BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement regarding the effect of the Commission's orders approving territorial agreements in Indian River County, by the City of Vero Beach.	DOCKET NO. 140244-EM ORDER NO. PSC-15-0102-DS-EM ISSUED: February 12, 2015

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
JULIE I. BROWN
JIMMY PATRONIS

DECLARATORY STATEMENT

BY THE COMMISSION:

BACKGROUND

On December 19, 2014, the City of Vero Beach filed a petition for declaratory statement (City's Petition). Pursuant to Rule 28-105.0024, Florida Administrative Code (F.A.C.), a Notice of Declaratory Statement was published in the December 23, 2014, edition of the Florida Administrative Register, informing interested persons of the City's Petition. The City's Petition requests the following two declarations:

> a. Neither the existence, non-existence, nor expiration of the Franchise Agreement between Indian River County and the City has any effect on the City's right and obligation to provide retail electric service in the City's designated electric service territory approved by the Commission through its Territorial Orders.
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> b. The City can lawfully, and is obligated to, continue to provide retail electric service in the City's designated electric service territory, including those portions of its service territory within unincorporated Indian River County, pursuant to applicable provisions of Florida Statutes and the Commission's Territorial Orders, without regard to the existence or non-existence of a franchise agreement with Indian River County and without regard to any action that the County might take in an effort to prevent the City from continuing to serve in those areas.

On January 13, 2015, the Board of County Commissioners, Indian River County, filed a response in opposition to the City's Petition and requested intervention. On January 20, 2015, Vero Beach filed a reply to the County's response in opposition to the City's Petition. Vero Beach did not object to the County's intervention. On January 22, 2015, intervention was granted to Indian River County. Amicus curiae status was granted to Duke Energy Florida, Inc.,

Tampa Electric Company, Florida Municipal Electric Association, Inc., and Florida Electric Cooperatives Association, Inc. Duke, TECO, FMEA, and FECA filed comments generally in support of the City's Petition. The parties and amici curiae were allowed oral argument at the February 3, 2015 Agenda Conference. We have jurisdiction pursuant to Section 120.565 and Chapter 366, F.S.

STATUTES AND RULES GOVERNING DECLARATORY STATEMENTS

Declaratory statements are governed by Section 120.565, Florida Statutes, F.S., and the Uniform Rules of Procedure in Chapter 28-105, F.A.C. Section 120.565, F.S., states, 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.

Rule 28-105.001, F.A.C., Purpose and Use of Declaratory Statement, provides:

> A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.[1]

Rule 28-105.002, F.A.C., requires a petition for declaratory statement to include a description of how the statutory provisions or rule on which a declaratory statement is sought may substantially affect the petitioner in the petitioner's particular set of circumstances. Since a declaratory statement procedure is intended to resolve controversies or answer questions or doubts concerning the applicability of statutes, rules, or orders, the validity of the statute, rule, or order is assumed.[2]

A purpose of the declaratory statement procedure is to enable members of the public to definitively resolve ambiguities of law arising in the planning of their future affairs and to enable

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[1] Order No. PSC-08-0374-DS-TP, at p. 15, issued June 4, 2008, in Docket No. 080089-TP, In re: Petition for declaratory statement regarding local exchange telecoms. network emergency 911 service, by Intrado Commc'ns Inc. (petition for declaratory statement denied in part because it asked to determine the conduct of other entities in addition to petitioner's own interests, which is prohibited by Rule 28-105.001, F.A.C.).

[2] Retail Grocers Ass'n of Fla. Self Insurers Fund v. Dep't of Labor & Employment Sec., Div. of Workers' Comp., 474 So. 2d 379, 382 (Fla. 1st DCA 1985)(citing to Waas, Initiating agency action: petition for declaratory statement and rulemaking under the Florida Administrative Procedure Act, 55 Fla. Bar. J. 43 (1981)).

the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts.[3] The courts and this Commission have repeatedly stated that one of the benefits of a declaratory statement is to enable the petitioner to avoid costly administrative litigation by selecting a proper course of action in reliance on the agency's statement.[4] Further, "the reasoning employed by the agency in support of the declaratory statement may offer useful guidance to others who are likely to interact with the agency in similar circumstances."[5] We have dismissed petitions for declaratory statement that fail to meet the threshold requirements of Section 120.565, F.S.[6]

An agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts.[7] A declaratory statement is controlling only as to the facts relied upon and not as to other, different or additional facts, and any alteration or modification of the facts relied upon could materially affect the conclusions reached. In ruling on a petition for declaratory statement, an agency may decide to issue a declaratory statement and answer the question or deny the petition and decline to answer the question.[8]

