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 FILED: November 4, 2016

THE CITY OF VERO BEACH'S CROSS-PETITION FOR FORMAL ADMINISTRATIVE HEARING ON PROPOSED AGENCY ACTION ORDER NO. PSC-16-0427-PAA-EU

The City of Vero Beach ("Vero Beach" or the "City"), pursuant to Rules 25-22.029(3) and 28-106.201, Florida Administrative Code ("F.A.C."), hereby files this cross-petition for formal administrative hearing on the Florida Public Service Commission's ("Commission") Notice of Proposed Agency Action Order Denying Petition for Modification of Territorial Order Based on Changed Legal Circumstances, Order No. PSC-16-0427-PAA-EU (the "PAA Order"). In summary, Vero Beach supports the conclusions set forth in the PAA Order (a) that there has been no legally cognizable change of either the legal or factual circumstances that led to issuance of the Territorial Orders or upon which the Commission based its decisions to issue the Territorial Orders; and (b) that the Town has failed to show that modifying the Territorial Orders is necessary to the public interest and likewise failed to show that such modification would not be detrimental to the public interest. However, on October 25, 2016, the Town of Indian River Shores (the "Town") filed a Petition for an Expedited

Administrative Hearing on a Proposed Agency Action Pursuant to Section 120.57(2), Florida Statutes (the "PAA Petition" or the "Town's PAA Petition").[1] The Town's PAA Petition rendered the PAA Order a "legal nullity" with respect to the PAA portion of the PAA Order - in which the Commission denied the Town's Original Petition on the merits, and thus the Town's PAA Petition commenced de novo proceedings on the issues raised in its Original Petition filed in March.

In its PAA Petition, the Town asserts that no material facts are in dispute in this proceeding and suggests that a non-evidentiary hearing pursuant to Section 120.57(2), Florida Statutes ("F.S."), is appropriate. See PAA Petition at 3. However, Vero Beach disputes a number of the facts alleged by the Town, and Vero Beach further asserts that there are additional facts relevant and germane to the gravamen of these proceedings. Accordingly, Vero Beach is filing this Cross-Petition for the following reasons:

A. to allege additional facts that it believes are material to the resolution of this matter;

B. to dispute numerous facts alleged to be "undisputed" in the Town's PAA Petition;

C. to request a formal administrative proceeding, including proceedings pursuant to Section 120.57(1), Florida Statutes, regarding the facts alleged by the Town and disputed by Vero Beach, as well as regarding the facts

[1] The Town styled its Petition Town of Indian River Shores, Petitioner, vs. Florida Public Service Commission, Respondent. However, Vero Beach has retained the style originally assigned to this docket and used in the PAA Order. To distinguish the Town's PAA Petition from the Town's petition that initiated Docket No. 160049-EU, the initiating petition is referred to herein as the "Town's Original Petition." All references to the Florida Statutes herein are to the 2016 edition.

alleged by Vero Beach to the extent that those facts are disputed by the Town; and

D. to preserve its right to contest the Town's standing to participate in this proceeding.

In this Cross-Petition, Vero Beach also responds to the requests made by the Town in its PAA Petition that the proceedings herein be expedited and that the Commission hold a hearing in Indian River Shores. As explained herein, Vero Beach opposes both requests. In addition, Vero Beach will timely file a motion to dismiss on the basis that the Town does not have standing to bring this action. In further support of its Cross-Petition, Vero Beach states as follows:

PROCEDURAL BACKGROUND

1. The name, address, and telephone number of the City of Vero Beach are as follows:

The City of Vero Beach
James R. O'Connor, City Manager
1053 20th Place
Vero Beach, Florida 32960

2. All pleadings, orders and correspondence should be directed to Vero Beach's representatives as follows:

Robert Scheffel Wright (schef@gbwlegal.com)
John T. LaVia, III (jlavia@gbwlegal.com)
Gardner, Bist, Bowden, Bush, Dee, LaVia & Wright, P.A.
1300 Thomaswood Drive
Tallahassee, Florida 32308
Telephone: (850) 385-0070
Facsimile: (850) 385-5416

with a courtesy copy to:

Wayne R. Coment, City Attorney (wcoment@covb.org)
City of Vero Beach
P.O. Box 1389
1053 20th Place
Vero Beach, Florida 32961-1389
Telephone: (772) 978-4730
Facsimile: (772) 978-4733

3. The agency affected by this Cross-Petition is:

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850.

4. Vero Beach received notice of the PAA Order by e-mail from the Commission Clerk on October 4, 2016. Vero Beach was served with a copy of the Town's PAA Petition by e-mail on October 25, 2016. Accordingly, pursuant to Rule 25-22.029(3), F.A.C., this Cross-Petition is timely filed.

STATEMENT OF VERO BEACH'S AFFECTED SUBSTANTIAL INTERESTS

5. Vero Beach has owned and operated a municipal electric utility system since 1920, when it purchased the original small power plant, poles, and lines from the Vero Utilities Company. Today, Vero Beach owns, maintains, and operates an electric utility system consisting of transmission lines and related facilities, and distribution lines and facilities (collectively the "City Electric System"), which serves approximately 34,800 customer accounts (meters). Accordingly, Vero Beach is an "electric utility" pursuant to Section 366.02(2), Florida Statutes.

