

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition of the City of Vero )  
 Beach, Florida, for a Declaratory ) DOCKET NO. \_\_\_\_\_-EM  
 Statement Regarding Effect of the )  
 Commission's Orders Approving ) FILED: December 19, 2014  
 Territorial Agreements in Indian )  
 River County )  
 \_\_\_\_\_)

**PETITION FOR DECLARATORY STATEMENT BEFORE**  
**THE FLORIDA PUBLIC SERVICE COMMISSION**

The City of Vero Beach, Florida ("City," "Vero Beach," or "Petitioner"), pursuant to Section 120.565, Florida Statutes, and Chapter 28-105, Florida Administrative Code ("F.A.C."), hereby files this Petition for Declaratory Statement ("City's Petition" or "Petition") through which the City respectfully requests that the Florida Public Service Commission ("Commission" or "PSC") declare the status of the City's rights to continue operating in its Commission-approved service territory under the Commission's statutes and orders regarding the regulation of electric utility service and service territories in Florida.

In summary, the City has provided electric service in Indian River County since 1920. The City has served customers outside its corporate limits since at least as early as 1952, and the City believes that it has served outside its city limits since the 1930s, and quite possibly earlier. Since 1972, the City has served pursuant to a series of Commission orders,

including orders issued both before and after the Florida Legislature enacted the "Grid Bill" in 1974, by which the Commission approved and confirmed the City's right and obligation to serve in the service territory reserved to the City by territorial agreements between the City and Florida Power & Light Company ("FPL").

Through a petition for declaratory statement filed with the Commission on July 21, 2014,<sup>1</sup> Indian River County now threatens to attempt to evict the City from serving in the City's Commission-approved service areas in unincorporated Indian River County upon the expiration of an existing franchise agreement (the "City-County Franchise Agreement" or simply the "Franchise Agreement") between the County and the City in 2017. Accordingly, while the City firmly and unequivocally believes that the expiration of that Franchise Agreement has no legal effect on the City's right and obligation to serve in its Commission-approved service areas, the City needs the Commission's affirmative declarations as to the City's continuing right and obligation to serve in its Commission-approved service territory, in order to continue planning and providing electric service in the most efficient and cost-

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<sup>1</sup> In re: Petition for declaratory statement or other relief regarding the expiration of the Vero Beach electric service franchise agreement, by the Board of County Commissioners, Indian River County, Florida, PSC Docket No. 140142 (hereinafter the "County's Petition").

effective way possible. Consistent with applicable precedents of the Commission, the City believes and respectfully seeks the Commission's declarations that:

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

**PROCEDURAL BACKGROUND**

1. The agency whose declaratory statement is sought by this Petition is as follows:

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

2. 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 20<sup>th</sup> Place  
Vero Beach, FL 32960  
Telephone: (772) 978-4710  
Facsimile: (772) 978-4716.

3. All pleadings, orders and correspondence should be directed to the City's representatives as follows:

Robert Scheffel Wright ([scchef@gbwlegal.com](mailto:scchef@gbwlegal.com))  
John T. LaVia, III ([jlavia@gbwlegal.com](mailto:jlavia@gbwlegal.com))  
Gardner, Bist, Wiener, 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](mailto: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.

4. In Docket No. 140142-EM, the Board of County Commissioners of Indian River County (hereinafter "County") is seeking fourteen (14) separate declarations from the Commission, most of which seek the Commission's determination or declaration that, upon expiration of the existing City-County Franchise Agreement, the County can force the City to remove its electrical facilities from the unincorporated areas of the County, in which the City presently serves, and that the County thereafter may invite the electric supplier of its choice to provide service. The County's Petition was filed on July 21, 2014, and the County's Petition was originally scheduled to be heard at the Commission's agenda conference on October 2, 2014.

