State of Florida

Public Service Commission

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

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

DATE: May 22, 2012

TO: Ann Cole, Commission Clerk, Office of Commission Clerk

FROM: Pamela Paultre, Executive Secretary to Chairman Brisé PP

RE: Docket No. 090524-EM, Complaint of Stephen J. Faherty and Glenn Fraser Heran against the City of Vero Beach for unfair electric utility rates and charges.

Please add the enclosed letter dated May 8, 2012 from Stephen J. Faherty to the above-referenced docket. Thank you.

Dr. Stephen J. Faherty, Sr.

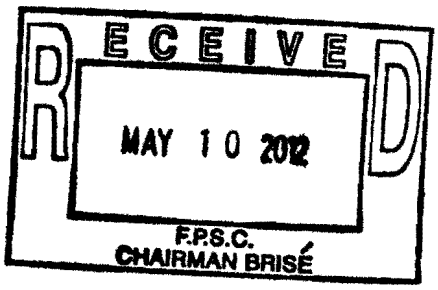
From: Filings@psc.state.fl.us
Sent: Tuesday, May 08, 2012 2:06 PM
To: Dr. Stephen J. Faherty, Sr.
Subject: PSC electronic filing

Your electronic filing has been received by the Florida Public Service Commission, Office of Commission Clerk.

The filing date for an electronically transmitted document is the date that the Office of Commission Clerk receives the complete document. If the document is received on a non-business day, or after 5:00 p.m. (EST) on a business day, it will be considered filed as of 8:00 a.m. on the following business day.

E-filings are accepted in accordance with the Commission's Electronic Filing Requirements, which can be accessed on the Commission's Web Site at http://www.floridapsc.com/dockets/e-filings/ or by contacting the Office of Commission Clerk at (850) 413-6770 during normal business hours. By electing to file electronically, you agree to abide by and accept the electronic filing requirements posted on the PSC's Web site.

Questions should be directed to the Office of Commission Clerk, Clerk@psc.state.fl.us, or call (850) 413-6770.



Paper copy attached

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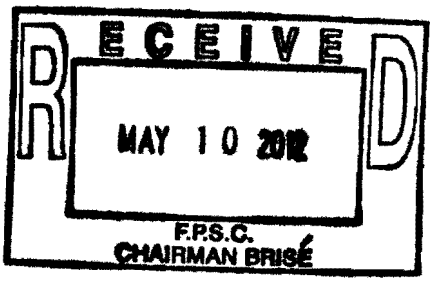

May 1, 2012

Dear Chairman Brisé:

We are seeking a Declaratory Statement from the Public Service Commission (PSC) under Section 120.565 that the PSC's Territorial Agreement (TA) process does not conform to the State's 1980 Anti Trust Act (ATA).

We also seek notification that the PSC is voluntarily changing its TA procedures to conform with the State's ATA by including a 30 year life for TAs similar to the usual period for electric franchise agreements within the State. Furthermore, we are asking that TAs in existence for 30 years be immediately reviewed and opened up for public hearing. Finally, we have attached suggested language for the revised PSC rules which we believe should be able to be done by Administrative Rule and without statutory change.

DECLARATORY STATEMENT PETITION

Section 120.565, Declaratory Statement by agencies provides:

"(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."

Comment - We meet these requirements as we both utilize the services of the City of Vero Beach municipal electric utility (muni) under the 1981 PSC approved TA (Docket No. 800596-EU, Order No. 10382, dated November 3, 1981) **(EXHIBITS 1 & 2)** between the City of Vero Beach (COVB) and Florida Power & Light (FPL). We do not live within the boundaries of COVB, but utilize the muni's services and are unable to vote for the COVB's muni decision makers. Therefore, we are both substantially affected.

"(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances."

Comment – PSC Section 25-6.0440, Territorial Agreements for Electric Utilities does not provide a time period or life for TAs which should contain a prescribed life for the TA as required by FL Antitrust Act, Section 542.335 (1) which provides that restrictions or prohibition against competition – which the PSC TA is - are not prohibited as long as such restrictions are reasonable in time, area and line of business which is not the case in PSC's Territorial Agreements. The restrictions of the PSC's TAs are not reasonable in time as they contain no restriction on the life of the TA (underlining added).

"3) The agency shall give notice of the filing of each petition in the next available issue of the Florida Administrative Weekly and transmit copies of each petition to the committee. The agency shall issue a declaratory statement or deny the petition within 90 days after the filing of the petition. The declaratory statement or denial of the petition shall be noticed in the next available issue of the Florida Administrative Weekly. Agency disposition of petitions shall be final agency action. "
Comment: This is PSC's responsibility.

1980 Anti Trust Act

In Section 542.16, the Legislature declared the Florida Anti Trust Act to complement the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition and indicated that the intent of the Legislation was to be liberally construed to accomplish its beneficial purpose. The Act covers "services" performed in whole or part for economic benefit, such as in providing electrical service to electric customers.

