BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by the Town of Indian River Shores For Modification of Territorial Order Based on Changed Legal Circumstances Emanating From Article VIII, Section 2(c) of the Florida Constitution.

Docket No. 160049-EU

Filed: April 7, 2016

_____/

TOWN OF INDIAN RIVER SHORES' RESPONSE IN OPPOSITION TO, AND MOTION TO STRIKE PORTIONS OF, CITY OF VERO BEACH'S MOTION TO DISMISS

The Town of Indian River Shores (the "Town") responds in opposition to the Motion to Dismiss the Town's Petition for Modification of Territorial Order (the "Motion") filed by the City of Vero Beach (the "City")[1] and, for reasons that follow, respectfully requests that the Florida Public Service Commission (the "Commission") strike improper allegations and material contained in the Motion and deny the Motion.

Standard of Review

The standard to be applied by the Commission in reviewing the City's Motion is whether, construing all factual allegations in the Town's Petition for Modification of Territorial Order (the "Petition") as true and in the light most favorable to the Town, the Petition states a cause of action upon which relief may be granted. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). Under settled legal principles, the Commission cannot dismiss the Town's Petition unless the City establishes beyond any doubt that the Town can prove no set of facts whatsoever in support of its claim. *Morris v. Fla. Power & Light Co.*, 753 So. 2d 153, 154 (Fla. 4th DCA 2000). When

[1] The City has not yet been granted leave to intervene. The City consented to an extension of seven days for the Town's response, and by Order dated March 30, 2016, the Prehearing Officer approved an extension of the response deadline through April 7, 2016.

evaluating the sufficiency of the Petition in response to the City's Motion, the Commission must confine itself to matters within the four corners of the Petition, and cannot consider any affirmative defenses or evidence that the City may intend to present when the Commission considers the merits of the matter. *Ingalsbe v. Stewart Agency, Inc.*, 869 So. 2d 30, 34-35 (Fla. 4th DCA 2004). The Commission has recognized that "[d]ismissal is a drastic remedy" and is only appropriate when the "legal standard has been clearly met." *In re: Application for certificate to provide competitive local exchange telecommunications service by Matrix Telecom, Inc.*, Docket No. 050200-TX, Order No. PSC-05-1126-FOF-TX, at *2 (F.P.S.C. Nov. 8, 2005); *In re: Application for limited proceeding increase in reuse water rates in Monroe County by K.W. Resort Utilities Corporation*, Docket No. 970229-SU, Order No. PSC-97-0850-FOF-SU, at *14-15 (F.P.S.C. July 15, 1997). Here, the City has not and cannot meet the legal standard for dismissal, and its Motion must be denied.

Summary

The City's 57-page Motion (not including attachments) is largely comprised of mischaracterizations of the Town's claims, extrinsic information beyond the four corners of the Town's Petition, and arguments on the merits that cannot be considered on a motion to dismiss. Setting aside that sound and fury, the City claims that the Petition should be dismissed because: (a) the Town lacks standing to seek modification of the Commission's territorial order, (b) the format of the Town's Petition does not meet hyper-technical pleading requirements, and (c) the Town's Petition is barred by the doctrine of administrative finality. None of these arguments support dismissal of the Petition.

An interested member of the public, like the Town, can petition the Commission to modify a territorial order. The Town's Petition properly and sufficiently pleads a cause of action for

modification of a territorial order. And the doctrine of administrative finality does not bar modification of a territorial order where, as here, changed circumstances are shown. As described in more detail below, when the allegations in the Town's Petition are accepted as true and viewed in a light most favorable to the Town, the Town has clearly stated a claim for modification of the territorial order. Accordingly, it would be error for the Commission to dismiss the Town's Petition.

Background

Summary of the Allegations

As much as the City would like to make it so, the Town's Petition is not a demand by a customer to be served by a particular utility of its choosing nor is it a territorial dispute. Rather this case is about an interested member of the public petitioning the Commission to modify an order (the "Territorial Order") approving a territorial service agreement between the City and Florida Power & Light ("FPL") (the "Territorial Agreement") based on changed legal circumstances that emanate from unique constitutional limitations of municipal powers found in Article VIII, section 2(c) of the Florida Constitution. (Petition ¶¶ 4-7, 34, 38-45.) That constitutional provision establishes that as a municipality, the City has no inherent home rule authority to exercise extra-territorial powers within the corporate limits of the Town, another equally independent municipality. Instead, the City only has those extra-territorial powers expressly granted to it by general or special law. (Petition ¶¶ 4, 38.) The Petition further alleges that there is no current general or special law that grants the City the right to exercise extra-territorial powers within the corporate limits of the Town without the Town's consent. (Petition ¶¶ 5, 38.)

The Petition explains that every time the Commission has reviewed and approved the Territorial Agreement and any amendments thereto, the City has enjoyed the Town's express written consent pursuant to a legally binding contract—most recently a Franchise Agreement. (Petition ¶ 17.) The Petition alleges that those legal circumstances have significantly changed since

the Commission last reviewed the Territorial Agreement over 28 years ago. (Petition ¶¶ 37, 40.) The Petition further alleges that on July 18, 2014, the Town formally notified the City that when the Franchise Agreement expires on November 6, 2016, the City will no longer have the Town's consent to exercise extra-territorial powers within the Town's corporate limits. (Petition ¶ 19.)

