BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for declaratory statement regarding the effect of the Commission's orders approving territorial agreements in Indian River County, by the City of Vero Beach.	)))))	Docket No.: 140244-EM Filed: January 13, 2014

RESPONSE OF THE BOARD OF COUNTY COMMISSIONERS, INDIAN RIVER COUNTY, IN OPPOSITION TO THE CITY OF VERO BEACH PETITION FOR DECLARATORY STATEMENT

The Board of County Commissioners, Indian River County, Florida (the "Board"), by and through its undersigned counsel, pursuant to the Notice of Declaratory Statement published in the Florida Administrative Record ("FAR") on December 23, 2014, Section 120.565, Florida Statutes, and Rules 28-105.001, 28-105.0027(1), and 28-106.204, Florida Administrative Code, hereby files with the Florida Public Service Commission ("PSC" or "Commission") this Response in Opposition ("Response") to the Petition for Declaratory Statement ("Petition") filed by the City of Vero Beach, Florida ("City").[1] The City's Petition should be denied as it is attempting to affect, control, or limit the Board's authority to issue electric service franchises for the unincorporated areas of Indian River County (the "County") and, thus, the requested declarations are more about the Board's authority than questions regarding the petitioner's particular circumstances. In furtherance of this Response in Opposition, the Board states:

[1] Based upon the PSC's formal notice of the City's Petition published in the FAR, simultaneously with the filing of this response the Board is submitting its Notice of Intervention by Appearance and Alternative Motion to Intervene and a separate Request for Oral Argument.

I. Introduction

1. The catalyst for the City's Petition is, the City admits, the expiration of the electric service franchise granted by the Board to the City. As the City relates and speculates, the City first began providing electric service to parts of the unincorporated areas of the County prior to 1987. On January 27, 1987, the Board granted the City the exclusive authority to provide electric service within certain unincorporated geographic areas of the County for thirty years and which the City approved and accepted on March 5, 1987 (the "Franchise" or "Franchise Agreement").[2] This Franchise by its terms also grants to the City certain property rights that permit the City to utilize the County's streets, bridges, alleys, easements, and public places for the placement of the City's electric facilities, such property rights being within the exclusive domain of the Board. On February 22, 2012, the Board properly noticed the City that it shall not renew the Franchise when it expires on March 4, 2017.[3] It is the expiration of this Franchise, granted by the Board and freely accepted by the City, that the City now seeks to improperly invalidate and otherwise render meaningless along with the Board's franchise authority through its Petition.

2. The other motivation for the City's Petition is the Board's own declaratory statement petition pending in Docket No. 140142-EM, and referenced on pages 2, 4, 5, and 14 but alluded to throughout the City's Petition. The Board's Petition is presently scheduled to be decided on February 3, 2015, on fourteen questions also arising out of the upcoming expiration of the Franchise Agreement. The City is a party of record in Docket No. 140142, and the PSC

[2] Board of Indian River County, Florida, Resolution 87-12, attached hereto as Exhibit A. It is important to note that the Franchise by its express language does not in any manner purport to limit or otherwise affect the electric service provided by the City within its own corporate limits. In addition, the Franchise by its express language does not in any manner grant or otherwise purport to limit or affect the electric service provided by the City within the corporate limits of the Town of Indian River Shores, Florida, which was incorporated as a municipality in 1953, and which has its own separate electric franchise agreement with the City regarding service within its corporate limits.

[3] *See* attached Exhibit B.

has had the full benefit of the City's unopposed motion to intervene, motion to dismiss, and substantive written response to the Board's Petition.[4] While the Board's requested declarations are different from the two requested by the City, the City's arguments in both dockets are substantially similar. Changing the format of the City's arguments from the negative in Docket No. 140142 to the affirmative in this docket does not change the fundamental defects in the City's arguments regarding the exclusive but limited authority of the PSC with respect to territorial agreements and preventing uneconomic duplication of facilities versus the separate and exclusive authority of the Board to issue franchises and to determine the use of public property rights in the unincorporated areas of the County.

3. With respect to the Historical and Factual Background in paragraphs 6 through 16 of the City's Petition, the Board does not dispute those facts, which the PSC as a matter of law must accept as true.[5] The Board notes that there are some critical omissions in the City's factual narrative as well as assumptions and conclusions that are neither fact nor law and which will be discussed in context in the relevant sections below.

4. The City's requested declarations are based upon two critical mistakes in law. First, the City states that the Franchise Agreement with the Board is meaningless and without any legal effect even though the Florida courts have declared that franchise agreements are valid exercises of authority that are bargained for exchanges of rights that mean more than mere authority to charge franchise fees. Second, the City asserts that the PSC's exclusive and superior authority with respect to approval of territorial agreements and prevention of uneconomic

[4] Docket No. 140142 also includes various other motions to intervene, to file as amicus curiae, and to dismiss along with numerous supporting comments and briefs, all of which were responded to by the Board on August 29, 2014. The Commission Staff filed a recommendation on November 13, 2014, for the November 25, 2014, Agenda Conference. On November 25, 2014, the Board requested deferral of consideration of the Staff Recommendation, and the Board's Petition is now scheduled for decision on February 3, 2014.

[5] Rule 28-105.003, Florida Administrative Code.

duplication is all the authority needed for the City to serve and continue to serve in the unincorporated areas of the County even though Chapter 366 does not provide the PSC with the authority to grant franchises or to convey property rights, both of which are necessary prerequisites to service. The City is asking the PSC to determine the rights of Indian River County, to invalidate the Board's Franchise Agreement with the City, and to convey the County's property rights to the City, none of which are appropriate for a declaratory statement or within the PSC's authority to grant to the City. Accordingly, the City's Petition should be denied.

II. Further Historical and Factual Background

5. The City's Petition in this docket, like the Board's Petition in Docket No. 140142, is not occurring in a vacuum. Electric service within the County has been one of the most high profile and persistent issues in the County over the last ten years. What makes this such a significant issue for the citizens of Indian River County is the unique and unprecedented extent to which this municipality has chosen to serve outside its corporate limits. Today, more than 60% of the City's electric customers do not live in the City,[6] and the City is unfairly taking advantage of these non-City electric customers by subsidizing the City's general government operations.

6. The general exemption from PSC jurisdiction for municipal electric utilities is based upon the fact that the ratepayers are citizens of the municipality who ultimately have recourse through the political process and their elected city representatives regarding the

[6] The City in its Petition at page 13 asserts that approximately 62% of its meters are located outside the City limits. This is consistent with the Board's estimate from the 6% fee-in-lieu-of-franchise revenue paid by City to the County that approximately fifty percent of the City's electric customers live in the unincorporated areas of the County and ten percent of the customers live in the Town of Indian River Shores. Thus, 40 percent or less of the City's electric customers actually live inside the City.

operation of their utility. But this municipal utility is not controlled by its ratepayers because a ***super majority*** of the customers are ***not*** city residents. The City's electric customers who live outside the City have no voice and no redress at all to the City – they can't vote in City elections and most municipal utility actions, including rates and subsidies, are outside the authority of the PSC.