THE CITY OF VERO BEACH'S PETITION FOR DECLARATORY STATEMENT

I. The City's Petition

A. Facts alleged in the City's Petition

The City's Petition summarizes the history of Vero Beach's operation of a municipal electric utility system beginning in 1920. Vero Beach explains that its service area, as approved by the Territorial Orders, includes area within the city limits and in unincorporated Indian River County, and that Vero Beach has been serving outside its municipal limits since at least 1952, and probably since the 1930s. Vero Beach states that it has been providing service pursuant to our orders since at least 1972. The City's Petition reviews our five territorial orders that approved and modified the territorial agreements between Florida Power & Light Company

[3] Dep't of Bus. and Prof'l Regulation, Div. of Pari-Mutual Wagering v. Inv. Corp. of Palm Beach, 747 So. 2d 374, 382 (Fla. 1999)(quoting Patricia A. Dore, Access to Florida Administrative Proceedings, 13 Fla. St. U.L. Rev. 965, 1052 (1986)).

[4] Id. at 384; Adventist Health Sys./Sunbelt, Inc. v. Agency for Health Care Admin., 955 So. 2d 1173, 1176 (Fla. 1st DCA 2007); Order No. PSC-02-1459-DS-EC, pp. 3-4, issued October 23, 2002, in Docket No. 020829-EC, In re: Petition for declaratory statement concerning urgent need for electrical substation in North Key Largo by Florida Keys Electric Coop. Ass'n Inc., pursuant to Section 366.04, Florida Statutes.

[5] Inv. Corp. of Palm Beach, 747 So. 2d at 385 (quoting Chiles v. Dep't of State, Div. of Elections, 711 So. 2d 151, 154-55 (Fla. 1st DCA 1998)).

[6] E.g. Order No. PSC-04-0063-FOF-EU, issued Jan. 22, 2004, in Docket No. 031017-EU, In re: Request for Declaratory Statement by Tampa Electric Company Regarding Territorial Dispute with City of Bartow in Polk County, (petition dismissed for lack of an actual, present and practical need, no live controversy, and assertions based on a state of facts which has not arisen); Order No. PSC-0210-FOF-EQ, issued February 15, 1995, in Docket No. 940771-EQ, In re: Petition for determination that implementation of contractual pricing mechanism for energy payments to qualifying facilities complies with Rule 25-17.0832, F.A.C., by Florida Power Corp. (dismissing petition for declaratory statement asking for interpretation of contract term).

[7] Rule 28-105.003, F.A.C.

[8] Subsection 120.565(3), F.S., and Rule 28-105.003, F.A.C.

(FPL) and Vero Beach (Territorial Orders). Vero Beach notes that the County did not participate in any of these proceedings.

Vero Beach states that in 1987 it entered into a franchise agreement with Indian River County (Franchise Agreement). It alleges that currently, pursuant to the Territorial Orders, home rule powers, Chapters 166 and 180, F.S., and other legal authority, Vero Beach operates an electric generating plant, transmission lines and related facilities, and distribution lines and facilities that serve approximately 34,000 meters, of which approximately 12,900 meters are located within the City limits and approximately 21,000 meters are located outside the City limits. The City's Petition estimates that about 20 percent of Vero Beach's transmission and distribution lines in the unincorporated areas of the County are located in County road rights-of-way, and the remainder is located in State rights-of-way, on private roads, and in private easements. The City's Petition alleges that in reliance on the Territorial Orders and other authority, and in order to serve its customers within its approved service area, Vero Beach 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.

B. Statutory provisions and orders to be applied to the facts

Vero Beach asks us to declare the status of its right to continue operating in its Commission-approved service territory under our statutes and orders regarding the regulation of electric utility service and service territories in Florida. The applicable statutory provisions addressed are Section 366.04(1), F.S., concerning our jurisdiction, Section 366.04(2)(d) and (e), F.S., giving us the authority to approve territorial agreements and resolve disputes concerning territorial agreements between certain electric utilities, and Section 366.04(5), F.S., concerning our jurisdiction over grid reliability.[9] These statutory provisions of Section 366.04, F.S., state as follows:

> (1) In addition to its existing functions, the [C]ommission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service; assumption by it of liabilities or obligations as guarantor, endorser, or surety; and the issuance and sale of its securities. . . . The jurisdiction conferred upon the [C]ommission shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the [C]ommission shall in each instance prevail.
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> (2) In the exercise of its jurisdiction, the [C]ommission shall have power over electric utilities for the following purposes:

[9] The Grid Bill codified our authority to approve and review territorial agreements involving investor-owned utilities and expressly granted us jurisdiction over rural electric cooperatives and municipal electric utilities for approving territorial agreements and resolving territorial disputes. See Richard C. Bellak and Martha Carter Brown, Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida, 19 Fla. St. L. Rev. 407, 413 (1991).

* * *

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

(e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the [C]ommission 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.

