BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for modification of territorial order based on changed legal circumstances emanating from Article VIII, Section 2(c) of the Florida Constitution, by the Town of Indian River Shores.	DOCKET NO. 160049-EU ORDER NO. PSC-16-0427-PAA-EU ISSUED: October 4, 2016

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING INTERVENTION, DENYING MOTION TO STRIKE, AND DENYING IN PART AND GRANTING IN PART MOTION TO DISMISS PETITION
AND
NOTICE OF PROPOSED AGENCY ACTION ORDER
DENYING PETITION FOR MODIFICATION OF TERRITORIAL ORDER
BASED ON CHANGED LEGAL CIRCUMSTANCES

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the Proposed Agency Action Order Denying Petition for Modification of Territorial Order Based on Changed Legal Circumstances discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code (F.A.C.).

I. Background

The City of Vero Beach (Vero Beach) provides electric service to the portion of the Town of Indian River Shores (Indian River Shores) located south of Old Winter Beach Road, pursuant to four territorial orders of the Commission that approved territorial agreements between Vero Beach and Florida Power & Light Company (FPL). *See* 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*; 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*; Order No. 10382, issued November 3, 1981 and Order No. 11580, issued February 2, 1983, 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*;

and 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* (referred to collectively as the Territorial Orders).

Although Vero Beach began providing electric service to residents of Indian River Shores prior to 1968, in that year Vero Beach and Indian River Shores entered into a contract whereby Indian River Shores requested and Vero Beach agreed to provide water service and electric power to any residents within the corporate limits of Indian River Shores (1968 Contract). In 1986, Indian River Shores and Vero Beach entered into a 30-year franchise agreement that superseded the 1968 Contract as to electric service and granted Vero Beach the sole and exclusive right to construct, maintain, and operate an electric system in public places in that portion of Indian River Shores lying south of Winter Beach Road (Franchise Agreement).

By letter of July 18, 2014, Indian River Shores advised Vero Beach that it was taking several actions to achieve rate relief for its citizens who receive electric service from Vero Beach. The letter states that Vero Beach's provision of electric service within Indian River Shores is permitted pursuant to the Franchise Agreement, but because of Vero Beach's unreasonably high electric rates as compared to FPL's rates, Indian River Shores will not renew the Franchise Agreement when it expires on November 6, 2016, and Vero Beach will no longer have Indian River Shores' permission to occupy rights-of-way or to operate its electric utility within Indian River Shores. In addition, the letter advised Vero Beach that Indian River Shores had filed a lawsuit against Vero Beach that included a challenge to Vero Beach's electric rates and "a Constitutional challenge regarding the denial of rights" to Vero Beach electric customers living in Indian River Shores.

Following unsuccessful mediation between Indian River Shores and Vero Beach pursuant to the Florida Governmental Conflict Resolution Act, Chapter 164, Florida Statutes (F.S.), Indian River Shores filed an amended complaint asking the circuit court, in part, to declare that upon expiration of the Franchise Agreement giving Vero Beach permission to provide electric service in Indian River Shores, Vero Beach has no legal right to provide electric service in Indian River Shores. In its amended complaint, Indian River Shores argued that there is no general or special law giving Vero Beach authority to provide electric service in Indian River Shores as required by Article VIII, Section 2(c), Florida Constitution, and for that reason, Vero Beach may only provide electric service in Indian River Shores if it has Indian River Shores' consent. Vero Beach filed a motion to dismiss this claim, which we supported in court as amicus curiae, on the grounds that the determination of whether Vero Beach has authority to provide service in Indian River Shores is within our exclusive and superior jurisdiction over territorial agreements. On November 11, 2015, the Court dismissed this claim, finding that the question of whether Vero Beach has the authority to continue to provide electric service within Indian River Shores upon expiration of the Franchise Agreement is squarely within our jurisdiction to decide.

On January 5, 2016, Indian River Shores filed a petition for declaratory statement asking us to declare that we lack jurisdiction to interpret Article VIII, Section 2(c), Florida Constitution, for purposes of determining whether Indian River Shores has a constitutional right to be protected from Vero Beach providing electric service within Indian River Shores without Indian

River Shores' consent. In response, we issued an order declaring that we have the jurisdiction under Section 366.04, F.S., to determine whether Vero Beach has the authority to continue to provide electric service within the corporate limits of Indian River Shores upon expiration of the Franchise Agreement. We found that in a proper proceeding, we have the authority to interpret the phrase "as provided by general or special law" as used in Article VIII, Section 2(c), Florida Constitution. Order No. PSC-16-0093-FOF-EU, issued March 4, 2016, in Docket No. 160013-EU, *In re: Petition for declaratory statement regarding the Florida public Service Commission's jurisdiction to adjudicate the Town of Indian River Shores' constitutional rights.*

On March 4, 2016, pursuant to Sections 120.57 and 366.04, F.S., Indian River Shores filed a Petition for Modification of Territorial Order Based on Changed Legal Circumstances Emanating from Article VIII, Section 2(c) of the Florida Constitution (Petition). The Petition includes an alternative request for us to treat the Petition as a complaint against Vero Beach for the same relief requested in the Petition. Indian River Shores also asks us to conduct a service hearing in Indian River Shores so that we can hear directly from residents.

On March 22, 2016, FPL filed a Petition to Intervene. On March 24, 2016, Vero Beach filed a Motion to Dismiss Indian River Shores' Petition for Modification of Territorial Order and Alternative Complaint (Motion to Dismiss) and a Motion to Intervene or, in the alternative, if the Petition is treated as a complaint, to be named a party (Motion to Intervene). On April 7, 2016, Indian River Shores filed its Response in Opposition and Motion to Strike Portions of the City of Vero Beach's Motion to Dismiss. On April 14, 2016, Vero Beach filed its Response in Opposition to Indian River Shores' Motion to Strike.

Indian River Shores, Vero Beach, and FPL were allowed to participate at the September 13, 2016 Agenda Conference. In addition, we heard comments from State Representative Debbie Mayfield, Indian River Shores elected officials, a member of the Vero Beach Utilities Commission, and customers of Vero Beach residing in Indian River Shores. We have jurisdiction pursuant to Sections 120.569, 120.57, and 366.04, F.S.

II. Motions

A. Intervention

Vero Beach states in its Motion to Intervene that as the incumbent utility providing service pursuant to territorial agreements between FPL and Vero Beach approved by our Territorial Orders at issue in the Petition, Vero Beach's substantial interests will be directly affected by the issues raised in the docket. Vero Beach requests intervenor status so that it may file responsive pleadings and otherwise fully participate in this docket. FPL alleges in its Petition to Intervene that it is clear on the face of the Petition that our decision in this proceeding will determine FPL's substantial interests because Indian River Shores has requested modification to the order approving FPL's territorial agreement with Vero Beach based on changed legal circumstances. FPL states that Indian River Shores has specifically requested us to augment FPL's service area approved in the Territorial Order by placing all of Indian River Shores within the electric service area of FPL.