7. Without the check provided by the political process, the City has been able to use its non-City electric customers to help significantly fund its general city government instead of reducing electric rates or improving utility operations and services. The City's records reflect that property tax revenues constitute 20% of the total general government revenue in the fiscal year ending September 30, 2013, but transfers from enterprise funds were 35%, most of which come from the electric utility.[7] On the other hand, property tax revenues in fiscal 2013 were $4,115,113[8] whereas net transfers to general revenue from just the electric utility were $5,438,214,[9] and the City has budgeted to transfer another $5.6 million this fiscal year.[10] This means that the non-City customers who receive no City services are contributing two-thirds or more as much revenue to general government as is generated by the City's property taxes.

8. This subsidization of City government by non-residents is especially offensive when the City's rates are compared to the rates of Florida Power & Light Company ("FPL"), which also has a franchise from the Board to serve certain other areas of the County. A City electric customer living across the street from an FPL customer can pay as much as a third more for the same amount of electricity. It seems that while FPL has become more efficient and cost

[7] City of Vero Beach, Florida, *Comprehensive Annual Financial Report for the Fiscal Year Ending September 30, 2013*, at 10 ("COVB 2013 Report").
[8] COVB 2013 Report, at 22 and 32.
[9] COVB 2013 Report, at 44.
[10] City of Vero Beach, Florida, *Annual Budget 2014-2015*, at 93.

effective over time, the City's electric utility has become more dependent upon the non-City customers as a source for general government funding and more expensive for those customers. The City has tried to justify these subsidy flows as a "return on investment" or as a franchise fee – but neither theory is applicable.[11]

9. The Legislature tried to address this abuse in 2008 by enacting Section 366.04(7), Florida Statutes, which requires an election regarding the creation an independent utility authority that would manage and operate the utility. But the City simply ignored the Legislature while reporting to the Commission customer counts that place the City squarely within the jurisdiction of this statute.[12]

10. The Board of County Commissioners has been working for some 10 years to give voice to the non-City customers. But the County has been ignored and the City has continued the subsidy while over time increasing it. It is the City's flagrant disregard for the law and its refusal to be accountable to more than 60% of its customers that finally led the Board of County Commissioners, as the elected representatives for all the citizens within the County, to the remarkable decision on February 22, 2012, to exercise its contractual right to give 5 years notice and not renew the City's electric franchise when it expires on March 4, 2017.

11. In the next two sections of this Response, the Board shall demonstrate that the two arguments raised by the City fail to provide the legal authority for the City's two requested declarations. Quite simply, the Franchise Agreement is not without meaning and effect and the

[11] A return on investment suggests a for-profit enterprise that requires a profit on the investments it makes, which is wholly inapplicable to a municipality. A franchise fee is paid to the property owner in exchange for the use of the property; here, the City collects a franchise fee from non-City residents that is paid to the County for the privilege of using the County's rights of way, roads, easements, etc., so there is no basis for a franchise fee being paid by the non-City residents to the City for use of the County's property.

[12] The City has asserted that this statute is inapplicable to it, but recently the City began the process of exploring an election or other process to create some kind of electric authority. Whether the City ultimately creates a true independent authority, with the power to set rates and stop the subsidy – or consummate the pending sale of the entire City electric utility to FPL – remains to be seen.

PSC's exclusive and superior authority over territorial agreements and disputes and to prevent the uneconomic duplication of electric facilities does not provide the PSC with the authority to rule upon the legal effectiveness of the Board's franchise authority. And certainly does not provide the PSC with any authority to grant or convey property rights.

III. Argument: The Franchise Agreement Has Meaning and Effect

12. Both of the City's requested declarations are premised on the idea that the Franchise Agreement is without meaning or effect. The City never explains why it accepted and agreed to its terms if the Franchise had no meaning, but as a complete statement of the facts and law demonstrates, the Franchise Agreement is valid, binding, and controlling.

13. The City's argument is largely based on the fact that prior to the 1987 Franchise Agreement the City provided electric service to at least some customers within the unincorporated areas of the County. The Board cannot state definitely when the City first began to provide electric service outside its corporate limits within the unincorporated areas of the County, but the Board recognizes that such service predated the 1987 Franchise and presumably preceded the 1972 territorial agreement between FPL and the City. Further, the Board acknowledges that at the time the Board granted its Franchise to the City, that the City and FPL had amended or revised its service areas several times since their original 1972 territorial agreement.

14. On the basis of its preexisting service the City wrongfully concludes that since it originally served customers outside the City without a franchise that the subsequent Franchise Agreement was unnecessary. But the absence of any franchise prior to 1987 does not mean that there was no authority for a franchise in 1987 or that thereafter a franchise is forever unnecessary

and irrelevant. As the Board explained in Docket No. 140142, and which the City conveniently ignores here, is that when the City began serving outside its corporate limits, the County had very limited legal authority with respect to its own property and rights of way. This was true because prior to the adoption of the Florida Constitution of 1968, non-charter counties, such as Indian River County, were considered to have only such powers that the Legislature expressly delegated to them.[13] As a consequence, until 1968, non-charter counties were ***precluded*** from conveying property rights through franchises for utility service,[14] and the County had no such specifically granted authority. Thus, regardless as to when the City first began providing electric service outside its corporate limits, at that time the County was powerless to require a franchise as a precondition of service or use of the County's property or rights of way.

15. This inequity was addressed with the adoption of the 1968 Constitution. As the Florida Supreme Court has acknowledged on numerous occasions, non-charter counties such as Indian River County now have almost the same broad scope of home-rule authority as was conferred upon charter counties.[15] Pursuant to this constitutional change, the specific powers enumerated in Chapter 125, County Government, and other enactments of the Florida Legislature, have been expanded and updated over the ensuing years to provide more extensive authority for self-governance in non-charter counties, including the power to grant a franchise for the use of public property.[16]

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[13] *Santa Rosa County v. Gulf Power Co*., 635 So. 2d 96, 102 (Fla. 1st DCA 1994).
[14] *Id*.
[15] *Taylor v. Lee County*, 498 So. 2d 424 (Fla. 1986*); Speer v. Olson*, 367 So. 2d 207 (Fla. 1979); and *State v. Orange County*, 281 So. 2d 310 (Fla. 1973).
[16] Florida Constitution Article VIII § 1(f)-(g); Sections 125.01 and 125.42, Florida Statutes. For example, section 125.01(1)(m), Florida Statutes, provides in part that the powers granted to a county include the power to "[p]rovide and regulate arterial, toll, and other roads, bridges, tunnels, and related facilities; eliminate grade crossings; regulate the placement of signs, lights, and other structures within the right-of-way limits of the county road system; . . ."

16. The County's decision to negotiate a franchise with the City was a recognition that the law had changed and that the County had the authority to protect the interests of its citizens. Thus, once the City accepted the Franchise Agreement, the relationship between the parties materially changed. Going forward, there was a valid and enforceable contract between the City and the County that established and controlled the rights, duties, and responsibilities of both parties with respect to electric service within the unincorporated areas of the County. The Franchise Agreement, attached hereto as Exhibit A, contained the following key terms and conditions:

a. The scope of the Franchise permitted the City as the Grantee, "the sole and exclusive right, privilege or franchise to construct, maintain, and operate an electric system in, under, upon, over and across the present and future streets, alleys, bridges, easements and other public places throughout certain unincorporated areas of Indian River County, Florida, (herein call the 'Grantor'), as such Franchise limits are or may be defined in the Service Territory Agreement between the City of Vero Beach, Florida and Florida Power and Light Company."[17]

b. The period of the Franchise was for "thirty (30) years from the date of acceptance."[18]

c. The exclusiveness of the Franchise was further confirmed in Section 8, whereby "the Grantor agrees not to engage in or permit any person other than the Grantee to engage in the business of distributing and selling electric power and energy during the life of this franchise or any extension thereof in competition with the Grantee."