After receiving responsive pleadings by the City and several other utilities and Florida utility associations,<sup>2</sup> which were submitted between August 14 and August 22, 2014, the County submitted a letter voluntarily waiving and extending the "90-day clock" applicable to petitions for declaratory statements so as to allow the PSC to consider the County's Petition at its agenda conference on November 25, 2014. The County subsequently waived and extended the 90-day clock to all the Commission to consider the County's Petition at its agenda conference on February 3, 2015.

**DECLARATORY STATEMENTS REQUESTED**

5. On the facts set forth in the City's Petition, and based on the analysis set forth below, the City of Vero Beach respectfully requests that the Commission issue an order declaring the following.

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

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<sup>2</sup> FPL and the Orlando Utilities Commission ("OUC") petitioned for and were granted intervention. Tampa Electric Company, Duke Energy Florida, the Florida Municipal Electric Association ("FMEA"), and the Florida Electric Cooperatives Association ("FECA") moved for leave to file amicus curiae pleadings, and the Commission granted those motions as well. All of the intervenors and amici oppose the County's positions.

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

#### **HISTORICAL AND FACTUAL BACKGROUND**

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

7. Today, the City serves within the service area described in its territorial agreement with FPL, which agreement

has been approved, with amendments over time, by the following Commission orders: In re: Application of Florida Power and Light Company for approval of a territorial agreement with the City of Vero Beach, Docket No. 72045-EU, Order No. 5520 (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").

8. The City's service area, as approved by the Commission's Territorial Orders, includes the area within the City limits, as well as defined areas outside the City limits in unincorporated Indian River County. The earliest known documentary evidence of the City serving outside the City limits is found in Chapter No. 599 of the City's ordinances, enacted on

October 21, 1952.<sup>3</sup> This ordinance clearly shows that the City was serving outside the City limits at least as early as that year. The City believes that it has served areas of unincorporated Indian River County, outside the City limits, since the 1930s, and probably earlier than that.

9. In 1972, FPL applied to the Commission to approve the original territorial agreement between FPL and the City.<sup>4</sup> FPL's Application was based on then-existing case law, specifically Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), cert. denied, 395 U.S. 909, which held that the Commission had the "implied power" to "approve territorial agreements which are in the public interest," and which recognized that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Id. at 307-08. In its Application, FPL asked the Commission to approve the Territorial Agreement, including the allocation of

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<sup>3</sup> 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.

<sup>4</sup> 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 "FPL's Application."



service areas, because both FPL and the City sought to avoid "needless and wasteful expenditures of time and money" and "dangerous, unnecessary and uneconomical conditions" that were "not in the public interest." FPL's Application at 3.

10. By 1972, the City had been providing electric service outside the City limits, in unincorporated areas of Indian River County, for at least 20 years, and probably for close to 50 years. In fact, FPL's Application stated that "The City served approximately 10,600 customers in 1971, more than 50% of whom were located outside the boundaries of the City." FPL's Application at 2. Following a hearing, 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. There is no evidence in the record that the County participated in those proceedings. The Commission approved a slight modification to the territorial agreement in 1973. 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).

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

12. In 1980, FPL and the City again applied for approval of an amended territorial agreement. In re: Application of Florida Power & Light Company and the City of Vero Beach for Approval of an Agreement Relating to Service Areas, Docket No. 800596-EU, Order No. 11580 (February 2, 1983). In that docket, following a hearing held at the request of customers who did not want to be transferred to FPL, the Commission approved an updated territorial agreement between FPL and the City. In its order, the Commission stated again the Florida Supreme Court's earlier holding that

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

Id. at 2 (quoting Storey, 217 So. 2d at 307-08). In sum, the Commission exercised its jurisdiction under its Grid Bill

authority in Chapter 366 to approve the territorial agreement in order to prevent the uneconomic duplication of facilities and to provide for the most efficient service to the area in question. The territorial agreement that the Commission approved by Order No. 11580 explicitly recognized the City's (and FPL's) "right and obligation to serve within" (emphasis supplied) the service areas reserved to each utility under the agreement. As in the previous proceeding, there is no evidence in the record that the County participated in the 1980 proceedings. Order No. 11580, Exhibit 1, Territorial Boundary Agreement Between Florida Power & Light Company and City of Vero Beach, Florida, at 3.