6. Vero Beach currently provides electric service to approximately 34,800 customer accounts (meters), of which approximately 13,200 accounts (meters) are located within the Vero Beach city limits and approximately 21,600 accounts (meters) are located outside the city limits. Approximately 3,000 of the outside-the-city-limits customer accounts (meters) are located in the Town of Indian River Shores, with the balance located in unincorporated Indian River County. Vero Beach provides safe and reliable service to all customers within its service territory described in territorial agreements with Florida Power & Light Company ("FPL") that were approved by the following Commission orders: In re: Application of Florida Power and Light Company for approval of a territorial agreement with the City of Vero Beach, Docket No. 72045-EU, Order No. 5520 (August 29, 1972); In re: Application of Florida Power & Light Company for approval of a modification of territorial agreement and contract for interchange service with the City of Vero Beach, Florida, Docket No. 73605-EU, Order No. 6010 (January 18, 1974); In re: Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas, Docket No. 800596-EU, Order No. 10382 (November 3, 1981); In re: Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas, Docket No. 800596-EU, Order No. 11580 (February 2, 1983); and In re: Petition of Florida Power & Light Company and the City of Vero Beach for Approval of Amendment of a Territorial Agreement, Docket No. 871090-EU, Order No. 18834 (February 9, 1988) (collectively referred to as the "Commission's Territorial Orders" or simply the "Territorial Orders").

7. As the incumbent utility providing service pursuant to and consistently with the Commission's Territorial Orders, which were issued by the Commission as provided by Section 366.04(2), Florida Statutes, Vero Beach's substantial interests will be directly

affected by the Commission's actions regarding the issues raised in the Town's PAA Petition. Moreover, in the PAA Order, in denying Vero Beach's motion to intervene in the PAA proceedings, the Commission stated:

> 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.[2]

PAA Order at 4. Accordingly, Vero Beach respectfully requests that the Commission designate Vero Beach as a full party to this docket.

[2] Inexplicably, the Town ignored this clear instruction from the Commission and did not identify or name either Vero Beach or FPL as a party in the PAA Petition.

FACTUAL BACKGROUND, INCLUDING DISPUTED ISSUES OF MATERIAL FACT[3]

8. The City of Vero Beach was initially incorporated in 1919 as the City of Vero, and reincorporated as the City of Vero Beach in 1925. Vero Beach has operated a municipal electric utility system since 1920, when it purchased the original small power plant, poles, and lines from the Vero Utilities Company. Naturally, Vero Beach's service area has grown since 1920, and during the intervening 96 years, Vero Beach has served customers inside and outside the city limits, pursuant to its own ordinances, pursuant to requests by customers living outside the city limits, pursuant to its powers under Florida Statutes, and, since at least 1972, pursuant to the Territorial Orders of the Commission approving Vero Beach's service area in territorial agreements with FPL. Further, since 1974, Vero Beach has provided service to the customers in its Commission-approved service territory pursuant to the Commission's Territorial Orders issued as provided by Section 366.04(2), Florida Statutes.

9. Today, Vero Beach provides retail electric service in the service area described in its territorial agreement with FPL, which agreement has been approved, with amendments over time, by the Territorial Orders. Vero Beach's service area, as approved

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[3] Vero Beach strongly believes that there are many additional facts that are material to the issues to be resolved in this case and that support the PAA Order, but which were not identified by the Town in its PAA Petition. For example, the PAA Petition does not even recount the full history of the subject Territorial Orders. Thus, Vero Beach is providing a complete statement of the material facts at issue in this proceeding. Vero Beach recognizes that some of these additional material facts may not be disputed by the Town and may be subject to stipulation by the parties. Because the Town's PAA Petition effectively triggers a de novo proceeding on at least the main issues in this proceeding, Vero Beach believes it is necessary to set forth all relevant and material facts in this Cross-Petition, even though many of these facts support the PAA Order.

by the Commission, includes the area within the city limits, areas outside the city limits in unincorporated Indian River County, and most of the Town of Indian River Shores. Vero Beach has served areas outside the city limits since the 1930s, and probably since as early as the 1920s. The earliest known documentary evidence of Vero Beach providing electric service outside the city limits is found in Chapter No. 599 of Vero Beach's ordinances, enacted on October 21, 1952.[4] That ordinance prescribed a system of contributions in aid of construction ("CIAC") to apply where Vero Beach was requested to extend service outside the city limits, by which Vero Beach would furnish a transformer and all labor, and the applicant would pay a CIAC for the cost of the materials other than the transformer. The ordinance also included provisions by which Vero Beach would annually refund to the customer who paid the CIAC 25 percent of the customer's total electric purchases in the preceding year, until the entire CIAC had been refunded to the customer. This ordinance clearly shows that Vero Beach was serving outside the city limits at least as early as that year.

10. The Town was incorporated in June 1953. Although a detailed history of electric service in the Town is not readily available, Vero Beach asserts that there were at least some persons living in the Town at that time, that they were receiving electric service, and that whatever electric service was provided in the Town in those early years was provided by the Vero Beach electric system.

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

11. Although the history is unclear as to exactly when the Town itself first became a customer of the Vero Beach electric system, .e.g., at the Town Hall, police station, fire station, or other such facilities, a history of the Town published on the Town's website indicates that the Town was a Vero Beach electric customer at least some time before 1972. The history states, "A new $130,000 Town Hall was dedicated December 1972, and by 1975 a $155,000 fire station was completed." Converse, C. Vaughn, and Simms, Henry F. (Ed.), "Our Town," at 2, published on the Town's website at http://www.irshores.com/Town-History.html. Given the reference to the "new" Town Hall being dedicated in 1972, it is reasonable to infer that there was an "old" Town Hall in existence sometime before 1972, and that such earlier Town Hall was receiving electric service from Vero Beach.

