudicate this constitutional issue before engaging in costly administrative proceedings.

The Applicable Statutory Provisions, Rules or Orders of the Agency, and Conflicting Ambiguities Necessitating This Petition

26. The statutory provisions and PSC orders applicable to the narrow jurisdictional question raised in this Petition are:

a. Chapter 366, and particularly Section 366.04, Florida Statutes.

b. Order No. PSC-15-0101-DS-EM (Feb. 12, 2015)[2] and Order No. PSC-11-0579-FOF-EI (Dec. 16, 2011),[3] both of which indicate that the PSC lacks jurisdiction to resolve constitutional questions or interpret the Florida Constitution and statutes beyond its purview.

[2] *In re: Petition for Declaratory Statement or Other Relief Regarding the Expiration of the Vero Beach Electric Service Franchise Agreement, by the Board of County Commissioners, Indian River County, Florida*, Order No. PSC-15-0101-DS-EM, Docket No. 140244-EM, 15 F.P.S.C. 2:090 at 30-31 (Feb. 12, 2015).

[3] *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Order No. PSC-11-0579-FOF-EI at 11, Docket No. 110001-EI, 11 F.P.S.C. 12:130 (Dec. 16, 2011).

27. In a case directly involving the PSC, the Florida Supreme Court cautioned that "[g]enerally speaking, administrative agencies are not the appropriate forum in which to consider questions of constitutional import." *Myers v. Hawkins*, 362 So. 2d 926, 929 n.4 (Fla. 1978) (citing *Department of Revenue v. Amrep Corp.*, 358 So. 2d 1343 (Fla. 1978); *Gulf Pines Mem'l Park, Inc. v. Oaklawn Mem'l Park, Inc.*, 361 So. 2d 695 (Fla. 1978); *Dep't of Revenue v. Young Am. Builders*, 330 So. 2d 864 (Fla. 1st DCA 1976)).

28. The PSC's adherence to the Supreme Court's warning in *Myers* was evident in the agency's denial of Indian River County's request for declaratory relief in recent proceedings involving Vero Beach, in which the PSC itself stated that it had no "authority" to address statutes granting local governments home rule and police powers, nor did it have any "authority" to address the powers of local governments under the Florida Constitution:

> It would not be possible to give a complete and accurate declaration on these questions without addressing the County's statutory and constitutional powers. **We have no authority over Chapter 125, F.S.,**[4] **or over any provision of the Florida Constitution**. [citing *Carr v. Old Port Cove Prop. Owners Ass'n*, 8 So. 3d 403, 404-405 (Fla. 4th DCA 2009) (a declaratory statement is not the appropriate mechanism to interpret a constitutional provision); *PPI, Inc. Ha. Dep't of Bus. & Prof'l Regulation, Div. of Parimutuel Wagering*, 917 So. 2d 1020 (Fla. 1st DCA 2006) (the agency had the authority to deny the request for declaratory statement because it was not authorized under *section 120.565, F.S.*, to construe a constitutional amendment).] Giving an incomplete declaration that only addresses Chapter 366, F.S., would undermine the purpose of the declaratory statement, which is to aid the petitioner in selecting a course of action in accordance with the proper interpretation and application of the agency's statute. [citing *Carr*, 8 So. 3d at 405.]

In re: Petition for Declaratory Statement or Other Relief Regarding the Expiration of the Vero Beach Electric Service Franchise Agreement, by the Board of County Commissioners, Indian River County, Florida, Order No. PSC-15-0101-DS-EM, Docket No. 140244-EM, 15 F.P.S.C.

[4] Chapter 125, Florida Statutes, addresses local government powers of a county and is analogous to Chapter 166, Florida Statutes, which addresses local government powers of a municipality.

2:090 at 30-31 (Feb. 12, 2015) (emphasis added). The PSC also noted Vero Beach's argument that the "threshold legal issue involving the interpretation of provisions of Chapter 125, F.S. [addressing the County's local government powers] should be resolved in a circuit court, not assumed in this declaratory statement proceeding." *Id.* at 19.

29. The jurisdictional principles articulated in Order No. PSC-15-0101-DS-EM are entirely consistent with PSC Order No. PSC-11-0579-FOF-EI which expressly stated that the PSC has "no authority in Chapter 366, F.S., to resolve constitutional questions." *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Order No. PSC-11-0579-FOF-EI at 11, Docket No. 110001-EI, 11 F.P.S.C. 12:130 (Dec. 16, 2011).

30. Based on these same principles, the Town pursued a lawsuit in the Circuit Court proceeding, asking that the Circuit Court adjudicate the constitutional and statutory question of whether Vero Beach has the requisite statutory authority to exercise extra-territorial powers within the Town's corporate boundaries absent the Town's consent.

31. In the Circuit Court proceeding, the Town agreed that after the Circuit Court interpreted the relevant constitutional and statutory provisions and determined whether Vero Beach had the requisite statutory authority to exercise extra-territorial powers within the Town without the Town's consent, that Vero Beach could continue to provide electric service as long as the Territorial Agreement remained in place. (*See* Exhibit "E", Town's Response to City's Motion to Dismiss at 3, and Exhibit "F", Town's Response to PSC Motion to Participate as Amicus Curiae at 6.) The Town specifically represented to the Court that "only the PSC can approve a modification of the Territorial Agreement, and that until the PSC's order approving the Territorial Agreement is modified, the City can continue to provide electric service in the Town." (*See* Exhibit "E" p. 3.)

32. In the Circuit Court proceeding, the Town also made sure the court and the parties understood that the Town was only seeking resolution of a threshold constitutional question under applicable constitutional and statutory provisions:

> Nor has the Town asked the Court to modify the Territorial Agreement. Instead, Count I prays for declaratory relief and asks this Court to determine, under Article VIII of the Florida Constitution, and Sections 166.021(3)(a) and 180.02(2), Florida Statutes, whether the City has the requisite **organic statutory authority conferred by general or special law** to furnish electricity to areas outside of its corporate boundaries and within the corporate limits of the Town without the Town's consent. This count is grounded upon the constitutional principle that a municipality like the City cannot exercise municipal powers outside its corporate boundaries and encroach within the corporate limits of another equally independent municipality without having been granted those extraterritorial powers by general or special law. That principle comes directly from Article VIII, Section 2(c) of the Florida Constitution, which provides that a municipality has no inherent municipal power to exercise municipal powers outside of its corporate boundaries; rather "the exercise of extra-territorial powers by municipalities shall be as provided by general or special law." The Florida Legislature respected that principle when it passed the Municipal Home Rule Powers Act, which states: "[T]he subjects of annexation, merger, **and the exercise of extraterritorial power … require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution."** § 166.021(3)(a), Fla. Stat. (emphasis added)…
>
> ***
>
> The Town has expressly acknowledged, if such finding is made [that the City does not have the organic statutory authority to exercise extra-territorial powers and furnish electricity within the Town without the Town's consent], the City will still serve the Town under the order approving the existing Territorial Agreement until the PSC modifies the agreement. If the Court finds, which it should, that the City does not have the organic statutory authority to provide extra-territorial electric service in the Town, and provided that there is another electric utility ready, willing and able to serve the Town (which FPL is), the PSC would then have the ability to modify the Territorial Agreement as it did in Reedy Creek. In other words, the PSC is certainly authorized to modify the Territorial Agreement to reflect the Court's finding that the City does not have the organic statutory authority to exercise extra-territorial municipal powers within the corporate limits of the Town without the Town's consent.

See Exhibit "F" at 2-3, 6 (emphasis in original). *See also* Exhibit "G", Transcript of Hearing on Motion to Dismiss at pp. 40-41.

33. The Circuit Court itself also recognized that

> [I]t 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.
>
> 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.

Exhibit "H", Order on Motion to Dismiss pp. 4-5 (footnote omitted).

34. In the Circuit Court proceeding, legal counsel for the PSC appeared as an amicus in support of Vero Beach's Motion to Dismiss and asserted that the Court was without jurisdiction and only the PSC could resolve these issues. *See* Exhibit "I", The Florida Public Service Commission's Memorandum Addressing Its Jurisdiction Concerning Issues Raised In The Amended Complaint (the "PSC's Memorandum").

35. In support of the PSC's jurisdiction, the PSC's Memorandum cited Chapter 366 generally, and specifically Sections 366.01, 366.04, 366.04(1), 366.04(2), 366.04(5), 366.05(7)-(8), and Chapter 74-196, 1974 Fla. Laws 538. *Id.* 2-5, 7. The Memorandum also cited Rules 25-6.0439, 25-6.0440, 25-6.0441, and 25-6.0442, Florida Administrative Code. *Id.* p. 2, n.2. The applicability of these provisions of Chapter 366 and implementing rules, as stated in the PSC's Memorandum filed in the Circuit Court proceeding, may apply to the Town's particular set of circumstances as alleged in this Petition, though Section 366.04, Florida Statutes, appears to be the only necessary statute to consider with respect to the jurisdictional question presented here.

36. At the hearing on Vero Beach's Motion to Dismiss, the PSC's counsel reiterated the jurisdictional arguments from the PSC's Memorandum and reasserted that only the PSC could resolve the issues presented by the Town. *See* Exhibit. "G", Transcript of Hearing on Motion to Dismiss at p. 66.

37. Following the hearing on Vero Beach's Motion to Dismiss, the Circuit Court accepted the jurisdictional assertions of the PSC's counsel and dismissed with prejudice the Town's request for declaratory relief for lack of jurisdiction. *See* Exhibit "H" pp. 5, 6, 10 and 11. Thus, the issues presented in this Petition are not before the court in the Circuit Court proceeding.[5]

38. Because the Circuit Court has stated it is without jurisdiction, the Town seeks a declaration on the limited issue of whether the PSC has jurisdiction under Chapter 366, Florida Statutes or any other applicable law, to interpret Article VIII, Section 2(c) of the Florida Constitution and Section 166.021, Florida Statutes, for purposes of adjudicating and resolving whether the Town has the right under Florida's Constitution to be protected from unconsented exercises of extra-territorial powers by Vero Beach.

The Town is Substantially Affected and Entitled to a Declaratory Statement

39. As pled above, the Town is an incorporated Florida municipality, has a right under Article VIII, Section 2(c) of the Florida Constitution to be protected from unconsented exercises of extra-territorial powers by another municipality, and needs to know where to go to adjudicate and enforce its constitutional and statutory rights.

40. The Town is substantially affected because, in light of the contradictions and ambiguities in the law noted above, the Town has a right know in advance of costly administrative

[5] The Town has filed a Second Amended Complaint in the Circuit Court proceeding which includes a count asking whether Vero Beach has the unilateral right to continue to occupy the Town's rights-of-way and other public areas without the Town's permission after the Franchise Agreement expires, in addition to maintaining a damages claim for breach of the Franchise Agreement for failure to charge reasonable rates.

litigation if the PSC has jurisdiction to adjudicate and resolve that question of constitutional import. *See Citizens of State ex rel. Office of Pub. Counsel v. Fla. Pub. Serv. Comm'n & Utils., Inc.*, 164 So. 3d 58, 62-63 (Fla. 1st DCA 2015) ("Where contradictory orders make applicability of statutes or rules an administrative agency enforces uncertain as to particular circumstances, a declaratory statement may well be appropriate.").

41. "The purpose of the declaratory statement procedure is to enable members of the public to definitively resolve ambiguities of law arising in the conduct of their daily affairs or in the planning of their future affairs and to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts." *Citizens*, 164 So. 3d at 62-63. "A declaratory statement of an agency's position may also help a party avoid costly administrative litigation by selecting the proper course of action in advance." *Id.* (quotation omitted).

42. These purposes for a declaratory statement are well served here. The Town wants to promptly take any and all appropriate steps to assert and protect its municipal rights under the Florida Constitution. But there is ambiguity about what tribunal can address and resolve these constitutional questions. The Town would be substantially affected by a determination from the PSC that it has jurisdiction to resolve these threshold constitutional questions because a "declaratory statement will allow [the Town] to plan its future conduct" regarding where and how to enforce these constitutional limits on extra-territorial power. *Adventist Health Sys./Sunbelt Inc. v. Agency for Health Care Admin.*, 955 So. 2d 1173, 1176 (Fla. 1st DCA 2007).

43. Moreover, declaratory statements seeking clarification of the PSC's jurisdiction are an appropriate use of the administrative relief provided by Section 120.565, Florida Statutes. *See In re: Petition for declaratory statement that NPCR, Inc. d/b/a Nextel Partners, commercial mobile*

radio service provider in Florida, is not subject to jurisdiction of Florida Public Service Commission for purposes of designation as "eligible telecommunications carrier," Order No. PSC-03-1063-DS-TP; Docket No. 030346-TP, 03 F.P.S.C. 9:311 (Sept. 23, 2003) ("A Declaratory Judgment of 'No Jurisdiction' is Proper…. we grant the petitions and declare that Nextel and ALLTEL, as commercial mobile radio service providers, are not subject to the jurisdiction of the Florida Public Service Commission for purposes of designation as an eligible telecommunications carrier…").

44. Because the Town is in doubt regarding whether the PSC has jurisdiction to address and resolve the constitutional questions pertaining to the Town's particular set of circumstances described above, the PSC should provide the Town the requested declaratory relief.

Conclusion

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

Respectfully submitted this 5th day of January 2016.

HOLLAND & KNIGHT LLP

/s/D. Bruce May, Jr.
D. BRUCE MAY, JR.
Florida Bar No. 354473
Email: bruce.may@hklaw.com
KAREN D. WALKER
Florida Bar No. 982921
Email: karen.walker@hklaw.com
KEVIN COX

Florida Bar No. 34020
Email: kevin.cox@hklaw.com
HOLLAND & KNIGHT LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301
Telephone: (850) 224-7000
Facsimile: (850) 224-8832
Secondary Email: jennifer.gillis@hklaw.com
Secondary Email: graciela.hirigoyen@hklaw.com

Attorneys for Petitioner Town of Indian River Shores

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing via email to Kathryn Cowdery, Florida Public Service Commission, Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399, kcowdery@psc.state.fl.us, counsel to the PSC on this 5th day of January, 2016.

/s/D. Bruce May, Jr.
D. Bruce May, Jr.

Exhibit A

C O N T R A C T

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

WITNESSETH:

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

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

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

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

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

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

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

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

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

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

OFFICES
OCELLE
&
KLAEHER
LACH, FLORIDA

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

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

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

CITY OF VERO BEACH

By _____
Mayor

Attest: _____
City Clerk

TOWN OF INDIAN RIVER SHORES

By _____
Mayor

Attest: _____
City Clerk

LAW OFFICES
Vocelle
&
Gallagher
P. O. Box 1389
Vero Beach, Florida
32961

Exhibit B

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

The following Commissioners participated in the disposition of this matter:

JESS YARBOROUGH, Chairman
WILLIAM T. MAYO
WILLIAM H. BEVIS

Pursuant to notice, the Florida Public Service Commission, by its duly designated Chief Hearing Examiner, Harold E. Smithers, held a public hearing on the above matter in Vero Beach, Florida, on April 17, 1972.

APPEARANCES: Talbot D'Alemberte, 1414 First National Bank Building, 100 Biscayne Boulevard, Miami, Florida, for the applicant.

James T. Vocelle, P. O. Box 1900, Vero Beach, Florida, for the City of Vero Beach, Intervenor in support of the application.

John T. Brennan, 519 South Indian River Drive, Ft. Pierce, Florida, for Tom Holman, Intervenor in opposition the application (Intervention denied by Order No. 5470).

M. Robert Christ, 700 South Adams Street, Tallahassee, Florida, for the Florida Public Service Commission staff and the public generally.

O R D E R

BY THE COMMISSION:

Florida Power and Light Company (FPL or applicant) seeks Commission approval of a territorial agreement with the City of Vero Beach, entered into on November 1, 1971. The agreement is purportedly designed to eliminate destructive competition between the applicant and the city in the furnishing of electric power outside the Vero Beach city limits by establishing a boundary beyond which neither utility may extend or maintain its facilities, except under certain stated conditions (Ex. 2). This agreement also encompasses the interconnection of the two systems.

This application was filed as the result of the implied power obtained by the Commission in judicial decisions culminating in Storey v. May, 217 So.2d 304 (Fla. 1968), certiorari denied, 395 U.S. 909, 80 Sup. Ct. 1751, 23 L.Ed.2d 222, which makes it abundantly clear that the Commission has the power to approve territorial agreements which are in the public interest, and as stated in the cited case at page 307, "an individual has no organic, economic, or political right to service by a particular utility merely because he deems it advantageous to himself." The cases do not set forth standards for determining when the public interest will require the approval of territorial agreements. This was done in Order No. 3835 which states in pertinent part:

> "* * * the absence of express statutory authority to award service areas leaves us with only an implied power to do so, and it is founded primarily in the imminence of destructive competition between neighboring utilities. Patently, with such a basis for our authority, we should not approve an agreement which awards to a utility territory with respect to which

there is no reasonably immediate possibility of duplicating service by one or the other of the parties to the agreement. In truth, what we call 'territorial agreements' are more aptly described in most cases as a boundary agreement and the extent of the boundary line should bear a reasonable relationship to the area in which competition may be expected.

"In the case at hand we have such a boundary drawn across two counties, providing a line of demarcation beyond which neither utility may extend its facilities. While the contractual agreement between the parties went much farther and purported to secure to each company, inviolate from any competition by the other, all that part of the two counties on its side of the line, we do not think that we have the authority to grant our approval to this extent. Rather, our approval should be limited to the establishing of a line beyond which the utilities will not extend their service facilities, and the extent of such line should be limited to the area in which possible encroachment is threatened." (emphasis supplied) Order quashed on other grounds, Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966).

In the most recent order approving territorial agreement (5121), the Commission confirmed that duplicate lines can establish the existence of destructive competition.

Although no specific evidence was presented on the actual location of lines in the various areas involved, Appendix "A" in Exhibit 1 (the agreement) shows that duplicating and crossing of lines to serve the outlying areas must exist; further, two areas, one served by each utility, are completely encompassed by service from the other utility. Although the proposed boundary involves a great deal of "gerrymandering", it cannot be said that it is unrealistic.

Two FPL customers located in an area isolated by the present and proposed Vero service area objected to their transfer to the city system since its rates are higher. Two customers of the city testified that they did not object to their transfer to FPL. 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.

From the foregoing, the 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. It is therefore,

ORDERED by the Florida Public Service Commission that the application of Florida Power and Light Company for approval of a territorial agreement with the City of Vero Beach relative to respective electrical systems and service be granted.

By Order of Chairman JESS YARBOROUGH, Commissioner WILLIAM T. MAYO and Commissioner WILLIAM H. BEVIS, as and constituting the Florida Public Service Commission, this 29th day of August, 1972.

William S. de Mello

ADMINISTRATIVE SECRETARY

(SEAL)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

The following Commissioners participated in the disposition of this matter:

WILLIAM T. MAYO
PAULA F. HAWKINS

ORDER APPROVING MODIFICATION OF TERRITORIAL AGREEMENT

BY THE COMMISSION:

By Order No. 5520 dated August 29, 1972, issued in Docket No. 72045-EU, the Commission granted the application of Florida Power & Light Company for approval of a territorial agreement with the City of Vero Beach relative to respective electrical systems and service. On March 6, 1973, the City of Vero Beach, pursuant to a favorable vote of its City Commission, has requested a slight modification in the aforesaid territorial agreement. As a result of this request, Florida Power & Light Company on October 5, 1973, filed the captioned application with this Commission.

After a thorough review of the proposed service area transfer, the Commission finds that only a slight territorial modification of the original agreement is involved with no facilities or customers being affected. This being the case, the Commission concludes that the request is reasonable and should be approved. It is, therefore,

ORDERED by the Florida Public Service Commission that the application of Florida Power & Light Company in Docket No. 73605-EU for approval of a modification of the territorial agreement and contract for interchange of service with the City of Vero Beach, Florida, which was approved by Order No. 5520 in Docket No. 72045-EU be and the same is hereby granted.

By Order of Chairman WILLIAM H. BEVIS, Commissioner WILLIAM T. MAYO and Commissioner PAULA F. HAWKINS, as and constituting the Florida Public Service Commission, this 18th day of January, 1974.

William B. DeMilly
ADMINISTRATIVE SECRETARY

(S E A L)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 ISSUED: 11-03-81

The following Commissioners participated in the dispostion of this matter:

JOSEPH P. CRESSE, Chairman
GERALD L. GUNTER
JOHN R. MARKS, III
KATIE NICHOLS
SUSAN W. LEISNER

NOTICE OF INTENT TO APPROVE TERRITORIAL AGREEMENT

BY THE COMMISSION:

Notice is hereby given by the Florida Public Service Commission of its intent to approve a territorial agreement between Florida Power and Light Company (FPL) and the City of Vero Beach, Florida (Vero Beach or the City.)

BACKGROUND

On May 4, 1981, FPL and Vero Beach filed an Amended Petition for Approval of Territorial Agreement seeking approval of a territorial agreement defining their respective service territories in certain areas of Indian River County. That agreement establishes as the territorial bounday line between the respective service areas of FPL and Vero Beach the line defined in Appendix A to this notice.

FPL and Vero Beach have since 1972 operated under an agreement to provide interchange service and to observe territorial boundaries for the furnishings of electric service to customers which was approved by the Commission in Docket No. 72045-EU, Order No. 5520, dated August 29, 1972, and modified in Docket No. 73605-EU, Order No. 6010, dated January 18, 1974.

At this point, the Commission finds no compelling reason to set this matter for hearing. There exists no dispute between the parties and there appears to be limited customer objection to the agreement. Moreover, the Commission concludes that it has before it sufficient information to find that the agreement is in the public interest.

Nevertheless, to insure that all persons who would be affected by the agreement have the opportunity to object to the approval of the agreement, the Commission is issuing this Notice of Intent to Approve. The reasons for approving the territorial agreement are listed below.

JUSTIFICATION FOR APPROVAL OF TERRITORIAL AGREEMENT

Under this agreement, the City of Vero Beach will transfer approximately 146 electric service accounts to FPL and FPL will transfer approximately 22 electric service accounts to the City. The value of the distribution facilities to be transferred from FPL to the City is approximately $11,000, while the value of the facilities to be transferred from the City to FPL is approximately $34,200.

The parties were successful in contacting 143 of the 168 accounts affected by the new agreement. Of these, 137 returned a written questionnaire on the agreement; 117 customers were not opposed to the transfer of accounts, while the remainder were.

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.

For these reasons, the Commission finds that there is justification for the approval of the agreement.

PROCEDURE

Any request for a hearing on this matter must be received by the Commission Clerk by December 3, 1981. If no such request is received by that date, this Order will become final.

A copy of this Notice will be provided to all persons listed on this matter's mailing list. Also, a copy of this Notice will be mailed by the parties to those customers whose accounts will be transferred by the new agreement within ten (10) days of the date of this Order.

In view of the foregoing, it is

ORDERED by the Florida Public Service Commission that the Petition of Florida Power and Light Company and the City of Vero Beach for approval of a territorial agreement as is hereby defined in Appendix A is approved as delineated above. This Order shall become final unless an appropriate petiton is received (See Rule 28-5.111 and 28-5.201, Florida Administrative Code) within thirty (30) days of the issuance of this notice. It is further

ORDERED that the applicants provide, by U.S. Mail, a copy of this Notice to each customer account which will be transferred pursuant to the territorial agreement within ten (10) days of the date of this Notice. It is further

ORDERED that upon receipt of an appropriate petition regarding this proposed action, the Commission will institute further proceedings in accordance with Rule 28-5.201(3), Florida Administrative Code. It is further

ORDERED that after thirty (30) days from the date of this Notice, this Order shall either become final or the Commission Clerk will issue notice of further proceedings.

By ORDER of the Florida Public Service Commission, this 3rd day of November 1981.

(S E A L)

Steve Tribble
COMMISSION CLERK

MBT

TERRITORIAL BOUNDARY AGREEMENT
BETWEEN
FLORIDA POWER & LIGHT COMPANY
AND
CITY OF VERO BEACH, FLORIDA
DATED JUNE 11, 1980

By virtue of the entitled Agreement, the area bounded by the Atlantic Ocean and the following described boundary line is, with respect to Florida Power & Light Company (FPL), reserved to the City of Vero Beach (City). The area outside of the boundary line with repsect to the City is reserved to FPL.

Beginning where the extension of Old Winter Beach Rd. meets the Atlantic Ocean; then westerly along Old Winter Beach Rd. and its extensions to the Intracoastal Waterway; then southerly along the Intracoastal Waterway to the intersection of a line parallel to and 1/4 mile south of Kingsbury Rd. (53 St.); then west along a line parallel to and 1/4 mile south of Kingsbury Rd. (53 St.) to the Florida East Coast Railroad right-of-way; then northerly along the Florida East Coast Railroad right-of-way to Kingsbury Rd. (53 St.); then west along Kingsbury Rd. (53 St.) to Lateral H Canal; then southerly along Lateral H Canal to Lindsey Rd.; then west along Lindsey Rd. to the rear property line between 32 Ave. and 33 Ave.; then south along the rear property line between 32 Ave. and 33 Ave. to No. Gifford Rd.; then west along No. Gifford Rd. to 39 Ave; then south along 39 Ave. for a distance of 1/4 mile; then west along a line parallel to and 1/4 mile south of No Gifford Rd. to a point 1/4 mile west of 43 Ave; then south along a line parallel to and 1/4 mile west of 43 Ave. to a point 1/4 mile south of So. Gifford Rd.; then west along a line parallel to and 1/4 mile south of So. Gifford Rd. to 56 Ave.; then south along 56 Ave. to Barber Ave.; then west along Barber Ave. to a point 1/4 mile west of 58 Ave.; then north along a line parallel to and 1/4 mile west of 58 Ave. to a point 1/4 mile south of No. Gifford Rd.; then west along a line parallel to and 1/4 mile south of No. Gifford Rd. to Range Line Canal; then south along Range Line Canal to a point 1/4 mile south of SR 60; then east along a line parallel to and 1/4 mile south of SR 60 to 58 Ave.; then south along 58 Ave. to 12 St.; then east along 12 St. to 41 Ave.; then north along 41 Ave. to 14 St.; then east along 14 St. to 27 Ave.; then south along 27 Ave. for a distance of 600 ft.; then east along a line parallel to and 600 ft. south of 14 St. to 20 Ave.; then north along 20 Ave. to 14 St.; then east along 14 St. to 16 Ave.; then south along 16 Ave. to 8 St.; then east along 8 St. to 12 Ave.; then south along 12 Ave. to 4 St.; then east along 4 St. to a point 130 ft. east of extended 9 Dr.; then south along a line parallel to and 130 ft. east of extended 9 Dr. to 2 St.; then west along 2 St. to 9 Dr.; then south along 9 Dr. to So. Relief Canal; then westerly along So. Relief Canal to Lateral J. Canal; then southerly along Lateral J. Canal to Oslo Rd.; then east along Oslo Rd. to US #1; then northerly along US #1 to So. Relief Canal; then easterly along So. Relief Canal to the Intracoastal Waterway; then southerly along the Intracoastal Waterway to the Indian River - St. Lucie County Line, then east along the Indian River - St. Lucie County Line to the Atlantic Ocean.

