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IN THE SUPREME COURT OF FLORIDA

Case Nos. SC15-504 and SC15-505
(Consolidated)

THE BOARD OF COUNTY COMMISSIONERS,
INDIAN RIVER COUNTY, FLORIDA,

Petitioner/Appellant,

v.

ART GRAHAM, ETC., ET AL.,

Respondent/Appellee,

On Appeal from the Florida Public Service
PSC Docket Nos. 140244-EM and 140142

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Within this Initial Brief, the Appellant, the Board of County Commissioners, Indian River County, Florida, will be identified as the "Board" or "County." The Florida Public Service Commission will be referred to as the "PSC" or the "Commission." The City of Vero Beach will be referred to as the "City."

Order No. PSC-15-0102-DS-EM, the order on review in Case No. SC15-504, will be referred to as the "City Order." Order No. PSC-15-0101-DS-EM, the order on review in Case No. SC15-505, will be referred to as the "County Order."

The County will refer to the City's Petition for Declaratory Statement in Docket No. 140244-EM that led to the issuance of the City Order as the "City Petition." The County's Petition for Declaratory Statement in Docket No. 140142-EM that led to the issuance of the County Order will be referred to as the "County Petition."

The 1987 franchise agreement between the County and the City for electric service in the unincorporated areas of Indian River County shall be referred to as the "Franchise Agreement."

The phrase "Agenda Conference" refers to the public meeting held on February 3, 2015, at which the PSC heard consolidated argument on the City Petition and the County Petition.

"FPL" shall refer to Florida Power and Light Company, an investor owned electric utility and a "public utility" as defined in Section 366.02(1), Florida Statutes. FPL was an intervenor below in the County's Petition docket but not the City Petition docket.

"Territorial Orders" shall refer to the PSC orders that approved territorial agreements or modifications between the City and FPL and which are more particularly defined in Footnotes 1-4, below, and the accompanying text.

Citations to the record will be "R at _". Citations to PSC orders will use the PSC's current order designation form, "Order No. PSC-XX-XXXX-XX" with orders prior to March 1991 using the prior format Order No. XXXXX. All orders are available on the PSC's website or from the Commission Clerk.

STATEMENT OF THE CASE AND FACTS

These consolidated appeals originate from the same event – the 2017 expiration of the Franchise Agreement between the Board and the City. Pursuant to this Franchise Agreement, the City provides electric service within parts of the unincorporated areas of Indian River County. The City's electric service has become increasingly more contentious for those customers living outside the City due to (1) the City's electric rates being materially higher than the comparable FPL rates, and (2) the subsidy flowing to the City's general revenue fund which is largely paid for by non-City customers who receive no City benefits and who have

no vote in City elections.[1] These issues should be resolved if the pending sale of the City's electric utility to FPL is completed. The Board strongly supports the sale to FPL, but there are problems that currently prevent this desired outcome. Given the uncertainty of the sale and the escalating concerns of its citizens, the Board sought the PSC's guidance through a declaratory statement.[2] Later, the City sought its own Declaratory Statement.

Electric Service & The Franchise Agreement.

The City began providing electric service outside its corporate limits in the unincorporated areas of Indian River County prior to 1972 and possibly as early as the 1950s if not even earlier.[3] The exact date such service began to the unincorporated areas is not relevant or determinative of this appeal, but the Board acknowledges that it precedes the City's acceptance of the Franchise Agreement between the City and the County on March 5, 1987.[4]

The Franchise Agreement is a bargained-for exchange and included five key provisions: (1) the "sole and exclusive right, privilege or franchise" for the City to "construct, maintain, and operate an electric system" within certain designated areas within the unincorporated area of the County; (2) a thirty-year term for the Franchise Agreement commencing upon the City's acceptance of the franchise; (3)

[1] R. at 28-31.
[2] R. at 319-320.
[3] R. at 22, 326, 595.
[4] R. at 42-59, 595, 614-631; the City's acceptance is at R. at 47 and 619.

the County's agreement to not permit any other franchisee within the City's exclusive franchise area; (4) a five-year advance notice of intent to renew the Franchise Agreement; and (5) a renewal of the Franchise Agreement only upon the mutual agreement of the parties.[5] The City accepted the Franchise Agreement on March 5, 1987.[6] By letter dated February 22, 2012 from the County's Chairman to the City's Mayor, the Board timely notified the City that it would not renew the Franchise Agreement when it expires on March 4, 2017.[7] The City has not made any attempt to renegotiate or extend the Franchise Agreement.

The service area boundaries for the City's electric service are defined "as such Franchise limits are or may be defined in the Service Territory Agreement between the City of Vero Beach, Florida and Florida Power and Light Company, and its successors."[8] The "Service Territory Agreement" referenced in the Franchise Agreement is the "Territorial Boundary Agreement" between the City and FPL dated June 11, 1980, and approved by the PSC on February 2, 1983.[9]

The Service Territory Agreement in effect on the effective date of the Franchise Agreement has been modified over the years. According to the PSC's

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[5] R. at 42-59 (Franchise Agreement, Sections 1, 8, 13).
[6] R. at 58, 630.
[7] R. at 60, 632.
[8] R. at 42, 614 (Franchise Agreement, Section 1).
[9] R. at 48-58, 620-631; Order No. 11580 (February 2, 1983). This agreement was submitted to the PSC in Docket No. 800596 and subsequently approved by Order No. 10382 (November 3, 1981) and Order No. 11580 (February 2, 1983).

records, the first agreement between the City and FPL was executed on November 1, 1971, and approved by the PSC on August 29, 1972.[10] Over the years, the service areas and territorial boundary between the City and FPL have changed reflecting changes in population and development. The original territorial agreement in 1971 was amended in 1974,[11] there was the 1980 agreement that was in effect at the time of the 1987 Franchise Agreement, and the last and most recent agreement was a 1987 amendment to address electric service to a new subdivision.[12]

The County Petition.

With the sale of the City electric utility to FPL in doubt and the termination date of the Franchise Agreement drawing closer, the Board realized it needed the PSC's guidance on several issues associated with the termination of the Franchise Agreement in 2017. To be proactive and to properly plan its future conduct, on July 21, 2014, the County submitted its Petition for Declaratory Statement to the PSC. The County Petition identified fourteen specific questions regarding potential actions or alternatives the Board may undertake with respect to the

[10] This Territorial Agreement was submitted to the PSC by FPL for approval on January 24, 1972, in Docket No. 72045, and it was approved by the Commission on August 29, 1972, in Order No. 5520.
[11] Order No. 6010, on January 8, 1974, in Docket No. 73605.
[12] Amendment to Territorial Boundary Agreement" on September 18, 1987. This agreement between COVB and FPL was the first to occur after the granting of the Franchise to COVB. This Amendment was approved by the PSC (February 9, 1988).

expiration of the Franchise Agreement as well as several related issues regarding electric service within the unincorporated areas of the County.[13]

The PSC did not request any additional or supplemental information from the County. The County twice extended the 90-day requirement of Section 120.565(3), Florida Statutes, permitting the Commission to consider and take final action at the February 3, 2015, Agenda Conference discussed further below.[14]

The City Petition.

Partially in response to the County Petition, the City filed its own Petition for Declaratory Statement with the PSC on December 19, 2014.[15] The City Petition posed two questions both of which sought the PSC's declaration "that the expiration of that Franchise Agreement has no legal effect on the City's right and obligation to serve in its Commission-approved services areas notwithstanding the expiration of the Franchise Agreement."[16]

The PSC Proceedings Below & This Appeal.

The PSC did not consolidate the two dockets, but the PSC did hear consolidated oral argument on the County Petition and City Petition at its February 3, 2015, Agenda Conference.[17] In the City Order, the order on appeal in Case No.

[13] R. at 8-60.
[14] R. at 350, 475; *see also* R. at 930.
[15] R. at 488-519.
[16] R. at 489-490.
[17] R. at 886-926.

SC15-504, the PSC granted the City's Petition and declared that "Vero Beach has the right and obligation to continue to provide retail electric service in the territory described in the Territorial Orders upon expiration of the Franchise Agreement."[18] With respect to the County's Petition, in the County Order, the order on appeal in Case No. SC15-505, the PSC denied the County Petition "for failing to meet the Section 120.565, F.S., threshold requirements for issuance of a declaratory statement."[19]

The County timely noticed its appeal of both the City Order and the County Order. By Order dated May 11, 2015, this Court granted the Unopposed Motion to Consolidate, Schedule and Establish Page Limits. Pursuant to this Court's Order, the County hereby submits this Initial Brief. This Court has jurisdiction pursuant to Article V, Section 3(b)(2), of the Florida Constitution, and Section 366.10, Florida Statutes.

SUMMARY OF ARGUMENT

The two orders on appeal incorrectly apply declaratory statement law in granting the City's Petition and denying the County's Petition. While each order correctly recites the relevant legal principles, those principles are incorrectly applied resulting in the City Order and the County Order being inconsistent with each other. Under the correct application of the law, the PSC should have denied

[18] R. at 1050.
[19] R. at 953, 959.

the City's two requested declarations and addressed the merits of the County Petition.

The City Petition and County Petition reflect fundamentally different requests to the PSC. The two questions in the City Petition are broad questions beyond the scope of the PSC's authority and jurisdiction – they expressly seek to override the termination date of the Franchise Agreement and eviscerate any County authority with respect to the City electric utility's operations and use of County property in the unincorporated areas of the County. On the other hand, the County's fourteen questions are narrowly tailored, and by themselves do not result in, cause, or mandate any action by any party. Fourteen questions are admittedly a lot of questions. But the novelty of the situation required the Board to meaningfully consider a number of potential scenarios in order to be fully informed. The County's questions went to specific alternatives or sought to gain information regarding the PSC's opinion on what certain terms mean or the consequences of certain actions. The City Order nullifies the Franchise Agreement and imposes restrictions on the County's ability to act in its own interests, thus meriting rejection by this Court. Alternatively, if the PSC had granted all fourteen of the County Petition questions on the merits, the City would not be adversely affected as the County would only gain information from the PSC about how the County may conduct itself.