* * *

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

The City's Petition identifies the Territorial Orders approving the electric service areas and territorial boundaries between Vero Beach and FPL as relevant and applicable to issuance of the requested declaratory statements. These orders are as follows:

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

Order No. 6010, issued January 18, 1974, in Docket No. 73605-EU, 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 (approving a slight modification of the territorial agreement with no facilities or customers being affected).

Order No. 10382, issued November 3, 1981, in Docket No. 800596-EU, In re: Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas (approving as in the public interest a territorial agreement where each utility transferred a number of electric service

accounts to the other) and Order No. 11580, issued February 2, 1983, in that same docket (consummating order).

Order No. 18834, issued February 9, 1988, in Docket No. 871090-EU, In re: Petition of Florida Power & Light Company and the City of Vero Beach for Approval of Amendment of a Territorial Agreement (approving amendment to the territorial agreement by establishing a new territorial dividing line).

C. Description of how Vero Beach is substantially affected

Vero Beach alleges that the statutory provisions and orders it identifies substantially affect its interests. The City's Petition states that Vero Beach provides retail electric service within its Commission-approved service area pursuant to the Territorial Orders, and our declaration will determine whether Vero Beach's right and obligation to provide service to its Commission-approved service areas are subject to abrogation or nullification by the actions threatened by the County. Vero Beach alleges that Indian River County, through the County's Petition for Declaratory Statement in Docket No. 140142-EM,[10] is threatening to evict Vero Beach from providing electric service in its Commission-approved service areas in unincorporated Indian River County upon expiration of the Franchise Agreement. It alleges that our declarations will have a direct and immediate impact on Vero Beach's ability to make appropriate, efficient planning and investment decisions that include addressing significant impacts arising from substantial stranded costs that would occur if the County were to oust Vero Beach from its Commission-approved service territory.

D. Declaration requested

The City's Petition requests the following two declarations:

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

b. [Vero Beach] can lawfully, and is obligated to, continue to provide retail electric service in [Vero Beach's] designated electric service territory, including those portions of its service territory within unincorporated Indian River County, pursuant to applicable provisions of Florida Statutes and the Commission's Territorial Orders, without regard to the existence or non-existence of a franchise agreement with Indian River County and without regard to any action that the County might take in an effort to prevent [Vero Beach] from continuing to serve in those areas.

[10] 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

E. Vero Beach's legal argument

Vero Beach states that because we have exclusive and superior jurisdiction over service territories and have expressly exercised that jurisdiction by approving the Vero Beach-FPL territorial agreements in the Territorial Orders, the Franchise Agreement has no effect on Vero Beach's right and obligation to serve or on our Territorial Orders. The City asserts that we should, accordingly, grant its requested declaratory statements.

Vero Beach alleges that because our jurisdiction over its service area is exclusive and superior with respect to all other entities of Florida state government pursuant to Section 366.04(1), F.S., specifically including counties, Vero Beach's continuing right and obligation to serve in its Commission-approved service area cannot be affected by the expiration of the Franchise Agreement, or by any other action of the County. It argues that the expiration, existence, or non-existence of the Franchise Agreement is of no effect or consequence to the City's right and obligation to provide electric service, to our jurisdiction, or to our Territorial Orders approving Vero Beach's service territory. Vero Beach argues that to hold otherwise would result in this Commission effectively ceding our Section 366.04(5), F.S., grid planning jurisdiction to the counties. The City alleges that no utility could reasonably plan or make proper investments if any county could evict the incumbent utility upon expiration of a franchise agreement.

Vero Beach argues that the Franchise Agreement is of no effect or consequence relative to our exclusive and superior jurisdiction over 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. Vero Beach maintains that because of our exclusive and superior jurisdiction over service territories, the Franchise Agreement does not affect the validity of our Territorial Orders and was never necessary to Vero Beach's serving customers in unincorporated Indian River County located within the area described in the Territorial Orders.

Vero Beach argues that our 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. Order No. PSC-13-0207-PAA-EM, at p. 20, issued May 21, 2013, in Docket No. 120054-EM, 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.

Vero Beach alleges that many utilities provide electric service without benefit of franchise agreements and that franchise agreements are not a necessary condition to a utility's right or obligation to serve. It states that Vero Beach provided service to customers in unincorporated Indian River County for at least 35 years with the County's acquiescence before execution of the Franchise Agreement.

Vero Beach maintains that it has provided service subject to our express statutory jurisdiction over service territories and 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 our "implicit authority" before that. Further, Vero Beach alleges that it provides electric service in the unincorporated areas of the County pursuant to its home rule powers under section 2(b), Article VIII of the Florida Constitution, and pursuant to its powers under Sections 166.021 and 180.02(2), F.S. Vero Beach states that the territorial agreements we approved are part of our Territorial Orders and thus have the full legal effect and authority of those orders.