Note: All references to avenues, drives, highways, streets, railroad R/W, canals and waterways means the centerline of same unless otherwise noted.

APPENDIX A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Florida Power and Light Company and the City of Vero Beach for approval of an agreement relating to service areas.	) DOCKET NO. 800596-EU) ORDER NO. 11580) ISSUED: 2-2-83	

The following Commissioners participated in the disposition of this matter:

CHAIRMAN JOSEPH P. CRESSE
COMMISSIONER GERALD L. GUNTER

CONSUMMATING ORDER APPROVING TERRITORIAL AGREEMENT

BY THE COMMISSION:

On November 3, 1981, the Florida Public Service Commission issued Order No. 10382, which provided that a proposed territorial agreement between the City of Vero Beach (Vero Beach) and Florida Power and Light Company (FPL) would be granted final approval, if no objections were filed within 30 days. A timely petition was filed on behalf of 106 customers served by Vero Beach who apparently did not want to be transferred to FPL. A hearing was properly noticed for May 5, 1982 in Vero Beach and was conducted as scheduled.

During the course of the hearing it became apparent that a majority of the customers wanted to continue receiving service from Vero Beach, which was provided for in the Order, but had somehow miscontrued the Commission's order as requiring that they submit a petition or a request for hearing. After listening to the parties' presentations and an explanation of the Commission's decision, the customers expressed their satisfaction with the agreement as it was originally proposed to be approved.

However, a group of Vero Beach customers residing along State Road 60 outside of Vero Beach voiced strong opposition to being transferred to FPL. The customers expressed a fear that their rates would significantly increase if they were to receive service from FPL. They also expressed their doubts concerning whether FPL would promptly respond to service problems.

Vero Beach presently has a three-phase distribution circuit along State Road 60 with single phase laterals to the north and south providing service to this group of residential customers. The territory north, west and south of the area is now within FPL's service territory. We are not unmindful of the concerns voiced by these customers. However, we find that the corridor should be transferred to FPL because this will provide the most economical means of distributing electrical service to all present and future customers in this area.

The majority of customers approved of the territorial agreement as initially presented in Commission Order No. 10382. The customers residing along the State Road 60 corridor opposed being transferred to FPL, but did not present evidence which would support reversal of the Commission's original decision. We find that Order No. 10382 should be adopted as the Commission's final order.

We believe that our decision is in the best interest of all parties concerned. Our approval of the territorial agreement

DOCUMENT NO.
1003-83

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. We find continued support for our approval of the territorial agreement in a Florida Supreme Court decision, Storey v. Mayo, 217 So. 2d 304, (Fla. 1968), cert. den., 395 U.S. 909, 80 Sup. Ct. 1751 23 L. Ed 2d 222, which held that:

> "...Because of this, the power to mandate an efficient and effective utility in the public interest necessitates the correlative power to protect the utility against unnecessary, expensive competitive practices. While in particular locales such practices might appear to benefit a few, the ultimate impact of repetition occurring many times in an extensive system-wide operation could be extremely harmful and expensive to the utility, its stockholders and the great mass of its customers."

In that decision the Supreme Court also held that:

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

We find that the assertions made on behalf of those customers residing within the corridor along State Road 60 do not justify reversing our decision in this case as proposed in Order No. 10382. It is, thefore,

ORDERED by the Florida Public Service Commission that Order No. 10382, issued on November 3, 1981, is hereby adopted as a final Order.

By ORDER of the Florida Public Service Commission, this 2nd of FEBRUARY 1983.

STEVE TRIBBLE
COMMISSION CLERK

(S E A L)

ARS

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 ISSUED: 2-9-88

The following Commissioners participated in the disposition of this matter:

KATIE NICHOLS, CHAIRMAN
THOMAS M. BEARD
GERALD L. GUNTER
JOHN T. HERNDON
MICHAEL McK. WILSON

NOTICE OF PROPOSED AGENCY ACTION

ORDER APPROVING AMENDMENT TO TERRITORIAL AGREEMENT BETWEEN FLORIDA POWER & LIGHT COMPANY AND THE CITY OF VERO BEACH

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are adversely affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

By a joint petition filed on October 16, 1987, Florida Power & Light Company (FPL) and the City of Vero Beach (City) requested approval of an amendment to their previously approved territorial agreement. (See Orders Nos. 5520, 10382, and 11580). The original agreement and subsequent amendments delineate the service territories of the two utilities in Indian River County, Florida.

According to the proposed amendment, a new subdivision, known as Grand Harbor, is presently under construction, which straddles the territorial dividing line, previously approved by the Commission. To avoid any customer confusion which may result from this situation 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. The results of this amendment will be the transfer of the area, shown in Attachment 1, from FPL to the City. There are currently no customers or facilities existing in the area.

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, on a proposed agency action basis, the amendment to the territorial agreement. It is, therefore,

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's and the City of Vero Beach's joint petition for approval of an amendment to a territorial agreement is granted. It is further

DOCUMENT NUMBER-DATE
01453 FEB-9 88
FPSC-RECORDS/REPORTING

ORDERED that Attachment 1, is hereby made a part of this order. It is further

ORDERED that the provisions of this order, issued as proposed agency action, shall become final unless a petition in the form provided by Rule 25-22.036, Florida Administrative Code is received by the office of the Director of the Division of Records and Reporting at 101 East Gaines Street, Tallahassee, Florida 32301 by the close of business on March 1, 1988.

By ORDER of the Florida Public Service Commission, this 9th day of FEBRUARY, 1988.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MRC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes (1985), as amended by Chapter 87-345, Section 6, Laws of Florida (1987), to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on March 1, 1988. In the absence of such a petition, this order shall become effective March 2, 1988 as provided by Rule 25-22.029(6), Florida Administrative Code, and as reflected in a subsequent order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on March 2, 1988, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

AMENDMENT TO TERRITORIAL BOUNDARY AGREEMENT BETWEEN FLORIDA POWER & LIGHT COMPANY AND CITY OF VERO BEACH, FLORIDA

This Amendment to a Territorial Boundary Agreement dated June 11, 1980, by and between Florida Power & Light Company (FPL) and the City of Vero Beach, Florida (City), is made this 18TH day of SEPTEMBER, 1987.

WHEREAS, the parties hereto have observed certain territorial boundaries to eliminate undesirable duplication of facilities and to promote economic and efficient electric service to their respective customers; and

WHEREAS, the parties deem it desirable to redefine the territorial boundaries previously approved by the Florida Public Service Commission so that such territorial division will better conform to present land development and will avoid uneconomic duplication of facilities in a development known as Grand Harbor.

NOW, THEREFORE, in consideration of the foregoing premises and of the mutual benefits to be obtained from the covenants herein set forth, the parties do hereby agree as follows:

1. The map attached hereto and labelled Exhibit A shows the existing territorial boundaries and the areas in which the City and FPL provide electric service to retail customers.

2. The map attached hereto and labelled Exhibit B shows the existing territorial boundary line and the areas in which the City and FPL provide electric service in and around the Grand Harbor development project. The map also shows the new boundary line agreed upon by the parties and further described in this Amendment, adjusting the existing boundary to the north.

3. The parties agree that the existing boundary line shown on Exhibit B shall be redefined as follows:

> Commencing at the juncture of the existing boundary and the west property line of Grand Harbor (approximately 700 feet east of U.S. Highway 1), the new boundary line shall be established on said Grand Harbor property line, then extending north on said property line (approximately 650 feet) to the Grand Harbor/River Club property line, then east to a point where the Grand Harbor property line turns north, continuing easterly following the proposed drainage and waterways to the channel of the Indian River and the point of intersection with the existing territorial boundary.

4. The provisions of this Amendment shall supersede the territorial boundary-related provisions of the Territorial Boundary Agreement between the parties dated June 11, 1980 for that certain boundary described herein. However, the remaining provisions of said Agreement shall in no way be affected by this Amendment.

5. This Amendment shall not be effective until the date it is approved by the Florida Public Service Commission. The parties agree to cooperate in petitioning the Commission for approval of the Amendment under Section 366.04(2)(d), Florida Statutes (1986 Supp.)

IN WITNESS WHEREOF, the parties hereto have caused this Amendment to be executed by their duly authorized representatives, and copies delivered to each party, as of the day and year first above written.

FLORIDA POWER & LIGHT COMPANY

By: _____

Attest:

By: _____
Secretary

CITY OF VERO BEACH, FLORIDA

By: _____
Mayor

By: _____
City Manager

By: _____
City Attorney

Attest:

By: _____
City Clerk

Exhibit C

RESOLUTION 414

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) capacity reservation fees,

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

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

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

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

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

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

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

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

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

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

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

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

ACCEPTED:

CITY OF VERO BEACH

By: _____
Mayor

Date: 6 Nov. 1986

Attest _____
City Clerk

TOWN COUNCIL
TOWN OF INDIAN RIVER SHORES

By: _____
Mayor

Attest: _____
Town Clerk

Resolution 414-Electric

Exhibit D

Wednesday, August 12, 2015

The Honorable Dick Winger
P. O. Box 1389
Vero Beach, FL 32961-1389

Dear Mayor Winger,

For more than six years Florida Power and Light Company ("FPL") has worked with the City of Vero Beach ("COVB" or "City") towards the common goal of delivering lower electric bills to Vero Beach customers. In 2013, the City Council approved a Purchase and Sale Agreement ("PSA") with FPL for its electric system, and City voters overwhelmingly supported the sale. Needless to say, we are disappointed that the sale remains stalled and we continue to believe strongly that the purchase of the entire City electric system is the best course of action for all customers.

Nevertheless, in our continuous effort to find solutions and alternatives to lowering bills and providing benefits to the greatest number of Vero Beach customers, and at the request of the Town of Indian River Shores ("Town"), FPL would like to submit this proposal to purchase the electric system of the Town. Since our initial meeting with you in May on the potential sale of the Town's electric system, FPL has spent considerable time analyzing data from several sources and looked at various scenarios. We are excited by this opportunity, which provides benefits for all parties, and hope to engage in a constructive dialogue with you and the City Council regarding this proposal. We are also amenable to including the Town in that dialogue at the appropriate time.

The proposal is as follows:

FPL will pay the City $13.0 million in cash with the following assumptions and considerations:

- FPL will acquire the COVB distribution assets (feeders, laterals and services) directly connected to the Town's customers. It is our understanding no transmission level assets are present within the Town's footprint.

- FPL assumes an execution date of October 1, 2015, and a close date of April 1, 2016. These dates are subject to approval by both the Federal Energy Regulatory Commission and the Florida Public Service Commission.
- It is estimated that it will take 28 months to properly integrate the Town's electric system into FPL's transmission grid.
- During this period between transaction close and the completion of transmission upgrades, FPL proposes to utilize the distribution and transmission assets of COVB to wheel power to the Town from FPL's transmission system. As compensation for providing these transmission services, FPL will pay COVB an additional monthly fee of $25,000 (the fee was determined using a comparable wheeling approach if FPL was to provide the service). It is estimated this service would be provided for a period of approximately two (2) years with adjustment as needed due to the transmission work being performed by FPL to tie the Town into the FPL transmission system.
    - The route FPL analyzed for the wheeling starts at FPL's Emerson substation and transmits over the COVB/Fort Pierce 138kV line to Substation 20, then to Substation 8, Substation 11, Substation 10 and then finally to Substation 9.
    - FPL understands that because the power needs to flow from Emerson to Substation 20, we will need to utilize the 138kV line jointly owned by COVB and Fort Pierce and that Fort Pierce will need to be involved in these discussions.
- Further, to successfully integrate the Town's customers, FPL will need customer data to be provided by COVB. The specifics of the information will be negotiated between the parties and will be safeguarded by FPL in a manner similar to our existing 4.8 million customer accounts. All deposits held by COVB for the Town's customers would be returned to those customers upon closing. It is estimated the lead time required for Customer Service integration is approximately 6 months. This timeline could start as soon as an agreement is executed between the parties.

FPL feels it is important to explain the basis for our proposal. The current PSA between FPL and COVB provides for a cash offer and several other considerations. All totaled, the entire package of the PSA provides for approximately $172 million in value to COVB. With a total COVB Electric Utilities customer count of approximately 34,000, the PSA provides for a price-to-customer purchase value of approximately $5,050. However, the transmission upgrades and substation relocation embedded in the PSA should be considered system integration costs. Removing those two items from the value of the PSA leaves a purchase value of approximately $4,500 per customer. The Town proposal contained herein similarly has separate components of value to COVB and integration costs. The cash component to COVB for the Town's assets is similarly $4,500 per customer. In addition, there are significant transmission efforts that FPL must undertake in order to tie the Town's system into the FPL transmission grid. The more than $12 million required for these required upgrades bring the total value of this transaction to approximately $8,500 per customer.

The proposal contained herein is indicative and does not constitute a binding offer to purchase the assets of the Town. Purchase of the Town's system is contingent upon approval of FPL's Board of Directors and execution of definitive agreements. Our team has worked hard to craft a fair and reasonable proposal and we look forward to engaging in a constructive and productive discussion with the City Council, as well as the City Manager. Please do not hesitate to call me at (561)694-3510 or Amy Brunjes at (772) 337-7006 if you have any questions or wish to discuss.

Warmest regards,

Sam Forrest
Vice President, Energy Marketing & Trading
Florida Power & Light Company

CC: City of Vero Beach City Council Members
James O'Connor, City of Vero Beach City Manager
Wayne Coment, City of Vero Beach City Attorney
The Honorable Brian Barefoot, Indian River Shores

Exhibit E

Filing # 29796177 E-Filed 07/17/2015 02:51:03 PM

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

TOWN OF INDIAN RIVER SHORES,
a Florida municipality,

CASE NO.: 2014-CA-000748

Plaintiff,

v.

CITY OF VERO BEACH, a Florida
municipality,

Defendant.
_____/

THE TOWN OF INDIAN RIVER SHORES' RESPONSE IN OPPOSITION TO VERO BEACH'S MOTION TO DISMISS AMENDED COMPLAINT AND SUPPORTING MEMORANDUM OF LAW

Plaintiff, the Town of Indian River Shores (the "Town"), submits this response and memorandum of law in opposition to Vero Beach's Motion to Dismiss Plaintiff's Amended Complaint (the "Motion to Dismiss"). As described below, this Court should deny the Motion to Dismiss filed by Defendant, the City of Vero Beach (the "City"), because the Court has jurisdiction over the matters that are the subject of the Town's Amended Complaint and the Amended Complaint clearly states a cause of action in each of its four counts.

INTRODUCTION

Overview of Response to Motion to Dismiss

In its Motion to Dismiss, the City attempts to characterize the Amended Complaint as something which it is not. This lawsuit does not involve parties to a territorial agreement, a territorial dispute arising out of a territorial agreement, or any request to amend a territorial agreement. Those matters are admittedly within the jurisdiction of the Florida Public Service Commission (the "PSC"). Instead, the allegations within the four corners of the Amended

Complaint show that this lawsuit involves constitutional, statutory and contract issues clearly within the jurisdiction of this Court and beyond the jurisdiction of the PSC.

The allegations of the Amended Complaint involve a dispute in which one municipality, the City, seeks to exert extra-territorial powers within the corporate limits of another municipality, the Town, without the Town's consent. The City currently provides electric service within a portion of the Town, with the Town's express written consent pursuant to an electric franchise agreement between the City and the Town (the "Franchise Agreement") which will expire on November 6, 2016. The Town has notified the City that the Town will not renew the Franchise Agreement when it expires and that the City will no longer have the Town's consent to provide extra-territorial electric service within the Town's corporate limits at that time. Simply put, the Town believes that because of the limitations on extra-territorial powers imposed by the Florida Constitution, Chapter 166, Florida Statutes (the "Municipal Home Rule Powers Act"), and Chapter 180, Florida Statutes, the City does not have the requisite authority under current general or special law to exercise extra-territorial powers within the corporate limits of the Town without the Town's consent. This lawsuit also involves the City's charging of unreasonable electric utility rates to its customers within the Town in breach of the Franchise Agreement and in violation of Florida law. This lawsuit further involves the City's anticipatory breach of the Franchise Agreement based upon its unwillingness to accept that the bargained-for Franchise Agreement has a finite term of 30 years and does not give the City a perpetual easement to occupy the Town's rights-of-way and public areas.

This lawsuit does *not*, as the City mistakenly argues, request the Court to make rulings regarding the City's territorial service agreement (the "Territorial Agreement") with Florida Power & Light ("FPL"), or any PSC order approving the Territorial Agreement. Rather, Count I of the

Town's Amended Complaint asks for a declaration of the rights of the Town and the City upon expiration of the Franchise Agreement under: (a) the terms of the Franchise Agreement; (b) Article VIII, Section 2(c) of the Florida Constitution; (c) Section 166.021(3)(a), Florida Statutes, which is part of the Municipal Home Rule Powers Act; and (d) Section 180.02, Florida Statutes. As the PSC and the City itself have recognized, the PSC is not the proper forum to seek a declaration about a franchise agreement or about the application of the Florida Constitution and the statutes cited above to the Town's and City's municipal rights, as the PSC does not have jurisdiction to construe a franchise agreement or the constitutional or statutory provisions at issue in this case. Moreover, the Amended Complaint specifically alleges that "the Town is *not* seeking to challenge the PSC's authority under Section 366.04, Florida Statutes, to coordinate the statewide electric grid through its consideration and approval of territorial agreements." (Am. Compl. ¶ 53) (emphasis added). The Amended Complaint itself recognizes that the Territorial Agreement will need to be addressed after this Court resolves the separate legal issues which are properly before it and which cannot be addressed by the PSC. (*Id.*. ¶ 13.) For clarity, the Town acknowledges that only the PSC can approve a modification of the Territorial Agreement, and that until the PSC's order approving the Territorial Agreement is modified the City can continue to provide electric service in the Town. The PSC's jurisdiction over territorial agreements, however, in no way limits this Court's proper role in determining the rights of the Town and the City under the Franchise Agreement, the Florida Constitution, the Municipal Home Rule Powers Act, and Section 180.02, Florida Statutes.

The City is quick to cite Section 366.04(1), Florida Statutes, for the proposition that the jurisdiction "conferred" on the PSC is exclusive and superior to that of all other "municipalities [and] towns." (Motion to Dismiss, at 5-6.) But the City fails to apprise this Court of the rest of

the story—namely that the jurisdiction "conferred" on the PSC is by no means pervasive nor is it preclusive of the claims raised by the Amended Complaint. While the PSC has the authority to approve territorial agreements and resolve territorial disputes, nothing in that or any other aspect of the PSC's jurisdiction under Chapter 366, Florida Statutes, restricts the power of a municipality like the Town to govern and control the use of its rights-of-way and other public places pursuant to franchise agreements. *See* § 366.11(2), Fla. Stat. ("Nothing herein shall restrict the police power of municipalities over their streets, highways and public places…."). Furthermore, the PSC has expressly recognized that the jurisdictional limitation imposed by Section 366.11(2) precludes it from interceding into disputes such as this one that fundamentally relate to the terms and conditions of a franchise agreement between a Florida municipality and an electric utility. *In re: Petition of the City of Miami Beach for Emergency Hearing,* Order No. 10543, 82 F.P.S.C. 196 (1982) ("[T]he Commission may not interpose itself in the terms and conditions of the franchise contract. This view is required by the clear dictates of the Legislature in Section 366.11(2).").

The City also fails to point out that the PSC does not have jurisdiction over the City's electric utility rates. *City of Tallahassee v. Mann*, 411 So. 2d. 162, 163 (Fla. 1982) ("We agree that the [PSC] does not have jurisdiction over a municipal electric utility's rates."); *Amerson v. Jacksonville Elec. Auth.*, 362 So. 2d 433, 444 (Fla. 1978) ("The PSC's power to regulate is based upon the provisions of Chapter 366…. With limited exceptions, … the jurisdiction of the PSC is limited to 'public utilities' …. Thus, the statute by its very terms specifically excludes electric utilities operated by … municipalities from its rate change jurisdiction."). It is plain to see that the jurisdiction conferred on the PSC by the Florida Legislature does not preclude the Town's claims.

In Count II, the Town validly states a claim for anticipatory breach of the Franchise Agreement based on the City's assertion that it will continue to provide service in the Town and occupy the Town's rights-of-way after the Franchise Agreement's expiration on November 6, 2016. The City's assertion that it has some never-ending right to occupy the Town's rights-of-way and public areas after the Franchise Agreement expires is contradicted by Florida law. The Town sufficiently alleges that the City has a contractual obligation under the Franchise Agreement to vacate the Town's rights-of-way and public areas, which the City repudiates, and that the Town has been harmed. The City argues that the only damages claimed are attorneys' fees and costs, but that is not what the Amended Complaint alleges.

Count III is a claim for breach of contract based on the City's failure to operate its electric utility and furnish electric services in accordance with normally accepted electric utility standards and charge only reasonable rates for its electric service as required by the Franchise Agreement. The City makes numerous arguments about general ratemaking principles, but this count does not ask the Court to engage in ratemaking. Rather, it alleges that the City has breached its *contractual* obligations under the Franchise Agreement to provide reasonable rates and prudently operate its utility, and that the Town has been harmed as a result. The Town is certainly entitled to damages if these bargained-for obligations were breached, and has stated a valid claim on that basis.

Count IV asserts a claim for declaratory and supplemental relief based on the City's violation of its legal duties as a municipal utility to charge only reasonable rates and to act prudently in managing its electric utility system in order to protect its customers from unreasonable rates and oppressive practices. The City makes mistaken arguments about the Town's request for supplemental relief and the use of a jury to address factual disputes, which are contradicted by the face of the Declaratory Judgment Act. Moreover, the City concedes that declaratory relief is

properly sought to challenge unreasonable rates and actually cites to a series of cases for the principle that the "courts will intervene to strike down unreasonable or discriminatory rates prescribed by the Legislature, a municipality or a municipal commission." (Motion to Dismiss at 23.) That is precisely what the Town is seeking. In disputes like this one, where the Motion to Dismiss itself demonstrates the disagreement and uncertainty over the parties' respective rights, the liberal construction of Chapter 86 requires allowing the claim for declaratory relief to proceed.

For these and other reasons set forth below, all of the Counts in the Amended Complaint state valid causes of action and the Motion to Dismiss should be denied.

Legal Standards

In considering a motion to dismiss, the trial court "may not properly go beyond the four corners of the complaint in testing the legal sufficiency of the allegations set forth therein." *Stubbs v. Plantation Gen. Hosp. Ltd. P'ship*, 988 So. 2d 683, 684 (Fla. 4th DCA 2008) (quotation omitted). The party moving for dismissal must "admit[ ] all well pleaded facts as true, as well as reasonable inferences that may arise from those facts." *Id.* (quotation omitted). Thus, "[i]f a Complaint contains any merit, it is to be liberally construed in favor of the pleader when subjected to a motion to dismiss." *Donaldson v. City of Titusville*, 345 So. 2d 800, 801 (Fla. 4th DCA 1977).

MEMORANDUM OF LAW

A review of the allegations of the Amended Complaint show that the Court has jurisdiction over this action and that all four Counts of the Amended Complaint state a claim upon which relief can be granted. Accordingly, the City's Motion to Dismiss must be denied.

I. The Town's Request for Declaratory Relief in Count I States a Valid Claim And This Court Has the Only Proper Jurisdiction to Resolve It

In Count I of the Amended Complaint, the Town states a valid claim for declaratory relief that, upon the imminent expiration of the Franchise Agreement, the City does not have the statutory authority required by Article VIII, Section 2(c) of the Florida Constitution, and Sections 166.021(3)(a) and 180.02(2), Florida Statutes, to exercise extra-territorial powers and provide electric service within the Town without the Town's consent. Count I also encompasses a valid claim for declaratory relief that the Town—obviously subject to the PSC's regulatory oversight and approval—has been given the statutory authority to decide how electric service is to be furnished to its inhabitants. The City's Motion to Dismiss makes three related arguments regarding the jurisdiction of the PSC over territorial agreements and the Town's purported administrative remedies, but all of these arguments are misplaced. The Town is *not* seeking a ruling from the Court on the Territorial Agreement and it is settled that this Court, and not the PSC, is the proper tribunal to address the issues that are the subject of the Town's request for declaratory relief.

A. Count I Validly States A Claim For Declaratory Relief

The purpose of the declaratory judgment statute is to "afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations," and it "is to be liberally construed." *Lutz v. Protective Life Ins. Co.*, 951 So. 2d 884, 888 (Fla. 4th DCA 2007) (citation omitted). "The test recognized in this state of whether or not a complaint will give rise to a proceeding under the Declaratory Judgment Act inquires whether or not the party seeking a

declaration shows that he is in doubt or is uncertain as to existence or non-existence of some right, status, immunity, power or privilege and has an actual, practical and present need for a declaration." *Id. at* 889. "There must be a bona fide controversy, justiciable in the sense that it flows out of some definite and concrete assertion of right, and there should be involved the legal or equitable relations of parties having adverse interests with respect to which the declaration is sought." *Id.* "A party is entitled to a declaration of rights where the ripening seeds of controversy make litigation in the immediate future appear unavoidable." *S. Riverwalk Invs., LLC v. City of Ft. Lauderdale*, 934 So. 2d 620, 623 (Fla. 4th DCA 2006).