12. In November 1971, FPL and Vero Beach entered into a territorial agreement that defined the areas in the Vero Beach-Indian River County area where each would serve. In January 1972, FPL applied to the Commission to approve that original territorial agreement between FPL and Vero Beach.[5] FPL's Application was based on Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), cert. denied, 395 U.S. 909 (1969), which held that the Commission had the "implied power" to "approve territorial agreements which are in the public interest," and which recognized that "a[n] individual has no

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

organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Id. at 307-08. In its Application, FPL asked the Commission to approve the Territorial Agreement, including the allocation of service areas, because both FPL and Vero Beach sought to avoid "needless and wasteful expenditures of time and money" and "dangerous, unnecessary and uneconomical conditions" that were "not in the public interest." FPL Application at 3.

13. By 1972, Vero Beach had been providing electric service outside the city limits, in unincorporated areas of Indian River County, for at least 20 years, and probably for close to 50 years. In fact, FPL's Application stated that "The City served approximately 10,600 customers in 1971, more than 50% of whom were located outside the boundaries of the City." FPL's Application at 2. The Commission held a public hearing in Vero Beach on the proposed 1972 territorial agreement, at which two customers objected to being transferred from being served by FPL to the City, and two customers did not object to being transferred from the City to FPL. There is no evidence in the record of that docket that either the Town, per se, or any representative or officer of the Town, participated in those proceedings. The Commission's Order also stated the following: "No residents of Indian River Shores appeared although that is the largest area under development in which competition exists; the proposed boundary reserves this area to the city." Order No. 5520 at 2.[6] The records of the Commission's other dockets

[6] In its Original Petition, the Town referred to a letter sent by the Town's Mayor, Roland B. Miller, to the Chairman of the Commission, Jess Yarborough. See Original Petition at 5 and Ex. E thereto. The letter speaks for itself, but the letter makes no reference to the Town having "consented" to allow Vero Beach to provide service in the Town, nor to any

in which it addressed the territorial agreements between FPL and Vero Beach, and in which the Commission issued its Territorial Orders approving those agreements, likewise show no evidence that any official, representative, or citizen of the Town of Indian River Shores ever appeared to oppose any of the FPL-Vero Beach territorial agreements or the issuance of any of the Territorial Orders.

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

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

16. In 1974, the Legislature enacted the Grid Bill, Chapter 74-196, Laws of Florida (codified in Sections 366.015, 366.04, 366.05, 366.055, and 366.11, Florida

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permission or consent to Vero Beach's use of the Town's rights-of-way; indeed, the letter does not mention rights-of-way at all. The letter also made clear, on both pages 1 and 2 thereof, that the Town considered that the territorial agreement was "none of our concern."

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

17. In 1980, FPL and Vero Beach again applied for approval of an amended territorial agreement. In re: Application of Florida Power & Light Company and the City of Vero Beach for Approval of an Agreement Relating to Service Areas, Docket No. 800596-EU, Order No. 11580 (February 2, 1983). In that docket, the Commission initially issued a proposed order to approve the parties' territorial agreement in November 1981. The proposed order offered affected persons the opportunity to request a hearing, and a "timely petition was filed on behalf of 106 customers served by Vero Beach who apparently did not want to be transferred to FPL." Id. at 1. There is no record evidence of the Town having participated in the proceedings in Docket No. 800596-EU.

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

customers to being transferred as provided by the new territorial agreement, the Commission concluded by stating the following:

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

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

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

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

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

20. In 1986, following on the already considerable history of Vero Beach serving outside its corporate boundaries for several decades and inside the Town for more than 30 years, Vero Beach and the Town of Indian River Shores entered into a franchise agreement (hereinafter the "Franchise Agreement"). In 1987, Vero Beach and Indian River County also entered into a 30-year franchise agreement. Neither Indian River Shores nor the County had ever had a franchise agreement with Vero Beach before 1986 or 1987, respectively.

21. Prior to 1986, the Town never had a franchise agreement with Vero Beach, as the 1968 Contract is not a franchise agreement. Only one paragraph (paragraph 6) of the 1968 Contract addresses Vero Beach's provision of electric service, and nothing in that paragraph makes any reference to a franchise, or any reference to a franchise fee, or to "consent," or to any matters that normally comprise the subject matter of franchise agreements. The subject paragraph 6 of the 1968 Contract provides in its entirety as follows:

> 6. The City also agrees to furnish electric power to any applicant therefor within the corporate limits of the Town, from a distribution line furnished by the City and will bill each customer therefor at the rate fixed and charged from time to time for such current to persons within the corporate limits of the City, plus 10% additional thereto, and each consumer will be billed direct by the City for such service and will be subject to all rules and regulations of the City with regard to the disconnection of such service upon non-payment of bills so furnished.

Paragraph 7 states that the term of the 1968 Contract is 25 years and that it is "predicated upon the Town furnishing to the City all necessary easements and rights of way for the location of the facilities required under the terms of this agreement." Vero Beach's research to date has been unable to discover any such easements relating to electric facilities, although research did find certain easements that were conveyed with respect to Vero Beach's water system. Notwithstanding the Town's apparent failure to provide written easements or other documents, Vero Beach in good faith proceeded to provide electric service to customers in the Town as requested. In so doing, Vero Beach naturally and reasonably used areas adjacent to the existing roads in the Town.

22. It bears noting that the Commission's express statutory territorial jurisdiction had been in effect for more than a decade before the Franchise Agreement was executed, and that the Commission's jurisdiction and power to approve territorial agreements had been in effect, as upheld and approved by the Florida Supreme Court, for two decades before the Franchise Agreement existed. Although authorized to do so, the Town has never asked Vero Beach to collect and remit franchise fees to the Town.