The Petition was processed and issued as proposed agency action (PAA). Formal intervention by Vero Beach and FPL pursuant to Chapter 120, F.S., is premature and unnecessary at this time. We invite broad participation in PAA proceedings by interested persons in order to better inform ourselves of the scope and implications of our decisions. *See* Rule 25-22.0021(2), F.A.C.; Order No. PSC-12-0139-PCO-WS, issued March 26, 2012, in Docket No. 110264-WS *In re: Application for increase in water and wastewater rates in Pasco County by Labrador Utilities, Inc.*; and Order No. PSC-14-0311-PCO-EM, issued June 13, 2014, in Docket No. 140059-EM, *In re: Notice of new municipal electric service provider and petition for waiver of Rule 25-9.044(2), by Babcock Ranch Community Independent Special District*. Vero Beach and FPL were given the opportunity to fully participate in the September 13, 2016, Agenda Conference without formal intervention. For these reasons, we deny Vero Beach's Motion to Intervene and FPL's Petition to Intervene.

Substantially affected persons have the opportunity to protest the PAA Order and request a hearing pursuant to Sections 120.569 and 120.57, F.S. The Petition requested modification of Territorial Orders approving territorial agreements between Vero Beach and FPL. The substantial interests of Vero Beach and FPL would be affected in any protest of the PAA Order. As the electric utilities providing service pursuant to those Territorial Orders, Vero Beach and FPL would be indispensable parties to any Section 120.57, F.S., or court proceeding concerning those Territorial Orders. For this reason, we find that Vero Beach and FPL must be named as parties in any challenge to this PAA Order.

B. Vero Beach's Motion to Dismiss for Failure to Meet Pleading Requirements

Vero Beach argues that one of the reasons why the Petition should be dismissed is that although the Petition purports to be filed pursuant to Section 120.57, F.S., it fails to meet the minimum pleading requirements of Rule 28-106.201(2), F.A.C. Specifically, Vero Beach alleges that the Petition fails to identify disputed issues of material fact, a statement of ultimate facts alleged, and an explanation of why Indian River Shores is entitled to the relief requested under specific statutes, rules, or orders.

Indian River Shores asserts that it has sufficiently pled a claim for relief. Indian River Shores contends that Rule 28-106.201, F.A.C., does not apply since the Petition is not challenging proposed agency action. Indian River Shores states that the Petition seeks relief pursuant to Section 366.04, F.S., and that the Florida Supreme Court expressly recognized in *Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335, 339 (Fla. 1966), that we may withdraw or modify our approval of a service area agreement in proper proceedings we initiate or that are initiated by an interested member of the public.

Indian River Shores further argues that Rule 28-106.201, F.A.C., applies to requests for hearings on disputed issues of material fact, but that the Petition's material facts are meant to be undisputed. Indian River Shores argues that even if Rule 28-106.201, F.A.C., is applicable, Indian River Shores has substantially complied with pleading requirements because a plain reading of the Petition indicates that there are no disputed issues of material fact. Indian River Shores further argues that the Petition gives a detailed explanation of the changed legal

circumstances and the provisions of the Florida Constitution, statutes, and case law that require modification of the Territorial Orders.

The Petition is in substantial compliance with the pleading requirements of the uniform rules and contains sufficient allegations to allow us to rule on the Petition's request to modify the Territorial Orders. For these reasons, we deny Vero Beach's Motion to Dismiss the Petition for failing to meet pleading requirements.

C. Indian River Shores' Motion to Strike

Rule 1.140(f), Florida Rules of Civil Procedure, states that a party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time. Indian River Shores argues that pursuant to Rule 1.140(f), Florida Rules of Civil Procedure, we should ignore or strike the material in the Motion to Dismiss that is outside the four corners of the Petition as immaterial and impertinent. Indian River Shores asks us to strike Vero Beach's factual allegations and arguments that the Petition's "real issue" is to challenge Vero Beach's utility rates. In addition, Indian River Shores argues that we should strike Exhibit B to the Motion to Dismiss, a newspaper article, which Indian River Shores states Vero Beach offers as purported evidence that the real purpose of the Petition is to challenge rates rather than enforce fundamental provisions of the Florida Constitution.

Vero Beach argues that the Motion to Strike should be denied because we are not bound by the Florida Rules of Civil Procedure unrelated to discovery. Vero Beach further argues that Rule 1.140(f), Florida Rules of Civil Procedure, provides for striking certain material from pleadings, and the rule does not apply because a motion to dismiss is not a pleading. Vero Beach also argues that a motion to strike language as immaterial should only be granted if the material is wholly irrelevant and can have no bearing on the equities and no influence on the decision. Vero Beach alleges that the material that Indian River Shores seeks to strike from the Motion to Dismiss, including Exhibit B, is clearly relevant to the equities, issues, and decision in this case and is therefore not subject to being stricken. Vero Beach further argues that the Motion to Strike should be denied because it fails to identify with sufficient specificity the portions of the Motion to Dismiss that Indian River Shores seeks to strike.

Indian River Shores' Motion to Strike is denied as premature because this docket is in the proposed agency action stage and has not progressed to an evidentiary administrative hearing. Further, Rule 1.140(f), Florida Rules of Civil Procedure, does not control in administrative proceedings. We have used the rule as guidance when ruling on motions to strike, generally concerning evidentiary questions on testimony filed during the course of an administrative hearing proceeding. *E.g.* Order No. PSC-99-1809-PCO-WS, issued September 20, 1999, in Docket 971220-WS, *In re: Application for transfer of Certificates Nos. 592-W and 509-S from Cypress Lakes Associates, Ltd. to Cypress Lakes Utilities, Inc. in Polk County*.

Even if Indian River Shores' Motion to Strike were not premature, it should be denied because a motion to strike is appropriately directed to pleadings, not to motions to dismiss. Order No. PSC-04-0930-PCO, issued September 22, 2004, in Docket No. 040353-TP, *In re: Petition to review and cancel, or in the alternative immediately suspend or postpone, BellSouth*

Telecommunications, Inc.'s PreferredPack Plan tariffs, by Supra Telecommunications and Information Systems, Inc. Further, a motion to strike should only be granted if the pleadings are completely irrelevant and have no bearing on the decision. *Bay Colony Office Bldg. Joint Venture v. Wachovia Mortgage Co.*, 342 So. 2d 1005 (Fla. 5th DCA 1977). We find that Vero Beach's arguments are not wholly immaterial to the Petition. It appears that Indian River Shores is asking us to strike Vero Beach's entire legal argument that Indian River Shores lacks standing to ask for modification of the Territorial Orders on the grounds that FPL has lower rates than Vero Beach. Vero Beach's arguments appear responsive to Indian River Shores' allegations in its Motion to Strike that the Territorial Orders should be modified because of changed circumstances arising from Vero Beach's abuse of monopoly powers by "charging excessive rates." Finally, the Motion to Strike fails to identify specific portions of the Motion to Dismiss that it believes are immaterial or impertinent. For the reasons set forth above, we deny Indian River Shores' Motion to Strike.