Here, the Town has a bona fide controversy with the City over whether the City has the statutory powers required by Florida's Constitution, the Municipal Home Rule Powers Act, and Chapter 180, Florida Statutes, to exercise extra-territorial powers within the corporate limits of the Town and occupy the Town's rights-of-way and public areas after the expiration of the Franchise Agreement on November 6, 2016. The Town asserts that the City will no longer have the requisite powers under general or special law to serve inhabitants inside the Town's corporate limits following the expiration of the Franchise Agreement, but that the Town has the power under its enabling legislation to decide how electric service is to be furnished to its residents. (Am. Compl. ¶¶ 43-56.) The City has indicated that it intends to continue to provide extra-territorial electric service within the Town following expiration of the Franchise Agreement and prevent the Town from reasonably exercising its municipal police power with respect to its rights-of-way and electric service to Town residents. (*Id*. ¶ 57.) The Town has a clear legal and equitable interest in the declaration that the City has no inherent municipal authority to exert extra-territorial powers within the corporate limits of the Town without the Town's consent. That consent is currently furnished by the Franchise Agreement. As a corollary to this principle, the Town believes it has a right under

Florida's Constitution, the Municipal Home Rule Powers Act, and Chapter 180 to be protected from the City's extra-territorial encroachments to which the Town has not consented.

Indeed, Florida law reflects that these questions are particularly well-suited to be raised through a claim for declaratory relief. Declaratory relief is an appropriate mechanism to resolve a dispute over the rights of parties to a utility franchise agreement. *See, e.g., Lee Cnty. Elec. Co-op., Inc. v. City of Cape Coral*, 159 So. 3d 126, 132 (Fla. 2d DCA 2014) (affirming summary judgment for municipality that brought action against utility company seeking declaration of rights under franchise agreement), *rev. denied*, 151 So. 3d 1226 (Fla. 2014). Declaratory relief is also particularly appropriate to resolve a legal dispute between two municipalities over whether one is required to accept extra-territorial utility services from the other as a matter of law. *See City of Indian Harbour Beach v. City of Melbourne*, 265 So. 2d 422, 424 (Fla. 4th DCA 1972) (addressing whether "Indian Harbour Beach [must] permit the intrusion and maintenance of another municipality's utility lines and services contrary to its municipal will when its rates and services were not acceptable to Indian Harbour Beach," and declaring that "[i]n the absence of ameliorating action on the part of the cities and accord, such as a franchise agreement providing for future rate structures and regulations, Indian Harbour Beach is empowered to expel and Melbourne is entitled to withdraw as concerns the water furnishing system of Melbourne to Indian Harbour Beach").

B. This Court Has Subject Matter Jurisdiction

The City's first argument for dismissal attempts to recast the Town's first count as an attack on the PSC's order approving the Territorial Agreement between the City and FPL, since territorial agreements lie under the exclusive jurisdiction of the PSC.[1] There is nothing within the four

[1] By way of background, in 1972 the PSC approved the bi-lateral Territorial Agreement entered between the City and FPL. (Motion to Dismiss at Ex. E.) At the time, the City already operated within the Town pursuant to a franchise agreement entered into between the Town and City in 1968 which was the predecessor to the current Franchise Agreement. (Am. Compl. ¶ 17.) Since that time, the Territorial Agreement has been periodically amended by the

corners of the Amended Complaint, however, that indicates that the Town is asking the Court to construe, interpret, modify or amend the Territorial Agreement or any PSC order approving the Territorial Agreement.

Contrary to the City's assertion, the Town's lawsuit is not a collateral attack on the Territorial Agreement. Rather, the lawsuit asks this Court to determine, under Article VIII of the Florida Constitution and Sections 166.021(3)(a) and 180.02(2), Florida Statutes, whether the City has the requisite powers conferred by general or special law to provide extra-territorial service within the Town's corporate limits without the Town's consent. That consent is currently provided in the Franchise Agreement but will expire when that agreement expires in November of 2016. The Town believes that the Florida Constitution, the Municipal Home Rule Powers Act and Section 180.02, Florida Statutes—matters that are appropriate to be addressed by this Court's jurisdiction—protect it from such extra-territorial encroachments. The PSC does not have jurisdiction to interpret franchise agreements or to make declarations regarding the constitutional and statutory provisions at issue in the Amended Complaint. Those matters are within the jurisdiction of this Court. Of course, the Territorial Agreement can be addressed in due course by the PSC following this Court's rulings on the fundamental constitutional and statutory issues that are not within the PSC's jurisdiction.

The PSC order attached as Exhibit "G" to the City's Motion to Dismiss evidences that the City is well aware, and has admitted, that the PSC does not have jurisdiction to address the issues which the Town has properly brought before this Court. In that order, the PSC declined to address

City and FPL, and such amendments have been approved by the PSC. (Motion to Dismiss at Ex. E.) Through the course of all of these amendments, the City has had the Town's consent to provide extra-territorial electric service within the Town by virtue of the Franchise Agreement that will expire in November of 2016 or by virtue of its predecessor. The current Territorial Agreement between the City and FPL recognizes service areas by the City within the Town that are consistent with the Franchise Agreement. *Id.*

a series of questions presented by Indian River County concerning its rights under its franchise agreement with the City. In contrast to this case which involves one municipality encroaching upon a neighboring municipality's home rule powers, those proceedings before the PSC addressed whether the City can continue to serve the *unincorporated* portions of the County following the expiration of the County's franchise agreement with the City.[2] The PSC's order attached as Exhibit G to the City's Motion shows that the City expressly acknowledged, and in fact argued, that a circuit court, not the PSC, has jurisdiction to resolve issues requiring the interpretation of franchise agreements, statutes granting home rule and police powers to local governments, and real property issues with regards to rights-of-way:

> Vero Beach maintains that this threshold legal issue involving the interpretation of provisions of Chapter 125, F.S. **should be resolved in a circuit court**, not assumed in this declaratory statement proceeding.
>
> Vero Beach alleges that the Petition incorrectly assumes that if the Franchise Agreement [between the City and the County] terminates the County can require Vero Beach to remove its electric facilities from the County's rights-of-way. Vero Beach states that the resolution of this legal issue will involve the construction of the Franchise Agreement, the application of preemption doctrine, the application of various real property principles including the rights of hold-over tenants, the interpretation of easements, the analysis of eminent domain law, and the analysis of potential prescriptive rights. Vero Beach maintains that such real property issues **should be resolved by a circuit court** and not assumed away in this declaratory statement proceeding.

(Exhibit G to City's Motion to Dismiss, *In re: Petition for Declaratory Statement or Other Relief Regarding the Expiration of the Vera Beach Electric Service Franchise Agreement, by the Board of County Commissioners, Indian River County, Florida*, Order No. PSC-15-0101-DS-EM, 15 F.P.S.C. 2:090 at 19 (Feb. 12, 2015) (emphasis added).)[3]

[2] *See* Motion to Dismiss at Ex. F at 1 and at Ex. G at 1-3.

[3] The PSC's order denying Indian River County's requested declaratory statement, and a separate order granting a request for declaratory relief by the City, are currently pending on appeal to the Florida Supreme Court. *Indian River County v. Graham*, Case No. SC-15-504 and *Indian River County v. Graham*, Case No. SC15-505.

Moreover, in denying the County's petition for declaratory statement, the PSC itself expressly stated that it had no "authority" to address statutes granting local governments' home rule and police powers, nor did it have any "authority" to address the powers of local governments under the Florida Constitution:

> We decline to issue a declaratory statement as to Questions a-c, e-i, and n because answering **those questions would require application of provisions of law not within our authority.**
>
> The Petition is premised on a legal assumption that Indian River County has statutory authority to assume ownership of Vero Beach's Electric Facilities and provide electric service within the Franchise Area (Questions a-c, e, g, i) and that it has legal authority to choose the electric service provider for the Franchise Area other than Vero Beach once the Franchise Agreement expires, notwithstanding our Territorial Orders (Questions c, f, h-i, and n). A complete determination of whether the County meets the statutory definition of "public utility" or "electric utility," whether it has the authority to provide electric service, or whether it has the authority to replace Vero Beach as the service provider, notwithstanding the Territorial Orders would involve an analysis of the powers of counties through interpretation of Chapter 125, F.S., and Florida Constitution Article VIII § 1(f) and (g). It would not be possible to give a complete and accurate declaration on these questions without addressing the County's statutory and constitutional powers. **We have no authority over Chapter 125, F.S., or over any provision of the Florida Constitution**. [citing *Carr v. Old Port Cove Prop. Owners Ass'n*, 8 So. 3d 403, 404-405 (Fla. 4th DCA 2009) (a declaratory statement is not the appropriate mechanism to interpret a constitutional provision); *PPI, Inc. Ha. Dep't of Bus. & Prof'l Regulation, Div. of Parimutuel Wagering,* 917 So. 2d 1020 (Fla. 1st DCA 2006) (the agency had the authority to deny the request for declaratory statement because it was not authorized under *section 120.565, F.S.*, to construe a constitutional amendment).] Giving an incomplete declaration that only addresses Chapter 366, F.S., would undermine the purpose of the declaratory statement, which is to aid the petitioner in selecting a course of action in accordance with the proper interpretation and application of the agency's statute. [citing *Carr*, 8 So. 3d at 405.]
>
> Additionally, the issue raised in Question i of **how expiration of the Franchise Agreement affects Vero Beach's use of the County's rights-of-way does not raise a matter within our jurisdiction**, and we therefore have no authority to address this issue in a declaratory statement. . . . **We have no jurisdiction over county franchise agreements and, therefore, no authority to issue a declaratory statement on Question 1 concerning the County's possible future actions concerning extension of its Franchise Agreement with Vero Beach**.

(*Id.* at 30-31 (emphasis added).)

The PSC's position that it does not have the jurisdiction to interpret or construe franchise agreements is nothing new. In 1982, the PSC confirmed that it was beyond its purview under Chapter 366, Florida Statutes, to interject itself into issues associated with the construction or interpretation of a franchise agreement between a Florida municipality and an electric utility:

> . . . the Commission may not interpose itself in the terms and conditions of the franchise contract. This view is required by the clear dictates of the Legislature in Section 366.11(2), Florida Statutes, that:
>
> > (2) Nothing herein shall restrict the police power of municipalities over their streets, highways, and public places or the power to maintain or require the maintenance thereof or the right of a municipality to levy taxes on public services under s. 166.231 or affect the right of any municipality to continue to receive revenue from any public utility as is now provided or as may be hereafter provided in any franchise.

In re: Petition of the City of Miami Beach for Emergency Hearing, Order No. 10543, 82 F.P.S.C. 196 (1982).[4]

The PSC's pronouncement that it has "no jurisdiction" to interpret franchise agreements fits with the case law holding that utility franchise agreements are enforceable contracts, and the interpretation of rights and responsibilities under those contacts is for the circuit courts to resolve. *See Fla. Power Corp. v. City of Casselberry*, 793 So. 2d 1174, 1177, 1181 (Fla. 5th DCA 2001). The *Casselberry* case is particularly instructive. In that case, the City of Casselberry filed a complaint for declaratory judgment with the circuit court seeking a determination of its rights under a franchise agreement with Florida Power Corporation ("FPC"). *Id.* at 1177. In response, FPC argued that "the court had no jurisdiction to hear the matter because the PSC had exclusive jurisdiction regarding matters of rates, service and territorial disputes involving electric utilities."

[4] In 1989, the PSC again reaffirmed that it lacked jurisdiction to interpret the terms of a franchise agreement involving a water utility explaining that "[c]oncerns of parties to such agreements would be more appropriately addressed in a circuit court action." *In re: Application of Topeka Group, Inc. to Acquire Control of Deltona Corp.'s Util. Subsidiaries*, Order No. 22307, 89 F.P.S.C. 12:54 (1989).

Id. The trial court rejected those arguments and ordered relief based on the rights of the parties under the franchise agreement. *Id.* The trial court's order was sustained on appeal where the Fifth District Court of Appeal noted that the issues regarding the PSC's "exclusive" jurisdiction raised by FPC were issues for another day and did not deprive the trial court of its jurisdiction to provide relief:

> [FPC] maintains that there are many obstacles to Casselberry's operation of an electrical distribution system within its city limits, the main one being that the PSC has exclusive jurisdiction over matters of rates, service and territorial disputes involving electrical utilities and that the Federal Energy Regulatory Commission (FERC) now exists which also would have jurisdiction over Casselberry's operations. It is indisputable that Casselberry will not be able to operate its own utility system without integrating its system within and being subject to regulation of a comprehensive system designed to serve the public with electrical energy. **But those complex matters are reserved for another day and are prematurely raised in this appeal.** The sole issue today is whether Casselberry is entitled to enforcement of a provision allowing it to seek the determination of a purchase price through arbitration.

Id. (emphasis added).

Likewise, the issues related to the PSC's jurisdiction to approve the Territorial Agreement and any modifications thereof should be "reserved for another day" following a declaration of the Town's rights under the Franchise Agreement, the Florida Constitution, the Municipal Home Rule Powers Act and Chapter 180, Florida Statutes, as requested in the Amended Complaint. As in *Casselberry*, the PSC jurisdiction issues are being "prematurely raised" by the City at this time. The Amended Complaint makes clear that the Town is not asking for a declaration regarding the Territorial Agreement or any order of the PSC approving the Territorial Agreement. Instead, the Amended Complaint expressly alleges that "the Town is *not* seeking to challenge the PSC's authority under Section 366.04, Florida Statutes, to coordinate the statewide electric grid through its consideration and approval of territorial agreements." (Am. Compl. ¶ 53.) Moreover, as stated above, the Town acknowledges that only the PSC can approve a modification of the boundaries of

the Territorial Agreement but that in no way limits this Court's role in resolving the separate legal issues in this lawsuit. (*Id.* ¶¶ 13, 53.)

The cases cited by the City on these issues are readily distinguishable. In *Roemmele-Putney v. Reynolds*, 106 So. 3d 78 (Fla. 3d DCA 2013), plaintiffs, including Monroe County, filed for injunctive and declaratory relief asserting that a local ordinance gave the County the right to bar Keys Energy Services ("KES") from providing electric service to No Name Key even though KES was authorized to serve the island under a territorial agreement that had been approved by the PSC. *Id.* at 79-80. The trial court dismissed the complaint on grounds that the matter fell within the PSC's jurisdiction over territorial agreements. *Id.* at 80. That decision was affirmed by the Third District Court of Appeal which found that the PSC "had continuing jurisdiction to review in advance for approval or disapproval any proposed modification to the [territorial] agreement." *Id.* at 81. The District Court obviously was troubled by the County's brutish attempt to use "circuit court injunctions" to modify a PSC-approved territorial agreement. *Id.* That is not at all what this lawsuit is about. Here, the Town does not seek to usurp the PSC's jurisdiction over territorial agreements. In fact the Town acknowledges that only the PSC can approve a modification of the Territorial Agreement, and that until the PSC's order approving that agreement is modified the City can continue to provide electric service in the Town. The Town is simply asking this Court to address questions of law the PSC has acknowledged it has no authority over so that any appropriate regulatory modification of the Territorial Agreement can be resolved by the PSC. Moreover the *Roemmele-Putney* case had nothing to do with the core constitutional and statutory issues in this case, where one municipality is attempting to exert extra-territorial powers within the corporate limits of another co-equal municipality. Nor did it involve a request that the court to construe the rights and obligations of the parties to a franchise agreement.

Likewise, *PSC v. Fuller*, 551 So. 2d 1210 (Fla. 1989), is inapposite. *Fuller* involved a circuit court action in which one party to a PSC-approved territorial agreement sought a declaration of its rights under the agreement. As previously explained, the Town is not a party to any territorial agreement, is not seeking a declaration of its rights under any territorial agreement, and has expressly alleged it is *not* seeking any modification of a territorial agreement in this case. Instead, the Town expressly recognizes that only the PSC can modify a territorial agreement.

The City's reliance on a recent PSC declaratory statement issued in the context of the City's service to *unincorporated* areas of Indian River County also is misplaced and provides no basis for dismissal. That declaratory statement simply said that the City could serve in unincorporated areas of Indian River County after the City's franchise agreement with the County expired and could continue to do so until the order approving the City's territorial agreement with FPL was modified. (Ex. F to Motion to Dismiss, at 15.) The declaratory statement has no bearing on the issues before this Court. It simply states what the Town has already acknowledged, namely that only the PSC can approve a modification to the Territorial Agreement and that until the PSC's order approving that agreement is modified the City can continue providing service in the Town. (*Id.*) But that in no way limits the Court's proper role in determining the rights and obligations of the Town and City under the Franchise Agreement, the Florida Constitution, the Municipal Home Rule Powers Act and Section 180.02(2), Florida Statutes. In fact, as clearly shown in Exhibit G to the Motion to Dismiss, the PSC has expressly stated that it does not have the jurisdiction to address those constitutional and statutory issues. (Ex. G to Motion to Dismiss, at 31-32.)

The City appears to be trying to use a petition for declaratory statement that it filed with the PSC—5 months *after* the Town initiated this lawsuit—to obtain administrative preemption

over legal issues in a pre-existing lawsuit between the parties.[5] As the PSC itself noted, that is an "abuse" of the declaratory statement process that defies established principles of administrative law. Indeed, the PSC was aware of this lawsuit in ruling on the petitions for declaratory statements by the City and County, and made very clear that its statements would not and could not affect the outcome of this lawsuit:

> Established case law and prior decisions of this Commission have held that a declaratory statement is not appropriate when another proceeding is pending that addresses the same question or subject matter. In such cases, it would be an abuse of the agency's authority to permit the use of the declaratory statement process as a means for the petitioner to attempt to obtain administrative preemption over legal issues involving the same parties.

(Ex. G to Motion to Dismiss, at 32.[6]) The PSC also noted that:

> In accordance with Rule 28-105.003, F.A.C., we rely on the facts contained in the City's Petition without taking a position on the validity of those facts. This declaratory statement order will be controlling only as to the facts relied upon and not as to other, different or additional facts. As our conclusions are limited to the facts described herein, any alteration or modification of those facts could materially affect the conclusions reached in this declaratory statement order.

(Ex. F to Motion to Dismiss, at 36 (footnote omitted).) The PSC made this particularly explicit with respect to addressing whether those administrative proceedings could in any way affect the instant lawsuit, which they cannot:

> On January 13, 2015, the Town of Indian River Shores filed a Notice of Pending Litigation in this docket that summarized the issues in its pending circuit court

[5] *See also* § 120.565(a), Fla. Stat. ("(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, **as it applies to the petitioner's particular set of circumstances**.") (emphasis added).

[6] *See also ExxonMobil Oil Corp. v. Dep't of Agric. & Consumer Servs.*, 50 So. 3d 755, 758 (Fla. 1st DCA 2010) ("[A]n administrative agency must decline to provide a declaratory statement when the statement would address issues currently pending in a judicial proceeding"); *Padilla v. Liberty Mut. Ins. Co.*, 832 So. 2d 916, 919-920 (Fla. 1st DCA 2002); *Suntide Condo. Ass'n, Inc. v. Div. of Fla. Land Sales, Condos. & Mobile Homes*, 504 So. 2d 1343, 1345 (Fla. 1st DCA 1987); *In re: Petition for declaratory statement regarding local exchange telecoms. network emergency 911 serv. by Intrado Commc'ns Inc.*, Order No. PSC-08-0374-DS-TP, 08 F.P.S.C. 6:15 (2008) ("[E]stablished case law and prior Commission orders have held that a declaratory statement is not appropriate where another proceeding is pending that addresses the same question or subject matter."); *In re: Petition for declaratory statement concerning urgent need for electrical substation in N. Key Largo by Fla. Keys Elec. Coop. Ass'n, Inc.*, Order No. PSC-02-1459-DS-EC, 02 F.P.S.C. 10:342 (2002) (noting that even though the legal issue before DOAH was different than the issue presented in the Petition, the subject matter was the same, and therefore not properly decided by the PSC).

> litigation against the City of Vero Beach and asked us to refrain from issuing declaratory statements that would address any factual or legal issues related to the town's pending litigation. Indian River Shores did not seek intervention or amicus curiae status in either docket. **The information provided in the Notice of Pending Litigation is not relevant to the City's Petition because it concerns the expiration of a franchise agreement between the Town of Indian River Shores and the City of Vero Beach, which is not addressed in this docket.**

(*Id.* at 14, n.12 (emphasis added).)

But even if the PSC declaratory statements in the proceedings involving the City and the County had any bearing here, the issues raised in those proceedings are far from "virtually identical facts" suggested by the City on page 8 of the Motion to Dismiss. Those proceedings did not address the distinct rights afforded under Florida law to a municipality like the Town, since the County by definition is not a municipality.[7] More importantly, Section 180.02(2), Florida Statutes—upon which the City itself relied in those same PSC proceedings for the basis of its extra-territorial power in the *unincorporated* portions of Indian River County (Ex. F to Motion to Dismiss, at 8)—provides that the City may *not* exercise extra-territorial powers in the Town without the Town's consent. § 180.02(2), Fla. Stat. (2014) ("Any municipality may extend and execute all of its corporate powers applicable for the accomplishment of the purposes of this chapter outside of its corporate limits, as hereinafter provided and as may be desirable or necessary for the promotion of the public health, safety and welfare or for the accomplishment of the purposes of this chapter; provided, **however, that said corporate powers shall not extend or apply within the corporate limits of another municipality**." (emphasis added)).

If the Court determines that the Town is entitled to the declaratory relief it seeks, the PSC will certainly retain discretion to modify the Territorial Agreement, which would include the

[7] *See* § 165.031(1) & (3), Fla. Stat. ("(1) 'County' means a political subdivision of the state established pursuant to s. 1, Art. VIII of the State Constitution…. (3) 'Municipality' means a municipality created pursuant to general or special law authorized or recognized pursuant to s. 2 or s. 6, Art. VIII of the State Constitution.").

discretion to conform the Territorial Agreement to the Court's order, just as it has approved modifications of the Territorial Agreement on multiple previous occasions.[8] Modification of the Territorial Agreement is an important regulatory step, but just as in *Casselberry*, it should be reserved for another day and certainly should not impede this Court's ruling on constitutional, statutory and contract issues that clearly are not within the jurisdiction of the PSC, but rest within the jurisdiction of this Court.

The Court has jurisdiction over this matter, that jurisdiction has been properly invoked and, therefore, dismissal of Count I for lack of subject matter jurisdiction would be in appropriate.

C. The PSC Does Not Have Primary Jurisdiction Over This Matter, and Even If It Did That Is Not The Basis For Dismissing The Complaint

As a second ground for dismissal of Count I, the City argues that the PSC has "primary jurisdiction." This argument fails for at least three reasons. First, the concept of "primary jurisdiction," is a doctrine of judicial deference and not restraint, and therefore not a ground for dismissal at all. *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1041 (Fla. 2001) (confirming that "even assuming the doctrine of primary jurisdiction to be applicable, the trial court erred in dismissing the amended complaint with prejudice"). As such, the doctrine merely "operates to postpone judicial consideration of a case to administrative determination of important questions involved by an agency with special competence in the area." *Id.* (quotation omitted). "It does not defeat the court's jurisdiction over the case, but coordinates the work of the court and the agency by permitting the agency to rule first and giving the court the benefit of the agency's views...." *Id.* (quotation omitted).

[8] *See* Ex. E to Motion to Dismiss, containing prior approvals of the Territorial Agreement and its modifications, issued in 1972, 1974, 1981 and 1988.

Second, as the PSC recognized, and the City argued in the recent PSC proceedings involving Indian River County, "the construction of the franchise agreement, the application of preemption doctrine, the application of various real property principles including the rights of hold-over tenants, the interpretation of easements, the analysis of eminent domain law, and the analysis of potential prescriptive rights … *should be resolved by a circuit court*." (Ex. G to Motion to Dismiss at 19.) Likewise, the PSC acknowledged in those proceedings that "[i]t would not be possible to give a complete and accurate declaration on these questions [raised by the County] without addressing the County's statutory and constitutional power," but that the PSC has "**no authority over Chapter 125, F.S.** [which explains a county's police powers and is akin to Chapter 166 which explains the Town's municipal home rule powers] **or over any provision of the Florida Constitution**." *Id.* at 31. As such, the PSC denied the County's petition for guidance on those issues. *Id.* Remarkably, after emphasizing the PSC's limited authority to address the County's questions that "must be resolved by a circuit court," the City now argues that this Court must not exercise its jurisdiction over fundamental questions about the construction of a franchise agreement and the Town's statutory and constitutional power, but instead should dismiss the claim in deference to the PSC's administrative determinations on those issues.[9]

Third, the City argues that Count I must be dismissed because the PSC has primary jurisdiction to determine its jurisdiction, and therefore, this Court is powerless to proceed. Essentially, the City's proposition is that any claims related to "any matter arguably within the [PSC's] jurisdiction" must always be dismissed because the Court cannot determine whether the Court or the PSC has jurisdiction—only the PSC can make that determination. Again, the Town

[9] Also as stated above, the Town acknowledges that the PSC does have special competence and exclusive jurisdiction to make administrative determination regarding proposed modifications of the Territorial Agreement. But that is a secondary issue that the PSC can address after this Court has determined the predicate constitutional, statutory and contractual legal questions presented here. *See Casselberry*, 793 So. 2d at 1177.

is not seeking a declaration about the Territorial Agreement nor is it asking for modification of the Territorial Agreement, issues which it agrees are matters within the PSC's exclusive jurisdiction. The Town has claims for declaratory relief based on constitutional and statutory law and contract rights, all of which happen to relate to the Town's rights as a contracting party to a franchise agreement and its rights as a municipality to be protected from extra-territorial encroachments by the City to which the Town has not consented. Taking the City's argument to its logical conclusion, any circuit court case involving utility service must be promptly dismissed because only the PSC, and not a circuit court, can determine who has jurisdiction. As the numerous circuit court cases cited in the City's Motion and this response illustrate, the circuit courts have an important role to play in interpreting contracts and Florida law, regardless of whether or not such issues relate to electric service, and while deference to the PSC is certainly required in situations where its jurisdiction is directly at issue, this is not such an occasion. *See Casselberry*, 793 So. 2d at 1177 (holding that regulatory matters involving PSC and FERC "**are reserved for another day and are prematurely raised** [because] [t]he sole issue today is whether Casselberry is entitled to enforcement of a provision" in its franchise agreement (emphasis added)).