23. In 1987, FPL and Vero Beach again petitioned the Commission for approval of an amendment to their territorial agreement, by which FPL and Vero Beach agreed that the City would serve a ***new subdivision***, Grand Harbor, which straddled the existing territorial dividing line and ***which, at the time, had no customers***. In approving the amendment, the Commission stated the following:

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

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

24. While Vero Beach believes that the information presented in ¶¶ 27-29 of the Town's PAA Petition, relating to an offer by FPL to purchase the facilities and

customer accounts of Vero Beach's electric system in the Town, is irrelevant to the Town's purported "constitutional" claim as well as irrelevant to the substantive and jurisdictional issues that the Town raises in the PAA Petition, Vero Beach provides the following additional facts relative to those communications. After receiving the letter from FPL (a copy of which is included in the exhibits to the Town's PAA Petition, and a copy of an updated letter dated August 9, 2016, is included as Exhibit A to this Cross-Petition), Vero Beach representatives met with FPL representatives to discuss their respective views of the terms of a possible transaction of the scope contemplated by FPL's letter. FPL stated its position relative to certain values, and Vero Beach's representatives respectfully explained that it was and is Vero Beach's position that any such transaction would have to keep ***all*** of Vero Beach's remaining customers (i.e., those inside the city limits and those in the unincorporated areas of Indian River County where Vero Beach serves) whole, as compared to the base case scenario in which Vero Beach would continue to serve customers inside the Town pursuant to the Commission's Territorial Orders. Because the proposed transfer of customers in the Town would not be accompanied by corresponding reductions in several components of the fixed costs of Vero Beach's electric system, Vero Beach viewed, and continues to view, any such transaction using the conceptual framework of the "Ratepayer Impact Measure" test, i.e., that the compensation received for the transaction would have to be sufficient to keep ***all*** of Vero Beach's remaining customers whole.

25. The Town's PAA Petition, at page 7, ¶¶27-29, mentions only FPL's August 2015 and August 2016 offers "to purchase the City's electric utility system in the Town

for $30 million cash." This information is incomplete. First, as seen from FPL's letter to Vero Beach Mayor Jay Kramer, dated August 9, 2016, FPL's offer was to purchase the following:

a. the roughly 3,000 customer accounts located in Indian River Shores that are currently served by the COVB municipal electric system;

b. Vero Beach's facilities inside the Indian River Shores boundaries . . . and the associated equipment and infrastructure that provide electrical distribution service directly to the Indian River Shores Customers, as well as additional customer information;

c. COVB's rights, title and interest in the COVB 138kV transmission system; and

d. Seller's [Vero Beach's] rights, title and interest in the Fort Pierce Utilities Authority ("FPUA") Joint Facilities.

In other words, the scope of FPL's offer to purchase was substantially greater than as characterized by the Town's PAA Petition.

26. Further, the statement made by Indian River Shores' Town Manager, Robert Stabe, at the Commission's agenda conference on September 13, 2016, that Vero Beach did not make a counter-proposal in response to FPL's offer of $30 million,[7] is patently false. The Vero Beach City Council, at its meeting four weeks earlier, on August 16, 2016, voted to "make a counteroffer to FPL to sell the Shores business for

[7] Docket No. 160049-EU, Transcript of September 13, 2016 Agenda Conference, FPSC Document No. 07705-16 at 21-22.

$47 million." City of Vero Beach, Regular City Council Minutes, Meeting of August 16, 2016 at 16. (A copy of the complete discussion of the electric sale issue in the City Council's August 16 Minutes is attached as Exhibit B to this Cross-Petition.) As explained elsewhere in the Council's August 16 Minutes, the $47 million value was the rounded sum of (a) $42.4 million, the amount estimated by Vero Beach's team of five consultants as being necessary to keep all of Vero Beach's remaining customers whole vis-à-vis the cost shifts that would otherwise occur if Vero Beach were no longer to serve its customers in the Town, and (b) $4.8 million, which was an estimate prepared by one of Vero Beach's experts to address potential future costs that could not presently be accounted for, also referred to as "contingent liabilities." (For a detailed explanation of the contingent liabilities issue and estimate, see also Exhibit C, esp. the third through fifth pages of that exhibit, which consist of a letter from WHH Enterprises, one of Vero Beach's consultants, and a table showing the estimated contingent liability exposure to Vero Beach, and the Town's proportionate share thereof, associated with the three large power supply projects in which Vero Beach participates and which serve all of Vero Beach's customers.) Vero Beach's $47 million counter-offer was also explained in detail in a letter from Jay Kramer, in his capacity as a citizen of Vero Beach and not in his official capacity as Mayor, to the Town's Mayor Brian Barefoot. (Mr. Kramer's letter, with attachments, and Mayor Barefoot's letter to which Mr. Kramer's letter responds, are contained in Exhibit C to this Cross-Petition.)

27. Again noting that the Town's allegations regarding action by the Vero Beach Utilities Commission are not relevant to the issues in this case, Vero Beach must

point out that the Town's representation is inaccurate. The Utilities Commission consists of at least 8 members, but only 5 were present on the date of the vote. It is true that the five members present voted to recommend acceptance of FPL's offer, but the vote was by a bare quorum of the Utilities Commission and not by all members. (The first page of Exhibit K to the Town's PAA Petition is the first page of the Utilities Commission minutes from August 9, showing that three members were absent on an "excused" basis.)