D. Motion to Dismiss for lack of standing

1. Legal Standard

For purposes of ruling on the Motion to Dismiss for lack of standing, we must confine our review to the four corners of the Petition, draw all inferences in favor of the petitioner, and accept all well-pled allegations in the petition as true. *Chandler v. City of Greenacres*, 140 So. 3d 1080, 1083 (Fla. 4th DCA 2014). S*ee also Mid-Chattahoochee River Users v. Florida Department of Environmental Protection*, 948 So. 2d 794, 796 (Fla. 1st DCA 2006), *rev. denied*, 966 So. 2d 967 (Fla. 2007)(affirming agency's final order granting motion to dismiss petition for lack of standing under *Agrico*). Dismissal of a petition may be with prejudice if it appears from the face of the petition that the defect cannot be cured. Section 120.569(2)(c), F.S.

The Florida Supreme Court has stated that we may modify our approval of a territorial agreement "in proper proceedings initiated by [the Commission], a party to the agreement, or even an interested member of the public." *Peoples Gas System*, 187 So. 2d at 339; *City of Homestead v. Beard*, 600 So. 2d 450, 453 n. 5 (Fla. 1992); *Public Service Commission v. Fuller*, 551 So. 2d 1210, 1212 (Fla. 1989). In order for Indian River Shores to have standing to receive a Section 120.57, F.S., hearing on its Petition, it must demonstrate: (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.569 and 120.57, F.S., hearing (degree of injury); and (2) that its substantial injury is of a type or nature that the proceeding is designed to protect (nature of injury). *Agrico Chemical Co., v. Department of Environmental Regulation*, 406 So. 2d 478, 472 (Fla. 2d DCA 1981), *rev. denied*, 415 So. 2d 1359 and 415 So. 2d 1361 (Fla. 1982). *See also Nuvox Communications, Inc. v. Edgar*, 958 So. 2d 920 (Fla. 2007)(affirming our order dismissing petitions with prejudice for lack of standing under *Agrico*); *Ameristeel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997)(affirming our order dismissing petition protesting territorial order for lack of *Agrico* standing, finding that Ameristeel's claim concerning paying higher rates to FPL was not injury in fact entitling it to a Section 120.57, F.S., hearing). Although Indian River Shores must demonstrate that it will suffer injury in fact of sufficient immediacy to entitle it to a hearing, it does not have to establish that it will prevail on

the merits of its argument. *Palm Beach County Environmental Coalition v. Florida Department of Environmental Regulation*, 14 So. 3d 1076, 1078 (Fla. 4th DCA 2015).

The purpose of requiring a party to have standing to participate in an administrative proceeding is to ensure that a party has sufficient interest in the outcome to warrant a hearing and to assure that the party will adequately represent its asserted interests. In this regard, "the obvious intent of *Agrico* was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues which are to be resolved in the administrative proceedings." *Prescription Partners, LLC v. State*, 109 So. 3d 1218, 1223 (Fla. 1st DCA 2013).

2. Arguments of Vero Beach and Indian River Shores

Vero Beach argues that the Petition should be dismissed for lack of standing because only persons whose substantial interests may or will be affected by action of the Commission may file a petition for an administrative hearing. Vero Beach alleges that in order to establish standing to initiate an administrative proceeding, a petitioner must demonstrate: (1) that the petitioner will suffer an injury in fact that is of sufficient immediacy to entitle it to a Section 120.57, F.S., hearing (degree of injury); and (2) that the petitioner's substantial injury is of a type or nature against which the proceeding is designed to protect (nature of injury). *Agrico*, 406 So. 2d at 472.

Vero Beach argues that the actual injury alleged in the Petition is that Vero Beach charges higher electric rates to customers in Indian River Shores than does FPL. Vero Beach alleges that Indian River Shores' interest in lower electric rates does not constitute an injury in fact of sufficient immediacy to establish grounds for *Agrico* standing because the change in the relationships between the rates of Vero Beach and the rates of FPL is not cognizable under the Commission's territorial statutes or its general Grid Bill authority.

Vero Beach argues that the Petition fails to allege any injury relative to the statutory or rule provision criteria for approving territorial agreements upon which the Territorial Orders were based, such as the reasonableness of the purchase price of any facilities being transferred; potential impacts on reliability; and the elimination of the potential uneconomic duplication of facilities. Likewise, Vero Beach argues that the Petition does not allege injury in fact relative to the statutory and rule provisions concerning territorial disputes. Vero Beach notes that even if Indian River Shores has alleged injury relative to the "customer preference" criterion of Rule 25-6.0441(2)(d), F.A.C., in that Indian River Shores has changed its mind because FPL's rates are now less than Vero Beach's rates, we and the Florida Supreme Court have recognized on many occasions that customer preference – particularly for lower rates, but for other factors as well - is not cognizable as a matter of law. Additionally, Vero Beach argues that the Petition is deficient because it does not allege any injury relative to the Section 366.04(5), F.S., requirement that we assure avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

Vero Beach argues that Indian River Shores failed to allege any injury to any of the interests protected by our territorial and related Grid Bill statutes, Sections 366.04(2)(d)-(e) or

366.04(5), F.S., or Rule 25-6.0441, F.A.C., relating to Vero Beach's ability to serve, to the adequacy and reliability of Vero Beach's service, or to the avoidance of uneconomic duplication of facilities. Vero Beach argues that because the alleged injuries are outside the zone of interests to be protected by our territorial and related Grid Bill statutes that Indian River Shores does not meet the second requirement of *Agrico*.

In addition, Vero Beach argues that Indian River Shores lacks power, a legal basis, and standing to assert the interests of its citizens in a representative capacity, citing to Order No. 96-0768-PCO-WU, issued June 14, 1996, in Docket No. 960192-WU, *In Re: Application for a Limited Proceeding to Include Groundwater Development and Protection Costs in Rates in Martin County by Hobe Sound Water Company* (*Hobe Sound Order*), where we stated:

> [I]ntervention is not granted to the Town [of Jupiter Island] in a representational capacity on behalf of its residents and taxpayers. There is no authority cited in the motion to support such standing to intervene, and there is nothing in Chapter 120, Florida Statutes, to authorize a Town to intervene in administrative proceedings on behalf of its taxpayers.

