**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| 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. | ) | DOCKET NO. 140142-EM<br><br>FILED: AUGUST 14, 2014 |

**THE CITY OF VERO BEACH'S MOTION TO DISMISS AND RESPONSE IN OPPOSITION TO INDIAN RIVER COUNTY'S PETITION FOR DECLARATORY STATEMENT AND OTHER RELIEF**

The City of Vero Beach (the "City" or "Vero Beach"), pursuant to the Notice of Declaratory Statement published in the Florida Administrative Record on July 24, 2014, pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), and having been granted leave to intervene in this proceeding, hereby files this motion to dismiss ("Motion to Dismiss") and response in opposition ("Response in Opposition") to the "Petition for Declaratory Statement and Such Other Relief as May be Required" (the "Petition") filed by the Board of County Commissioners, Indian River County (the "Board")[1] with the Florida Public Service Commission ("Commission") on July 21, 2014.

In summary, the Florida Public Service Commission should dismiss the Petition because: (1) the Petition does not comply with Section 120.565, Florida Statutes, in that it is based on hypothetical and speculative factual circumstances and there is no present need for the requested declaratory statements; (2) the Petition improperly seeks to determine the conduct of the City and other third parties; (3) the Petition improperly questions – and attacks – the validity of certain orders of the Commission; (4) this declaratory statement proceeding is not the appropriate forum

[1] As used herein, "Board" refers to the Board of County Commissioners as the petitioning entity in this docket, and "County" refers to the geographic area and governmental entity that is Indian River County.

for addressing territorial issues at all, especially where no territorial dispute exists; and (5) the Petition improperly assumes, as undisputed, the threshold legal conclusions that the Board has the legal authority to provide electric service and that the Board has the authority to require the City to remove its electrical facilities from the County's rights of way in the unincorporated areas of the City's Commission-approved service territory when the current franchise agreement ("Franchise Agreement" or "Franchise") between the County and the City expires. The Commission should also dismiss the Board's alternative request for relief – that "the PSC should initiate such proceedings as are authorized within the PSC's jurisdiction to address the territorial agreements, service boundaries, and electric grid reliability responsibilities" because such a request is legally improper for a petition for declaratory statement, because the Board has not complied with the pleading requirements of Rule 28-106.201, F.A.C. (particularly the requirements that the petitioner identify disputed issues of material fact, that the petitioner state the ultimate facts alleged, that the petitioner identify the rules and statutes that entitle it to relief, and that the petitioner explain how the facts alleged relate to the rules and statutes), and because the Board lacks standing to pursue its real interest – lower electric rates – through a territorial proceeding in any event.

If the Commission declines to dismiss the Board's Petition, then it should issue a declaratory statement (or statements) in the negative as compared to most of the statements requested by the Board, declaring that:

1. The Commission's orders and jurisdiction with respect to the City's service area are exclusive and superior to the County's Franchise Agreement with the City, and accordingly, that Franchise has no effect or consequence with respect to either the Commission's jurisdiction or the Commission's orders approving territorial agreements between the City and Florida Power & Light Company ("FPL");

2. The Board has no right or power to determine what utility provides electric service in what is now, pursuant to the Commission's orders, the City's service area; and

3. The City of Vero Beach can continue to serve in the areas disputed by the Board pursuant to the Commission's Orders approving the territorial agreement that was in effect before the County and City entered into the above-referenced Franchise Agreement and that has continued in effect since the Franchise was executed.

The Commission will readily recognize that the Petition is merely an attempt by the Board to obtain lower electric rates through an end-run around the Commission's statutes, which vest exclusive and superior jurisdiction in the Commission over territorial matters, through an end-run around the Commission's Orders approving the territorial agreement pursuant to which the City serves the areas disputed by the Board, and through an end-run around the Florida Supreme Court's numerous orders upholding the Commission's territorial jurisdiction and further holding that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Lee County Elec. Co-op. v. Marks, 501 So. 2d 585, 587 (Fla. 1987) (quoting Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), cert. denied, 395 U.S. 909.)

Most of the Board's requested declaratory statements are contrary to the Commission's governing statutes, contrary to controlling precedent of the Florida Supreme Court, and contrary to good public policy. If the Commission were to grant them, the Commission would effectively abdicate its jurisdiction over the "planning, development, and maintenance of a coordinated electric power grid throughout Florida" by ceding to counties – and cities – the Commission's existing, legislatively mandated, exclusive and superior jurisdiction and authority over territorial matters and "over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy . . . in Florida and the

avoidance of further uneconomic duplication of generation, transmission, and distribution facilities." Such a result is absurd, nonsensical, and contrary to law, and the Commission must reject the Board's arguments and deny the Petition.

## HISTORICAL BACKGROUND[2]

The City of Vero Beach was initially incorporated in 1919 as the City of Vero, and reincorporated as the City of Vero Beach in 1925. (Coincidentally, Indian River County was also created in 1925.[3]) The City has operated a municipal electric utility system since 1920, when it purchased the original small power plant, poles, and lines from the Vero Utilities Company. Naturally, the City's service area has grown since 1920, and during the intervening 94 years, the City has served customers inside and outside the City limits, pursuant to its own ordinances, pursuant to requests by customers living outside the City limits, pursuant to its powers under Florida Statutes, and, since at least 1972, pursuant to orders of the Commission approving the City's service area in territorial agreements with ("FPL").

Today, the City serves within the service area described in its territorial agreement with FPL, which agreement has been approved, with amendments over time, by the following Commission orders: 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

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[2] Consistent with the law of declaratory statements, the City accepts the Board's alleged facts as true. However, the City believes that the Board has omitted many pertinent facts from its statement, and accordingly, the City offers the more complete exposition of the relevant history here.

[3] "In 1855 St. Lucia County was renamed Brevard County. In 1905 St. Lucie County was formed from the southern portion of Brevard County; in 1925 Indian River County was formed from the northern portion of St. Lucie County." http://en.wikipedia.org/wiki/Indian_River_County,_Florida#History. Citing to the Historical Records and State Archives Surveys, published by Florida Works Progress Administration, and available in the digital historical maps of Florida section of the University of Florida library. And the Indian River County Historian, Ruth Stanbridge.

(August 29, 1972); In re: Application of Florida Power & Light Company for approval of a modification of territorial agreement and contract for interchange service with the City of Vero Beach, Florida, Docket No. 73605-EU, Order No. 6010 (January 18, 1974); In re: Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas, Docket No. 800596-EU, Order No. 10382 (November 3, 1981); In re: Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas, Docket No. 800596-EU, Order No. 11580 (February 2, 1983); and In re: Petition of Florida Power & Light Company and the City of Vero Beach for Approval of Amendment of a Territorial Agreement, Docket No. 871090-EU, Order No. 18834 (February 9, 1988) (collectively referred to as the "Commission's Territorial Orders").

The City's service area, as approved by the Commission's Territorial Orders, includes the area within the City limits, areas outside the City limits in unincorporated Indian River County, and most of the Town of Indian River Shores. On information and belief, the City asserts that it has served areas outside the City limits since as early as the 1930s, and probably since the 1920s. The earliest known documentary evidence of the City serving outside the City limits is found in Chapter No. 599 of the City's ordinances, enacted on October 21, 1952.[4] This ordinance clearly shows that the City was serving outside the City limits at least as early as that year. The ordinance prescribed a system of contributions in aid of construction ("CIAC") to apply where the City was requested to extend service outside the City limits, by which the City would furnish a transformer and all labor, and the applicant would pay a CIAC for the cost of the materials other than the transformer. The ordinance also included provisions by which the City would

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

annually refund to the customer who paid the CIAC 25 percent of the customer's total electric purchases in the preceding year, until the entire CIAC had been refunded to the customer.

In 1972, FPL applied to the Commission to approve the original territorial agreement between FPL and the City.[5] FPL's Application was based on then-existing case law, specifically Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), cert. denied, 395 U.S. 909, which held that the Commission had the "implied power" to "approve territorial agreements which are in the public interest," and which recognized that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Id. at 307-08. In its Application, FPL asked the Commission to approve the Territorial Agreement, including the allocation of service areas, because both FPL and the City sought to avoid "needless and wasteful expenditures of time and money" and "dangerous, unnecessary and uneconomical conditions" that were "not in the public interest." FPL Application at 3.

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

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

officer of the County participated in those proceedings. Notably in light of current events, the Commission's Order also stated the following: "No residents of Indian River Shores appeared although that is the largest area under development in which competition exists; the proposed boundary reserves this area to the city." Order No. 5520 at 2.

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

FPL petitioned the Commission to approve a slight modification to the territorial agreement in 1973. The 1973 amendment changed the utilities' service areas slightly, with no customers and no facilities being affected. The Commission accordingly approved the requested amendment. In re: Application of Florida Power & Light Company for Approval of a Modification of Territorial Agreement and Contract for Interchange Service with the City of Vero Beach, Florida, Docket No. 73605-EU, Order No. 6010 at 1 (January 18, 1974).

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

In 1980, FPL and the City again applied for approval of an amended territorial agreement. In re: Application of Florida Power & Light Company and the City of Vero Beach for Approval of an Agreement Relating to Service Areas, Docket No. 800596-EU, Order No.

11580 (February 2, 1983). In that docket, the Commission initially issued a proposed order to approve the parties' territorial agreement in November 1981. The proposed order offered affected persons the opportunity to request a hearing, and a "timely petition was filed on behalf of 106 customers served by Vero Beach who apparently did not want to be transferred to FPL." Id. at 1. There is no record evidence of the County having participated in the proceedings in Docket No. 800596-EU.