Sprinkled throughout the City's Motion to Dismiss is the notion that the Florida Legislature, in Section 366.04(1), Florida Statutes, has "conferred" jurisdiction to the PSC that is exclusive and superior to that of municipalities and towns. But, as the PSC has properly acknowledged, the Legislature has not "conferred" upon that agency any jurisdiction to interpret the constitutional or statutory provisions at issue in this case. Nor has it extended the PSC's jurisdiction to construe or declare the rights of parties under a franchise agreement. In fact, the Legislature has made it clear that nothing in Chapter 366 restricts the power of a municipality like the Town to govern and control the use of its rights-of-way and other public places pursuant to

franchise agreements. *See* § 366.11(2), Fla. Stat. ("Nothing herein shall restrict the police power of municipalities over their streets, highways and public places…."). Notably, the PSC itself has expressly recognized that the jurisdictional limitation imposed by Section 366.11(2) precludes it from interceding into disputes such as this one that fundamentally relate to the terms and conditions of a franchise agreement between a Florida municipality and an electric utility. *In re: Petition of the City of Miami Beach for Emergency Hearing,* Order No. 10543, 82 F.P.S.C. 196 (1982) ("[T]he Commission may not interpose itself in the terms and conditions of the franchise contract. This view is required by the clear dictates of the Legislature in Section 366.11(2).").

Nor has the Legislature "conferred" jurisdiction on the PSC to regulate the rates of a municipally-owned electric utility like the City. *See* §§ 366.04 & 366.02(1), Fla. Stat. (providing the PSC with the jurisdiction to regulate rates and services of a "public utility," but excluding municipalities from the definition of "public utility"); *see also Mann,* 411 So. 2d. at 163 ("We agree that the [PSC] does not have jurisdiction over a municipal electric utility's rates."); *Amerson* 362 So. 2d at 444 (Fla. 1978) ("The PSC's power to regulate is based upon the provisions of Chapter 366…. With limited exceptions, … the jurisdiction of the PSC is limited to 'public utilities' …. Thus, the statute by its very terms specifically excludes electric utilities operated by … municipalities from its rate change jurisdiction. Furthermore, Section 366.11, Florida Statutes … provides certain exemptions from the PSC's jurisdiction stating in part 'No provision of this chapter shall apply in any manner, other than as specified in ss. 366.04(2), 366.05(7) and 366.055 to utilities owned and operated by municipalities , whether within or without any municipality.'").

The City's primary jurisdiction arguments are misguided and afford no basis for the Court to dismiss this action.

D. The Town Has No Administrative Remedies to Exhaust

For many of the same reasons, the City's argument that the Town has failed to exhaust its administrative remedies is also misplaced. First, Section 86.111, Florida Statutes, clearly states that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief." *Orange Cnty. v. Expedia, Inc.*, 985 So. 2d 622, 627-29 (Fla. 5th DCA 2008) (rejecting argument on motion to dismiss that declaratory judgment action must be dismissed due to failure to exhaust administrative remedies).

More fundamentally, the Town has no administrative remedy to exhaust. The PSC's orders, the case law, and the City's own prior arguments to the PSC cited above, confirm that the PSC has no authority over issues of construction of a franchise agreement or over the constitutional and municipal powers at issue here. *See* § I.B. *supra*. And the City itself confirms that its "right and obligation to provide electric service under the PSC's territorial orders are separate and distinct from the rights and obligations under the Franchise Agreement." (Motion to Dismiss at 16.) A party is not required to exhaust administrative remedies that do not exist or would be futile. *Artz ex rel. Artz v. City of Tampa*, 102 So. 3d 747, 751 (Fla. 2d DCA 2012) ("The law requires no futile act."); *Winick v. Dep't of Children & Family Servs.*, 161 So. 3d 464, 469 (Fla. 2d DCA 2014) ("exhaustion of administrative remedies is not required where none are adequate or available to provide the requested relief").

II. The Town Has Stated a Claim for Anticipatory Breach of the Franchise Agreement

Count II of the Amended Complaint asserts a claim for anticipatory breach of contract based on the City's assertion it will not comply with the agreed-upon 30-year expiration term of the Franchise Agreement. The City asks the Court to dismiss the Town's anticipatory breach count based on the erroneous assertions that: (1) the Town has failed to allege that the City has repudiated

its obligations prior to the date in which performance for said obligations is required; (2) the City's right and obligation to provide service to the Town is found in the territorial agreement orders of the PSC which are separate and apart from the rights and obligations of the Franchise Agreement; and (3) the Town's only damages are attorneys' fees and costs and those damages are not recoverable in this action. All of these arguments must fail for the reasons set forth below.

A. Count II Sufficiently Alleges The Repudiation Of A Contractual Duty By The City

In its Motion to Dismiss, the City concedes the Franchise Agreement is a valid contract with a term that will expire on November 6, 2016 (Motion to Dismiss at 19-20), but then argues that the Town has not alleged any repudiation of any duty before the time has come to perform that duty. The City further asserts that because it intends to continue to provide service after the Town's consent has expired, it cannot possibly be deemed to have repudiated a duty to perform. These arguments ignore the express allegations in the Amended Complaint and misrepresent the City's duty to vacate the premises upon expiration of the Franchise Agreement.[10]

Anticipatory breach occurs when one party repudiates a contractual obligation before the time for its performance. *Alvarez v. Randon*, 953 So. 2d 702, 709 (Fla. 5th DCA 2009). "When an anticipatory breach occurs, the non-breaching party has the right … to elect to treat the repudiation as a breach by bringing suit…" *Dutra v. Kaplan*, 137 So. 3d 1190, 1192 (Fla. 3d DCA 2014). "The elements of a breach of contract action are: (1) a valid contract; (2) a material breach; and (3) damages." *Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP*, 137 So. 3d 1081, 1094-95 (Fla. 3d DCA 2014).

[10] The City argues in various places that it cannot leave because of the Territorial Agreement, but the City is fully empowered to take whatever steps are required to modify that regulatory approval as part of its departure from the Town, including advising the PSC that it no longer has the Town's consent to serve after the Franchise Agreement expires.

The Town specifically alleges that the City has asserted it will not honor the contract expiration date which was bargained-for in the Franchise Agreement, but will continue to operate extra-territorially within the Town and occupy the Town's rights-of-way and other public areas without the Town's permission after the Franchise Agreement expires on November 6, 2016. (Am. Compl. ¶¶ 64-65.) However, the Franchise Agreement on its face provides that the City is given the permission to operate its electric utility extra-territorially within the Town and occupy its rights-of-way and public areas for a *limited* period of 30 years. (*Id*. ¶¶ 18, 62, and Ex. A thereto at §§ 1, 2, 5 and 8.) Without the Town's permission, the City has no extraterritorial powers conferred by general or special law to operate within the Town. (*Id*. ¶¶ 10, 12.) Thus, the City has an obligation to vacate the Town's rights-of-way and other Town public places upon expiration of the Franchise Agreement.

The City appears to be arguing that regardless of the Franchise Agreement, it has some perpetual right to continue to occupy the Town's public rights-of-way and other public areas when the Franchise Agreement expires, but that claim is not supported by Florida law. The City has no authority to occupy the Town's rights-of-ways or serve extra-territorially within its municipal boundaries absent the Town's consent. Under Section 180.02(2), Florida Statutes, the corporate power of a municipality to extend its utility extra-territorially "shall not extend or apply within the corporate limits of another municipality." Under the Article VIII, § 2(c) of the Florida Constitution and Section 166.021(3)(a), Florida Statutes, a municipality's extra-territorial powers can only be granted by special or general law. The City has no such authorization, and the only statute that does expressly govern this situation, Section 180.02, expressly prohibits the City's encroachment

in the Town without the Town's consent. The City has no perpetual right to occupy Town property after the Franchise Agreement expires.[11]

The case of *Florida Power Corp. v. City of Winter Park*, 887 So. 2d 1237 (Fla. 2004), cited by the City, actually confirms these principles. In that case, a franchise agreement between an electric utility and the city expired before it was renegotiated. The utility continued to serve and occupy the city's rights-of-way with the consent of the franchisor city but no longer paid its franchise fees to the city. *Id.* at 1239. The Court, analogizing the situation to a holdover tenant, held that an implied contract continued to govern and that the franchise fees must continue to be paid for the rights to use the rights-of-way. *Id.* The Court also was careful to note that the parties had not been "forced" to continue to perform, but since they performed voluntarily and the city consented to occupation of its rights-of-way, an implied contract could be applied. *Id.* at 1241. Thus, contractual rights and duties dictated by the franchise cannot simply be ignored by a holdover franchisee when the franchise expires. Here, in contrast to the *Winter Park* case, the Town cannot be more clear that it no longer consents to the City remaining under an implied contract when the Franchise Agreement expires, but that the City would remain as a holdover franchisee without the Town's consent in violation of the Franchise Agreement, as well as the Florida Constitution, the Municipal Home Rule Powers Act and Section 180.02(2), Florida Statutes. Thus, it must take what steps are required to leave.

Stated simply, the duration and expiration date of a contract are material terms to any agreement and thus must be honored by the parties. The City's argument that it has "no obligation under the Franchise Agreement" to remove its facilities from the Town's rights-of-ways after the

[11] The law in Florida is that contracts are not to be construed to confer "a right in perpetuity … unless compelled by the unequivocal language of the contract." *See S. Bell Tel. & Tel. Co. v. Fla. E. Coast R. Co.*, 399 F.2d 854, 857 (5th Cir. 1968) (applying Florida law). Here there is no question that the Franchise Agreement had a limited 30-year duration, and the City cannot argue that it enjoys the right to occupy the Town's public places in perpetuity.

Franchise Agreement expires is a blatant repudiation of that performance obligation and a direct breach that violates the Town's rights under the Franchise Agreement, the Constitution, the Municipal Home Rule Powers Act and Section 180.02(2), Florida Statutes. (Motion to Dismiss, at 20.) The Town has sufficiently alleged an anticipatory breach.

B. The PSC's Territorial Agreement Does Not Invalidate the Town's Claim for Breach of Contract

The City appears to argue that even though there is no statutory authority for the City to provide extra-territorial electric service within the Town after the Franchise Agreement expires, and even though Section 180.02(2) expressly prohibits the exercise of such extra-territorial powers, the City does not need the Town's consent to exert extra-territorial powers within the Town by virtue of a PSC-approved agreement between the City and FPL. Taken to its logical conclusion, the City's argument renders its obligations to observe its duties under the Franchise Agreement meaningless and defies well-settled constitutional and statutory principles that protect the equal independence of municipalities by limiting the exercise of extra-territorial municipal powers.

There is absolutely nothing in the Franchise Agreement that provides the City with a privilege to ignore the Franchise Agreement's terms upon regulatory approval of the service area. It would make no sense. Why would the parties enter into the Franchise Agreement if it were not needed to confer authority upon the City and memorialize the Town's consent for the City to occupy the Town's rights-of-way? Moreover, there is nothing preventing the City from informing the PSC that it will no longer have the Town's consent to provide electric service within the Town following expiration of the Franchise Agreement in November 2016, and ask the PSC for modification of the territorial boundaries.

C. The Town Has Sufficiently Alleged Damages

The Town alleges that it has been damaged by the City's refusal to comply with the Franchise Agreement's express statement as to its duration, specifically alleging that it "has been harmed by the City's anticipatory breach of the Franchise Agreement's expiration terms because it has been required to take formal action to protect its rights as a franchising municipality from continued service and occupation of the Town's rights-of-way and public areas by the City without the Town's consent." (Am. Compl. ¶ 66.) The City argues that this is merely a claim for attorney's fees incurred for prosecuting this lawsuit, even though that appears nowhere in the allegation. The allegation on its face would relate to actual damages incurred for any steps the Town has taken and may continue to be required to take in the future to protect itself and its citizens following the City's repudiation of its contractual obligations under the Franchise Agreement, which would certainly encompass more than the attorneys' fees in this lawsuit. Given that the Town is losing its contractual protections against unreasonable rates and unauthorized use of its rights-of-way upon expiration of the Franchise Agreement on November 6, 2016, the Town must certainly consider and potentially implement other means of regulating the utility service to protect its inhabitants.

In addition, there is no question that if the Town has adequately alleged a breach, then as a matter of law it has been harmed by the breach itself and is entitled to at least nominal damages. *Abbott Labs., Inc. v. Gen. Elec. Capital*, 765 So. 2d 737, 740 (Fla. 5th DCA 2000) (holding that "nominal damages had been sustained" at the time of breach).

Count II states a valid cause of action and should not be dismissed.

III. Count III of the Amended Complaint States a Valid Claim

The City argues that the Court should dismiss the Town's claim for breach of contract in Count III because the Town's requested relief is a refund and the Court cannot order a refund of

moneys paid for utility services. To support this argument, the City cites numerous cases involving general ratemaking principles which are not relevant to the breach of contract allegations in Count III. This count does not ask the Court to engage in ratemaking. Rather, it sets forth a breach of contract claim based on specific allegations that the City has breached its *contractual* obligations under the Franchise Agreement to provide reasonable rates and prudently operate its utility, and that the Town has been harmed as a result. The Town is certainly entitled to damages if these bargained-for obligations were breached, and has stated a valid claim on that basis.

As set forth above, a claim for breach of contract must allege: (1) a valid contract, (2) a material breach, and (3) damages. *Grove Isle Ass'n, Inc.*, 137 So. 3d at 1094-95. All of these elements are alleged in Count III. The Town alleges the Franchise Agreement is a valid contract between the City and the Town. (Am. Compl. ¶ 70.) The Franchise Agreement requires that the City operate its electric utility and furnish electric services in accordance with normally accepted electric utility standards, and to charge only reasonable rates for the electric services it provides. (*Id.*, Ex. A, Franchise Agreement, §§ 1, 2 and 5.) The Town alleges that the City has not operated its electric utility and furnished its electric services in accordance with normally accepted electric utility standards, but rather has acted imprudently in the management of its utility. (*Id.* ¶ 70.) The City also alleges that the City has not charged reasonable rates for the electric services it provides, but rather has charged unreasonable, excessive rates for those services. (*Id.* ¶ 71.) In particular, the Town has alleged numerous specific activities of the City's operation of its utility which are imprudent and which have led to the excessive rates that are being charged to the Town. (*Id.* ¶ 38.) The Town furthermore alleges that the City has used its unregulated electric monopoly to force the Town and many of its occupants to pay electric rates that have been consistently and substantially higher than the electric rates paid by Town citizens receiving electric utility service

from FPL. (*Id*. ¶ 29.) The City cites several authorities on pages 22 and 23 of the Motion to Dismiss to argue that because rate-setting is legislative and prospective function, a Court cannot award damages even if it strikes down a rate as excessive. None of the authorities cited by the City, however, involve a claim for damages based on the breach of an express *contractual* obligation to charge reasonable rates, as is the case here with the Franchise Agreement.

Finally, the Town has been harmed by the breach itself even if the City were only required to pay nominal damages for the harm it has caused. *Abbott Labs., Inc.*, 765 So. 2d at 740 (holding that "nominal damages had been sustained" at the time of breach).

For all of these reasons, the Town has adequately stated a claim for breach of contract in Count III on which relief can be granted.

IV. The Town Validly Requests for Declaratory Relief in Count IV Based on the City's Charging of Unreasonable and Oppressive Rates Based on Imprudent Utility Management

Count IV requests declaratory and supplemental relief for the City's breach: (i) of its duties under the Franchise Agreement, and (ii) of its duties a matter of law, to act prudently in managing its electric utility system in order to protect its customers from unreasonable and oppressive rates. Florida law is clear that this is a validly stated cause of action. The City concedes in its Motion to Dismiss that declaratory relief is proper to challenge the reasonableness of rates. But then the City argues that Count IV: (1) fails to allege the necessary element required to state a cause of action for declaratory relief, (2) improperly seeks to have the Court delegate its "exclusive" powers to review a rate to the jury, (3) is "procedurally improper" under section 86.061 by requesting "supplemental relief," and (4) is improper because it seeks relief in the form of a refund which this Court is not legally authorized to award. The City's arguments do not support dismissal of Count IV.

A. The Town Has Properly Pled The Necessary Elements For Declaratory Relief

The City first argues that the Town has not adequately pled its entitlement to declaratory relief. This argument fundamentally ignores that the Declaratory Judgment Act is to be "liberally administered and construed." § 86.101, Fla. Stat. The Town's allegations, recited above, make clear that there is a dispute between the Town and the City over the unreasonableness of its rates, and according to principles cited in the City's own motion, Florida's "courts will intervene to strike down unreasonable or discriminatory rates prescribed by the Legislature, a municipality, or municipal commission." (Motion to Dismiss at 23 (citing *Mohme v. City of Cocoa*, 328 So. 2d 422, 424-25 (Fla. 1976)).

As described above, the City has a contractual duty under the Franchise Agreement to operate its utility prudently and not charge unreasonable rates. (Am. Compl., Ex. A, §§ 1, 2 and 5.) Independent of that contractual duty, Florida law is clear that a municipal electric utility has an inherent legal duty to its customers to operate and manage its municipal electric utility with the same degree of business prudence, conservative business judgment and sound fiscal management as required of private investor-owned electric utilities. *State v. City of Daytona Beach*, 158 So. 300, 305 (Fla. 1934). Moreover, customers of an electric utility are not required to bear the cost of imprudent utility management decisions. *See Gulf Power Co. v. FPSC*, 487 So. 2d 1036, 1037 (Fla. 1986).

The Town has alleged that the City has imprudently managed its utility and is imposing unreasonable rates resulting from that imprudent management on its customers, including the Town. The City continues to charge these rates. As in Count I, the Town has a bona fide controversy with the City concerning whether the unreasonable rates which it has charged and continues to charge are permissible under Florida law and can be charged in the future. The Motion

to Dismiss itself clearly indicates a difference of opinion concerning the parties' rights regarding these issues under the Franchise Agreement and under Florida law. This alone illustrates the necessity of a declaratory judgment here, particularly under the liberal construction of the Declaratory Judgment Act. *See, e.g., Jensen v. DiPaolo's Italian Foods Co.*, 244 So. 2d 513, 514-15 (Fla. 2d DCA 1970) (reversing dismissal of declaratory action over franchise agreement, and stating that "the motion to dismiss clearly discloses a difference in interpretation of the contract … and our declaratory judgment law gives a right to seek interpretation of contracts in the circuit court in such a circumstance. Fla.Stat. s 86.011.... The law is to be liberally construed. Fla.Stat. s 86.101 …. The existence of another remedy is not disqualifying. Fla.Stat. s 86.111 (1969)…. These parties have a continuing relationship under this contract and are entitled to know what it means."); *see also Donaldson v. City of Titusville,* 345 So. 2d 800, 801 (Fla. 4th DCA 1977) (reversing order dismissing declaratory judgment counts and holding that "[i]f a Complaint contains any merit, it is to be liberally construed in favor of the pleader when subjected to a motion to dismiss.").

B. The Town Is Not Asking The Court To Delegate Is Powers To The Jury But Only To Refer Pertinent Questions Of Fact To The Jury Which Is Routinely Permitted In Declaratory Judgment Proceedings

The City argues that Count IV should be dismissed because it requests that the Court refer factual questions to a jury for determination. First, the insertion of a request that the Court use a jury for factual questions is not a valid basis to dismiss Count IV for failure to state a claim. At the appropriate time, the Court can consider which questions can or should be submitted to a jury, and even then can reserve the discretion to use or not use the jury's findings on those issues. If the Court ultimately concludes that some or all of the issues are not appropriate for a jury, the Town's claim for declaratory relief can obviously still proceed. In any event, "the Legislature clearly contemplated fact-finding in declaratory actions." *Higgins v. State Farm Cas. Co.*, 894 So.

2d 5, 12 (Fla. 2005). Indeed, "Section 86.071 expressly provides a mechanism for jury trials when an action under the Act concerns the determination of an issue of fact." *Id.* The Declaratory Judgment Act also specifically provides that "[w]hen an action under this chapter concerns the determination of an issue of fact, the issue may be tried as issues of fact are tried in other civil actions in the court in which the proceeding is pending. To settle questions of fact necessary to be determined before judgment can be rendered, the court may direct their submission to a jury...." § 86.071, Fla. Stat.; *see also F.R.W.P., Inc. v. Home Ins. Co.*, 450 So. 2d 914, 915 (Fla. 4th DCA 1984).

Contrary to the City's argument, the Amended Complaint does not request that a jury make any ultimate determination regarding the reasonableness of the City's rates. Rather, the Amended Complaint only requests that factual questions be referred by the Court to a jury, where the Court deems appropriate, with the Court making the ultimate decision on Count IV.

C. The Town's Request For Supplemental Relief Is Procedurally Proper

The City also argues that the Town's request for supplemental relief in the Amended Complaint is procedurally improper. To the contrary, the Declaratory Judgment Act expressly provides that "[a]ny person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action." § 86.011, Fla. Stat. Thus, the relevant statutory provisions contemplate the opportunity to provide notice of claim for relief in the Amended Complaint itself as well as through the procedures under Section 86.061, Florida Statutes.[12] Florida law does not prohibit a request for supplemental relief in an initial

[12] Section 86.061, Florida Statutes, provides that

> Further relief based on a declaratory judgment may be granted when necessary or proper. The application therefor shall be by motion to the court having jurisdiction to grant relief. If the application is sufficient, the court shall require any adverse party whose rights have been adjudicated by the declaratory judgment to show cause on reasonable notice, why further relief should not be granted forthwith.

complaint seeking declaratory relief, but quite the opposite. Giving notice in the Amended Complaint of the relief sought under Chapter 86, Florida Statutes, helps preserve and resolve the claims at issue. *Lassetter v. Blalock*, 139 So. 2d 726, 728-29 (Fla. 1st DCA 1962) ("The plaintiffs, by thus praying only for a declaration, failed to take advantage of the provisions of [predecessor] Section 87.01, Florida Statutes, . . . which provided in pertinent part: 'Any person seeking a declaratory decree, judgment or order may, in addition to praying for a circuit court declaration, also pray for additional, alternative, coercive, subsequent or supplemental relief in the same action.'"). As the *Lasseter* court explained, the Declaratory Judgment Act's "supplement relief" section simply provided "[o]ne **other** statutory avenue of relief …to the plaintiffs if they wished relief in addition to the declaration of rights." *Id.* (quoting § 87.07, Fla. Stat. (predecessor to § 87.061)). Furthermore, even if the Town were ultimately entitled to no supplement relief, a request for supplemental relief in the pleading would not necessitate a dismissal for failure to state a claim on which relief can be granted. The Court could simply deny the supplemental relief requested following adjudication of the underlying request for declaratory relief.

D. The Court Is Not Legally Precluded From Requiring The City To Disgorge Ill-Gotten Gains.

The City further argues that Count IV's request for a refund as supplemental relief is improper. Again, the Court may or may not determine later in this proceeding that the Town is entitled to a particular form of supplementary relief, but that is not a question to be resolved on a motion to dismiss. *See Mills v. Ball*, 344 So. 2d 635, 638 (Fla. 1st DCA 1977) ("Unlike other actions, a motion to dismiss a petition for declaratory judgment does not go to the merits but goes only to the question of whether or not the plaintiff is entitled to a declaration of rights-not to whether or not he is entitled to a declaration in his favor.").

Moreover, the Amended Complaint alleges that the City is using the electric rate payments from the Town and other customers outside the City's limits as a means to keep ad valorem taxes on property within the City artificially low and to cover costs that had nothing to do with the operation of the City's electric utility. (Am. Compl. ¶ 38d & e.) The City's use of its electric rates as a surrogate for taxation is one of the factors that has made its rates excessive, and therefore it is a component of the unreasonable rate burden being improperly imposed on the Town. (*Id*. ¶ 38.) As such, it is fundamentally no different than numerous instances under Florida law in which "the courts have mandated the refund of illegally extracted monies" collected by municipalities. *Bill Stroop Roofing, Inc. v. Metro. Dade Cnty.*, 788 So. 2d 365, 366 (Fla. 3d DCA 2001) (collecting authorities). The Court should be able to consider these issues and, if appropriate, refund electric utility revenues that were improperly extracted by the City.

For all these reasons, Count IV states a claim on which relief can be granted and should not be dismissed.

CONCLUSION

At its core, this lawsuit is about the Florida Constitution, the Municipal Home Rule Powers Act, Section 180.02(2), Florida Statutes, and the rights and responsibilities of the Town and City under a Franchise Agreement that is scheduled to expire in less than two years. It is about settled constitutional and statutory principles that respect the equal independence of municipalities by limiting the exercise of extra-territorial municipal powers. It is about whether the City has the necessary statutory authority to exert extra-territorial powers within the corporate limits of the Town and occupy the Town's public places in perpetuity without the Town's consent after the Franchise Agreement expires. This Court, and only this Court, is the proper forum to adjudicate these important questions.

This lawsuit is not about modifying a service territory agreement approved by the PSC, and the Amended Complaint acknowledges that issues relative to modification of that agreement are for another day and will need to be taken up by the PSC. But the PSC's jurisdiction over territorial agreements in no way limits the Court's proper role in ruling on the questions that are before it. The PSC has no authority over the interpretation of the rights of the City and the Town under the Franchise Agreement, the Florida Constitution, the Municipal Home Rule Powers Act, and Section 180.02, Florida Statutes, which are all pertinent to the questions raised here regarding extra-territorial municipal powers. In fact, the PSC has stated that these types of issues are for the circuit courts to decide.