[17] Exhibit A, Franchise Section 1.
[18] Exhibit A, Franchise Section 1.

d. The Franchise may be renewed upon the mutual agreement of the parties five years in advance of the expiration.[19]

17. On March 5, 1987, the City formally accepted and executed the Franchise Agreement, thus starting the 30 year term of the Franchise.[20] Regardless of whatever may have existed prior to the Franchise, by accepting the Franchise the City agreed that its right and ability to deliver electric service throughout the unincorporated areas of the County was expressly conditioned upon and subject to the rights and conditions set forth in the Franchise Agreement.

18. One of those key terms in this Franchise Agreement is the fact that the City is not authorized to serve in perpetuity. Generally, franchises are considered to be irrevocable unless the Franchise expressly reserves the right of revocation.[21] Here, the Franchise Agreement clearly and unambiguously limited the City's service to a 30-year term unless mutually extended. In recognition of the limited time period, the Franchise Agreement provides a five-year advance notice requirement in order to provide both parties with the opportunity to reasonably prepare for the termination of the Franchise if not extended or renewed. Pursuant to this notice requirement, by a letter dated February 22, 2012, from Gary C. Wheeler, the Chairman of the Board, to Pilar Turner, the Mayor of the City of Vero Beach, attached hereto as Exhibit B, Chairman Wheeler provided the Board's formal written notice that the County would not be renewing the Franchise Agreement at the end of its term. Since the Franchise Agreement requires an affirmative effort to renew "upon the agreement of both parties," the Board's notice of nonrenewal means that the City's right to serve the unincorporated areas of the County and to use the County's property, rights of way, and easements shall expire on March 4, 2017.

[19] Exhibit A, Franchise Section 13.
[20] Exhibit A, Franchise, at page 6 (acceptance signature and seal).
[21] *Florida Power Corp. v. City of Casselberry*, 793 So.2d. 1174, 1179 (Fla. 5th DCA 2001).

19. The City now takes the outrageous position that the Franchise Agreement, duly voted upon and lawfully executed by both governmental bodies, was never needed. In assuming that the Franchise Agreement is invalid the City now claims that its right to serve outside its corporate limits is absolute and solely and completely controlled by the territorial agreements between the City and FPL. This is not supported by the law or facts.

20. It is well settled that a franchise is a privilege and not an absolute or unregulated right.[22] The Board has broad authority with respect to utilities utilizing its rights of way and other public property, including the ability to deny use.[23] Given the conditional nature of a utility's placement of facilities pursuant to a franchise,[24] once the City accepted the Board's Franchise, the City's right to occupy the County's property within the unincorporated areas of the County or to utilize easements dedicated to the public for the purpose of furnishing utility service became totally and completely dependent upon and subject to the legal authority provided by this contract.[25] Today, the Franchise provides the sole legal authority for the City to occupy or in any manner utilize the streets, bridges, alleys, easements, or other public places within the unincorporated areas of the County to provide electric service.[26]

21. The City also goes to great lengths in paragraphs 33-38 to discuss its legal right to be in the electric business and to serve customers wherever they may be located within the

[22] *New Orleans Gaslight Company v. Drainage Commission of New Orleans*, 197 U.S. 453 (1905).
[23] *See* Section 337.401(2), Florida Statutes, which provides in part, "[n]o utility shall be installed, located, or relocated unless authorized by a written permit issued by the authority." The "authority" is defined as "local governmental entities, referred to in ss. 337.401-337.404" that "have jurisdiction and control of public roads or publicly owned rail corridors" and "are authorized to prescribe and enforce reasonable rules or regulations with reference to the placing and maintaining along, across, or on any road or publicly owned rail corridors under their respective jurisdictions any electric transmission, telephone, telegraph, or other communications services lines; pole lines; poles; railways; ditches; sewers; water, heat, or gas mains; pipelines; fences; gasoline tanks and pumps; or other structures referred to in this section as the 'utility'." Section 337.401(1), Florida Statutes.
[24] *Lee County Electric Coop., Inc. v. City of Cape Coral*, 2014 WL 2218972, at *3 (Fla. 2nd DCA 2014), *rev. den*., *Lee County Elec. Co-op., Inc. v. City of Cape Coral*, --- So.3d --- (Fla. 2014) (2014 WL 4826782).
[25] *Florida Power Corp. v. City of Castleberry*, 793 So.2d 1174, at 1179 (Fla. 5th DCA 2001).
[26] *Lee County Electric Coop., Inc. v. City of Cape Coral*, 2014 WL 2218972 (Fla. 2nd DCA 2014), *rev. den*., *Lee County Elec. Co-op., Inc. v. City of Cape Coral*, --- So.3d --- (Fla. 2014) (2014 WL 4826782).

County. The Board agrees that the City has the authority to provide electric service within and outside of its corporate city limits. However, the City would have the PSC believe that the ***right*** to extend service outside the City limits is dispositive in proving the City's absolute and unfettered ***use*** of the County's property and rights of way notwithstanding the County's objections. But the right to serve does not include the legal right to use another's property to actually provide service.

22. While ignoring the property rights issue, the City argues in paragraph 30 that most utilities do not serve 100% of their entire service areas pursuant to a franchise. The Board does not dispute this fact, but this is irrelevant as to whether the County has the legal authority to require and to grant franchises and for the contracting utilities to thereby be bound to such terms. Indian River County cannot speak for the other counties in Florida. But in Indian River County, the Board has chosen to utilize and require a franchise before a utility may utilize the County's streets, bridges, alleys, easements, or other property.[27]

23. The City also argues that perhaps only 20% of its facilities rely upon the use of the County's rights of way.[28] Regardless what a survey would show, the Franchise Agreement conveys both the right to use the County's rights of way and property and, in the first place, the right to serve within the unincorporated areas which includes access to all easements dedicated for utility purposes. Without this service authorization or use of property, service within the unincorporated areas would not be possible.

24. In the final analysis, franchises have meaning and purpose. They are bargained for exchanges of rights, duties, and responsibilities that are more than just franchise fee

[27] Catching up on utilities utilizing the public property and rights of way is an ongoing process. As recently as 2013, the County executed a franchise agreement with Florida City Gas.
[28] City Petition, at para. 15.

arrangements. The City cannot assume away a contract it lawfully entered and which expressly conditions its use to a thirty-year term. Moreover, the PSC has no authority to grant franchises or any authority to amend, continue, or revoke a franchise. Given the Board's exclusive authority to grant franchises and the terms and conditions of the Franchise Agreement at issue here, the PSC has no authority to grant either of the City's requested declarations which seek to assume the Franchise Agreement is invalid and to determine the use of the Board's property rights by authorizing the City to continue to serve in perpetuity.