Vero Beach argues that Indian River Shores' allegation of injury to its purported constitutional right to be protected from Vero Beach providing service in Indian River Shores without Indian River Shores' consent fails to demonstrate injury in fact. Vero Beach argues that this is because the allegation of injury is speculative, affords no grounds for modification of the Territorial Orders, and is only being alleged as an injury because Vero Beach's electric rates are higher than those of FPL.

Indian River Shores argues that the Motion to Dismiss should be denied because Vero Beach has not and cannot meet the legal standard for dismissal, noting that we have recognized that dismissal is a drastic remedy and is only appropriate when the legal standard has been clearly met. Indian River Shores states that the Petition is not a simple demand by a customer to be served by a particular utility of its choosing, and, instead, is complaining about Vero Beach's unconstitutional exercise of extra-territorial powers in Indian River Shores' corporate limits and the particular unregulated monopolistic abuses arising out of that unconstitutional act.

Indian River Shores argues that the *Agrico* standing test does not apply because Indian River Shores has standing to seek modification of the Territorial Orders as an interested member of the public under *Peoples Gas*, 187 So. 2d at 339; *Fuller*, 551 So. 2d 1210 at 1212; and *City of Homestead*, 600 So. 2d at 453 n. 5. Indian River Shores alleges that if *Agrico* applies, Indian River Shores meets the first requirement because it will suffer substantial and immediate injury by Vero Beach using its unregulated monopoly electric service area within Indian River Shores to extract monopolistic profits from Indian River Shores' residents, resulting in excessive rates for lower quality service, with profits supporting non-utility operations of Vero Beach and reducing the tax burden on Vero Beach residents. Indian River Shores argues that it has standing because it has a constitutional right to be protected from Vero Beach providing electric service within Indian River Shores without consent.

Indian River Shores argues that it has met the second prong of the *Agrico* test because the Petition alleges injury of a type or nature which this proceeding to modify a territorial order is designed to protect. Indian River Shores argues that the Florida Supreme Court has emphasized that in order for a territorial agreement to be in the public interest, parties to such an agreement must be subject to a statutory regulatory regime sufficient to protect consumers from monopoly abuses because a utility's power to fix the price and thereby injure the public and the danger of deterioration in service quality are the inevitable evils of unregulated monopolies. Indian River Shores argues that we have a duty to modify the Territorial Order to protect Indian River Shores and its residents from "monopoly abuses" to extract "monopolistic profits" in the form of high rates. Indian River Shores objects to Vero Beach's use of utility revenues as general revenue to fund city operations unrelated to electric utility operations. Indian River Shores argues that the active supervision that we must exercise to protect against monopoly abuses is particularly needed in this very unique situation where Vero Beach is serving extraterritorially and exerting unregulated monopoly powers within the corporate limits of another equally independent municipality.

Indian River Shores states that Vero Beach's arguments that Indian River Shores has waived consent and that administrative finality bars the Petition are affirmative defenses that cannot be used in ruling on the Motion to Dismiss and, in addition, are without merit. Indian River Shores states that even if Indian River Shores lacks standing to bring this Petition, we should address on our own motion the changed legal circumstances that will render Vero Beach's provision of electric service to Indian River Shores unconstitutional upon expiration of the Franchise Agreement.

Indian River Shores argues that it has standing as a municipality to represent the interests of its residents because it has an obligation to protect them from Vero Beach's unconstitutional exercise of unregulated extraterritorial monopoly powers within Indian River Shores. Indian River Shores distinguishes the *Hobe Sound Order* as being a rate case that did not address the issue of constitutional protections against improper encroachments by one municipality within the boundaries of another. Indian River Shores notes that in the *Hobe Sound Order,* although we determined that the municipality did not have standing to represent its citizens, the municipality did have standing to intervene as a customer of the utility. Indian River Shores states that even if it cannot legally represent the interests of its residents, it has standing as a customer of Vero Beach.

3. Analysis and Conclusion

The Petition's allegations that Indian River Shores is harmed by excessive rates caused by abuses of monopoly power, even if taken as true, do not establish Indian River Shores' standing to request modification of the Territorial Orders in order to change service providers. It is established law that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." *Story v. Mayo,* 217 So. 2d 304, 307 (Fla. 1968), *cert. denied,* 395 U.S. 909 (1969). In our exercise of jurisdiction over territorial agreements, larger policies are at stake than one customer's self-interest. *Lee County Electric Co-op v. Marks,* 501 So. 2d 585, 587 (Fla. 1987)(stating that we must enforce and

safeguard those larger policies). An allegation of a significant price differential between two electric utility providers does not give an existing customer of one utility a substantial interest in the outcome of the territorial agreement proceeding between those providers. *Ameristeel*, 691 So. 2d at 478 (affirming our dismissal of Ameristeel's petition protesting territorial order for lack of standing under the *Agrico* test). *See also* Order 9259, issued Feb 26, 1980, in Docket No. 79063-EU, *In re: Complaint of J. and L. Accursio, et al., v. Florida Power and Light Company and City of Homestead* (where we dismissed a petition to "enjoin enforcement" of a 12 year old territorial order, primarily because of rate issues, because the petition did not sufficiently allege changes in circumstances), *cert. denied, Accursio v. May*o, 389 So. 2d 1002 (Fla. 1980).

Further, we do not have jurisdiction over municipal rates. In the 1974 Grid Bill,[1] as part of the Legislature's regulatory regime over electric utilities, we were given limited regulatory jurisdiction over municipal electric utilities. *See* 366.04(2), F.S. The Legislature gave us authority over municipalities to prescribe uniform systems and classifications of accounts; to prescribe a rate structure for all electric utilities; to require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes; to approve territorial agreements; to resolve territorial disputes; and to prescribe and require the filing of periodic reports and other data. The Legislature did not give us jurisdiction over the actual rates charged by a municipal electric utility. *Lewis v. Public Service Commission*, 463 So. 2d 227 (Fla. 1985)(stating that our jurisdiction over rate structure does not include jurisdiction over the actual rates charged by a municipal electric utility). Because we lack this jurisdiction, we do not have authority to determine what Vero Beach's electric rates should be or whether they are "too high" compared to FPL's current rates.