Vero Beach alleges that neither the County nor any other officer or agency of the County ever appeared in any of our proceedings pursuant to which our Territorial Orders were issued. Vero Beach states that the County acquiesced in Vero Beach's serving in the unincorporated areas of the County allocated to Vero Beach, with FPL's express agreement and support, in at least three separate instances before the Franchise Agreement ever existed, and in one additional territorial amendment since the Franchise Agreement existed. Vero Beach alleges that this acquiescence may well provide additional, separate legal authority for Vero Beach's continuing ability to serve using the County's rights-of-way, but such issues should be addressed by the courts.

II. Indian River County's Response in Opposition to the City's Petition

A. The facts

The County does not dispute the facts set forth in the City's Petition, but alleges that there are critical omissions and, therefore, adds additional historical and factual background. The County alleges that what makes this such a significant issue for the citizens of Indian River County is the unique and unprecedented extent to which Vero Beach serves outside its corporate limits: More than 60 percent of Vero Beach's electric customers do not live in Vero Beach, and Vero Beach is unfairly taking advantage of these non-city electric customers by subsidizing Vero Beach's general government operations. The County alleges that non-city customers who receive no city services are contributing two-thirds or more as much revenue to general government as is generated by Vero Beach's property taxes.

The County alleges that the customers who live outside Vero Beach have no voice in the utility's operation and management and no redress to any governmental authority because they reside outside the city limits and have no vote in city elections and are outside our authority. The County states that a Vero Beach residential customer can pay approximately one third more for electricity than an FPL customer living across the street.

The County states that the Legislature enacted Section 366.04(7), F.S., that requires an election regarding the creation of an independent utility authority, but Vero Beach has refused to comply with the requirements of Section 366.04(7), F.S., by failing to conduct an election or to otherwise create an electric utility authority that would include representation of non-city customers. The County alleges that it is Vero Beach's flagrant disregard for the law and its refusal to be accountable to more than 60 percent of its customers that resulted in the Board of County Commissioners deciding not to renew the Franchise Agreement when it expires on March 4, 2017.

B. Indian River County's legal arguments

The County argues that the City's Petition should be denied because it is attempting to affect, control, or limit the County's authority to issue electric service franchises for the unincorporated areas of the County. The County further states that the City's Petition seeks to improperly invalidate and otherwise render meaningless the expiration of the Franchise Agreement and the County's franchise authority. The County maintains that on the basis of our limited but exclusive statutory authority to approve territorial agreements, to resolve territorial disputes, and to prevent uneconomic duplication, we have no authority to determine the County's authority under Chapter 125, F.S., to invalidate or continue the franchise, or to stop the County from determining a successor electric service franchisee.

The County alleges that the City's Petition is requesting a declaration that the County's franchise authority is meaningless and without purpose. The County argues that the absence of a franchise agreement between Indian River County and Vero Beach before 1987 does not mean that there was no authority for a franchise in 1987 or that thereafter a franchise is forever unnecessary and irrelevant. The County notes that until the adoption of the Florida Constitution of 1968, non-charter counties, such as Indian River County, did not have the authority to convey property rights through franchises for utility service. The County alleges that the Franchise Agreement for electric service outside Vero Beach's city limits significantly and materially changed the relationship between the parties and that the Franchise Agreement, as a contract, established and controls the rights, duties, and responsibilities of both parties with respect to electric service within the unincorporated areas of the County.

The County alleges that by accepting the Franchise Agreement, Vero Beach 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 terms of the Franchise Agreement. The County alleges that the Franchise Agreement clearly and unambiguously limited Vero Beach's service to a 30-year term unless mutually extended, and provides a five-year advance notice requirement. The County alleges that its notice of nonrenewal means that Vero Beach's right to serve the unincorporated areas of the County and to use the County's property, rights-of-way, and easements will expire on March 4, 2017.

The County states that it is well settled that a franchise is a privilege and not an absolute or unregulated right and that the County has broad authority with respect to utilities utilizing its rights-of-way, including the ability to deny use. It argues that the Franchise Agreement now provides the sole legal authority for Vero Beach 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. The County states that the right to serve does not include the legal right to use another's property to actually provide service.

The County states that regardless of whether only 20 percent of Vero Beach's electric facilities rely upon the use of the County's rights-of-way, the Franchise Agreement conveys both the right to use the County's rights-of-way and the right to serve within unincorporated Indian River County, and without this authorization or use of property, service within the

unincorporated areas would not be possible. The County asserts that we haves no authority to grant either of Vero Beach's requested declarations that seek to assume the Franchise Agreement is invalid and no authority to determine the use of the County's property rights by authorizing the City to continue to serve in perpetuity.

The County agrees that we have exclusive and superior jurisdiction limited to approving territorial agreements, resolving territorial disputes, and avoiding uneconomic duplication of facilities. It further states that we do not have authority in a territorial order to address a utility's ability to secure the necessary property rights, such as easements, leases, licenses, and purchase, in order to place facilities used to provide service. The County further states that we have no jurisdiction to require or compel a property owner to grant a lease, license, easement, sale, or franchise. The County states that a non-charter county's power to require franchise agreements from electric utilities is not inconsistent with our powers.