Such service providers include for example, any person, partnership, corporation, professional association, and any governmental entity including the State of Florida, its departments, agencies, political subdivision, and units of government, which appears to apply to the Florida Public Services Commission (PSC). (Section 542.17)

Every contract, combination, or conspiracy in restraint of trade or commerce or attempts to do so are unlawful (Sections 542.18 and 19). It is particularly important to note the first section regarding the word "contract" as the 1981 PSC Territorial Agreement is viewed as a contract approved by the State and dividing electric service areas within the State (see Section 25-6.0439(2), Territorial Agreements and Disputes for Electric Utilities – Definitions). The PSC approved Territorial Agreements are also superior in standing to lesser 30 year Franchise Agreements entered into between COVB or FPL and Indian River County (IRC) for those electric suppliers to provide electricity for to the unincorporated portions of IRC. (FPL = 55,000 electric customers and COVB = 18,000 electric customers).

FL Antitrust Act, Section 542.335 (1) states that restrictions or prohibition against competition – which a PSC Territorial Agreement is - are not prohibited as long as such

restrictions are reasonable in time, area and line of business which is not the case in PSC's Territorial Agreements. The referenced Territorial Agreement is applicable in an area (i.e., Indian River County) and a line of business (i.e., electric service) but is not in existence for a reasonable time. PSC Section 25-6.0440, Territorial Agreements for Electric Utilities, do not establish any time frames at all for the existence, termination, and/or periodic review of the Territorial Agreements contrary to the State's 1980 Antitrust Act. The TAs life is ad infinitum in the absence of action specifically initiated by COVB, FPL and/or PSC.

As noted in Section 542.335 (c) "If a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests. The timeframe for the existence of the PSC Territorial Agreements without periodic review is overlong – there is no timeframe.

The PSC Territorial Agreement Sections provide no opportunity for "reevaluation of the factors" considered in the original Territorial Agreement analysis and award and no opportunity for rebidding the service area, particularly considering factors that may have arisen and/or changed since the particular COVB/FPL Territorial Agreement was approved 31 years ago. The burden of proof that there is a legitimate business reason for not having such a periodic review is on the PSC per the Antitrust statutes.

As noted above, in the case of PSC's Territorial Agreements (Docket No. 800596-EU, Order No. 10382, dated November 3, 1981) between COVB and FPL was the third in a series (prior revisions in 1972 and 1974) and completed nearly 31 years ago at a time when about 10 percent of the City's electric customers were outside of the City. Now, 61 percent of the City's electric customers are outside of the City and the future local growth area is really now in IRC and not in COVB.

Florida Antitrust Act Implications

Section 542.33 states that restraints against subsequent competition must for a reasonable time and area. Similarly, Section 542.335 (1) states that restrictions or prohibition against competition is not prohibited as long as such restrictions are reasonable in time, area and line of business which is not the case in FMPA's contracts. The burden of proof that there is a legitimate business reason is again on FMPA.

PSC Territorial Agreement provisions clearly do not have these provisions in them. They are approved by the PSC for indefinite periods of time which do not allow for periodic review of factors originally considered in approving the Territorial Agreement Section 542.335(1) (g) (1) states that in determining the enforceability of a restrictive covenant, a court shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought. Section 542.335(1) (h) further states that a court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person(s) seeking enforcement.

Applicability of the Florida Antitrust Act of 1980 to County, City, and Town Franchise Agreements

There is an October 30, 1986, agreement (Shores Resolution # 414) between the Shores and the City and also a March 5, 1987 agreement (County Resolution 87-12) between the County and the City for the City to provide for 30 year electric service to those parts of the Shores and County not receiving electricity from FPL. Five year advance notification must be given on or before October 29, 2011 and March 4, 2012, respectively, if either party desires to extend the agreement. These 1986 and 1987 agreements were initiated subsequent to the Commission's 1981 Order.

There is also a separate 30 year Franchise Agreement with different start dates by the County and the Shores with FPL for those portions of their jurisdiction serviced by FPL. For example, the County entered into a 1987 agreement franchising (County Resolution # 77-12) on November 2, 1977 with FPL to provide electric service for 30 years. It renewed that agreement for another 30 years July 2, 2007 (County Resolution #2007-015) to about 51,000 customers in unincorporated portions of the County.

On April 5, 2011, IRC Resolution 2011 - 26 (and its accompanying letter) provided notice to PSC and others that it does not want the City to provide electric service to other unincorporated portions of the County at COVB's exorbitant rates and that it wants to switch its current COVB electric constituents to FPL providing that service. A County survey of its County customers of City electric to determine if such customers want COVB or FPL electric service is being considered for the fall 2012 after more is known about current negotiations between the City and OUC/FMPA for the sale of COVB electric system to FPL (**EXHIBITS 3 & 4**).

The Commission is aware of, and acknowledges the existence of these types of 30 year franchise agreements with notification periods, expiration dates, etc., such as between COVB and the County, COVB and the Shores, South Ormond Beach and FPL, etc. If they were not valid agreements, the PSC would have stopped them from being initiated years ago.

