CORRESPONDENCE
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Crystal Card

From: Office of Commissioner Brown
Sent: Wednesday, January 14, 2015 8:26 AM
To: Commissioner Correspondence
Subject: FW: FPSC Docket Nos.: 140142-EM and 140244-EM
Attachments: Notice of Pending Litigation.pdf

Please place the correspondence below in Docket Correspondence for Consumers and their Representatives in Docket Nos. 140142-EM and 140244-EM.

Thank you,
Terry

Ms. Terry Holdnak
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Cc: bruce.may@hklaw.com; kevin.cox@hklaw.com; Karen.Walker@hklaw.com
Subject: RE: FPSC Docket Nos.: 140142-EM and 140244-EM

Attached is a courtesy copy of the Town of Indian Rivers Shores' Notice of Pending Litigation filed today in the referenced dockets.

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January 13, 2015

Via E-Mail

Carlotta Stauffer
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0810

Re: Notice of Pending Litigation: Docket Nos. 140142-EM and 140244-EM

Dear Ms. Stauffer:

This law firm represents the Town of Indian River Shores, Florida (the "Town"). Although the Town is not a party to the above-referenced dockets, the Town submits this letter to notify the Commission that on July 18, 2014, the Town filed a complaint in the Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County against the City of Vero Beach (the "City"), Case No. 2014-CA-0007448 ("Pending Litigation"). The reason for this notification is that after the Town filed its lawsuit against the City, Indian River County (the "County") and the City each filed separate petitions for declaratory statements with the Commission that could potentially invite the Commission to address issues related to the Pending Litigation.[1] On pages 13 and 37 of its recommendation on the County's petition dated November 13, 2014, your staff recognized that it would be improper for the Commission to provide a declaratory statement that would address issues that are related to currently pending litigation, and cited a number of authorities to support that principle.[2] The policy underlying this principle was explained by the

[1] The County filed its petition for declaratory statement on July 21, 2014 in Docket No. 140142-EM. The City filed its petition for declaratory statement on December 19, 2014 in Docket No. 140244-EM.

[2] *See ExxonMobil Oil Corp. v. Dep't of Agric. & Consumer Servs.*, 50 So. 3d 755, 758 (Fla. 1st DCA 2010) ("[A]n administrative agency must decline to provide a declaratory statement when the statement would address issues currently pending in a judicial proceeding"); *Padilla v. Liberty Mut. Ins. Co.*, 832 So. 2d 916, 919 (Fla. 1st DCA 2002); *Suntide Condo. Ass'n, Inc. v. Div. of Fla. Land Sales, Condos. & Mobile Homes*, 504 So. 2d 1343, 1345 (Fla. 1st DCA 1987); Order No. PSC-08-0374-DS-TP, *In re: Petition for declaratory statement regarding local exchange telecoms. network emergency 911 serv. by Intrado Commc'ns Inc.*, 08 F.P.S.C. 6:15 (2008) ("[E]stablished case law and prior Commission orders have held that a declaratory statement is not appropriate where another proceeding is pending that addresses the same question or subject matter."); Order No. PSC-02-1459-DS-EC, *In re: Petition for declaratory statement concerning urgent need for electrical substation in N. Key Largo by Fla. Keys Elec. Coop. Ass'n, Inc.*, 02 F.P.S.C. 10:342 (2002) (noting that even though the legal issue before DOAH was different than the

Florida First District Court of Appeal:

> We do view it as an abuse of authority for an agency to either permit the use of the declaratory statement process by one party to a controversy as a vehicle for obstructing an opposing party's pursuit of a judicial remedy, or as a means for obtaining, or attempting to obtain, administrative preemption over legal issues then pending in a court proceeding involving the same parties.

Suntide Condo. Ass'n, Inc. v. Div. of Fla. Land Sales, Condos. & Mobile Homes, 504 So. 2d 1343, 1345 (Fla. 1st DCA 1987).