In addition, the Petition alleges that changed circumstances also arise from the City's abuse of its monopoly service territory since the Commission last approved the Territorial Agreement 28 years ago. The Petition alleges that the City operates as an unregulated monopoly electric service provider within parts of the Town pursuant to the Territorial Order. (Petition ¶¶ 25-30.) The Petition alleges that the Town and its residents are completely disenfranchised and have no electoral say or control in how the City monopoly electric utility sets its rates and provides its services. (Petition ¶¶ 26, 27, 28, 29, 30.) The Petition also expressly alleges that subsequent to issuance of the Territorial Order, the City has abused its monopoly powers by charging excessive rates and extracting monopolistic profits from the Town's residents in exchange for lower quality service, and has done so in order to subsidize City operations that are unrelated to its electric utility and to keep ad valorem taxes on residents within the City artificially low. (Petition ¶¶ 30, 31, 47.) The Petition alleges that the Commission has the responsibility to actively supervise the City's implementation of the Territorial Agreement to protect the Town and its residents from monopoly abuses by the City. (Petition ¶¶ 8, 35.)

Commission Control of Monopoly Powers Is Required for Territorial Agreements Not to Conflict With Antitrust Laws

Territorial agreements among utilities are designed to create monopoly service territories and eliminate competition between the parties. *See City of Homestead v. Beard*, 600 So. 2d 450, 452 (Fla. 1992) ("[T]he City sought PSC approval of an agreement which extended its territorial monopoly beyond its municipal boundaries to adjacent areas."); *City Gas Co. v. Peoples Gas Sys.,*

Inc., 182 So. 2d 429, 430 (Fla. 1965) ("The obvious purpose [of the territorial agreement] was to eliminate competition between, and duplication of facilities and service by, the parties within the area covered.") The Florida Supreme Court has recognized that territorial agreements, by creating monopoly service areas, can potentially subject customers to abuse of monopoly powers such as the "monopolistic control over price, production, or quality of service." *City of Homestead*, 600 So. 2d at 452. The Court also explained that if a territorial agreement

> has the effect of leaving an unreasonable degree of control over price, production, or quality of product or service in the hands of the parties thereto, it would evidence the kind of monopolistic advantage that [Florida's antitrust laws] and other statutes of the kind were intended to prevent. If it does not leave such control in the hands of the parties we perceive no conflict between the agreement and anti-monopoly statute.

City Gas Co., 182 So. 2d at 432. The Court further analyzed the conflict between territorial agreements and the antitrust laws as follows: "Our decisions exempting territorial agreements from antitrust legislation have been premised on the existence of a statutory system of regulations governing the public utilities that is sufficient to prevent any abuses arising out of the monopoly power created by the agreements." *City of Homestead*, 600 So. 2d at 452.

Under the Court's analysis, territorial agreements that create monopoly service areas for investor-owned electric utilities like FPL do not conflict with the antitrust laws because the rates and quality of services of investor-owned electric utilities are extensively regulated and controlled by the Commission pursuant to its jurisdiction under Chapter 366, Florida Statutes. The same is true for territorial agreements that create monopoly service areas for rural electric cooperatives since cooperatives operate under a statutorily-authorized "one member/one vote" democratic governance structure that gives member/customers of a cooperative direct control over electing the board of trustees which in turn determines the level of the cooperative's rates and services. *See e.g.*, § 425.09(7), Fla. Stat. ("Each member shall be entitled to one vote on each matter submitted

to a vote at a meeting" of the cooperative.); § 425.10 (1) & (2), Fla. Stat. ("The business and affairs of a cooperative shall be managed by a board of not less than five trustees . . . , [and] the members shall elect trustees to hold office.").

However, the City's extra-territorial monopoly within the Town raises red flags under the Court's antitrust analysis. The unique structure of the Territorial Agreement extends the City's territorial monopoly beyond the City's municipal boundaries and into the corporate limits of the Town, leaving the Town and its residents completely disenfranchised with no electoral control over the City's monopoly rates or services. To further exacerbate the potential for monopoly abuse, the statutory limitations on the Commission's jurisdiction over the City, as a municipal electric utility, leave the City's monopoly rates and quality of service unregulated, unchecked, and within the absolute control of the City. Nonetheless, while the Commission has no control over the City's monopolistic rates or service quality, it does have the ultimate authority to prevent the City from abusing its monopoly powers. There is no doubt that the Commission has the authority and the responsibility under Section 366.04, Florida Statutes, to reconfigure the monopoly service area boundaries to protect the Town and its residents from the City's monopolistic price fixing and other abuses of its monopoly powers under the Territorial Agreement. (Petition ¶ 36.)

Accordingly, the Town's Petition asks that the Commission exercise its authority under Section 366.04, Florida Statutes, on an expedited basis, modify the Order in accordance with the Florida Constitution, and redraw the monopoly service area boundaries in a manner that will comply with the antitrust laws by providing for transition of service of the Town and its residents currently served by the City to FPL, an investor-owned electric utility whose rates and service quality are extensively regulated by the Commission. (Petition at 2, ¶¶ 8, 20.) The Petition alleges that the Town has a substantial and immediate interest in seeking this relief because it is the

municipality within whose corporate limits the City intends to exercise powers not authorized by the Constitution. (Petition ¶ 34.) The Petition further alleges that the Town is a customer of the City's utility, and is therefore is substantially harmed by the City's unregulated abuse of monopolistic power. (Petition ¶ 35.)

Argument

A. The Town Has Standing

1. The Town Has Standing Under Florida Supreme Court Precedent

The City's argument that the Town lacks standing ignores established Florida Supreme Court precedent that interested members of the public, like the Town, have standing to petition the Commission to modify a territorial order. Indeed, under Florida law there cannot "be any doubt that the commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, ***or even an interested member of the public***." *Peoples Gas Sys., Inc. v. Mason*, 187 So. 2d 335, 339 (Fla. 1966) (emphasis added); *Pub. Serv. Comm'n v. Fuller*, 551 So. 2d 1210, 1212 (Fla. 1989) ("[W]e held then [in *Mason*] and reaffirm now that 'the commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public.'"); *see also City of Homestead*, 600 So. 2d at 453 n.5 (same).

