



## P R O C E E D I N G S

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2           **CHAIRMAN GRAHAM:** Okay, Commissioners, back  
3 up to the top of the agenda, Item Number 2. I believe  
4 we're going to take both Item Number 2 and Number 3 up  
5 together, so make that so.

6           **MS. COWDERY:** Good morning, Commissioners.  
7 I'm Kathryn Cowdery with the Office of General Counsel.

8           As you stated, Chairman, staff is  
9 recommending that Items 2 and 3 be heard together  
10 because both dockets are petitions for declaratory  
11 statements and involve similar questions.

12           Item 2 is Indian River County's petition  
13 for declaratory statement regarding the rights,  
14 duties, and responsibilities of the County upon  
15 expiration of the Vero Beach electric service  
16 franchise agreement and how electric service may  
17 thereafter be provided to county customers.

18           Item 3 is the City of Vero Beach's  
19 petition for declaratory statement regarding the  
20 effect of the Commission's orders approving  
21 territorial agreements in Indian River County.

22           Staff recommends the Commission deny the  
23 County's petition because it does not meet the  
24 requirements for issuance of a declaratory  
25 statement. Staff recommends that the Commission

1 issue a declaratory statement on Vero Beach's  
2 petition because it does meet the requirements for  
3 issuing a declaratory statement, and that the  
4 Commission declare that Vero Beach has the right and  
5 obligation to continue to provide retail electric  
6 service in the territory described in the  
7 territorial orders upon expiration of the franchise  
8 agreement between the County and Vero Beach.

9 FPL and Orlando Utilities Commission have  
10 been granted intervention on the County's petition.  
11 Tampa Electric Company, Duke Energy Florida, the  
12 Florida Electric Cooperatives Association, and the  
13 Florida Municipal Electric Association have been  
14 granted amicus curiae status in both dockets.

15 Oral argument on the petitions has been  
16 requested. Staff recommends that the Commission  
17 should grant the motions to address the Commission,  
18 and all parties in amicus curiae should be allowed  
19 to participate on the issues raised in both  
20 petitions. Staff is recommending the oral argument  
21 on both petitions should be heard together and that  
22 the Commission should allow 15 minutes for each  
23 side.

24 However, in addition, there is a  
25 preliminary matter on the County's petition.

1 Issue 1 of Item 2 is Indian River County's request for  
2 reconsideration of the Prehearing Order granting Orlando  
3 Utility Commission's motion to intervene. The County  
4 has requested oral argument on the motion.

5 Staff recommends that before addressing  
6 the petitions, the Commission should rule on the  
7 County's motion for reconsideration. Staff  
8 recommends that the Commission should deny the  
9 County's request for reconsideration because the  
10 request does not identify a point of fact or law  
11 which was overlooked. And even if the Commission --  
12 the County's request for reconsideration is treated  
13 as a response in opposition to OUC's motion to  
14 intervene as requested by the County, the arguments  
15 do not support denial of Orlando Utility  
16 Commission's motion to intervene.

17 Staff recommends that the Commission deny  
18 the County's request for oral argument on its motion  
19 for reconsideration because the County's arguments  
20 are fully set forth in its motion, and oral argument  
21 would not aid the Commissioners in understanding or  
22 evaluating the issues to be decided. The Commission  
23 does have sole discretion to grant or deny requests  
24 for oral argument. Staff is available to answer any  
25 questions.

1           **CHAIRMAN GRAHAM:** Okay. So, Commissioners,  
2 it looks likes we have to deal with Issue Number 1 on  
3 Item 2 first before we move forward. Commissioner  
4 Edgar.

5           **COMMISSIONER EDGAR:** Thank you, Mr. Chairman.  
6 I do not believe that there is a need for oral argument  
7 on Issue 2, which is the request for reconsideration on  
8 the intervention by OUC, so I would move approval of  
9 issue -- of the staff recommendation for Issues 1 and  
10 2 on Item 2. And if that motion carries, then that  
11 would lead us to the point where we can consider oral  
12 argument on the other issues.

13           **COMMISSIONER BRISÉ:** Second.

14           **CHAIRMAN GRAHAM:** It's been moved and  
15 seconded, staff recommendation on Issues 1 and 2, Item  
16 2. Commissioner Brown.

17           **COMMISSIONER BROWN:** Thank you. And I would  
18 support the motion, too. I do understand the County's  
19 argument and strict interpretation of the Rule 28-105.  
20 However, I looked at it; there's no error of fact or  
21 law. And OUC is a directly affected party in this  
22 docket and, hence, I support the motion.

23           **CHAIRMAN GRAHAM:** Any further discussion of  
24 the Edgar motion? Seeing none, all in favor, say aye.

25           (Vote taken.)

1 Any opposed? By your action, you've  
2 approved the motion.

3 Okay. So now we will have oral argument  
4 for both Items 2 and 3. We're going to go with  
5 staff recommendations on 15 minutes on each side,  
6 and we'll start with Indian River County. Mr. Floyd  
7 [sic], you're on.

8 **MR. SELF:** Thank you, Mr. Chairman,  
9 Commissioners. Good morning. I am Floyd Self of the  
10 Gonzalez, Saggio & Harlan law firm representing Indian  
11 River County. Also with me today is the County  
12 Attorney, Mr. Dylan Reingold. I would also like to  
13 specifically introduce the members of our county  
14 commission that are with us today. We have the Vice  
15 Chairman, Bob Solari, and Commissioners Peter O'Bryan  
16 and Tim Zorc. We also have the County Administrator,  
17 Mr. Joe Baird.