Argument I addresses the City Petition and how the two requested declarations granted by the PSC were outside the scope of the PSC's authority. First, the City had no standing. The City relied upon three substantive statutes for its requested declarations: the PSC's authority to approve territorial agreements, to resolve territorial disputes, and to manage a coordinated electric grid in order to avoid further uneconomic duplication.[20] However, the City did not provide any facts of how in its particular circumstances any of these statutes were implicated by the expiration of the Franchise Agreement. The expiration of the Franchise Agreement does not involve any of these three statutes.

Second, the City Order is an interpretation of the County's franchise authority and of the Franchise Agreement which is not entitled to any deference and clearly erroneous. The PSC determined that "[n]either the existence, non-existence, nor expiration of the Franchise Agreement . . . has any effect on the City's right and obligation to provide retail electric service"[21] and that "[t]he City can lawfully, and is obligated to, continue to provide electric service . . . without regard to the existence or non-existence of a franchise agreement with Indian River County and without regard to any action that the County might take in an effort to prevent the City from continuing to serve in those areas."[22] The PSC could not

[20] Section 364.04(2)(d) – (e), Florida Statutes and Section 364.04(5), Fla. Stat.
[21] R. at 1034 (Question a).
[22] R. at 1034 (Question b).

have determined whether the Franchise Agreement or its expiration had no effect on the PSC's Territorial Orders without considering the County's franchise authority under Chapter 125, Florida Statutes, and Section 337.401, Florida Statutes. As a matter of law, the PSC is without authority to interpret or construe statutes outside of its own jurisdiction.

Third, the County's franchise authority is not limited by or subject to the PSC's Territorial Orders. Franchise agreements reflect a bargained for exchange of property rights between the County and the utility receiving the franchise.[23] A territorial order may determine which utility has the right to serve as between utilities, but the PSC's order approving a territorial agreement does not convey any property rights. Property rights associated with the County's streets, rights of way, and other public property are controlled exclusively by the County.

Fourth, the PSC violated Section 366.13, Florida Statutes, which prohibits the PSC from "in any way" affecting a franchise fee. In granting the two declarations and directing the City to continue to serve in perpetuity even after the expiration of the Franchise Agreement, the PSC has conveyed the County's property rights to the City without any franchise agreement. If the City may use the County's property solely at the PSC's direction and authority, then the PSC is

[23] *Santa Rosa County v. Gulf Power Co.*, 635 So.2d 96 (Fla. 1st DCA 1994), *rev. den.*, *Gulf Power Co. v. Santa Rosa County*, 645 So.2d. 452 (Fla. 1994).

denying the County the ability to bargain for and be compensated for its property through a franchise fee in violation of Section 366.13, Florida Statutes.

Argument II addresses the County Order and the PSC's decision to not address the merits of any of the fourteen requested declarations. First, in determining that the County lacked standing to seek its requested declarations, the Court is not required and should not give any deference to the PSC's interpretation of Section 120.565, Florida Statutes. The questions as framed by the County pertained to its own potential future conduct and any requirements under Chapter 366, Florida Statutes that the Board may need to address.

Second, the six reasons cited by the PSC as grounds for denying the County Petition on the merits ignored or misconstrued the facts presented by the County which the PSC was obligated to assume as true but did not.

The County did not assume the Territorial Orders are invalid. The Board in fact acknowledged that the expiration of the Franchise Agreement had no effect on the Territorial Orders.[24]

The County properly described how it is substantially affected and needed its declaratory statement answered. The Board's questions requested the PSC's opinion on such matters as whether under the stated facts the Board may become a "public utility" or an "electric utility" as defined in Section 366.02, Florida

[24] R. at 324.

Statutes, whether the Territorial Orders impacted the County's ability to grant a new franchise or enter into a territorial agreement, and whether there are infrastructure or other matters that the Board needed to address during the transition to a new electric provider.

The County did not request a general legal advisory opinion. The PSC came to this conclusion based upon its rewriting of the questions posed by the Board or by refusing to answer questions not asked by the County. The PSC cannot rewrite or answer unasked questions.

The Board did not ask for a declaratory statement determining the conduct of third parties. Again, the Board's questions were tailored to its future conduct.

The Board did not ask for declarations that would require the PSC to analyze statutes and rules outside the PSC's authority. The Board recognized this limitation in the PSC's authority, and so it limited its questions solely to issues within Chapter 366, Florida Statutes. The PSC twisted and expanded the questions and asked other questions in order to reach this conclusion.

Finally, the question the Board asked regarding Section 366.04(7), Florida Statutes, was not the subject of pending litigation. The County's participation in the conflict resolution process of Chapter 164, Florida Statutes, is not a judicial or administrative proceeding that would bar the PSC from answering the question the Board asked.

STANDARD OF REVIEW

The standard of review for all aspects of both orders being appealed is *de novo*. Generally, this Court defers to the PSC when it is interpreting its own legislative authority.[25] But the courts will not defer to an agency's interpretation of a statute if the statute is unrelated to the functions of the agency.[26] Here the exception applies as both orders being appealed involve interpretations of Section 120.565, Florida Statutes, Chapter 125, Florida Statutes, and Section 337.401, Florida Statutes, all of which are outside the scope of Chapter 366, Florida Statutes, which is the PSC's governing electric service statute. Furthermore, "[s]tatutory interpretation is a question of law subject to de novo review."[27]

In the City Order, the PSC acted outside its statutory authority when it told the City that it should continue to provide electric service in the unincorporated areas of the County regardless of the existence or expiration of the Franchise Agreement. In making this decision, the PSC effectively interpreted and determined that the County's franchise authority under Section 125.01, Florida Statutes, and Section 125.042, Florida Statutes, is inferior and subordinate to the PSC's authority. The PSC admits that it had "no authority to issue a declaration

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[25] *Choctawhatchee Elec. Co-op., Inc. v. Graham*, 132 So. 3d 208, 211 (Fla. 2014).
[26] *Chiles v. Dep't of State, Div. of Elections*, 711 So. 2d 151, 154 (Fla. 1st DCA 1998).
[27] *BellSouth Telecommunications, Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003) (citing *State v. Glatzmayer*, 789 So. 2d 297, 301 n.7 (Fla. 2001)).

interpreting the [Franchise A]greement,"[28] however, it did just that. To declare the term of the Franchise Agreement meaningless, and to direct the City to continue to serve regardless of the Franchise Agreement or its expiration, is to interpret and construe the Franchise Agreement and the County's authority to grant a franchise.

In the County Order, the PSC has interpreted Section 120.565, Florida Statutes, the declaratory statement statute, to find that the County does not have standing to request any of the fourteen requested declarations. Standing to seek a declaratory statement is reviewed *de novo* by the appellate court: "Whether a party has standing to bring an action is a question of law that is to be reviewed de novo."[29] "The agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts."[30] Indeed, the PSC is obligated to liberally construe the facts set forth in the County Petition and draw all reasonable inferences in the County's favor.[31] Here, the PSC

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[28] R. at 1048.

[29] *Mid-Chattahoochee River Users v. Florida Dept. of Envtl. Prot.*, 948 So. 2d 794, 796 (Fla. 1st DCA 2006); cited by *Adventist Health Sys./Sunbelt, Inc. v. Agency For Health Care Admin.*, 955 So. 2d 1173, 1176 (Fla. 1st DCA 2007).

[30] Fla. Admin. Code Ann. R. 28-105.003.

[31] *Higgs v. Florida Dept. of Corr.*, 647 So. 2d 962, 964 (Fla. 1st DCA 1994) (quoting *Abruzzo v. Haller, 603 So. 2d 1338 (Fla. 1st DCA 1992)*); *The Tribune Co. Holdings, Inc. v. State, Dept. of Revenue*, 34 So. 3d 762 (Fla. 1st DCA 2010). Petitions for declaratory statements are similar to petitions for declaratory judgments, and appellate courts are guided by decisions issued under declaratory judgments statute. *Sutton v. Dep't of Envtl. Prot.*, 654 So. 2d 1047 (Fla. 5th DCA 1995).

impermissibly ignored the facts, assumed different facts, and otherwise construed the facts against the County in order to not address the merits of the County's declarations.

Since the fundamental statutory provisions relied upon by the PSC in each case on appeal are outside the PSC's legislative grant of authority, the PSC's interpretation of those statutes is not entitled to any deference and this Court should conduct a *de novo* review of both the City Order and the County Order.

ARGUMENT

I. THE PSC ERRED IN GRANTING THE CITY'S PETITION BECAUSE THE REQUESTED DECLARATIONS WERE OUTSIDE THE SCOPE OF THE PSC'S AUTHORITY.

Granting the City Petition is an unprecedented action of the Commission, far beyond the powers delegated to the PSC by the Florida Legislature, and contrary to the PSC's own decision in the County Order. In undertaking this extraordinary action, the PSC had no jurisdiction because the City did not present any facts relevant to the statutes it cited as a basis for its two requested declarations. In directing the City to continue to serve notwithstanding the expiration of the Franchise Agreement, the PSC impermissibly interpreted the County's franchise authority under Chapter 125, Florida Statutes, and Section 337.401, Florida Statutes. The County's franchise authority is not limited by the Territorial Orders and the PSC is without authority to grant the City the use of the County's property

for an unregulated monopoly in perpetuity. Finally, by determining that the City should continue to provide electric service in the County irrespective of the Franchise Agreement and its expiration, the PSC denied the County the ability to bargain for and receive a franchise fee for the use of its property in violation of Section 366.13, Florida Statutes, which prohibits the PSC from "in any way" affecting a franchise fee.

The specific problems and issues meriting reversal of the City Order are discussed in the following sections.

A. THE CITY HAD NO STANDING TO REQUEST THE TWO DECLARATIONS BECAUSE THERE WERE NO FACTS SUPPORTING THE STATUTES THE CITY RELIED UPON FOR ITS QUESTIONS.