The Commission duly held a hearing on May 5, 1982 in Vero Beach. During the course of the hearing, most of the customers were satisfied with the Commission's process and with the agreement as originally proposed by FPL and the City, and as the Commission had proposed to approve it. Id. Following the hearing, the Commission approved the new territorial agreement between FPL and the City by its Order No. 11580, in which the Commission stated the following:

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

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

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

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

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

In 1986, following on the already considerable history of the City serving outside its corporate boundaries, the City and the Town of Indian River Shores entered into a 30-year franchise agreement. In 1987, the City and Indian River County also entered into the 30-year franchise agreement discussed in the Board's Petition (the "County-City Franchise Agreement" or the "Franchise Agreement"). Neither Indian River Shores nor the County had ever had a franchise agreement with the City before 1986 or 1987, respectively. Although facially obvious, it bears noting that the Commission's express statutory territorial jurisdiction had been in effect for more than a decade before either franchise agreement was executed, and that the Commission's jurisdiction and power to approve territorial agreements had been in effect, as upheld and approved by the Florida Supreme Court, for two decades before either franchise agreement existed. Although authorized to do so, the Town has never asked the City to collect and remit franchise fees to the Town. Pursuant to the County-City Franchise Agreement, the City has consistently collected and remitted franchise fees to the County.

In 1987, FPL and the City again petitioned the Commission for approval of an amendment to their territorial agreement, by which FPL and the City agreed that the City would

serve a new subdivision, Grand Harbor, which straddled the existing territorial dividing line. In approving the amendment, the Commission stated the following:

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

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

In February 2013, the City entered into an Asset Purchase and Sale Agreement with FPL, pursuant to which the City agreed to sell the City Electric System (as defined below) to FPL, subject to a number of conditions precedent to closing the planned system sale. As events have unfolded, at the present time there are doubts as to whether the proposed sale can be consummated, because it appears that a specific condition precedent to closing the sale cannot be fulfilled. The City and FPL, however, are continuing their discussions to determine whether another path to closing the sale can be found. In furtherance of the City's efforts to reduce its retail electric rates, the City, FPL, and the Orlando Utilities Commission ("OUC," which supplies most of the City's wholesale power needs) have executed a three-party letter pursuant to which the City will be working with both FPL and OUC to identify and implement measures to reduce the City's electric rates.

Today, pursuant to the Commission's Territorial Orders, pursuant to its home rule powers, pursuant to its powers under Chapter 166 and Chapter 180, Florida Statutes, and

pursuant to other legal authority, the City operates an electric generating plant, transmission lines and related facilities, and distribution lines and facilities (collectively the "City Electric System"), which serves approximately 34,000 customer accounts (meters), of which approximately 12,900 accounts (meters) are located within the City limits and approximately 18,400 accounts (meters) are located outside the City limits. Approximately 3,000 of the outside-the-city-limits customer accounts (meters) are located in the Town of Indian River Shores, with the balance located in unincorporated Indian River County. Some of the City's transmission and distribution facilities in the unincorporated areas of the County are located in County road rights of way; the balance are located in State rights of way, on private roads, and in private easements. The City's preliminary estimates indicate that approximately 20 percent of the City's transmission and distribution lines in the unincorporated areas of the County are located in County road rights of way.

In reliance on the Commission's Territorial Orders and in exercising its home rule powers, as well as in reliance on its powers under Section 180.02(2), Florida Statutes, and other legal authority, including reliance on the fact that both Indian River County and Indian River Shores knew of and allowed the City to use their rights of way for decades before any franchise agreements ever existed, the City has for nearly 100 years provided safe, adequate, reliable, and sufficient service to its customers both inside and outside the City limits. In fulfilling this necessary public purpose, the City has invested tens of millions of dollars, borrowed tens of millions of dollars, and entered into long-term power supply projects and related contracts, also involving millions of dollars of long-term financial commitments, in order to serve all of the customers in the City's service area approved by the Commission's Territorial Orders.

## LEGAL BACKGROUND

The Commission's statutes applicable to the issues presented by the Petition include Sections 366.02, 366.04(1), 366.04(2)(d)&(e), and 366.04(5), Florida Statutes.

Section 366.02 provides the definitions of "public utility" and "electric utility" that would apply to the Board's requested statements in paragraphs 7a, 7b and 7c and paragraphs 57a, 57b, and 57c. Section 366.02 provides in pertinent part as follows:

> (1) "Public utility" means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state; but the term "public utility" does not include either a cooperative now or hereafter organized and existing under the Rural Electric Cooperative Law of the state; a municipality or any agency thereof; any dependent or independent special natural gas district; any natural gas transmission pipeline company making only sales or transportation delivery of natural gas at wholesale and to direct industrial consumers; any entity selling or arranging for sales of natural gas which neither owns nor operates natural gas transmission or distribution facilities within the state; or a person supplying liquefied petroleum gas, in either liquid or gaseous form, irrespective of the method of distribution or delivery, or owning or operating facilities beyond the outlet of a meter through which natural gas is supplied for compression and delivery into motor vehicle fuel tanks or other transportation containers, unless such person also supplies electricity or manufactured or natural gas.
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> (2) "Electric utility" means any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.

Section 366.04, Florida Statutes, sets forth the Legislature's grant of jurisdiction to the Commission, and Section 366.04(1) articulates the Legislature's clear mandate that the Commission's jurisdiction is exclusive and superior to that of all other state agencies, political subdivisions, and other entities, specifically including counties, providing in pertinent part as follows:

> The jurisdiction conferred upon the commission shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns,

villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail.

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

> (2) In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:
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> * * *
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> (d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. However, nothing in this chapter shall be construed to alter existing territorial agreements as between the parties to such agreements.
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> (e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

Section 366.04(5), Florida Statutes[6], codifies the Commission's jurisdiction over the State's generation, transmission, and distribution grid, and provides in pertinent part as follows:

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

The specific Commission orders that are directly applicable to the issues of what utility may serve in the City's service area are the Commission's Territorial Orders cited at pages 5-6 above. Numerous other orders of the Commission, and decisions of the Florida Supreme Court,

[6] The Board failed to identify Section 366.04(5), Florida Statutes, in Section III, "Declaratory Statement Statutes, Rules and Orders" of the Petition.

are also relevant to the issues presented in the Board's Petition, and those are cited in the following discussion.

The balance of this pleading includes the City's Motion to Dismiss the Board's Petition and, in the event that the Commission declines to dismiss, the City also presents its Response in Opposition to the Petition. The City's pleading concludes with an item by item discussion of the City's positions with respect to each of the fourteen separate declarations requested by the Board.

## MOTION TO DISMISS

### Legal Standard

A motion to dismiss raises, as a question of law, whether the facts alleged in a petition state a cause of action. The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In considering a motion to dismiss, the Commission is confined to an examination of the pleading and any attached documents. See Posigian v. American Reliance Ins. Co., 549 So. 2d 751, 754 (Fla. 3d DCA 1989). The Commission has dismissed petitions for declaratory statement that fail to meet these legal standards. See, e.g., In Re: Petition for Declaratory Statement with Respect to Florida Power & Light Company's Obligations to Serve E.I. DuPont and DeNemours & Company's Maxville Mine Site, Docket No. 900169-EI, Order No. 22917 "Order Dismissing Petition for Declaratory Statement" (May 9, 1990) (hereinafter "In Re: FPL's Obligation to Serve"); In Re: Request for Declaratory Statement by Tampa Electric Company Regarding Territorial Dispute

with City of Bartow in Polk County, Docket No. 031017-EU, Order No. PSC-04-0063-FOF-EU (Jan. 22, 2004), 2004 WL 239416 (hereinafter "In Re: TECO Territorial Dispute").

1. **The Petition Should Be Dismissed Because it Fails to Comply with Section 120.565, Florida Statutes, Because the Petition is Based on Hypothetical Factual Allegations, and Because There is No Present Controversy or Need for the Requested Declaratory Statement.**

Section 120.565, Florida Statutes, provides in pertinent part

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
> (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

A party seeking a declaratory statement[7] must show that there is an "actual present and practical need" for the requested declaratory statement, and that the declaration addresses a "present controversy." Sutton v. Dep't of Envtl. Protection, 654 So. 2d 1047, 1048 (Fla. 5th DCA 1995); In Re: TECO Territorial Dispute at 3-4. A declaratory statement should not be issued if it "amounts to an advisory opinion at the instance of parties who show merely the possibility of legal injury on the basis of a hypothetical 'state of facts which have not arisen' and are only 'contingent, uncertain [and] rest in the future.'" In Re: TECO Territorial Dispute at 4 (citing Santa Rosa County v. Administration Comm'n, 661 So. 2d 1190, 1192-93 (Fla. 1995), (quoting Williams v. Howard, 329 So. 2d 277, 283 (Fla. 1976)).

In the Petition the Board admits that:

> 35. In 2013, COVB [the City] and FPL agreed to the sale of the entire COVB electric utility system to FPL, and the sale of the electric system

[7] It is well-settled that when determining the availability of a declaratory statement under Section 120.565, Florida Statutes, the agency may be guided by the law of declaratory judgments in civil proceedings. See Couch v. State, 377 So. 2d 32, 33 (Fla. 1st DCA 1979); In Re: TECO Territorial Dispute at 3.

> contemplates FPL serving the Franchise Area as well as within the city limits of Vero Beach and within the Town of Indian Shores. At this time, that sale is still pending. On information and belief, there are several outstanding issues yet to be resolved before the sale may close and the electric service transfers from COVB to FPL. The Board supports this sale, and is prepared to negotiate the necessary franchise agreement and any other required documentation within the Board's authority that would enable FPL to serve customers [in] [sic] the Franchise Area. However, there have been some reports suggesting that the transfer may not be completed. . . .

Petition at 19-20 (emphasis supplied). Thus, the Board concedes that under the present set of circumstances, the City plans to sell its entire electric system to FPL, and the Board supports that sale. It is only unidentified "reports suggesting" that the sale will not be completed that allegedly give rise to the need for the requested declaratory statement. These reports are mere speculation. Additionally, the Board has acknowledged that – assuming it has the power to determine what utility shall serve in the area now served by the City - it is prepared to grant an extension of the franchise to the City to facilitate continued service during the hypothesized transition period. Accordingly, under the current ascertainable set of circumstances, there simply is no present need for the requested declaratory statement.