The Town is clearly an "interested member of the public," and the Town's interest and injury is significant and immediate. Because the City has no organic constitutional or statutory power to exercise extra-territorial power within the Town's corporate limits without the Town's consent, the Town will be subject to an unconstitutional encroachment by the City within the Town's boundaries when the Franchise Agreement expires on November 6, 2016. The Town and its residents will suffer immediate harm as the result of such unconstitutional encroachment.

(Petition ¶ 36.) The Town and its residents also will be immediately harmed by the City's continued abuse of its unregulated monopoly electric service area as the City extracts monopolistic profits from the Town and its residents in order to subsidize City operations that are unrelated to its electric utility. (Petition ¶ 35.)

2. The Town Has Standing Under the *Agrico* Test

The City erroneously argues that the Town has failed to include allegations that demonstrate that it meets the test set forth in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). As explained above, it is well settled under Florida Supreme Court precedent that, as an interested person, the Town has standing to seek to modify the Territorial Order. As such, the *Agrico* standing test does not apply. Nonetheless, even if *Agrico* applied, the Town meets such test. Under *Agrico*, a party must show that (1) it will suffer injury in fact which is of sufficient immediacy to entitle it to a hearing, and (2) the substantial injury is of a type or nature which the proceeding is designed to protect. *Id*. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. *Id.*

(1) The Town Will Suffer A Substantial and Immediate Injury

First, as an incorporated municipality under the Florida Constitution the Town has a constitutional right to be protected from unilateral exercise of extra-territorial powers by the City. The Town and its residents will be immediately harmed by an unconstitutional encroachment when the City exercises extra-territorial power within the Town without the Town's consent. The Town has specifically alleged that the City's abuse of its unregulated monopoly power has resulted in excessive rates for lower quality service, all while the City uses unregulated monopoly profits from its electric service within the Town to support non-utility operations of the City and reduce the tax burden on City residents. These are concrete and not speculative allegations of a substantial and

immediate injury in fact that is, and will continue to be, suffered by the Town absent action by the Commission in response to the Town's Petition. (Petition ¶¶ 21-31.)

(2) The Town's Injury is of a Type or Nature Which the Proceeding is Designed to Protect

Second, the substantial injury alleged in the Petition is of a type or nature which this proceeding is designed to protect. As described above, the Town's harm results not only from a facially unconstitutional encroachment within its boundaries, but also from the City's use of unregulated monopoly electric service area within the Town to extract monopolistic profits from the Town and its residents in order to subsidize City operations that are unrelated to its electric utility. This is exactly the type of utility customer interest that proceedings to approve or modify territorial agreements were designed to protect. The Florida Supreme Court has emphasized that in order for a territorial agreement to be in the public interest, parties to such agreement must be subject to a statutory regulatory regime sufficient to protect consumers from monopoly abuses since the power to "fix the price and thereby injure the public" and the "danger of deterioration in quality" are the "inevitable" evils of unregulated monopolies. *City Gas*, 182 So. 2d at 432 (quoting *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 221 (1910) (White, C.J.)). "Our decisions exempting territorial agreements from antitrust legislation have been premised on the existence of a statutory system of regulations governing the public utilities that is sufficient to prevent any abuses arising out of the monopoly power created by the agreements." *City of Homestead*, 600 So. 2d at 452.

But that "statutory system of regulation" must come with active supervision to specifically protect the consumer, particularly disenfranchised consumers such as the Town and its residents, from the inevitable abuses that arise from an unregulated monopoly. Indeed, the Commission recently acknowledged that it has a strict duty to actively supervise a municipal electric utility's

implementation of the territorial agreement to protect the public from monopoly abuses and other anticompetitive behavior:

> ***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 (11th 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 (11th 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.
>
> The [other parties] dismiss this concern with the argument that there is no anticompetitive behavior demonstrated by Keys Energy and Florida Keys Electric Cooperative in this case, but our charge under antitrust law extends beyond the policing of any particular anticompetitive behavior. We must demonstrate continued, meaningful, active supervision of the State's policy to displace competition between electric utilities throughout the state by approving—and enforcing—territorial agreements and resolving disputes. An agreement and Order that we cannot enforce in any substantive way will not satisfy the state action immunity doctrine under *Parker v. Brown and Midcal*.

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 *42-43 (F.P.S.C. May 21, 2013) (emphasis added).

The relief requested by the Town's Petition is squarely in the zone of these interests that the Commission described in the *Reynolds* order. The antitrust laws are not designed to protect competitors, but consumers. *City Gas*, 182 So. 2d at 432. Actively supervising the ongoing implementation of territorial agreements, including making adjustments where warranted by changed circumstances, is precisely what the Commission is supposed to do. *Id.*; *City of Homestead*, 600 So. 2d at 452. Moreover, it is what the Commission said it will do in *Reynolds.* The active supervision which the Commission must exercise to protect against monopoly abuses is particularly needed in the very unique situation here where the City is serving extraterritorially and exerting unregulated monopoly powers within the corporate limits of another equally independent municipality.

(3) The City's Arguments Against The Town's Standing Are Inapplicable

Rather than accepting the Town's Petition on its face, the City repeatedly argues that the "***real*** issue in these ongoing proceedings" can be boiled down to the Town's "interest in lower electric rates." (Motion at 35) (emphasis in original). The City argues that this case is no different than *Ameristeel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997), where the Supreme Court determined that "AmeriSteel's claim that the higher rates it pays to FPL for electricity are one factor threatening the continued viability of its Jacksonville plant—and the related claim that relocation of its plant would cause an economic detriment to the City of Jacksonville—is not an injury in fact of sufficient immediacy to entitle AmeriSteel to a 120.57 hearing." *Id.* Contrary to the City's mischaracterization, the Petition is not a simple demand by a customer to be served by a particular utility of its choosing. Rather, unlike *Ameristeel*, which involved a private company's

"speculative economic interests," *id.* at 478, the Petition alleges that the Town is a municipality complaining about the City's unconstitutional exercise of extra-territorial powers in the Town's corporate limits and the particular unregulated monopolistic abuses arising out of that unconstitutional act.