28. Today, pursuant to the Commission's Territorial Orders issued as provided by Chapter 366, Florida Statutes, pursuant to its home rule powers, pursuant to its powers under Chapter 166 and Chapter 180, Florida Statutes, and pursuant to other legal authority, Vero Beach operates an electric utility system consisting of transmission lines and related facilities, and distribution lines and facilities (collectively the "City Electric System"), which serves approximately 34,800 customer accounts (meters), of which approximately 13,200 accounts (meters) are located within the city limits and approximately 21,600 accounts (meters) are located outside the city limits. Approximately 3,000 of the outside-the-city-limits customer accounts (meters) are located in the Town of Indian River Shores, with the balance located in unincorporated Indian River County.

29. Vero Beach's transmission facilities that serve the Town consist of a line that emanates from the mainland and runs under water and underground to connect to Vero Beach's Substation No. 9 in the Town; Vero Beach owns this substation as well as the site on which it is situated. The current transmission line was installed in 1987; there was a prior line connecting the distribution substation to Vero Beach's mainland system.

Vero Beach's research to date does not indicate whether there are any formal easements or other formal documents relating to Vero Beach's rights to have its transmission line in its present location.

30. In the 1968 Contract, the Town committed to provide easements to accommodate Vero Beach's electric facilities. As noted above, Vero Beach's research to date has been unable to discover any such easements.

31. Some of Vero Beach's transmission and distribution facilities in the Town are located in County and State road rights-of-way. The majority are generally located in utility easements dedicated to the public, or to the Town, with at least one dedicated directly to Vero Beach. Approximately 95 percent of Vero Beach's distribution lines in the Town are located in dedicated utility easements.

32. In reliance on the Commission's Territorial Orders issued as provided by Chapter 366, Florida Statutes, in reliance on Chapter 366, and in exercising its home rule powers, as well as in reliance on its powers under other provisions of Florida Statutes, and other legal authority, including reliance on the fact that both Indian River Shores and Indian River County knew of and allowed Vero Beach to use public rights-of-way for decades before any franchise agreements ever existed, Vero Beach has for nearly 100 years provided safe and reliable service to its customers both inside and outside the city limits. With respect to its service to the Town and to Vero Beach's electric customers in the Town, Vero Beach has, for the past sixty-three years, installed, operated, and maintained its electric system facilities in good faith for the purpose of providing electric service to the Town and to Vero Beach's electric customers in the Town. In fulfilling

this necessary public purpose,[8] 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, involving hundreds of millions of dollars of long-term financial commitments, in order to serve all of the customers in Vero Beach's service area approved by the Commission's Territorial Orders.

FACTS IDENTIFIED BY THE TOWN AS "UNDISPUTED" WHICH VERO BEACH DISPUTES[9]

33. This case is procedurally unusual in that the filing of the Town's PAA Petition effectively imposes upon the Commission the requirement to hold formal administrative proceedings on the Town's PAA Petition, while at the same time requiring both the Town and the City of Vero Beach to identify disputed issues of material fact relative to the Commission's PAA Order. See Rule 25-22.029(3), F.A.C. Vero Beach supports the PAA Order's provisions that deny the Town's Original Petition on the merits, generally at pages 16-19, and agrees with the limited factual statements made in the PAA Order. However, the Town, in its PAA Petition, makes many factual allegations that are nowhere contained in the PAA Order and then effectively claims that the Town's factual allegations form the basis for its requested relief; Vero Beach disputes many of

[8] Underscoring the necessary public purpose aspect of Vero Beach's electric operations, the Commission should consider this quote from the letter sent by the Town's Mayor Roland Miller to PSC Chairman Yarborough in 1971, "[T]he writer entered into negotiations with the City of Vero Beach back in 1958 to furnish the Town of Indian River Shores utilities, i.e. water, power and sewer, inasmuch as ***it was a physical impossibility to develop this area without these items***." (Emphasis added.)

[9] This represents an initial list of facts which Vero Beach specifically disputes. Vero Beach reserves its right to dispute other facts claimed by the Town to be "undisputed" based on information obtained through discovery in this docket.

the Town's factual allegations, because those allegations are now placed at issue and in dispute in these proceedings. The following represents an initial list of factual allegations made by the Town that Vero Beach disputes; Vero Beach reserves its rights to dispute additional "facts" alleged by the Town based on discovery in this proceeding.

34. The Town alleges as an undisputed fact that "In 1968, the Town entered into a bilateral agreement with the City which, among other things, authorized the City to provide electric service to residents 'within the corporate limits of said Town' and to occupy and use the Town's rights-of-way and other public places, for a limited term of 25 years." Town's PAA Petition at 4, ¶14. Vero Beach disputes this conclusory assertion. The 1968 Contract speaks for itself, but it is readily observed that there is no mention in that Contract of "authorization" or "consent" being given by the Town: the 1968 Contract obligated Vero Beach to provide electric service to the Town's citizens, period.[10] As stated in the 1971 letter from the Town's Mayor Roland Miller to then-PSC Chairman Jess Yarbrough, cited in footnote 7 above, the Town sought Vero Beach's help in order to support development of the Town; there was no "authorization" or "consent" given by the Town.

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[10] Further complicating this issue and potentially these proceedings, any dispute regarding the interpretation of the 1968 Contract is only resolvable by the courts of Florida. . See 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 Corporation, Docket No. 940771-EQ, Order No. PSC-95-0210-FOF-EQ (Feb. 15, 1995) at 8 ("matters of contract interpretation were properly left to the civil courts"); United Telephone Co. of Florida v. Pub. Serv. Comm'n, 496 So. 2d 116, 118 (Fla. 1986).