The language of the specifically enumerated requests for declaratory statement provides additional evidence of the hypothetical and speculative nature of the requests made by the Board. For example, paragraph 7(e) of the Petition asks:

> Once the Franchise expires, and **if** the territorial agreements and boundaries approved by the PSC between COVB and FPL become invalid in full or in part (at least with respect to the Franchise Area), with respect to the PSC's jurisdiction under Chapter 366, Florida Statutes, **if** the Board chooses to supply electric service in the geographic area described by the Franchise, are there any limitations on the Board's ability to enter into a territorial agreement with FPL regarding their respective service areas within the county?

Petition at 4 (emphasis supplied). This requested declaration is based on a circumstance that will not occur for more than two and a half years (the expiration of the franchise), if ever, and a

completely hypothetical and speculative scenario (in which currently valid orders of the Commission become "invalid").

Moreover, a petition for declaratory statement can assume facts, but it cannot assume legal conclusions. The Board's Petition, however, assumes that the Commission's Territorial Orders would no longer be valid; assuming such a legal conclusion is simply, on its face, contrary to law. This follows directly from the fundamental principles that a petitioner may only ask for a declaration as to the applicability of statutes, rules, and orders to the petitioner in its particular circumstances (see Fla. Stat. § 120.565), and the principle that agency orders must be assumed to be valid. See Retail Grocers Assoc. of Florida v. Department of Labor and Employment Security, 474 So. 2d 379, 382 (Fla. 1st DCA 1985). Here, the Board violates this principle by asking the Commission to assume a legal falsehood – the invalidity of the Commission's Territorial Orders.[8]

The requested declarations in paragraphs 7a-7i, 7k, 7l, and 7m (in which they are phrased as questions) and in paragraphs 57a-57i, 57k, 57l, and 57m (in which they are phrased as statements) are similarly based on circumstances that have not occurred or that are purely hypothetical. The Commission should decline the Board's invitation to issue advisory opinions in response to these speculative questions and should, accordingly, dismiss the Petition.

[8] Moreover, territorial agreements approved by the Commission have the full legal effect of the Commission's Orders, because they are, in legal fact, part of those Orders. City Gas Co. v. Peoples Gas System, Inc., 182 So. 2d 429, 436 (Fla. 1965); Fuller, 551 So. 2d at 1212.

2. **The Petition Should Be Dismissed Because it Improperly Seeks to Determine the Conduct of the City and Other Third Parties.**

Rule 28-105.001, F.A.C., provides that a "declaratory statement is not the appropriate means for determining the conduct of another person." See also In Re. Intrado Communications Inc., 2008 WL 2478574, Docket No. 080089-TP, Order No. PSC-08-0374-DS-TP, "Order Denying Amended Petition for Declaratory Statement" (hereinafter "In Re: Intrado").

In the Petition, the Board is attempting to obtain declarations from the Commission that will clearly and unavoidably determine the conduct of the City. For example, paragraph 57d of the Petition asks the Commission to declare that:

> Once the Franchise expires, the COVB-FPL territorial agreements and boundaries approved by the PSC will become invalid as void or voidable at least with respect to the Franchise Area.

In this paragraph, the Board is asking the Commission to issue a declaratory statement concerning Commission-approved territorial agreements to which the Board is not even a party. The requested declaration will significantly and primarily affect the conduct of the City and FPL.[9] Moreover, a total of eleven of the fourteen requested declaratory statements specifically reference the City[10] by name and will directly or indirectly determine the City's conduct. The

[9] Several of the requested declarations similarly appear to seek to determine FPL's conduct. Moreover, paragraph 7k [57k] asks the Commission to issue a declaration concerning legal obligations to unknown "third parties."

[10] As further evidence that the Petition seeks to determine the City's conduct, the Board explains

> The Board requests the PSC's confirmation that the termination of the Franchise is without consequence to the Board or any of the Franchise Area customers with respect to those municipal utility contracts of [the City], OUC, FMPA, or any other contracting party with [the City] and that these contracts do not provide [the City] with any authority to continue service in the Franchise Area after the Franchise expires.

Petition at 28.

Commission should reject the Board's attempt to improperly determine the City's (and other parties') conduct and substantial interests and dismiss the Petition for violating Rule 28-105.001, F.A.C. See also In Re: Intrado.

3. **The Petition Improperly Questions the Validity of the Commission's Territorial Orders.**

In Retail Grocers Assoc. of Florida Self-Insurers Fund v. Department of Labor and Employment Security, 474 So. 2d 379, 382 (Fla. 1st DCA 1985), the Court stated:

> . . . we reiterate what the purpose of the declaratory statement is. It is simply a means of establishing "the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his particular set of circumstances only." Section 120.565. Since the declaratory statement procedure provides a means for resolving controversies or answering questions of doubts concerning the applicability of statutes, rules or orders, "the validity of the statute, *rule* or order is assumed. Therefore, the declaratory statement petition is not a vehicle for testing the validity of the matter on which the declaration is sought."

Id. at 382 (emphasis in original) (quoting Waas, Initiating agency action: petitions for declaratory statement and rulemaking under the Florida Administrative Procedures Act, 55 Fla.Bar.J. 43 (1981)). Stated simply, in a declaratory statement proceeding an agency's orders are assumed to be valid.

In the Petition, the Board turns this rule on its head. The Board clearly identifies the Commission's Territorial Orders as relevant to the Commission's decision. See Petition at 10-11. However, instead of assuming the validity of the orders, the Board asks if the orders are invalid (see paragraphs 7d and 57d), or, alternatively assumes that the orders are, in fact, invalid (see paragraphs 7e and 7f and 57e and 57f). The Petition further states:

> This means that the territorial agreements and boundaries must therefore become invalid as well, or at least invalid with respect to the Franchise Area. The expiration of the Franchise, and thus the underlying legal

> authority for the territorial agreements and boundaries calls into question the PSC's orders approving such agreements . . . .

Petition at 25 (emphasis supplied). This clearly represents an improper attempt by the Board to use this declaratory statement proceeding to attack the validity of orders that the Commission is required to assume to be valid. See Retail Grocers Assoc., 474 So. 2d at 382.

Moreover, while a petition for declaratory statement can assume facts, it cannot assume legal conclusions, here the Board's assumption that the Commission's Territorial Orders would no longer be valid, contrary to law. This follows directly from the fundamental principles that a petitioner may only ask for a declaration as to the applicability of statutes, rules, and orders to the petitioner in its particular circumstances (see Fla. Stat. § 120.565), and the principle that agency orders must be assumed to be valid. Retail Grocers Assoc., 474 So. 2d at 382. Here, the Board violates these principles by asking the Commission to assume a legal falsehood – the invalidity of the Commission's Territorial Orders.

The Commission should reject the Board's collateral attack on the Commission's Territorial Orders and dismiss the Petition.

4. **This Declaratory Statement Proceeding is Not the Appropriate Vehicle For Addressing Territorial Matters Where There Is No Territorial Dispute.**

Among other things, the Board's Petition seeks to have the Commission resolve hypothetical future territorial disputes between the County and the City (in paragraphs 7g and 57g of the Petition), between the City and FPL (in paragraphs 7d, 7e, 7f and 7h and paragraphs 57d, 57e, 57f, and 57h), or between the City and other potential electric utilities (paragraphs 7f, 7h, 7i, 7j, 7m, and possibly 7n and paragraphs 57f, 57h, 57i, 57j, 57m, and possibly 57n). The

Board seeks these results by asking the Commission to declare that the Board can pick whatever utility it wants to serve, at least in the unincorporated areas of the County where the City presently serves. These results are not only contrary to Florida statutory and decisional law, they are not an appropriate subject for a declaratory statement, and the Commission should accordingly dismiss the Petition.

In In Re: FPL Territorial Dispute, 1990 WL 10549640, the Commission dismissed FPL's petition for declaratory statement because a declaratory statement proceeding was not the proper forum for resolving a territorial dispute between FPL and Clay Electric Cooperative ("Clay"). The Commission reasoned that the nature of a declaratory statement proceeding would deny Clay its due process rights because there would be no opportunity for an evidentiary hearing. In this case, there is not even a territorial dispute to be addressed, which underscores the speculative and hypothetical nature of the Board's requests, as well as the impropriety of the Board's efforts to utilize the declaratory statement process to address what is, at most, a highly speculative future dispute.[11]

The Commission should reject the Board's attempt to circumvent the Commission's territorial dispute procedure and associated evidentiary hearing, and should accordingly dismiss the Petition.

**5. The Petition Improperly Assumes, as Undisputed, Threshold Legal Issues Involving the County's Basic Authority to Provide Electric Service and the Status of the City's Electrical Facilities Which are in Dispute and Cannot be Resolved in this Proceeding**

As noted above, while a petition for declaratory statement may assume facts, nothing in Section 120.565, Florida Statutes, authorizes a petition for declaratory statement to assume legal

[11] As discussed below, as a non-charter county, Indian River County lacks the legal authority to operate an electric utility system.

conclusions. In the Petition, the Board improperly assumes as true threshold legal issues concerning (1) the County's basic authority to provide electric service and (2) the status of the City Electric System located in County rights of way ("ROWs") if the County-City Franchise Agreement expires or terminates.

First, the Petition assumes that the County is authorized to provide electric service. See, e.g., Petition at 25, 30-31 (paragraphs 57a, 57b, 57c, 57e, 57g). The City disputes this assumption. Nothing in Chapter 125, Florida Statutes,[12] specifically authorizes the Board or the County to provide electrical service and, in fact, no other county in Florida provides such service. This threshold legal issue involving the interpretation of provisions of Chapter 125, Florida Statutes, should be resolved in a circuit court, not assumed away in this declaratory statement proceeding.