To be sure, the danger of an unregulated monopoly is that it has an inevitable tendency to charge excessive prices for lower quality service. *City Gas,* 182 So. 2d at 432. That danger is particularly acute here, where the City's customers in the Town have no electoral voice in the City's governance, and yet the City uses the unregulated monopoly rates charged to the Town to subsidize its own non-utility operations in order to lower the tax burden on the City's own residents. These abuses of monopoly power are certainly occurring, as alleged in the Petition, but they are a symptom of the unconstitutional exercise of extra-territorial monopoly power which is the focus of the Petition. (Petition ¶¶ 21-31.) The Town has a right to bring to the Commission's attention the Florida Constitution's limitation on municipal powers and to request that any Commission-approved territorial agreement does not sanction such unconstitutional conduct. *City Gas,* 182 So. 2d at 435.

The City also attempts to advance a waiver argument by claiming that the Town is akin to the petitioner in *Ameristeel* because the Town is a long-time customer of the City that never asserted its rights before 2014 or 2015. Those are affirmative defense arguments and cannot be considered when evaluating the sufficiency of the Petition in response to the motion to dismiss. *Ingalsbe,* 869 So. 2d at 34-35. In any event, the City's waiver theory is meritless. The Petition clearly alleges that the Town entered into two agreements with the City, in 1968 and 1986, which expressly limited the City's exercise of extra-territorial powers within the Town to a finite period of time based on a bargained for exchange. If the Town wanted to give the City perpetual consent

to exercise extra-territorial powers within the Town it would not have insisted on a finite term in the Franchise Agreement. The 1986 Franchise Agreement, which is attached to the Petition as Exhibit A, provides consent for the City to provide electric service in the Town for a period of 30 years, which will expire November 6, 2016.

The City next argues that the Town has not addressed the criteria set forth in Section 366.04(2)(e), Florida Statutes, and Rule 25-6.0441, Florida Administrative Code, regarding territorial disputes. The City again mischaracterizes the Town's Petition as a territorial dispute when it is not.[2] Based on the four corners of the Petition, the Town is not asking the Commission to redraw a service territory boundary between two utilities based on a factor-by-factor determination of which utility is best suited to serve considering the nature of the disputed area, the cost of service, and similar evidence. Rather, the Town is asking for modification of the Territorial Order as a matter of law because the existing Territorial Order will no longer comply with the Florida Constitution as of November 6, 2016. That is to say, the factors in Section 366.04(2)(e), Florida Statutes, and Rule 25-6.0441, Florida Administrative Code, address which utility should serve in an area assuming that service by either would be authorized by the Florida Constitution. They simply are inapplicable where a utility lacks the legal authority to provide service within a particular territory, as will be the case when the Franchise Agreement expires.

Even if territorial dispute considerations were relevant, which they are not, one of the factors referenced by the City is "the ability to serve." The Town has certainly challenged the City's legal capacity, and thus "ability to serve," within the Town's corporate limits. That is the thrust of the Petition. As a matter of law, the City no longer has the "ability to serve" the Town in

[2] The City concedes in footnote 10 of its response that this is not a traditional territorial dispute.

a manner that complies with the extra-territorial power limitations in the Florida Constitution, and this factor is dispositive.[3]

Even if the Town did not have standing, which it plainly does, the Commission could, and should, address on its own motion the changed legal circumstances that will render the City's extra-territorial provision of electric service to the Town unconstitutional upon expiration of the Franchise Agreement. Section 350.05, Florida Statutes, establishes that each member of the Commission has an affirmative duty to "support, protect, and defend" the Constitution of the State of Florida. Thus, the Commission cannot and should not condone the provision of extra-territorial electric service by a municipality in direct contravention of the Florida Constitution, particularly where there is a Commission-regulated utility ready, willing and able to serve the customers at issue at a lower rate and with demonstrated reliable service.

Moreover, the Commission has stated that it has jurisdiction to address these issues. On January 5, 2016, the Town petitioned the Commission for a declaratory statement to confirm the extent of the Commission's jurisdiction to address the constitutional limitations on the City's exercise of extra-territorial powers within the Town's corporate limits. On March 1, 2016, the Commission voted to issue a declaratory statement that it "has the jurisdiction under Section 366.04, F.S., to determine whether Vero Beach has the authority to continue to provide electric service within the corporate limits of the Town of Indian River Shores upon expiration of the franchise agreement between the Town of Indian River Shores and the City of Vero Beach." In that vote the Commission also confirmed that in exercising such jurisdiction it could interpret

[3] In addition, the Petition alleges that FPL has made an offer to purchase the City's electric utility assets within the Town and stated it is ready, willing and able to serve the Town. (Petition ¶ 47.) This is another change in circumstance that the Commission can consider with respect to whether there is a utility with the ability to serve without uneconomic duplication.

Article VIII, Section 2(c) of the Florida Constitution and Section 166.021(3)(a), Florida Statutes, which limit a municipality's lawful ability to exercise extra-territorial powers.

3. The Town Will Be Injured by Changed Circumstances

The City also argues there is no cognizable injury here because there are no "changed circumstances." The City makes this same argument in the last section of its Motion and those claims also will be addressed in detail later in the Response. But in short, the City suggests that the Town has alleged no change in the "ability of competing utilities to provide reliable service, their costs to provide service, and the avoidance of uneconomic duplication of distribution and subtransmission facilities." (Motion at 40-41.)