The Florida Supreme Court has stated that as part of Florida's legislatively constructed regulatory regime, if customers of municipal electric utilities have complaints of "excessive rates or inadequate service their appeal under Florida law is to the courts or the municipal council." *Story*, 217 So. 2d at 308. In apparent recognition that the circuit court is the appropriate forum in which it must seek rate relief, Indian River Shores filed a lawsuit against Vero Beach in circuit court, seeking relief from what it alleges are unreasonable, oppressive, and inequitable electric rates. *See* Exhibit B to Order No. PSC-16-0093-FOF-EU, issued March 4, 2016, in Docket No. 160013-EU, *In re: Petition for declaratory statement regarding the Florida Public Service Commission's jurisdiction to adjudicate the Town of Indian River Shores' constitutional rights*.

The Petition also generally alleges that we have a duty to protect Indian River Shores and its residents from "other anticompetitive behavior" and "other monopoly abuses." Indian River Shores' Response to the Motion to Dismiss specifically asks us to "redraw the monopoly service area boundaries in a manner that will comply with the antitrust laws" by replacing Vero Beach with FPL as service provider. These statements are misleading. The very proceedings whereby we approve territorial agreements or resolve territorial disputes are the actions that cause territorial agreements to "comply with the antitrust laws." This is because the Florida Legislature

[1] 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).

has through Section 366.04(2), F.S., created a "clearly articulated and affirmatively expressed state policy for establishing electric utility territorial boundaries" resulting in state action immunity for utilities from antitrust liability. *See Union Carbide Corp. v. Florida Power & Light Co*., 1993 U.S. Dist. LEXIS 21203 (M.D. Fla. 1993). As we stated in affirming our authority to enforce our territorial orders:

> We must demonstrate continued, meaningful, active supervision of the State's policy to displace competition between electric utilities throughout the state *by approving — and enforcing — territorial agreements and resolving disputes*. (emphasis added)

Order No. PSC-13-0207-PAA-EM, 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*, 2013 Fla. PUC LEXIS 128, *53.

Further, other than making general statements concerning anticompetitive behavior, the Petition does not allege any specific anticompetitive behavior or violations of antitrust laws by Vero Beach. Even if specific antitrust violations were alleged, we do not have jurisdiction to adjudicate antitrust violations, and the Petition does not argue otherwise.

The Petition's complaint that the Territorial Orders result in Indian River Shores residents being disenfranchised from voting for members of the Vero Beach City Council is not a circumstance that has changed since the Territorial Orders were issued, and therefore does not form a basis for modifying the Territorial Orders. For the same reason, there is no merit to the Petition's argument that the Territorial Orders should be modified because we regulate FPL's rates but not Vero Beach's rates. *See Storey*, 217 So. 2d at 307-308 (where, in affirming our territorial order, the Court did not accept the customers' argument that the order should be reversed because the impact of the approved territorial agreement was to force them to take service from an unregulated city utility with inferior rates and service, instead of receiving service from a regulated utility).

In order to act in a representative capacity on behalf of its residents, the Legislature has to grant that power to Indian River Shores. *See Ormond Beach v. Mayo*, 330 So. 2d 524 (Fla. 1st DCA 1976), *cert. denied*, 341 So. 2d 1083 (Fla. 1976). We are unaware of any grant of statutory authority to Indian River Shores that would allow it to represent the electric customers of Vero Beach that are located in Indian River Shores on any of the issues raised in its Petition. We have previously denied a municipality intervention to act in a representational capacity on behalf of its residents and taxpayers on the basis that there is nothing in Chapter 120, F.S., to authorize a town to intervene in administrative proceedings on behalf of its taxpayers. *Hobe Sound Order*. However, interested persons are allowed to participate in the Agenda Conference on proposed agency action items, and Vero Beach electric customers were allowed to speak at our September 13, 2016, Agenda Conference on this matter.

For the reasons set forth above, we grant Vero Beach's Motion to Dismiss, in part, on the grounds that Indian River Shores does not have standing to request modification of the Territorial Orders based on its allegations of injury from abuses of monopoly powers and excessive rates. Further, Indian River Shores lacks standing to request modification of the Territorial Orders in a representative capacity on behalf of Vero Beach's electric customers who reside in Indian River Shores. We grant the Motion to Dismiss on these grounds with prejudice because it conclusively appears from the face of the Petition that the defects as to standing cannot be cured.

However, the question of whether Indian River Shores' consent must be given in order for Vero Beach to continue to provide electric service within the municipal boundaries of Indian River Shores is a legal question separate and apart from Indian River Shores' allegations that rates are too high. Indian River Shores' legal argument that its consent is required by Section VIII, Article (2)(c), Florida Constitution, in order for Vero Beach to provide service within Indian River Shores forms a basis for standing. Standing may be based upon an interest created by the Constitution or a statute. *Florida Medical Association v. Department of Professional Regulation*, 426 So. 2d 1112, 1116, 1118 (Fla. 1st DCA 1983)(noting that zone of interest test of *Agrico* is met if standing is based on constitutional grounds).

Indian River Shores has established *Agrico* standing by alleging injury to its substantial interests as a municipality by arguing that it has a constitutional right to require us to modify the Territorial Order when the Franchise Agreement and Indian River Shores' consent expire on November 6, 2016. We are unaware of any Commission order or Florida court case that directly addresses this question. Indian River Shores' allegations demonstrate that Indian River Shores as a municipality has sufficient interest in representing its asserted interests. Indian River Shores' alleged substantial interests relate to a question appropriately addressed by us, that is, whether there has been a changed circumstance that would require us to modify the Territorial Orders and replace Vero Beach with FPL as electric service provider within the municipal boundaries of Indian River Shores.

Vero Beach's argument that the Florida Constitution does not afford any basis for modification of the Territorial Orders, that Indian River Shores waived consent, and arguments concerning the doctrine of administrative finality, all concern the merits of Indian River Shores' request for modification of the Territorial Orders. Arguments on the merits do not support denying Indian River Shores standing to request modification of the Territorial Orders based on changed circumstances emanating from the Florida Constitution. For the reasons explained above, we deny Vero Beach's Motion to Dismiss, in part, and find that Indian River Shores has standing as a municipality to request modification of the Territorial Orders based on changed legal circumstances emanating from Article VIII, Section 2(c), of the Florida Constitution.

III. The Town of Indian River Shores' Petition for Modification of Territorial Orders

A. Legal Standard

In 1972, when we first approved the territorial agreement between FPL and Vero Beach, the Florida Supreme Court had already established that we had implied authority under Chapter 366, F.S., to approve territorial agreements between electric utilities. *City Gas Co. v. Peoples Gas System, Inc.*, 182 So. 2d 429, 436 (Fla. 1965). In 1974, the Florida Legislature codified this authority in Section 366.04, F.S., as part of the Grid Bill, Chapter 74-196, Laws of Florida.