18 The fundamental issue before you today is  
19 the City's attempt to declare the franchise  
20 agreement between the City and the County void and  
21 without a fact and to eviscerate the authority of  
22 Indian River County to issue a utility franchise.

23 My comments will focus on the five most  
24 important reasons why you should deny the City's  
25 petition, while also addressing several relevant

1 aspects of the County's petition.

2           The first and most significant reason to  
3 deny the City's petition is that it seeks to  
4 materially and adversely affect the County. As the  
5 staff tells you in its recommendation on the  
6 County's petition, it is a fundamental tenet of  
7 declaratory statement law that you cannot determine  
8 and affect third parties through a declaratory  
9 statement, and yet this is exactly what the City is  
10 asking for.

11           If you read the two requests that they  
12 have, they very expressly and directly attempt to  
13 affect the County in both of them, and indeed they  
14 are seeking, quote, the expiration -- or they're  
15 seeking a determination that, quote, the expiration  
16 of the franchise agreement has no legal effect on  
17 the City's right and obligation to serve in its  
18 Commission-approved service areas.

19           But the City does not stop there. The  
20 City is also seeking a broader, more far-reaching  
21 authorization by asking you to protect the City  
22 from, quote, any action that the County might take.  
23 A declaratory statement is not a proper means for  
24 attempting to restrain the County, as the City is  
25 seeking here.

1           If you still have any remaining doubt  
2 about what is really going on here, then I simply  
3 ask you to look around the room at all of the other  
4 utilities that are here today against the County,  
5 none of which serve in the county except for FPL.  
6 If the City of Vero Beach can stop the County and  
7 the franchise agreement and serve customers solely  
8 on the basis of a territorial order, then no utility  
9 with a territorial agreement will ever subject  
10 itself to a franchise. Thus, the City's petition is  
11 to eliminate the County's ability to require a  
12 franchise as a precondition of utility service and,  
13 more directly, to render the existing franchise  
14 agreement with the County meaningless. These  
15 actions are clearly outside the scope of authority  
16 in a declaratory statement, and so you should deny  
17 the petition of the City.

18           The second reason for denying the City's  
19 petition is that the exclusive and superior  
20 authority that you have under Chapter 366 does not  
21 support granting the City's declaratory statement.  
22 The County agrees that the PSC has exclusive and  
23 superior jurisdiction over those matters that are  
24 enumerated in Chapter 366, but there are no facts  
25 that would support a violation of any of these three



1 statutes that are relied upon by the City.

2 First, there is no territorial agreement  
3 before you for approval, modification, or  
4 revocation. The County is not asking you to amend  
5 or repeal any territorial agreement or order, and  
6 the County agrees that the expiration of the  
7 franchise by itself does not modify or terminate any  
8 agreement or any order of this Commission.

9 Second, you do not have a territorial  
10 dispute. You do not have two utilities fighting  
11 about which should serve where. Likewise, the  
12 expiration of the franchise agreement does not  
13 automatically give rise to a territorial dispute.

14 Third, there is no uneconomic duplication  
15 of generation, transmission, and distribution  
16 facilities. Before you may consider taking action  
17 under the grid bill on a claim of uneconomic  
18 duplication, you must first conduct a formal  
19 evidentiary hearing, and a declaratory statement is  
20 not such a proceeding.

21 The requirement for an evidentiary hearing  
22 was demonstrated by the Florida Supreme Court in a  
23 case where the Commission refused to draw a  
24 territorial boundary in a dispute between two  
25 electric utilities. The Commission found commingled

1 facilities, but the evidence of record did not  
2 support a finding that those facilities were, in  
3 fact, uneconomic within the meaning of the statute.  
4 Today everyone agrees, I hope, that there are no  
5 duplicative facilities in place. The only evidence  
6 of duplicative facilities arises from some of the  
7 questions that the County has posed in its petition  
8 and which the staff says are too speculative and  
9 insufficient to support the granting of a  
10 declaratory statement. Thus, there are no facts  
11 supporting any of the three statutes upon which the  
12 City relies that would support the issuance of the  
13 declaratory statement that they seek today.

14 The third major reason to deny the City's  
15 petition is that the City and staff in both dockets  
16 completely ignore the County's exclusive authority  
17 with respect to franchises and the right to control  
18 and regulate its property.

19 The City argues that since it has provided  
20 electric service prior to the 1987 franchise that it  
21 simply does not need any permission from the County.  
22 What the City and the staff recommendation ignore in  
23 both dockets is the fundamental change in law that  
24 occurred with the adoption of the 1968 Florida  
25 Constitution. At whatever time the City began

1 serving outside its corporate limits as a  
2 non-charter county, at that time Indian River County  
3 had no authority over its property under the then  
4 existing law. But with the 1968 constitution and  
5 the subsequent actions of the Florida Legislature,  
6 non-charter counties have gained essentially the  
7 same powers as charter counties. These powers now  
8 include the ability to control and regulate the use  
9 of streets, bridges, rights-of-ways, easements, and  
10 other property through a franchise.

11 Now, the City has tried to mitigate the  
12 importance of the franchise agreement by claiming  
13 that a franchise is only relevant for franchise fee  
14 purposes, but this is not true. As the Florida  
15 Legislature's Office of Economic and Demographic  
16 Research says, quote, the fee, meaning the franchise  
17 fee, is considered fair rent for the use of such  
18 rights-of-way in consideration for the local  
19 government's agreement not to provide competing  
20 utility services during the term of the franchise  
21 agreement.