The City again mischaracterizes the Petition. The Petition alleges that after November 6, 2016, the City will no longer have the Constitutional legal capacity to serve in the Town's corporate limits regardless of any of those factors. The change in circumstances is that the Town no longer consents to service by the City after November 6, 2016. Until that date, the City can serve within the Town without violating the Florida Constitution. After that date, service in the Town's boundaries will be an unconstitutional exercise of extra-territorial powers. That certainly constitutes a change in circumstances, and the constitutional violation will result in real and immediate harm to the Town. In fact, this same change in circumstances has been recognized by the Commission as necessitating modification of territorial service areas to conform to a utility's underlying legal capacity to exercise extraterritorial powers. *See In re: Joint petition for approval to amend territorial agreement between Progress Energy Florida, Inc. and Reedy Creek Improvement District*, Docket No. 090530-EU, Order No. PSC-10-0206-PAA-EU, at *4 (F.P.S.C.

Apr. 5, 2010) ("*Reedy Creek*") (recognizing the need to modify the territorial order because "pursuant to its charter, RCID cannot furnish retail electric power outside of its boundary").

The changed circumstances also arise from the City's abuse of its monopoly service territory since the Commission last approved the Territorial Agreement 28 years ago. The Town alleges in its Petition that the Territorial Order gives the City a monopoly service area within the Town and, because the Town and its residents have no electoral say in how the City monopoly sets its rates and provides its services, the Commission has the responsibility of actively supervising the City's implementation of territorial agreement to protect the Town and its residents from monopoly abuses by the City. The Petition also expressly alleges that the City has abused, and continues to abuse, its monopoly privilege under the Territorial Order. The injury associated with such abuse will only be exacerbated when the Franchise Agreement expires and the Town no longer has the contractual protections afforded by that agreement. (Petition ¶¶ 21-31.) These changed circumstances warrant modification of the City's monopoly service area to protect the Town and its disenfranchised residents from the City's abusive monopolistic practices.

4. As a Municipal Government, the Town is Obligated to Represent the Interests of its Citizens

Last, the City argues that the Town lacks standing to assert the interests of its citizens. The Town, however, as a municipality under Florida's constitution, has an obligation to protect the interests of its residents from the City's *unconstitutional* exercise of *unregulated* extraterritorial *monopoly* powers within the Town. Moreover, the Town is a customer of the City's utility and also challenges the City's exercise of unconsented and unregulated extra-territorial monopoly powers within the Town's limits on that basis.

The City cites to the Commission's order in *In Re: Application for a Limited Proceeding to Include Groundwater Development and Protection Costs in Rates in Martin County by Hobe*

Sound Water Company, Docket No. 960192-WU, Order No. PSC-96-0768-PCO-WU (F.P.S.C. June 14, 1996), to argue that the Town has no standing. That proceeding, however, was a rate case and had nothing to do with assertion of constitutional protections against improper encroachments by one municipality within the boundaries by another. In that case, a municipality, the Town of Jupiter Island, sought to intervene in a proceeding initiated by Hobe Sound Water Company to increase its utility rates on the basis that it was a customer of the utility. The Town of Jupiter Island also advised the Commission that the bulk of its residents also were customers of the utility and were expecting the municipality to represent their interests in the rate case. Although the Commission determined that an intervening municipality did not have standing to represent the interests of its citizens for purposes of challenging rate levels, the Commission permitted intervention by the Town of Jupiter Island as a customer. *Id.* at *4 ("Nevertheless, as a water customer of the utility, it appears that the Town's substantial interests may be affected by Commission action taken in this docket. Therefore, the Town's motion shall be granted to the extent that the Town requests permission to intervene itself as a customer of Hobe Sound."). Even if the Town cannot legally represent the interests of its residents, the Town clearly has standing as a customer of the City.

B. <u>The Town's Petition Sufficiently Pleads the Town's Claim For Relief</u>

The City argues that the Town has not complied with the pleading requirements of Rule 28-106.201, Florida Administrative Code. This argument must fail for at least three reasons: (1) a petition seeking modification of a territorial order pursuant to Section 366.04, Florida Statutes, need not comply with Rule 28-106.201 because it is not a petition seeking to challenge proposed agency action; (2) regardless, the Town's petition substantially complies with Rule 28-106.201;

and (3) even if the Town's petition did not substantially comply with Rule 28-106.201, dismissal should be without prejudice and the Town should be provided leave to amend.

First, the Petition seeks relief from the Commission pursuant to Section 366.04, Florida Statutes. The Florida Supreme Court has expressly recognized that the commission may ***withdraw or modify its approval of a service area agreement, or other order***, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public." *Peoples Gas Sys., Inc.*, 187 So. 2d at 339 (emphasis added). This is not a petition seeking to challenge proposed agency action, to which Rule 28-106.201 rule is largely applicable. Moreover, Rule 28-106.201 by its own terms plainly applies only to hearings on "disputed issues of material fact." At the time the Petition was filed the Town described the relevant material facts that it did not consider disputed. If the City disputes those facts, it must describe with specificity those facts alleged in the Petition that it disputes.

Even if Rule 28-106.201 were applicable, the Town has substantially complied with such rule. It is improper to dismiss pleadings which substantially comply with these minimal pleading requirements. *See In re: Petition for approval of optional non-standard meter rider, by Florida Power & Light Company*, Docket No. 130223-EI, Order No. PSC-14-0145-FOF-EI, at *18-22 (F.P.S.C. Apr. 1, 2014) (rejecting argument for dismissal based on alleged pleading deficiencies under Rule 28-106.201(2)). A comparison of the requirements of Rule 28-106.201(2) with the allegations of the Petition demonstrates the Town's compliance with all applicable provisions:

RULE 28-106.201(2)(a) – "The name and address of each agency affected and each agency's file or identification number, if known";

- PETITION: The Town's Petition provides this information on page 1.