Section 366.04, F.S., is the general law that gives us exclusive and superior jurisdiction over territorial agreements between electric utilities. Section 366.04(2), F.S., gives us the power to approve territorial agreements and to resolve any territorial disputes between and among municipal electric utilities and other electric utilities under its jurisdiction. Section 366.04(5), F.S., gives us 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., states that the jurisdiction conferred upon us shall be exclusive and superior to that of all other political subdivisions, including municipalities, "and, in case of conflict therewith, all lawful acts, orders, rules and regulations of the [C]ommission shall in each instance prevail." Through territorial orders issued under this authority, we determine which electric utility serves a given area. A franchise agreement between a local government and an electric utility cannot override a territorial order. *See Board of County Commissioners Indian River County, Florida v. Art Graham, etc., et al.*, 191 So. 3d 890, 896-96 (Fla. 2016)(rejecting the argument that counties may use franchise agreements to choose their electric service provider because that would let counties do indirectly what our exclusive and superior jurisdiction over territorial agreements precludes them from doing directly).

The Territorial Orders give Vero Beach the right and obligation, as provided in Section 366.04, F.S., to supply electric service to the territory described, which includes the portion of Indian River Shores lying south of Old Winter Beach Road. *See Id.* at 897 (affirming our declaratory statement 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" between Vero Beach and Indian River County).

The Territorial Orders are final orders subject to the doctrine of administrative finality. Under that doctrine, we have limited, inherent authority to modify our final orders in a manner that accords requisite finality to the orders, while still affording us ample authority to act in the public's interest. *Peoples Gas*, 187 So. 2d at 339. We may only modify a territorial order after proper notice and hearing, and upon a specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified. *Id.*

The public interest is the ultimate measuring stick to guide our decisions. *Gulf Coast Electric Cooperative v. Johnson*, 727 So. 2d 259, 264 (Fla. 1999)(affirming our denial of a request to establish territorial boundaries). In exercising our jurisdiction over the Territorial Orders and determining what is in the public interest, we must consider all affected customers, both those transferred and those not transferred, and ensure that any modification works no detriment to the public interest as a whole. *See Utilities Commission of New Smyrna Beach v. Florida Public Service Commission*, 469 So. 2d 731, 732-33 (Fla. 1985).

B. Arguments of Indian River Shores and Vero Beach

Indian River Shores asks us to modify the Territorial Orders by placing the entire municipality of Indian River Shores within FPL's service area. This would result in the transfer of approximately 3000 Vero Beach electric customers located south of Old Winter Beach Road to FPL which currently serves approximately 739 Indian River Shores residents located north of Old Winter Beach Road. Indian River Shores argues that this modification of the Territorial Orders is required pursuant to *Peoples Gas*, 187 So. 2d at 339, because fundamental legal circumstances have changed since we last approved an amendment to the territorial agreement between FPL and Vero Beach in 1988. The changed legal circumstance alleged by Indian River Shores is that Vero Beach will no longer have Indian River Shores' consent to provide electric service within Indian River Shores upon expiration of the Franchise Agreement on November 6, 2016.

Indian River Shores argues that its consent is required because Article VIII, Section 2(c), Florida Constitution, states that "exercise of extra-territorial powers by municipalities shall be as provided by general or special law." Indian River Shores interprets this constitutional phrase to mean that the Legislature must grant the power to provide electricity outside Vero Beach's municipal borders directly to Vero Beach. Indian River Shores alleges that because the Legislature gave the Section 366.04, F.S., authority over territorial agreements to us, and not Vero Beach, Vero Beach is not providing electric service in Indian River Shores as provided by general law. Indian River Shores alleges that because Vero Beach is not providing electric service in Indian River Shores as provided by general law, it requires Indian River Shores' consent to do so. Indian River Shores argues that it gave Vero Beach this consent in the 1968 Contract and in the 1986 Franchise Agreement but that Vero Beach will lose this consent when the Franchise Agreement expires on November 6, 2016. Indian River Shores maintains that Vero Beach will be in violation of the Florida Constitution if it provides electric service within Indian River Shores without Indian River Shores' consent.

Indian River Shores contends that we have acknowledged that an order approving a territorial agreement between a municipal utility and an investor-owned utility does not provide a municipal utility the inherent statutory authority to provide electric service outside its municipal boundaries. Indian River Shores alleges that in Order No. PSC-10-0206-PAA-EU, issued Apr. 5, 2010, in Docket No. 090530-EU, *In re: Joint petition for approval to amend territorial agreement between Progress Energy Florida, Inc. and Reedy Creek Improvement District*, (*Reedy Creek Order*), when a development area was de-annexed from the Reedy Creek Improvement District, we "saw the need" to modify the territorial agreement because pursuant to

its charter, Reedy Creek Improvement District cannot furnish retail electric power outside of its boundaries.

Indian River Shores argues that because its consent is required, we must modify the Territorial Orders as requested in the Petition as a matter of law. Indian River Shores maintains that we may not consider any of the factors relative to territorial disputes in Section 366.04(2)(e), F.S., and Rule 25-6.0441, F.A.C., or to territorial agreements in Section 366.04(2)(d), F.S., and Rule 25-6.0440, F.A.C. Indian River Shores explains that it is not asking us to redraw a service territory boundary between Vero Beach and FPL based on a statutory or rule criteria, factor-by-factor determination of which utility is best suited to serve considering the nature of the disputed area, ability of competing utilities to provide reliable service, their costs to provide service and similar evidence, and the avoidance of uneconomic duplication of distribution and subtransmission facilities. Indian River Shores alleges that even if territorial dispute criteria are relevant, the thrust of the Petition is its challenge to Vero Beach's legal ability to serve, which is one of those criteria.

Vero Beach argues that the Petition should be dismissed as being barred by the doctrine of administrative finality because it does not meet the standard for modifying the Territorial Orders. Vero Beach contends that the doctrine of administrative finality is one of fairness, based on the premise that the parties and the public may rely on our orders. Vero Beach states that we may only modify a territorial order upon a "specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified." *Peoples Gas*, 187 So. 2d at 339. Vero Beach argues that Indian River Shores' alleged changed circumstance – expiration of the Franchise Agreement and Indian River Shores' withdrawal of its consent for Vero Beach to operate in Indian River Shores – is not a changed circumstance relevant to the statutory criteria and factors that we considered in approving the Vero Beach-FPL territorial agreements through the Territorial Orders. Vero Beach states that we specifically found in the Territorial Orders that each version of the Vero Beach-FPL territorial agreements was in the public interest and consistent with our Grid Bill authority to avoid uneconomic duplication of facilities.