22 This is exactly why the Florida Supreme  
23 Court and other appellate courts refer to franchises  
24 as a bargained-for exchange and why those courts  
25 have held that such franchises are fully and

1 completely enforceable. The Courts have said that  
2 the bargains that can be enforced include all manner  
3 of things, including the right to purchase a  
4 utility's assets at the end of a term, a limited  
5 term of time, an exclusive service area, insurance  
6 indemnification, and whatever other terms the  
7 parties have bargained for.

8 A stated term in the franchise, one of the  
9 key issues here, is especially relevant and  
10 enforceable because the general state of the law is  
11 without a stated term, a franchise is considered  
12 irrevocable. This franchise agreement is fully  
13 enforceable. It's a bargained-for exchange that  
14 includes, among other terms, the termination in  
15 2017.

16 To ignore the constitutional and statutory  
17 framework that supports the franchise is to deny the  
18 board its fundamental right to govern and control  
19 its own property. The PSC cannot take this away  
20 from the County in a declaratory statement.

21 The fourth reason to deny the City's  
22 petition is that the City has no authority to grant,  
23 modify, or extend franchises or to otherwise convey  
24 property rights. For you to grant the City's  
25 petition and to declare that the City can continue

1 to serve regardless of the expiration of the  
2 franchise, you are effectively extending the term of  
3 the franchise into perpetuity or you're otherwise  
4 determining that an essential bargained-for term of  
5 that franchise is meaningless.

6 The staff acknowledges in the County's  
7 docket that the Commission has no jurisdiction over  
8 county franchise agreements, and this has been  
9 supported by the courts as well. If you have no  
10 jurisdiction over county franchise agreements, then  
11 you certainly do not have authority to extend an  
12 existing franchise or to otherwise declare it  
13 meaningless.

14 As for property rights, a territorial  
15 order does not grant a utility any authority to  
16 place its infrastructure. This is because Chapter  
17 366 does not contain any authority for you to grant  
18 a lease, a license, an easement, a franchise, or to  
19 otherwise convey real property rights.

20 The property rights a utility must, must  
21 secure to actually serve in an area can only be  
22 conveyed by the underlying property owners, which in  
23 this case for the County's property is the County  
24 through a franchise.

25 The fifth reason for rejecting the City's

1 petition is that the Town's lawsuit is a complete  
2 bar to the City's petition. In the County's  
3 petition, the Staff states that you are not  
4 permitted to opine on questions that are subject to  
5 other legal proceedings. The staff then cites the  
6 County's resolution 2014-069, which is attached to  
7 the staff recommendation, wherein the County  
8 indicated that it shares the same conflicts with the  
9 City regarding the City's unreasonable rates, the  
10 failure to comply with the referendum requirements  
11 of 366.047, and the removal of the City's electric  
12 facilities upon the expiration of the franchise.

13 On the basis of this resolution, the staff  
14 recommends that you not answer one of the questions  
15 since it's subject to litigation. Following that  
16 same principle, since both of the City's requested  
17 declarations involve the expiration of the franchise  
18 agreement and since that is an issue in the  
19 litigation, it would not be appropriate for you to  
20 answer either of the City's questions since both  
21 deal with the expiration of the franchise.

22 So where does that leave us? Any one of  
23 the five reasons I've cited I believe is sufficient  
24 alone to deny the City's petition, but together they  
25 demonstrate that the scope of what is being sought

1 by the City is completely inappropriate for any  
2 action by you through a declaratory statement. The  
3 bottom line is simple; you need to deny the City's  
4 petition.

5 With respect to the County's petition, in  
6 an ideal world it would be nice to have some  
7 additional time to discuss with you the problems we  
8 have with the staff recommendation on the County's  
9 requests. However, we focused our time on the  
10 City's petition because of the outrageous and  
11 illegal relief that the City is seeking from you  
12 today.

13 If you are inclined to deny the County's  
14 petition, we believe that you should provide some  
15 context for that decision and make clear two points  
16 that the staff relates in their recommendation with  
17 which we agree.

18 First, the County has no jurisdiction or  
19 authority with respect to territorial agreements and  
20 orders. And, second, the PSC has no jurisdiction or  
21 authority with respect to local government franchise  
22 agreements.

23 I don't know how much time I have left,  
24 but I -- Mr. Chairman, I'd like to reserve any  
25 remaining time and, of course, have the appropriate

1 opportunity to respond to the cast of thousands that  
2 are lined up to speak. Thank you.

3 **CHAIRMAN GRAHAM:** You have, you have three  
4 minutes left.

5 **MR. SELF:** Wow. I'm impressed. Thank you.

6 **CHAIRMAN GRAHAM:** Okay. Thank you, Mr. Self.  
7 Side number two. I take it, Mr. Wright,  
8 you're going to orchestrate?

9 **MR. WRIGHT:** That's, that's very kind and  
10 generous of you, Mr. Chairman. Thank you. I'm going  
11 to lead off for those of us who oppose the County and  
12 support the City.

13 Good morning. As you know, I'm Schef  
14 Wright. I'm with -- a partner in the Gardner, Bist,  
15 Wiener law firm. Also appearing with me today is my  
16 partner, John T. LaVia, III. I'd also like to  
17 specifically introduce to you the Honorable Mayor  
18 Dick Winger of the City of Vero Beach who is here,  
19 and also the Honorable council member Pilar Turner,  
20 also here in case you want to ask them any  
21 questions. But we take this very seriously and  
22 that's why they're here.