IV. Argument: The PSC'S Exclusive Jurisdiction is Limited to Enumerated Matters

25. The other legal argument for the City's requested declarations rests on the PSC's "exclusive and superior"[29] jurisdiction to approve territorial agreements,[30] resolve territorial disputes,[31] and the authority to prevent the "uneconomic duplication" of electric facilities.[32] The City has cited to several precedents in advancing its arguments for the PSC's exclusive authority, including the PSC's "No Name Key" order.[33] But these statutory enactments do not give the PSC the authority to do what the City seeks in its two declarations: to determine that the Board's franchise authority is meaningless and without purpose. The only thing that is clear from the City's Petition is that Chapter 366 does not grant to the PSC any authority to grant, deny, extend, or otherwise invalidate the Franchise Agreement or the Board's franchise authority. Because the

[29] Section 366.04(1), Florida Statutes.
[30] Section 366.04(2)(d), Florida Statutes.
[31] Section 366.04(2)(e), Florida Statutes.
[32] Section 366.04(5), Florida Statutes.
[33] City Petition, at paragraphs 27-28, citing *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 (May 21, 2013).

PSC lacks such authority being sought, there is no basis for the PSC to grant either of the two requested declarations.

26. Starting with the obvious, the Board agrees that the Florida Legislature has granted the PSC "exclusive and superior" jurisdiction. For purposes of the City's Petition, that exclusive and superior authority is limited to approving territorial agreements, resolving territorial disputes, and avoiding uneconomic duplication of facilities. Given the statutory language, the Supreme Court has said that the PSC does not have to grant or set a territorial boundary arising from an agreement or a dispute,[34] meaning there may be no PSC territorial order regarding certain areas of the state. But it also means that because the PSC's jurisdiction is based upon the filing of a territorial agreement or the presence of a territorial dispute, the PSC has no authority to unilaterally designate an electric service provider for a given geographic area. These prerequisites and the PSC's "statutory mandate to avoid further uneconomic duplication of facilities"[35] also underlie the state action doctrine that precludes antitrust actions against utilities that otherwise collaborate to divide up service areas.[36]

27. What is also plain from the language of the statutes is what is ***not*** included in Chapter 366 – any PSC authority with respect to property rights. Issuing an order accepting a territorial agreement or resolving a territorial dispute to ensure no uneconomic duplication of facilities is only relevant between the affected utilities as to which utility may have the opportunity to serve in a particular geographic area. But the PSC's approval of the right to an exclusive service area does not include the authority to utilize real property within the designated service area. Once free from competing utilities through a territorial order, the utility with the

[34] *Gulf Coast Elec. Co-op., Inc. v. Johnson*, 727 So. 2d 259, 264 (Fla. 1999).
[35] *Id.*
[36] See the City's Petition, at paragraph 28.

approved service area must secure various property rights in order to have the legal right and ability to place facilities used to provide service. The franchise is one form of granting a utility those necessary property rights, with other forms including easements, leases, licenses, and outright purchases.

28. The PSC's exclusive jurisdiction does not enumerate any statutory authority for the PSC to grant, modify, or extend franchises[37] or other property rights. If the PSC had such authority, then upon the issuance of a territorial order, the utility could proceed to place its infrastructure without any further legal work. But that is not the case. A territorial order alone does not permit a utility to use property. The appropriate property rights can be conveyed only by the underlying property owners, and the PSC has no jurisdiction to require or compel that a property owner grant a lease, license, easement, sale, or franchise. Likewise, the PSC's absence of property rights authority is consistent with the fact that there is nothing in Chapter 366 that requires a customer to take service from a utility and that a customer may serve itself irrespective of any territorial agreements, orders, or other authority.[38]

29. The rights reserved to property owners in utility matters are long and well established. Over a century ago, the Florida Supreme Court recognized that a utility's placement of facilities is not absolute, but that it is subservient to the legal right to occupy or utilize the property where it places it facilities.[39] More recently, the Florida Fourth District Court found that a governmental body with franchise authority does not have to "permit the intrusion and maintenance" of a municipality's utility lines and services within its jurisdiction, and that the

[37] *Santa Rosa County v. Gulf Power Co.*, 635 So.2d 96 (Fla. 1st DCA 1994), *rev. den.*, *Gulf Power Co. v. Santa Rosa County*, 645 So.2d. 452 (Fla. 1994).
[38] *See, e.g.,* Docket No. 860725, *In Re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility*, Order No. 17009 (Dec. 22, 1986), regarding self-service.
[39] *Anderson v. Fuller*, 41 So. 684, 688 (Fla. 1906).

municipal utility could be and was expelled.[40] Even where the placement of utility assets precedes a franchise, preexisting easements do not create or vest the utility with a property interest that is superior to the government's authority or otherwise supersedes the right of the public.[41]

30. The purpose, effect, and consequence of having or not having a franchise are therefore legally relevant, even in the face of the PSC's enumerated responsibilities. While the "pervasiveness of PSC regulation over electric utilities under chapter 366, Florida Statutes," may be exclusive and superior as to those enumerated powers, a non-charter county's power to require franchise agreements from electric utilities is not inconsistent with the powers granted to the PSC.[42] The Florida Supreme Court has explained that a county's franchise agreement is not simply a unilateral imposition of a fee, but is instead a bargained for exchange in which a county relinquishes a property right.[43] In that bargained for exchange in which a utility gets a franchise, the utility obtains a real and valuable property right. But even within the context of a franchise agreement, it is not an unlimited right. For example, under sections 337.401-.406, Florida Statutes, governmental authorities are granted broad powers with respect to the location and relocation of utility facilities along roadways, including the ability to deny use.

31. This bargain and exchange was central to the legal effectiveness and consequences of the City of Winter Park's electric franchise granted to Florida Power Corporation ("FPC"). Under the terms of the franchise agreement, when FPC's franchise

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[40] *City of Indian Harbour Beach v. City of Melbourne*, 265 So.2d 422, 424-25 (Fla. 4th DCA 1972). It should be added that the court ordered that the termination of services "not be done precipitously but shall be accomplished within a reasonable length of time so as to not interrupt service to users, taking into account the amount of time required for Indian Harbour Beach to obtain a substitute source of water." *Id*., at 425.

[41] *Lee County Electric Coop. v. City of Cape Coral*, --- So.3d ---, 2014 WL 2218972 (Fla. 2d DCA 2014), at *3; *rev. denied*., *Lee County Elec. Co-op., Inc. v. City of Cape Coral*, --- So.3d ---,2014 WL 4826782 (Fla. 2014).

[42] *Santa Rosa County v. Gulf Power Co*., 635 So. 2d 96 (Fla. 1st DCA 1994).

[43] *Alachua County v. State*, 737 So. 2d 1065, 1068-69 (Fla. 1999).

expired in 2001 Winter Park had the bargained for right to purchase the electric facilities and to itself provide electric service within its city.