35. The Town alleges as an undisputed fact that "the Town . . . again granted to the City the Town's temporary consent for the City to exercise certain extra-territorial powers within the Town's corporate limits . . . ." Town's PAA Petition at 6-7, ¶20. Vero Beach disputes the allegations (a) that the 1986 Franchise Agreement, or any other agreement between the Town and Vero Beach referenced the Town's consent, and (b) that the Town actually granted consent. Vero Beach further dispute the Town's assertions that its consent or any agreement (see Town's PAA Petition at 13, ¶48) was necessary for Vero Beach to provide electric service to its customers in the Town, at any time.

36. The Town alleges as an undisputed fact that "[W]hen the Territorial Agreement was last amended in 1988 there was a formal bilateral agreement in place pursuant to which the Town gave the City temporary consent to exercise extra-territorial powers within the Town up through but not beyond November 6, 2016." PAA Petition at 6, ¶ 22. Vero Beach disputes the Town's allegations (a) that either the 1986 Franchise Agreement or any other agreement between the Town and Vero Beach referenced the Town's consent and (b) that the Town actually granted consent, and Vero Beach further disputes that the Town's consent was necessary.

37. The Town alleges as an undisputed fact that "[S]ubsequent to the execution of the 1968 Agreement, the Town has never collected franchise fees from the Town or from FPL." PAA Petition at 6, ¶ 23. This factual allegation is patently unclear – i.e., it makes no sense that the Town would ever collect franchise fees from itself – and accordingly, Vero Beach disputes it.

38. The Town alleges as an undisputed fact that "[o]n August 4, 2016, FPL made a new offer to purchase the City's electric utility system in the Town for $30 million cash." PAA Petition at 7, ¶27 (emphasis supplied). Vero Beach disputes this allegation. Exhibit J to the Town's PAA Petition, which speaks for itself, clearly identifies Vero Beach-owned assets outside of the Town that were to be included in FPL's purchase.

39. The PAA Petition alleges that modification of the Territorial Orders "would be in the public interest." See PAA Petition at 16. Vero Beach disputes this conclusory factual allegation. Determinations of whether any potential action is "in the public interest" are inherently fact-specific, and it may be said that this is particularly true of territorial service issues.[11] This allegation by the Town necessarily implicates all of the factors to be considered by the Commission pursuant to Section 366.04(2)(d)&(e),

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[11] Moreover, the Town's public interest claims are merely – and clearly – pretextual claims (apparently designed to shoehorn the Town's claims into the ambit of Peoples Gas v. Mason) based solely on the ***Town's*** interests, and not on the general "public interest," and are therefore barred by Storey v. Mayo. In another territorial case where a transfer of customers was proposed, In Re: Joint Petition for Approval of Territorial Agreement in Leon and Wakulla Counties by Talquin Electric Cooperative, Inc. and Progress Energy Florida, Inc., the Commission articulated its "longstanding Commission policy concerning the approval of territorial agreements," stating as follows:

> Our decision on whether or not to approve a territorial agreement is based on the effect the agreement will have on all affected customers, not just on whether transferred customers will benefit.

Docket No. 040231-EU, Order No. PSC-04-1106-PAA-EU at 2-3 (citing In Re: Joint Motion for Approval of Territorial Agreement and Dismissal of Territorial Dispute, Docket No. 891245-EU, Order No. 92-1071-FOF-EU at 3 (Fla. Pub. Serv. Comm'n September 28, 1992)). The ***Town's*** purported "public interest" benefits completely ignore the impacts on the approximately 32,000 customers served by Vero Beach's Electric Utility System outside the Town.

Florida Statutes, as well as the Commission's jurisdiction as provided by Section 366.04(5), Florida Statutes, "over the planning, development, and maintenance of a coordinated electric power grid through Florida to assure an adequate and reliable source of energy . . . and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities." Further, the Town's allegation also implicates the need for factual determinations regarding all of the factors in Commission Rules 25-6.0440 and 25-6.0441, F.A.C. In summary, Vero Beach disputes the Town's conclusory allegation that modification of the Territorial Orders would be in the public interest, and Vero Beach requests a formal proceeding pursuant to Section 120.57(1), Florida Statutes, on all factors identified in the above-cited statutes and rules.

40. Although the Town carefully refers to its "Unregulated Monopoly Claim," Town's PAA Petition at 10-11, ¶¶39-40, in relation to its partially dismissed Original Petition, Vero Beach wishes to make clear that, in the event that the Town attempts to make factual allegations regarding its allegations of "monopoly abuses," all such allegations will be subject to strict proof based on actual evidence.

STATEMENT OF ULTIMATE FACTS ALLEGED

41. Vero Beach supports in its entirety the factual basis and legal analysis in that parts of the PAA Order in which the Commission denied the Town's request to modify the Territorial Orders based on changed legal circumstances. In sum, there has been no legally cognizable change of either the legal or factual circumstances that led to issuance of the Territorial Orders or upon which the Commission based its decisions to issue the Territorial Orders. The Town has failed to show that modifying the Territorial

Orders is necessary to the public interest and that such modification would not be detrimental to the public interest.