RULE 28-106.201(2)(b) – "The name, address, any e-mail address, any facsimile number, and telephone number of the petitioner, if the petitioner is not represented by an attorney or a qualified representative; the name, address, and telephone

number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination";

- PETITION: The Town's Petition provides this information. The name and contact information of the Town are set forth on pages 3-4 of the pleading under the subheading "Parties." The Town's substantial interests in this proceeding are clearly described in paragraphs 33, 34 and 35 of the Petition (and explained above).

RULE 28-106.201(2)(c) – "A statement of when and how the petitioner received notice of the agency decision";

- PETITION: This subsection is designed to address proposed agency action and is not applicable.

RULE 28-106.201(2)(d) – "A statement of all disputed issues of material fact. If there are none, the petition must so indicate";

- PETITION: A plain reading of the Town's Petition indicates that that the Town believes there are no "disputed" issues of material fact. The Town sets forth an extensive list of "Material Facts" in paragraphs 9 through 32 of the Petition, but at the time the pleading was filed those were not disputed.

RULE 28-106.201(2)(e) – "A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action";

- PETITION: This subsection is designed to address proposed agency action and is not applicable. However, it should be noted that the Town's Petition sets forth a detailed explanation of the changed legal circumstances that require modification of the Territorial Order in paragraphs 37-40 of the Petition.

RULE 28-106.201(2)(f) – "A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes";

- PETITION: This is designed to address proposed agency action and is thus not applicable here. However, it should be noted that the Town sets forth a detailed explanation of the provisions of the Florida Constitution, the Florida Statutes and the case law that that require modification of the Territorial Order. *See*, *e.g.*, paragraphs 4, 5, 6, 7 and 8 of the Petition.

RULE 28-106.201(2)(g) – "A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action."

- PETITION: Again this is designed to address proposed agency action and is not applicable. However, the Town sets forth a detailed statement of relief requested in paragraphs 46-48 and in the "Conclusion" on pages 20-21 of the Petition.

Thus, to the extent that Rule 28-106.201(2) is applicable, the Town attempted in good faith to provide all of the information contemplated in the rule. At the very least the Town should be deemed in "substantial compliance" under section 120.569(2)(c).

Finally, even if the Town had not substantially complied with Rule 28-106.201, the appropriate remedy would be dismissal without prejudice and leave to amend. § 120.569(2)(c), Fla. Stat. ("Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect…. "); *Fla. Dep't of Revenue ex rel. A.L. v. S.B.*, 124 So. 3d 377, 378 (Fla. 2d DCA 2013) ("Dismissal with prejudice is a severe sanction…. The trial court should grant such relief only when the pleader has failed to state a cause of action and it conclusively appears that the pleader cannot possibly amend the pleading to state a cause of action." (citation omitted)).

C. <u>Administrative Finality Does Not Bar the Petition</u>

The City argues that the Commission order approving the territorial agreements should not be revisited because of the doctrine of administrative finality. The City concedes in its Motion that changed circumstances constitute an exception to the doctrine of administrative finality, but simply disputes that the Town has adequately alleged any "changed circumstance" that would entitle it to relief by the Commission. Administrative finality, however, is an affirmative defense that is not appropriately resolved on a motion to dismiss, where the Town has alleged that material circumstances have changed. *See In Re: Petition of BellSouth Telecommunications, Inc. to Lift Marketing Restrictions by Order No. PSC-96-1569-FOF-TP,* Docket No. 971399-TP, Order No.

PSC-98-0293-FOF-TP, at *6 (F.P.S.C. Feb. 17, 1998) (rejecting argument of administrative finality in motion to dismiss and stating that "BellSouth has alleged sufficient facts to demonstrate changed circumstances"). Moreover, the doctrine of administrative finality has not prevented the Commission from modifying a territorial order to reconfigure a municipal electric utility's monopoly service area where legal circumstances changed such that the municipal utility "cannot furnish retail electric power outside of its boundary." *Reedy Creek*, Order No. PSC-10-0205-PAA-EU, at * 4.

In any event, the Town has sufficiently alleged throughout its Petition that there are changed circumstances requiring modification of the Commission's Territorial Order. To provide the relevant legal context, the Petition alleges that "Article VIII, section 2(c) of the Florida Constitution establishes that a municipality has no inherent authority to exercise extra-territorial powers; instead, the 'exercise of extraterritorial powers by municipalities shall be as provided by general or special law.' " (Petition ¶ 38.) The Petition also alleges that "[t]here is no current general or special law that provides the City with the power to exercise extra-territorial powers within the corporate limits of the Town without the Town's consent." (Petition ¶ 38.)

Against that backdrop, the Petition alleges that up until now, every time the Commission has reviewed and approved the Territorial Agreement and any amendments thereto, there existed a bilateral legally binding contract between the City and the Town under which the City enjoyed the Town's express written consent to provide extra-territorial electric service within the corporate limits of the Town. (Petition at 2.) But those legal circumstances changed significantly in July of 2014 when the Town formally notified the City that when the Franchise Agreement between the Town and the City expires on November 6, 2016, the City will no longer have the Town's consent

to exercise extra-territorial powers in the Town's corporate limits. (Petition ¶ 19.) The Petition makes detailed allegations about these changed circumstances:

- The Petition alleges that on December 18, 1968 the City entered into a freely bargained-for agreement with the Town pursuant to which the Town gave the City temporary consent to exercise certain extra-territorial powers within the corporate limits of the Town, including temporary permission to provide electric service to residents "within the corporate limits of said Town" and to occupy and use the Town's rights-of-way and other public places, for a limited term of 25 years. A copy of the 1968 Agreement is attached as Exhibit "A" to the Petition. (Petition ¶ 12.)
- The Petition alleges that on November 1, 1971, FPL and the City entered into the bilateral Territorial Agreement which was contingent upon Commission approval. (Petition ¶ 13.) The Territorial Agreement was presented to the Commission for its review and approval in Docket No. 72045-EU, styled *In re: Application of Florida Power and Light Co. for approval of a territorial agreement with the City of Vero Beach.* (Petition ¶ 14.)
- The Petition includes as exhibits the pertinent orders approving the Territorial Agreement and amendments thereto. (Petition ¶ 14, Ex. B.) According to the Commission's records in Docket No. 72045-EU, FPL filed an "Application of Florida Power & Light Company for Approval of a Territorial Agreement and Contract for Interchange Service with the City of Vero Beach, Florida," on January 24, 1972. At that time, pursuant to the 1968 Agreement, the City had the Town's express written consent to exercise certain extra-territorial powers within the

corporate limits of the Town, including temporary permission to provide electric service until December 18, 1993. (Petition ¶ 12, Ex. A.)