32. There were several different issues and proceedings that developed out of the expiration of the Winter Park franchise, all of which reinforce the separate and distinct authority in local government to execute and rely upon the terms and conditions set forth in a franchise agreement. On an appeal involving whether FPC remained liable for the franchise fee after the franchise expired and while FPC continued to provide electric service on a holdover basis until a new utility was established, the Supreme Court noted that the electric franchise granted to FPC provided for the "right, privilege and franchise to construct, operate and maintain in the said City of Winter Park, all electric facilities."[44] The Supreme Court continued,

> Thus, during its effective period, the franchise agreement constituted a permissible bargained-for exchange pursuant to which FPC ceded six percent of revenues in exchange for access to the City's rights-of-way, the monopoly electricity franchise, and the City's corresponding relinquishment of its power to provide electric service in the community.[45]

33. In addition to the exchange of benefits from the franchise, the Supreme Court recognized that franchises ***can expire*** and that with the expiration of the franchise the benefits of the franchise will also expire.[46] The reverse is also true – there is simply no authority for a utility to hold over after a franchise has expired, which is just as repugnant as a unilaterally imposed franchise fee that was rejected by the Supreme Court.[47]

34. Similar to the Winter Park situation, the Board's Franchise to the City contains virtually the same bargained for exchange – the Board gave to the City the right to access and use the County's streets, alleys, bridges, easements, and other public property along with an

[44] *Florida Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1240 (Fla. 2004) (quoting from the franchise).
[45] *Id.*
[46] *Id.*, at 1242.
[47] *Santa Rosa County v. Gulf Power Co.,* 635 So. 2d 96 (Fla. 1st DCA 1994).

exclusive right to provide electricity in exchange for which the City collects and remits a franchise fee to the County. While the Board's Franchise does not include a right for the County to purchase the facilities at the end of the Franchise period, an option to purchase is not required – there is still a bargained for exchange of other benefits from the Franchise Agreement. Moreover, the courts have found that an option to purchase is not the only enforceable term of a franchise.[48] Thus, the presence of a purchase option in a franchise is not required in order for an expiration term in a franchise to be enforceable.

35. Subsequent to the Florida Supreme Court's 2004 *Winter Park* decision, as the parties worked toward completing the sale and transfer of facilities to Winter Park and the establishment of a Winter Park electric utility, the PSC continued to work concurrently to give effect to the consequences of the expired franchise. In 2005, the PSC formally relieved Progress Energy (FPC's successor) of its obligations to provide electric service in Winter Park, which it had been serving since 1927.[49] In an Attorney General Opinion that relied heavily on information from the PSC Staff, the Attorney General opined that the City of Winter Park did not need the PSC's approval for the actual transfer of the electric facilities to the city.[50] Indeed, in the later PSC decision approving the relinquishment of Progress Energy's obligation to serve, the order is silent as to any authorization or approval for Winter Park's acquisition of facilities or its commencement of service as an electric utility.

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[48] *Florida Power Corp. v. City of Casselberry*, 793 So.2d. 1174, 1179 (Fla. 5th DCA 2001).

[49] Docket No. 050117, *In re: Petition to relieve Progress Energy Florida, Inc. of the statutory obligation to provide electrical service to certain customers within the City of Winter Park, pursuant to Section 364.03 and 366.04, F.*S., Order No. PSC-05-0453 (April 28, 2005) (Proposed Agency Action Order Relieving Progress Energy Florida, Inc. Of The Obligation To Provide Retail Electric Service To Certain Customers Within The City Of Winter Park), *consummated by* Order No. PSC-05-0568 (May 23, 2005).

[50] Florida AGO 2005-14 (March 3, 2005). The Attorney General noted that unlike section 367.071(1), Florida Statutes, which specifically required PSC approval for the sale or transfer of water and wastewater system facilities, Chapter 366 did not contain any similar language.

36. The Winter Park transition also demonstrates that a territorial order is not a necessary prerequisite for service. While there was no territorial order that needed to be revoked or modified in 2005, a new territorial agreement between Winter Park and Duke was not approved by the PSC until early 2014.[51] This means that for almost ten years the parties supplied electricity without the benefit of any territorial agreement or any PSC order authorizing boundary lines and that the parties provided electricity to their respective service areas only subject to the underlying property rights each possessed.

37. The response of this Commission to the Winter Park sequence of cases and events is highly relevant to the declarations now being sought by the City. Critically, in the face of the expired franchise, this Commission did not tell Winter Park that its franchise with FPC was without effect. In the face of the expired franchise, this Commission did not tell Winter Park that FPC was the authorized electric service provider and that FPC would continue to serve its customers. In the face of the expired franchise, this Commission did not tell Winter Park that it would be uneconomic for the city to duplicate FPC's facilities. In the face of the expired franchise, this Commission did not tell Winter Park that it could not purchase FPC's facilities. In the face of the expired franchise, this Commission did not tell Winter Park that it could not be the electric utility.

38. Throughout the various proceedings the PSC's exclusive and superior jurisdiction did not undermine the legal relevance of the Winter Park franchise or the fundamental authority of Winter Park inherent in its property rights to designate a ***successor*** electric utility. The importance the court placed on the franchise and the right it conveyed to provide electric service

[51] Docket No. 130267, *In re: Joint petition for approval of territorial agreement in Orange County by the City of Winter Park and Duke Energy Florida, Inc*., Order No. PSC-14-0108 (February 24, 2014) (Notice of Proposed Agency Action Order Approving Territorial Agreement), consummated by Order No. PSC-14-0138 (March 21, 2014).

within Winter Park occurred notwithstanding the utility's prior authority from the PSC to serve the Winter Park area.

39. The City also raises two other arguments that go to the issue of the PSC's exclusive jurisdiction.

40. The City argues that the termination of the Franchise could adversely impact the City's ability to plan its system and result in stranded costs. In paragraph 16 of the City's Petition, the City asserts that it has made a substantial investment in infrastructure serving the unincorporated areas of the County and it implies it would not have done so if its ability was time limited. But the law is well settled that "the franchise agreement is irrevocable unless the agreement 'expressly reserves' the right of revocation.[52] That right of revocation is expressly reserved in the unambiguously stated 30-year term with a 5-year advance notice of non-renewal. To make a contractual commitment to a 30-year term without regard to the underlying property rights would be irresponsible. A utility would not construct a power plant on a piece of property that it was leasing for only 30 years. The type of utility infrastructure placed pursuant to a franchise is not the same as a power plant, but responsible utility management would have prepared for the contingency. If there were long term contracts in effect that predated the Franchise Agreement, then the City should have renegotiated any agreements that extended past the Franchise period. If the City made new contractual agreements in excess of its 30 year right to serve without any recourse to terminate in the event of a franchise non-renewal, then the City was not acting responsibly. If nothing else, when the Board provided the City with its five-year advance notification of non-renewal, the City should have immediately taken action to plan and prepare for the termination of the Franchise or at least to ask the County what might be required

[52] *Florida Power Corp. v. City of Casselberry*, 793 So.2d. 1174, 1179 (Fla. 5th DCA 2001).

to extend the Franchise, which it did not. Of course, as the Winter Park case also demonstrates, the City's investments in infrastructure can be sold to the successor and there are reasonable procedures for determining such value. Orderly transitions can and do occur.

41. The other argument the City makes is that an individual does not have an absolute right to service by a particular utility.[53] The Board agrees, but there are circumstances where individual choice may be considered. However, the present matter is a different, unique, and special situation. This is not a situation of an individual wanting to be served by a different utility because that individual does not like the current rates. Rather, in view of the totality of the circumstances discussed in paragraphs 5 through 10 above – not just rates, but the massive general government subsidization flowing from electric ratepayers to the City and the lack of representation through the legislatively required but ignored utility authority – the Board, with the input of its citizens, made the fundamental public interest determination that all of the customers in the unincorporated area of the county, which constitutes at least half of the City's total customer base, are not being well served by granting the City a new or extended franchise after March 4, 2017. The public interest standard is a broad mandate that ultimately controls the decision-making process for both the PSC and the Board. These citizen ratepayers are paying monopoly rates with absolutely no forum for relief from the PSC or the City. If the PSC made the same type of public interest investigation it would come to the same conclusion – the Franchise should not be renewed.