The Town hopes that the Commission will continue to be guided by this fundamental tenet of administrative law as it considers the petitions filed by the County and the City. In particular, if the Commission is inclined to issue declaratory statements in response to the petitions of the County and the City, the Town respectfully requests that it do so carefully and narrowly so as not to prejudge or predetermine any issues in the Pending Litigation. In order to assist the Commission in that regard, the Town submits the following overview of, and summary of the issues in, the Pending Litigation.

Overview of Pending Litigation[3]

The Pending Litigation is founded on the principle that the Town has the express statutory right to provide electric service to its residents and the corresponding responsibility to protect its residents from unreasonable rates and oppressive utility practices. The City currently operates its electric utility within certain areas of the Town as an unregulated monopoly, and the Town's residents receiving electric service from the City are captive non-resident electric customers that have no voice in how the City manages its electric utility or sets its electric rates. The Town has lost confidence in the City's ability to properly manage its electric utility and treat its non-resident customers fairly. Accordingly, in order to protect its residents from further harm, the Town seeks judicial confirmation that it has the right to provide electric service to its inhabitants independent of the City upon the expiration of the Town's franchise agreement with the City in November of 2016. The Town also seeks damages suffered as a result of the City's unjust enrichment, unreasonable rates, and failure to comply with Florida law.

Summary of Litigation Issues

The Pending Litigation covers three general issues: (1) the City's lack of extra-territorial powers under constitutional and municipal law to extend its electric service within the Town

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issue presented in the Petition, the subject matter was the same, and therefore not properly decided by the Commission).

[3] A copy of the complaint filed by the Town against the City on July 18, 2014 was appended as Attachment A to Staff's Recommendation on the County's Petition dated November 13, 2014 in Docket No. 140142-EM. The Pending Litigation is currently abated while the parties comply with the requirements of the Florida Governmental Conflict Resolution Act, Chapter 164, Florida Statutes. Pursuant to an Interim Mediation Agreement dated January 7, 2015, unless the Town and the City agree to continue with the abatement or otherwise resolve their dispute, the Town will file an unopposed motion to lift the abatement of the Pending Litigation on March 2, 2015.

without the Town's consent; (2) the harm inflicted upon the Town and its residents by the City's unreasonable electric rates, imprudent management decisions, and oppressive utility practices; and (3) the harm inflicted upon the Town and its residents by the City's continued disenfranchisement of its non-resident customers in the Town. These general issues are further explained below.

The Florida Legislature Has Not Given The City The Extra-Territorial Power To Serve Within The Municipal Boundaries Of The Town Without The Town's Consent

The Pending Litigation involves an issue of constitutional[4] and municipal law where one municipality, the City, seeks to exert extra-territorial monopoly utility powers and extract monopoly profits within the corporate limits of another municipality, the Town, without the Town's consent.

Florida's Constitution and Home Rule Powers Act make it clear that the City has no inherent home rule power to provide extra-territorial electric service within the municipal limits of the Town. Art. VIII, 2(c), Fla. Const. ("Municipal annexation of unincorporated territory, merger of municipalities, and exercise of extra-territorial powers by municipalities shall be as provided by general or special law."); § 166.021(3)(a), Fla. Stat. ("The subjects of annexation, merger, and exercise of extraterritorial power ... require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution."). The Town's lawsuit points out that there are no general or special laws granting the City the power to provide extra-territorial electric service within the Town. In fact, the special law that creates the City only empowers the City to provide electric service to "the City and its inhabitants". Ch. 14439, § 40, Laws of Fla. (1929).

It is worth noting that the Florida Legislature knows how to provide a municipal electric utility with extra-territorial powers. For instance, the City of Gainesville has been expressly given the extra-territorial power "to sell electricity to any consumer within or without the limits of the city." Ch. 90-394, Laws of Fla. (1990). Similarly, Chapter 61-2589, Laws of Florida, as amended by Chapter 97-334, Laws of Florida, expressly authorizes the Orlando Utilities Commission to "furnish electricity, power and energy services to persons, firms and corporations in any part of Orange County". The Legislature has conferred no such extra-territorial powers on the City of Vero Beach.