The Town also has raised valid claims for anticipatory breach of contract based on the City's repudiation of the Franchise Agreement's express expiration date, for breach of the City's obligations under Franchise Agreement to charge only reasonable rates and prudently manage its electric utility, and for declaratory relief that the City's electric rates it charges the Town are unreasonable.

For all of these reasons, there is no basis for dismissal of the Amended Complaint and the Amended Complaint should stand.

WHEREFORE, the Town asks that the Court deny the City's Motion to Dismiss, and provide the Town such other and further relief as this Court deems just and proper.

Respectfully submitted this 17th day of July, 2015.

HOLLAND & KNIGHT LLP

/s/D. Bruce May, Jr.

Karen D. Walker
Florida Bar No. 982921
Email: karen.walker@hklaw.com
D. Bruce May, Jr.

Florida Bar No. 354473
Email: bruce.may@hklaw.com
Kevin Cox
Florida Bar No. 34020
Email: kevin.cox@hklaw.com
HOLLAND & KNIGHT LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301
Telephone: (850) 224-7000
Facsimile: (850) 224-8832
Secondary Email: jennifer.gillis@hklaw.com
Secondary Email: connie.boatright@hklaw.com

Attorneys for Plaintiff Town of Indian River Shores

CERTIFICATE OF SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of the Court, using the E-Portal system, which will automatically transmit a copy of this Motion to John W. Frost, II, and Nicholas T. Zbrezeznj, Frost Van Den Boom, P.A., Post Office Box 2188, Bartow, FL 33831-2188 [Jfrost1985@aol.com; nzbrzeznj@fvdblaw.com; paulaw1954@aol.com; pwilkinson@fvdlaw.com], and that a true and correct copy of the foregoing has been sent by electronic mail to Wayne R. Coment, City Hall, 1053 20th Place, Vero Beach, FL 32960 [cityatty@covb.org] and to Robert Scheffel Wright, Esq., Gardner, Bist, Bowden, Bush, Dee, LaVia & Wright, P.A., 1300 Thomaswood Dr., Tallahassee, FL 32308-7914 [schef@gbwlegal.com], counsel for the City all on this 17th day of July, 2015.

/s/D. Bruce May, Jr.
Attorney

Exhibit F

Filing # 30119818 E-Filed 07/27/2015 01:27:38 PM

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

TOWN OF INDIAN RIVER SHORES,
a Florida municipality,

CASE NO.: 2014-CA-000748

Plaintiff,

v.

CITY OF VERO BEACH, a Florida
municipality,

Defendant.
_____/

THE TOWN OF INDIAN RIVER SHORES' RESPONSE TO THE FLORIDA PUBLIC SERVICE COMMISSION'S MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE AND FILE MEMORANDUM

Plaintiff, the Town of Indian River Shores (the "Town"), respectfully responds in opposition to the Motion for Leave to Participate as Amicus Curiae and File Memorandum filed on July 23, 2015 by the Florida Public Service Commission (the "PSC") (the "Motion"). The Motion is procedurally inappropriate as there is no right to participate as an amicus curie at the trial court level afforded by the Florida Rules of Civil Procedure or this Court's local rules. Although the Town understands that the PSC seeks to apprise the Court of what it believes to be its regulatory jurisdiction, the PSC is not a party to this case. Moreover, the jurisdictional proclamations in the memorandum show that the PSC fundamentally misunderstands the nature of the declaratory relief that the Town is asking of the Court, and thus the memorandum provides no basis for the Court to find that it lacks subject matter jurisdiction over Count I of the Town's Amended Complaint. Furthermore, the PSC wrongfully suggests that the Town's entire Amended Complaint should be dismissed for lack of subject matter jurisdiction without indicating how the

PSC could possibly have jurisdiction over claims for breach and anticipatory breach of the Franchise Agreement, or for unreasonable rates – which it does not.

The PSC's memorandum again and again proclaims that its order approving the Territorial Agreement has given the City the right to serve within the Town and, unless and until the PSC's order approving the Territorial Agreement is modified or terminated, the City can continue to serve the Town. The Town doesn't disagree and, in fact, readily acknowledges "that only the PSC can approve a modification of the Territorial Agreement, and that until the PSC's order approving the Territorial Agreement is modified, the City can continue to provide electric service in the Town." (Town's Response to City's Motion to Dismiss at 3.)

The PSC, however, fails to grasp this case is <u>not</u> about the Territorial Agreement or the PSC order approving that agreement. Nor has the Town asked the Court to modify the Territorial Agreement. Instead, Count I prays for declaratory relief and asks this Court to determine, under Article VIII of the Florida Constitution, and Sections 166.021(3)(a) and 180.02(2), Florida Statutes, whether the City has the requisite **organic statutory authority conferred by general or special law** to furnish electricity to areas outside of its corporate boundaries and within the corporate limits of the Town without the Town's consent. This count is grounded upon the constitutional principle that a municipality like the City cannot exercise municipal powers outside its corporate boundaries and encroach within the corporate limits of another equally independent municipality without having been granted those extraterritorial powers by general or special law. That principle comes directly from Article VIII, Section 2(c) of the Florida Constitution, which provides that a municipality has no inherent municipal power to exercise municipal powers outside of its corporate boundaries; rather "the exercise of extra-territorial powers by municipalities shall be as provided by general or special law." The Florida Legislature respected that principle when

it passed the Municipal Home Rule Powers Act, which states: "[T]he subjects of annexation, merger, **and the exercise of extraterritorial power … require general or special law pursuant to s. 2(c) , Art. VIII of the State Constitution."** § 166.021(3)(a), Fla. Stat. (emphasis added).

To support its claim for declaratory relief in Count I, the Town has expressly pled that: (i) nothing in current general or special law or in the City's charter provide the City with organic statutory authority to furnish extra-territorial electric service within the Town without the Town's consent (Am. Compl. ¶¶ 10, 12 & 45); (ii) Section 180.02(2), Florida Statutes, actually forbids the City from exercising extra-territorial powers within the Town without the Town's consent (Am. Compl. ¶ 13); and (iii) the Town has previously consented to the City exerting extra-territorial powers in the Town in the Franchise Agreement but such consent will expire when the Franchise Agreement expires in November 2016 (Am. Compl. ¶¶ 16-20, 26 & 48). More fundamentally, the Town has pled that the PSC's administrative order approving the Territorial Agreement between the City and FPL is not a general or special law that grants the City the organic statutory authority to serve outside of its boundaries and within the corporate limits of the Town. (Am. Compl. ¶ 50.)

It is important for the Court to understand that in 2010 the PSC itself acknowledged that its order approving a territorial agreement did not provide a municipal utility the organic authority to serve extra-territorially outside its corporate boundaries. *See In re: Joint petition for approval to amend territorial agreement between Progress Energy Florida, Inc. and Reedy Creek Improvement District,* Order No. PSC-10-0206-PAA-EU, 10 F.P.S.C. 4:23 (Apr. 5, 2010). That case involved a territorial agreement between Reedy Creek Improvement District ("RCID"), a special district that the PSC regulates as a municipal utility, and Progress Energy Florida, Inc., an investor-owned utility like Florida Power and Light ("FPL"). The original territorial agreement was approved by the PSC in 1987 and provided RCID with the exclusive right to serve a

development area known as Golden Oak Estates. However, when the Golden Oak Estates area was de-annexed from the RCID political boundary in 2008, the PSC saw the need to modify the territorial agreement because "pursuant to its charter, RCID cannot furnish retail electric power outside of its boundary." *Id.* at 2. Consequently, the PSC modified the territorial agreement by placing the Golden Oak Estates area within Progress Energy's service territory. *Id.* at 3. In so doing, the PSC recognized that the territorial agreement did not provide the organic authority of a municipal electric utility to serve outside of its legal boundary, and conformed its territorial order to reflect the extent to which the municipal utility under "its charter" could exercise extraterritorial powers outside its municipal boundaries. *Id.* at 2-3. Those are precisely the dynamics that are in play here.

In *Reedy Creek*, however, there was no dispute that the municipal utility's charter limited its ability to serve extra-territorially outside of its corporate boundaries. Thus, there was no need for a party to resort to a court for declaratory relief as to its entitlement under Florida's Constitution to be protected from extra-territorial encroachments by another municipality. In this case there is a bona fide controversy and dispute as to whether the City has the requisite organic statutory authority to furnish electricity outside of its corporate boundaries within the Town without the Town's consent. There is no doubt that resolution of this dispute will require an in-depth analysis and interpretation of the Florida Constitution, the Municipal Home Rule Powers Act, Section 180.02(2), Florida Statutes, and the City's charter.

The Town respectfully believes that the Court – and not the PSC – is the appropriate tribunal to make these threshold constitutional and legal determinations. In fact, in the context of administrative proceedings conducted pursuant to Section 120.57, Florida Statutes, the PSC has expressly stated that it has "no authority in Chapter 366, F.S., to resolve constitutional questions."

See In re: Fuel and purchased power cost recovery clause with generating performance incentive factor, Order No. PSC-11-0579-FOF-EI at 11, 11 F.P.S.C. 12:130 (Dec. 16, 2011). More recently, the PSC advised Indian River County that it had no jurisdiction to provide declaratory relief to resolve issues requiring the interpretation of franchise agreements, statutes granting home rule and police powers to local governments, and real property issues with regard to rights-of-way, nor did it have any authority to provide declaratory relief to address the powers of local governments under Florida's Constitution. *In re: Petition for declaratory statement of other relief regarding the expiration of the Vero Beach electric service franchise agreement, by the Board of County Commissioners, Indian River County, Florida,* Order No. 15-0101-DS-EM at 30-31, 15 F.P.S.C. 2:090 (Feb. 12, 2015). Even more recently – in fact, just 10 days ago – the PSC advised the Florida Supreme Court that it is "without authority" to issue declaratory relief on statutes that are outside of its jurisdiction, or that would require the Commission to interpret and analyze the powers of local governments under home rule powers statutes or the Florida Constitution. PSC Answer Brief at pp. 59-60, *Indian River County v. Graham*, Case No. SC15-505.[1]

The aforementioned limitations on the PSC's jurisdiction, which the PSC itself has acknowledged except in the Motion, are precisely the reasons that the Town presented these issues to the Court and not the PSC. In fact, the law in the Fourth District Court of Appeal is clear that where a constitutional issue is paramount in a proceeding and where an administrative tribunal cannot pass on constitutional issues, a party should not be required to go through an administrative proceeding and litigate all other issues before going to the circuit court for ruling on the constitutional issue. *See E.T. Legg & Co. v. Franza,* 383 So. 2d 962, 964 (Fla. 4th DCA 1980) ("[W]hen a proper constitutional question has been raised the circuit court should proceed with the

[1] Available electronically at https://efactssc-public.flcourts.org/casedocuments/2015/504/2015-504_brief_116636.pdf .

determination of that question and should stay the other issues pending before the hearing officer.").

Contrary to the PSC's suggestion, the sky will not fall if the Court finds that the City does not have the organic statutory authority to exercise extra-territorial powers and furnish electricity within the Town without the Town's consent. The Town has expressly acknowledged, if such finding is made, the City will still serve the Town under the order approving the existing Territorial Agreement until the PSC modifies the agreement. If the Court finds, which it should, that the City does not have the organic statutory authority to provide extra-territorial electric service in the Town, and provided that there is another electric utility ready, willing and able to serve the Town (which FPL is), the PSC would then have the ability to modify the Territorial Agreement as it did in *Reedy Creek*. In other words, the PSC is certainly authorized to modify the Territorial Agreement to reflect the Court's finding that the City does not have the organic statutory authority to exercise extra-territorial municipal powers within the corporate limits of the Town without the Town's consent.

The Amended Complaint in no way seeks to invade or usurp the PSC's regulatory authority to coordinate the state's electric grid or to approve or modify territorial agreements. Nor does it tread upon the PSC's "state police powers" to regulate rates as was the case in *City of Plantation v. Utilities Operating Co.*, 156 So. 842 (Fla. 1963) cited by the PSC because the agency does not have jurisdiction to regulate the rates of a municipal utility such as the City. *See, e.g., City of Tallahassee v. Mann*, 411 So. 2d 162, 163 (Fla. 1982) ("We agree that the [PSC] does not have jurisdiction over a municipal electric utility's rates.").

The Amended Complaint only seeks determinations by this Court which the PSC has previously admitted are beyond its jurisdiction relating to municipal powers. The PSC's

memorandum provides no basis for the Court to find that it lacks subject matter jurisdiction over Count I or any other aspect of the Town's Amended Complaint.

Respectfully submitted this 27th day of July, 2015.

HOLLAND & KNIGHT LLP

/s/Karen D. Walker
Karen D. Walker
Florida Bar No. 982921
Email: karen.walker@hklaw.com
D. Bruce May, Jr.
Florida Bar No. 354473
Email: bruce.may@hklaw.com
Kevin Cox
Florida Bar No. 34020
Email: kevin.cox@hklaw.com
HOLLAND & KNIGHT LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301
Telephone: (850) 224-7000
Facsimile: (850) 224-8832
Secondary Email: jennifer.gillis@hklaw.com
Secondary Email: connie.boatright@hklaw.com

Attorneys for Plaintiff Town of Indian River Shores

CERTIFICATE OF SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of the Court, using the E-Portal system, which will automatically transmit a copy of this Motion to counsel for the Florida Public Service Commission Kathryn G.W. Cowdery and Samantha Cibula, [kcowdery@psc.state.fl.us; scibula@ psc.state.fl.us] and to counsel for the City John W. Frost, II, and Nicholas T. Zbrezeznj, Frost Van Den Boom, P.A., Post Office Box 2188, Bartow, FL 33831-2188 [Jfrost1985@aol.com; nzbrzeznj@fvdblaw.com; paulaw1954@aol.com; pwilkinson@fvdlaw.com], and that a true and correct copy of the foregoing has been sent by

electronic mail to additional counsel for the City Wayne R. Coment, City Hall, 1053 20th Place, Vero Beach, FL 32960 [cityatty@covb.org] and to Robert Scheffel Wright, Esq., Gardner, Bist, Bowden, Bush, Dee, LaVia & Wright, P.A., 1300 Thomaswood Dr., Tallahassee, FL 32308-7914 [schef@gbwlegal.com], all on this 27th day of July, 2015.

/s/Karen D. Walker
Attorney

Exhibit G

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

CASE NO. 2014-CA-000748

TOWN OF INDIAN RIVER SHORES,
a Florida municipality,

Plaintiff,

vs.

CITY OF VERO BEACH, a Florida municipality,

Defendant.
_____/

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN:	August 26, 2015
TIME:	10:01 AM - 11:50 AM
PLACE:	2000 16th Avenue Vero Beach, Florida
BEFORE:	CYNTHIA COX, Circuit Judge

This cause came on to be heard at the time and place aforesaid, when and where the following proceedings were reported by:

Jodi J. Benjamin, Court Reporter
and Notary Public, State of Florida at Large.

King Reporting & Video Conference Services, Inc.
14 Suntree Place
Suite 101
Viera/Melbourne, FL 32940

APPEARANCES

APPEARANCE ON BEHALF OF THE PLAINTIFF

KAREN. D. WALKER, ESQUIRE
D. BRUCE MAY, JR., ESQUIRE
KEVIN W. COX, ESQUIRE
Holland & Knight, LLP
315 South Calhoun Street
Suite 600
Tallahassee, FL 32301

APPEARANCE ON BEHALF OF THE DEFENDANT

ROBERT SCHEFFEL WRIGHT, ESQUIRE
Gardner, Bist, Bowden, Bush, Dee, LaVia & Wright, P.A.
1300 Thomaswood Drive
Tallahassee, FL 32308

JOHN W. FROST, II, ESQUIRE
Frost Van den Boom, P.A.
395 South Central Avenue
Bartow, FL 33830

APPEARANCE ON BEHALF OF THE FLORIDA PUBLIC SERVICE COMMISSION

KATHRYN G. W. COWDERY, ESQUIRE
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

(Thereupon, the following proceedings were had:)

THE COURT DEPUTY: All rise. Circuit court is open and in session. The Honorable Cynthia Cox, Circuit Judge, presiding.

THE COURT: Not too bad, sixty-one maybe.

You may be seated.

We had an issue yesterday, it was too cold and I'm trying to rectify that, but it's a little bit better.

So good morning.

We're here this morning on Town of Indian River Shores vs. City of Vero Beach. This is 31-2014-748.

And this is the defendant's motion to dismiss. Who represents the defendant?

MR. WRIGHT: We do, Your Honor.

Robert Scheffel Wright and Mr. Frost.

THE COURT: All right.

MR. FROST: John Frost, Your Honor.

THE COURT: Okay. I have two hours reserved, that's an hour for each side.

You may proceed.

MR. WRIGHT: Thank you, Your Honor. May it please the Court.

I am Robert Scheffel Wright. I'm with the law firm Gardner, Bist, Bowden, Bush, Dee, LaVia & Wright in Tallahassee representing the City of Vero Beach.

Also here is Mr. John Frost of the firm Frost Van den Boom.

Also representing the City, the City Attorney Mr. Wayne Coment is here.

And Ms. Kathryn Cowdery, Senior Attorney with the Florida Public Service Commission, is also here appearing on behalf of the PSC as amicus to the City.

We would respectfully suggest that you hear argument on Counts I and II together at thirty minutes to the side. We would go first. I believe Ms. Cowdery --

THE COURT: Count I is the dec action; right? Count I is the dec?

MR. WRIGHT: Yes, ma'am.

THE COURT: Okay.

MR. WRIGHT: And Count II is an anticipatory breach action that is pretty closely related to Count I which is why I thought we might take those together.

And then after I present on behalf of the

City, I think it would be appropriate for you to hear from Ms. Cowdery if you so wish. If you don't, then we'll do something different.

THE COURT: Okay.

MR. WRIGHT: And we would, we've given thirty minutes to the side on Counts I and II and we would like to reserve the balance of our time for rebuttal after the Town presents.

THE COURT: All right. That's fine.

MR. WRIGHT: Thank you.

In summary, Your Honor, with respect to Count I, the Town's assertions that upon expiration of the franchise agreement, the Town and not the Florida Public Service Commission has the power to determine what electric utility will provide service within the City's PSC-approved service area, and its other assertions that the City has no right to serve in those PSC-approved service areas are incorrect as a matter of Florida Law.

Pursuant to Chapter 366 Florida Statutes, the PSC has the exclusive and superior jurisdiction to determine what utilities will serve in what geographic areas. The PSC has exercised its jurisdiction under this general law by issuing valid orders that grant to the City of Vero Beach

the right and obligation to serve in the areas approved by the PSC in those orders. Accordingly, this Court is without jurisdiction to grant the relief requested in Count I, and that count should be dismissed.

With respect to Count II, the Town's assertion that Vero Beach has repudiated any of its obligations under the franchise agreement is without merit. There has been no breach and no repudiation of any of Vero Beach's obligations for the simple reason that no provision of the franchise agreement applies after it expires. There's no provision in the franchise agreement upon which the Court could grant relief, and accordingly, Count II should also be dismissed.

I would like to continue with a brief history of the facts on the ground and the relevant statutes and the PSC's territorial orders and proceedings approving them.

The City of Vero was incorporated in 1919. It acquired the Vero Electric Company in 1920, and has been providing service continuously then for these last ninety-five years.

The City was reincorporated as the City of Vero Beach in 1925.

In 1935 and '36, Section 180.02, Sub 2, Florida Statutes was enacted. It was enacted in '35 and amended in '36.

We know that in 1952, the City of Vero Beach was serving outside its city limits because there was an ordinance providing for the cost and rate and treatment of extensions of service outside the city as of that date. We believe that we were serving outside the city limits for quite some time before that.

In 1953, the City was serving the area that was in that year incorporated as the Town of Indian River Shores. There was no franchise agreement or any other agreement, we were just asked to provide electric service in that area and we did so. There were never any complaints about our services or our rates until sometime well after the turn of the century.

In 1968 there was an agreement that the City would provide service to Indian River Shores but not exactly a franchise agreement.

In 1972 --

THE COURT: What kind of an agreement, a written agreement?

MR. WRIGHT: A written agreement.

THE COURT: Okay.

MR. WRIGHT: That we would provide service and be compensated.

THE COURT: All right.

MR. WRIGHT: In 1972, the City of Vero Beach and Florida Power & Light Company executed their first territorial agreement governing who would serve in what areas where those areas abutted each other. The Public Service Commission held a hearing on the matter and subsequently approved the territorial agreement. Indian River Shores did not appear. PSC actually noted that in its order.

In 1973, the territorial agreement was amended.

In 1974, switching venues, the Florida Legislature enacted the Grid Bill, which notably for these purposes include Section 366.04(2)(d) and (e), which confer upon the Public Service Commission jurisdiction over territorial agreements and territorial disputes.

And also Section 366.04(5), which gives the PSC essentially plenary jurisdiction over the planning, development, and maintenance of a coordinated electric power supply grid throughout Florida for the purpose of ensuring a reliable

electric supply and avoiding an uneconomic duplication of generation, transmission, and distribution facilities.

In 1981, after the Grid Bill was enacted, there was a new territorial agreement executed by the City of Vero Beach and Florida Power & Light Company.

There was a hearing held on that agreement in 1982 pursuant to a request of some customers who objected to being transferred from Vero Beach to FPL. There's no indication that Indian River Shores appeared in that hearing either.

The new territorial agreement was approved by an order of the Florida Public Service Commission issued on February 2nd, 1983.

In 1986, the City and the Town, Vero Beach and Indian River Shores, executed the franchise agreement that is somewhat at issue here.

The territorial agreement was again modified by a PSC order in 1988. There's no indication that the Town of Indian River Shores appeared in that proceeding either.

Today the City serves in the areas defined and described in the territorial agreement with FPL as approved by the PSC in its territorial orders. The

PSC's approved service area includes roughly eighty percent of the Town of Indian River Shores.

In Count I of its amended complaint, the Town asks the Court for three things, the third being such other relief as may be deemed appropriate.

They ask for two specific declarations. That the Town, not PSC, has the right to choose the electric utility that will serve in the town after the franchise agreement expires, and that the City will no longer have the right to serve within the Town's limits after the franchise agreement expires.

Pursuant to governing provisions of Chapter 366, and applicable, well-developed decisions of the PSC and the Florida Supreme Court, the jurisdiction to decide both of these matters is vested solely in the PSC pursuant to Section 366.04(1), that jurisdiction is exclusive and superior to that of any other branch of the state, including specifically towns and counties and so on. And, accordingly, as a matter of law, Count I of the Town's amended complaint should be dismissed.

I've mentioned the statutes --

THE COURT: Dismissed with prejudice or

without?

MR. WRIGHT: We would suggest with prejudice, Your Honor.

THE COURT: Why?

MR. WRIGHT: Because we believe that, as I'll discuss momentarily, that this Court cannot grant to the Town the power, cannot issue a declaratory statement granting to the Town the power to designate a successor electric supplier. And that they cannot remove, force us to be removed from the city limits, per se. I'll discuss the issue of our use of their rights-of-way momentarily.

Thank you.

The applicable statutes are, as I said, 366.04(2)(d) and (e), 366.04(5), and 366.04(1). These general laws provide that the PSC has the jurisdiction to approve territorial agreements, that's Subsection (d), which it has done. And to resolve any territorial dispute involving service areas between and among utilities, including rural co-ops, municipal electric utility and other electrical utilities under its jurisdiction.

366.04(5), as I mentioned a minute ago, grants the PSC jurisdiction over 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), states unequivocally that the jurisdiction conferred 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, all lawful acts, orders, rules, and regulations of the PSC shall in each instance prevail.

Under Florida statutory framework, the PSC has the authority to approve territorial agreements. Those agreements merge with and become part of the PSC's orders approving them.

This is held by the Florida Supreme Court in PSC v. Fuller. The territorial orders determine which utilities provide electric service in the areas delineated in the territorial agreements until and unless the Public Service Commission modifies or terminates the orders. Jurisdictionally then, the PSC has the exclusive and superior jurisdiction to determine which

utility serves in what service areas. And, jurisdictionally, only a modification or termination of the PSC's orders can change which utilities are authorized to serve in what areas.

Vero Beach provides service disbursement to exactly such PSC orders and those orders have not been modified or terminated.

In a recent case the PSC articulated this principle very clearly. That case involved competing declaratory statement actions before the PSC as between Indian River County and the City of Vero Beach.

Briefly, the Commission held --

THE COURT: Is that the February 12, 2015?

MR. WRIGHT: Yes, ma'am. Yes, Your Honor.

THE COURT: Okay.

MR. WRIGHT: PSC stated, Vero Beach provides electric service to the territory described in the territorial orders. We have given Vero Beach the right and the obligation to serve customers within the territory described in the territorial orders. These orders have not been amended or modified to lead the unincorporated Indian River County area from Vero Beach's service territory.

Because the territorial orders are valid

Commission orders, Vero Beach will obtain its right and obligation to provide electric service to customers within the territory described in the territorial orders unless and until we modify those orders.

The Town suggests that the second part of Section 180.02(2) Florida Statutes, somehow prevents the City from serving within the Town. We believe that Section 366.04(1) could not be clearer. It declares unequivocally the legislature's intent that Chapter 366.04, Section 366.04, gives the PSC exclusive and superior jurisdiction over all other branches of Florida state government. In other words, the Town can't assert that. The assertion that they have to give us their consent to serve in their areas is governed by the PSC's exclusive and superior jurisdiction over all such matters.

THE COURT: What is the status of that decision, has it been administratively reviewed or judicially reviewed?

MR. WRIGHT: It is on appeal to the Florida Supreme Court, Your Honor. Briefing is complete.

THE COURT: So it went somewhere else first though; right?

MR. WRIGHT: No, Your Honor.
THE COURT: The judicial review is directly to the Supreme?
MR. WRIGHT: Yes, Your Honor.
THE COURT: Oh, okay.
MR. WRIGHT: On electric and natural gas matters.
THE COURT: And what's the status of that case?
MR. WRIGHT: Briefing is complete. Oral arguments have not been set.
THE COURT: Okay.
MR. WRIGHT: Your Honor, we would suggest that the facts in the instant dispute as between the Town of Indian River and the City of Vero Beach are virtually identical to those in the case Public Service Commission vs. Fuller, 551 So.2d 1210.
In that case there were proceedings in which the City of Homestead, a municipal utility, sought to vacate, sought to terminate a territorial agreement that it had executed between itself and Florida Power & Light Company. Florida Power & Light Company filed a motion to dismiss or motion to abate. Those motions were denied.
The Public Service Commission brought an

action for prohibition before the Florida Supreme Court which led to this, to the decision in which the Court ultimately said only the PSC has jurisdiction.