The City did not have standing to request its two declarations because there were no facts in the City Petition that triggered the PSC's jurisdiction under the statutes relied upon by the City. Thus, there was no legal authority for the PSC to declare that the City should continue to provide electric service in the County notwithstanding the expiration of the Franchise Agreement.

1. No Facts Support Relief Under the Territorial Orders or Grid Bill.

As a matter of substantive law, the City Petition relied on three separate statutory provisions as a basis for its requested declaratory statement: the PSC's

statutory authority (1) to approve territorial agreements;[32] (2) to resolve territorial disputes;[33] and (3) to manage a coordinated electric grid in order to avoid the further uneconomic duplication of generation, transmission, and distribution facilities.[34] But there are no facts and no disputes under any of these three statutes that would give the City standing to seek a declaratory statement regarding the expiration of the Franchise Agreement.

First, the City cites the PSC's authority "to approve territorial agreements between and among rural electric cooperatives, municipal electric utility, and other utilities under its jurisdiction."[35] But there was no territorial agreement before the PSC for approval. The City certainly did not petition the PSC to approve a territorial agreement with FPL. Without a territorial agreement before the PSC for approval, there was no authority for the PSC to issue a declaratory statement on the basis of Section 366.04(2)(d), Florida Statutes. Similarly, while the authority to approve a territorial agreement may inherently include the authority to modify or revoke a territorial agreement, there was no request by the City, FPL, the County, or anyone else to modify or revoke a territorial agreement. In the same manner, the City was not seeking to enforce the City-FPL territorial agreements or the Territorial Orders against FPL. FPL certainly was not challenging or seeking to

[32] R. at 502, citing Section 366.04(2)(d), Fla. Stat.
[33] R. at 503, citing Section 366.04(2)(e), Fla. Stat.
[34] R. at 503, citing Section 366.04(5), Fla. Stat.
[35] Section 366.04(2)(d), Fla. Stat.

modify or revoke its territorial agreement with the City. Finally, the "threat" of eviction by the County, cited by the City,[36] is neither real nor justiciable. The County has not taken any legal action against the City to evict it. Declaratory Statement questions to the PSC regarding future options the Board was considering *vis-à-vis* the PSC's authority are not legal actions against the City. Given the PSC's jurisdiction under Section 366.04(2)(d), Florida Statutes, to approve a territorial agreement, the Board's questions do not grant the City standing to ask the PSC to continue electric service after the Franchise Agreement expires.

Second, the City Petition does not involve "any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities subject to its jurisdiction."[37] Again, none of the facts presented by the City include allegations regarding two utilities fighting about which should serve where. FPL was not challenging the City's service area; FPL was not even a party to the docket. Furthermore, the expiration of the Franchise Agreement is not a territorial dispute. The Franchise Agreement is between the City and the County, and under the statute a territorial dispute requires two electric utilities, and the County is not an electric utility. The County Petition, in a

[36] R. at 409. To the extent there was to be an actual eviction, much like a landlord would seek to evict a holdover tenant after the expiration of a lease, such a process would require judicial proceedings. The County Petition to the PSC certainly was not such a proceeding.

[37] Section 366.04(2)(e), Fla. Stat.

separate docket, certainly posed several prospective scenarios regarding potential future electric service. But such questions cannot and do not give rise to a territorial dispute that would trigger the PSC's authority to act pursuant to its territorial dispute resolution authority.

Third, nothing in the City Petition supports a claim of "further uneconomic duplication of generation, transmission, and distribution facilities" requiring managing or any other action by the PSC.[38] There are no allegations in the City Petition of another utility constructing or wanting to construct facilities within the City's service area. Moreover, before there can be a finding of uneconomic duplication, the PSC must first conduct a formal evidentiary hearing – which it has not done.[39] The County Petition, which simply asks the PSC questions, is not evidence and is not a part of the City Petition docket. But even if the County Petition is a part of the City Petition docket, declaratory statement questions and facts are not actionable and do not create a competing utility that would trigger this statute. There are no other utility's facilities in the City service area duplicating,

[38] Section 366.04(5), Fla. Stat.

[39] In 1999 the Florida Supreme Court approved a Commission order that refused to establish a territorial boundary between Gulf Power and Gulf Coast Electric Cooperative. *Gulf Coast Elec. Co-op., Inc. v. Johnson*, 727 So. 2d 259, 264-265 (Fla. 1999). The Commission's order found comingled facilities, but based upon the evidentiary record they were not uneconomic. As the Court noted, these are case-by-case decisions dependent upon the evidence of record developed through the hearing process.

let along uneconomically duplicating the City's facilities. The bottom line is that there are no allegations and there has been no evidentiary hearing establishing as fact the uneconomic duplication of facilities, under Section 366.04(5), Florida Statutes.

Finally, the expiration of the Franchise Agreement in 2017 is not a sufficient trigger to invoke the PSC's jurisdiction under any of the three statutes relied upon by the City. The one thing that everyone agrees on, including the County, is that the expiration of the Franchise Agreement, by itself, has no direct effect on the territorial agreements or the Territorial Orders. Likewise, the mere expiration of the Franchise Agreement does not result in the uneconomic duplication of generation, transmission, and distribution facilities, or any changes in the planning, development, or maintenance of a coordinated electric grid and the availability of reliable electric service for operational and emergency purposes under Section 366.04(5), Florida Statutes. Therefore, the City has not demonstrated any facts under the three statutes that would provide the PSC with the jurisdiction to issue the requested declarations.

2. Sections 120.565 and 366.04(1), Florida Statutes, Do Not Convey Standing.

As additional statutory authority for the requested declarations, the City Petition identified Section 120.565, Florida Statutes, which is the declaratory statement statute, and Section 366.04(1), Florida Statutes, which provides the PSC

with "exclusive and superior" jurisdiction over other entities with respect to certain matters. But these two statutes do not provide any substantive basis for the requested declarations.

Section 120.565, Florida Statutes, is the authority for agencies to issue declaratory statements, and by itself it does not provide any substantive rights for relief. In the County Order, the PSC properly stated the legal standard for the granting of a declaratory statement: "Section 120.565, F.S., requires a petition for declaratory statement to state with particularity the petitioner's set of circumstances to which the agency will apply its interpretation."[40] As the County discussed in the preceding subsection, the City did not provide any facts, let alone describe with particularity any facts, that support any of the three substantive statutes relied upon by the City for its declaratory statement.

The final statutory basis cited by the City Petition is Section 366.04(1), Florida Statutes, but this statute does not provide any substantive basis for relief, and there are no facts regarding this statute. Section 366.04(1), Florida Statutes, grants the PSC "exclusive and superior" jurisdiction over "all other boards, agencies, political subdivisions, . . . or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each

[40] R. at 953.

instance prevail.[41] This means that if there is a conflict in jurisdiction, for example, a County tried to rate regulate a PSC-regulated utility, since rate regulation under 366.04(1) is reserved to the PSC, its authority would prevail.[42] Thus, the PSC may assert that it has "exclusive and superior" jurisdiction in connection with territorial agreement approvals, resolving territorial disputes, or preventing the uneconomic duplication of facilities under the grid bill.[43] But the PSC's exclusive and superior authority does not come into play unless and until there are facts demonstrating a territorial agreement for approval, a territorial dispute, or the presence of uneconomically duplicative facilities. As was discussed above, the City did not demonstrate any of these situations, and the expiration of the Franchise Agreement does not constitute any of these three situations. Thus, there is no authority for the PSC to act under Section 366.04(1), Florida Statutes.

3. Conclusion.

There were no facts in the City Petition that described with particularity how the three substantive statutory grounds relied upon by the City were in fact applicable. In the absence of a bona fide statutory basis for a declaratory statement

[41] R. at 502, 504-505, 507-513, 517.
[42] *Florida Public Service Com'n v. Bryson*, 569, So.2d 1253 (Fla. 1990).
[43] Given the structure of Section 364.04, Florida Statutes, and the fact that the phrase "exclusive and superior" appears in Section 364.04(1), Florida Statutes, the PSC's exclusive and superior jurisdiction may only pertain to those matters enumerated in Section 366.04(1), Florida Statutes, which does not include the three statutes the City relied on. This conclusion is supported by the fact that Section 366.04(6), Florida Statutes, includes a separate "exclusive jurisdiction" statement.

the City had no standing. Thus, it was error for the PSC to have considered and granted the City Petition.

B. THE CITY ORDER IS AN INTERPRETATION OF THE COUNTY'S FRANCHISE AUTHORITY AND THE FRANCHISE AGREEMENT WHICH IS NOT ENTITLED TO ANY DEFERENCE AND CLEARLY ERRONEOUS.

While the courts generally defer to an agency's interpretation of its own statutes and rules,[44] to grant the City Petition required the PSC to construe the County's exclusive jurisdiction with respect to its own franchise authority. In the City Order, the PSC specifically directed the City to continue to provide service beyond the expiration of the Franchise Agreement and without regard to any other authority or permission of the County. This is very much an interpretation and construction of the Franchise Agreement and the County's franchise authority. The PSC is not entitled to any deference in matters outside its authority under Chapter 366, Florida Statutes, and this Court's review of the City Order thus should be *de novo*.[45]

The City voluntarily entered into the Franchise Agreement and agreed to be contractually bound to its terms.[46] Nevertheless, the City sought the PSC's

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[44] *Chiles*, 711 So. 2d at 151.

[45] *Health Options v. Agency for Health Care*, 889 So.2d 849 (Fla.App. 1 Dist. 2004). *Health Options, Inc*., 889 So. 2d at 854 at n.2 (citing *Chiles*, 711 So. 2d at 155).