23 Mr. Chairman, I'm shooting to have eight  
24 or nine minutes of prepared comments that will  
25 probably get a little longer responding to some of



1 the things Mr. Self said. After that, several of  
2 the amicus curiae have a few things to say. I'm  
3 just going to start with a summary and then launch  
4 into some specific commentary on the County's  
5 petition and the City's petition.

6 In summary, the City strongly supports the  
7 staff's recommendations that you deny the County's  
8 petition for declaratory statement and, likewise,  
9 that you deny the County's request for alternative  
10 relief to initiate proceedings. The County's  
11 petition is procedurally flawed, as your staff have  
12 correctly concluded, and the staff have recommended  
13 it be denied. It's substantively flawed as well for  
14 many of the reasons that the staff supports the  
15 City's petition for declaratory statement that you  
16 don't even need to get there.

17 Similarly, we strongly support the staff's  
18 recommendation that you issue the declaratory  
19 statement requested by the City. Where the County  
20 failed to provide any adequate basis for declaratory  
21 statement, your staff correctly recognized that the  
22 City has met the legal requirements for issuance of  
23 a declaratory statement. They have further  
24 concluded that the City's legal analysis of your  
25 jurisdiction and the effectiveness of your orders is

1 correct and, accordingly, have recommended that you  
2 issue the statement.

3           With my specific comments I'll first  
4 address the County's petition. The staff have  
5 correctly analyzed the County's petition according  
6 to Florida law applicable to declaratory statements,  
7 and they have correctly concluded that you should  
8 deny the requested statements for the following  
9 reasons.

10           The County improperly, unlawfully assumes  
11 that the Commission's territorial orders are either  
12 invalid or inapplicable. In essence, the majority  
13 of the County's requested statements, the majority  
14 of their 14 requested statements are simply attempts  
15 to usurp your exclusive jurisdiction over  
16 territorial matters and to end run your orders.  
17 They want to be able to designate a successor  
18 utility. Only you, the Florida Public Service  
19 Commission, gets to say who serves where.

20           The County's petition fails to state  
21 particular presently existing ascertained or  
22 ascertainable facts upon which you might issue a  
23 statement. Rather, as the staff recognizes, the  
24 County has simply offered assumed legal conclusions  
25 that the Commission's orders are invalid, that it

1 has the legal authority to operate an electric  
2 utility system, and that it has the legal authority  
3 to choose the utility that provides service within  
4 its jurisdiction. They haven't cited any facts to  
5 support this.

6           The County's petition does not explain how  
7 your statutes and orders may substantially affect  
8 the County. The petition seeks general and very  
9 broad legal advisory opinions on a large number of  
10 hypothetical assumed scenarios. The County's  
11 petition improperly seeks a declaratory statement  
12 that would determine the conduct and rights of the  
13 City of Vero Beach, Florida Power & Light Company,  
14 and probably the Orlando Utilities Commission. The  
15 County's petition asks the Commission to interpret  
16 statutes and the constitution that are outside the  
17 Commission's jurisdiction.

18           With respect to the referendum issue,  
19 which is 567-J in the County's petition, staff's  
20 recommendation correctly applies case law confirming  
21 that you should deny this request and that you take  
22 administrative notice of the pending proceedings in  
23 the circuit court. This is the referendum issue  
24 under Section 366.04(7). We would also suggest to  
25 you that you should deny this request outright,

1 because even if the issue were not pending in  
2 circuit court, this request is legally inappropriate  
3 for declaratory statement. Since the County has  
4 raised it, however, you need to know that the City,  
5 in 2008, right after the statute was enacted,  
6 considered and evaluated the criteria in the statute  
7 and determined that the City, which was not named in  
8 this general act, the City did not fall within the  
9 scope of the specific enumerated applicability  
10 criteria because on the date specified in the  
11 statute, September 30th, 2007, the City had fewer  
12 than 30,000 named retail electric customers, which  
13 was the criterion set forth in the statute. We also  
14 served outside our home county on that date. So we  
15 didn't meet two of the criteria.

16 Finally, in their pleadings, although  
17 Mr. Self didn't talk much about it this morning, the  
18 County goes on at length about rates, rates, rates,  
19 rates, rates, rates, rates. The arguments about  
20 rates are utterly irrelevant. This is clear from  
21 many decisions of this Commission and decisions of  
22 the Florida Supreme Court.

23 As the Court said in *Storey v. Mayo* cited  
24 many times by you and the Court since, "An  
25 individual has no organic, economic, or political

1 right to service by a particular utility merely  
2 because he deems it advantageous to himself."

3 The County tries to argue that there's  
4 some unique reason here for the Commission to act on  
5 this because our rates are high. Our rates are  
6 higher than we wish they were. We're working on it.  
7 But they say it's because such a high percentage of  
8 the customers are outside the city limits. This is,  
9 one, factually unfounded. There are at least five  
10 other utilities that have more than 50 percent,  
11 munis that have more than 50 percent of their  
12 customers outside the city limits, and it's old  
13 news. In 1972, when FPL filed the first petition,  
14 application for approval of a declaratory statement,  
15 they stated in their petition that more than  
16 50 percent of the City's customers were located  
17 outside the city limits.

18 Even if the County could allege facts  
19 specific enough to give you something to act on, you  
20 should still deny the requested statements or issue  
21 them in the negative because substantively their  
22 arguments are wrong.

23 Finally, with respect to the County's  
24 petition, you should deny the County's request for  
25 alternative relief, basically do something. It's

1 not appropriate for a petition for declaratory  
2 statement, it doesn't include facts or information  
3 upon which you could decide whether to do so, and we  
4 strongly believe, the City strongly believes that  
5 based on directly applicable case law, *AmeriSteel v.*  
6 *Clark*, that the County lacks standing to initiate  
7 such proceedings in any event.