42. Moreover, as points of fact, in its Territorial Orders, the Commission specifically found that each version of the Vero Beach-FPL territorial agreement was in the public interest, based principally upon the Commission's Court-approved policy and mandate – both before and after the Grid Bill was enacted – to approve territorial agreements that are in the public interest, by avoiding the uneconomic duplication of facilities. In re: Application of Florida Power and Light Company for Approval of a Territorial Agreement with the City of Vero Beach, Docket No. 72045-EU, Order No. 5520 at 1-2 ("This application was filed as the result of the implied power obtained by the Commission in judicial decisions culminating in Storey v. Mayo, . . . which makes it abundantly clear that the Commission has the power to approve territorial agreements which are in the public interest." . . . [T]he Commission finds that the evidence presented shows a justification and need for the territorial agreement; and, that the approval of this agreement should better enable the two utilities to provide the best possible utility services to the general public at a less cost as the result of the removal of duplicate facilities."); In re: Application of FPL and the City of Vero Beach for Approval of an Agreement Relative to Service Areas, Docket No. 800596-EU, Order No. 10382 (Nov. 3, 1981) at 2 ("Approval of this territorial agreement should assist in the avoidance of uneconomic duplication of facilities on the part of the parties, thereby providing economic benefits to the customers of each. Additionally, the new territorial boundary will better conform to natural or permanent landmarks and to present land development.

Thus, the proposed territorial agreement should result in higher quality electric service to the customers of both parties.") In re: Petition of Florida Power & Light Company and the City of Vero Beach for Approval of Amendment of a Territorial Agreement, Docket No. 871090-EU, Order No 18834 at 1 ("The amended agreement is consistent with the Commission's philosophy that duplication of facilities is uneconomic and that agreements eliminating duplication should be approved. Having reviewed all the documents filed in the docket, we find that it is in the best interest of the public and the utilities to approve . . . the amendment to the territorial agreement.") Nothing has changed in this regard, there is no uneconomic duplication of facilities and no threat of any such duplication, and there is therefore no statutorily cognizable basis to reopen or modify the Territorial Orders.

43. Vero Beach provides, and has for nearly a century provided, safe and reliable service to all of its customers both inside and outside the Vero Beach city limits. For the past 44 years, Vero Beach has served as provided by the Commission's Territorial Orders, and for the past 42 years, i.e., since the Grid Bill was enacted, Vero Beach has served as provided by that general statutory law of the State of Florida.

44. With regard to that portion of the PAA Order, addressing the Town's standing to file the Original Petition, Vero Beach respectfully disagrees with the Commission's findings and will renew its objections in a motion to dismiss the PAA Petition.

STATUTES AND RULES THAT REQUIRE REVERSAL OR MODIFICATION OF THE PAA ORDER

45. The portion of the PAA Order "Denying Petition for Modification of Territorial Order Based on Changed Legal Circumstances" correctly analyzes the applicable constitutional, statutory and rule provisions; consequently, no statute or rule requires reversal or modification of that portion of the PAA Order. As noted in the PAA Order, Section 366.04(2)(d), Florida Statutes, is general law which authorizes Vero Beach to provide electric service to the Town. See PAA Order at 16. Thus, again noting the unusual procedural posture of this case, Vero Beach asserts that the applicable Florida Statutes, Commission rules, and the Territorial Orders, as well as directly applicable Florida case law, require denial of the Town's PAA Petition on the merits, and thus affirmation of the conclusion that the Commission reached in the PAA Order. Vero Beach has provided and continues to provide safe and reliable service to all of its customers, and modifying the Territorial Orders as sought by the Town would result in uneconomic duplication of facilities, as well as adverse impacts on the public interest, as measured by the Commission's express standard of examining the impacts on all affected Vero Beach customers, i.e., the full 34,800 customers rather than just the 3,000 or so (roughly 9 percent) of Vero Beach's customers in Indian River Shores. The Town's self-serving public interest claims are directly contrary to, and thus defeated by application of, the Florida Supreme Court's holding in Storey v. Mayo, 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." Storey v. Mayo, 217 So. 2d at 307-08. Vero Beach

has the right and obligation to continue providing service as provided by the Commission's Territorial Orders, which were themselves issued as provided by Section 366.04(2), Florida Statutes.

STATUTES AND RULES THAT ENTITLE VERO BEACH TO THE RELIEF REQUESTED HEREIN

46. The statutes and rules that entitle Vero Beach to the relief requested herein include Chapters 120 and 366, Florida Statutes, the Commission's procedural rules applicable to proposed agency action proceedings, and the Commission's substantive rules applicable to territorial matters. Vero Beach is also entitled to the relief requested herein by the various orders of the Commission, including the Territorial Orders, and decisions of the Florida Supreme Court cited herein. In short, Vero Beach's substantial interests will be directly affected by the Commission's actions in this matter, and because there are many disputed issues of material fact in play, as articulated and explained hereinabove, Vero Beach is entitled to a formal evidentiary proceeding on these issues pursuant to Section 120.57(1), Florida Statutes. Vero Beach is entitled to the substantive relief requested by Sections 366.04(2) and 366.04(5), Florida Statutes, as well as by the Commission's Territorial Orders and opinions of the Florida Supreme Court. That substantive relief is the denial of the Town's request to modify the Territorial Orders, pursuant to which Vero Beach has provided and continues to provide safe and reliable service to all of its customers for the past 44 years, i.e., since the first of those Territorial Orders was issued.

RESPONSE TO REQUEST FOR HEARING IN THE TOWN

47. In the PAA Petition, the Town states that if any party requests an evidentiary hearing, and the Commission determines such a hearing is necessary, that the hearing be conducted in the Town. PAA Petition at 3, ¶ 5. There is neither any basis for, nor any need for conducting a hearing in the Town. The evidentiary hearing should be held in Tallahassee.