[46] R. at 598, 619.

permission to ignore the Franchise Agreement and its expiration. Both City declarations are quoted here in their entirety so that this Court can fully appreciate the broad and expansive scope of the PSC's decision to eviscerate the County's franchise authority and give the City free rein to serve without regard to the County's property rights:

> a. Neither the existence, non-existence, nor expiration of the Franchise Agreement between Indian River County and the City has any effect on the City's right and obligation to provide retail electric service in the City's designated electric service territory approved by the Commission through its Territorial Orders.
>
> b. The City can lawfully, and is obligated to, continue to provide retail electric service in the City's designated electric service territory, including those portions of its service territory within unincorporated Indian River County, pursuant to applicable provisions of Florida Statutes and the Commission's Territorial Orders, without regard to the existence or non-existence of a franchise agreement with Indian River County and without regard to any action that the County might take in an effort to prevent the City from continuing to serve in those areas.[47]

The PSC tried to minimize the effect of the actual words in the declarations by stating that it has no authority to interpret the Franchise Agreement.[48] But this is lip service to the principle while doing the exact opposite. There is no middle ground with these declarations, and no reservation of any authority to the County.

[47] R. at 490.
[48] R. at 1048.

In granting these declarations, the City Order invalidates the entire Franchise Agreement and not just part. For example, the City Order does not say, ignore the Franchise Agreement's 30-year term but continue to pay the franchise fee, because to do so would be an interpretation of the Franchise Agreement and the County's franchise authority.[49] The scope of the declarations in undermining the County's authority under Chapter 125, Florida Statutes, and Sections 337.401-337.404, Florida Statutes, to grant, regulate, and control public property through franchises is complete: "Neither the existence, non-existence, nor expiration of the Franchise Agreement . . . has any effect," and, the City shall continue to serve "without regard to the existence or non-existence of a franchise agreement."[50]

But exempting the City from the Franchise Agreement was not enough. In the last clause of the second declaration, the PSC goes far beyond the present Franchise Agreement and announces that the City shall continue to serve, "without regard to any action that the County might take in an effort to prevent the City from continuing to serve in those areas."[51] This super declaration of invincibility against ***any other action*** the County may take is extraordinary in its scope and effect. It purports to control the County's future actions in violation of the

[49] The Franchise Agreement provided for more than just a term of years and the payment of a franchise fee. See infra the discussion under Argument II.
[50] R. at 1049-50.
[51] R. at 1050.

prohibition against declaratory statements affecting third parties.[52] Chapter 366, Florida Statutes, simply does not provide any authority for such an open ended pronouncement, let alone a directive involving an entity the PSC does not regulate.

It is impossible to reconcile the granting of the City's two declarations when the PSC took the exact opposite approach in the County Order that was issued the same day. In the County Order, discussed further below in Argument II of this brief, the PSC correctly acknowledges its limited authority and that it cannot do what the PSC simultaneously did in the City Order. Contrast the PSC's declarations stated above with what the PSC said it cannot do in the County Order:

> We have no authority over Chapter 125, F.S., or over any provision of the Florida Constitution. Giving an incomplete declaration that only addresses Chapter 366, F.S., would undermine the purpose of the declaratory statement, which is to aid the petitioner in selecting a course of action in accordance with the proper interpretation and application of the agency's statute.[53]

In deciding whether the City's "right and obligation to continue serving its customers in its Commission approved Territorial Order service areas in unincorporated Indian River County are affected by the expiration of the Franchise Agreement,"[54] the PSC undeniably conducted an inquiry not into just Chapter 366,

[52] Fla. Admin. Code Ann. R. 28-105.001.
[53] R. at 957 (footnotes and citations omitted).
[54] R. at 1047.

Florida Statutes, but also Chapters 125 and 337, Florida Statutes, in violation of the correct principle stated in the County Order.

In granting the City's Order, the PSC impermissibly construed Chapter 125, Florida Statutes, and county government franchise law authority. The County specifically addressed Chapter 125, Florida Statutes, in its pleadings, and the City Order expressly discussed the County's arguments regarding this authority.[55] Given the Commission's expressed discussion of the County's Chapter 125, Florida Statutes, authority, and the direction to the City to continue to provide service and utilize the County's property in perpetuity, the PSC has unquestionably construed Chapter 125, Florida Statutes, even though it is outside the PSC's jurisdiction.

Similarly, the City Order construes and ignores the County's authority under Sections 337.401-337.404, Florida Statutes. Pursuant to this legislative authorization, local governmental entities

> that have jurisdiction and control of public roads . . . are authorized to prescribe and enforce reasonable rules or regulations with reference to the placing and maintaining along, across, or on any road or publicly owned rail corridors under their respective jurisdictions any electric transmission, telephone, telegraph, or other communications services lines; pole lines; poles; railways; ditches; sewers; water, heat, or gas mains;

[55] R. at 596, 611, 1042, 1046.

> pipelines; fences; gasoline tanks and pumps; or other structures referred to in this section as the "utility."[56]

Under this grant of power, local governments, referred to as the "authority" for purposes of Sections 337.401-337.404, have been given specific and final authority with respect to a utility's use of its property: "No utility shall be installed, located, or relocated unless authorized by a written permit issued by the authority."[57] In the case of the City's use of the County's property, that "written permit" is the Franchise Agreement. These clear legislative pronouncements outside of the PSC's jurisdiction were presented to and evaluated by the PSC.[58] Given the PSC's lack of statutory authority to grant property rights, when presented with the clear legislative grant of authority to the County under Sections 337.404-3376.404, Florida Statutes, the PSC should have stopped and rejected the City's requested declarations as beyond its authority. But it did not. With the explicit discussion in the pleadings and the City Order, the PSC unquestionably conducted an analysis and interpretation of statutes outside of its authority to construe.

The City's two declarations required an analysis of statutory authority far beyond the PSC's jurisdiction and resulted in a decision with significant and far reaching consequences in perpetuity. It was reversible error for the PSC to find that "[n]either the existence, non-existence, nor expiration of the Franchise

[56] Section 337.401(1)(a), Fla. Stat.
[57] Section 337.401(2), Fla. Stat.
[58] R. at 599, 604, 1045.

Agreement . . . has any effect on the City's right and obligation to provide retail electric service"[59] and that "[t]he City can lawfully, and is obligated to, continue to provide electric service . . . without regard to the existence or non-existence of a franchise agreement with Indian River County and without regard to any action that the County might take in an effort to prevent the City from continuing to serve in those areas."[60] The City Order should be reversed and the declarations declared illegal.

C. THE COUNTY'S FRANCHISE AUTHORITY IS NOT LIMITED BY OR SUBJECT TO THE PSC'S TERRITORIAL ORDERS.

The PSC's two declarations rest on the idea that a territorial agreement, once approved by the PSC, provides complete and exclusive authority ***in perpetuity*** for an electric utility to serve a particular geographic area and that a franchise is unnecessary and without any legal effect. But this is not the law. The PSC's jurisdiction is limited only to those matters specifically granted by the Florida Legislature.[61] Chapter 366, Florida Statutes, does not include any authority with respect to franchises just as Chapter 366, Florida Statutes, does not provide the PSC with any authority to grant property rights.

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[59] R. at 1034 (Question a).
[60] R. at 1034 (Question b).
[61] *United Tel. Co. v. Public Serv. Comm'n*, 496 So.2d 116, 118 (Fla. 1986).

First, the PSC's authority with respect to electric utilities is not pervasive.[62] The City Order relies on the statutory authority granted to the PSC to approve territorial agreements,[63] resolve territorial disputes,[64] and prevent uneconomic duplication.[65] But the PSC's action under any of these three statutes is not unlimited. Once the PSC has resolved a specific question under one of these three statutes regarding a utility's service area, the utility must secure the additional appropriate permits, authorizations, or other rights in order to have the legal right and ability to erect facilities used to provide service. This includes access to and use of real property.

The Franchise Agreement between the City and the County specifically included permission for the City to utilize the County's "streets, alleys, bridges, easements and public places" along with other agreed to mutual responsibilities.[66] This is the primary purpose of a franchise – it provides a utility with the authority to utilize public property for the placement of its electric facilities.[67] Such use of government property is not given away, but is part of a bargained-for exchange in which a county relinquishes a property right.[68] The County's authority to grant a

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[62] *Santa Rosa County*, 635 So.2d at 96.
[63] Section 366.04(2)(d), Fla. Stat.
[64] Section 366.04(2)(e), Fla. Stat.
[65] Section 366.04(5), Fla. Stat.
[66] R. at 614.
[67] *City of Plant City v. Mayo*, 337 So. 2d 966, 973 (Fla. 1976).
[68] *Alachua County v. State*, 737 So. 2d 1065, 1068-69 (Fla. 1999).

franchise came with the adoption of the Constitution of 1968.[69] In conferring home rule authority on non-charter counties like Indian River County, the Legislature through Chapter 125, Florida Statutes, has given the counties the authority to require a franchise as a condition of service.[70] More specific authority has been granted through Sections 337.401-337.404, Florida Statutes, which require utilities to obtain "a written permit"[71] before the utility can install, locate, or relocate any electric transmission facilities "along, across, or on any road."[72] As this Court has said, "local governments have the authority to require that utilities be licensed pursuant to their police power, and that governments may require a reasonable fee to cover the cost of regulation."[73] Whether it is called a franchise, written permit, or license, a county's authority to control its property is not subject to the PSC's authority to grant service areas.

This authority of local governments to license and control public property through the franchise process is well established. Over a century ago, the Florida Supreme Court recognized that a utility's placement of facilities is not absolute, but that it is subservient to the legal right to occupy or utilize the property where it

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[69] The County's authority was obtained after the City first began providing electric service, which was also after the City's first territorial agreement and the PSC's first territorial order. See supra note 10 and the accompanying text.
[70] *Santa Rosa County*, 635 So. 2d at 99.
[71] Section 337.401(2), Fla. Stat.
[72] Section 337.401(1)(a), Fla. Stat.
[73] *Alachua County*, 737 So. 2d at 1068.

places it facilities.[74] More recently, the Fourth District Court of Appeal found that a governmental body with franchise authority does not have to "permit the intrusion and maintenance" of a municipality's utility lines and services within its jurisdiction, and that the municipal utility could be and was expelled.[75]

Even where the placement of utility assets precedes a franchise, preexisting easements do not create or vest the utility with a property interest that is superior to the government's authority or otherwise supersedes the right of the public.[76] Further, even within the context of a franchise agreement, the property rights granted to the utility are not absolute. For example, under Sections 337.401-.406, Florida Statutes, governmental authorities are granted broad powers with respect to the location and relocation of utility facilities along roadways, including the ability to deny use.