The County points to Florida Power Corp. v. City of Winter Park, 887 So. 2d 1237, 1240 (Fla. 2004), as a "real world, analogous situation and precedent as to how the [Commission] should address the scenario posed by [Vero Beach]." The County argues that because the Court in City of Winter Park, 887 So. 2d at 1240, recognized that franchises and their benefits can expire, there is no authority for a utility to "hold over" after a franchise expires. The County states that, similarly, Vero Beach's right to access public property is a bargained for exchange for the County's collection of a franchise fee and that the expiration of the Franchise Agreement is enforceable.

The County states that following City of Winter Park, we continued to work concurrently to give effect to the consequences of the expired franchise and formally relieved the utility of its obligations to provide electric service in Winter Park.[11] The County further alleges that an Attorney General's Opinion concluded that the actual transfer of the electric facilities to Winter Park did not require our approval. The County alleges that the Winter Park situation also demonstrates that a territorial order is not a necessary prerequisite for service, since there was no territorial agreement between Winter Park and Florida Power Corp., although we approved a new territorial agreement between Winter Park and Duke Energy in 2014. The County believes that our approach to the Winter Park case is relevant because in the face of the expired franchise, we did not tell Winter Park that Florida Power Corp. was the authorized electric service provider that would continue to serve customers, that it would be uneconomic for Winter Park to duplicate Florida Power Corp.'s facilities, that Winter Park could not purchase Florida Power Corp.'s facilities, or that Winter Park could not be the electric utility.

In response to Vero Beach's arguments that termination of the Franchise Agreement could adversely impact the City's ability to plan its system and result in stranded costs, the County asserts that the Franchise Agreement had a term of 30 years, and that, therefore,

[11] Order No. PSC-05-0453-PAA-EI, issued April 28, 2005, in Docket No. 050117 (Proposed Agency Action Order Relieving Progress Energy Florida, Inc. of the Obligation to Provide Retail Electric Service to Certain Customers Within Vero Beach of Winter Park), In re: Petition to relieve Progress Energy Florida, Inc. of the statutory obligation to provide electrical service to certain customers within Vero Beach of Winter Park, pursuant to Section 364.03 and 366.04, F.S. and consummating Order No. PSC-05-0568-CO-EI, issued May 23, 2005.

responsible management would have prepared for that contingency and that Vero Beach should not have entered into contracts that exceeded the 30 year contract term. The County notes that Vero Beach's investments in infrastructure can be sold to the successor and that orderly transitions can and do occur.

The County agrees with Vero Beach's argument that an individual does not have an absolute right to service by a particular utility, but states that the present matter is a different, unique, and special situation involving massive general government subsidization flowing from electric ratepayers to Vero Beach and lack of representation. The County states that the public interest standard is a broad mandate that ultimately controls the decision-making process for both this Commission and the County.

The County argues that if Vero Beach believed that it had an unlimited right to serve customers in the unincorporated areas of the County solely on the basis of the territorial agreement with FPL, then it would not have voluntarily entered into the Franchise Agreement. The County states that the expiration of the Franchise Agreement will not change or void our Territorial Orders because the Franchise Agreement exists independently of the Territorial Orders, that those orders remain effective until changed in a proper proceeding, and that, absent other legal action, the territorial boundaries between Vero Beach and FPL would remain effective for service, but only within the corporate limits of Vero Beach and Indian River Shores. The County maintains that when the Franchise Agreement expires, Vero Beach 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.

III. Amici curiae comments

TECO, FECA, FMEA, and Duke generally echo or support Vero Beach's arguments that we have exclusive and superior jurisdiction over Vero Beach's service territory and that the Franchise Agreement has no impact on our jurisdiction or Territorial Orders. FMEA states that the Grid Bill is the heart of our regulatory authority over electric service territories in Florida and that if each of Florida's 410 municipalities and 67 counties could choose their own retail electric provider, or unilaterally evict an existing electric utility provider at the end of a franchise agreement term, there would be no coordinated electric power grid in Florida. FECA believes that if a local government were allowed to evict a utility from an area it serves and had planned to serve in the future, the Grid Bill's purposes of prevention of further uneconomic duplication of facilities would be undermined.

Duke argues that any provisions in the Franchise Agreement that purport to authorize Vero Beach to provide electric service within the County are void. Duke states that the territorial agreement between FPL and Vero Beach has no expiration date and will continue in effect until the two parties either mutually agree to, or we order, its termination. Duke argues that an electric utility has an obligation to provide service to customers within its territorial boundaries until we relieve it of that obligation. Duke states that the Franchise Agreement exists to provide a mechanism for the County to recoup the costs of providing and maintaining the rights-of-way through the collection of franchise fees.