13. In 1987, the City and Indian River County entered into the City-County Franchise Agreement. There was never a franchise agreement between the City and the County before 1987. Although facially obvious, 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. Pursuant to the City-County Franchise Agreement, the City has consistently collected and remitted franchise fees to the County.

14. In 1987, FPL and the City again petitioned the Commission for approval of an amendment to their territorial agreement, by which FPL and the City agreed that the City would serve a new subdivision, Grand Harbor, which straddled the existing territorial dividing line. In approving the amendment, the Commission stated the following:

To avoid any customer confusion which may result from this situation [the new subdivision straddling the existing territorial boundary] and to ensure no disputes or duplication of facilities will occur, the City and FPL have agreed to amend the existing agreement by establishing a new territorial dividing line.

\* \* \*

The amended agreement is consistent with the Commission's philosophy that duplication of facilities is uneconomic and that agreements eliminating duplication should be approved.

Again, there is no evidence in the record that the County chose to participate in the 1987 proceedings. 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).

15. Today, pursuant to the Commission's Territorial Orders, pursuant to its home rule powers, pursuant to its powers under Chapter 166 and Chapter 180, Florida Statutes, and pursuant to other legal authority, the City operates an electric generating plant, transmission lines and related facilities, and

distribution lines and facilities (collectively the "City Electric System"), which serves approximately 34,000 meters, of which approximately 12,900 meters are located within the City limits and approximately 21,000 meters are located outside the City limits. Some of the City's transmission and distribution facilities in the unincorporated areas of the County are located in County road rights of way; the balance are located in State rights of way, on private roads, and in private easements. The City's preliminary estimates indicate that only about 20 percent of the City's transmission and distribution lines in the unincorporated areas of the County are located in County road rights of way.

16. In reliance on the Commission's Territorial Orders and in exercising its home rule powers, as well as in reliance on its powers under Section 180.02(2), Florida Statutes, and other legal authority, including reliance on the fact that Indian River County knew of and allowed the City to use the County's rights of way, as limited as such usage may be, for decades before any franchise agreements ever existed, the City has, for nearly a century, provided safe, adequate, and reliable service to its customers both inside and outside the City limits. In fulfilling this necessary public purpose, the City has invested tens of millions of dollars, borrowed tens of millions of dollars, and entered into long-term power supply projects and

related contracts, also involving millions of dollars of long-term financial commitments, in order to serve all of the City's customers in its service area approved by the Commission's Territorial Orders.

**NEED FOR THE REQUESTED DECLARATORY STATEMENTS**

17. The City needs the Commission's declarations requested herein because the City requires certainty as to its right and obligation to serve in its Commission-approved service territory in order to be able to plan and provide service in the most efficient and cost-effective manner possible. The City's need for the Commission's declarations has arisen because the County has attacked, by its petition in Docket No. 140142-EM, the City's right and obligation to continue serving its customers in its Commission-approved service territory that lies in unincorporated Indian River County.

**STATUTES AND ORDERS RELEVANT TO THE  
REQUESTED DECLARATORY STATEMENT**

18. The statutes relevant and applicable to the requested declaratory statement are as follows.

- a. Section 120.565, Florida Statutes, which provides in pertinent part as follows:

120.565 Declaratory statement by agencies.—

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency,

as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

- b. Section 366.04(1), Florida Statutes, which provides in pertinent part as follows:

366.04 Jurisdiction of commission.—

(1) In addition to its existing functions, the commission shall have jurisdiction

\* \* \*

The jurisdiction conferred upon the commission shall be exclusive and superior to that of all other boards, agencies, political subdivisions, . . . or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail.