This bargain and exchange was central to the legal effectiveness and consequences of the City of Winter Park's electric franchise granted to Florida Power Corporation ("FPC"). There were multiple proceedings associated with the

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[74] *Anderson v. Fuller*, 41 So. 684, 688 (Fla. 1906).

[75] *City of Indian Harbour Beach v. City of Melbourne*, 265 So.2d 422, 424-25 (Fla. 4th DCA 1972). It should be added that the court ordered that the termination of services "not be done precipitously but shall be accomplished within a reasonable length of time so as to not interrupt service to users, taking into account the amount of time required for Indian Harbour Beach to obtain a substitute source of water." *Id*., at 425.

[76] *Lee County Electric Coop. v. City of Cape Coral*, 159 So.3d 126, at 130 (Fla. 2d DCA 2014); *rev. denied*., *Lee County Elec. Co-op., Inc. v. City of Cape Coral*, 151 So.3d 1226 (Fla. 2014).

expiration of the Winter Park franchise and Winter Park ultimately acquiring the FPC electric facilities within Winter Park.[77] But for purposes of this appeal, there are two key points.

First, this Court recognized the Winter Park franchise as a "permissible bargained-for exchange pursuant to which FPC ceded six percent of revenues in exchange for access to Winter Park's property rights-of-way, and a monopoly electricity franchise, and Winter Park's corresponding relinquishment of its right to provide electric service in the community."[78] As a part of that exchange of benefits, this Court also recognized that when a franchise expires so do the benefits of the franchise.[79] The Franchise Agreement now before this Court contains virtually the same bargained-for exchange.[80] And while the Franchise Agreement does not include a right to purchase like in the Winter Park case, a purchase option is not required nor is a purchase option the only enforceable term of a franchise.[81] Thus, the absence of a right to purchase in the Franchise Agreement does not render the Franchise Agreement unenforceable.

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[77] R. at 604-608 which extensively discusses the *Winter Park* cases; *see also* 328-334.
[78] *Florida Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1240 (Fla. 2004).
[79] *Id*., at 1042.
[80] Compare the language the Court quoted from the *Florida Power Corp.*, 887 So. 2d at 1240, with the Franchise Agreement terms at R. 614-619 and summarized at R. 22-23.
[81] *Florida Power Corp. v. City of Casselberry*, 793 So. 2d 1174, 1179 (Fla. 5th DCA 2001).

Second, throughout the Winter Park proceedings, from the expiration of the franchise agreement to Winter Park ultimately becoming the successor electric utility, the PSC did nothing except facilitate the transition. The PSC did not tell Winter Park that its franchise with FPC was without effect, or that only FPC could serve in Winter Park, or that the expiration of the franchise and the transition to a new provider would be an uneconomic duplication of FPC, or that Winter Park could not purchase FPC's facilities and become the electric utility. Instead, the PSC supported Winter Park's fundamental policy decision regarding who should be the electric service provider by not interfering with the franchise expiration and the transition to a new provider. Thus, the Winter Park franchise was relevant and its terms enforceable, especially in connection with the use of Winter Park's property.

The Winter Park experience, and the other cases relied upon by the County in the PSC proceeding, were summarily dismissed by the PSC because they did not involve territorial agreements or the underlying franchise agreements included an option to purchase.[82] These facts do not make them inapplicable. Rather, when each case is considered in context, there is one fundamental legal fact that remains – the PSC has no authority to grant property rights and no power to tell the City to

[82] R. at 1048-1049.

continue to utilize the County's property in perpetuity after the Franchise Agreement expires.

Finally, the PSC cites the case of *Roemmele-Putney v. Reynolds*[83] for the idea that the PSC's authority to approve and enforce territorial agreements is not subject to local control. But the PSC overreaches with its interpretation of this case. First, at both the circuit court and appellate court levels this case involved a threshold jurisdictional decision as to where the case should be heard, circuit court or the PSC. Thus, this is only a precedent regarding jurisdiction and not a decision on the merits.[84] Second, and more importantly, the underlying issue there was very different than the one present in the instant case. In the *Roemmele-Putney v. Reynolds* case, the question was whether a County code could preclude private property owners from having access to electric service. In contrast, in the instant case the question is whether the PSC has the authority to order an unregulated municipal electric utility to utilize the County's property and continue to serve notwithstanding the expiration of the Franchise Agreement.

The City entered into the Franchise Agreement knowing full well its requirements, including its term of 30-years. This is why there was a 5-year advance notice of renewal so the parties could reasonably transition out of the

[83] *Roemmele-Putney v. Reynolds*, 106 So. 3d 78 (Fla. 3d DCA 2013); R. at 1048.
[84] *Id.* at 81. The complaint was dismissed on the basis of the "colorable claim" standard set by the *Bryson* decision, 569 So. 2d at 1255, which renders most of the court's commentary in the Conclusion as *dicta*.

Franchise Agreement. The City has no right to serve and use County property in perpetuity. Franchises have meaning and effect and are enforceable, including their term provisions. It is well established that the PSC has no authority over franchises.[85] There is simply no authority within Chapter 366, Florida Statutes, for the actions the PSC has taken to strip the County of its right to make decisions regarding its property and how electric service is to be provided within the County.

D. THE CITY ORDER VIOLATES SECTION 366.13, FLORIDA STATUTES.

By determining that the City should continue to serve irrespective of the Franchise Agreement, the PSC violated Section 366.13, Florida Statutes, which prohibits the PSC from "in any way" affecting a franchise fee.

As the court said in the *Santa Rosa County*[86] case, under Chapter 366, Florida Statutes, the PSC's regulation of electric utilities is not pervasive. Specifically, the court held that the PSC had not preempted a county's right to convey a franchise to an electric utility because the PSC does not have unconditional authority with respect to electric utilities.[87]

In the City Order, the PSC directed the City to continue to serve and provide electric service in perpetuity without any regard to the Franchise Agreement: "Neither the existence, non-existence, nor expiration of the Franchise Agreement .

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[85] *Santa Rosa County*, 635 So. 2d at 98-99.
[86] *Santa Rosa County,* So.2d at 96.
[87] *Santa Rosa County*, 635 So. 2d at 98-99.

. . has any effect," and, the City shall continue to serve "without regard to the existence or non-existence of a franchise agreement."[88] By ordering the City to continue to serve "upon the expiration of the Franchise Agreement"[89] the PSC effectively granted to the City a franchise for the use of the County's property.

Section 366.13, Florida Statutes, provides: "**Taxes, not affected**—No provision of this chapter shall in any way affect any municipal tax or franchise tax in any manner whatsoever." The *Santa Rosa County* decision specifically included a county franchise fee as within the scope of the "franchise tax" language used in Section 366.13, Florida Statutes.[90]

It is well established that a franchise agreement is a "bargained for exchange."[91] In the Franchise Agreement between the City and the County, the consideration for the use of the streets, rights of way, easements, and other property was the collection and remittance of a franchise fee. But if the PSC can grant the City authority to use the County's property without the County's permission, then the PSC has taken away the ability to have a bargained for exchange. This affects the County's franchise fee because the underlying franchise has expired and been ruled without any legal effect by the PSC.

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[88] R. at 1049-50.
[89] R. at 1050.
[90] *Santa Rosa County*, 635 So. 2d at 100.
[91] *Alachua County*, 737 So. 2d at 1068.

With the PSC effectively granting a new franchise in perpetuity to the City, there is no longer any basis for the City to remit a franchise to the County. The PSC granting a franchise is distinguishable from the *Winter Park*[92] franchise case, discussed above. There, the Court ordered the utility to continue to pay the franchise fee on the theory that the utility was a hold over tenant during the transition to a new utility.[93] The hold-over service was a time-limited proposition, especially since Winter Park wanted the utility to continue to provide electric service until it could assume responsibility for the electric service. Here, there is no hold over, no transition to a new utility. The PSC has ordered the City to ignore the Franchise Agreement, the County's franchise authority, and serve in perpetuity on the basis of the PSC's authority.

By the PSC's action, after the Franchise Agreement expires, there is no longer any agreement or any obligation by the City to the County to collect and remit the franchise fee. Moreover, there is no reason for the City to enter into a new franchise agreement and compensate the County via a franchise fee because the PSC has taken away the County's ability to control its own property. There is nothing to bargain for – under the City Order the County can no more negotiate for

[92] *Florida Power Corp*, 887 So. 2d 1237, 1240 (Fla. 2004).
[93] The County advised the PSC that as a part of any transition to a successor utility, the County would temporarily extend the Franchise Agreement and take such other appropriate action to ensure that customers would continue to have electric service.

the use of its property than it can grant an exclusive franchise area, which is what the County gave up in the Franchise Agreement. Thus, the PSC has impaired the County's ability to collect the franchise fee in violation of Section 366.13, Florida Statutes, and the City Order should be reversed.

II. THE PSC DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW AND ERRED BY DECLINING TO ISSUE A DECLARATORY STATEMENT ON THE GROUNDS THAT THE COUNTY'S PETITION FAILED TO MEET THE REQUIREMENTS FOR A DECLARATORY STATEMENT.