Attorney General Opinions

In addition, two Attorney General Opinions appear to be relevant. The AGO cite and a brief analysis/discussion of each is provided below:

Attorney General Opinion, AGO 76-124 (1976)

It would appear that the 61 percent of customers are also being denied equal protection under the law by extension of Attorney General Opinion Number: AGO 76-124, dated June 1, 1976, related to nonresidents and municipal recreational facilities

The issue of difference in rates charged to City residents versus outside of City residents for the use of recreation facilities was the primary basis for the Opinion which noted the U. S. Supreme Court's "two-tiered" distinction of the Equal Protection Clause.

The first tier was the "Strict Scrutiny" test which related to the denial of fundamental rights, such as to the right to travel, right to vote, etc., or certain "suspect" classifications for denial such as race or gender. The second tier related to "compelling state interest" or "rational relationship." If the first test didn't apply, then the second could only apply if there was a reasonable relation to a valid state purpose.

Although the Opinion noted that the use of a recreational facility was not a fundamental right, the question arises whether the provision of electric utility services is a fundamental right under the "Strict Scrutiny" test of the Equal Protection Clause, particularly when the customer is denied the option to: 1) select an alternative to the utility service provider; or 2) elect the officials deciding the utility taxes, costs, and liabilities.

If a municipal electric provider denies the right to transfer to an alternative utility service provider or the State Public Service Commission does not have any authority to affect or effect such a transfer of provider, then it would appear that a citizen residing outside of the municipal limits, but receiving municipal utility services, would be denied a fundamental right under the "Equal Protection Clause."

Furthermore, even if the same utility rates were charged inside and outside customers, the use of utility revenue coming from 61% of the "captive" customers outside of COVB to lower COVB proprty taxes where there is no voice for the outside customers is in effect "taxation without representation."

Attorney General Opinion, AGO 90-72 (1990)
(Underlining and/or red added)

This AGO involved the restricting of utility services for a rental unit by a municipal utility because a prior tenant did not pay the utility bills

The AG noted from Williams v. Mt. Dora that "a public utility has a legal duty to provide services on an equal basis to all users who apply for service at reasonable and non-discriminatory rates and deposits."

The Court further noted: "The providing of utility services by a municipality is a private or proprietary function in the exercise of which the municipality is subject to the same legal rules applicable to private corporations. The fact that a municipal utility may enact its rules and regulations as ordinances does not itself give it rights or duties with respect to users any different than those possessed by private utility companies. Because utility service is vested with a public interest, and the public utility by law is given an exclusive monopoly over services vital to the public, users are entitled to the equal protection provisions of the law and utility service must be provided and **administered in all respects fairly, reasonably, and free from opposition and discrimination**. A public utility can attach no conditions to its duty to provide services which are unlawful, improper or personal to the user."

The AG noted "Thus, the Williams court acknowledged that municipalities providing electricity have a monopoly over services vital to the public and found that users of municipal utilities must be treated fairly, reasonably and in a manner free from

discrimination. **Applying general principles of constitutional equal protection to such a situation would mean that all utility customers similarly situated, such as residential electrical customers, would be treated alike."**

Therefore, consumers at the local level have the right to switch electric providers every 30 years as a result of the local government 30 year franchise agreements but are being denied that right by the PSC at the State level because of the absence of a 30 year life for PSC Territorial Agreements!

FLORIDA MARKETABLE RECORD TITLES TO REAL PROPERTY ACT

This act was amended in the early 2000s and modified all property Covenant provisions to provide for a 30 year period for the existence of the covenants. This superseded different periods of life for covenants which varied from none to 50 years. This is further evidence that the State is moving to have its laws and provisions comply with the ATA and with the standard 30 year periods for Franchise Agreements, Covenants, etc. As a result of a large number of covenants expiring and not being renewed, the State passed another amendment in 2007 to provide for reestablishment of expired covenants (including those for utilities) for 30 year periods.

COMMENTS ON FEDERAL TRADE COMMISSION REQUIREMENTS FOR FRANCHISE AGREEMENTS

A Franchise Agreement is a legal, binding contract between a franchisor and franchisee, enforced in the United States. It is a privilege or immunity of a public nature which cannot be legally exercised without legislative grant which comes from Federal, State and/or local level governments. It is normally not granted to citizens in general.

The Federal Trade Commission's (FTC) Franchise Disclosure Document (FDD) is a legal document which is presented to prospective buyers of franchises in the pre-sale disclosure] process in the United States. It was originally known as the **Uniform Franchise Offering Circular (UFOC)** (or uniform franchise disclosure document), prior to revisions made by the Federal Trade Commission in July 2007. Franchisors were given until July 1, 2008 to comply with the changes.

The FTC Rule of 1979 which governs disclosure of essential information in the sale of franchises to the public underlies the state FDD's and prohibits any private right of action for the violation of the mandated disclosure provisions of the FDDs. Therefore, the FDD implies that only the federal government or the state governments have the right to sue and negotiate consent decrees and rescissions with those franchisors that violate the provisions of the FTC Franchise Rule and the Franchise Disclosure Document (FDD).