The extra-territorial powers of the City appear to be issues in the respective petitions for declaratory statements filed by the County and the City. For example, in response to the County's petition for declaratory statement, and as part of its own petition, the City has cited Chapter 180, Florida Statutes and specifically Section 180.02(2), Florida Statutes, for its purported power to provide extra-territorial electric service "outside its corporate limits".[5] However, Section 180.02(2)

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[4] As the Commission staff noted on page 37 of its recommendation on the County's Petition, it would be improper for the Commission to address constitutional issues in a declaratory statement. *See Myers v. Hawkins*, 362 So. 2d 926, 929 n.4 (Fla. 1978) ("[A]dministrative agencies [such as the Commission] are not the appropriate forum in which to consider questions of constitutional import.").

[5] See, for example, the City's Petition filed in Docket No. 140244-EM on December 19, 2014 at pages 12, 13, 24 and 27. See also the City's motion to dismiss the County's Petition filed in Docket No. 140142-EM on August 14, 2014 at pages 10, 11, 26, 30, 35, and 36.

further provides that "said corporate powers shall not extend or apply within the corporate limits of another municipality," such as the Town. Thus, the Town's lawsuit asserts that the City's power to provide extra-territorial electric utility service within the Town is derived not by general or special law, but rather by contract with the Town in the form of a franchise agreement. As explained below, that franchise agreement will expire on November 6, 2016.

In contrast to the City's lack of extra-territorial powers to serve within the Town, the Legislature has given the Town broad powers to: "furnish any and all local public services, including electricity" to its inhabitants; contract "on behalf of the inhabitants of the Town" with other utilities for the provision of electricity; "purchase, construct, maintain, operate, lease or contract for any public utilities, including but not limited to, electric light systems and plants ... and distribution systems therefore"; and to grant public utility franchises of all kinds. Ch. 29163, § 2(e) & (f), Laws of Fla. (1953).

Pursuant to these broad statutory powers, the Town entered into a Franchise Agreement[6] which has four basic features. First, it is based on the Town's fundamental right to provide electric service to its residents either by itself or through contracts with other electric utilities, and its corresponding responsibility to protect its residents from unreasonable rates and oppressive utility practices. Second, it called for the Town to temporarily relinquish its right to provide electric service to its residents residing south of Old Winter Beach Road for a period of thirty years. Franchise Agreement, § 8. Third, it temporarily granted the City the exclusive franchise and permission to provide extra-territorial electric service within parts of the Town lying south of Old Winter Beach Road for a period of thirty years in return for the City agreeing to only charge rates and implement utility policies that are "reasonable." Franchise Agreement, §§ 1 and 5. Fourth, it granted the City temporary permission to place its electric facilities in the Town's rights-of-way and other public areas for a period of thirty years. *Id.* The Franchise Agreement has no automatic or mandatory renewal provisions and will expire on November 6, 2016.

The Town has formally advised the City that it will not renew the City's Franchise, and that upon expiration of the Franchise Agreement the City will no longer have the Town's permission to furnish extra-territorial electric service to the Town's residents. The City has indicated that it intends to continue to provide extra-territorial electric service within the Town on a monopoly basis when the City's Franchise expires. The City has also indicated that it will seek to prevent the Town from exercising its statutory rights to provide electric service to its inhabitants. The Town's lawsuit asserts that after the Franchise Agreement expires, it is unlawful for the City to exert extra-territorial monopoly powers and extract monopoly profits within the Town without the Town's consent.