The PSC acknowledges in the County Order that "Questions a-n are primarily centered on what actions the Indian River County might or might not take relating to its alleged responsibility to pick a new electric service provider for the County after the Franchise Agreement terminates on March 4, 2017."[94] Despite this recognition that the Board was seeking answers regarding its own potential future conduct, the types of questions for which the declaratory statement process was designed,[95] the PSC nevertheless refused to answer the questions claiming the County lacked standing. The PSC's interpretation and application of Section 120.565, Florida Statutes, and the facts presented in the County Petition in order to not reach the merits of the County's fourteen requested declarations violates the scope and purpose of declaratory statements and constitutes reversible

[94] R. at 953.
[95] *Florida Dept. of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering v. Inv. Corp. of Palm Beach*, 747 So. 2d 374, 382 (Fla. 1999).

error. Moreover, the County Order is completely inconsistent with the City Order discussed at Argument I above, wherein the PSC ignored well settled Florida law and nevertheless granted the City Petition on questions outside the PSC's jurisdiction and without any legal standing for the City.

A. THE PSC'S INTERPRETATION OF SECTION 120.565, FLORIDA STATUTES, IS ENTITLED TO NO DEFERENCE AND IS CLEARLY ERRONEOUS.

The issue before this Court is not the PSC's interpretation or action on Chapter 366, Florida Statutes, the PSC's electric service authority statute, but rather Section 120.565, Florida Statutes, the declaratory statement statute. As this Court has established, "[j]udicial deference to an agency's construction of a statute is not required if the statute is unrelated to the regulatory functions of the agency."[96] The issuing of a declaratory statement is unrelated to the "regulatory functions" of the PSC. Thus, the PSC's decision to interpret Section 120.565, Florida Statutes, in such a manner as to "deny Indian River County's Petition for Declaratory Statement for failure to meet the statutory requirements necessary to obtain a declaratory statement,"[97] is entitled to no deference.[98]

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[96] *Health Options, Inc*., 889 So. 2d at 854 at n.2 (citing *Chiles*, 711 So. 2d at 155).
[97] R. at 959.
[98] *Mid-Chattahoochee River Users*, 948 So. 2d at 796; cited by *Adventist Health System*, 955 So. 2d at 1176 (denial of standing to seek a declaratory statement reversed), rev. den., 966 So.2d 967, *reversed)*.

There is no ambiguity in Section 120.565, Florida Statutes, or the case law construing access to a declaratory statement. The PSC's interpretation is clearly erroneous because it failed to give full effect to the Legislature's purpose for issuing declaratory statements. This Court spoke clearly and definitively in 1999 when it broadened the previously narrow scope of when declaratory statements were to be available by adopting Judge Cope's analysis of Professor Pat Dore's authoritative article on the Florida Administrative Procedures Act.[99] In accepting Professor Dore's analysis, this Court said that the purpose of a declaratory statement was "'to enable members of the public to definitively resolve ambiguities of law arising in the conduct of their daily affairs or in the planning of their future affairs' and 'to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts.'"[100]

The County Petition conformed to the requirements of the statute by identifying fourteen discrete questions (identified as Questions a-n in the County Petition and County Order) and asking whether and to what extent the Board's

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[99] As Judge Cope wrote, in words that ring true in the present case, "The declaratory statement mechanism was created in order to deal with the common citizen complaint that some agencies will not give the citizen a direct, binding answer on how the agency's statutes and rules apply to a citizen's individual case." *Inv. Corp. of Palm Beach v. Div. of Pari-Mutuel Wagering, Dept. of Bus. & Prof'l Regulation*, 714 So. 2d 589, 592 (Fla. 3d DCA 1998) *decision quashed sub nom. Florida Dept. of Bus. & Prof'l Regulation*, 747 So. 2d 374 (Fla. 1999).

[100] *Florida Dept. of Business and Professional Regulation*, 747 So. 2d at 382 (quoting Patricia A. Dore, *Access to Florida Administrative Proceedings,* 13 Fla. St. U.L.Rev. 965, 1052 (1986).

proposed actions implicated the PSC's authority under Chapter 366, Florida Statutes. Some of the questions were very basic to the PSC's jurisdiction and similar to questions asked of and answered by the PSC in the past. For example, Questions a and b asked whether the Board would be a "public utility" or an "electric utility" as defined in Section 366.02, Florida Statutes, if the Board supplied electric service to customers.[101] Question c asked whether the Board would be a "public utility" or an "electric utility" as defined in Section 366.02, Florida Statutes, if the Board obtained electric service facilities that it leased or conveyed to a third party that would provide electric service.[102]

Other questions, while referencing the upcoming expiration of the Franchise Agreement, did not require an analysis of the County's franchise authority, which is outside the PSC's authority. Rather, the County's questions focused on whether Chapter 366, Florida Statutes, expressed any requirements with respect to the County's ability to issue an electric service franchise. For example, Question f asked whether there are any limitations under Chapter 366, Florida Statutes, on the Board's ability to enter into a new franchise agreement with FPL once the Franchise Agreement expired.[103] Similarly, Question l asked whether there are any matters under Chapter 366, Florida Statutes, or the PSC's rules and orders that the

[101] R. at 11-12.
[102] R. at 12.
[103] Id.

Board would need to address in any transition to a new provider granted a franchise to provide electric service.[104]

On their face, the fourteen questions legitimately probed the potential future conduct the Board may take and whether there are any requirements in Chapter 366, Florida Statutes, that the Board would need to address. Even if a question was beyond the PSC's jurisdiction to answer, the PSC still should have addressed the question by explaining why it lacks the jurisdiction to answer. But the PSC's refusal to address all fourteen questions on the merits is preciously the type of problem this Court has said that Section 120.565, Florida Statutes, was designed to remedy. Thus, the PSC erred as a matter of law by dismissing the County Petition without reaching the merits, and the decision should be reversed and remanded with the instruction to answer all fourteen questions.

B. THE SIX REASONS RECITED BY THE PSC AS GROUNDS FOR DENYING THE COUNTY'S PETITION DEMONSTRATE THAT THE PSC DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW.

"Whether a party has standing to bring an action is a question of law that is to be reviewed *de novo*."[105] The PSC's conclusion that the County Petition failed to meet the threshold standing requirements for a declaratory statement is based upon an incorrect interpretation and application of Section 120.565, Florida

[104] R. at 13.
[105] *Mid-Chattahoochee River Users*, 948 So. 2d at 796; *see also Adventist Health System,* 955 So. 2d at 1176.

Statutes, and constitutes an impermissible barrier to access. The Board was seeking the PSC's statement on its fourteen questions so that it might "plan its future conduct."[106] But the PSC refused to provide any guidance. Just as the First District Court of Appeal recently reversed and remanded on another case where the PSC refused to reach the merits of a Public Counsel declaratory statement petition,[107] this Court should do the same here. The PSC's six grounds for not answering the County Petition are addressed in the following six subsections.[108]

1. The County Does Not Assume the Territorial Orders Are Invalid.

The first error and a persistent theme throughout the County Order is the PSC's assertion that the County has assumed that the PSC's Territorial Orders are invalid.[109] This is not true. This conclusion reflects a misreading of the County Petition. More importantly, the PSC ignored the explicit statements by the County to the PSC in both dockets that the Board was not seeking the invalidation, termination, or amendment of the PSC's Territorial Orders.

A plain reading of County Petition unambiguously establishes that the Board was not challenging the Territorial Orders. Instead, the Board was only seeking to understand how the PSC's jurisdiction would affect potential alternatives the

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[106] *Adventist Health System*, 955 So. 2d at 1176.
[107] *Citizens of State ex rel. Office of Pub. Counsel v. Florida Pub. Serv. Com'n & Utilities, Inc.*, 40 Fla. L. Weekly D1041 (Fla. 1st DCA May 4, 2015).
[108] R. at 952-958.
[109] R. at 953-954.

County was evaluating. For example, Question d of the County Petition asks a direct question about the legal status of the Territorial Orders once the Franchise Agreement expires:

> Once the Franchise [Agreement] expires, what will be the legal status of the [Vero Beach]-FPL territorial agreements and boundaries approved by the PSC? Will the territorial agreements and boundaries approved by the PSC between [Vero Beach] and FPL become invalid in full or in part (at least with respect to the Franchise Area)?[110]

This is neither a challenge to the PSC's territorial order authority nor an assumption that the Territorial Orders are or will be invalid. The Board assumes the PSC's answer would be to the effect of "the expiration of the Franchise Agreement has no impact on the Territorial Orders" with the second part answered with a simple "no." But the Board, as a governmental body, is not supposed to act on assumptions about the scope and effect of other agencies' authority, so the Board asked its question. The PSC refused to answer.

Similarly, the questions raised under the successor questions do not assume the invalidity of the Territorial Orders. Questions g and h specifically pose questions based upon the assumption that the Territorial Orders remain valid: "Once the Franchise expires and if the territorial agreements and boundaries

[110] R. at 12.

approved by the PSC between [Vero Beach] and FPL remain valid, . . ."[111] Questions e and f use similar phrasing as Questions g and h, but within the context of "if" the orders were to become "invalid," which does not mean that the orders are or will become invalid.[112] These are fundamental jurisdictional questions that can be, and should have been, answered. Again, the PSC refused.

Even if the County's questions in a vacuum could be construed so as to assume the Territorial Orders are invalid, the law and facts don't support such a reading. The First District Court of Appeal recently reaffirmed the long-standing rule on the permissible scope of a declaratory statement: "We agree that 'the declaratory statement petition is not a vehicle for testing the validity of the [statute or agency actions about] which the declaration is sought.'"[113] The issue presented to the First District Court was the PSC's dismissal of the Public Counsel's declaratory statement petition for a lack of standing. In reversing the PSC and ordering the PSC to "address the petition for declaratory statement on the merits,"[114] the court did not find the Public Counsel's petition a collateral attack on a prior PSC order. The same is true here as well – the County Petition is not a

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[111] R. at 12-13.
[112] R. at 12.
[113] *Citizens of State ex rel.*, 40 Fla. L. Weekly D1041 (Fla. 1st DCA May 4, 2015, 2015 WL 1963786, at *3 (Fla. 1st DCA 2015) (citing *Retail Grocers Ass'n of Florida Self Insurers Fund v. Dep't of Labor & Employment Sec., Div. of Workers' Comp.*, 474 So. 2d 379, 382 (Fla. 1st DCA 1985) (citations omitted)).
[114] *Id*. at *6.

collateral attack the Territorial Orders. Rather, the Board clearly and unambiguously stated to the PSC that it was "not seeking to terminate the territorial agreements between FPL and [the City] nor otherwise to challenge the PSC's authority in this area."[115] Thus, the County Petition does not involve any action against the Territorial Orders.