8 In summary, the County's petition is an  
9 attack on your jurisdiction and on your orders, as  
10 well as on the overall statutory system for  
11 regulating territorial issues to prevent the  
12 uneconomic duplication of facilities. Your staff  
13 have correctly analyzed the County's petition in  
14 accordance with Florida law, and they have correctly  
15 recommended that you deny the County's petition. We  
16 urge you to do so.

17 Responding to a couple of things Mr. Self  
18 said, we're not asking you to declare that the  
19 franchise is void. We're asking you to declare our  
20 rights under your statutes and your territorial  
21 orders. Those orders will remain in effect after  
22 the franchise expires. We have duly fulfilled our,  
23 all of our responsibilities under the franchise.  
24 They're not suing us for breach of the franchise.  
25 The suggestion that the utilities would never

1 subject themselves to franchise agreements is just  
2 off base. Mr. Self did not even mention Alachua  
3 County and the statement by the Florida Supreme  
4 Court in *Winter Park* where they said, "Moreover, we  
5 reiterate that Alachua validates fees that are  
6 reasonably related to the government's cost of  
7 regulation or the rental value of the occupied land,  
8 as well as those that are the result of a  
9 bargained-for exchange." That's what the Florida  
10 Supreme Court has had to say about this.

11 We don't say that the County can't try to  
12 issue a franchise. What we do say is made clear in  
13 our response in regard to our petition is this: If  
14 the County issues a franchise, tries to issue a  
15 franchise, that will create a territorial dispute on  
16 its face. That dispute is squarely under your  
17 jurisdiction. And the lawsuit is not a complete bar  
18 to our petition because, as the staff have correctly  
19 noticed -- have correctly noted, our petition  
20 addresses only our relationship to the County and  
21 our service in unincorporated Indian River County.

22 With regard to our petition, we strongly  
23 support the staff's recommendation, and we urge you  
24 to approve it. We have clearly stated facts that  
25 warrant, explain our need for the requested

1 statement. The County is threatening to evict us.  
2 We have to make significant planning decisions  
3 starting last fall, starting before then. We're  
4 working on renegotiating contracts. We're making  
5 decisions whether to shut down our power plant or  
6 keep it operating, and we have to make some  
7 significant distribution systems -- distribution  
8 system and T&D decisions. If we don't know who  
9 we're going to serve, we can't do it. We need your  
10 statement.

11 On the law, as the staff have correctly  
12 concluded, your jurisdiction is exclusive and  
13 superior. You, the Florida Public Service  
14 Commission, have, through your territorial orders,  
15 exercised this jurisdiction and granted Vero Beach  
16 the right and obligation to serve in the service  
17 territory described in your orders. Only you, the  
18 Commission, can modify your orders. And absent such  
19 modification, those orders, pursuant to your  
20 exclusive and superior jurisdiction under 366.04(1),  
21 will continue, as will our right and obligation to  
22 serve.

23 You don't have jurisdiction over the  
24 franchise agreement, but that doesn't matter. The  
25 City didn't have a franchise with the County before



1 1987, and even after 1968, you know, we went 19  
2 years without one, and in the meantime the grid bill  
3 was enacted, which gave you even more jurisdiction  
4 than you had before. The staff have it right; the  
5 City has met our legal requirements for issue of  
6 declaratory statement and the staff has correctly  
7 stated the law. We respectfully ask that you issue  
8 the statement. Thank you.

9 **CHAIRMAN GRAHAM:** You have about six minutes  
10 left.

11 **MR. WILLINGHAM:** Thank you, Chairman Graham.  
12 Good morning, Commissioners. I'm Bill Willingham, the  
13 Executive Vice President and General Manager of the  
14 Florida Electric Cooperatives Association, and we're  
15 participating today as an amicus. We greatly  
16 appreciate the opportunity to appear today. The issues  
17 in these dockets are critical to the long-term planning  
18 that Florida's electric utilities have to undertake in  
19 order to maintain a reliable grid and keep rates as low  
20 as possible.

21 We agree with staff's recommendation on  
22 both petitions and we agree with the points just  
23 made by Mr. Wright. However, we take great  
24 exception with the County's claims that its  
25 franchise authority supersedes the Commission's

1 territorial jurisdiction and that it can evict  
2 an electric utility and bring in another utility  
3 once a franchise agreement expires, which also  
4 means the County could evict the utility at any time if  
5 there is no franchise agreement.

6 Some electric co-ops have entered into  
7 territorial -- into franchise agreements, but in  
8 many areas our member co-ops have refused to do so  
9 and they operate without a franchise agreement.  
10 If the County could evict a utility when there is  
11 no franchise agreement or the agreement has expired,  
12 it would completely undermine the clear intent  
13 of the grid bill, which is to have a coordinated grid  
14 and to prevent the uneconomic duplication of facilities.

15 Clearly, the new utility's facilities  
16 would uneconomically duplicate the existing  
17 utility's facilities if there was a changeover, so I  
18 strongly disagree with the point that was previously  
19 made on behalf of the County. If this was allowed  
20 to happen, it would cripple the incumbent utility's  
21 ability to utilize long-term planning to keep costs  
22 down. Under the County's scenario, a utility's  
23 stranded costs could quickly mount and rates would  
24 increase unnecessarily due to uneconomic duplication  
25 of facilities, which is exactly what the grid bill

1 was supposed to prevent.