- c. Sections 366.04(2)(d)&(e), Florida Statutes, which provide in pertinent part as follows:

(2) In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes:

\* \* \*

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

(e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

d. Section 366.04(5), Florida Statutes, which provides as follows:

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

19. The orders of the Commission that are relevant to the requested declaratory statements are the Commission's Territorial Orders identified in paragraph 7 above.

**HOW THE STATUTES AND ORDERS SUBSTANTIALLY AFFECT  
THE CITY'S INTERESTS**

20. Pursuant to Rule 28-105.002(5), F.A.C., the City provides the following statement as to how the above-cited statutes and orders substantially affect the interests of the



City of Vero Beach. First, the City provides retail electric service within its Commission-approved service area pursuant to the Commission's Territorial Orders, which the Commission issued in the exercise of its exclusive and superior jurisdiction over utility service areas, over the planning, development, and maintenance of a coordinated electric power grid throughout Florida, and in fulfillment of its statutory duty to ensure the avoidance of uneconomic duplication of generation, transmission, and distribution facilities. The substantial interests of the City of Vero Beach will be directly affected by the Commission's interpretation of Chapter 366 and the above-cited orders, in that the Commission's declarations will determine whether the City's right and obligation to serve in its Commission-approved service areas are subject to abrogation or nullification by the threatened actions of the County. These decisions will also have direct and immediate impacts on the City's ability to plan its system and to make appropriate, efficient planning and investment decisions. These planning considerations and decisions will include how the City may have to address significant impacts on the City arising from the substantial stranded costs with which the City would be burdened if the County were somehow to prevail in its attempted ouster of the City from its Commission-approved service territory.

## ANALYSIS AND DISCUSSION

21. On the facts set forth in this Petition, and based on the analysis set forth below, the City of Vero Beach respectfully requests that the Commission issue an order declaring the following.

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

### Summary

22. The Commission has, and has expressly exercised, its Grid Bill jurisdiction over the City's service areas in Indian River County. The City has the right and obligation to serve in the areas described and approved by the Commission through the Territorial Orders. The Commission's jurisdiction over the City's - and indeed, all Florida electric utilities' - service areas is "exclusive and superior" with respect to all other

entities of Florida state government (Fla. Stat. § 366.04(1)), specifically including counties, and accordingly, the City's continuing right and obligation to serve in its Commission-approved service area cannot be affected by the expiration of the Franchise Agreement, or by any other action of the County.

23. For the Commission to hold otherwise - i.e., for the Commission to declare that the City cannot lawfully continue to serve pursuant to the Statutes and the Commission's Territorial Orders - would effectively abandon and nullify the Commission's jurisdiction over service areas and coordinated planning by abdicating its statutory jurisdiction over territorial matters and over the "planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy . . . in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities," Fla. Stat. § 366.04(5). Such a statement would effectively cede the Commission's powers and jurisdiction to counties. Further, there is no logical or substantive difference between the expiration of a franchise agreement and the absence of a franchise agreement, so if a county can evict an incumbent utility after a franchise expires, it can also evict an incumbent at any time where no franchise exists. Of course, this is absurd, nonsensical, and completely contrary to Florida

law, as well as completely contrary to sound, rational public policy: No utility could reasonably plan or make proper investments if any county could evict the incumbent utility upon expiration of a franchise agreement. See City of Homestead v. Beard, 600 So. 2d 450, 454 (Fla. 1992). Finally, such a statement would contradict the oft-repeated holding of both the Commission and the Florida Supreme Court that

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

Lee County Electric Co-op., 501 So. 2d at 507 (quoting Storey, 217 So. 2d at 307-08). Accordingly, the Commission should grant the City's requested declaratory statements.