Further, in acknowledging the PSC's "exclusive and superior" jurisdiction under Chapter 366, Florida Statutes, for those matters specifically delegated to the PSC, the Board explicitly told the Commission:

> the statutes establish that the PSC approves territorial agreements or resolves territorial disputes that are initiated by the affected "electric utilities" or the PSC. In respect of this statutory grant, the Board did not petition the PSC to terminate or amend the orders. Rather, the Board asked a series of questions regarding the consequences of the expiration of the Franchise Agreement on the PSC's territorial orders vis a vis what the Board may or may not do. Some of those questions assume, for purposes of the inquiry, that the territorial orders may be invalid. But the Board did not ask the PSC to void or invalidate the orders, and the presentation of the question was worded only so the Board could more fully explore and understand the consequences of the Franchise Agreement expiration.[116]

The PSC ignored the Board's statements in the County Petition and the Board's other pleadings that the PSC is obligated to assume as true, and instead the PSC assumed facts and made conclusions in complete disregard to what the Board

[115] R. at 322.
[116] *Id*.

said.[117] The County's Petition does not assume the invalidity of the Territorial Orders nor is it a collateral attack on those orders. Read in full and in context, it was reversible error for the PSC to conclude that the County assumed the Territorial Orders are invalid and to refuse to answer the County Petition.

2. The County Properly Describes How It Is Substantially Affected Under a Particular Set of Circumstances.

A complete reading of the County Petition demonstrates the Board's entitlement to a declaratory statement. However, the PSC denied the requested declaratory statement because the County Petition "fails to describe how any statutory provisions, rules, or orders may substantially affect Indian River County under its particular set of circumstances."[118] This conclusion is possible only because the PSC failed to assume that all the facts stated in the County Petition are true and failed to draw all reasonable inferences in favor of the Board.[119]

Looking at the specific analysis used by the PSC, the Commission rejected Questions d, e, and f because, the PSC said, those questions assumed the Territorial Orders were invalid. Similarly, the PSC concluded that Questions a-c, k-l, and n "ask questions which presume the [Territorial] Orders are inapplicable, and therefore invalid." As the Board discussed in the prior section of this brief,

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[117] Fla. Admin. Code Ann. R. 28-105.003.
[118] R. at 954.
[119] *Shahid v. Campbell*, 552 So. 2d 321, 322 (Fla. 1st DCA 1989).

and in its pleadings to the PSC, these PSC conclusions are wrong. The Board does not believe the Territorial Orders are invalid. By filing its declaratory statement petition, the Board was not taking any action to change or invalidate the Territorial Orders. Quite the contrary. The Board acknowledged to the PSC that the expiration of the Franchise Agreement may constitute "changed conditions or other circumstances" that might lead the PSC in a separate, future proceeding to void or otherwise modify the Territorial Orders. But the County's legal position, directly stated to the PSC, was that the County's Petition and the expiration of the Franchise Agreement do not affect the PSC's Territorial Orders.[120]

The PSC's next line of analysis conflicts with its own prior actions. In denying Questions a-c the PSC refused to answer whether the Board would become subject to the PSC's jurisdiction if it engaged in the operation of electric facilities or the supplying of electric service under certain scenarios. This threshold jurisdictional question has been asked and answered many times over the years on the basis of a variety of potential future factual scenarios, just as the County has done here. For example, in the Monsanto Declaratory Statement in 1986, the PSC accepted various proposed financing arrangements to determine that "Monsanto's proposed lease financing of a cogeneration facility does not

[120] R. at 35, 322-326, 602.

cause Monsanto's lessor to be deemed a public utility under Florida law."[121] In subsequent declaratory statement proceedings, the PSC has accepted and reviewed the facts presented and decided the threshold jurisdictional question.[122] Here, the PSC ignored the Board's factual statements regarding the potential ownership of electric facilities and the supply of electricity and whether, under Sections 366.02(1) or (2), Florida Statutes, those circumstances would make the Board a "public utility" or an "electric utility" for jurisdictional purposes.

The PSC concludes this part of the County Order by summarily dismissing Questions a-n for not addressing Sections 366.04(1)-(2), Florida Statutes, or Sections 366.05(7)-(8), Florida Statutes. Such a dismissal reflects a complete failure to read and accept the contents of the petition. Whether Sections 366.04(1)-(2), Florida Statutes, apply to Questions a-c is dependent upon whether the County would be a "public utility" or an "electric utility" under Sections 366.02(1) or (2), Florida Statutes, questions the PSC has refused to answer. Questions d-h each make inquiries regarding the Territorial Orders and the extent of the PSC's territorial authority, with each relying upon the PSC's authority under

[121] Order No. 17009, at 5 (Dec. 22, 1986).
[122] See, e.g., *Seminole Fertilizer Declaratory Statement,* Order No. 23729 (Nov. 7, 1990); *PW Ventures Declaratory Statement*, Order No. 18302-A (Oct. 22, 1987), aff'd *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281, 284 (Fla. 1988); *Polk Power Partners Declaratory Statement*, Order No. PSC-94-0197 (Feb. 16, 1994).

Sections 366.04(1)-(2), Florida Statutes. Questions i, k, l, and m ask questions regarding electric service infrastructure, which are matters potentially impacted by Sections 366.05(7)-(8), Florida Statutes, which is why the Board asked. Question n, while not specifically referencing a statute, raises a legitimate question as to whether under Chapter 366, Florida Statutes, the PSC has been granted the specific power to control, override, or otherwise affect the expiration of the Franchise Agreement. The context for Question n is everything contained in the County Petition, which does not require an interpretation of the County's franchise authority, only whether Chapter 366, Florida Statutes, grants to the PSC "the legal authority to invalidate or otherwise supersede the Board's decision to terminate the Franchise [Agreement] and to designate [Vero Beach] the electric service provider in the Franchise Area?"[123]

The final straw is the PSC's handling of Question j. In the County Order, the PSC says, "Question j references Section 366.04(7), Florida Statutes, but does not ask about application of that statutory provision to the County, instead asking how Vero Beach's conduct under Section 366.04(7), Florida Statutes, might affect the County." Contrast the PSC's statement with what Question j actually said:

> "What is the PSC's jurisdiction with respect to Section 366.04(7), Florida Statutes? Does [Vero Beach's] failure to conduct an election under Section 366.04(7), Florida

[123] R. at 13.

> Statutes, have any legal effect on the Franchise Agreement or the Board's duties and responsibilities for continued electric service within the Franchise area?"[124]

Question j does not ask about the City's past or future conduct. Rather, Question j asks an initial question regarding the scope of the PSC's authority under Section 366.04(7), Florida Statutes. In the second part of Question j, the County inquires whether the failure to have an election would have any effect going forward on the Franchise Agreement "or the Board's duties and responsibilities for continued electric service within the Franchise area?" If the PSC has no authority on this issue, even though this legislative enactment is within one of the PSC's enabling statutes, the answer to the second part of Question j may well be "none." But again, we don't know because the PSC would not answer the question.

The County's Petition attempts to address a very high profile, highly contentious community issue that involves the substantial interests of the County and its residents. To provide context and further exemplify the seriousness of the local situation, the Board provided an extensive discussion of the City electric service issues and the impacts on the County and its citizens. The City electric utility is largely unregulated, with the PSC having only very limited authority over municipal utilities like the City. When it comes to rates and service, the City is

[124] *Id.*

completely unregulated by any authority.[125] The City has been able to not only raise rates but, more detrimentally, subsidize its general government fund with the surplus revenues earned from the electric utility. Those electric revenue transfers exceed the City's property tax revenues from City residents. With a majority of the City electric customers not being City residents, this means non-City customers have no vote and no voice in the operation of the utility through the City elections. This also means that more of that subsidy comes from non-City residents than City residents. Finally, this means that the non-City residents are being forced to subsidize City general government operations without any representation or benefits.[126] Unquestionably, the substantial interests of these non-City customers are directly at issue, and the Board, both as a City electric customer and as the elected representative of all the residents in the County, has demonstrated that its substantial interests are at issue and in need of the PSC's declarations on the questions posed.[127]

This extensive factual history and background was fully explored in the 33-page County Petition and the further elaborated on in the Board's 29-page substantive response to the motions to dismiss and various amicus comments. The PSC simply dismissed out of hand these statements of interests or the PSC

[125] Section 366.02(2), Fla. Stat., Section 366.04(2), Fla. Stat., and Section 366.04(6), Fla. Stat.
[126] R. at 28-30.
[127] R. at 28-33.

reinterpreted the facts in order to find that the County did not describe how it was substantially affected.

As the Board initially stated in the County Petition: "This Petition seeks a declaration regarding the rights, duties, and responsibilities of the Board once the electric service franchise granted by Board to the City of Vero Beach, Florida ("COVB") for certain unincorporated areas of Indian River County (the "County") expires in 2017 and how electric service may thereafter be provided to those County customers, including offices and departments of the Board."[128] The March 4, 2017, expiration of the Franchise Agreement is a real, actual event that is going to occur, and the City has not taken any action to renegotiate or extend the Franchise Agreement. Thus, the Board needed the PSC's guidance on the consequences and scope of the PSC's jurisdiction on its fourteen specific questions in order "to properly assess the impact of the Franchise expiration on its particular circumstances as a [City] electric customer and as the sole authority to grant a franchise to a successor electric supplier."[129]

The Board's fourteen individual questions included extensive references to the applicable statutes, both in the questions or the corresponding discussion. Read as a whole, the County Petition provides not only questions, but controversies and doubts regarding the Board's potential future conduct that required answers from

[128] R. at 9.
[129] R. at 20.

the PSC regarding the scope and extent of its jurisdiction *vis-a-vis* the Board's authority. The PSC's summary dismissal of the fourteen questions for failure to demonstrate how the cited statutes, rules, and orders may substantially affect the County is offensive and inexcusable. The complete County Petition demonstrates a *bona fide* present need for the requested declarations. It was reversible error for the PSC to ignore the Board's substantial interests and not answer any of the fourteen questions on the merits.