42. In the final analysis, franchises have meaning and purpose – more so than merely a mechanism for paying a fee to the franchise authority. It is, as the Supreme Court said, a bargained for exchange. If the City believed that it had an unlimited right to serve customers in

[53] City Petition, at paragraphs 9 and 12, citing *Story v. Mayo*, 217 So. 2d 304 (Fla. 1968), *cert. denied*, 395 U.S. 909.

the unincorporated areas of the County solely on the basis of the territorial agreements between City and FPL, then it would not have voluntarily entered into the Franchise, but it did. Likewise, the presence of several previous territorial agreements and PSC orders did not bar the City from agreeing to the Franchise in the first place, and the mere expiration of the Franchise by itself will not change or void the PSC's territorial orders since the Franchise exists independently of the PSC's orders. The PSC's orders remain effective until changed in a proper proceeding, which this is not.[54] However, when the Franchise expires the City's electric utility will no longer have the legal right to serve the unincorporated areas of the County or the right to utilize the roads, rights of way, public easement, and other County property within the Franchise.

V. The City's Declaratory Statement

43. The requested declarations should be denied because the PSC does not have the authority to declare that the City has the right to use and continue to use the County's rights of way and property notwithstanding the expiration of the Franchise Agreement. The PSC has exclusive jurisdiction with respect only to those matters expressly enumerated in Chapter 366, Florida Statutes – and that authority extends to and includes only the authority to approve territorial agreements, to resolve territorial disputes, and to prevent the uneconomic duplication of facilities. The expiration of the Franchise does not change the PSC's orders approving the FPL-City territorial orders because any change to those orders can only come through a lawful process. The expiration of the Franchise does not result in the uneconomic duplication of facilities because the issue is not one of multiple providers, but rather one of a single successor electric service provider, just as was the situation in Winter Park a decade ago. In view of the

[54] Absent other legal action, the Board recognizes that the territorial areas and boundaries between the City and FPL would remain effective with respect to service within the corporate limits of the City and Indian River Shores.

plain language in Chapter 366, the PSC has no jurisdiction and no authority to grant the City an electric franchise, no authority to extend the expiring franchise, and no authority to grant property rights. On its face, the City's declarations seek to determine the Board's rights and to override the Board's authority to grant a franchise. Nothing in Chapter 366 supports such a naked grab of power by the PSC or the City.

VI. Conclusions and Relief

44. The City freely entered into the Franchise Agreement in 1987 knowing the full extent of its terms and conditions. Critically, the Franchise Agreement provided that the agreement was only valid for 30 years and that service beyond the expiration was subject to the agreement of the parties, which has not occurred. To address the contingency of the Franchise expiring, there was a five-year notice period so that the parties could reasonably and safely transition to a new service provider.

45. A petition seeking a declaratory statement is appropriate when there is a need for "resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the ***agency*** has authority."[55] On the basis of the PSC's limited but exclusive statutory authority to approve territorial agreements, to resolve territorial disputes, and to prevent uneconomic duplication there is no authority for the PSC to determine the Board's authority under Chapter 125, to invalidate the Franchise, to continue the Franchise, or stop the Board from determining a successor electric service franchisee. The Winter Park case provides a real world, analogous situation and precedent as to how the PSC should address the scenario posed by the City.

[55] Rule 28-105.001, Florida Administrative Code (emphasis added).

WHEREFORE, the Board of County Commissioners, Indian River County, Florida, respectfully requests that the Florida Public Service Commission deny the declaratory statements requested by the City of Vero Beach.

Respectfully submitted,

s/ Floyd R. Self

Floyd R. Self, B.C.S.
floyd_self@gshllp.com
Gonzalez Saggio & Harlan LLP
3411 Capital Medical Blvd.
Tallahassee, Florida 32308
Phone: (850) 702-0090

Dylan Reingold, Esq.
County Attorney
County Attorney's Office
1801 27th Street
Vero Beach 32960-3388
Phone: (772) 226-1427

Counsel for the Board of County Commissioners, Indian River County, Florida

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 the 13th day of January, 2015.

Kathryn Cowdery, Esquire Florida Public Service Commission Division of Legal Services 2540 Shumard Oak Boulevard Tallahassee, Florida 32399 kcowdery@psc.state.fl.us	Dylan Reingold, Esquire, County Attorney Office of the County Attorney Indian River County 1801 27th Street Vero Beach, FL 32960-3388 dreingold@ircgov.com
Wayne R. Coment City Attorney City of Vero Beach 1053 20th Place Vero Beach, Florida 32960 WComent@covb.org	Robert Scheffel Wright John T. LaVia, III Gardner, Bist, Wiener, Wadsworth, Bowden, Bush, Dee, La Via & Wright, P .A. 1300 Thomaswood Drive Tallahassee, Florida 32308 schef@gbwlegal.com jlavia@gbwlegal.com

By:

s/ Floyd R. Self

Floyd R. Self, B.C.S.
floyd_self@gshllp.com
Gonzalez Saggio & Harlan LLP
3411 Capital Medical Blvd.
Tallahassee, Florida 32308
Phone: (850) 702-0090

E F (12/05/86)

RECORD VERIFIED
JEFFREY K. BARTON
CLERK CIRCUIT COURT
INDIAN RIVER CO. FLA

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RESOLUTION 87-12.

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

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

Section 1. That there is hereby granted to the City of Vero Beach, Florida (herein called "Grantee"), its successors and assigns, the sole and exclusive right, privilege or franchise to construct, maintain, and operate an electric system in, under, upon, over and across the present and future streets, alleys, bridges, easements and other public places throughout certain unincorporated areas of Indian River County, Florida, (herein called the "Grantor"), as such Franchise limits are or may be defined in the Service Territory Agreement between the City of Vero Beach, Florida and Florida Power and Light Company, and its successors, in accordance with established practices with respect to electric system construction and maintenance, for a period of thirty (30) years from the date of acceptance hereof. Such electric system shall consist of electric facilities (including poles, fixtures, conduits, wires, meters, cable, etc., and, for electric system use, telephone lines) for the purpose of supplying electricity to Grantor, and its successors, the inhabitants thereof, and persons and corporations beyond the limits thereof.

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

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

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

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

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

neglect, default or misconduct of Grantee in the construction, operation or maintenance of its facilities hereunder.

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

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

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

Section 7. Payments of the amount to be paid to Grantor by Grantee under the terms of Section 6 hereof shall be made in monthly installments. Such monthly payments shall be rendered twenty (20) days after the monthly collection period.

The Grantor agrees to hold the Grantee harmless from any damages or suits resulting directly or indirectly as a result of the collection of such fees, pursuant to Sections 6 and 7 hereof and the Grantor shall defend any and all suits filed against the Grantee based on the collection of such moneys.