Attempts by one municipality to exert extra-territorial monopoly powers within the corporate limits of another municipality are not commonplace. However, such attempts are not

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[6] The current Franchise Agreement superseded the City's prior agreement with the Town dated December 18,1968, which authorized the City to provide electric service to residents "within the corporate limits" of the Town for a period of twenty-five years. Thus, contrary to the City's mistaken assertions on page 9 of its motion to dismiss the County's petition, the Town has had a franchise agreement with the City as far back as six years before the Legislature passed the Grid Bill.

unprecedented and where they have occurred they have been rejected by the courts. For example, in *City of Indian Harbour Beach v. City of Melbourne*, 265 So. 2d 422 (Fla. 4th DCA 1972), the Fourth District Court of Appeal was asked to resolve a similar inter-municipality dispute involving Melbourne's provision of extra-territorial utility service to the residents of Indian Harbour Beach at rates which Indian Harbour Beach asserted were unreasonable. The court resolved the dispute over Melbourne's extra-territorial powers by first finding that the two municipalities were "theoretically equally independent." The court then ruled that, unless there was a franchise agreement that gave Melbourne the right to serve within Indian Harbour Beach or unless the cities mutually agreed to resolve their dispute, Melbourne would have to exit the area and Indian Harbour Beach had the right to obtain "substitute" utility service from other utilities pursuant to an orderly process which the court would supervise. *Id.* at 424-25.

The Town wishes to point out that the Pending Litigation does not threaten to subrogate the Commission's authority to approve territorial agreements or to oversee the integrity Florida's power grid. There is no dispute that the City has entered into a bi-lateral territorial agreement with Florida Power & Light Company ("FPL") that currently envisions that the City will provide electric service to a portion of the Town. Likewise, there is no dispute that the Commission has approved that territorial agreement pursuant to its regulatory authority under Chapter 366, Florida Statutes. However, when the Legislature passed the Grid Bill in 1974, it included a provision that made it very clear that the Grid Bill was never intended to impede the existing statutory rights of the Town to provide its inhabitants with electric service.[7] Furthermore, the courts and the Commission have recognized that a municipality like the Town can exercise its statutory rights and pursue the option of furnishing electric service to its residents at the end of a franchise agreement without running afoul of existing Commission-approved territorial agreements. *Florida Florida Power Corp. v. City of Casselberry,* 793 So. 2d 1174, 1177 (Fla. 5th DCA 2001). Indeed, the Commission has recognized that existing territorial boundaries are not carved in stone and may be modified when a municipality elects to provide electricity to its residents at the end of a franchise agreement. *See* Order No. PSC-05-0453-PAA-EI, *In re: Petition to relieve Progress Energy Florida, Inc. of the statutory obligation to provide electric service to certain customers within the City of Winter Park,* 05 F.P.S.C. 4:326 (2005); *see also* Order No. PSC-14-0108-PAA-EU, *In re: Joint petition for approval of a territorial agreement in Orange County by City of Winter Park and Duke Energy Fla., Inc.,* 14 F.P.S.C. 2:113 (2014).

Moreover, the Florida Legislature has confirmed that "nothing" in Chapter 366, including the PSC's approval of the territorial agreement, should be read to restrict the Town's broad regulatory power to grant or deny public utility franchises for the use of its rights-of-way and other public areas. § 366.11(2), Fla. Stat. (2014) ("Nothing herein shall restrict the police power of municipalities over their streets, highways, and public places..."). In fact, in interpreting the jurisdictional limitations in Section 366.11(2), Florida Statutes, the Commission has expressly ruled that it has no authority to interfere in a dispute over whether a city's franchise agreement

[7] The territorial agreement provisions in the Grid Bill specify that the passage of that legislation was not intended to alter agreements regarding service territories that existed on the date that the Grid Bill took effect (i.e., July 1, 1974) and that nothing in Chapter 366 "shall be construed or applied to impede, prevent, or prohibit any municipally owned electric utility system from distributing at retail electrical energy within its corporate limits as such corporate limits exist on July 1, 1974."

with an electric utility should be allowed to expire. *See* Order No. 10543, *In re: Petition of the City of Miami Beach for Formal Emergency Hearing*, 82 F.P.S.C. 196 (1982) (the Commission "may not interpose itself in the terms and conditions of the franchise contract.").