2 We believe the law is very clear that the  
3 Commission's jurisdiction over territorial issues is  
4 exclusive and superior to any jurisdiction alleged  
5 by the County, and we urge that you approve staff's  
6 recommendation on both petitions. Thank you.

7 **CHAIRMAN GRAHAM:** Mr. Moline.

8 **MR. MOLINE:** Good morning. I'm Barry Moline  
9 with the Florida Municipal Electric Association and  
10 appear as an amicus.

11 FMEA supports staff's recommendation and  
12 Vero Beach in its comments made by Mr. Wright this  
13 morning, and I'm here for your questions. Thank  
14 you.

15 **CHAIRMAN GRAHAM:** Mr. Beasley.

16 **MR. BEASLEY:** Thank you, Commissioners. Jim  
17 Beasley for Tampa Electric Company.

18 I'll just say that we support the staff's  
19 recommendations in both dockets. We think they're  
20 well-reasoned and consistent with your authority  
21 under the grid law and Chapter 366.

22 **CHAIRMAN GRAHAM:** Yes, sir.

23 **MR. BERNIER:** Good morning, Commissioners.  
24 Matt Bernier for Duke Energy.

25 We appreciate the opportunity to

1 participate in these dockets. We also support the  
2 staff's recommendations and the City and FEECA's  
3 arguments today. We urge you to adopt staff's  
4 recommendations. Thank you.

5 **CHAIRMAN GRAHAM:** Okay.

6 **MR. WRIGHT:** Mr. Chairman, may I know, may I  
7 know how much time our side has left?

8 **CHAIRMAN GRAHAM:** You have about two and a  
9 half minutes.

10 **MR. WRIGHT:** Thank you, sir. We would like  
11 to reserve it for rebuttal. I thought that was clear  
12 from what I asked you.

13 **CHAIRMAN GRAHAM:** Sure.

14 **MR. WRIGHT:** Thank you.

15 **CHAIRMAN GRAHAM:** Mr. Self.

16 **MR. SELF:** Thank you, Mr. Chairman. Just a  
17 couple of quick points. Quite frankly, I haven't heard  
18 anything out of Mr. Wright that changes anything that I  
19 said. Whatever situation you have in place today is,  
20 at best, speculative. The mere fact that we have  
21 noticed that we're not renewing the franchise in and of  
22 itself, again, doesn't have any impact or affect on any  
23 of your orders. We're not challenging those orders or  
24 anything like that. So I think, at a minimum, what you  
25 may have is something that's, that's premature.

1           The only other thing that I'd like to  
2 point out to you is what happened in the *Winter Park*  
3 case back in the early 2000s. The facts are  
4 slightly different admittedly. In that situation,  
5 the franchise between Winter Park and Progress was  
6 about to expire. They had a right to purchase. And  
7 what the Commission did throughout that entire  
8 process was basically let the parties work through  
9 the property rights issues in terms of valuing and  
10 ultimately the City acquiring assets from Progress.  
11 At the appropriate times, you, you relieved Progress  
12 of its obligation to serve within that area, and you  
13 ultimately then approved a territorial agreement  
14 just last year between Winter Park and Duke.

15           The staff and the others make the point  
16 that, oh, well, wait a minute, there was no  
17 territorial order there, and that makes all the  
18 difference in the world. The reality is utilities  
19 serve some pursuant to franchise agreements, some  
20 not; some pursuant to territorial agreements and  
21 orders, some not. You have to work together in  
22 terms of all -- both the Commission's jurisdiction  
23 and authority and local government's jurisdiction  
24 and authority with respect to property rights in  
25 order to make these things work.

1           The claims of stranded investment and the  
2 grid is going to go all to hell if you start  
3 allowing the counties to enforce their property  
4 rights I think is, is ridiculous, and there's  
5 certainly no evidence to support that. And, again,  
6 I would say if you look back to what happened in the  
7 *Winter Park* scenario, none of those types of things  
8 happened. The Commission, the local government  
9 ultimately worked together to effectuate the timely  
10 and efficient transfer of those facilities, and at  
11 best or worst that's exactly what may happen here.  
12 We don't know exactly how this is going to play out,  
13 but what we are trying to work toward is the ability  
14 to respect the County's property rights, while at  
15 the same time respecting the Commission's  
16 jurisdiction. Thank you.

17           **CHAIRMAN GRAHAM:** Thank you, Mr. Self.  
18           Mr. Wright.

19           **MR. WRIGHT:** Thank you, Mr. Chairman.

20           In arguing that the, that ruling on our  
21 petition is speculative, Mr. Self is basically  
22 arguing on behalf of the County that their whole  
23 petition is speculative. Contrary in our case, he  
24 makes it sound like it's speculative. They have  
25 told the world they're going to try to kick us out.

1 We have to make decisions, like I said, starting  
2 last fall. We are in active discussions with OUC  
3 regarding renegotiating our major power purchase  
4 agreement through which we buy about 60 percent of  
5 our power. We need to know what our status is  
6 before we can make a rational, efficient decision on  
7 that. We're in active consideration of shutting  
8 down our power plants. We've already shut one of  
9 our five units down. We need to know what our  
10 status is in order to proceed. It's not premature.