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

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

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

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

(3) capacity reservation fees,

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

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

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

discretion to grant such additional time to Grantee for compliance as necessities in the case require; provided, however, that the provisions of this Section shall not be construed as impairing any alternative right or rights which the Grantor may have with respect to the forfeiture of franchises under the Constitution or the general laws of Florida.

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

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

Section 12. The Franchise Territory will be expanded or contracted to include or exclude lands, provided such lands are lawfully annexed into the Grantee's City limits and/or the Service Territory Agreement between the Grantee and Florida Power and Light Company is amended and the Public Service Commission of the State of Florida approves of such change(s) in service boundaries.

Section 13. This franchise is subject to renewal upon the agreement of both parties. In the event the Grantee desires to renew this franchise, then a five year notice of that intention to the Grantor shall be required. Should the Grantor wish to renew this franchise, the same five year notice to the Grantee from the Grantor shall be required and in no event will the franchise be terminated prior to the initial thirty (30) year period, except as provided for in Section 9 hereof.

Section 14. Provisions herein to the contrary notwithstanding, the Grantee shall not be liable for the non-performance or delay in performance of any of its obligations undertaken pursuant to the terms of this franchise, where said failure or delay is due to causes beyond the Grantee's control including, without limitation, "Acts of God", unavoidable casualties, and labor disputes.

DONE and ADOPTED in regular session, this 27th day of January, 1987.

ACCEPTED:

CITY OF VERO BEACH

By: _____
Mayor

Date: 5 March 1987

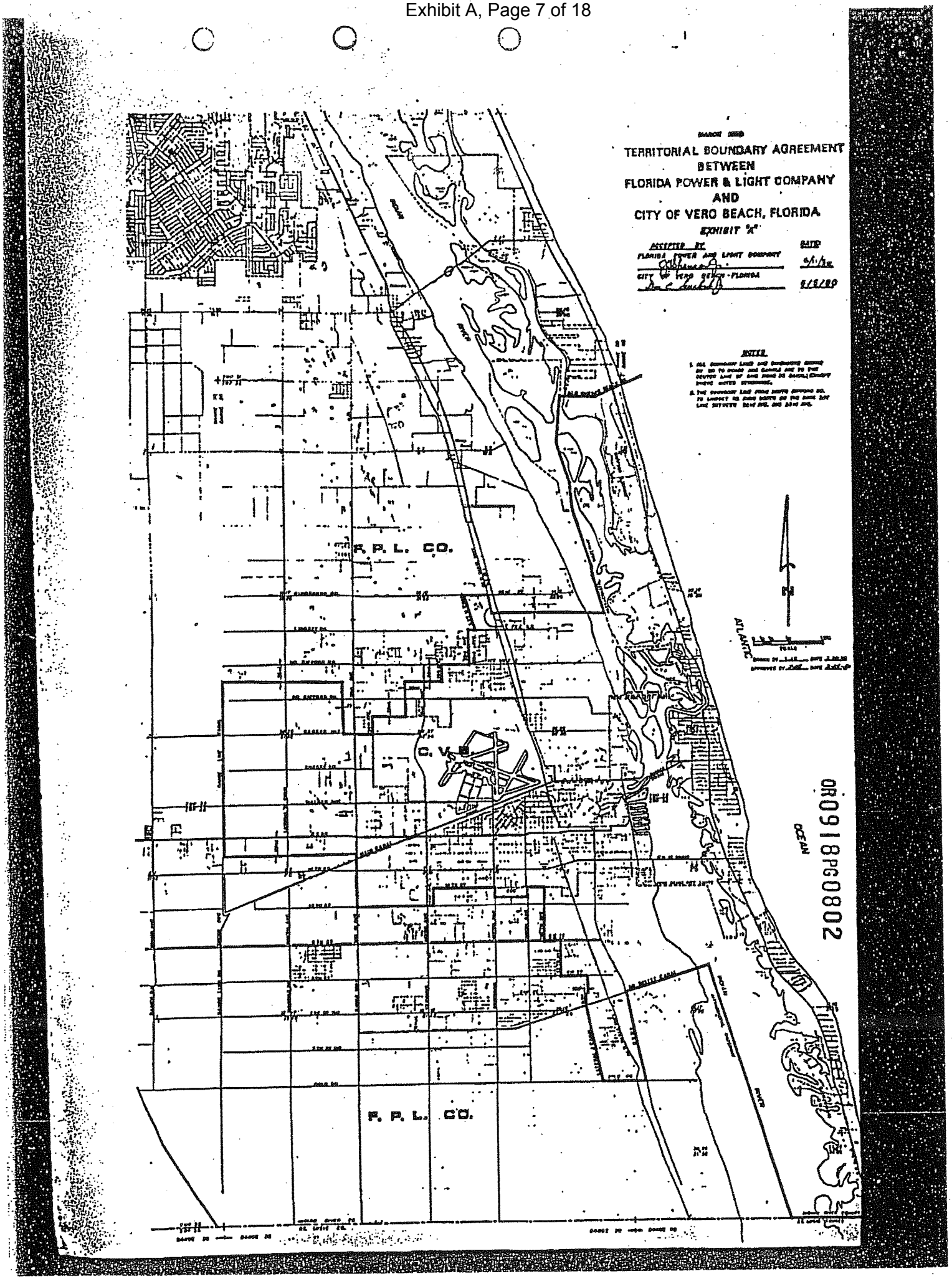
Attest: _____
City Clerk

BOARD OF COUNTY COMMISSIONERS
INDIAN RIVER COUNTY

By: _____
Chairman

Attest: _____

Approved as to form
and legal sufficiency
By _____
Charles P. Vitunac
County Attorney



BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas.	DOCKET NO. 800596-EU ORDER NO. 10382 ISSUED: 11-03-81

The following Commissioners participated in the dispostion of this matter:

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

NOTICE OF INTENT
TO APPROVE TERRITORIAL AGREEMENT

BY THE COMMISSION:

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

BACKGROUND

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

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

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

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

JUSTIFICATION FOR APPROVAL OF TERRITORIAL AGREEMENT

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

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

Approval of this territorial agreement should assist in the avoidance of uneconomic duplication of facilities on the part of the parties, thereby providing economic benefits to the customers of each. Additionally, the new territorial boundary will better conform to natural or permanent landmarks and to present land development. Thus, the proposed territorial agreement should result in higher quality electric service to the customers of both parties.