In addition, the Petition assumes that if the County-City Franchise Agreement terminates, the Board can require the City to remove its electric facilities from the County's rights of way. See, e.g., Petition at 24-26. The City strongly disputes this assumption: The resolution of this legal issue will involve the construction of the County-City Franchise Agreement, the application of preemption doctrine, and the application of various real property principles including, but not limited to, the rights of hold-over tenants, the interpretation of easements, the analysis of eminent domain law and the analysis of potential prescriptive rights. Such complex real property issues should be resolved by a circuit court, and cannot simply be assumed away in this declaratory statement proceeding. Accordingly, the Commission should dismiss the Petition.

[12] Sections 125.01(1)(k)&(q), Florida Statutes, make no reference to the provision of electrical services by a county.

**6. The Commission Should Also Dismiss the Board's Alternative Request That the Commission Initiate Proceedings to Modify the Territorial Agreement Between the City and FPL.**

The Commission should likewise reject the Board's alternative request for relief – that "the PSC should initiate such proceedings as are authorized within the PSC's jurisdiction to address the territorial agreements, service boundaries, and electric grid reliability responsibilities so as to ensure the continued and uninterrupted supply of electric service throughout the County." Petition at 1. First, this request is procedurally improper for a petition for declaratory statement, for the obvious reason that, on its face, it seeks action other than the Commission's declaration as to the application of statutes, rules, or orders to the Board in its particular circumstances. Substantively, and more importantly, in light of the Board's real goal – lower electric rates – the Board almost certainly lacks standing to initiate such proceedings. See Ameristeel v. Clark, 691 So. 2d 473, 478 (Fla. 1997) (holding, inter alia, that in a proceeding to approve a territorial agreement, a customer who wanted to be served by one utility, in order to get lower rates, but who would not be transferred under the proposed agreement did not have the right to intervene based on "speculative economic interests" and reiterating that "the Commission's charge in proceedings concerning territorial agreements is to approve those agreements which ensure the reliability of Florida's energy grid and to prevent needless uneconomic duplication of electric facilities.")

**MOTION TO DISMISS – CONCLUSION**

The Commission should dismiss the Board's Petition because it is based on hypothetical and speculative assumptions, rather than on actual facts; because it improperly seeks to have the Commission determine the conduct and the substantial interests of the City and other parties; because it improperly questions the validity of the Commission's orders and,

indeed, asks the Commission to assume that the Commission's own orders are invalid; because it improperly attempts to use the declaratory statement process to address territorial issues where there is no territorial dispute; because it improperly assumes legal conclusions, including not only the invalidity of the Commission's Territorial Orders but also that the County has the statutory power to operate an electric utility system, which is not present in Florida Statutes; and because the Board lacks standing to initiate a territorial action where its real interest is to obtain lower electric rates. The Commission should reject all of the Board's improper efforts, speculation, and invalid assumptions, and the Commission should accordingly dismiss the Petition.

## RESPONSE IN OPPOSITION TO REQUESTED DECLARATORY STATEMENTS

If the Commission declines to dismiss the Petition, it should either deny the majority of the requested statements or issue declarations "in the negative," i.e., contrary to those requested by the Board. Most of the Board's requests – including those requested in paragraphs 57d, 57e, 57f, 57g, 57h, 57i, 57m, and 57n - turn critically on its mistaken belief that its Franchise Agreement with the City is the sole legal authority for the City to use the County's rights of way to provide electric service. See Petition at 26, 28. The City's argument, below, explains the clear and unequivocal bases upon which the Commission must reject the Board's theory and deny the declaratory statements based upon it.

Other requested statements, e.g., 57a, 57b, and 57c, could be answered by the Commission, although they are speculative and improperly assume that the County has the statutory power to operate an electric utility system. (See the discussion of this issue in section 5 of the City's Motion to Dismiss, infra.) While requested statements 57j, 57k, and 57l are speculative and hypothetical, if the Commission elects to address them, the City provides its analyses of those issues in the final section of this pleading.

### Summary of Argument

The Board's Petition is merely an attempt to obtain lower rates, based on its erroneous theory that its 1987 Franchise Agreement is necessary for the City to provide service in its Commission-approved service territory in the unincorporated areas of the County. In other words, the Board asserts that its ability to grant or withhold a franchise is superior to the Commission's exclusive and superior jurisdiction over territorial matters and the planning, development, and maintenance of a coordinated power supply grid in Florida, and also superior to the Commission's Territorial Orders approving the territorial agreements between FPL and the

City, at least three of which pre-date the 1987 County-City Franchise Agreement. The Board's baseless theory is plainly contrary to applicable provisions of Chapter 366, Florida Statutes, which confer upon the Commission "exclusive and superior" jurisdiction over these matters, and its theory is clearly debunked by numerous orders of this Commission and by controlling opinions of the Florida Supreme Court, which have long recognized the Commission's exclusive and superior jurisdiction over the matters presented here. With regard to the core of the Board's claims – namely its efforts to obtain lower electric rates by evading the Commission's jurisdiction and the Commission's Territorial Orders approving the City's service area – the Court and the Commission have repeatedly stated, since 1968, that

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

Lee County Electric Co-op., 501 So. 2d at 507 (quoting Storey, 217 So. 2d at 307-08).

Moreover, the Board's positions are erroneous because the City not only has an obligation to provide electric service pursuant to the Commission's Territorial Orders, it also provides service – in its Commission-approved service area – pursuant to Section 166.021 and Section 180.02(2), Florida Statutes, and pursuant to other legal authority.

Finally, if the Commission were to grant most of the requested declaratory statements, the Commission would effectively abdicate its statutory jurisdiction over territorial matters and over the "planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy . . . in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities," Fla. Stat. § 366.04(5), by ceding its powers and jurisdiction to counties, and, if the Board's arguments were accepted, to municipalities as well. Further, there is no logical or substantive difference between the expiration of a franchise agreement and the absence of a

franchise agreement, so following the Board's theory, if a county can evict an incumbent utility after a franchise expires, it can also evict an incumbent where no franchise exists. Of course, this is completely contrary to Florida law, as well as completely contrary to good, rational public policy: No utility could reasonably plan or make proper investments if any county, and by extension any municipality, could evict the incumbent utility upon expiration of a franchise agreement. See City of Homestead v. Beard, 600 So. 2d 450, 454 (Fla. 1992). Such a result is absurd, nonsensical, and contrary to law, and the Commission must reject the Board's arguments and deny the Petition.

## ARGUMENT

### I. The Commission Has "Exclusive and Superior" Jurisdiction Over the City's Service Territory, and the County-City Franchise Agreement Is of No Effect Or Consequence to the Commission's Jurisdiction or the Commission's Territorial Orders.

The Board's Petition asks the Commission to render 14 separate declaratory statements. Six of the requested statements – those set forth in subparagraphs 57d through 57i of the Petition - depend on the premise that the City's sole right to provide electric service in unincorporated Indian River County derives from the 1987 Franchise Agreement between the County and the City. This premise is false for a number of reasons, most notably because the City provides service to customers in the subject areas pursuant to the Commission's Territorial Orders, issued pursuant to the Commission's "exclusive and superior" jurisdiction over territorial matters and the Commission's powers to prevent the uneconomic duplication of distribution facilities. The 1987 County-City Franchise Agreement is of no effect or consequence with respect to the Commission's jurisdiction or with respect to the Commission's Territorial Orders.

The Commission has jurisdiction to approve territorial agreements and to resolve territorial disputes. Fla. Stat. § 366.04(2)(d)&(e). The Commission further 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." Fla. Stat. § 366.04(5). The Commission's jurisdiction over these matters is

> 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.

Fla. Stat. § 366.04(1) (emphasis supplied).

The statutes could hardly be any clearer: the Commission has jurisdiction over the key issues raised by the Board – namely whether the County has the power to evict the City[13] from using its rights of way[14] and the power to designate a successor electricity supplier in what is now the City's Commission-approved service territory – and the Commission's jurisdiction is "exclusive and superior" to that of all other boards, agencies, and political subdivisions, specifically including "counties" and their "boards" of commissioners.

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[13] As purported authority for its claimed power to evict or expel the City from using County rights of way in the absence of a franchise, the Board cites City of Indian Harbour Beach v. City of Melbourne, 265 So. 2d 422 (Fla. 4th DCA 1979), which held that where two cities both had rate-setting authority but could not agree on the rates for water service to be charged by one city to customers located in the other city, the serving city could withdraw from serving and the served city could expel the other. This case, however, is inapposite on its face: in contradistinction to the Commission's express and exclusive jurisdiction over the service territory matters at issue here pursuant to the Grid Bill, the District Court itself stated the following: "Since the Public Service Commission is expressly forbidden from regulating the utilities in question, such power can and should be exercised by franchise agreements entered into by the municipalities." Id. at 423 (emphasis supplied). Accordingly, this case provides no support for the County's positions.

[14] The City, like other Florida electric utilities, also provides service through its facilities that are located in State rights of way, private easements, and utility easements over which county governments have no power.

As the Commission explained in a recent order,

> The Third District's decision is supported by a long line of Florida Supreme Court cases holding that we have exclusive jurisdiction over electric service territorial agreements between all utilities, which become part of our orders approving them. See, e.g. Storey v. Mayo, 217 So. 2d 304 (Fla. 1968); City Gas Company v. Peoples Gas System, Inc., 182 So. 2d 429 (Fla. 1965) ("In short, we are of the opinion that the commission's existing statutory powers over areas of service, both expressed and implied, are sufficiently broad to constitute an insurmountable obstacle to the validity of a service area agreement between regulated utilities, which has not been approved by the commission."); City of Homestead v. Beard, 600 So. 2d 450 (Fla. 1992). As the Supreme Court held in Public Service Commission v. Fuller, 551 So. 2d 1210, 1212 (Fla. 1989) any interpretation, modification or termination of an order approving a territorial agreement:
>
> . . . must first be made by the [Commission]. The subject matter of the order is within the particular expertise of the [Commission], which has the responsibility of avoiding uneconomic duplication of facilities and the duty to consider such decisions on the planning, development, and maintenance of a coordinated electric power grid throughout the State of Florida. The [Commission] must have the authority to modify or terminate this type of order so that it may carry out its express statutory purpose.
>
> Our order approving the agreement is an exercise by the state of its police power for the public welfare. Peoples Gas system Inc. v City Gas Co., 167 So.2d 577 (Fla. 3d DCA 1964), aff'd 182 So. 2d 429 (Fla. 1965).