11 *Winter Park* is not slightly different from  
12 this case. In *Winter Park*, the City of Winter Park  
13 had a contract right to purchase the facilities of  
14 Florida Power Corporation. The Court -- that was  
15 challenged by Florida Power. They lost, and the  
16 Court said, yes, you have the right to buy the  
17 system. What happened after that was an extended  
18 series of arbitration. There was, there was also  
19 litigation over whether the, whether Florida Power  
20 had to continue collecting franchise fees, and the  
21 Court said, yes, you do. But the real guts of it  
22 was that there was a contract right that the courts  
23 of Florida, properly within their jurisdiction,  
24 enforced in favor of the City of Winter Park  
25 allowing them to buy Florida Power's facilities.

1 There is no such contract right here. We never  
2 agreed to one and we do not intend to voluntarily  
3 sell our system.

4 So to the extent there are any property  
5 rights issues -- and we only, we think only  
6 20 percent or so of our facilities are even in the  
7 County's rights-of-way, so, you know, there may be  
8 some court proceedings as to whether they can evict  
9 us from their rights-of-way, but there's a whole  
10 other body of property law that's not really  
11 relevant to y'all that will come up if we ever get  
12 there. But it's not, it's not really -- it's not  
13 something you need to worry about. If there's  
14 property rights litigation, that will occur in the  
15 courts.

16 And the other stuff that he said about  
17 what you did and didn't do in *Winter Park* is just  
18 utterly irrelevant, as are their rates arguments.  
19 Thanks very much.

20 **CHAIRMAN GRAHAM:** Thank you, Mr. Wright.

21 Commissioners, I would like to take up the  
22 three questions in Item Number 3 first, and then  
23 we'll conclude Item Number 2. I'll let you -- let's  
24 take a, like a five-minute break so we can all  
25 organize our thoughts, and we'll reconvene by that



1 clock in the back, let's say by 10:30. Thank you.

2 (Recess taken.)

3 Okay. So let's deal with the issues on  
4 Item Number 3. We've already handled Issue Number  
5 1 with the oral arguments. Commissioner Brown.

6 **COMMISSIONER BROWN:** Thank you, Mr. Chairman.

7 And first I just want to say these local  
8 government issues are near and dear to my heart. I  
9 came from local government; it's kind of what led me  
10 to this job. And so we all do take these very  
11 seriously. I also want to thank the public -- the  
12 elected officials here for driving up to  
13 Tallahassee, and for those that are here when they  
14 could be in committee meetings. We appreciate you  
15 being here. And, Representative Mayfield, I know  
16 this is an issue near and dear to your heart. It's  
17 one that I absolutely on a personal level agree  
18 with. I don't know today if it's the proper forum  
19 for us to address, but I know that you're going to  
20 continue working on the issue going forward. So  
21 thank you for being here and speaking.

22 That being said, Ms. Cowdery, can we, can  
23 you please address some of the arguments that  
24 Mr. Floyd [sic] made with regard to the City's  
25 petition? Particularly they alleged -- he alleged

1 that the City's petition deals with the expiration  
2 of the franchise agreement, which is the subject of  
3 pending litigation. Can you provide a brief  
4 response to that allegation?

5 **MS. COWDERY:** First, I want to make clear  
6 that the Town of Indian River Shores litigation is  
7 dealing with a completely separate franchise agreement.  
8 It was not clear, I don't think, from Mr. Self's  
9 comments, but that is a completely different situation.

10 **COMMISSIONER BROWN:** Thank you.

11 **MS. COWDERY:** Okay. I think that might clear  
12 up your questions there.

13 **MR. SELF:** Commissioner, if I may, I agree  
14 that the Town has its own separate franchise agreement.  
15 I certainly agree with that, and I apologize if I  
16 confused that issue.

17 The County participated because while the  
18 Town has its franchise, the County has its own, and  
19 the issue of expiration of the franchise is  
20 obviously --

21 **COMMISSIONER BROWN:** Oh, I get it. I just  
22 wanted her to clarify that.

23 **MR. SELF:** Thank you.

24 **MS. COWDERY:** Okay. So just going a little  
25 bit further with that, Mr. Self had mentioned that then

1 the Town's lawsuit is a complete bar to the declaratory  
2 statement, which I would, I would disagree with that  
3 because the issues in that pending litigation have no  
4 bearing on what is in front of us. It's a completely  
5 different situation. They accept --

6 **COMMISSIONER BROWN:** Uh-huh.

7 **MS. COWDERY:** Yes, thank you.

8 As we have heard, and it is correct, the  
9 Commission is not addressing any franchise agreement  
10 in this declaratory statement. What the Commission  
11 is addressing is application of its statutes and the  
12 territorial orders, its orders to the specific facts  
13 of the City of Vero Beach. We are not addressing  
14 the franchise agreement. We are not taking action  
15 that would render a franchise agreement void,  
16 without effect, or meaningless. We're just not  
17 going there.

18 Mr. Floyd [sic] mentioned that we, the  
19 Commission does not have authority under 366 to  
20 issue a declaratory statement looking at there's no  
21 territorial order agreement in front of us, there's  
22 no territorial dispute in front of the Commission,  
23 there's no unnecessary, unnecessary duplication, but  
24 this, this does not, this is not why we would be  
25 issuing a declaratory statement.

1           We are issuing a declaratory statement  
2 because the petition meets the requirements of the  
3 *Florida Administrative Procedure Act*, Section  
4 120.565. Those requirements are met and we're  
5 issuing, we're recommending that the declaratory  
6 statement be issued.

7           Most of Mr. Self's arguments that I see  
8 having to do with the Commission ignoring the  
9 exclusive authority to issue a franchise agreement  
10 go back to the same, my same statement that we're  
11 not addressing the franchise agreement. So the 1968  
12 constitutional argument, whether or not franchise  
13 agreements are only relevant for collection of  
14 franchise fees, really have no bearing on what the  
15 Commission is doing here today.