Vero Beach further argues that there is no requirement and nothing concerning the need for Indian River Shores' consent in any of the statutes or rules relating to our Grid Bill jurisdiction, the territorial agreements between FPL and Vero Beach, or in the Territorial Orders. Vero Beach maintains that Indian River Shores' consent – if it existed – never had anything to do with the FPL-Vero Beach territorial agreements or Territorial Orders. Vero Beach alleges that it has been providing electricity to Indian River Shores for at least 63 years and that if Indian River Shores ever had a constitutional right to be protected against Vero Beaches' exercise of its power to provide electric service in Indian River Shores, Indian River Shores waived that right many years ago.

Vero Beach alleges that in reliance on the Territorial Orders, Chapter 366, F.S., other legal authority, and the actions of Indian River Shores, Vero Beach has installed, operated, and maintained its electric system facilities for the purpose of providing electric service to its service

territory. Vero Beach states that in fulfilling this necessary public purpose, it has invested tens of millions of dollars, borrowed tens of millions of dollars, and entered into long-term power supply projects and related contracts involving hundreds of millions of dollars of long-term financial commitments.

Vero Beach contends that Indian River Shores' list of public interest considerations for modifying the Territorial Orders has nothing to do with our Section 366.04(2), F.S., territorial jurisdiction or our Section 366.04(5), F.S., Grid Bill responsibilities. Instead, Vero Beach alleges the list is merely a pretextual claim based solely on Indian River Shores' interest and not on the general public interest. Vero Beach further argues that the Petition's list of public interest considerations ignores the impacts that the requested modification to the Territorial Orders would have on the 32,000 customers served by Vero Beach outside Indian River Shores.

C. Analysis and Conclusion

1. The Petition does not show a change in circumstances that led to issuance of the Territorial Orders.

Article VIII, Section 2(c) of the Florida Constitution did not require us to obtain the consent of Indian River Shores in 1972 or subsequent proceedings as a prerequisite, or condition precedent, to our approving the territorial agreements between FPL and Vero Beach. Article VIII, Section 2, Municipalities, states:

> (c) ANNEXATION. Municipal annexation of unincorporated territory, merger of municipalities, and exercise of extra-territorial powers by municipalities shall be as provided by general or special law.

A plain reading of Article VIII, Section 2(c) is that Vero Beach's authority to supply electricity outside its boundaries must come from general or special law. Vero Beach is providing electric service to customers in the territory approved in the Territorial Orders as provided by general law, Section 366.04, F.S. There is no additional constitutional requirement in Article VIII, Section 2(c) for us to obtain Indian River Shores' consent as a condition precedent to approving the territorial agreements between FPL and Vero Beach. Likewise, Section 366.04, F.S., contains no requirement for us to obtain Indian River Shores' consent as a condition precedent to approving the territorial agreements between FPL and Vero Beach in order for Vero Beach to provide electric service within Indian River Shores.

We disagree with Indian River Shores' argument that the constitutional phrase "exercise of extra-territorial powers by municipalities shall be as provided by general or special law" means that Section 366.04(2)(d), F.S., is not general law authorizing Vero Beach to provide electric service in Indian River Shores pursuant to the Territorial Orders. In *Ford v. Orlando Utilities Commission*, 629 So. 2d 845, 847 (Fla. 1994), relied upon by Indian River Shores, the Court found that where a municipality locates an electrical generating plant on its property in another county to supply electricity to that municipality's residents, but does not supply any electrical power to the county residents, the property is exempt from ad valorem taxation. *Ford*

found that the Orlando Utilities Commission had statutory power to acquire and operate a utility plant in a neighboring county and that production of energy was a municipal purpose, and therefore it was exempt from taxation by the neighboring county. *Ford* does not address or support Indian River Shores' argument that Section 366.04, F.S., is not the general law pursuant to which Vero Beach is providing electric service to Indian River Shores.

We also disagree with Indian River Shores' characterization that we have acknowledged that a territorial order does not provide a municipal utility with the inherent statutory authority to provide electric service outside its municipal boundaries. In the *Reedy Creek Order*, cited by Indian River Shores for this proposition, a joint petition to amend the petitioners' territorial agreement was brought to us for approval in order to reflect de-annexation of a planned development area from the Reedy Creek Improvement District political boundary and to avoid any potential for uneconomic duplication of electric facilities. We approved the petition pursuant to Section 366.04(2)(d), F.S., giving consideration to factors of Rule 25-6.0440(2), F.A.C., and noting that there were no existing customers affected by the proposed territory amendment. Our order stated that the joint petition alleged that Reedy Creek Improvement District, pursuant to its charter, could not furnish retail electric power outside of its boundary. We found that the amended territorial agreement appeared to eliminate existing or potential uneconomic duplication of facilities and did not cause a decrease in the reliability of electric service to existing or future ratepayers. There was no issue before us concerning whether a municipality providing service within the boundaries of another municipality under a territorial order is considered to be providing service pursuant to general law.

Rule 25-6.0441(2)(d), F.A.C., provides that in resolving territorial disputes, we may consider customer preference if all other factors are substantially equal. Rule 25-6.0442, F.A.C., provides that any substantially affected customer shall have the right to intervene in proceedings to approve a territorial agreement or resolve a territorial dispute. However, Indian River Shores did not participate in any of the four FPL – Vero Beach territorial agreement dockets that we decided. Further, it does not appear that any issue was raised in any of those proceedings concerning the need for Indian River Shores' consent as a condition precedent to our approving the territorial agreements. In addition, neither the 1968 Contract nor the Franchise Agreement makes any reference to Article VIII, Section 2(c), nor do they contain any language that Indian River Shores is giving temporary consent to Vero Beach as a condition precedent to our approving the territorial agreements between FPL and Vero Beach.

Even if the 1968 Contract or the Franchise Agreement were interpreted as containing language whereby Indian River Shores gave its temporary consent to Vero Beach to provide electric service within Indian River Shores, that language would not affect the validity of the Territorial Orders. In the case of conflict between Commission and municipality jurisdiction, our lawful orders shall in each instance prevail. *See Indian River County*, 191 So. 3d at 897 (citing to Section 366.04(1), F.S.). Expiration of the Franchise Agreement on November 6, 2016, will not affect the validity of the Territorial Orders. Vero Beach will continue to have the right and obligation to provide electric service to the entire territory within the boundaries established in the Territorial Orders, including that portion of Indian River Shores located south of Old Winter Beach Road. *See Id.* (affirming our order declaring that upon expiration of the franchise

agreement between Vero Beach and Indian River County on March 4, 2017, Vero Beach has the right and obligation to continue to provide retail electric service in the territory described in the Territorial Orders).