The Franchise Rule specifies FDD disclosure compliance obligations as to who must be the one to prepare the disclosures, who must furnish them to prospective franchisees, how franchisees receive the disclosures, and how long franchisees must have to review the disclosures and any revisions to the standard franchise agreement.

According to the Federal Trade Commission, there are 15 states that require franchisors to give a FDD to franchisees before any franchise agreement is signed. Thirteen of those states require that they be filed by a state agency for public record.

The FDD requires extensive disclosure of information about the franchisor and the franchise organization which is intended to give the potential franchisee enough information to make educated decisions about their investments. The information is divided into a cover page, table of contents and 23 categories called "Items"

Item 17 relates to "Renewal, Termination, Repurchase, Modification and/or Transfer of the Franchise Agreement, and Dispute Resolution. This section spells out the conditions under which the franchisor may end a franchisee's franchise and a franchisee's obligations to the franchisor after termination. It also defines the conditions under which a franchisee can renew, sell, or assign the franchise to others.

In the case of the PSC's TAs, they are essentially franchise agreements. They would not at this time meet Federal FTC franchise requirements regarding renewal and/or termination.

FLORIDA FRANCHISE AGREEMENT COMMENTS

In an article published in the Stetson Law Review (35 Stetson L. Rev. 383, 390-91 (2006) (footnotes omitted), government law attorney Thomas A. Cloud stated:

> "Because franchises are typically not perpetual (or for that matter, exclusive) in Florida, one must ultimately determine what happens upon the expiration or termination of the franchise. Most franchises are renewed or extended by the franchisor and the franchisee. However, case law indicates at least three options exist for the franchising authority: (1) renewal of the franchise: (2) acquisition of the facilities and property used under the franchise; or (3) ouster of the facilities of the expired franchise holder. For half a century, this area engendered significant litigation through [out] the United States. In Florida, the primary mean of ouster came to be the municipal franchise purchase option."

As indicated above, "franchises are typically not perpetual" which is what the PSC's TAs, or franchise agreements are, contrary to Federal and Florida State practice.

CONCLUSION

In conclusion, the lack of timeframes allowing periodic review of factors and decisions leading to establishing and continuation of PSC TAs appears to be a violation of the State's ATA, Section 542.335 (1) which states that "restrictions or prohibition against competition (which the PSC Territorial Agreements are) are not prohibited as long as such restrictions are reasonable in time, area and line of business" (underlining added). The PSC Territorial Agreements do not have timeframes and thus do not meet the FL

Antitrust Act requirements. Furthermore, they do not appear to meet FTC requirements for renewal and/or termination

We seek a Declaratory Statement from the Public Service Commission (PSC) under Section 120.565 that the PSC's Territorial Agreement (TA) process does not conform to the State's 1980 Anti Trust Act (ATA).

We also seek notification that the PSC is voluntarily changing its TA procedures to conform with the State's ATA by including a 30 year life for TAs similar to the usual period for electric franchise agreements within the State. Furthermore, we are asking that TAs in existence for 30 years be immediately reviewed and opened up for public hearing.

RECOMMENDATION

Finally, we included the following language for the revised PSC rules which we believe should be able to be done by Administrative Rule and without statutory change.

1) Change the PSC TA provisions to:
    a. Allow a Town, City, County, or Village which is served by two or more electric utilities under Franchise Agreements to initiate a Petition to thePSC from the governing body of the Town, City, County, or Village three years prior to the expiration of a Town, City, County, or Village Franchise Agreement with an utility requesting the Commission to approve a change to, or from, an electric utility provider.
        i. Such a Petition is to be automatically considered by the PSC as a request, on its own motion, to identify the existence of a dispute and for the Commission to order the affected parties to participate in a proceeding to resolve it.
        ii. For purposes of implementing this, all Towns, Cities, Counties, or Villages which are served by more than one electric utility and have a PSC approved Territorial Agreement initially approved more than 27 years ago, have one (1) year to submit such a Petiton to the PSC.
2) A priority for the review of current Territorial Agreements in 1 above should be established in the following order:
    a. A review of all Territorial Agreements involving municipal electric utilities where there are customers/ratepayers outside of the municipal boundaries;
    b. Prioritize the group above by focusing first on the municipal electric utilities with the highest percentage of customers/ratepayers outside of the municipal boundaries;
    c. The municipal electric utilities above should have a Referendum or Independent Survey of property owners served by the electric utilities and paid for by the Towns, Cities, Counties, or Villages which are served by the electric utilities; and

d. All PSC Territorial Agreements more than 30 years old prioritized by the oldest Territorial Agreements first.

3) Provide guidance on non-PSC governmental Franchise Agreements (e.g., Towns, Cities, Counties, or Villages) and the need to coordinate the timing of the renewal and/or termination of such Franchise Agreements and PSC Territorial Agreements by the served governmental jurisdictions (e.g., Towns, Cities, Counties, or Villages.

We will be happy to assist in this matter and provide any other additional information we have.

Sincerely,

Dr. Stephen J. Faherty, Sr.