16           **COMMISSIONER BROWN:** Thank you. Excellent  
17 analysis. I know you could continue to go on, but I  
18 will say I think Mr. Wright hit it out of the park  
19 today on his legal arguments, and I completely agree  
20 with him.

21           One thing though with regard to this  
22 issue, and we'll get to the next one, but with  
23 regard to Mr. Self wanted two things included in our  
24 order if we agree with staff's recommendation.

25           The first, he said he wanted -- which was

1 not included in the petition for a dec statement. I  
2 don't know if we can legally even do that, but he  
3 wanted the inclusion that the County had no  
4 authority with respect to the territorial  
5 agreements, as well as the Commission has no  
6 authority with respect to franchise agreements.  
7 What are your thoughts on that?

8 **MS. COWDERY:** I would not go there. The way  
9 I heard it, what you would be doing is issuing a  
10 general legal opinion. And I would, you know, I would  
11 stick to what has been alleged in the petition, and I  
12 would not expand upon that. We addressed those points  
13 in the staff recommendation and it will be in the  
14 order, but that is not the specific question that's in  
15 front of us.

16 **COMMISSIONER BROWN:** Commissioners, I agree  
17 with the City and I agree with staff's recommendation  
18 on all issues.

19 **CHAIRMAN GRAHAM:** Other Commissioners?  
20 Commissioner Brown, would you like to make  
21 a motion?

22 **COMMISSIONER BROWN:** Move staff  
23 recommendation on all issues under Item 3.

24 **CHAIRMAN GRAHAM:** It's been moved and  
25 seconded, staff recommendations on all issues on Item

1 Number 3. Any further discussion? Seeing none, all in  
2 favor, say aye.

3 (Vote taken.)

4 Any opposed? By your actions, you've  
5 approved the staff recommendations on Item Number 3,  
6 which brings us back to Item Number 2. We've  
7 already dealt with Issues 1 and 2 under Item Number  
8 2 and 3. Commissioner Brown.

9 **COMMISSIONER BROWN:** Thank you, Mr. Chairman.  
10 I have to ask Mr. Self and the County a few questions  
11 just because back in November you asked for a deferral  
12 to amend your pleadings, your petition, but we never  
13 had any supplemental modifications or amendments.  
14 Could you explain why not?

15 **MR. SELF:** Let me answer your question this  
16 way. We drafted something, and when we got done and  
17 looked at the original and compared it to the amended  
18 one, we determined that it was in the County's best  
19 interest to proceed, to proceed with the original.

20 **COMMISSIONER BROWN:** So a lot of time has  
21 been spent on, by all the parties, by the City, by the  
22 County, by our Commission staff on this particular  
23 petition. And I'm just curious, you've got a pending  
24 acquisition with FPL and the City of Vero Beach, which  
25 you've acknowledged in your petition would be, would

1 basically make the petition moot if that is  
2 consummated. We have a pending civil litigation that  
3 touches upon an issue in here. Why would you proceed  
4 with a petition for dec utilizing all of the resources  
5 when, quite frankly, I think it's pretty clear that  
6 there are several flaws in the actual petition, as Mr.  
7 Wright enumerated in his oral arguments? Back in  
8 November I was wondering why you went ahead and did it  
9 rather than wait with all these pending actions.

10 **MR. SELF:** Well, the fact of the matter is,  
11 Commissioner, is it was imperative to come here first  
12 and to receive your, your opinion on certain issues. I  
13 won't go into the merits of why we think at least some  
14 of those questions should have been answered, but the  
15 fact of the matter is that it's important -- it was  
16 important to us to go to the PSC first because we knew  
17 there would be certain issues there. And so regardless  
18 of the declaratory statements that you issue as a  
19 result of the two petitions, that's going to be helpful  
20 to all of the parties as they move forward with their  
21 next steps.

22 **COMMISSIONER BROWN:** I have no further  
23 questions.

24 **CHAIRMAN GRAHAM:** Any other Commissioners? I  
25 would entertain a motion for items -- I'm sorry --

1 Issues Number 4 and 5 on Item Number 2.

2 **COMMISSIONER EDGAR:** Move staff, Mr.  
3 Chairman.

4 **COMMISSIONER BRISÉ:** Second.

5 **CHAIRMAN GRAHAM:** It's been moved and  
6 seconded, staff recommendations on Issues Number 4 and  
7 5, 4 and 5 under Item Number 2. Any further  
8 discussion? Seeing none, all in favor, say aye.

9 (Vote taken.)

10 Any opposed? By your action, you've  
11 approved staff recommendation.

12 (Agenda item concluded.)

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1 STATE OF FLORIDA )  
 : CERTIFICATE OF REPORTER  
2 COUNTY OF LEON )

3  
4 I, LINDA BOLES, CRR, RPR, Official Commission  
5 Reporter, do hereby certify that the foregoing  
6 proceeding was heard at the time and place herein  
7 stated.

8 IT IS FURTHER CERTIFIED that I  
9 stenographically reported the said proceedings; that the  
10 same has been transcribed under my direct supervision;  
11 and that this transcript constitutes a true  
12 transcription of my notes of said proceedings.

13 I FURTHER CERTIFY that I am not a relative,  
14 employee, attorney or counsel of any of the parties, nor  
15 am I a relative or employee of any of the parties'  
16 attorney or counsel connected with the action, nor am I  
17 financially interested in the action.

18 DATED THIS 9th day of February, 2015.

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