TECO states that once we approved the territorial agreement and amendments, they merged with and became a part of our Territorial Orders approving them, and any modification or termination of the Territorial Orders must first be made by this Commission. TECO maintains that the Territorial Orders control, not the Franchise Agreement, and local governments have no authority to "trump" our Territorial Orders with franchise agreements.

FECA states that the issues before us are of great concern to FECA, its 17 electric cooperative members and to the consumer-members that are served by those electric cooperatives. FECA states that one issue of extreme significance is whether a utility can rely on Commission-approved territorial agreements and the territorial provisions in Section 366.04, F.S., to define the service area that it must plan to serve now and in the future, or whether a local government can unilaterally take away a utility's customers and service area whenever a franchise agreement expires or if there is no franchise agreement.

FECA argues that termination of the Franchise Agreement does not affect Vero Beach's rights to continue using the County, state, city, or federally-owned rights-of-way or private easements. FECA states that Section 361.01, F.S., authorizes electric utilities to use eminent domain to obtain easements they require, both on public and private lands, and Vero Beach can obtain the easements it needs to continue to provide service in the Franchise Area. FECA states that Indian River County's reliance on Section 337.401(2), F.S., for the proposition that it can deny use of its rights-of-way for no cause is misplaced because that section authorizes local government to prescribe and enforce reasonable rules or regulations for the placement of utility facilities in rights-of-way, but gives no authority for a local government to require a utility to remove its facilities from a right-of-way or completely prohibit a utility from using its rights-of-way under any circumstances without good cause.

Citing to Parker v. Brown, 317 U.S. 341, 350 (1942), TECO, FECA, and FMEA agree with Vero Beach that failure of the Commission to actively supervise the territorial decisions of utility service territories would be considered per se Federal antitrust violations under the Sherman Act.

IV. Vero Beach's reply to the County's response in opposition to the City's Petition

Vero Beach asserts that the County has incorrectly characterized the degree to which the City serves outside its city limits, ignored applicable Florida law in its assertions that Vero Beach is inappropriately using non-City electric customers to subsidize general government operations, and falsely stated that Vero Beach has ignored the referendum requirement of Section 366.04(7), F.S. Vero Beach asks us to disregard the misleading, incorrect, and incomplete statements in the County's response.

Vero Beach argues that, contrary to the County's assertions, the City's Petition does not argue that the Franchise Agreement is meaningless, without any legal effect, or invalid. Vero Beach states that the Franchise Agreement is valid and binding, but that the County incorrectly interprets the "bargained-for exchange" as terminating the City's right and obligation to serve customers in its Commission-approved service area upon expiration of the Franchise Agreement.

Vero Beach states that pursuant to Public Service Commission v. Fuller, 551 So. 2d 1210 (Fla. 1989), and City of Homestead v. Beard, 600 So. 2d 450 (Fla. 1992), it is not obligated to stop providing service within its Commission-approved territory upon expiration of the Franchise Agreement.

Vero Beach argues that when the Franchise Agreement expires, the City and County will be relieved of their contractual obligations under the Franchise Agreement, but that there will be no effect on the City's rights and obligations under the Territorial Agreements. The City asserts that upon expiration of the Franchise Agreement, if the County takes action to replace Vero Beach as service provider, we would need to decide the matter as a territorial dispute. The City argues that the existence of a Franchise Agreement is not a prerequisite to any utility's legal ability to provide electric service, that many Florida electric utilities serve in areas without franchise agreements, and that Vero Beach served within Indian River County without a franchise agreement prior to 1987.

Vero Beach asserts that the County's reliance on City of Winter Park, 887 So. 2d at 1237 and subsequent proceedings, provides no support for its positions. The City states that all City of Winter Park stands for is that a utility can convey to a franchisor municipality, by express terms in a franchise agreement, the right to purchase the utility's facilities at the end of a franchise, and that the utility must continue to collect and remit franchise fees during the arbitrated acquisition process. Vero Beach argues that the franchise agreement in City of Winter Park was critically different from the 1987 Franchise Agreement because it gave Winter Park the right to purchase Florida Power Corporation's facilities upon expiration of the franchise. The City states that Winter Park never had the right to designate a successor utility; rather, it had the right under the terms of the franchise agreement to purchase the utility's facilities. The City further argues that in the Commission proceedings subsequent to the City of Winter Park decision there were no issues before us concerning the franchise agreement, uneconomic duplication, or who could or should provide service, and, for this reason, such issues were not addressed.