In re: Complaint of Robert D. Reynolds and Julianne C. Reynolds Against Utility Board of the City of Key West, Florida d/b/a Keys Energy Services Regarding Extending Commercial Electrical Transmission Lines to Each Property Owner of No Name Key, Florida, Docket No. 120054-EM, Order No. PSC-13-0207-PAA-EM at 19 (May 21, 2013) ("No Name Key").

The Commission's exclusive jurisdiction over these matters is grounded not only in the Legislature's sound policy of avoiding the uneconomic duplication of facilities, it is also grounded in the need for jurisdiction over service areas to prevent antitrust violations. As the Commission further stated in No Name Key,

> It is important that we have, and fully exercise, our jurisdiction over electric service territorial agreements, not just to approve them in the first instance as a simple geographical boundary, but to actively supervise their implementation

> and enforce their terms. Territorial agreements are horizontal divisions of territory, considered to be per se Federal antitrust violations under the Sherman Act, 15 U.S.C. § 1. Parker v. Brown, 317 U.S. 341, 350 (1942) (a territorial agreement effective "solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate, would violate the Sherman Act.") When territorial agreements are sanctioned by the State, however, they are entitled to state action immunity from liability under the Sherman Act. 317 U.S. at 350; Municipal Utilities Board of Albertville v. Alabama Power Co., 934 F. 2d 1493 (11th Cir. 1991). Entitlement to state action immunity is demonstrated by a "clearly articulated and affirmatively expressed state policy" encouraging the activity in question, and "the policy must be actively supervised by the State itself." California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 105 (1980). See also Praxair, Inc. v. Florida Power & Light Co., 64 F. 3d 609 (11th Cir. 1995), where the Court held that two Florida electric utilities were entitled to state action immunity from antitrust liability for their territorial agreement because Chapter 366, F.S., demonstrated a clearly articulated and affirmatively expressed state policy to regulate retail electric service areas, and our extensive control over the validity and effect of territorial agreements indicated active state supervision of the agreements. 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.

No Name Key at 20.

One clear and unavoidable conclusion from the legal fact of the Commission's exclusive and superior jurisdiction over service territories is that the Franchise Agreement was never necessary to the City's serving in the subject areas, and the Franchise Agreement is of no effect or consequence relative to the Commission's exclusive and superior jurisdiction over both territorial matters and the planning, development and maintenance of a coordinated electric power supply grid in order to prevent the uneconomic duplication of distribution facilities. For the same reasons, the Franchise Agreement is of no effect or consequence to the effectiveness of the Commission's Territorial Orders. Finally, the Franchise Agreement is of no effect or consequence to the City's authority pursuant to the Commission's Territorial Orders, pursuant to its home rule powers, pursuant to its powers under Chapter 180, Florida Statutes, and pursuant to

other legal authority, to serve within its service area as described in and approved by the Commission.

The City provided service to customers in unincorporated Indian River County for at least 35 years before the 1987 Franchise Agreement was executed by the County and City, and probably for twenty-plus years before that, the point being that the Franchise Agreement was never necessary to the City's serving in the subject areas, and the Franchise Agreement is of no effect relative to the Commission's exclusive and superior jurisdiction over both territorial matters and the planning, development and maintenance of a coordinated electric power supply grid in order to prevent the uneconomic duplication of distribution facilities. The Commission has duly approved the FPL-Vero Beach territorial agreements on at least four occasions, stating as follows:

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

Order No. 11580 at 1-2.

Therefore, because the Commission has exclusive and superior jurisdiction over service territories, and because the Commission has expressly exercised that jurisdiction in approving the territorial agreement between FPL and Vero Beach, the County-City Franchise Agreement is of no effect or consequence to the Commission's Territorial Orders, and the Commission must deny the requested declaratory statements posed by the Board that challenge, or assume the ineffectiveness of, the Commission's Territorial Orders.

## II. The Board's Petition Is Really An Attempt To Usurp the Commission's Jurisdiction Over Service Territories In Order To Get Lower Rates, But Such Efforts Have Long Been Rejected By This Commission and By the Florida Supreme Court.

The Board's Petition is, at its core, an attempt to usurp the Commission's exclusive and superior jurisdiction over service territories, planning, and the avoidance of uneconomic duplication of facilities, in an effort to get lower rates. Such attempts have been consistently and unwaveringly rejected by this Commission and by the Florida Supreme Court since at least as early as 1968, and the Commission must reach the same result here and deny the Board's requested statements by which the Board hopes to be able to pick and choose electric suppliers. Demonstrating its plain intent, the Petition asserts that the Board has the power and authority to "designate a successor electric service provider" in areas presently served by the City. Petition at 6.

The Petition, at pages 20-22, complains about alleged subsidization of City government by County residents through their electric rates (para. 38) and about the City's rates being higher than FPL's (para. 39), and recites that the issue of the City's rates has become increasingly contentious and controversial (para. 36). The Petition also mistakenly alleges that the County residents have "no redress at all to any governmental authority;" this mistaken allegation is addressed in Section III, below.

The real thrust of the Board's Petition is its effort to persuade the Commission to issue declaratory statements that would abdicate the Commission's exclusive jurisdiction over territorial issues, planning, and the avoidance of uneconomic duplication of facilities, just so the Board can get lower rates. This is, on its face, an attempt to end-run the Commission's jurisdiction, an attempt to end-run the Commission's Territorial Orders pursuant to which the

City serves in its Commission-approved service territory, and an attempt to evade the Florida Supreme Court's consistent holding that:

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

Lee County Electric Co-op., 501 So. 2d at 587 (quoting Storey, 217 So. 2d at 307-08); Order No. 11580 at 2 (the 1983 Territorial Order approving a territorial agreement between the City and FPL); Order No. 5520 at 1 (the 1972 Territorial Order approving the original territorial agreement between the City and FPL).

Accordingly, the Commission must deny the Board's requested declaratory statements related to its efforts to terminate the City's rights to serve pursuant to the Commission's Territorial Orders.

## III. The Board's Assertion That Non-City Residents "Have No Redress At All To Any Governmental Authority" Is False And Affords No Basis For the Requested Declaratory Statements.

The Board asserts, apparently as some sort of attempted justification for its requested declaratory statements, that "the customers in the Franchise Area have no voice and no redress at all to any governmental authority – since they reside outside the corporate city limits they have no vote in Vero Beach city elections." While it is true that customers outside the City limits do not vote in city elections, the claim of "no redress" is patently false. In Storey v. Mayo, certain consumers challenged a territorial agreement approved by the Commission that transferred them from being served by an investor-owned utility to a municipal utility. Among the consumers' claims was their assertion that they were denied equal protection under the law. The Court rejected this claim, not unlike the Board's claim in the instant case, stating as follows:

> If he [a customer] lives within the limits of a city which operates its own system, he can compel service by the city. However, he could not compel service by a

> privately-owned utility operating just across his city limits line merely because he preferred that service. In the instant situation, these petitioners have not been denied equal protection because they occupy the same status as all users of the municipal power. In the event of excessive rates or inadequate service their appeal under Florida law is to the courts or the municipal council.

Storey, 217 So. 2d at 308 (emphasis supplied). In fact, a lawsuit has been filed against the City by the Town of Indian River Shores in the circuit court in Indian River County raising exactly this claim as the first count of the complaint. Town of Indian River Shores v. City of Vero Beach, Case No. 312014 CA 000748 (Fla. 19th Circuit in and for Indian River County, Complaint filed July 18, 2014).[15]

The Board's claim is false and affords no basis for the requested declaratory statements, and the Commission should accordingly deny the requested statements.

## IV. The City Provides Electric Service In Its Commission-Approved Service Territory Pursuant to the Commission's Express Jurisdiction, Pursuant to the Commission's Territorial Orders, and Pursuant to Additional Legal Authority.

As described above, the City of Vero Beach has provided electric service outside its city limits since at least as early as 1952, and probably since the 1920s. At a minimum, the City has thus provided service pursuant to the Commission's Territorial Orders since the issuance of

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[15] With regard to the Board's assertion that the City's electric rates are excessive, see Rosalind Holdings v. Orlando Utils. Comm'n, 402 So. 2d 1209, 1211 (Fla. 5th DCA 1981), which held, inter alia, that:

> A person seeking to attack in the courts the rates charged by a utility has the burden of showing that the rates are outside or beyond the "zone of reasonableness," as established by the evidence, and not necessarily by the PSC, so as to be confiscatory or discriminatory. Absent a controlling statute, a municipal utility, like any other utility, is entitled to earn a reasonable rate of return on its capital and its rates may be set so that it earns a rate of return on its equity comparable to other similar businesses."

(Footnotes omitted.) Such a claim would, as stated by the Court in Storey, be addressed in appropriate proceedings in Florida circuit court. Storey, 217 So. 2d at 308.