Exactly like the posture of this case, using the language of Fuller, the underlying purpose of this instant Circuit Court action, this Circuit Court action, is the effort by the Town of Indian River Shores to change the boundaries of the territorial agreement between Vero Beach and FPL, and to change the utility which should serve customers in the affected territories. The law is clear that the PSC has had the implicit power to approve and to modify territorial agreements since before the parties executed the instant agreement. And the PSC now has the expressed authority pursuant to the Grid Bill, 366.04 and 5, to approve territorial agreements between and among utilities.

The Supreme Court concluded that the purpose of the action brought by the City of Homestead -- substitute the Town of Indian River Shores here -- in the Circuit Court is to modify the territorial agreement between it, Homestead and FPL -- substitute the Town of Indian River Shores. Indian River Shores is here as a would-be electric utility

saying that they can, can change the boundaries of the territorial agreement and say who may serve after the franchise agreement expires.

The Supreme Court went on to say, we find the agreement has no existence apart from the PSC order approving it, and that the agreement merged with and became part of the PSC's order. Any modification or termination of that order must first be made by the PSC.

The subject matter of the order is within the particular expertise of the PSC which has the responsibility of avoiding the uneconomic duplication of facilities and the duty to consider the impact of such decisions on the planning, development, and maintenance of a coordinated electric power grid throughout the State of Florida. Accordingly, the Court held that the Circuit Court is without jurisdiction to conduct further proceedings in the City of Homestead case.

Accordingly, Your Honor, Count I should be dismissed.

Count II is the Town's claim for anticipatory breach. Their specific request for relief is that the Court award 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's assertion that the City has refused to acknowledge the Town's rights upon expiration of the franchise agreement whatever they are, is simply false.

The Town's claims appear to be in Paragraph 64 of its amended complaint that Vero Beach will continue to provide electric service in the Town and charge the City's rates for that service.

And in Paragraph 65, that Vero Beach intends to continue to occupy the Town's rights-of-way for the purpose of providing electric service to its customers located in its PSC-approved service area in the Town.

The Town's assertion in Paragraph 64 is really simply a restatement of its Count I, that the City has no right to serve. Pursuant to the PSC's jurisdiction and its territorial orders implementing that jurisdiction, we have the right to continue serving after the franchise agreement expires.

The Town's assertion in Paragraph 65, even if true, does not constitute a breach of the franchise agreement or any other breach of civil, statutory, or contractual law. The Town has not even asked

the Court to order Vero Beach to remove or relocate its facilities from the Town's rights-of-way. The City will fully respect the Town's rights to regulate the use of its rights-of-way in a lawful, reasonable, and nondiscriminatory matter pursuant to Chapter 337, particularly Subsections 401 through 403. The City does not believe that such regulatory authority includes the right to simply remove the, allows the Town to simply remove the City from providing electric service within the Town.

If and when the Town were to bring a claim to this Court seeking to require Vero Beach to remove or relocate its facilities, we would likely assert that we have a lawful right to continue using the Town's rights-of-way pursuant to a number of other legal theories, and that we will willingly compensate the Town for such use pursuant to the holdings of the Florida Supreme Court in Winter Park and Alachua County. The Town has never asked us to pay, nor has it asked us, asked you to order us to remove our facilities.

With respect to the assertion of an anticipatory breach of the obligations, I think it's important to look at our respective

obligations under the agreement. Our obligations are basically to provide safe, adequate, reliable service at reasonable rates, to locate our facilities properly so as not to interfere with traffic, to operate our system within the town pursuant to established utility practices and applicable federal and state regulations, to restore the areas around our facilities if and when we disturb them with construction, to collect and remove franchise fees if asked to do so by the Town, and to indemnify the Town against any claims that may be brought against the Town by virtue of a negligent or wrongful act on the part of the City or its agents.

The Town's basic obligations pursuant to the franchise agreement is simply not to compete with the City to sell retail electric service within the town.

In practical terms, Your Honor, upon expiration of the franchise agreement, the City will continue providing service because that's our duty. We'll continue to provide safe, adequate, reliable service at reasonable rates, and we will do so pursuant to accepted utility practices and federal and state regulations and any lawful

regulations that the Town would endeavor to impose upon us. We'll clean up after ourselves if and when our construction disturbs areas within the town.

Upon expiration of the franchise, the Town will no longer be bound as a matter of contract between itself and the City not to compete against the City to provide electric service. However, any effort by the Town to do so is subject to the Public Service Commission's exclusive and superior jurisdiction over service territories pursuant to Section 366.04(2)(d) or (e). If there's a dispute, it's Subsection (e). If there's an agreement, it's Subsection (d).

The Town's fundamental error, Your Honor, is their attempt to conflate the right of the City to use the rights-of-way granted in the franchise agreement with Vero Beach's right to provide electric service within the geographic area of the Town. They attempt to conflate the franchise agreement with the right to serve. They attempt to conflate the franchise agreement's expiration with the expiration of the right to serve. Our right to serve derives from the Public Service Commission's territorial orders lawfully issued pursuant to

Chapter 366.

THE COURT: So how do you serve without the right-of-way, is that determined by PSC, too?

MR. WRIGHT: No, Your Honor. If they were to require us to move out of the rights-of-way, we would have to go find, get private easements to provide service.

THE COURT: I'm not asking that based on the motion to dismiss, it was just a curious thought because that would be a summary judgment issue. That's a question of fact, not of law.

MR. WRIGHT: Yes.

THE COURT: And this is also a question of law, and that's another question I have.

I mean, usually motions to dismiss are on the four corners and I don't consider questions of law or fact. Because you're claiming this is a jurisdictional issue, I'm sticking to the jurisdictional question of law.

MR. WRIGHT: Yes, Your Honor.

Did I answer your question?

THE COURT: Yes, you did.

MR. WRIGHT: Okay. And I understood it as such.

THE COURT: Just based on your argument, that

thought came to my mind.

MR. WRIGHT: Sure.

THE COURT: Because the agreements, I mean, the agreement would no longer be in effect at the expiration for the right-of-way.

MR. WRIGHT: Yes, Your Honor, that's correct. The use of the rights-of-way potentially involves a whole bunch of other legal issues, affirmative defenses and so on, but that's not before you today.

THE COURT: Right. Okay. I understand.

MR. WRIGHT: In sum, with respect to Count II, back to the four corners, the City has not breached the franchise agreement, nor has the City asserted that it will breach the franchise agreement. After the franchise agreement expires, there's nothing to breach. The expiration of the franchise agreement may remove a contractual right to use the Town's rights-of-way, but it doesn't change any other rights the City may have, nor does it void any affirmative defenses we may have.

There's no provision in the franchise agreement that addresses the effect of termination of the franchise agreement. There's no provision that would require the City to remove or relocate

its facilities. There's no provision that would require the City to cease providing service with Indian River Shores in its PSC-approved service area. There's no provision in the franchise agreement to exceed the Town's asserted right under Count I to choose the next electric supplier to serve after November 6, 2016.

There's no provision in the franchise agreement that would obligate the City to sell its facilities to the Town. The Town might have attempted to bargain for said provisions in the franchise agreement, but it didn't. Other franchise agreements have included such provisions, and the franchise agreement clearly does not contain any such provisions. Accordingly, there's nothing for us to breach. We haven't asserted that we're going to breach anything. We haven't breached anything.

There's no provision in the franchise agreement upon which to grant the relief requested, and therefore Count II should also be dismissed.

Thank you, Your Honor.

I would like to turn it over to Ms. Cowdery now if you have no more questions of me.

THE COURT: All right.

MS. COWDERY: May it please the Court. I'm Kathryn Cowdery with the Office of General Counsel for the Florida Public Service Commission.

The Public Service Commission filed an amicus memorandum in this case because it is the Office of General Counsel's opinion that the Circuit Court does not have jurisdiction to issue a declaratory judgment that determines whether or not Vero Beach has the right and obligation to provide electric service in the Town of Indian River Shores.

This determination has already been made by the Public Service Commission in its territorial orders, which are Exhibit E to the motion to dismiss. These orders were issued pursuant to the Public Service Commission's exclusive and superior jurisdiction granted to it by the Florida Legislature. It is well-established that territorial orders may only be modified by the Commission.

THE COURT: Has there been an application for modification?

MS. COWDERY: No, Your Honor.

The Florida Legislature has recognized the need for central supervision and coordination of electric utility transmission and distribution

systems.

I think Mr. Wright has gone through a pretty extensive analysis of the Commission's jurisdiction in the short time allowed. I want to give the Commission's perspective which I think agrees with what Mr. Wright has said.

366.04(1) and (2) give the Commission exclusive and superior jurisdiction to require electric power conservation and reliability within a coordinated grid for operational as well as emergency purposes. We have the authority to resolve, upon petition of the utility or on the Commission's own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under our jurisdiction.

In resolving territorial disputes, the Commission has a technical staff that does a very technical analysis of various information and data that the utilities provide in order to help resolve the dispute.

Pursuant to statute, the Commission may consider but is not limited to consideration of the ability of 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 the service.

Pursuant to our Rule 256.0441 which concerns territorial disputes, we further clarify that this includes the capability of each utility to provide reliable electric service within the disputed area with its existing facilities and to the extent to which additional facilities are needed. We look at the cost of each utility to provide distribution in sub-transmission facilities to the disputed area presently and the future. And if all other factors are considered equal, customer preference may also be considered.

My point being, this is a very technical complex area that the Commission has been granted jurisdiction on. And I think the language of the statute granting this jurisdiction is important. It's very strong language. 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. This is because the Commission has been granted by the Legislature the, well, the Legislature has recognized the need for central supervision and coordination of the electric utility transmission and distribution systems, the electric utility grid in Florida.

The Florida Public Service Commission's exclusive regulatory oversight over agreements protects the public welfare as an exercise of the police power of the state.

Additionally, Florida's clearly articulated and affirmatively expressed state policy actively supervised by the Florida Public Service Commission entitles utility's territorial agreements to state action immunity from antitrust liability under the Sherman Act because these territorial agreements do set up monopolies, and these monopolies are approved then by the Commission under its supervision and regulatory authority.

Additionally, there are many Florida utilities that provide service to geographical areas pursuant to territorial agreements. These electric

cooperatives, municipalities, and other utilities rely on these territorial agreements to establish their boundaries. And they rely on the Commission's oversight and authority for the purposes of planning, providing service in the future, making investments in their facilities.

The PSC is not misconstruing the Town's argument. There are no threshold questions that we believe must be determined by the Circuit Court. It is important to note that the Florida Supreme Court in the case of Florida Public Service Commission v. Bryson stated that as a threshold matter, as the state entity charged by law with planning and regulating electrical power throughout Florida, the Public Service Commission is to determine its own jurisdiction. The PSC, stated the Court, must be allowed to act when it has at least a colorable claim that the matter under consideration falls within its exclusive jurisdiction as defined by the statute.

The Town's request to the Circuit Court for a determination of whether the City of Vero Beach, upon expiration of the franchise agreement, has the right to continue to provide service in the Town of Indian River Shores as it is authorized to do by

the Commission in the territorial order, directly interferes with the Public Service Commission's jurisdiction.

There is more than a colorable claim that the Florida Public Service Commission has jurisdiction to decide the question raised in Count I of the amended complaint in order for the Commission to exercise its responsibilities to assure a coordinated electric power grid in Florida.

Do have you have any questions of the Commission?

THE COURT: No.

MS. COWDERY: Okay. Thank you.

THE COURT: Thank you.

MR. MAY: Good morning.

THE COURT: Good morning.

And your name, please.

MR. MAY: May it please the Court.

Your Honor, good morning, I'm Bruce May with the law firm of Holland & Knight. With me today is my partner Karen Walker. We're both here today on behalf of the plaintiff in this action, the Town of Indian River Shores.

Ms. Walker and I will split our argument.

THE COURT: Okay.

MR. MAY: I'll respond to the defendant's motion to dismiss on the subject matter jurisdiction grounds particularly focused in Count I. Ms. Walker will address the balance of the motion to dismiss Counts II, III, and IV.

THE COURT: Okay.

MR. MAY: Before I begin, I would be remiss if I didn't introduce the Vice Mayor of the Town Mr. Weick, the Town Manager Mr. Stabe, Town Counsel Mr. Clem, and also Kevin Cox is with our law firm.

THE COURT: Good morning.

MR. MAY: Your Honor, I think before I begin, what I would like to do is to provide a couple of handouts which are demonstrative handouts. I've given them, just given them to counsel for the City. And with your permission, I would like to provide demonstrative exhibits, both handouts to the Court.

THE COURT: Sure. Did you email them?

MR. MAY: I did not.

THE COURT: Okay. That's fine.

MR. MAY: But these are part of our filings that we did. They're simply, Handout Number 1 is the statutes and constitutional provisions which we're asking you to construe.

THE COURT: Right.

MR. MAY: In addition to the franchise agreement, these are constitutionally and statutory provisions that are outside the PSC's jurisdiction.

And in Handout Number 2 are the PSC's own statements that it does not have the jurisdiction over and cannot interpret the Florida Constitution, the statutes governing local government powers and utility franchise agreements, and that's why Count I was filed with the Court and not with the PSC.

So with that, would I have your permission to provide you with that handout?

THE COURT: Sure. The only thing that was emailed, I have an amended notice of hearing. Everything else I have on paper, which I don't like. In the future, if you have hearings, try to e-serve it all so I have it.

MR. MAY: Thank you, ma'am.

THE COURT: I don't do paper well.

MR. MAY: Your Honor, in light of what was just said, I think it may be helpful for me to explain what Count I is and what Count I is not. There appears to be a considerable amount of confusion as far as what Count I involves. Let me explain or let me start with what Count I is not.

Count I is not an action about a territorial agreement. The Town is not a party to any territorial agreement. The Town has not requested that the Court construe the territorial agreement. And the Town is not asking the Court to repudiate or modify the PSC's order approving the territorial agreement.

In fact, Paragraph 33 of the amended complaint acknowledges that the PSC has the authority to approve territorial agreements and resolve territorial disputes. More to the point, the Town's response to the motion to dismiss further acknowledges that until the PSC's order approving the territorial agreement is modified by the PSC, the City could continue to provide electric service in the Town.

Now what Count I is, Your Honor, is an action --

THE COURT: So that's undisputed?

MR. MAY: Pardon me?

THE COURT: That's undisputed?

MR. MAY: That's undisputed.

THE COURT: Okay.

MR. MAY: Count I, Your Honor, is an action under the Declaratory Judgment Act for declaratory

relief regarding the Town's rights to be protected from the City intruding and exercising extraterritorial powers within the Town without the Town's consent. The Town believes it's entitled to those protections under the franchise agreement, under the Florida Constitution, under the Municipal Home Rule Powers Act, and under Chapter 180 Florida Statutes, as well as under the Special Act creating the Town.

The core issue, the core issue in Count I is whether the City has the required organic municipal authority to exercise monopoly extraterritorial powers by occupying the Town's rights-of-way and charging monopoly rates within the Town without the Town's consent. That's a fundamental issue of municipal law. It's not a fundamental issue of utility law.

As you know, Your Honor, under our system of government, municipalities are considered to be equally independent, each with equal dignity and each with equal power. While a municipality has broad and inherent home rule powers to operate within its corporate limits, it's extraterritorial powers are circumscribed by Article VIII of the Florida Constitution. Simply put, one municipality

cannot intrude and exercise extraterritorial powers within the corporate limits of another without the other's consent or without legislative authorization by general or special law.

As you can see in Handout Number 1, Article VII, excuse me, Article VIII, Section 2(c) of the Florida Constitution, and Section 166.021(3)(a) of the Florida Home Rule Powers Act, make it clear that a municipality like Vero has no inherent home rule authority when it comes to the exercise of extraterritorial power. Instead, if a municipality seeks to exercise extraterritorial powers within the corporate limits of another municipality without the other's consent, it must have legislative authorization under general and special law.

In Count I the Town has pled and is prepared to prove at trial that there is no current general or special law that authorizes the City to exercise extraterritorial power within the Town without the Town's consent.

In fact, as shown in Section 180.02(2), which is also in Handout 1, that statute is general law and expressly prohibits one municipality from encroaching and exercising extraterritorial powers

within the corporate limits of another municipality without the other municipality's consent.

Now the Town has pled and is prepared to prove at trial that it gave the City the consent to occupy its rights-of-way and to serve within the City for a limited period of thirty years. But that agreement and the Town's consent will expire in a little over a year, November 6, 2016.

Your Honor, the Town believes, again, that under the franchise agreement, the Constitution, the Home Rule Powers Act, Section 180.022 as well as its own Special Act, it has a right to be protected from the City exercising extraterritorial powers within the Town without the Town's consent after the franchise agreement expires.

However, the Town is uncertain as to those rights because the City continues to insist, as Mr. Wright just said, that it can exert extraterritorial powers within the Town and occupy the Town's rights-of-way without the Town's consent even after the franchise agreement expires.

Count I is a classic action, Your Honor, for declaratory relief. To address the fundamental issues and to look and to dig into the fundamental issues that are embedded in Count I, this Court

will need to analyze and interpret the franchise agreement, it will need to analyze and interpret the Florida Constitution, it will need to analyze and interpret the Home Rule Powers Act, Chapter 180, and the Special Act creating the Town.

The Declaratory Judgment Act in section or Chapter 86 Florida Statutes, as you know, gives the Court broad expressed subject matter jurisdiction to perform those very tasks and to issue or grant the declaratory relief the Town has requested.

However, if you'll look at Handout Number 2.

THE COURT: Well, let's go back.

So if I granted your count, what would the effect be since PSC has exclusive jurisdiction to modify?

What if PSC, okay, I grant your declaration, PSC denies the modification, then what?

MR. MAY: We would have to cross that bridge, but I think that's a good question.

Your Honor, if you were to grant, which we hope you do, the declaration we've asked --

THE COURT: We're not here today on that.

MR. MAY: Right. I understand.

But if this, if the declaratory relief is granted --

THE COURT: If you were successful.

MR. MAY: We would then, we would presume that the Florida Public Service Commission would modify its order or conform its order to recognize the limited extraterritorial powers.

This is precisely what happened, Your Honor, in the Reedy Creek case. In that case the Florida Public Service Commission approved a territorial agreement between Florida Power Corporation and Reedy Creek district, which is regulated by the Public Service Commission.

THE COURT: I think they did it first though before the Court was involved; right?

MR. MAY: What happened was, what happened was the Public Service Commission approved the territorial agreement which gave Reedy Creek, a municipal utility, the right to serve a development about the size of the Town of Indian River Shores called Golden Oak Estates.

And then later, when it was brought to the Commission's attention that Reedy Creek did not have the extraterritorial power to serve that district, the Public Service Commission went back and modified its order to conform its order to reflect the fact that this municipal utility did

not have the extraterritorial powers to serve outside its municipal boundaries.

Again, that's an issue for another day. That's entirely within the discretion of the Commission. We're not suggesting that your order will trump the Public Service Commission's deliberations and determinations.

THE COURT: I understand, but what's the purpose of the success on the merits of Count I then if it's contingent upon what the PSC does?

MR. MAY: I think we need, these are threshold constitutional issues, threshold legal issues that the Florida Public Service Commission does not, by its own orders, have the discretion to give that kind of declaratory relief. And those are set forth in Handout Number 2, which are again gleaned from the orders actually cited by the Public Service Commission and by the City.

THE COURT: So before you get back on your train of thought.

MR. MAY: Sure.

THE COURT: And before I lose mine, can you just square the Fuller and the Beard cases and the findings in those two Florida Supreme Courts with the issues in this case.

MR. MAY: Sure.

THE COURT: Specifically I keep reading Beard, I know the defendant was focused on Fuller, but I keep reading some of the findings in Beard, and I have a little bit --

MR. MAY: Well, I think again the Beard case and particularly the Fuller case did not involve the issues in this case. Both of those cases involved a situation where a party to a PSC-approved territorial agreement sought the declaration of its rights under the territorial agreement.

That's precisely what Fuller did. And I know Mr. Wright spent a lot of time on Fuller, but Fuller had nothing to do with the issues in this case. In fact, it's an opposite. Unlike Fuller, unlike here, Fuller involved a Circuit Court action in which one party to the territorial agreement, the City of Homestead, sought a declaration of its rights under the territorial agreement and sought those declarations before the Circuit Court.

THE COURT: I think all of them were Homestead, every case I read is Homestead.

MR. MAY: The Town is not a party to any territorial agreement, Your Honor. It's not

seeking a declaration of rights under any territorial agreement, and it's expressly confirmed it's not seeking any modification to any territorial agreement in this case. Instead, the Town has recognized that only the PSC can modify a territorial agreement.

Again, what we're asking the Court to do is to rule on discrete and threshold constitutional and legal issues that the Public Service Commission has said it does not have the jurisdiction to provide. It does not have the jurisdiction to provide that kind of declaratory relief.

If you look at the Order Number 10543, the PSC states --

THE COURT: Wait. Wait.

MR. MAY: The operative or the relevant provision is the --

THE COURT: 15010 or 102?

MR. MAY: 10543.

THE COURT: Oh, I don't have that one.

MR. MAY: It's in Handout Number 2. It's at the very top, the style of the case.

THE COURT: I'll find it later.

MR. MAY: But as you can see, as you can see on Handout Number 2, it shows that the agency, the

PSC is precluded by Section 366.112 from interceding into disputes that fundamentally involve the terms and conditions of franchise agreements.

THE COURT: Oh, I'm sorry, you have it on the handout on the second page.

MR. MAY: Yes, Handout Number 2.

THE COURT: Okay. So that is, let me just make a note, that is from Rule 15010.

MR. MAY: That's from PSC Order Number 10543.

THE COURT: 10543, and what was the date of that?

MR. MAY: It was dated 1982.

THE COURT: Oh.

MR. MAY: And it states, and I quote, the Commission may not interpose itself in the terms and conditions of the franchise contract. This view is required by the clear dictates of the Legislature in Section 366.11(2).

Look at a more recent order, in PSC Order 150102 issued last February to the City.

THE COURT: Page number?

MR. MAY: It's, again, it's the second, it's on Handout Number 2.

THE COURT: Oh, okay.

MR. MAY: I just tried to just streamline this and provide you the actual excerpts.

THE COURT: Oh, I got it. All right.

MR. MAY: In this order, which was issued to the City of Vero Beach last February, the PSC stated, quote, the franchise agreement that's between Indian River County and the City is not a rule order or a statutory provision of this Commission, and we would have no authority to issue a declaration interpreting that agreement.

Another order issued that same day to Indian River County said the PSC expressly acknowledged, quote, we have no jurisdiction over the County franchise agreements, and therefore no authority to issue declaratory statements concerning the County's possible future actions concerning the extension of the franchise agreement with Vero Beach.

THE COURT: That's in Rule 101?

MR. MAY: That's in, right, that's in PSC Order 150101.

THE COURT: Oh, I got it.

MR. MAY: In that same order the PSC went on to state that the issue of, quote, how expiration of the franchise agreement affects Vero Beach's use

of the County's rights-of-way does not raise a matter within our jurisdiction. It does not raise a matter --

THE COURT: Well, the City is saying they acknowledge they're not going to use the right-of-way, they're going to find some other way basically.

MR. MAY: But, again, the point that I'm trying to make, Your Honor, is that these franchise agreements are beyond the Public Service Commission's jurisdiction to interpret.

THE COURT: Okay.

MR. MAY: And that's why we're --

THE COURT: For jurisdiction, you're right, you're right.

MR. MAY: We're asking you to make some fundamental judicial determinations as to matters of law and constitution which the PSC has stated it has no authority to get into that area.

The PSC also confirmed that it did not have the authority to issue declaratory relief to Indian River County regarding the County's local government powers under Chapter 125, which as you know is the counterpart to the Municipal Home Rule Powers Act, nor did it have authority to grant

relief interpreting the Florida Constitution. I quote the Commission's order, quote, we have no authority under Chapter 125 or over any provision of the Florida Constitution.

Your Honor, this is not even a close question. The PSC has no authority or jurisdiction to address the threshold legal and constitutional issues in Count I which require legal analysis and interpretation of the Town's franchise agreement, the Constitution, the Home Rule Powers Act, or the Special Act creating the Town.

In order to get around this precedent that the PSC lacks jurisdiction to provide the declaratory relief that the Town has requested, the PSC and the City tried to attempt to distort Count I into something that it's not. The City suggested the Town, again, is trying to attack the territorial agreement. With all due respect, that's not what Count I does.

As I mentioned earlier, this is not about the territorial agreement. In fact, the amended complaint acknowledges that the PSC has the authority to approve territorial agreements. And we've also acknowledged in our response to the motion to dismiss that until the PSC's orders

approving territorial agreement is modified by the PSC, the City can continue to provide service in the Town.

Your Honor, as you pointed out to Mr. Wright, we're here today on a motion to dismiss. We're not here to discuss the merits. We're looking at the four corners of the complaint.

And the 4th District Court of Appeal in Donaldson v. City of Titusville, that's 345 So.2d 800, held that when the Circuit Court considers a motion to dismiss a declaratory judgment action, all reasonable inferences from the amended complaint must be made in favor of the non-moving party, that would be the Town. And that the complaint is to be liberally construed in favor of the pleader, again, that would be the Town.

When the amended complaint in Count I is read as a whole, it's reasonable to infer that the Town is not asking the Court to override the PSC's jurisdiction over service territories. Any efforts by the City to distort the amended complaint as an attack on the territorial agreement would be an unreasonable inference and must be rejected.

Your Honor, the Court has actually confirmed that the franchise agreements are enforceable

contracts and the interpretation of rights and responsibilities under those contracts is for the Circuit Courts to resolve even though the PSC has jurisdiction over service territory issues. And that's the Casselberry case at 793 So.2d 1174.