The City argues that the County has incorrectly characterized our jurisdiction as being limited by the County's permissive authority to grant franchises. Further, Vero Beach asserts that, contrary to the County's argument, it is not asking us to invalidate the Franchise Agreement, to determine the County's rights and powers under Chapter 125, F.S., to declare that the City has the right to continue using the County's rights-of-way notwithstanding the expiration of the Franchise, and to stop the County from determining a successor electric utility upon expiration of the Franchise Agreement. The City emphasizes that it is asking us to declare that, pursuant to our governing statutes and the Territorial Orders, Vero Beach may lawfully continue to serve in its Commission-approved service areas after the Franchise Agreement expires.

Vero Beach argues that that County has no authority to evict Vero Beach from the County's rights-of-way or to force Vero Beach to remove its facilities from the rights-of-way and areas located within unincorporated Indian River County, to designate a successor electric service provider in the City's Commission-approved service areas, and to force the City to sell its

facilities to another electric utility. The City states that any dispute as to who would provide electric service would need to be resolved by us as a territorial dispute.

Vero Beach claims that the County is incorrectly attempting to usurp our Chapter 366, F.S., jurisdiction by elevating the County's permissive authority to grant a franchise into the overarching power to determine what utility will provide electric service in Indian River County. The City alleges that its requested declarations do not improperly determine the County's rights but seek our determinations only as to the City's right and obligation to provide retail electric service in the City's Commission-approved service territory under the Territorial Orders.

FINDINGS AND CONCLUSION

In accordance with Rule 28-105.003, F.A.C., we rely on the facts contained in the City's Petition without taking a position on the validity of those facts. This declaratory statement order will be controlling only as to the facts relied upon and not as to other, different or additional facts.[12] As our conclusions are limited to the facts described herein, any alteration or modification of those facts could materially affect the conclusions reached in this declaratory statement order.

The City of Vero Beach has met the threshold requirements for issuance of a declaratory statement. The City's Petition seeks guidance as to how Grid Bill Sections 366.04(1), (2)(d) and (e), and (5), F.S., and the Territorial Orders apply to Vero Beach's set of circumstances as the electric service provider for the customers located in its territory described in the Territorial Orders. Vero Beach's substantial interests will be directly affected because our declaration will determine whether its right and obligation to continue serving its customers in its Commission-approved Territorial Order service areas in unincorporated Indian River County are affected by the expiration of the Franchise Agreement.

Pursuant to Section 366.04(2), F.S., we have power over electric utilities to approve territorial agreements between and among municipal electric utilities and other electric utilities under our jurisdiction. Additionally, pursuant to Section 366.04(5), F.S., we 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." Section 366.04(1), F.S., provides that the jurisdiction conferred upon us "shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of

[12] On January 13, 2015, the Town of Indian River Shores filed a Notice of Pending Litigation in this docket that summarized the issues in its pending circuit court litigation against the City of Vero Beach and asked us to refrain from issuing declaratory statements that would address any factual or legal issues related to the town's pending litigation. Indian River Shores did not seek intervention or amicus curiae status in either docket. The information provided in the Notice of Pending Litigation is not relevant to the City's Petition because it concerns the expiration of a franchise agreement between the Town of Indian River Shores and the City of Vero Beach, which is not addressed in this docket.

conflict therewith, all lawful acts, orders, rules, and regulations of the [C]ommission shall in each instance prevail."

Territorial orders are subject to our power over all electric utilities pursuant to Section 366.04(2)(d) and (e), F.S. Roemmele-Putney v. Reynolds, 106 So. 3d 78, 81 (Fla. 3d DCA 2013). Any modification or termination of a Commission-approved territorial order must first be made by this Commission pursuant to our exclusive jurisdiction. See Fuller, 551 So. 2d at 1212. We have this authority so that we may carry out our express statutory purpose of avoiding the uneconomic duplication of facilities and our duty to consider the impact of such decisions on the planning, development, and maintenance of a coordinated electric power grid in Florida. Id.; Section 366.04(5), F.S. The statutory authority granted to us to approve and enforce territorial agreements is not subject to local regulation. Roemmele-Putney, 106 So. 3d at 81 (where the Court stated that our statutory authority would be eviscerated if initially subject to local governmental regulation). As pointed out by Vero Beach, TECO, FECA, and FMEA, failure of this Commission to actively supervise the territorial decisions of utility service territories would be considered per se Federal antitrust violations under the Sherman Act, 15 USC §12. Parker, 317 U.S. at 350.

Vero Beach provides electric service to the territory described in the Territorial Orders. We have given Vero Beach the right and the obligation to serve customers within the territory described in the Territorial Orders. These orders have not been amended or modified to delete the unincorporated Indian River County area from Vero Beach's service territory. Because the Territorial Orders are valid Commission orders, Vero Beach will retain its right and obligation to provide electric service to customers within the territory described in the Territorial Orders unless and until we modify those orders.

Vero Beach is not asking us to interpret or apply the Franchise Agreement to its particular circumstances, and we are not doing so in this declaration. The Franchise Agreement is not a rule, order, or statutory provision of this Commission, and we would have no authority to issue a declaration interpreting that agreement. Section 120.565(1), F.S.; Rule 28-105.001, F.A.C.