Order No. 5520 in August 1972. Further, the City has provided service subject to the Commission's express statutory jurisdiction over service territories and the Commission's jurisdiction over the planning, development, and maintenance of a coordinated power supply grid for the avoidance of uneconomic duplication of facilities since the enactment of the Grid Bill in 1974, and pursuant to the Commission's "implicit authority" before that. Fuller, 551 So. 2d at 1212. Further still, the City provides service pursuant to its home rule powers under the Florida Constitution and pursuant to its powers under Section 166.021, Florida Statutes and Section 180.02(2), Florida Statutes

The territorial agreements approved by the Commission are part of the Commission's Territorial Orders, and thus have the full legal effect and authority of those Orders. City Gas, 182 So. 2d at 436; Fuller, 551 So. 2d at 1212. The City has served within its Commission-approved service territory, including areas both inside and outside its City limits, pursuant to the Commission's Territorial Orders since 1972. Neither the Board or any other officer or agency of the County ever appeared in any of the Commission's proceedings pursuant to which the Commission's Territorial Orders were issued. (Neither did the Town of Indian River Shores.) There is not – or at least there should not be – any dispute that the City also provides service within its Commission-approved service territory subject to the Commission's jurisdiction over territorial agreements, territorial disputes, and the avoidance of uneconomic duplication of electric distribution facilities.

Thus, the Board's argument that the City has no legal right to serve absent the County's authorization pursuant to the Franchise Agreement is false on its face: if the City had no right to serve in 1972, the Commission would not have approved its service area.

Under section 2(b), Article VIII of the Florida Constitution, under its home rule powers, and under Section 166.021(1)&(4), Florida Statutes, the City also has "the governmental, corporate, and proprietary power to enable [it] to conduct municipal government, perform municipal functions, and render municipal services, and [to] exercise any power for municipal purposes, except when expressly prohibited by law." Section 166.021(2) defines "Municipal purpose" as "any activity or power which may be exercised by the state or its political subdivisions," which clearly includes the power to operate an electric utility system. The City's power to operate an electric utility system is not prohibited by law, and accordingly, this statute provides additional authority for the City's legal ability to operate its electric system.[16]

Under Section 180.02(2), Florida Statutes, the City has the power to "extend and execute all of its corporate powers applicable for the accomplishment of the purposes of this chapter outside of its corporate limits . . . for the promotion of the public health, safety and welfare . . . ." The provision of electricity is fundamentally a public purpose for the promotion of the public health, safety, and welfare,[17] and accordingly, this statute also provides independent support for the City's power to serve in the unincorporated areas of the County, as it did for decades before the current Franchise Agreement ever existed.

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[16] Correspondingly, the County does not have these statutory powers. Section 125.01(1)(q), Florida Statutes, cited by the Board, does indeed list many things that counties may do, including, through municipal services taxing or benefit units, operating water, alternative water, sewer, waste disposal, streets, beach erosion control, street lighting, and others, but nowhere does this statute refer to a county's legal power to operate an electric utility providing service to or for the public generally. See United Auto Ins. Co. v. Salgado, 22 So. 3d 594, 600 (Fla. 3d DCA 2009) (citing Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976)) (it is a general principle of statutory construction that the mention of one thing implies the exclusion of another). Section 125.01(k), Florida Statutes, also identifies some specific utility functions – water, alternative water supplies sewage, and reclaimed water – that counties may conduct, but this section does not include electric service, either.

[17] See Fla. Stat. § 366.01.

Moreover, it is clear from known evidence of record that the County acquiesced in the City's serving in the unincorporated areas of the County allocated to the City, with FPL's express agreement and support, in at least three separate instances before the Franchise ever existed, and in one additional territorial amendment since the Franchise existed. This acquiescence may well provide additional, separate legal authority for the City's continuing ability to serve using the County's rights of way (i.e., those in the City's Commission-approved service area in the unincorporated areas of the County, as well as those within the City limits), but issues relating to or deriving from the County's knowing acquiescence in the City's serving areas in the County outside the city limits, if applicable at all in light of the Commission's express, exclusive and superior jurisdiction over service areas, planning, and the avoidance of uneconomic duplication of facilities, should be addressed by the courts. At a minimum, the simple logic and equity of these facts cuts strongly in favor of the City.

Because the City has the power to serve pursuant to its home rule powers and pursuant to the Commission's express, exclusive, and superior jurisdiction, which the Commission has specifically exercised in its Territorial Orders to approve the territorial agreements between the City and FPL, the Commission must deny the requested declaratory statements. Moreover, the existence of independent statutory authority for the City's electric utility operations further disproves the Board's main contention, i.e., that the City has no right to serve except pursuant to its Franchise Agreement with the County, and the Commission must accordingly deny the declaratory statements requested by the Board.

## V. The Legislature's Statutory System of Governing Service Areas, Electric System Planning, and Avoiding Uneconomic Duplication of Facilities Would Be Undermined If a County Could Simply Designate Electric Suppliers At Will.

Under Chapter 366, Florida Statutes, the Commission has exclusive and superior jurisdiction over territorial agreements, territorial disputes, the planning, development, and maintenance of the grid, and avoiding the uneconomic duplication of electric facilities. Contrary to the Legislature's clearly established system of regulating these matters, the Board asserts that for a utility to serve within the County's boundaries, it must have a franchise agreement, and that absent a franchise, the utility would have no right to serve. See Petition at 23-24. Accepting the Board's assertions would completely undermine Chapter 366, with violence not only to the statutes themselves but to the expectations of all electric utilities in Florida that provide service in reliance on the Commission's exclusive jurisdiction and in reliance on the Commission's territorial orders approving their service areas.

The Board asserts that the City's only right to serve in the unincorporated areas of the County that are within the City's Commission-approved service area derives from its Franchise Agreement with the City. If accepted as true, it would follow that any utility would have to have a franchise with any county, or with any city, in which it provides service. As envisioned by Indian River County, either the County itself, or any other county, or any city would have the power to designate any utility of its choosing upon expiration of a franchise. Logically, there is no difference between the expiration of a franchise and the absence of a franchise, and for purposes of granting franchises, there is no difference between a county and a city, so the Board's theory is really that a county or city can designate the electric service provider of its choosing at any time, except when an existing franchise prevents it from doing so. This is absurd, as evidenced by the fact that the City operated in the unincorporated areas of the County

for at least 35 years, and probably for close to 60 years, before there was ever a franchise agreement at all; the absurdity of the Board's argument is further demonstrated by the fact that other Florida utilities serve in many cities and many counties without franchises.

The violence that the Board's position would do to the statutory system is obvious. The Commission has exclusive jurisdiction over all territorial matters, over the planning, development, and maintenance of the grid, and over the uneconomic duplication of facilities. The Board would seize this jurisdiction for itself and usurp the Commission's statutory powers and authority.

The practical violence to the ability of utilities to plan and make investments in generation, transmission, and distribution facilities would be at least as great. No utility could reasonably make investments if it were uncertain as to the continuation of its legal ability to serve. Of course, the Florida Legislature has fully and definitively addressed this potential problem by enacting the Grid Bill, which gives the Commission the exclusive jurisdiction over all such matters, and pursuant to which utilities can plan in peace to serve their Commission-approved service areas in reliance on the statutes and in reliance on the Commission's territorial orders.

The Florida Supreme Court's opinion in City of Homestead v. Beard, 600 So. 2d 450 (Fla. 1992), is instructive. That case involved the effort by Homestead to terminate a territorial agreement with FPL based on Homestead's theory that the agreement should be construed according to the ordinary law of contracts, by which the City claimed it could terminate the agreement at will, because Homestead was not subject to the Commission's jurisdiction when the agreement was originally executed. The Commission dismissed Homestead's petition upon

motion by FPL, and Homestead appealed to the Court. The Court upheld the Commission, holding that

> In the absence of an express provision to the contrary in the approved agreement, the statutory and decisional law surrounding the modification or termination of PSC orders governs the territorial settlement agreement in the instant case.

Id. at 452. The practical effect of the Court's decision was to uphold the Commission's and FPL's position that the territorial agreement was of indefinite duration and that it could only be modified by the Commission.

The Court went on to discuss two points relevant here. First, the Court observed that,

> in construing a contract, it is well established that "the laws existing at the time and place of the making of the contract and where it is to be performed which may affect its validity, construction, discharge and enforcement, enter into and become a part of the contract as if they were expressly referred to or actually copied or incorporated therein."

Id. at 454-55 (quoting Shavers v. Duval County, 73 So. 2d 684, 689 (Fla. 1954)). As applicable here, the Commission's full, exclusive and superior jurisdiction under Chapter 366, including its Grid Bill powers, were in the Florida Statutes when both the 1980 and 1987 Territorial Agreements were executed, and accordingly, those statutes are part of the County-City Franchise Agreement "as if they were expressly referred to or actually copied or incorporated therein."

Second, the Court discussed the impacts on parties to a territorial agreement if one party could terminate it at will. In fact, the Court discussed the issue in terms of a "franchise" and "franchised areas," even though the agreement at issue was the Commission-approved territorial agreement between Homestead and FPL, not a franchise agreement, and the Court further discussed the adverse impacts on parties who made investments in reliance on the territorial agreement, stating as follows:

> A party would be hesitant to make substantial investments in franchised areas if the other party could terminate the franchise at will. In the instant

> agreement, FPL refrained from competing with the City for twenty years, transferred a large number of its customers to the city, and made investments in territories in which it believed it had an exclusive franchise. The detriment to FPL as a result of these acts cannot be undone and it is unlikely that FPL intended to place itself in a position in which the City could unilaterally deprive it of its franchised areas under the agreement and, thus, impair its investment in those areas.

Id. at 454 (footnotes omitted).

The Board's theory would not only undermine the Commission's legislatively granted jurisdiction, it would undermine the ability of parties to any territorial agreements to rely on those agreements or on the Commission's orders approving them, with adverse impacts on whichever parties turned out, at any point in time, to be disfavored by a county or city for any reason. This theory cannot stand, and the Commission must deny the requested statements relating to the Board's asserted powers (a) to evict the City from County rights of way in the unincorporated areas of the City's Commission-approved service territory, and (b) to designate a successor electric supplier for such areas.