Because Indian River Shores' consent was not required by the Florida Constitution or Section 366.04, F.S., for our approval of the FPL – Vero Beach territorial agreements, Indian River Shores' alleged withdrawal of consent is not a change in any circumstance that we considered or relied upon in issuing the Territorial Orders. For this reason, Indian River Shores' alleged withdrawal of consent when the Franchise Agreement expires on November 6, 2016, is not a change in circumstance requiring modification of the Territorial Orders.

2. The Petition fails to show that modifying the Territorial Orders is necessary to the public interest or that it would not be detrimental to the public interest.

Even if the issue of Indian River Shores' consent could be considered a changed circumstance supporting modification of the Territorial Orders, the Territorial Orders may only be modified if necessary to the public interest. We disagree with Indian River Shores' argument that we must modify the Territorial Orders without giving any consideration to our legislatively mandated responsibility over territorial agreements under Section 366.04(2), F.S. In order to modify the Territorial Orders as requested by Indian River Shores, by transferring the territory containing approximately 3000 customers located south of Old Winter Beach Road from Vero Beach to FPL, we must examine the factors normally considered under Section 366.04(2)(d) and (e), F.S., and Rules 25-6.0440 and 25-6.0441, F.A.C.

Under these statutes and rules, in order to determine whether modification of the Territorial Orders is in public interest, we would need to consider criteria such as the terms and conditions pertaining to implementation of the transfer of customers, information with respect to affected customers, the reasonableness of the purchase price of any facilities being transferred, the effect of the transfer on reliability of electrical service to the existing or future ratepayers of FPL and Vero Beach, the reasonable likelihood that the modification will eliminate existing or potential uneconomic duplication of facilities, the capability of FPL and Vero Beach to provide reliable electric service within the disputed area with their existing facilities, and the cost to FPL and Vero Beach to provide distribution and subtransmission facilities to the disputed area presently and in the future. Additionally, under Section 366.04(5), F.S., we must determine what impact the requested modification would have on the coordinated electric power grid in Florida and to assure the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

Indian River Shores argues that the statutory and rule criteria for approval of territorial agreements and resolution of territorial disputes are inapplicable to its Petition. Nonetheless, it alleges that modifying the Territorial Order would be in the public interest because the transfer would give customers access to FPL's energy conservation programs, deployment of solar generation, smart meters, FPL's storm hardening initiatives, highly regarded management expertise, and high customer satisfaction ratings. These reasons, even if true, are insufficient to

demonstrate that modifying the Territorial Orders is necessary in the public interest or that modification would work no detriment to the public interest as a whole.

Indian River Shores states that its residents are overwhelmingly in favor of having FPL as the single electric provider within Indian River Shores. Indian River Shores asks us to ensure that Indian River Shores residents currently served by Vero Beach will be transitioned to service by FPL in an orderly and efficient manner. However, neither FPL nor Vero Beach has asked us to modify the Territorial Orders by approving a territorial agreement or resolving a dispute between them. FPL alleges in its Petition to Intervene that it is ready, willing, and able to serve all of Indian River Shores residents "*assuming reasonable terms were reached for the acquisition of the City of Vero Beach's electric facilities in that area*." (emphasis added) However, there is no indication in this docket of any agreement for transfer of lines or facilities from Vero Beach to FPL. We do not have jurisdiction to order Vero Beach to sell its facilities to FPL. There is no information before us concerning how a transfer of facilities would occur, the costs or facilities involved, impact of such a transfer on all affected customers, or other information we normally consider in approving a territorial agreement or resolving a territorial dispute. Without this information, we cannot ensure an orderly and efficient transition of service from Vero Beach to FPL or determine whether such a transfer would be necessary in the public interest.

For the reasons set forth above, we deny Indian River Shores' Petition for Modification of Territorial Order Based on Changed Legal Circumstances Emanating from Article VIII, Section 2(c) of the Florida Constitution because: (1) it fails to demonstrate that modification of the Territorial Orders is necessary in the public interest due to changed circumstances not present in the proceedings which led to the Territorial Orders; and (2) it fails to show that modification would not be detrimental to the public interest.

It is, therefore,

ORDERED that the City of Vero Beach's Motion to Intervene and Florida Power & Light Company's Petition to Intervene are denied as set forth in the body of this Order. However, the City of Vero Beach and Florida Power & Light Company must be named as parties in any administrative or judicial challenge to this Order. It is further

ORDERED that the Town of Indian River Shores' Motion to Strike is denied as set forth in the body of this Order. It is further

ORDERED that the City of Vero Beach's Motion to Dismiss is granted in part, with prejudice, and denied in part as set forth in the body of this Order. It is further

ORDERED that the Town of Indian River Shores' Petition for Modification of Territorial Order Based on Changed Legal Circumstances Emanating from Article VIII, Section 2(c) of the Florida Constitution is denied as set forth in the body of this Order. It is further

ORDERED that the denial of the Town of Indian River Shores' Petition, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating

Order unless an appropriate petition protesting the proposed agency action is received by the Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date and in the form as set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 4th day of October, 2016.

Carlotta S Stauffer

CARLOTTA S. STAUFFER
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

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

DISSENT

Commissioner Edgar dissents from the majority decision as follows:

I respectfully dissent with the majority vote approving our staff's recommendation that the Commission should deny on the merits Indian River Shores' Petition for Modification of Territorial Order Based on Changed Legal Circumstances Emanating from Article VIII, Section 2(c) of the Florida Constitution because: (1) it fails to demonstrate that modification of the Territorial Orders is necessary in the public interest due to changed circumstances not present in the proceedings which led to the Territorial Orders; and (2) it fails to show that modification would not be detrimental to the public interest. By a 4-1 vote, the majority voted to adopt staff's recommendation to deny the petition to change the existing territorial order. I disagree with this decision for the Indian River Shores captive customers, noting that there are no critical dates or procedural deadlines compelling Commission action at this time. I believe this case presents a unique problem and further discussion should include Commission authority and resources devoted to a mutually acceptable resolution.

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to an administrative hearing.

The Proposed Agency Action Order Denying Petition for Modification of Territorial Order Based on Changed Legal Circumstances is preliminary in nature. Any person whose substantial interests are affected by this proposed agency action may file a petition for hearing as provided by Sections 120.569 and 120.57, Florida Statutes, and pursuant to the requirements of Rule 25-22.029, Florida Administrative Code and Rule 28-106.201 or Rule 28-106.301, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on October 25, 2016.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

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

The Commission’s Order Denying Intervention, Denying Motion to Strike, and Denying in Part and Granting in Part Motion to Dismiss are preliminary, procedural, or intermediate in nature. Any party adversely affected by the Commission’s Order Denying Intervention, Denying Motion to Strike, and Denying in Part and Granting in Part Motion to Dismiss may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final agency decision will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.