**I. The Commission Has Exercised Its "Exclusive and Superior" Jurisdiction Over the City's Service Territory by Approving the City-FPL Territorial Agreements, and the City-County Franchise Agreement Is of No Effect Or Consequence to the City's Right and Obligation to Serve, to the Commission's Jurisdiction, or to the Commission's Territorial Orders Approving the City's Service Territory.**

24. The City provides service to its customers located within the City's Commission-approved service territory in the unincorporated areas of Indian River County pursuant to the Commission's Territorial Orders, issued pursuant to the Commission's "exclusive and superior" jurisdiction over territorial matters and the Commission's powers to prevent the uneconomic duplication of distribution facilities. The 1987 City-County Franchise Agreement is of no effect or consequence

with respect to the City's right and obligation to serve in its Commission-approved service area, to the Commission's jurisdiction, or to the Commission's Territorial Orders.

25. The Commission has jurisdiction to approve territorial agreements and to resolve territorial disputes. Fla. Stat. § 366.04(2)(d)&(e). The Commission further has jurisdiction over the "planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities." Fla. Stat. § 366.04(5). The Commission's jurisdiction over these matters is

exclusive and superior to that of all other **boards**, agencies, political subdivisions, . . . or **counties**, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail.

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

26. The statutes could hardly be any clearer: the Commission has jurisdiction over the issues raised here by the City - namely whether the existence, absence, or expiration of the Franchise Agreement has any effect on the City's right and obligation to serve, and whether, upon expiration of the Franchise Agreement, the City can lawfully continue to provide retail electric service, in accordance with its obligation to do

so, in the areas prescribed by the Commission's Territorial Orders. The Commission's jurisdiction is "exclusive and superior" to that of all other boards, agencies, and political subdivisions, specifically including "counties" and their "boards" of commissioners.

27. As the Commission explained in a recent order,

The Third District's decision is supported by a long line of Florida Supreme Court cases holding that we have exclusive jurisdiction over electric service territorial agreements between all utilities, which become part of our orders approving them. See, e.g. Storey v. Mayo, 217 So. 2d 304 (Fla. 1968); City Gas Company v. Peoples Gas System, Inc., 182 So. 2d 429 (Fla. 1965) ("In short, we are of the opinion that the commission's existing statutory powers over areas of service, both expressed and implied, are sufficiently broad to constitute an insurmountable obstacle to the validity of a service area agreement between regulated utilities, which has not been approved by the commission."); City of Homestead v. Beard, 600 So. 2d 450 (Fla. 1992). As the Supreme Court held in Public Service Commission v. Fuller, 551 So. 2d 1210, 1212 (Fla. 1989) any interpretation, modification or termination of an order approving a territorial agreement:

. . . must first be made by the [Commission]. The subject matter of the order is within the particular expertise of the [Commission], which has the responsibility of avoiding uneconomic duplication of facilities and the duty to consider such decisions on the planning, development, and maintenance of a coordinated electric power grid throughout the State of Florida. The [Commission] must have the authority to modify or terminate this type of order so that it may carry out its express statutory purpose.

Our order approving the agreement is an exercise by the state of its police power for the public welfare. Peoples Gas system Inc. v City Gas Co., 167

So.2d 577 (Fla. 3d DCA 1964), aff'd 182 So. 2d 429 (Fla. 1965).

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

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

It is important that we have, and fully exercise, our jurisdiction over electric service territorial agreements, not just to approve them in the first instance as a simple geographical boundary, but to actively supervise their implementation and enforce their terms. Territorial agreements are horizontal divisions of territory, considered to be per se Federal antitrust violations under the Sherman Act, 15 U.S.C. § 1. Parker v. Brown, 317 U.S. 341, 350 (1942) (a territorial agreement effective "solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate, would violate the Sherman Act.") When territorial agreements are sanctioned by the State, however, they are entitled to state action immunity from liability under the Sherman Act. 317 U.S. at 350; Municipal Utilities Board of Albertville v. Alabama Power Co., 934 F. 2d 1493 (11<sup>th</sup> Cir. 1991). Entitlement to state action immunity is