Again, the Town's lawsuit does not disregard the Commission's authority under Chapter 366 to approve territorial agreements or to oversee our state's power grid. To be clear, upon judicial confirmation that the Town has the right to provide electricity to its inhabitants and deny the City permission to furnish extra-territorial electric service within the Town at the expiration of the Franchise Agreement, the Town will formally notify the Commission and request that the Commission's order approving the territorial agreement between the City and FPL be modified accordingly.

The City's Unreasonable Rates, Imprudent Management Decisions, and Oppressive Utility Practices Continue to Harm The Town and its Residents

The Town's lawsuit challenges the reasonableness of the City's electric rates and the prudency of the City's utility management decisions.

Unlike an investor-owned electric utility, the City's electric utility rates and its management decisions are not regulated by the Commission. *See* §§ 366.04 and 366.02(1), Fla. Stat. (providing the Commission with the jurisdiction to regulate rates and services of a "public utility," but excluding municipalities from the definition of "public utility"). Furthermore, unlike rural electric cooperatives which are ultimately controlled by their individual members/customers,[8] the City's electric utility is managed and its rates are set exclusively by the City Council. Ch. 14439, § 40, Laws of Fla. (1929). Notably, the City Council members are not elected by the customers of the City's electric utility; rather, they are elected by the citizens who reside inside the City's corporate limits. *Id.* at §§ 9-11.

Under Florida law, the rate levels and management decisions of a municipal electric utility like the City are not regulated by the Commission because there is an expectation that citizen-ratepayers of a municipal electric utility have an adequate voice in regulating their own electric utility. This expectation is based on the premise that elected municipal officials are ultimately responsible to their citizen-ratepayers for all rate impacts associated with their operation of the municipal utility system. In other words, if a customer believes that an elected official is not properly managing the municipal electric utility, then that customer has a remedy at the polls by voting the elected official out of office.

However, because approximately 62% of the City's electric customers are non-residents of the City, a significant majority of the City's electric customers cannot vote in City elections, and thus have no remedy at the polls and no voice in electing those officials that manage the City's electric utility system and set their electric rates. Although the City is not subject to the Commission's rate-setting jurisdiction, the City is still required by law to set rates and implement

[8] *See, e.g.*, § 425.09(7), Fla. Stat. ("Each [cooperative] member shall be entitled to one vote on each matter submitted to a vote at a meeting.").

utility policies that are reasonable. In return for having been granted an exclusive franchise to provide electric service within the Town until November 6, 2016, the City has formally agreed only to charge rates and implement utility policies that are "reasonable". Franchise Agreement, § 5. Moreover, the special act creating the City provides that the "City Council may by ordinance make *reasonable* regulations as to the use of any public utility and may fix *reasonable* rates for service furnished by public utilities to consumers." Ch. 14439, § 40, Laws of Fla. (1929) (emphasis added).

In the Pending Litigation, the Town asserts that the City has harmed the Town and its residents by charging unreasonable rates and engaging in oppressive rate-making practices. For example, the Town's lawsuit alleges that the City intentionally adopted electric rates that require the Town, its citizens and other non-resident customers of the City to produce millions of dollars of surplus electric revenues that the City then diverts to the City's General Operating Fund. Those diverted surplus revenues are then used to cover non-utility costs, including propping up the City's unfunded pension obligations to current and former employees that have nothing to do with the operation of the City's electric utility or the furnishing of electric service. In addition, the Town believes that the City is diverting these surplus electric revenues from non-resident customers as a surrogate for *ad valorem* tax levies such that non-citizens are required to fund the City's municipal functions. This diversion of surplus electric revenues results in a subsidy that unjustly enriches the City at the expense of the Town and other captive non-resident customers. The lawsuit further asserts that this subsidy has contributed to driving up the City's electric rates to unreasonable and oppressive levels.