- The Petition attaches the order dated August 29, 1972, in which the Commission approved the Territorial Agreement. *In re: Application of Florida Power and Light Co. for approval of a territorial agreement with the City of Vero Beach*, Docket 40045-EU, Order No. 5520 (F.P.S.C. Aug. 29, 1972); (Petition ¶ 14, Ex. B.) Again, at the time the Commission reviewed and approved the Territorial Agreement the City had the Town's express written consent under the 1968 Agreement to exercise certain extra-territorial powers within the corporate limits of the Town until December 18, 1993. (Petition ¶ 12, Ex. A.)[4]
- The Petition alleges that , effective November 6, 1986, the Town and the City entered into a freely bargained-for Franchise Agreement which expressly superseded the parties' 1968 Agreement and extended the Town's temporary consent to the City exercising certain extra-territorial powers within the corporate limits of the Town, for a limited term of 30 years. (Petition ¶ 16, Ex. C.)
- The Petition alleges that the last Commission order approving amendment of the territorial agreement was entered on February 9, 1988. (Petition ¶ 15, Ex. B.) Once again, at that time the City had the Town's express written consent pursuant to the

[4] In its Motion, the City concedes that approximately nine months before the Commission approved the Territorial Agreement in 1972, the Town responded to an inquiry from the Commission and provided the Commission with express written notice that the Town had entered the 1968 "utility contract" with the City to provide electric service for a 25-year term. Since the Town had already consented to that service, the Town made it clear to the Commission that the Territorial Agreement between the City and FPL was none of the Town's concern. In reciting the 25-year term of the Town's "utility contract" with the City, the Town certainly did not suggest that it anticipated the City would be able to assert the right to serve in perpetuity as a result of the Territorial Agreement and any related Commission proceedings.

Franchise Agreement to exercise certain extra-territorial powers within the corporate limits of the Town until November 6, 2016. (Petition ¶ 15, Ex. B.)

The Petition clearly alleges that from 1968 to the present, the City has had the Town's consent in the form of formal service and franchise agreements under which the Town expressly gave the City temporary permission to exercise extra-territorial powers to provide electric service within the Town's corporate limits for a limited period of time. The Petition plainly alleges that those circumstances significantly changed when the Town formally notified the City in July 2014 that when the Franchise Agreement between the Town and the City expires on November 6, 2016, the City will no longer have the Town's consent to exercise extra-territorial powers in the Town's corporate limits.

The Town has pled and is prepared to prove that whatever permissions, consents or legislative grants that might have given the City power to exercise extraterritorial powers within the Town when the Territorial Agreement was first presented to the Commission in 1972 are circumstances that have since changed over time. The Petition clearly alleges that there is no current general or special law that grants the City the power to exercise unilateral extraterritorial powers within the corporate limits of the Town. (Petition ¶¶ 5, 38.)

The City chooses to ignore the legal effect of the Town's consent in this unique situation between two municipalities, where the Florida Constitution restricts a municipality's ability to exercise power within the limits of another municipality. The Commission, on the other hand, has not ignored that a service boundary must be modified based on changed conditions when the utility no longer has the organic authority to serve in the area previously approved by the Commission. *See Reedy Creek*, Order No. PSC-10-0206-PAA-EU, at *4 (recognizing the need to modify the

territorial order because "[p]ursuant to its charter, RCID cannot furnish retail electric power outside of its boundary").

The simple, undisputed process described in the Commission's Order in *Reedy Creek* is the same process that *should* be occurring here, but is not. There should be no dispute that the City lacks the underlying organic municipal power y to exercise extraterritorial powers in the Town, and the City itself should advise the Commission of that change in circumstances which affects the Commission's prior order. Instead, the City is still trying to avoid having that issue addressed at all.

The Town has also alleged changed circumstances that have arisen from the City's abuse of its unregulated monopoly service territory within the Town since the Commission last approved the Territorial Agreement 28 years ago. The Town has alleged that these changed circumstances include monopolistic abuses whereby the City has charged excessive rates to the Town in order to subsidize the City's own non-utility operations and reduce the tax burden on its own residents at the expense of the Town. (Petition ¶¶ 21-31.) The monopolistic abuses inherent in these alleged changed circumstances are precisely the kind that the Commission must protect against. *City Gas*, 182 So. 2d at 435.

As such, the Petition has stated a valid claim that the circumstances have changed and that the Town is entitled to relief on that basis. The City may dispute that the circumstances have changed, and it can attempt to prove that as an affirmative defense at the appropriate time. The City's merit-based arguments, however, cannot support dismissal of the Petition.

D. <u>The Town's Complaint Against The City Is Also Sufficiently Pled</u>

The Town's Petition also asks, in the alternative, that it be treated as a customer complaint. The City argues that the Petition must be dismissed as a customer complaint because it does not

refer to a "rule, order or statute" that has been violated. But the Petition is very clear about the conduct and the law at issue. To summarize, the City entered a Territorial Agreement with FPL which included parts of the Town within the City's monopoly service area at a time when the City had the Town's express written consent to serve within that area of the Town. (Petition ¶¶ 12-17.) The City sought and obtained the approval by the Commission of that Territorial Agreement and its amendments by invoking the Commission's power under section 366.04, Florida Statutes. (Petition ¶¶ 14-15, 17.)