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

PROCEDURE

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

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

In view of the foregoing, it is

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

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

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

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

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

(S E A L)

Steve Tribble
COMMISSION CLERK

MBT

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

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

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

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

APPENDIX A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

The following Commissioners participated in the disposition of this matter:

CHAIRMAN JOSEPH P. CRESSE
COMMISSIONER GERALD L. GUNTER

CONSUMMATING ORDER APPROVING TERRITORIAL AGREEMENT

BY THE COMMISSION:

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

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

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

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

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

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

serves to eliminate competition in the area; prevent duplicate lines and facilities; prevent the hazardous crossing of lines by competing utilities; and, provides for the most efficient distribution of electrical service to customers within the territory. We find continued support for our approval of the territorial agreement in a Florida Supreme Court decision, Storey v. Mayo, 217 So. 2d 304, (Fla. 1968), cert. den., 395 U.S. 909, 80 Sup. Ct. 1751 23 L. Ed 2d 222, which held that:

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

In that decision the Supreme Court also held that:

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

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

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

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

STEVE TRIBBLE
COMMISSION CLERK

(S E A L)

ARS

EXHIBIT 1

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

Section 0.1 THIS AGREEMENT, made and entered into this 11th day of June, 1980, by and between FLORIDA POWER & LIGHT COMPANY, a corporation organized and existing under the laws of the State of Florida, herein referred to as the "COMPANY," party of the first part, and CITY OF VERO BEACH, FLORIDA, a body politic and corporate of the State of Florida, herein referred to as the "CITY," party of the second part;

W I T N E S S E T H

Section 0.2 WHEREAS, by contract dated November 1, 1971 the parties hereto agreed to observe a certain territorial boundary and to provide for interchange service between them; and

Section 0.3 WHEREAS, the parties hereto now deem it desirable to reaffirm that the existence of territorial boundaries has been and will continue to be beneficial in eliminating undesirable duplication of facilities and thereby providing economical benefits to the customers of each party; and

Section 0.4 WHEREAS, the parties hereto also deem it desirable to redefine the territorial boundary previously approved by the Florida Public Service Commission, herein referred to as the "FPSC," so that such territorial division will better conform to natural or permanent landmarks and to present land development; and

Section 0.5 WHEREAS, each party desires to describe more clearly the intent of the parties with respect to the administration of a territorial agreement between them; and

Section 0.6 WHEREAS, the execution of this AGREEMENT by the parties hereto is not conditioned upon the acceptance of or agreement to any other contractual arrangements pending or contemplated by or between the parties.

Section 0.7 NOW, THEREFORE, in consideration of the foregoing premises and of the mutual benefits to be obtained from the covenants herein set forth, the parties hereto do hereby agree as follows:

ARTICLE I

TERM OF AGREEMENT

Section 1.1 TERM: After this AGREEMENT becomes effective pursuant to Section 3.4 hereof, it shall continue in effect until termination or until modification shall be mutually agreed upon, or until termination or modification shall be mandated by governmental entities or courts with appropriate jurisdiction. Fifteen (15) years from the date above first written, but not before, either of the parties hereto shall have the right to initiate unilateral action before any governmental entity or court with appropriate jurisdiction, seeking to obtain modification or cancellation of this AGREEMENT.

Section 1.2 The provisions of this AGREEMENT shall supersede any territorial boundary-related provisions of existing or prior contracts and/or agreements between COMPANY and CITY; provided, however, that the remaining provisions of any such existing or prior contracts and/or agreements shall in no way be affected by this AGREEMENT.

ARTICLE II

ESSENCE OF AGREEMENT

Section 2.1 The area inside the boundary line shown on the map attached hereto and labelled Exhibit A is reserved to the CITY (as relates to the COMPANY), and the area outside said boundary line is reserved to the COMPANY (as relates to the CITY), with respect to service to retail customers.

Section 2.2 The parties agree that neither party will provide or offer to provide electric service at retail to future customers within the territory reserved to the other party.

Section 2.3 The parties recognize that, in specific instances, good engineering practices (or economic constraints on either of the parties) may from time-to-time indicate that small service areas and/or future retail electric customers should not be served by the party in whose territory they are located. In such instances, upon written request by the party in whose territory they are located to the other party, the other party may agree in writing to provide service to such small service areas and/or future retail electric customers, and it is understood that no additional regulatory approval will be required for such agreement(s).

Section 2.4 As a result of the revision of the boundary lines effected hereunder, each party shall as soon as possible and not later than two (2) years after the date of approval of this AGREEMENT by the FPSC, surrender to the other party without further action by the other party the right and obligation to serve within the areas being transferred to such other party, as more particularly described on Exhibit B hereto, and shall by that date, have made all necessary modifications to its

facilities to effect that transfer. Each party shall be obligated to sell to the other party on the basis of fair value, those certain distribution facilities providing service to customers which, as a result of this boundary revision, are within an area being transferred to the other party.

Section 2.5 The COMPANY and the CITY may continue to have their existing respective transmission lines and feeders within the service area of the other party. In addition, either party may, from time-to-time, locate substations and transformers and install transmission lines or feeders and other facilities in the service area of the other party, subject to mutual written consent and approval, which consent shall not be unreasonably withheld. No such facilities shall be used by the one party to provide service to customers located in the service area of the other party except as may be necessary to implement the provisions of Section 2.3.

Section 2.6 Annexation or deannexation of territory by the CITY shall not affect this AGREEMENT unless mutually agreed upon by the parties hereto.

ARTICLE III

MISCELLANEOUS PROVISIONS

Section 3.1 The failure of either party to enforce any provision of this AGREEMENT in any instance shall not be construed as a waiver or relinquishment on its part of any such provision but the same shall nevertheless be and remain in full force and effect.

Section 3.2 Neither party shall assign, transfer or sublet any privilege granted to it hereunder without the prior consent in writing of the other party, but otherwise, this AGREEMENT shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

Section 3.3 This AGREEMENT shall be governed by the laws of the State of Florida.

Section 3.4 The parties recognize that under the laws of the State of Florida, the FPSC has jurisdiction to approve retail territorial agreements, and therefore they agree to cooperate in petitioning that Commission for its required approval of and authorization to implement all of the terms and conditions of this AGREEMENT.

Section 3.5 This AGREEMENT shall be effective on the date it is approved by the FPSC in accordance with Section 3.4 hereof.

IN WITNESS WHEREOF, the parties hereto have caused this AGREEMENT to be executed by their duly authorized officers or officials, and copies delivered to each party, as of the day and year first above stated.

ATTEST:

BY: _____
Secretary

FLORIDA POWER & LIGHT COMPANY

BY: _____
Sr. Vice President

ATTEST:

BY: _____
City Clerk

CITY OF VERO BEACH, FLORIDA

BY: _____
Mayor

BY: _____
City Manager

BY: _____
City Attorney
As to form

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

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

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

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

APPENDIX A

BOARD OF COUNTY COMMISSIONERS

February 22, 2012

Honorable Pilar Turner, Mayor
City of Vero Beach Councilmembers
1053 20th Place
Vero Beach, Florida 32961-1389

RE: Electric Franchise, IRC Resolution 87-12

Dear Mayor Turner and Members of the City Council:

As you know, on March 5, 1987, the County granted a thirty year franchise to the City to provide electric service to certain areas of the County. The franchise provides that "This franchise is subject to renewal upon the agreement of both parties. In the event the [City] desires to renew this franchise, then a five year notice of that intention to the [County] shall be required. Should the [County] wish to renew this franchise, the same five year notice to the [City] from the [County] shall be required ... ."

The purpose of this letter is to advise that at its meeting on February 21, 2012, the Board of County Commissioners voted not to renew the franchise, and to provide notice of this fact to the City Council. Thus, the Council should consider this letter to be formal notice that the County will not renew the electric franchise when it expires on March 4, 2017.

Sincerely,

Gary C Wheeler

Gary C. Wheeler, Chairman
Indian River County Board of County Commissioners

cc: Craig Fletcher, Vice Mayor
Tracy Carroll, Councilmember
Jay Kramer, Councilmember
Dick Winger, Councilmember
James O'Connor, City Manager

Building A
1801 27th Street
Vero Beach, FL 32960-3388
Telephone: 772.226.1490 FAX: 772.770.5334