Glenn Heran, CPA

Enclosures

ccs:
Senator Mike Haridopolis
Senator Joe Negron
Representative Tom Goodson
Representative Debbie Mayfield
Indian River County Board of Commissioners

EXHIBITS:
1 - 1981 Territorial Agreement, PSC Order No 10382, November 3, 1981
2 – Comments on 1981 Territorial Agreement above
3 – IRC letter to PSC and others
4 – IRC Resolution # 2011-026

EXHIBIT 1

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.

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.

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

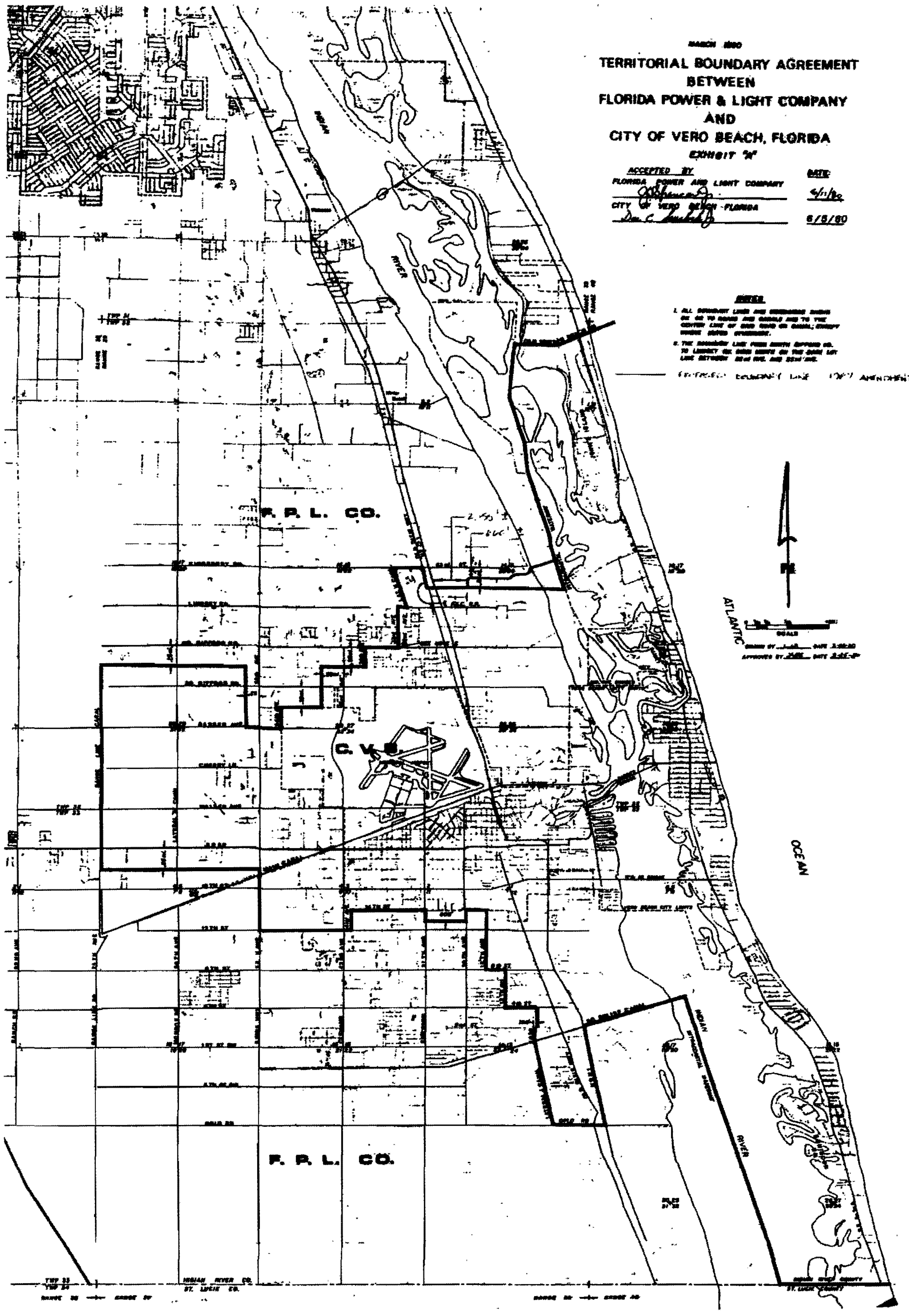
TERRITORIAL BOUNDARY AGREEMENT
BETWEEN
FLORIDA POWER & LIGHT COMPANY
AND
CITY OF VERO BEACH, FLORIDA
EXHIBIT "A"
ACCEPTED BY
DATE
FLORIDA POWER AND LIGHT COMPANY
CITY OF VERO BEACH - FLORIDA
6/5/80
F. P. L. CO.
C.V.B.
RIVER
ATLANTIC
OCEAN
F. P. L. CO.