demonstrated by a "clearly articulated and affirmatively expressed state policy" encouraging the activity in question, and "the policy must be actively supervised by the State itself." California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 105 (1980). See also Praxair, Inc. v. Florida Power & Light Co., 64 F. 3d 609 (11<sup>th</sup> Cir. 1995), where the Court held that two Florida electric utilities were entitled to state action immunity from antitrust liability for their territorial agreement because Chapter 366, F.S., demonstrated a clearly articulated and affirmatively expressed state policy to regulate retail electric service areas, and our extensive control over the validity and effect of territorial agreements indicated active state supervision of the agreements. If we cannot decide who can receive electric service in territory covered by a territorial agreement, and in contravention of its terms, it could be argued that we are without power to enforce our own orders and actively supervise the agreements we have approved. This result could place electric utilities who are parties to territorial agreements throughout the state in jeopardy of antitrust liability.

No Name Key at 20.

29. One clear and unavoidable conclusion from the legal fact of the Commission's exclusive and superior jurisdiction over service territories is that the Franchise Agreement was never necessary to the City's serving in the subject areas. Thus, the Franchise Agreement is of no effect or consequence to the City's right and obligation to serve within its service area pursuant to the Commission's Territorial Orders, pursuant to its home rule powers, pursuant to its powers under Chapter 180, Florida Statutes, and pursuant to other legal authority. Further, and the Franchise Agreement is of no effect or consequence relative to the Commission's exclusive and superior



jurisdiction over both territorial matters and the planning, development and maintenance of a coordinated electric power supply grid in order to prevent the uneconomic duplication of distribution facilities. For the same reasons, the Franchise Agreement is of no effect or consequence to the effectiveness of the Commission's Territorial Orders.

30. At this point, it bears noting that many utilities serve in areas without franchise agreements. For example, many of Florida's electric cooperatives operate in municipalities and counties without franchise agreements. While FPL has approximately 177 franchise agreements, the NextEra Energy annual report states that FPL has franchises that cover only about 85 percent of its retail customers. NextEra Energy/FPL Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the year ended December 31, 2013, at 5. Clearly, the existence of a franchise agreement is not a necessary condition to a utility's right or obligation to serve.

31. The City provided service to customers in unincorporated Indian River County for at least 35 years before the 1987 Franchise Agreement was executed by the County and City, and probably for twenty-plus years before that, the point being that the Franchise Agreement was never necessary to the City's serving in the subject areas, and the Franchise Agreement is of no effect relative to the Commission's exclusive and

superior jurisdiction over both territorial matters and the planning, development and maintenance of a coordinated electric power supply grid in order to prevent the uneconomic duplication of distribution facilities. The Commission has duly approved the FPL-Vero Beach territorial agreements on at least four occasions, stating as follows:

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

Order No. 11580 at 1-2.

32. Therefore, because the Commission has exclusive and superior jurisdiction over service territories, and because the Commission has expressly exercised that jurisdiction in approving the territorial agreement between FPL and Vero Beach, including approval of the City's - and FPL's - right and obligation to serve in their respective services areas, the City-County Franchise Agreement is of no effect or consequence to the City's right and obligation to serve or to the Commission's Territorial Orders, and the Commission should accordingly grant the declaratory statements requested by the City herein.

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

33. As described above, the City of Vero Beach has provided electric service outside its city limits since at least as early as 1952, and probably since the 1920s. At a minimum, the City has thus provided service pursuant to the Commission's Territorial Orders since the issuance of Order No. 5520 in August 1972. Further, the City has provided service subject to the Commission's express statutory jurisdiction over service territories and the Commission's jurisdiction over the planning, development, and maintenance of a coordinated power supply grid for the avoidance of uneconomic duplication of facilities since the enactment of the Grid Bill in 1974, and pursuant to the Commission's "implicit authority" before that. Fuller, 551 So. 2d at 1212. Further still, the City provides service pursuant to its home rule powers under the Florida Constitution and pursuant to its powers under Section 166.021, Florida Statutes and Section 180.02(2), Florida Statutes