It's an important case, Your Honor. In that case, the City of Casselberry filed a complaint for declaratory judgment seeking a determination of its rights under a franchise agreement with Florida Power Corporation. In response to that complaint, Florida Power Corporation made the exact same argument that Vero makes here. Florida Power Corporation argued that the Circuit Court did not have jurisdiction to hear the matter because the PSC had exclusive jurisdiction over service territory issues.

Now the Trial Court in that case, Your Honor, properly rejected those arguments. And the 5th District Court of Appeal affirmed the Trial Court noting that the PSC's jurisdiction over service territories was a matter reserved for another day and was prematurely raised in an action involving interpretation of rates, rights under the franchise agreement.

Your Honor, just as in Casselberry, the PSC's

jurisdictional issues are being prematurely raised by the City at this time. The amended complaint makes it clear that the Town is not asking for declaratory, declaration regarding the territorial agreement or any order approving the territorial agreement.

Now I mentioned that the cases cited by the City are readily distinguishable and do not support dismissal. I've already talked about the Fuller and the Beard case. Let me talk a little bit about the Reynolds case which the City spends a good bit of time.

In that case, Monroe County actually repudiated, actually repudiated the PSC's jurisdiction over territorial agreements, and the County was attempting to use declaratory and injunctive relief to modify the territorial agreement.

Again, that's not what Count I is about. Here the Town does not repudiate or seek to usurp the PSC's jurisdiction over territorial agreements. In fact, the Town acknowledges that only the PSC can approve the territorial agreement, and only the PSC can approve a modification to that territorial agreement. And until the PSC does such, does just

that, the City can continue to provide electric service to the Town.

Your Honor, the Town is simply asking the Court to address threshold questions of law that the PSC has acknowledged it has no authority over.

Let me talk briefly about the City's primary jurisdiction and exhaustion of administrative remedies. I've covered this earlier so I won't belabor the point except to say that the PSC's own orders show that it doesn't have the authority to issue declaratory relief regarding a party's rights on a franchise agreement, the Constitution, the Municipal Home Rule Powers, and those are core issues in this case, and therefore the primary jurisdiction argument is misplaced.

The City's argument that the Town has failed to exhaust administrative remedies is also without merit. A party is not required to exhaust administrative remedies that are futile or do not exist. And as I just explained to the Court, the PSC's own orders show that it does not have the authority to give the declaratory relief that the Town has asked for.

Your Honor, I'll wrap it up and then I'll turn it over to Ms. Walker. But Count I is an action

that calls out for declaratory relief. The allegations in Count I show that there is a bona fide dispute involving a rapidly approaching deadline in a franchise agreement. The Town is uncertain --

THE COURT: Rapidly approaching, November 2016?

MR. MAY: It's a little over, a little over a year.

THE COURT: It's a long time for me. It's quicker than I, or that's longer than it takes me to enter an order, which is pretty long.

MR. MAY: Okay. That's --

THE COURT: So rapidly approaching.

MR. MAY: That's good to know.

THE COURT: Well, it doesn't take me a year, maybe half a year.

MR. MAY: Okay. But, again, we believe that there is an approaching deadline, we would think it's rapidly approaching, but perhaps it's not rapidly approaching.

THE COURT: Hurricane Erica is rapidly approaching.

MR. MAY: That's true. That's true. And we hope it slows down.

But, again, the Town is uncertain about its rights under the franchise agreement, under the Florida Constitution, the Home Rule Powers Act, as well as the Special Act creating the Town.

Now the Declaratory Judgment Act, Your Honor, gives this Court express subject matter jurisdiction to clarify the rights of the parties, and I quote, to contracts, rights of parties under municipal ordinances, and rights of parties under, quote, franchises. It also gives the Court the express subject matter jurisdiction to declare the existence or nonexistence of any, quote, immunity, power, privilege, or right, which of course includes any rights under the Florida Constitution.

Unless you can say that the PSC has jurisdiction to provide the Town the declaratory relief regarding its rights under the franchise agreement, regarding its rights under the Constitution, regarding its rights under the Home Rule Powers Act, and regarding it's rights under 180.02, then there's no reason to dismiss this proceeding. Again, the PSC has made it absolutely clear that it does not have jurisdiction to issue declaratory relief in those areas. Those areas are within the province of this Court.

Your Honor, abatement or dismissal of the PSC, on PSC subject matter jurisdiction grounds not only would be an error, it would place the Town in a proverbial state of limbo. If this case is pushed down to the Florida Public Service Commission and we ask for the declaratory relief my client needs, and if the PSC is going to be consistent with its final orders and its recent filings with the Florida Supreme Court, the PSC is going to tell us we need to be in Circuit Court.

Your Honor, we're not asking the Court to trample on the Public Service Commission's service territory jurisdiction, and we're certainly not asking you to modify PSC order approving territorial agreement. As in the Casselberry case, those issues are to be reserved to the PSC and resolved by the PSC on another day.

Your Honor, as we just discussed, the franchise agreement will expire a little over a year from now, and the Town of Indian River Shores deserves its day in court. Because this Court has subject matter jurisdiction over the threshold contractual statutory and constitutional issues in Count I, and the PSC does not, the City's motion to dismiss Count I should be denied.

THE COURT: Thank you.

MS. WALKER: Good morning, Your Honor.

I'm Karen Walker with the law firm of Holland & Knight appearing as co-counsel on behalf of Plaintiff, Town of Indian River Shores.

Your Honor, at the beginning of this hearing, Mr. Wright asked the Court to hear Counts I and II together, and obviously we're respecting that request and will respond accordingly. And as Mr. May indicated, we are splitting our arguments with Mr. May addressing Count I, and I will address the City's motion to dismiss Counts II, II, and IV. And that's for a reason, Your Honor. And that's because the only count on which there is a subject matter jurisdiction argument is Count I.

Count II is a claim for anticipatory breach of contract. There is no basis for any argument that the Public Service Commission has jurisdiction to resolve a breach of contract claim. It's a breach of contract claim for damages. Certainly the Public Service Commission does not have authority from the Florida Legislature to award damages for breach of contract.

In fact, it's clear based on the Florida Supreme Court case of The Deltona Corporation vs.

Mayo where the Florida Supreme Court said -- and, I'm sorry, that citation is 342 So.2d 510, Florida Supreme Court, 1977. And in that case the Florida Supreme Court specifically said that the Florida Public Service Commission has no authority to vindicate breaches.

Your Honor, this claim in Count II is a claim for anticipatory breach of the franchise agreement. It's not a claim relating to a territorial agreement. It cannot be a claim related to a territorial agreement because the Town of Indian River Shores can't be a party to a territorial agreement. It's not a utility. A territorial agreement is an agreement between two utilities talking about how they're going to serve which areas. The Town of Indian River Shores is not an electric utility. It is a municipality. And as Mr. May pointed out, this is a dispute about the rights of two municipal governments.

Count II is a claim for anticipatory breach. It's a breach of contract claim. All that is at issue on this motion to dismiss is whether Count II states a claim upon which relief can be granted. And as Your Honor pointed out, we're not here on the merits. We are limited to the four corners of

the complaint. And the issue before the Court today is whether the plaintiff has stated a claim upon which relief can be granted.

Mr. Wright made lot of arguments about the merits and why he believes that there has been no breach of the franchise agreement. But, Your Honor, frankly those are inappropriate arguments on a motion to dismiss.

To allege an anticipatory breach, we have to show basically a breach of contract, that there is a contract, that there is, we have to allege it's been breached, and that there have been damages that the Town has incurred as a result of that breach.

The only difference between an anticipatory breach claim and any other breach of contract claim, is that in an anticipatory breach claim, the non-breaching party does not have to wait until the performance under the contract becomes due if the breaching party repudiates an obligation under the contract. Otherwise it's the same as any other breach of contract claim.

And, Your Honor, as you know, the standard for pleading in Florida is not perfection. The standard requires that the plaintiff include a

short claim statement and ultimate facts showing that the plaintiff is entitled to relief. And I know at the beginning of this argument, Mr. Scheff asked for the Court to dismiss the case with prejudice. I would submit that to the extent the Court finds any pleading deficiency, and we would submit there are no pleading deficiencies, but to the extent the Court finds any, that, if anything, the plaintiff should be given leave to amend because the City cannot show and has not shown that any alleged pleading deficiencies can't be cured by amendment.

So going to the allegations of the amended complaint relating to anticipatory breach. The Town's amended complaint alleges there's a contract at issue, the franchise agreement, a contract between the City and Town. The Town's amended complaint alleges that the City has anticipatorily breached that franchise agreement by repudiating its obligation to recognize the expiration of the franchise agreement.

The franchise agreement is a bargain for a contract. It's a contractual agreement just like any other contract agreement. And the parties bargained for the fact that that agreement would

not last in perpetuity, that it would last thirty years. That thirty-year period expires November 6, 2016.

THE COURT: Rapidly approaching.

MS. WALKER: Well, Your Honor, and I think that Mr. May's point to that is --

THE COURT: I understand.

MS. WALKER: -- there are obviously rights that need to be determined here and a lot of uncertainty. And we understand, you know --

THE COURT: I'm just kidding. A year is not a short time in a court.

MS. WALKER: It is not a short time.

THE COURT: To get hearing dates and trials.

MS. WALKER: Exactly.

So, Your Honor, with respect to the allegations in the amended complaint, specifically at Paragraph 65, the plaintiff has alleged that the City has repudiated its obligations under the franchise agreement and breached the franchise agreement by asserting its electric facilities will continue to occupy the Town's rights-of-way and other public areas after the franchise agreement expires. The franchise agreement is what gives the City the right to operate and maintain its electric

facilities in the Town's public rights-of-way and other public places.

So the anticipatory breach claim alleges that the City has said and repudiated the fact that upon the expiration of the franchise agreement, it no longer has the authority to operate and maintain its electric facilities in the Town's public rights-of-way. That's the repudiation that's been alleged. That's sufficient to state a claim for anticipatory breach. And so we've alleged in the contract there's a breach and there's damages. We've stated a claim upon which relief can be granted.

To the extent that the City wants to argue there hasn't been a breach, that's an argument on the merits. There's maybe affirmative defenses that should be raised at the appropriate time, but those arguments do not show that we have not stated a claim for anticipatory breach of contract.

In its motion to dismiss, the City argues that there is no anticipatory breach claim here because the City has some type of independent obligation and right to serve the Town under the territorial agreement as approved by the Public Service Commission. Again, Your Honor, that may be an

affirmative defense. That's not a basis to dismiss the claim in Count II of the amended complaint.

And, again, that addresses a right and obligation that the City claims they have to serve the Town. The Public Service Commission cannot give the City the right to occupy the Town's rights-of-ways.

The authority of the Public Service Commission is limited by what the Legislature has delegated or given to the Public Service Commission. And in Section 366.11(2) Florida Statutes, the legislature has said nothing herein shall restrict the police power of municipalities over their streets, highways, and public places.

So when the Legislature gave jurisdiction to the Public Service Commission to address territorial agreements and resolve territorial disputes, it also said that jurisdiction did not extend to the police power of municipalities over its ability to regulate its own public rights-of-way.

And the Florida Supreme Court has also addressed this issue in a case that's actually cited by the City. That case is Miami Bridge Company vs. Miami Beach Railway, 12 So.2d 438. And

in that case the Florida Supreme Court said, quote, it is well-settled that as a general rule, a public service company cannot use the streets of the city unless the municipality consents or unless it has legislative authority to do so.

Your Honor, in this case the consent of the Town for the City to occupy its public rights-of-way is via the franchise agreement. That franchise agreement expires on November 6, 2016. And the City has repeatedly said it's going to continue to operate and maintain its electric facilities in the Town's public rights-of-way after the expiration of that agreement.

In response to your question, Mr. Wright pointed out appropriately that there are other ways for the City to provide electric service without occupying the public rights-of-way, and those would include the private easements or possibly state rights-of-way use. But the repudiation that's alleged in the complaint is that the City has stated and intends to continue to use the Town's public rights-of-way even without their consent through the franchise agreement after it expires.

The final issue that the City raises in its motion to dismiss Count II is an argument that

frankly misconstrues the amended complaint. And as Mr. May pointed out on a motion to dismiss the allegations of the amended complaint are to be construed in the light most favorable to the plaintiff.

The argument the City makes is that the damages allegation is a claim for attorney's fees. Your Honor, that simply is not the case. The words attorney's fees are not mentioned in the amended complaint. It alleges that the Town has suffered damages as a result of the anticipatory breach. That's all that's required to be alleged at this point. It argues it's had to take action as a result of the City's repudiation of the right to occupy the public rights-of-way in the franchise agreement. And at trial the Town will certainly prove up those damages.

But for purposes of the motion to dismiss today, the City has alleged there's a contract, it has been repudiated by the City, therefore breached, and that the Town has suffered damages. That's all that's required to state a claim for anticipatory breach. And for that reason the Court should deny the City's motion to dismiss Count II of the amended complaint.

THE COURT: All right. Response or replies?
MS. COWDERY: I think I'll start with the general overview is that Chapter 366 is general law and it gives exclusive and superior jurisdiction over service of the utility providers in the State of Florida.
THE COURT: But does it address private property rights such as easements or right-of-ways?
MS. COWDERY: No, that is correct.
THE COURT: In the contract?
MS. COWDERY: That's correct. That is absolutely correct.
THE COURT: Okay. Well, they're arguing that this is not over a territorial agreement, this is over the agreement that the City and the Shores entered into, the franchise agreement, yeah, in the right-of-way.
MS. COWDERY: And I would disagree.
When you look at what is being requested, their specific questions are whether upon expiration of the franchise agreement, does the Town have the right to determine how electric service should be provided to its inhabitants; and upon expiration of the franchise agreement, does the City have a legal right to provide service.

These are areas that are specifically within the jurisdiction of the Commission.

THE COURT: It's undisputed.

MS. COWDERY: Excuse me?

THE COURT: That's undisputed they said.

MS. COWDERY: Right.

THE COURT: The service --

MS. COWDERY: That's right.

THE COURT: It's the right-of-ways, I think it's narrowed down to these right, yeah, the right-of-ways and the agreement to use these right-of-ways.

MS. COWDERY: Right. To the extent, to the extent that there is any kind of dispute between the parties about use of right-of-ways, that's between the parties. The Commission does not get involved in that.

But the language of Count I, what they are requesting the Court to do is to determine who the service provider is, is to determine that the City may no longer provide service. That is specifically within the Commission's jurisdiction.

And, you know, the answer to the question, well, what if the Court grants this declaratory relief, then the Circuit Court will have made the

determination on who provides service. We sort of, you know, glossed that over. Mr. May glossed that over a bit.

THE COURT: Well, I think the Supreme Court would eventually decide, because it wouldn't stop here.

MS. COWDERY: Right. But it should go to the Commission. Under Bryson, it should go to the Commission.

The amended complaint says, upon the Court's declaration that the City does not have the statutory powers to provide extraterritorial electric service within the Town and the Town has the right to decide how electric service would be furnished, the PSC's order approving the territorial agreement should simply be conformed to the Court's order. The Town is saying that the Court would trump the Commission's determination. That would be the effect of the Circuit Court making a determination.

Otherwise, it has no purpose. It would have no purpose for the Court to say, we are no, we are going to issue a declaration that the City doesn't have the right to provide service upon expiration of the franchise agreement. And then would it make

that like a suggestion to the Public Service Commission? It doesn't make sense. It does not make sense.

The issue of territorial agreements and providers of service in this case has been determined by the Florida Public Service Commission in the territorial orders. The case law is clear, Fuller, Roemmele-Putney, cases that we have cited that the Commission makes that determination.

The Town is attempting to pull in areas outside of the Commission's jurisdiction and make statements that by the Commission's own orders that we, we will not interpret municipal powers and Constitutional provisions as to franchise agreements and rights-of-way. Well, that is true.

And in the Indian River County order where we denied the petition for declaratory statement of Indian River County, which is Exhibit G I think to the motion to dismiss, yes. Those issues where we made statements about not looking at 125 or the Constitutional issues were because those particular questions posed were not within our authority. They did not have to do with the provider of service and the territorial agreement. They had to do with, you know, our rights to, in the

right-of-way, and we don't get into that. They are two separate things. You can't push them together.

Furthermore, the statement of Town's counsel that if pushed to the PSC, if the Town were to ask for a declaratory statement, and in order to be consistent with the orders, the Public Service Commission will say we need to be in Circuit Court, I will disagree with that.

Based upon what has been alleged in Count I in the amended complaint, I can represent to the Court that if the Town were to come with a declaratory statement asking the questions that it asks in the context of what it has asked to the Court, the Office of General Counsel would recommend to the Commission that a declaratory statement be issued. That is because these issues, as framed, go to the service provider. They affect the territorial agreement that the Commission has issued. Just as we issued a declaratory statement in response to the City's petition for declaratory statement in Exhibit F in that order.

If you look at the questions, the issue in these two cases both go to upon expiration of the franchise agreement, does Vero Beach have the authority or the right to continue to provide

service. It's in, squarely within our jurisdiction.

THE COURT: All right. Well, let me ask you this.

MS. COWDERY: Yes.

THE COURT: Their argument is different from what's alleged in the complaint.

So based on their argument as presented, why shouldn't I grant the motion to dismiss without prejudice and let them amend to allege what they've alleged that they're arguing here today?

MS. COWDERY: I don't see any way that that argument could be that, the Commission would have jurisdiction.

THE COURT: No, the Commission has jurisdiction you're arguing, and they have stipulated or it's undisputed that the Commission has jurisdiction over the modification or determination of the territorial agreements.

MS. COWDERY: Correct.

THE COURT: And basically your argument is Count I says just that.

MS. COWDERY: Right.

THE COURT: But their argument here today was it's not at all about that, it's about these

right-of-way easements. And that they are saying we are going to pursue the modification, and we agree until PSC makes their decision, the City can't just violate our franchise agreement, and that we need a declaration -- well, that's my interpretation anyway. We need a declaration on the constitutionality or what our rights are under this franchise agreement once it expires either before, during, or after the PSC makes their agreement, because we still have this right-of-way that has not, that PSC has said they do not have jurisdiction over.

So why should the dismissal be with prejudice if they, their argument today matched -- and I agree, what they've got in Count I is not what they argued today.

MS. COWDERY: I see their argument as trying today, as trying to support their request that is in the amended complaint. I see them as, I see the Town's argument as, I see the arguments as being the same.

Because in the response to our amicus brief the Town attempted to pull in the rights-of-way as a means of just arguing, well, what we're asking the Court to do really isn't affecting the

territorial agreement. It really has to do with the franchise agreement.

THE COURT: I understand. So I'll rule on the issue of the territorial agreement either with, maybe with prejudice if you're right.

But that still, I mean, everyone has the right to access the court. And if they're saying they still have an issue that needs to be decided based on their argument, then why shouldn't that amendment or that dismissal be with leave to amend, excluding the PSC territorial argument if that's, which I think that's what the case law says. Right now, without looking any further, I tend to agree.

But assuming I conclude that, I can grant dismissal as far, or insofar as any jurisdiction over the territorial agreement with prejudice, and leave to amend as to any other issues that they're arguing without prejudice with twenty days leave to amend or whatever.

MS. COWDERY: If in fact, Your Honor, their argument just went completely toward the right-of-ways, then in my opinion that would make it a completely different Count I, a completely different Count I, and it absolutely did not have to do with any determination of whether or not Vero

Beach would continue as service provider, then I would have no opinion as to that.

THE COURT: Right.

MS. COWDERY: But the way I was hearing the argument, and this might have been my perception, it sounded like it was a different angle, a different argument in support of their position that the City of Vero Beach should no longer be service provider upon expiration of the service.

THE COURT: May or may not. And if I gave them leave to amend and they file it, we would be back here on another motion to dismiss with prejudice if that were the case.

MS. COWDERY: That would be the Court's discretion.

THE COURT: Okay. So do you have anything further that you want to argue on Count I?

MS. COWDERY: Let me just take a quick look to see if there's, if you don't have questions, probably not.

Only to emphasize that I believe that the Commission has authority when it's looking at a specific jurisdiction, that it may determine issue, all the issues.

THE COURT: Undisputed. They agreed.

MS. COWDERY: Thank you, Your Honor.

MR. WRIGHT: Thank you very much, Your Honor.

Very briefly on Count II with one note on Casselberry. The Casselberry case involved an action on a specific right that was embedded specifically in the franchise agreement vested in the City of Casselberry to purchase the facilities of Florida Power Corporation upon expiration. There's no such provision related to the effect of expiration of the franchise agreement at issue in this case.

With respect to Count I, respectfully, we believe that dismissal with prejudice is appropriate because it's a subject matter jurisdiction case.

With respect to Count II, that's, I agree with Ms. Walker, that's not a subject matter jurisdictional issue and they may be able to amend it to ask for what it sounds like they're asking for now. But the complaint asks that you award damages in the amount in which the Town has been harmed by the City's refusal to acknowledge the Town's rights upon expiration of the franchise agreement.

Our point with respect to dismissal is that

there's no provision in the franchise agreement that addresses the effects of expiration of the franchise agreement, and therefore there's no, nothing in the franchise agreement that states a claim upon which relief may be granted.

If the Town wishes to file a new complaint, if what they really want is an order from the Court saying that upon expiration of the franchise agreement, they have the authority to require us to remove or relocate our facilities from their rights-of-way, they should file that complaint. And they can either have leave to amend Count II to make that request, or file and amend their whole complaint and to add a count that asks for that. That would be, that would be, that's something I think you could do something about.

But there's nothing in the franchise agreement that addresses that. We haven't breached anything. And as I described earlier briefly, they can file their new, they can file a new complaint saying that upon expiration, they can force us to be removed from the rights-of-way and we'll defend that, but they haven't pled that, Your Honor.

Thank you.

THE COURT: All right. Reply, briefly?

MR. MAY: Your Honor, again, we think that the City and the Public Service Commission are really misconstruing or miscasting what Count I says. And I won't belabor the point except, again, it is a municipal powers issue under the Constitution of whether one municipality can encroach within another without specific authorization by general or special law.

And, again, we're not asking the Court to trample on the PSC's jurisdiction. If we have to amend Count I, we will.

THE COURT: Well, you understand Count I doesn't say what you're arguing?

I mean, you're declaring expiration of the, that you have the right to determine how electric service should be provided to its inhabitants.

MR. MAY: Let me, I guess that's where I think we're kind of missing each other between the City and PSC, and let me explain.

It says, what we said was upon expiration of the franchise agreement, the Town has the right to determine how electric should be provided to inhabitants. Really what that statement simply does is simply recount what the Special Act creating the Town says. And that's in Paragraphs

15 through 16 of the amended complaint.

And basically that says that the Town was established by Chapter 29.163 which gives the Town the broad powers to, quote, furnish electricity to its inhabitants, end quote, contract on behalf of its inhabitants with other utilities for the provision of electricity, and to, quote, grant public utility franchises.

THE COURT: Well, let me just stop you. Because, I mean, the Beard case specifically addressed and superceded that.

MR. MAY: No, absolutely. And I want to make this clear and, again, if we need to amend our complaint.

THE COURT: Right.

MR. MAY: All the complaint is asking is for the Court to declare that after the franchise agreement expires, the Town will have the power set forth in the Special Act. Of course if the Town attempts to exercise those powers, it would have to do so under the direct supervision and approval of the PSC. We recognize that, and we will clarify in our amended complaint.

THE COURT: All right. But that's not what this says, I mean, by contracting with other

utility providers of its choosing. And if I granted that and I ordered that, that would be in direct derogation of what the Florida Supreme Court has said in the statute as far as to them having exclusive jurisdiction over the territorial agreement.

MR. MAY: And, again, Your Honor, I agree.

We, you know, again, we think the complaint did not say that, but if there is confusion, we'll be glad to amend it.

THE COURT: It does say that.

All right. Any further argument?

MR. FROST: I have Count III and Count IV, Your Honor.

THE COURT: Okay. And this was a motion to dismiss with or without, you didn't really specify I don't think?

MR. FROST: May it please the Court.

My name is John Frost and I have the pleasure of representing the City of Vero Beach.

Your Honor, Count III specifically in their request for relief says award the Town damages in an amount reflecting the difference between the amount that the City has charged the Town for electric rates and the amount the Town would have

paid if such rates were reasonable.

I would submit, Your Honor, that that's an area that this Court cannot do. And where we start is that the law in Florida is really pretty clear that the principle is that rate setting for municipal utilities is a legislative function to be performed by legislative bodies like local governments and the commissioners to which these bodies delegate such authority. The authority for that, Judge, is the Mohme vs. City of Cocoa Beach or Cocoa case, Miami Bridge vs. Miami Beach Railroad Company, and City of Pompano Beach vs. Altman.

It goes on to say that the Court's power is limited to making a judicial determination that said rates are not unreasonable or discriminatory. You can make that determination. If the Court were to make that determination, then it goes back to the commissioners to set a new rate, but it is not a rate that can be determined by the Court.

And, Judge, if you look at the case, and that one is Miami Bridge talks about that, and Westwood Lake, Inc. vs. Dade County talks about it. But the Court in Gargano, G-A-R-G-A-N-O, vs. Lee County says, thus the Court can strike down a rate, but it

cannot impose some other rate.

And if you look at the language in those cases, they will tell you that specifically. In looking at the language in the McAllister case, it says that -- well, it's not McAllister, I think it's Miami Bridge. They talk specifically about the power of the Court and the Court having the power to strike down rates, find them unreasonable, and then send them back. It says our Courts will intervene to strike down unreasonable or discriminatory or public utility services prescribed by the legislature. But it says that, it says, however, the Courts will not themselves fix prospective rates. And I think the law is clear and they have cited no authority to the contrary that says those cases which I cited to you are not good law.

And so if you look at this and you look at the only thing that they're asking for in their complaint is that relief. They're asking for the relief of a refund. And clearly in that case the Court cannot grant a refund. And so we would submit to you, Your Honor, that because their relief is that, that they, their relief, the count should be stricken because the relief is improper.