## RESPONSES REGARDING SPECIFIC REQUESTED DECLARATIONS

The City herewith provides its responses to the fourteen separate statements requested by the Board, in paragraphs 57a through 57n of its Petition.

57a. The Board will not become a "public utility" as that term is defined in Section 366.02(1), Florida Statutes, if the Board assumes ownership of the Electric Facilities and the Board supplies electric service through the Electric Facilities to those customers currently served by the Electric Facilities.

Vero Beach Position and Discussion

The Board, and the County, would, in its hypothetical scenario, become a "public utility" under Section 366.02(1), Florida Statutes, by the plain language of that statute, which defines a "public utility" as follows:

> every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state; but the term "public utility" does not include either a cooperative now or hereafter organized and existing under the Rural Electric Cooperative Law of the state; a municipality or any agency thereof; any dependent or independent special natural gas district; any natural gas transmission pipeline company making only sales or transportation delivery of natural gas at wholesale and to direct industrial consumers; any entity selling or arranging for sales of natural gas which neither owns nor operates natural gas transmission or distribution facilities within the state; or a person supplying liquefied petroleum gas . . .

The County is neither a municipality nor any of the other specifically enumerated entities exempt from definition as a public utility, and accordingly, under its hypothetical, and assuming that it even has the statutory power to operate an electric system, it would be an "other legal entity . . . supplying electricity . . . to or for the public within this state," and thus a "public utility."

57b. The Board will become an "electric utility" as that term is defined in Section 366.02(2), Florida Statutes, if the Board assumes ownership of the Electric Facilities and the Board supplies electric service through the Electric Facilities to those customers currently served by the Electric Facilities.

Vero Beach Position and Discussion

The Board, and the County, would, in its hypothetical scenario, be a public utility. The language of Section 366.02(2), Florida Statutes, leaves the answer to this request ambiguous because the County would not be an investor-owned utility, a municipal electric utility, or a cooperative utility, although it would, in its hypothetical scenario, own, maintain, and operate at least an electric distribution system in Florida. However, whether the County was ultimately determined to be some other species of utility not expressly named in Section 366.02(2), it is clear that the County, in this hypothetical scenario, would be subject to the Commission's exclusive and superior jurisdiction over service territories, territorial agreements, territorial dispute resolution, planning, and the avoidance of uneconomic duplication of facilities.

57c. The Board will not become a "public utility" as that term is defined in Section 366.02(1), Florida Statutes, or an "electric utility" as that term is defined in Section 366.02(2), Florida Statutes, if the Board assumes ownership of the Electric Facilities and the Board leases or otherwise conveys the Electric Facilities to FPL or some other provider of electric service (e.g., a public utility, another municipality, or a cooperative) that would supply electric service through the Electric Facilities and/or other necessary equipment to customers within the geographic area of the Franchise.

Vero Beach Position and Discussion

Although this is not relevant to most of the Board's requests, the City believes that the Board, and the County, would, in its hypothetical scenario, at a minimum, be a public utility through its participation in the provision of electricity to or for the public through distribution facilities that, by the Board's hypothesis, the County would own. However, regardless whether the County was ultimately determined to be a public utility, an electric utility, or some other

species of utility not expressly named in Section 366.02(2), it is clear that the County, in this hypothetical scenario, would be subject to the Commission's exclusive and superior jurisdiction over service territories, territorial agreements, territorial dispute resolution, planning, and the avoidance of uneconomic duplication of facilities.

57d. Once the Franchise expires, the COVB-FPL territorial agreements and boundaries approved by the PSC will become invalid as void or voidable at least with respect to the Franchise Area.

Vero Beach Position and Discussion

The COVB-FPL territorial agreements will continue in full force and effect regardless whether the Franchise expires or is renewed or extended. The Commission's territorial jurisdiction is exclusive and superior to that of the County with respect to all matters within the Commission's jurisdiction, including territorial agreements and also including the Commission's closely related jurisdiction under Section 366.04(5), Florida Statutes, over the planning, development, and maintenance of a coordinated electric power supply grid for the avoidance of uneconomic duplication of facilities. The existence or non-existence of the Franchise is of no effect or consequence to either the Commission's jurisdiction or the continuing validity of the Commission's Territorial Orders.

57e. Once the Franchise expires and the territorial agreements and boundaries approved by the PSC between COVB and FPL become invalid in full or in part (at least with respect to the Franchise Area), if the Board chooses to supply electric service in the geographic area described by the Franchise, there [sic] no limitations in Chapter 366 that would preclude or limit the Board's ability to enter into a territorial agreement with FPL regarding their respective service areas within the county.

Vero Beach Position and Discussion

Aside from its legally incorrect premise, namely that the expiration of the Franchise would render the Commission's Territorial Orders ineffective, and further assuming that the County has the statutory power to operate an electric utility system in the first instance, any effort by the Board or the County to supply electricity to or for the public in the City's Commission-approved service area would violate the Commission's Territorial Orders and would subject the County to a territorial dispute that the City would lodge with the Commission, because such action by the County would violate the Commission's Territorial Orders and would further violate the Commission's exclusive and superior jurisdiction over the planning of the grid and the avoidance of uneconomic duplication of facilities. Since the County lacks the statutory power to establish or operate an electric utility system, the County cannot take the City's facilities by eminent domain,[18] so the County would have to construct its own electric distribution facilities in the City's Commission-approved service area. Of course, this would, on its face, constitute the uneconomic duplication of the City's existing distribution facilities, which

[18] Under the prior public use doctrine, "property devoted to public use cannot be taken and appropriated to another public use unless the authority for the taking either has been given expressly by the legislature or is necessarily implied. This doctrine has particular application when one condemning authority seeks property held by another and neither authority possesses a superior power of condemnation by statute or by court decision." Florida Eminent Domain Practice and Procedure, The Florida Bar, 7th Ed. at § 2.7 (citing Florida East Coast Railway Co. v. City of Miami, 321 So. 2d 545 (Fla. 1975).

the City has installed over the past century to serve County residents outside the City limits, in reliance on the City's own statutory authority, in reliance on the Commission's exclusive jurisdiction, in reliance on the Commission's Territorial Orders, and in reliance on the County's acquiescence to the City's serving in those areas.

57f. Once the Franchise expires and if the territorial agreements and boundaries approved by the PSC between COVB and FPL become invalid in full or in part (at least with respect to the Franchise Area), under Chapter 366 there any [sic] no limitations on the Board's ability to grant FPL or some other successor electric supplier an exclusive franchise to supply electric service within the geographic area described by the Franchise and for that successor electric supplier to serve such customers.

Vero Beach Position and Discussion

Aside from its legally incorrect premise, namely that the expiration of the Franchise would render the Commission's Territorial Orders ineffective, any effort by the Board or the County to enter into an agreement with any other potential supplier of electricity in the City's Commission-approved service area would violate the Commission's Territorial Orders and would subject either such other potential supplier, or the County, or both to a territorial dispute that the City would lodge with the Commission, because such action by the County would further violate the Commission's exclusive and superior jurisdiction over the planning of the grid and the avoidance of uneconomic duplication of facilities. Since neither the County nor any other entity can take the City's facilities by eminent domain, any effort by the County or any other potential supplier to construct facilities would on its face constitute the uneconomic duplication of the City's existing facilities, which the City has installed over the past century to serve County residents outside the City limits, in reliance on the City's own statutory authority, in reliance on the Commission's exclusive jurisdiction, in reliance on

the Commission's Territorial Orders, and in reliance on the County's acquiescence to the City's serving in those areas.

57g. Once the Franchise expires and if the territorial agreements and boundaries approved by the PSC between COVB and FPL remain valid, the PSC's orders regarding the territorial agreements and boundaries do not limit or otherwise preclude the Board from supplying electric service within the geographic area described by the Franchise.

Vero Beach Position and Discussion

This is essentially the same request as set forth in paragraph 57e of the Board's Petition, discussed above, except that it posits the assumption that the Commission's Territorial Orders remain valid, but then asks the Commission to declare that its Territorial Orders do not have any effect on the Board's future actions, rather than assuming that the Commission's Orders have no effect, as it did in paragraph 57e. Accordingly, the City's position and analysis are the same as set forth above.

Aside from its legally incorrect premise, namely that the expiration of the Franchise would render the Commission's Territorial Orders ineffective, and further assuming that the County has the statutory power to operate an electric utility system in the first instance, any effort by the Board or the County to supply electricity to or for the public in the City's Commission-approved service area would violate the Commission's Territorial Orders and would subject the County to a territorial dispute that the City would lodge with the Commission, because such action by the County would violate the Commission's Territorial Orders and would further violate the Commission's exclusive and superior jurisdiction over the planning of the grid and the avoidance of uneconomic duplication of facilities. It is clear that the County cannot condemn the City's facilities, so any effort by the County to construct electric distribution facilities in the City's

Commission-approved service area would on its face constitute the uneconomic duplication of the City's existing distribution facilities, which the City has installed over the past century to serve County residents outside the City limits, in reliance on the City's own statutory authority, in reliance on the Commission's exclusive jurisdiction, in reliance on the Commission's Territorial Orders, and in reliance on the County's acquiescence to the City's serving in those areas.

57h. Once the Franchise expires and if the territorial agreements and boundaries approved by the PSC between COVB and FPL remain valid, the PSC's orders regarding the territorial agreements and boundaries do not limit or otherwise preclude the Board from granting an exclusive franchise to FPL or a successor electric supplier that would authorize the supply [of] electric service to customers within the geographic area of the Franchise and for that supplier to serve customers.

Vero Beach Position and Discussion

This is essentially the same request as set forth in paragraph 57f of the Board's Petition, discussed above, except that it posits the assumption that the Commission's Territorial Orders remain valid, but then asks the Commission to declare that its Territorial Orders do not have any effect on the Board's future actions, rather than assuming that the Commission's Orders have no effect, as it did in paragraph 57f.