In addition, the Town's lawsuit alleges that the City has breached its duty to prudently operate and manage its electric utility by making a series of ill-advised utility management decisions, including entering into a number of imprudent, expensive long-term power supply arrangements that bind the City to above-market prices well into the latter parts of this century. *State v. City of Daytona Beach,* 158 So. 300, 305 (Fla. 1934) (a municipal electric utility has a legal duty to its customers to operate and manage its municipal electric utility with the same degree of business prudence, conservative business judgment and sound fiscal management as required of private investor-owned electric utilities). For the record, the Town is not seeking to invalidate the City's long-term power supply arrangements. Those are contractual obligations of the City not the Town. Rather, the Town's lawsuit seeks only to show that the City was imprudent in entering into those long-term power supply arrangements in the first place and thus the costs caused by the City's imprudent management decisions should not be borne by the Town and its residents that have had no voice in the management of the City's electric utility. *See Gulf Power Co. v. FPSC,* 487 So. 2d 1036 (Fla. 1986) (customers of an electric utility are not required to bear the cost of imprudent utility management decisions).

At this juncture, it is difficult to ascertain whether the petitions for declaratory statements filed by the County and the City involve the reasonableness of the City's rates. However, the City's petition appears to argue that it was prudent for the City to rely on "Section 180.02(2), Florida Statutes" in investing "tens of millions of dollars" and entering "into long-term power supply projects . . . 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."[9] As explained above, the prudency of the City's utility management decisions is a core issue in the Pending Litigation. The Town's position is that it was imprudent for the City to rely on Section 180.02(2) in entering into "long-term financial commitments" since that statute on its face prohibits the City from exerting extra-territorial powers "within the corporate limits of another municipality" like the Town. Furthermore, the Town will provide evidence at trial that shows that it was imprudent for the City to ignore the fact that its Franchise Agreement expires in November 2016 and contractually bind itself to long-term financial commitments that extend well beyond 2016 without including in those contracts appropriate provisions such as "regulatory out" clauses that are routinely employed in the electric utility industry to alleviate the risks of future governmental actions.

Simply put, whether the City was prudent in making investments and entering into long-term power supply arrangements that obligated the City well beyond the term of its Franchise Agreement with the Town is an issue in the Pending Litigation and should not be addressed by the Commission in a declaratory statement proceeding.

The City's Failure To Comply With Section 366.07(4), Florida Statutes, Continues To Harm The Town And Its Residents

The Town's lawsuit asserts that the City has imposed unreasonable rates on the Town and its residents, which the City has used to subsidize its own operations and reduce its citizens' own tax burdens, while not providing the Town a voice in the management of the utility and the use of its revenues. More specifically, the lawsuit asserts that the City's disenfranchisement of its non-resident customers violates Section 366.04(7), Florida Statutes, which the Florida Legislature passed in 2008 for the express purpose of providing all customers of small municipal utilities, including those outside the municipality, a proportionate voice in electing the governing board of their municipal utility. The City's failure to comply with Section 366.04(7) is an issue raised by the County in its Petition filed on July 21, 2014.[10]

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[9] See pages 13-14 of the City's Petition.

[10] See pages 5, 8, 13, 21, and 32 of the County's Petition.

We hope that this letter provides the Commission with a more complete understanding of the Pending Litigation, and that the Commission will adhere to established precedent and refrain from issuing declaratory statements that would address any factual or legal issues related to the Pending Litigation. Please let us know if the Commission or its staff has any questions or needs additional information regarding the Pending Litigation.

Sincerely,

HOLLAND & KNIGHT LLP

D. Bruce May, Jr.

DBM:kjg

cc: Chairman Art Graham
Commissioner Julie Imanuel Brown
Commissioner Lisa Polak Edgar
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