They try to argue that, well, they're asking for nominal damages. Well, they don't allege that they're asking for nominal damages. So, again, if they're asking for a refund, which is what their language says, you have to look at the Gargano case. And it says, and it says that just as the Circuit Court cannot set a reasonable fee for the future, it cannot determine a reasonable fee for the past and then order the difference returned to persons who use the bridge.

So clearly the case law is, Your Honor, that the Court has authority to strike down unreasonable rates, but not to go back and give a refund. And that's the only request that they have for relief in that paragraph.

Number 4, Your Honor, is a complaint for declaratory judgment. And one of the things that we think is missing from that complaint is that it has to allege there is some person or persons who have a reasonably or may have an actual present adverse and antagonistic interest in the subject matter, either in fact or in law, and that all of the people who are grieved in this case are not part of that declaratory judgment action.

The Town can't represent each individual

utility customer in a declaratory judgment action without them being in the action, because whatever this Court rules has an effect on all of them. And we think that they have not alleged properly under the declaratory judgment action.

Also in their action they allege an action for supplemental relief. And we have cited the Court to case law, Roslyn Holding Company is one of them, and the McAllister case, the Hill case, and the Cossette (phonetic) case, that basically the supplemental relief, the procedure for supplemental relief is that you first have to have a declaratory judgment. The Court has to say, okay, here's the declaratory judgment. And after the Court says there is a declaratory judgment, upon motion as the cases say, they can then ask for supplemental relief.

But to bring it in at this time before they even have the declaratory judgment, and they don't make allegations and that's the way they're proceeding, they just go ahead and allege supplemental authority, we think that they are premature in alleging that and that's not the proper procedure.

Also in Count IV, they also ask again for a

refund. Count IV asks that --

THE COURT: Well, Count, just in the relief under Paragraph 3 which is the supplemental relief, that's where the refund is, the supplemental relief is the refund.

MR. FROST: Right. Yeah, I mean, that's the supplemental relief they want you to get to a refund, and we're saying that you can't do that.

So the supplemental relief, we also say supplemental relief shouldn't be pled at this time because the proper procedure is a motion after you get the declaratory judgment.

THE COURT: You're moving to strike III really, if nothing else, in the alternative?

MR. FROST: Strike III, and we think they don't have all the proper plaintiffs in here under a dec action.

THE COURT: All right. I understand that.

Are you claiming they're necessary and indispensable?

MR. FROST: Yes.

THE COURT: Okay. All right.

MR. FROST: Okay. Count III we dealt with, that dealt with the refund.

Oh, the other issue is a factual issue as to

giving certain factual issues to the jury.

THE COURT: Factual issues, I don't do factual issues on a four corners motion to dismiss.

MR. FROST: Well, what they're asking for is that a jury trial on factual issues in a declaratory judgment.

THE COURT: Which they do. They usually do.

MR. FROST: Yeah, well, I think at this point --

THE COURT: Count IV.

MR. FROST: -- because it is because rate making is a --

THE COURT: Oh, you're arguing the --

MR. FROST: The legislative issue and that you're giving that not to the Court, you're giving it to the jury.

THE COURT: You're arguing the Mohme and the Miami Bridge again?

MR. FROST: Yes, yes.

THE COURT: Okay.

MR. FROST: Unless you have any questions?

Okay.

THE COURT: I ask them as I go along if you haven't noticed.

Okay. Response?

So we're on Count III, they say that dispositive action can't stand because the jurisdiction is solely with the legislative function to determine rates.

MS. WALKER: Your Honor, we disagree with that.

Count III is a breach of contract action. And, again, we're here on a motion to dismiss, so what's before the Court is whether we've stated a claim for breach of contract, which requires us to allege there's a contract, that it's been breached, and we suffered damages. We've alleged all those elements.

The City does not argue in its motion to dismiss that we haven't alleged the elements of a motion to dismiss, I mean, we haven't alleged the elements of a breach of contract. They haven't argued that we haven't stated a claim. All they argue about is one statement in the request for relief, and they're claiming that that is the basis on which to dismiss all of Count III because we're not entitled to a refund.

Your Honor, the cases that were cited for that proposition, none of them are breach of contract cases. Mohme is not a breach of contract case.

Miami Bridge is not a breach of contract case. The City of Pompano case is not a breach of contract case. Gargano is not a breach of contract case. Those were all cases brought by utility customers under common law asking the Court to determine whether municipal rates were unreasonable or not.

That is not the basis for Count III. Count III is a contractual action. There is something different here that did not exist in any of the cases that Mr. Frost cited, that is we have the franchise agreement. It's a contractual agreement between the plaintiff, Town of Indian River Shores, and the defendant, the City of Vero Beach. That contractual agreement carries rights and responsibilities. It also entitles the Town to damages because the City has breached it. That is all that Count III is.

And, Your Honor, we have stated a claim under Count III for breach of contract. Whether those damages amount to a refund at the end of the day is ultimately going to be up for the Court to determine what the amount of these damages are and we'll be required to prove up those damages at trial.

But in order to state a claim, all we have to

show is that there's a contract, we have to allege it's been breached and that we have suffered damages. And we have alleged that. We are not asking for the Court to engage in rate making.

THE COURT: Jury, for jury trial.

MS. WALKER: The jury?

THE COURT: Mm-hmm.

MS. WALKER: We're not asking anybody to engage in rate making here. We are asking the Court on Count III, or the jury, to determine that the contract has been breached, and determine what the Town's damages are as a result of that breach, and to award the Town the damages it has incurred as a result of the City's breach of the franchise agreement. The franchise agreement contains a contractual obligation that all rates shall be reasonable. That's what's at issue in Count III.

Count IV is a claim for declaratory relief that asks the Court to issue a declaratory judgment that the City's rates are unreasonable and oppressive.

The City has raised four issues in its motion to dismiss with respect to Count IV. They've argued we haven't stated a claim for declaratory relief. Your Honor, under the Declaratory Judgment

Act and specifically Section 86.101, the Declaratory Judgment Act is to be liberally administered and construed.

We have alleged, if you look at the amended complaint as a whole, and you read those allegations in the light most favorable to the Town, we've alleged that there is a need for a declaration regarding the reasonableness or unreasonableness of the rates charged by the City to the Town. There's a controversy with respect to the rates the City is charging the Town, that the Town has a common law right not to pay unreasonable and oppressive rates, that the City and the Town have antagonistic interests and that the City and Town are before the Court.

The argument that Mr. Frost has made here today is not an argument that's in their motion to dismiss, and frankly it's not supported by the case law that they cite either. It appears he's making an argument that the Town can't state a claim for declaratory relief without having all of the --

THE COURT: Necessary and indispensable parties.

MS. WALKER: -- the utility customers for the Court.

But, Your Honor, the City has cited the cases like Miami Bridge and Gargano. And if you look at those cases, Gargano was a case brought by one person who was driving over a bridge everyday. It is not a case that was brought on behalf of all of the customers of that particular municipality. And actually in that case the Court held it was, it was error for the Court to have reversed Ms. Gargano's claim even though it was not very artfully pled.

So, Your Honor, the cases they cite do not support the proposition they're arguing here. In fact, I haven't seen any case that supports an argument that in this type of action where a customer of a municipal utility is asking the Court to determine the reasonableness or unreasonableness of municipal utility rates, that all of the rate payers have to be before the Court. I'm not aware of any authority that's been cited to support that proposition or any authority that exists. In fact, the authority they cite does not support that proposition.

All the other arguments they raise --

THE COURT: What about striking Paragraph 3?

I mean, usually declaratory relief doesn't award damages such as refunds.

MS. WALKER: And, Your Honor, all that is is that is just a reference to the right of a party seeking declaratory relief to also demand supplemental relief in the same action, and that's in Section 86.011 Florida Statutes.

The Town understands supplemental relief is only appropriate under the Declaratory Judgment Act if we prevail on our request for a declaratory judgment, and at that point we would then need to move to the Court to grant the request for supplemental relief.

And to give an example, the City cites to the case of McAllister vs. Breakers Seville Association, Inc. In that case, the 4th DCA recognized that Mr. McAllister's complaint, quote, prayed not only for a declaration but for the Court to grant supplemental relief in the form of money damages.

That's exactly what the Town has done here. We've just said that if we prevail on our declaratory judgment, that we would intend to seek supplemental relief. In the McAllister complaint, the complaint was not dismissed on the basis that Mr. McAllister prayed for a declaration as well as for supplemental relief. And, in fact, on appeal

the 4th DCA held that the Court in that case should have entered a declaratory judgment for Mr. McAllister and that he should thereafter have been permitted to file a motion for supplemental relief.

We're just putting the parties on notice that we intend, if we prevail, to try to seek supplemental relief. Obviously we're not asking the Court to determine that at this time. That would be determined by the Court at the appropriate time if we were to prevail on a declaratory judgment whether we would be entitled to relief.

Your Honor, also with respect to the City's argument about our reference in the amended complaint to referring factual questions to a jury, that is provided in Section 86.071 Florida Statutes, also part of the Declaratory Judgment Act, which allows the Court to refer factual questions related to a declaratory judgment action to a jury.

We're just pointing that out to the Court in our amended complaint as a tool in the Court's toolbox should it determine there are factual issues related to the request of declaratory judgment, that it could defer those factual

questions to the jury. We're not saying that the jury would ultimately make that determination. We realize the ultimate determination is for the Court.

And the cases that the City cites actually support Count IV of the amended complaint, Mohme, Miami Bridge, all of those cases are cases that say that the proper venue and the proper vehicle for a municipal utility customer to seek review of municipal utility rates and whether or not they are reasonable or not is in the Circuit Court.

And the Circuit Court, through a declaratory action, has a right to determine whether to strike down municipal utility rates as unreasonable. There is no other review of municipal utility rates, particularly in this type of situation where we're dealing with municipal utility rates imposed on non-resident customers who don't have a right to vote within that municipality. So the only opportunity they have to seek review of whether those rates are reasonable or not is before you in the Circuit Court. That's all Count IV is asking.

I think if you look at cases like Gargano, you'll see that there's no requirement that all the rate payers be before the Court for the Court to

review the reasonableness of the City's rates, and we would ask that Count IV stand and that the motion to dismiss Count IV be denied.

THE COURT: All right. Mr. Frost, brief reply?

MR. FROST: Your Honor, the issue, and there's no argument against the fact that rate making, rate making is legislative. The Courts cannot set, determine what the rate is. I mean, that's undisputed. They didn't argue that's not true.

If you look at what they ask for in their breach of contract, they've alleged a contract and attempted to allege a breach, but then they have alleged damages. But their damages are award the Town damages in amount reflecting the difference between the amount the City has charged the Town for electric rates and the amount the Town would have paid if such rates were reasonable. That's rate making. That's exactly what it is. And the Courts can't do that, and neither can a jury do that. It's a legislative function and all the cases cited say that.

The other interesting thing is --

THE COURT: Well, let me ask you this. I mean, what I read the complaint says from the four

corners is that pursuant to the agreement that the City and the Shores entered into, that the City agreed to charge only reasonable rates.

MR. FROST: That's the standard law, contract or not.

THE COURT: Well, that's a contract.

MR. FROST: That is true.

THE COURT: So why would the jury not be able to declare whether or not the rates charged pursuant to the franchise agreement were reasonable?

MR. FROST: They can declare that.

THE COURT: Right.

MR. FROST: But they can't go the next step. The next step is say, okay, what is the reasonable rate.

THE COURT: No, no, I understand.

But what if they determine in the dec action that they were or they were not reasonable, and if they determine that they were not reasonable, that there was a breach of the contract?

MR. FROST: They have nominal damages, because they can't go to the rate making.

THE COURT: Well --

MR. FROST: Or they have no damages, or they

have zero damages. All they can determine is the first question, that's where you get to the next question. And they're not asking for that. They're asking for a refund. So somebody has to set those rates.

And the law is, I mean, the law is clear, Judge, that rate making is a legislative function. The courts can't do it. Even if it were a dec action, and you declared they're unreasonable, they're discriminatory, it has to go back to the Commission. The Commission has to set the rate. It comes back to you, you can again say I still find that, but they have the duty, the Commission, and they're the only ones, they're the legislative body that can do it.

THE COURT: All right.

MR. FROST: And the other interesting thing, just briefly, is you go to Paragraph 72, and they say the Town and its citizens in whose behalf it entered into the franchise agreement. They're already saying that they're here on their own behalf, or they're here on the City's behalf, or all these customers as they are.

And so the point is is that they're now bringing an action that will declare rights and

liabilities of people who are not before this body or not before this Court, they're going to declare their rights and liabilities.

THE COURT: All right. Well, now I think you're arguing issues of fact and/or law, but.

MR. FROST: I'm just arguing off this Complaint, 72.

THE COURT: Okay.

MR. FROST: 72 is what I was going off of.

THE COURT: Well, I know, but you're arguing dismissal based on issues of fact or law.

MR. FROST: Indispensable parties.

THE COURT: Okay. All right. I'll take it under advisement. I am, because I was in a five-week tobacco trial last month, I am behind. I can't tell you how fast I will have this. Hopefully within the next week. If not, I'll attempt to stick to my within sixty days, and it will not be more than six months. I'm working on February right now, and I'm going to try to get caught up to April in the next day or two.

So if you have any questions about where the order is, feel free to email my JA to ask her. I don't forget, but if you want to be assured that I am reminded and I haven't forgot, email on. It

doesn't offend me, and I'll let you know where I am.

All right. Have a good day.

MR. MAY: Thank you, Your Honor.

MR. WRIGHT: Thank you, Your Honor.

THE COURT DEPUTY: Court will be in recess.

(Thereupon, the proceedings were concluded at 11:50 a.m.)

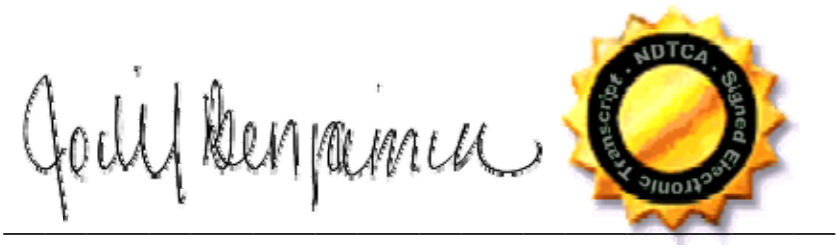
CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF BREVARD)

I, Jodi J. Benjamin, Court Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings, and that the transcript, Pages 1 through 95, is a true and correct record of my stenographic notes.

Dated this 6th day of November, 2015, at Melbourne, Brevard County, Florida.



Jodi J. Benjamin, Court Reporter

Exhibit H

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),

[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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

/s/ Cynthia L. Cox
CYNTHIA L. COX, CIRCUIT JUDGE

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

Exhibit I

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

TOWN OF INDIAN RIVER SHORES,
A Florida municipality, and
MICHAEL OCHSNER,

Plaintiffs, Case No.: 312014CA-000748

v.

CITY OF VERO BEACH,
A Florida municipality,

Defendant.
_____/

THE FLORIDA PUBLIC SERVICE COMMISSION'S
MEMORANDUM ADDRESSING ITS JURISDICTION
CONCERNING ISSUES RAISED IN THE AMENDED COMPLAINT

Amicus curiae, the Florida Public Service Commission ("Commission"), through its undersigned attorneys, hereby files this Memorandum addressing the Commission's jurisdiction over the subject matter of certain issues raised in the Town of Indian River Shores' ("Town") Amended Complaint. This Memorandum is filed in support of Vero Beach's Motion to Dismiss Plaintiff's Amended Complaint ("Motion to Dismiss") as it relates to the Commission's exclusive and superior jurisdiction over the territorial agreements between the City of Vero Beach ("Vero Beach") and Florida Power & Light Company ("FPL").

The Town argues that Vero Beach is providing electric service within the Town's municipal boundaries solely by the Town's consent given in the Franchise Agreement (Amended Complaint, para. 14, 46) and that Vero Beach will lose its right to provide such service when the Franchise Agreement expires on November 6, 2016 (Amended Complaint, para. 48, 49). The

Town asks this Court to declare that upon expiration of the franchise agreement between the Town and Vero Beach ("Franchise Agreement"), Vero Beach will have no legal right to provide service to customers living within the Town's corporate limits and the Town may choose a new provider. (Amended Complaint, p. 14)

The Circuit Court does not have jurisdiction to make such a declaration because determination of service providers pursuant to territorial agreements is within the exclusive jurisdiction of the Commission. The Commission has granted Vero Beach the right and obligation to provide electric service within the Town pursuant to Commission orders (Exhibit E, Motion to Dismiss, hereinafter referred to as "Territorial Orders"), and this right and obligation may only be changed by a determination made directly by the Commission in an appropriate proceeding.

The Commission has superior and exclusive jurisdiction
over the Territorial Orders pursuant to Section 366.04, Fla. Stat.

In 1974, the Florida Legislature codified in the Grid Bill[1] the Commission's exclusive jurisdiction to require electric power conservation and reliability within a coordinated grid, to approve territorial agreements, and resolve any territorial disputes involving municipal electric utilities.[2] § 366.04(2)(c) – (e), Fla. Stat. Importantly, the Grid Bill also states:

> The [C]ommission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes

[1] Ch. 74-196, 1974 Fla. Laws 538, codified at §§366.04(2) and 366.05(7) and (8), Fla. Stat., (1974) (R. 3: 581; R. 4: 672; R. 5: 935-36) See Richard C. Bellak and Martha Carter Brown, Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida, 19 Fla. St. L. Rev. 407-413 (1991). (R. 5: 936, n. 26; R. 6: 1037, n. 9)

[2] The Commission implements § 366.04, Fla. Stat., under Fla. Admin. Code Rules 25-6.0439, Territorial Agreements and Disputes for Electric Utilities – Definitions; 25-6.0440, Territorial Agreements for Electric Utilities; 25-6.0441, Territorial Disputes for Electric Utilities; and 25-6.0442, Customer Participation.

> in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

§366.04(5), Fla. Stat. The Commission exercises its authority over territorial agreements so that it may carry out these express statutory purposes. Chapter 366, Fla. Stat., is deemed to be an exercise of the police power of the State for the protection of the public welfare, and it must be liberally construed for the accomplishment of that purpose. § 366.01, Fla. Stat.; Accord Peoples Gas System v. City Gas Co., 167 So. 2d 577, 582, 584 (Fla. 3d DCA 1964), aff'd, 182 So. 2d 429 (Fla. 1965).

The Commission's jurisdiction over territorial agreements is, by statute, exclusive and superior authority to that of municipalities to enforce, regulate, and resolve issues concerning territorial agreements, and "in case of conflict therewith, all lawful acts, orders, rules, and regulations of the [C]omission shall in each instance prevail." § 366.04(1), Fla. Stat. The subject matter of electric service territorial agreements approved by the Commission is within the particular expertise and exclusive jurisdiction of the Commission. See Public Service Commission v. Fuller, 551 So. 2d 1210, 1212-13 (Fla. 1989) (holding that the circuit court was without jurisdiction and that the Commission had exclusive jurisdiction over its order approving a territorial agreement), and Roemmele-Putney v. Reynolds, 106 So. 3d 78, 80-81 (Fla. 3d DCA 2013)(affirming the circuit court's order dismissing the County's complaint, stating that Commission-approved territorial agreements are subject to the Commission's exclusive and superior jurisdiction and statutory power over all electric utilities and any territorial disputes pursuant to §§366.04(1) and (2), Fla. Stat.)

The Florida Legislature recognized the importance of providing by statute for a comprehensive framework for the Commission to allocate exclusive electric service territories to utility providers with territorial agreements. See Roemmele-Putney, 106 So. 3d at 80-81. This

exclusive statutory authority granted to the Commission would be eviscerated if initially subject to local governmental regulation. Id. The exercise by the Commission of the State's police power over territorial agreements cannot be interfered with by franchise agreement. Cf. Plantation v. Utilities Operating Co., 156 So. 2d 842, 843-44 (Fla. 1963), appeal dismissed, 379 U.S. 2 (1964)(finding that the Florida Railroad and Public Utilities Commission's authority to regulate rates, representing the State's continuing right to exercise the police power, cannot be intercepted by franchise agreement between the city and utility).

The Commission approved the Vero Beach – FPL territorial agreements (Exhibit E to Vero Beach's Motion to Dismiss) for reasons consistent with the Commission's exercise of its Grid Bill authority. The initial agreement, approved in 1972, states:

> [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 1981, the Commission amended the territorial agreement between Vero Beach and FPL, stating that such approval would assist in the avoidance of uneconomic duplication of facilities and to provide higher quality electric service and economic benefits to customers. The Commission most recently modified the Territorial Orders in 1988 by approving an amendment to the territorial agreement as being in the best interest of the public and the utilities and as being consistent with the Commission's philosophy of eliminating uneconomic duplication of facilities.

The Commission granted Vero Beach the right and obligation to provide service within the Town pursuant to the Territorial Orders. Only the Commission may modify or terminate that right and obligation. Any modification or termination of a territorial order must first be made by the Commission in order to carry out its statutory duties under § 366.04, Fla. Stat. Fuller, 551

So. 2d at 1212; Cf. Homestead v. Beard, 600 So. 2d 450, 452-55 Fla. 1992) (affirming the Court's decision in Fuller and holding that the territorial agreement between the parties was not terminable at will and could be modified or terminated only by the Commission in a proper proceeding). The Town does not have the authority to pick a new service provider to replace Vero Beach when the Franchise Agreement expires. This would amount to the Town unilaterally modifying the Territorial Orders contrary to the Commission's §366.04, Fla. Stat., exclusive and preemptive statutory authority over territory agreements. Homestead, 600 So. 2d at 452-55, Fuller, 551 So. 2d at 1212, Roemmele-Putney, 106 So. 3d at 80-81.

Moreover, the clearly articulated state policy to regulate retail electric service areas and the Commission's extensive control over territorial agreements gives Florida electric utilities state action immunity for antitrust liability under the Sherman Act, 15 U.S.C. §12. See Praxair, Inc. v. Florida Power & Light Co., 64 F. 3d 609, 611-13 (11th Cir. 1995)(finding that Florida's regulatory scheme and the Commission's oversight and approval of the territorial agreement between Florida Power Corp. and FPL conferred state action antitrust immunity on those utilities). The failure of the Commission to carry out its Legislative directive to actively supervise the territorial decisions of utility service territories would be considered per se Federal antitrust violations under the Sherman Act, 15 U.S.C. §12. See Id. The Commission has warned that:

> if we cannot decide who can receive electric service in territory covered by a territorial agreement, and in contravention of its terms, it could be argued that we are without power to enforce our own orders and actively supervise the agreements we have approved. This result could place electric utilities who are parties to territorial agreements throughout the state in jeopardy of antitrust liability.

In re: Complaint of Reynolds, Order No. PSC-13-0207-PAA-EM at 20, 2013 Fla. PUC LEXIS 128 *53-54 (2013). The Town's argument that the Circuit Court has the power to determine that

Vero Beach does not have authority to provide electric service within the Town is contrary to the Commission's Territorial Orders and threatens the Commission's power to enforce its own orders and actively supervise the approved territorial agreements, which could have antitrust liability consequences to Florida electric utilities.

The Town's request for declaratory relief from the Circuit Court concerning Vero Beach's right to serve in territory approved in the Territorial Orders should be denied for lack of subject matter jurisdiction

The Commission has superior and exclusive jurisdiction to answer the question of whether Vero Beach has the right and obligation to continue to provide electric service pursuant to the Territorial Orders upon expiration of the Franchise Agreement. The Town argues that it is not challenging the Commission's Territorial Orders, but that once this Court declares that Vero Beach does not have the right to provide service within the Town, "the PSC's order approving the territorial agreement should simply be conformed to the Court's order." (Amended Complaint, para. 53) Although the Town insists that it is not asking the Court to address matters within the Commission's jurisdiction, the effect of a Court declaration concerning Vero Beach's right to provide service within the Town is nothing less than a request that the Circuit Court supersede the Commission's exclusive jurisdiction to determine who has the right and obligation to provide service in a territory covered by Commission-approved territorial agreements. There are no threshold questions concerning Vero Beach's right and obligation to serve pursuant to the Territorial Orders over which the Circuit Court has jurisdiction.

The Commission must be allowed to assert its jurisdiction when it has at least a colorable claim that the matter under consideration falls within its exclusive jurisdiction as defined by statute. Florida Public Service Commission v. Bryson, 569 So. 2d 1253, 1255 (Fla. 1990). It is well established that the Commission, not the Circuit Court, possesses superior and exclusive

jurisdiction pursuant to § 366.04, Fla. Stat., over territorial agreements establishing electric service provider territory boundaries. Fuller, 551 So. 2d at 1211-12, Roemmele-Putney, 106 So. 3d at 80-81.

II. Conclusion

The Commission's Territorial Orders granting Vero Beach the right and obligation to provide electric service within the Town may only be modified by the Commission pursuant to its exclusive and superior jurisdiction. Pursuant to the aforementioned law, the Court should decline to issue any declaration judgment or take any action that would directly or indirectly rule upon or affect Vero Beach's right and obligation to provide electric service pursuant to the Territorial Orders.

Respectfully submitted

/s/ Kathryn G.W. Cowdery
KATHRYN G. W. COWDERY
Florida Bar No. 0363995
kcowdery@psc.state.fl.us
SAMANTHA M. CIBULA
Florida Bar No. 0116599
scibula@psc.state.fl.us
FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850
(850) 413-6199

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed a copy of the foregoing with the Clerk of the Court, using the E-Portal system, which will automatically transmit a copy of this pleading to: D. Bruce May, Jr., bruce.may@hklaw.com ; Karen D. Walker, Karen.walker@hklaw.com ; and Kevin Cox, Kevin.com@hklaw.com Holland & Knight, LLP, 315 S. Calhoun Street, Suite 600, Tallahassee, FL 32301, attorneys for Platintiff, and John W. Frost, II, Jfrost1985@aol.com ; and Nicholas T. Zbrzeznj, nzbrzeznj@fvdblaw.com , attorneys for Defendant, this 23rd day of July, 2015.

/s/ Kathryn G.W. Cowdery
Kathryn G.W. Cowdery