34. The territorial agreements approved by the Commission are part of the Commission's Territorial Orders, and thus have the full legal effect and authority of those Orders. City Gas, 182 So. 2d at 436; Fuller, 551 So. 2d at 1212. The City has served within its Commission-approved service territory,

including areas both inside and outside its City limits, pursuant to the Commission's Territorial Orders since the Commission issued the first of those Orders in 1972. There cannot be any legitimate dispute that the City provides service within its Commission-approved service territory subject to the Commission's jurisdiction over territorial agreements, territorial disputes, and the avoidance of uneconomic duplication of electric distribution facilities.

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

36. Under Section 180.02(2), Florida Statutes, the City has the power to "extend and execute all of its corporate powers

applicable for the accomplishment of the purposes of this chapter outside of its corporate limits . . . for the promotion of the public health, safety and welfare . . . ." The provision of electricity is fundamentally a public purpose for the promotion of the public health, safety, and welfare,<sup>5</sup> and accordingly, this statute also provides independent support for the City's power to serve in the unincorporated areas of the County, as it did for decades before the current Franchise Agreement ever existed.

37. Moreover, it is clear from known evidence of record that the County acquiesced in the City's serving in the unincorporated areas of the County allocated to the City, with FPL's express agreement and support, in at least three separate instances before the Franchise ever existed, and in one additional territorial amendment since the Franchise existed. This acquiescence may well provide additional, separate legal authority for the City's continuing ability to serve using the County's rights of way, i.e., those in the City's Commission-approved service area in the unincorporated areas of the County, as well as those within the City limits. At a minimum, the simple logic and equity of these facts cuts strongly in favor of the City.

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<sup>5</sup> See Fla. Stat. § 366.01.

38. Because the City has the power to serve pursuant to its home rule powers and pursuant to the Commission's express, exclusive, and superior jurisdiction, and because the Commission has specifically exercised that jurisdiction in its Territorial Orders approving the territorial agreements between the City and FPL, the Commission should grant the declaratory statements requested by the City.

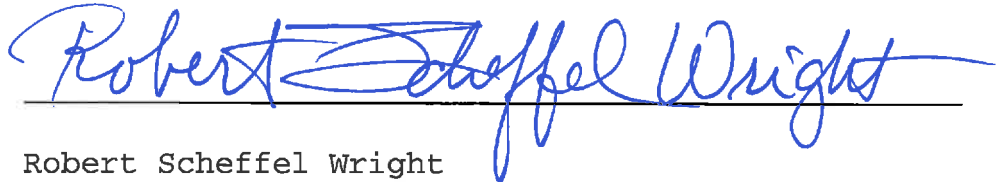
**CONCLUSIONS AND RELIEF REQUESTED**

39. As explained above, the Commission has exercised its statutory powers and jurisdiction to approve the City's right and obligation to provide retail electric service within service area, both inside and outside the Vero Beach city limits. The Commission's jurisdiction and powers are exclusive and superior to any powers that the County might have relative to utility service areas. Accordingly, neither the expiration, the existence, nor the non-existence of a franchise agreement between the City and the County has any effect whatsoever on the City's right and obligation to serve in its Commission-approved service territory. Further, by virtue of the Commission's Territorial Orders confirming the City's right and obligation to serve in its approved service territory, the City can lawfully continue to serve in the areas approved by the Commission in those Orders, without regard to the existence or non-existence of a franchise agreement with Indian River County and without

regard to any action that the County might take in any effort to prevent the City from continuing to serve in those areas.

WHEREFORE, the City of Vero Beach, Florida, respectfully requests that the Florida Public Service Commission enter its order granting the declaratory statements set forth above.

Respectfully submitted this 19th day of December, 2014.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, by electronic delivery, on this 19th day of December, 2014.

Kathryn Cowdery  
Florida Public Service Commission  
Division of Legal Services  
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Attorney