EXHIBIT 2

Comments on PSC approved Territorial Agreement (TA)
(Docket No. 800596-EU, Order No. 10382, dated November 3, 1981)

The Territorial Agreement raises a number of comments which appear to be relevant in today's electric utility environment and which should cause it in particular, and all Territorial Agreements in general, to be periodic reopened to public hearing. Have there been any changes in the factors considered nearly 31 years ago that would justify having a periodic PSC Territorial Agreement review every 27-30 years?

1. In the fourth paragraph, page 1, of the 1981 Territorial Agreement, it states that "the Commission finds no compelling reason to set this matter for hearing...there appears to be limited customer objection...moreover, the agreement is in the public interest."

   Comment: The Commission should establish a 30 year life on TA's and open up the TA for a public hearing 27 years after a TA is approved to allow for public input and to meet the requirements of the State's 1980 AntiTrust Act (ATA). In the Case of the COVB/FPL TA, there is significant customer objection to the City's electric utility both from inside the City and particularly the 61% of outside City customers, its inefficient operation, rates significantly higher than FPL (averaging 23% higher over the last 12 years and currently about 30% higher than FPL), City Council siphoning of utility revenue for City budget purposes rather than utility operations or reserves, no voice with City elected officials for the 61 % of customers outside of the City limits, mismanagement, negligence, and breach of fiduciary responsibility, etc. In a November 2011 COVB Referendum, 2/3 of the COVB voters voted FOR authorizing the City Council to lease the COVB power plant, a necessary step in the sale of the City's utility to FPL.
2. In the fifth paragraph, page 1, it states that "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."

   Comment: Similarly, the Commission should provide for periodic review (e.g., every 30 years and 3 years prior to the expiration of the 30 year ATAs) of the TAs at a public hearing in order to allow direct public comment on the City's proposed changes to rates significantly higher than FPL, City Council siphoning of utility revenue for City budget purposes rather than utility operations or reserves, no voice with City elected officials for the 61 percent of customers outside of the City limits, mismanagement, negligence, breach of fiduciary responsibility, noncompliance with PSC Section 366.04(7)(a), Territorial agreement, and other matters described herein.
3. In the first paragraph, page 2, the Commission noted the attempts by FPL and/or the City to contact the affected customers and determine their reaction to the proposal for changes to the prior TAs.

   Comment: The 2008 City Council ignored PSC Section 366.04(7) (a) which was passed by Legislators to give over 34,000 customers the opportunity to vote

their preference for a representative utility authority to run the City's electric utility. Similarly, the City has ignored the submission of over 800 names of customers on previously submitted petitions for similar action.

Customers have sought Local Legislation to modify the Commission's statutes to provide for a Referendum for customers outside of the City to vote on switching to FPL and amending the Commission's 1981 territorial agreement. Such legislation has been opposed by the Florida Municipal Electric Association (FMEA), a State lobbying group for 33 municipal electric utilities. COVB has recently dropped its membership in FMEA as FMEA was opposing COVB's efforts to sell its municipal utility. FMPA and OUC who provide electric power to COVB currently appear to be dragging their feet to reach agreement and allow COVB to exit and/or market COVB's FMPA power interests. Municipal utilities or their conglomerates do not appear to be covered by many PSC legislative or regulatory restraints.

4. In the second paragraph, page 2, the Commission stated "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.

   Comment: The City is uneconomical compared to FPL historically (averaging 23 % higher than FPL over the last 12 years), presently about 30% higher than FPL. FPL surrounds the City and it could easily substitute for the City's electric utility. The sale of the City's electric utility's Transmission and Distribution (T & D) system outside of the City would provide funds to the City which could be used to pay off any electric utility liabilities associated with the outside City customers, and enable the City to invest the net proceeds and use the return to replace any revenue reductions to its General Fund.

5. In the second paragraph, page 2, the Commission also stated "The territory will better conform to natural or permanent landmarks and to present land development."

   The County and the Shores are each faced with situations where one side of a street in their jurisdictions is served by COVB electric and the other side is served by FPL with significant electric rate differentials (about 30 %) between the two sides of the same street. This has been compounded with the increase in the percent of outside City ratepayers from about 10 percent in 1981 when the PSC approved the division of the electrical service territory in Indian River County between COVB and FPL to about 61 percent outside of the City now. There are no logical natural or permanent landmarks which distinguish or which have created this situation. It is due to land development over the past 30 years and has created significant differences in the desirability of property for purchase or lease. Real estate agents and brokers state that the one of the first questions prospective purchasers or lessees ask is whether the property is served by COVB utilities. If it is, then generally they want to see other property served by FPL.

   Section 366.04(2) (e) states "To resolve, upon petition of a utility, or on its own motion (underlining added), any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the

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

Comment: Much has changed over the last 30 years since the last TA modification in 1981. FPL has the capability to expand services in comparison to the City's electric utility which has limited geographical area, limited economic capacity, is deficit ridden, has no cash reserves, and runs its antiquated plant about 9% of the year. In addition, the City purchases about 45 percent of its electric power from a recently selected major supplier, the Orlando Utilities Commission (OUC). To supply additional customers, it would have to purchase it, not generate it, thus adding its cost as a middleman which is passed on to the customers.