Now that the City will no longer have the Town's consent to exercise otherwise unconstitutional extraterritorial powers within the Town's corporate limits, not only has the City failed to advise the Commission and seek appropriate modification of the territorial order, *see Reedy Creek*, Order No. PSC-10-0206-PAA-EU, but the City continues to invoke the prior approval of the territorial agreement pursuant to section 366.04 to assert its right to serve within the Town's corporate limits in perpetuity. Moreover, because the City has received the Commission's approval of a monopoly service area, it has a legal obligation not to abuse that monopoly power in the manner alleged by the Petition. *City Gas*, 182 So. 2d at 435 ("[T]his agreement could result in monopolistic control over price, production, or quality of service only by the sufferance of the commission."). Continuing to abuse its monopoly powers established by the Territorial Order, and insisting on serving the Town pursuant to that order which must be modified to comply with the Florida Constitution, plainly contradicts, violates, and indeed abuses, Section 366.04, which the Commission has jurisdiction to address.

Motion to Strike Allegations Outside of the Pleadings

The City has included numerous material in its Motion which are well outside the Town's pleadings, which the Commission should ignore or strike. To the extent the City is granted leave to intervene, it must take the case as it has found it, and in any event it must accept the allegations

of the Petition as true. The City has not done so. In addition to re-characterizing the Town's Petition and speculating as to "real issue" behind it, the City has injected numerous additional facts and even attached a newspaper article as an exhibit to its Motion. As noted above, consideration of a motion to dismiss "may not properly go beyond the four corners of the complaint in testing the legal sufficiency of the allegations set forth therein." *Stubbs v. Plantation Gen. Hosp. Ltd. P'ship*, 988 So. 2d 683, 684 (Fla. 4th DCA 2008) (internal quotation omitted).

For instance, the newspaper article attached as Exhibit B to the Motion is cited to support that the Town's mayor has previously expressed frustration with the rates charged by the City. The City offers this as purported evidence that the real purpose of the Petition is to challenge rates rather than enforce fundamental provisions of the Florida Constitution. To be sure, excessive and abusive rates, in addition to other issues alleged in the Petition, are a chronic symptom and inevitable result of the City's unregulated refusal to accept the constitutional limits on its powers to encroach within the boundaries of another municipality. *City Gas,* 182 So. 2d at 432. But that certainly does not mean that the Town's petition is merely a challenge regarding rates, or a challenge regarding service quality, or a challenge regarding the availability of conservation measures. The Petition is a challenge to the unconsented and unregulated exercise of extra-territorial monopoly power by another municipality within the Town's boundaries, which contradicts the Florida Constitution and which subjects the Town and its residents to monopoly abuse. . These arguments and allegations of the City, including the article and the various arguments about the Town's "real issue," have no place in determining whether the Town has stated a claim on which relief can be granted and should be stricken as immaterial and impertinent. *See* Fla. R. Civ. P. 1.140(f).

Conclusion

Wherefore, the Town respectfully requests that the Commission strike from the City's Motion those matters outside the four corners of the Petition and deny the Motion thereby allowing the Town's Petition to move forward.[5]

Respectfully submitted this 7th day of April, 2016.

HOLLAND & KNIGHT LLP

/s/D. Bruce May, Jr.
D. BRUCE MAY, JR.
Florida Bar No. 354473
Email: bruce.may@hklaw.com
KAREN D. WALKER
Florida Bar No. 982921
Email: karen.walker@hklaw.com
KEVIN COX
Florida Bar No. 34020
Email: kevin.cox@hklaw.com
HOLLAND & KNIGHT LLP
315 S. Calhoun Street, Suite 600
Tallahassee, Florida 32301
Telephone: (850) 224-7000
Facsimile: (850) 224-8832
Secondary Email: jennifer.gillis@hklaw.com

Attorneys for Petitioner Town of Indian River Shores

[5] The City has not requested oral argument on its Motion. The Town is not certain at this time whether oral argument would be beneficial to the Commission, but respectfully asks that it be allowed to request participation at the agenda conference following its review of Staff's Recommendation. In any event, if the Commission believes that hearing from the Town on any issues raised in the Motion would be beneficial, the Town is prepared to provide argument and answer any questions that the Commission may have.

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing via email this 7th day of April, 2016 to:

John Villafrate
jvillafr@psc.state.fl.us
Kathryn Cowdery
kcowdery@psc.state.fl.us
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Robert Scheffel Wright
schef@gbwlegal.com
John T. La Via, III
jlavia@gbwlegal.com
Gardner, Bist, Bowden, Bush, Dee,
La Via & Wright, P.A.
1300 Thomaswood Drive
Tallahassee, Florida 32308

Kenneth Hoffman
Vice President Regulatory Affairs
Ken.Hoffman@fpl.com
Florida Power & Light
Company
215 S. Monroe Street, Ste 810
Tallahassee, FL 32301

Wayne R. Coment
City Attorney
wcoment@covb.org
City of Vero Beach
P.O. Box 1389
1053 20th Place
Vero Beach, Florida 32961-1389

Jessica Cano
Senior Attorney
Jessica.Cano@fpl.com
Florida Power & Light
Company
700 Universe Boulevard
Juno Beach, FL 33408

Patrick Bryan
Senior Counsel
Patrick.Bryan@fpl.com
Florida Power & Light
Company
700 Universe Boulevard
Juno Beach, FL 33408

/s/D. Bruce May, Jr.
D. Bruce May, Jr.