RESPONSE TO TOWN'S REQUEST TO EXPEDITE

48. The Town's stated basis for requesting an "expedited administrative hearing" is that the Franchise Agreement expires on December 6, 2016, and thereafter the Town's constitutional rights will be allegedly violated. See PAA Petition at 15. The Town's predicated reason for its request for expedited process has arisen from its own circuitous and misplaced legal actions, which have now been going on for nearly two-and-one-half years. ***The Town***, which ***had complete control*** over ***when*** it filed its legal actions, ***where*** it filed those actions, and the substantive ***content*** of those actions, initiated legal action on the substance of its claims on July 18, 2014, when it filed its original complaint in the Circuit Court in and for Indian River County. Town of Indian River Shores v. City of Vero Beach, Case No. 31-2014CA-000748. After pursuing the mandatory governmental dispute resolution process required by Chapter 164, Florida Statutes, the Town filed its Amended Complaint on May 18, 2015, notably omitting its earlier claim regarding infringement of a customer's constitutional rights.

49. Vero Beach moved to dismiss all four of the counts in the Town's Amended Complaint, and on November 11, 2015, the Circuit Court issued its Order

Granting in Part and Denying in Part City of Vero Beach's Motion to Dismiss Amended Complaint, in which the Court dismissed three of the four counts. Vero Beach timely filed an Answer, Affirmative Defenses, and Counter-claim in the circuit court case. The Town filed a petition for declaratory statement with the Commission on January 5, 2016. In re: Petition for Declaratory Statement by the Town of Indian River Shores Regarding the Commission's Jurisdiction to Adjudicate the Town's Constitutional Rights, Docket No. 160013-EU. The Commission denied the Town's petition in that docket by Order No. PSC-16-0093-FOF-EU, issued on March 4, 2016, whereupon the Town filed its Original Petition in the instant docket on March 4, 2016.

50. On June 22, 2016, the Town voluntarily dismissed its complaint in the Circuit Court lawsuit with prejudice. Vero Beach simultaneously dismissed its counter-claim.

51. In the meantime, on July 21, 2014, three days after the Town filed its original lawsuit in Circuit Court, the Board of County Commissioners of Indian River County, Florida, filed a petition for declaratory statement with the Commission raising essentially the same issues raised by the Town throughout the procedural odyssey documented in its various complaints and petitions, namely asking the PSC to declare that, upon expiration of the franchise agreement between the County and Vero Beach in February 2017, the County would have the right to choose its electric supplier. In re: Petition for Declaratory Statement by the Board of County Commissioners, Indian River County, Florida, Docket No. 140142-EM. After some procedural issues not relevant here, on December 19, 2014, Vero Beach filed its own petition for declaratory statement

that posed the critical questions clearly to the Commission. In re: Petition of Vero Beach for a Declaratory Statement Regarding Effect of Commission's Orders Approving Territorial Agreements in Indian River County, initiating Docket No. 140244-EM. The County's and Vero Beach's petitions were considered together at an agenda conference on February 3, 2015, and by orders[12] issued on February 12, 2015, the Commission denied the County's petition and effectively granted Vero Beach's petition, declaring as follows:

> 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.

The County appealed both orders and oral argument was heard by the Florida Supreme Court on December 10, 2015. By its opinion issued on May 19, 2016, the Court affirmed both Commission Orders. Indian River County v. Graham, 191 So. 3d 892 (Fla. 2016).

52. In short, Indian River County raised effectively and essentially the same issues that the Town has now attempted to raise in three complaints filed in circuit court and two separate petitions filed with the Commission, plus now its PAA Petition. The County's issues were finally resolved by the Commission some seven months after the County's original filing in July 2014, and the Florida Supreme Court issued its final opinion upholding the Commission's Orders less than two years after the County initiated proceedings before the Commission. Id.

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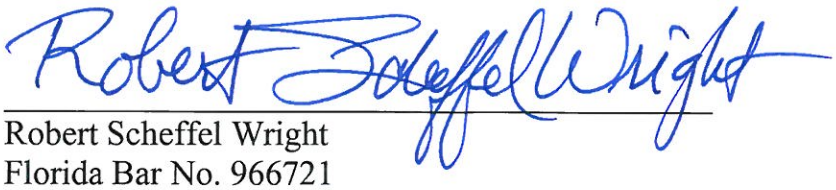
[12] Order No. PSC-15-0101-DS-EM in Docket No. 140142-EM and Order No. pSC-15-0102-DS-EM in Docket No. 140244-EM.

53. The Town, on the other hand, for the past 27-plus months, has dragged Vero Beach and the Commission through extensive and protracted – and wasteful – proceedings both in circuit court and before the Commission, and is only now on the threshold of a formal evidentiary hearing on its purported factual allegations, which of course Vero Beach disputes. That these proceedings have dragged on for this extended time is solely and exclusively the fault of the Town of Indian River Shores, and the fact that the Town now finds itself facing its self-imposed deadline of the expiration of the franchise agreement is also solely and exclusively the Town's own doing. The Town's plea that it needs expedited treatment because it now finds itself up against an imaginary, self-imposed deadline – the expiration of its Franchise Agreement with Vero Beach, which it has been fully aware of for thirty years – is patently absurd and should be rejected.

RELIEF REQUESTED

WHEREFORE, for the reasons set forth above, the City of Vero Beach respectfully asks the Commission to grant this Cross-Petition for Formal Administrative Proceeding and to set this matter for hearing pursuant to Section 120.57(1), Florida Statutes, on a normal and reasonable schedule.

Respectfully submitted this 4th day of November, 2016.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, by electronic delivery, on this 4th day of November, 2016.

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