6. We have tried legislation and we have petitioned the City, but to no avail! We have sought legislative changes and have had them ignored by the City or opposed by the other municipal utilities or their associations. We had no other administrative option other than the limited authority of the Commission!
Comment: Therefore we claimed a territorial dispute under Section 25-6.0441 and asked for the Commission to identify, on the Commission's own motion, the existence of the existence of a territorial dispute based on the reasons described above.

EXHIBIT 3

BOARD OF COUNTY COMMISSIONERS

April 7, 2011

Florida Public Service Commission

Florida Legislative Delegation:
Honorable Mike Haridopolos
Honorable Joe Negron
Honorable Debbie Mayfield
Honorable Tom Goodson

Vero Beach City Council
c/o Monte K. Falls, Interim City Manager

Indian River Shores Town Council
c/o Richard Jefferson, Town Manager

Sebastian City Council
c/o Al Minner, City Manager

Fellsmere City Council
c/o Jason R. Nunemaker, City Manager

Orchid Town Council
c/o Deb C. Branwell, Town Manager

Dr. Stephen J. Faherty, Sr.

Mr. Glenn Fraser Heran

Re: **In Re: Complaint Against the City of Vero Beach, Florida, by Stephen J. Faherty and Glenn Fraser Heran; Docket No. 090524-EM**

Ladies and Gentlemen:

Attached please find a copy of Resolution No. 2011-026 adopted by the Indian River County Board of County Commissioners on April 5, 2011, entitled "A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF INDIAN RIVER COUNTY, FLORIDA,

1801 27th Street, Building A
Vero Beach, FL 32960-3365
Telephone: 772-226-1490 FAX: 772-770-5334

SETTING FORTH THE BOARD'S POSITION ON CERTAIN ISSUES RELATING TO CITY OF VERO BEACH ELECTRIC SYSTEM."

Yours truly,

Bob Solari

Bob Solari
Chairman

asp/nhm
attachment

EXHIBIT 4

RESOLUTION 2011 - 026

A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF INDIAN RIVER COUNTY, FLORIDA, SETTING FORTH THE BOARD'S POSITION ON CERTAIN ISSUES RELATING TO CITY OF VERO BEACH ELECTRIC SYSTEM

WHEREAS, on November 3, 1981, the Florida Public Service Commission ("PSC") approved a Territorial Agreement between the City of Vero Beach ("City") and Florida Power & Light ("FPL") which established electric service areas for the City and FPL in Indian River County. Specifically, the electric service area for the City was defined to include the City itself, the Town of Indian River Shores, the south barrier island, and other unincorporated areas of the County, and the service area for FPL was defined to include all other areas of the County; and

WHEREAS, the demographics of Indian River County have changed significantly since approval of the Territorial Agreement. In 1981, approximately 10% of the City's customers were located outside City limits ("non-resident customers"). Today approximately 61% of the City's customers are non-resident customers. Specifically, the City has approximately 34,000 total customers, of which approximately 21,000 are non-resident customers. This percentage of non-resident customers (61%) is believed to be the highest percentage of any municipal electric system in Florida; and

WHEREAS, the City's rates on average over the past ten years have been 23% higher than FPL's rates, resulting in a substantial rate disparity for County residents served by the City, compared to those served by FPL. Current residential rates per 1000 KWH, as set forth in the most recently available data, are 22.1% higher than FPL's rates. When the rate disparity is applied to all City customers (resident customers and non-resident customers), approximately $16,000,000 in additional electric charges are paid each year compared to the amount customers would pay if served by FPL. Approximately $9,760,000 of this amount (61%) is paid by non-resident customers. These additional payments take substantial funds out of the private sector of the local economy and have a negative impact on economic development and recovery efforts in Indian River County; and

WHEREAS, the City uses its electric system to subsidize its general fund and reduce taxes for City residents. Specifically, the City transfers approximately $6,000,000 from its electric system to its general fund each year. Non-resident customers pay approximately $3,660,000 of this amount (61%), resulting in a form of "taxation without representation"; and

WHEREAS, non-resident customers who bear this rate and subsidy burden have no way to protect themselves or to influence City rates or subsidy practices. While resident customers protect themselves by voting in City elections, non-resident customers have no such ability. Non-resident customers are required by the 1981 PSC order to be customers of the City electric system but, having no vote in City elections, have no ability to protect themselves from rate and subsidy burdens; and

WHEREAS, in 2008, the Florida Legislature recognized the unfair plight of non-resident customers by adopting Chapter 2008–227, Laws of Florida. This statute required that a referendum be held of retail customers of any municipal electric system falling within statutory parameters to determine whether a separate utility authority should be created to operate the system. Upon an affirmative vote, the municipality would be required to create a utility authority with a governing board made up proportionately of resident and non-resident customers. Although Chapter 2008-227 was introduced by Indian River County State Representative Stan Mayfield and was intended to apply to the City electric system, the City determined that the statute did not apply and never held the referendum; and