The cases cited by Indian River County in its response in opposition to the City's Petition are not on point to our determination of the City's Petition for Declaratory Statement. These cases are distinguishable because although franchise agreements were involved or referred to, no Commission-approved territorial agreement orders were involved. In Florida Power Corp. v. City of Casselberry, 793 So. 2d 1174 (Fla. 5th DCA 2001), the City of Casselberry had the option under the franchise agreement to purchase the utility's distribution facilities. The issue before the court was whether the utility had to submit to arbitration on the value of the system, which the court held it did. Id. at 1181. The court noted that we had not intervened in the case and had not been asked to approve rates, service, or territorial agreements. Id. at 1178. In Lee County Electric Cooperative, Inc. v. City of Cape Coral, 2014 Fla. App. LEXIS 8432 (Fla. 2d DCA 2014), the issue was whether the utility could be required to pay the costs to relocate its lines to a different public utility easement when the road was widened, and the court held it had to pay those costs. City of Indian Harbour Beach v. City of Melbourne, 265 So. 2d 422, 424-25

(Fla. 4th DCA 1972), involved a dispute between two cities concerning the right to regulate water rates where there was no franchise agreement or contract between the two. None of these cases address the question before us.

Likewise City of Winter Park, 887 So 2d at 1237, is distinguishable from the question raised by the City of Vero Beach's Petition for Declaratory Statement because no territorial agreement was involved. The issue in City of Winter Park was whether the city could continue to receive a franchise fee from the utility under an expired franchise agreement for as long as the utility used the public rights-of-way. Id. at 1238. The Court held that after the franchise agreement expired, the city and utility operated under an implied contract, with the utility being treated like a holdover tenant, and that the utility would have to continue to pay the franchise fee to avoid unjust enrichment. Id. at 1241. City of Winter Park does not support the County's premise that the City of Vero Beach would lose its right and obligation to provide service to the territory approved in the Territorial Orders upon expiration of the Franchise Agreement.

Proceedings between Florida Power Corp.[13] and the City of Winter Park subsequent to the court's decision in City of Winter Park are similarly not on point or relevant to the City's Petition because those proceedings addressed the transfer of utility facilities from the utility to the city and did not involve a franchise agreement conflict and territorial agreement order. The Attorney General Opinion, 2005 Fla. AG LEXIS 15, Op. Att'y Gen Fla. 2005-14, March 3, 2005, stated that the City of Winter Park was not required to seek our approval for the transfer of the utility's electric distribution system assets to the city. Id. at *12. This opinion has no bearing on the City's Petition because no territorial dispute or territorial agreement issues were involved. Id. at *9 – 10. Our 2005 order granting Progress Energy's petition asking the Commission to relieve it of the obligation to provide electric service, because Winter Park decided to purchase the utility's facilities and establish a municipal utility, did not involve a dispute between the parties and did not involve a territorial agreement. Docket No. 050117-EI, Order No. PSC-05-0453-PAA-EI, issued April 28, 2005, 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 366.03 and 366.04, F.S. In Docket No. 130276-EU, Order No. PSC-14-0108-PAA-EU, issued February 24, 2014, In re: Joint petition for approval of territorial agreement in Orange County by the City of Winter Park and Duke Energy Florida, Inc., we granted the joint petition of Duke Energy and the City of Winter Park for approval of a territorial agreement in order to more clearly define the boundaries of each utility's service area. Neither of these Commission decisions gives support to the County's position that the rights and obligations granted by the Territorial Orders to Vero Beach would be affected by expiration of the Franchise Agreement.

The City of Vero Beach has asked us to issue the following two declarations:

a. Neither the existence, non-existence, nor expiration of the Franchise Agreement between Indian River County and the City has any effect on the City's right and

[13] During the time period covered by these subsequent proceedings, Florida Power Corp. changed its name to Progress Energy Florida, Inc. The utility is now Duke Energy Florida, Inc.

obligation to provide retail electric service in the City's designated electric service territory approved by the Commission through its Territorial Orders.

b. The City can lawfully, and is obligated to, continue to provide retail electric service in the City's designated electric service territory, including those portions of its service territory within unincorporated Indian River County, pursuant to applicable provisions of Florida Statutes and the Commission's Territorial Orders, without regard to the existence or non-existence of a franchise agreement with Indian River County and without regard to any action that the County might take in an effort to prevent the City from continuing to serve in those areas.

Based upon our findings, we declare that Vero Beach has the right and obligation to continue to provide retail electric service in the territory described in the Territorial Orders upon expiration of the Franchise Agreement.

It is therefore,

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

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 12th day of February, 2015.

Carlotta S Stauffer

CARLOTTA S. STAUFFER
Commission Clerk
Florida Public Service Commission
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

KGWC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.