Aside from its legally incorrect premise, namely that the expiration of the Franchise would render the Commission's Territorial Orders ineffective, any effort by the Board or the County to enter into an agreement with any other potential supplier of electricity in the City's Commission-approved service area would violate the Commission's Territorial Orders and would subject either such other potential supplier, or the County, or both to a territorial dispute that the City would lodge with the Commission, because such action by the County would further violate the Commission's

exclusive and superior jurisdiction over the planning of the grid and the avoidance of uneconomic duplication of facilities. It is clear that neither the County nor any other entity can condemn the City's facilities, so any effort by the County or any other potential supplier would on its face constitute the uneconomic duplication of the City's existing distribution facilities, which the City has installed over the past century to serve County residents outside the City limits, in reliance on the City's own statutory authority, in reliance on the Commission's exclusive jurisdiction, in reliance on the Commission's Territorial Orders, and in reliance on the County's acquiescence to the City's serving in those areas.

57i. Once the Franchise expires, and COVB is no longer legally authorized to utilize the County's rights of way, so long as the Board takes such actions as will facilitate the continued and uninterrupted delivery of electric service to customers in the Franchise Area by the Board, FPL, or some other supplier, there [sic] no electric reliability or grid coordination issues that the Board must address with respect to the PSC's jurisdiction under Chapter 366.

Vero Beach Position and Discussion

Aside from its legally incorrect premise, namely that the expiration of the Franchise would remove the City's legal authority to use the County's rights of way in the unincorporated areas of the County to provide service within its Commission-approved service territory, this requested statement is irrelevant and immaterial to the Commission's exclusive and superior jurisdiction over planning, reliability, and the uneconomic duplication of facilities. The Board has no jurisdiction or authority to "take such actions as will facilitate the continued and uninterrupted delivery of electric service to customers in the Franchise Area," because these matters are within the exclusive and superior jurisdiction of the Commission. In other words, unless the Board somehow

becomes authorized to provide electric service in Florida, neither the Board nor the County has anything to do with electric service reliability or grid coordination (including the avoidance of the uneconomic duplication of facilities), because those powers and jurisdiction are vested exclusively in the Florida Public Service Commission.

57j. If the sale of the COVB utility to FPL is completed, or once the Franchise expires and there is a new electric service supplier within the Franchise Area, there are no other matters to be addressed with respect to Section 366.04(7), Florida Statutes. COVB's failure to conduct an election under Section 366.04(7), Florida Statutes, does not have any legal effect on the Franchise or the Board's duties and responsibilities for continued electric service within the Franchise Area.

Vero Beach Position and Discussion

The Board's paragraph 57j requests two declaratory statements. With respect to the first, under the assumption stated, i.e., that the City is able to complete the sale of its electric system to FPL, the requested statement is moot, and the Commission accordingly need not address it. Technically and logically, it is true that if the proposed sale to FPL is consummated, there would be no other matters to be addressed under Section 366.04(7), Florida Statutes.

With regard to the second, i.e., the City's alleged failure[19] to conduct an election pursuant to Section 366.04(7), Florida Statutes, whether an election was held or not is wholly irrelevant to the requested statements. Whether an election was held or not has no bearing and no effect on the Franchise or on the Board's assumed "duties and responsibilities." The Franchise governs contractual relationships between the City and the County according to its terms, and any election is irrelevant to those relationships. The Board has no duties or responsibilities with

[19] Although irrelevant to the Board's requested declaratory statements, the City does not concede that its failure to conduct a referendum pursuant to Section 366.04(7), Florida Statutes was in any way unlawful.

respect to electric service "within the Franchise Area" because, as a matter of law, the Florida Public Service Commission has "exclusive and superior" jurisdiction over all such matters.

57k. Once the Franchise expires, and customers in the Franchise Area are being served by a successor electric service provider, the Board does not have any legal obligations to COVB or any third parties for any COVB contracts for power generation capacity, electricity supply, or other such matters relating to electric service within the Franchise Area.

Vero Beach Position and Discussion

Although the Board does not state this request as conditional, it obviously depends on the conditional assumption that, one way or another, the City would no longer be serving in its Commission-approved service area. Regardless of how the County's hypothesized state of the world might come about, the requested statement is outside the Commission's jurisdiction. If the County were somehow involved in transactions that impaired the City's bonds or contracts, there would likely be litigation in the courts related to such issues, but those are outside the Commission's jurisdiction. Accordingly, the Commission cannot render the requested statement.

57l. If the Board grants COVB a temporary extension in the Franchise for the limited purpose and for a limited time in order to seamlessly and transparently transition customers in the Franchise Area to a new electric service provider, there are no issues or matters under Chapter 366 or the PSC's rules and orders that must be addressed by the Board for the transition period.

Vero Beach Position and Discussion

This requested declaratory statement is moot on its face. There are no issues concerning the County or the Board under Chapter 366 under the existing Franchise, just as there were no Chapter 366 issues concerning the Board or the County before the Franchise existed, and there will be no Chapter 366 issues concerning the County or the Board if the County and the City

were to agree to extend the Franchise. Accordingly, the Commission need not address this requested statement.

57m. The PSC does not have any jurisdiction with respect to the Electric Facilities once the franchise has expired. There is no limitation or other restriction under Chapter 366 impacting a successor electric service provider from buying, leasing, or otherwise lawfully seeking to acquire the Electric Facilities in the Franchise Area from COVB.

Vero Beach Position and Discussion

The Board's premise for this requested statement, that the Commission does not have any jurisdiction over the distribution facilities in the City's Commission-approved service territory outside the City limits in unincorporated Indian River County after the Franchise has expired, is legally incorrect. The Commission has exclusive and superior jurisdiction over the facilities, at a minimum under Sections 366.04(5), Florida Statutes, relating to planning and maintenance of the grid, reliability, and the avoidance of uneconomic duplication of facilities, and under Section 366.04(6), Florida Statutes, pursuant to which the Commission has jurisdiction to prescribe and enforce safety standards for transmission and distribution facilities of all electric utilities operating in Florida.

Aside from this obvious defect, and aside from the Commission's jurisdiction over the facilities as discussed above, the City believes that it is true that there are no statutory limitations on the City's ability to sell, lease, or otherwise legally dispose of its electric facilities. Indeed, the City has a contract to sell its facilities to FPL, which the City will consummate if it is legally able to do so, and that contract is not per se subject to any limitations under Chapter 366. If the acquiring utility were an investor-owned utility, there would likely be ancillary issues relating to the acquiring utility's treatment of the acquisition costs for rate-setting purposes under Chapter

366. If the acquiring utility were another municipal utility, there would likely be no direct Chapter 366 implications. In either case, however, the Commission's territorial jurisdiction would continue, as would its jurisdiction over planning, reliability, and the avoidance of uneconomic duplication of facilities.

57n. The PSC does not have the legal authority to invalidate or otherwise supersede the Board's decision to terminate the Franchise or to designate COVB the electric service provider in the Franchise Area after the Franchise has expired.

Vero Beach Position and Discussion

As discussed extensively in the body of this pleading, the Board's decision with respect to the County-City Franchise Agreement is of no effect or consequence to the Commission's jurisdiction; correspondingly, the Commission need not, and would not, take any action on the County's decision to terminate the Franchise or to extend it. The County may terminate the Franchise if it wishes, as may the City, but neither act would affect the Commission's exclusive jurisdiction over service areas, territorial agreements, territorial disputes, planning, and the avoidance of uneconomic duplication of electric service facilities. Thus, the County may terminate the Franchise or extend it, assuming that the City agrees to an extension, but the Commission's jurisdiction will remain unchanged, and the Commission's Territorial Orders will remain unaffected. The County may not, however, designate any electric service provider in the Franchise Area, because it has no jurisdiction or power with respect to service territories of electric utilities.

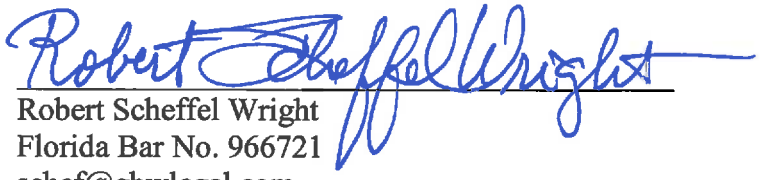
## CONCLUSION AND RELIEF REQUESTED

The Commission should dismiss the Board's Petition because it is based on hypothetical and speculative factual circumstances, because there is no present need for the requested declaratory statements, because it improperly seeks to determine the conduct and substantial interests of the City and other third parties, because it is based on erroneous legal assumptions, because it improperly questions – and attacks - the validity of the Commission's Territorial Orders, as well as the Commission's statutory jurisdiction, because a declaratory statement proceeding is not the appropriate forum for addressing territorial issues, and because the Board lacks standing to pursue its real goal – lower electric rates – through a territorial proceeding in any event. Ameristeel, 691 So. 2d at 477-78.

If the Commission decides to rule on the requested declarations, then the Commission should uphold its clear, exclusive and superior jurisdiction over territorial matters, planning and maintenance of the grid, and avoiding the uneconomic duplication of facilities by denying the Board's requested statements, as discussed in the body of the City's Motion to Dismiss and Response in Opposition above.

**WHEREFORE**, for the reasons set forth above, the City of Vero Beach respectfully asks the Commission to DISMISS the Petition for Declaratory Statement filed in this docket by Indian River County, or in the alternative, to DENY the substantive declaratory statements requested by the Board as being contrary to the Commission's Territorial Orders that approved, as being in the public interest and in furtherance of the Commission's statutory mandate to avoid the further uneconomic duplication of distribution facilities in Florida, the City's right and authority to serve within the service areas approved in those Orders.

Respectfully submitted this 14th day of August, 2014.



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, by electronic delivery, on this 14th day of August, 2014.

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