WHEREAS, in 2009, two Indian River County citizens, Dr. Stephen J. Faherty, Sr. and Glenn Heran filed a petition with the PSC asking that the PSC (i) act on its own motion to redefine the territorial service areas of the City and FPL in Indian River County to better protect non-resident customers, (ii) require that the City stop the practice of using its electric system to subsidize its general fund, (iii) address and mitigate the "taxation without representation" situation that exists for the 61% of City customers who are non-resident customers, and (iv) enforce Chapter 2008-227 by requiring the City to hold the referendum and, upon affirmative vote, to create a utility authority governed proportionately by resident and non-resident customers; and

WHEREAS, the County, as well as several other taxing bodies such as the Town of Indian River Shores, the Indian River County School Board and the Indian River County Hospital District, are customers of the City electric system and as such pay higher City rates. These increased costs result in higher taxes being imposed on Indian River County taxpayers; and

WHEREAS, on April 4, 2011, FPL submitted a letter of intent to the City expressing its interest in purchasing the City electric system. If FPL and the City are able to reach a definitive agreement, and FPL acquires the City electric system, many of the rate and subsidy issues set forth above will be resolved; and

WHEREAS, given the significance of these issues, particularly as they relate to non-resident customers, the Board of County Commissioners believes that it should adopt this resolution setting forth the Board's position on the issues,

NOW THEREFORE BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF INDIAN RIVER COUNTY, FLORIDA THAT:

1. **Recitals**. The findings set forth in the "whereas" clauses above are true and correct and are hereby adopted as the findings of the Board.

2. **Position of the Board**. The Board hereby adopts and publishes the following positions:

a. Higher Rates. The higher rates charged by the City of Vero Beach electric system are taking substantial funds out of the hands of local residents – estimated at $16,000,000 per year, approximately $9,760,000 (61%) of which is taken from non-resident customers. These higher rates are having a negative impact on the local economy and are impeding economic development and recovery efforts. Given the apparent willingness of FPL to serve City customers, these impacts are unnecessary;

b. Subsidy Practice. The subsidy practice of the City of Vero Beach places an unfair burden on non-resident customers who pay approximately $3,660,000 (61%) of the $6,000,000 transferred each year from the City electric system to the City general fund. This practice amounts to "taxation without representation" for non-resident customers;

c. Sale of System. On April 4, 2011, FPL submitted a letter of intent expressing its interest in purchasing the City electric system for a cash payment of up to $100 million. The Board urges the City Council seriously to consider the transaction proposed in the letter of intent. To the extent the transaction impacts non-resident customers of the City electric system, the Board offers its support and assistance to FPL and the City with respect to negotiations for a definitive agreement. If a definitive agreement is reached, and if the agreement provides for FPL rates for City customers which are consistent with FPL's rates to its other customers, the Board urges the PSC to approve the agreement and include County areas now served by the City within FPL's new service area;

d. Change in City Practices. If a sale of the City electric system to FPL does not occur, the Board urges the City Council to (i) reduce electric rates to the lowest level possible, consistent with prudent practices, and (ii) stop the subsidy practice which places an unfair burden on non-resident customers;

e. PSC Case. The Board supports the positions asserted by Dr. Stephen J. Faherty, Sr. and Glenn Heran in the PSC case. If a sale of the City electric system to FPL does not occur, the Board urges the PSC to accept jurisdiction of the issues raised and to take appropriate action to protect non-resident customers of the City electric system from the unfair subsidy burden which they currently endure;

f. Amend State Law. If a sale of the City electric system to FPL does not occur, the Board urges the Indian River County Legislative Delegation, and the entire Florida Legislature, to amend existing state law to afford protection to non-resident customers of municipal electric systems by (i) prohibiting subsidy practices and (ii) requiring the creation of utility authorities governed proportionately by resident and non-resident customers; and

g. County Action. If a sale of the City electric system to FPL does not occur, the Board serves notice that it will seriously consider (i) intervening in the Faherty/Heran PSC case to protect non-resident customers, and (ii) filing a civil lawsuit to enforce Chapter 2008-227 so that a referendum can be held of City customers regarding the creation of an electric utility authority governed proportionately by resident and non-resident customers.

The foregoing resolution was moved for adoption by Commissioner O'Bryan, and the motion was seconded by Commissioner Flescher and, upon being put to a vote, the vote was, as follows:

Chairman Bob Solari	Aye
Vice Chairman Gary C. Wheeler	Aye
Commissioner Wesley S. Davis	Aye
Commissioner Joseph E. Flescher	Aye
Commissioner Peter D. O'Bryan	Aye

The Chairman thereupon declared the resolution duly passed and adopted this 5th day of April, 2011.

INDIAN RIVER COUNTY
Board of County Commissioners

Attest: J. K. Barton, Clerk

By: _____
Deputy Clerk

By: _____
Bob Solari, Chairman

Approved for form and legal sufficiency:

_____
Alan S. Polackwich, Sr., County Attorney

BCC approval date: April 5, 2011

COUNTY COMMISSIONERS
INDIAN RIVER COUNTY, FLORIDA