3. The Petition Is Not Requesting a General Legal Advisory Opinion.

The PSC summarily – and erroneously – concludes that the County was seeking a general advisory opinion.[130] The PSC made this decision on the incorrect conclusion that the Board failed "to provide a present, ascertained, or ascertainable set of facts" and failed "to describe how the statutory provisions, rules, or orders may substantially affect Indian River County in its particular circumstances."[131] The basis for the PSC's summary conclusion on this point has been thoroughly responded to in the prior two subsections of this brief and is adopted also in response to this finding.[132] In addition to the foregoing, the PSC's specific commentary on this point reflects a misunderstanding of the purpose of

[130] R. at 955.
[131] *Id*.
[132] *Supra*, at Section II.B, Issues 1 and 2, beginning on pages 44 and 48, respectively.

declaratory statements and a refusal to stick to the questions raised by the County Petition.

The essence of the PSC's failure to appreciate its statutory duty to answer the Board's declaratory statement questions is reflected in the second paragraph of the Commission's order on this point. The County Order states:

> The essential question posed by the Petition is whether a non-charter county has the authority to designate an electric utility service provider, or provide that service itself, within the unincorporated territory of the county, notwithstanding the existence of a Florida Public Service Commission order approving a territorial agreement between a regulated public utility and municipal electric utility for that same territory. We do not have the authority to issue a legal advisory opinion or to announce general policy of far-reaching applicability in a declaratory statement proceeding.[133]

The Board agrees that this question as framed by the PSC may be the ultimate question. But it is not one of the fourteen questions asked by the County and not one that the PSC can answer even though it did so in the City Petition, as was addressed under Argument I above. The PSC's job is not to reinterpret the Board's questions into something not asked. The PSC's job is not to reinterpret the Board's questions into a policy issue regarding the future of electric service in Indian River County. Nor is it the PSC's job to reinterpret the Board's questions into a broad generic policy with statewide application so that it will not have to

[133] R. at 955.

answer the question posed. While some of the actual questions asked by the Board may be "a matter of interest to more than one person," such questions are still appropriate for a declaratory statement.[134] But the general legal advisory opinion the PSC refuses to answer is a question of the PSC's own making. None of the Board's questions seek such a broad based, general policy of far reaching applicability, and it was reversible error for the PSC to not answer them as asked.

4. The County Is Not Asking for a Declaratory Statement Determining the Conduct of Third Persons.

The County agrees that as a matter of law the PSC should not be determining the rights or conduct of third parties in a declaratory statement.[135] That is exactly what the PSC improperly did in the City Petition, which is addressed in Argument I above. With respect to the County Petition, the Board carefully crafted its questions in such as manner as to limit the scope of such questions solely to the Board and its potential future actions, as is required in a declaratory statement. Like with the previous issues, the PSC did not accept the County's statement of facts but instead ignored or modified the facts and questions in order to fabricate a basis for denying the Board's questions.

For example, the Board stated its opinion that once the Franchise Agreement expires the City must cease providing electric service in the unincorporated areas,

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[134] *Chiles*, 711 So. 2d at 154.
[135] R. at 956.

the County may designate a successor electric service provider, and the County may acquire the City electric facilities. However, instead of accepting these as statements of fact within the context of the specific questions posed, the PSC wrongfully treats these statements ***as the questions*** and otherwise ignores the actual questions that were presented. As framed by the PSC, the fact became the question whether the City must "cease conducting its business in the unincorporated areas of the County"[136] once the Franchise Agreement expires, which would be an improper question regarding the City's conduct. Indeed, it is the reverse of the two City Petition questions addressed in Argument I above as to whether the City must continue to utilize the County's property to provide electric service after the Franchise Agreement expires, which the PSC improperly answered. From either perspective, such questions impact third parties and are not permissible in a declaratory statement.

The Board did not ask the PSC whether the City must stop providing electric service once the Franchise Agreement expires. Similarly, the Board did not ask for the PSC's permission to designate a successor electric service provider or whether the County may acquire the City electric facilities. Instead, the Board's questions were more nuanced, and focused on whether the expiration of the Franchise Agreement would impact or effect the territorial agreements, whether there are any

[136] *Id.*

limitations in Chapter 366, Florida Statutes, on the Board's ability to grant a new Franchise Agreement, and whether the Board may supply electric service. These are questions relating to potential future conduct by the Board. The PSC may not agree with the prospective facts as set forth by the County, but the PSC's job is to accept the facts as presented and to address the questions posed.[137]

The PSC's specific problems with questions d, k, and m are equally unfounded. Asking the PSC about the legal status of the Territorial Orders after the Franchise Agreement expires does not determine anyone's rights, especially when the Board agrees and has stated that the expiration of the Franchise Agreement does not do anything to the PSC's orders. Likewise, under the facts actually stated in Question k, the Board is only seeking to know what are the Board's obligations regarding the contracts between the City and its power suppliers; the Board is not seeking a determination regarding the rights, duties, and responsibilities of the parties to those contracts. Finally, within the context of the overall statements of fact, in Question m the Board is simply seeking to understand whether under Chapter 366, Florida Statutes, there are any limitations on a successor electric supplier's ability to acquire the City's electric facilities if the Board grants a new electric service franchise. In the final analysis, the actual questions as framed by the County are valid questions about the Board and its

[137] Fla. Admin. Code R. 28-105.003.

potential future conduct and not questions regarding third parties. It was reversible error for the PSC to not answer the questions asked by the Board.

5. The County Is Not Asking for Declarations That Would Require an Analysis of Statutory Provisions Not Within the PSC's Authority.

The County also agrees with the legal principle cited by the PSC in the County Order that the PSC is without authority to address statutes outside its enumerated authority.[138] But the County did not ask questions outside of the PSC's authority. The Board carefully and properly limited its questions to issues solely within the scope of Chapter 366, Florida Statutes, the PSC's enabling statute. In response, the PSC twisted and expanded on the scope of the Board's questions, and as recast by the PSC they failed the test. But recasting questions in order to reject them is not the PSC's job.

The problems with the PSC's conclusion that Questions a-c, e-l, and n are outside the scope of the PSC's authority are driven by the PSC's disagreement with the underlying assumptions that the County may acquire the electric facilities, provide service, and choose an electric supplier. But these were not the questions the County asked.

For example, in determining whether the Board would be an "electric utility" or a "public utility," the questions asked in Questions a-c, the Board is not

[138] R. at 956-957.

asking the PSC to determine whether the Board may engage in such ownership or electric supply activities. Moreover, the Board simply asked whether ***if*** it engaged in certain activities would such activities result in the County being declared an "electric utility" or a "public utility" under Sections 366.02(1) or 366.02(2), Florida Statutes.

Regarding the selection of a successor electric utility, again the Board did not ask the PSC to rule on whether the Board had such authority. Rather, the Board asked a series of questions regarding its ability to enter into territorial agreements and the impact of the Territorial Orders on such potential Board actions. Similarly, with respect to Question i, the PSC says that the Board is asking how the "expiration of the Franchise Agreement affects Vero Beach's use of the County's rights of way."[139] Instead, Question i reads in its entirety as follows:

> Once the Franchise expires, and [Vero Beach] is no longer legally authorized to utilize the County's rights of way, to the extent the Board takes such actions as to ensure the continued and uninterrupted delivery of electric service to customers in the Franchise Area, by the Board, FPL, or some other supplier, are there any electric reliability or grid coordination issues that the Board must address with respect to the PSC's jurisdiction under Chapter 366, F.S.?[140]

Question i asks nothing about the City's use of the County rights of way.

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[139] R. at 957.
[140] R. at 928.

This type of reinterpretation of the Board's questions into different questions that then can be declared legally inappropriate is not what the Commission is supposed to be doing. As presented in the County Petition, the Board limited its questions to potential jurisdictional issues impacting the County and not third parties. It was reversible error not to answer the questions posed, and the PSC should be directed to answer the questions as written.

6. Question j Was Not the Subject of Pending Litigation.

As an additional ground for not answering Question j, the PSC cited the County's participation in the Chapter 164, Florida Statutes,[141] conflict resolution process that was triggered when the Town of Indian River Shores ("Town") sued the City of Vero Beach in circuit court.[142] The County did participate in the Chapter 164, Florida Statutes, process, which recently concluded without any resolution. However, since the Chapter 164, Florida Statutes, process is not a judicial or administrative proceeding with the authority to "finally determine the issues,"[143] it was error for the PSC to refuse to answer Question j.

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[141] Chapter 164, Fla. Stat., is designated as the "Florida Governmental Conflict Resolution Act" *see*, Sections 164.101-164.1065. Fla. Stat.

[142] *Town of Indian River Shores v. City of Vero Beach*, Case No. 312014 CA 000748 (Fla. 19th Cir. in and for Indian River County, Complaint filed July 18, 2014); R. at 957-958.

[143] *Couch v. State*, 377 So. 2d 32, 33 (Fla. 1st DCA 1979).

At the outset, it must be clearly stated that the County is not a party to the lawsuit between the Town and the City. The County has not taken any action to join or otherwise intervene in this court case. While the Town's case against the City did include an issue similar to that raised by Question j in the County Petition, in order for a decision on that issue to be binding on the County, the County would have to be a party to the Town's case. Since there is no participation by the County in a judicial proceeding involving the same or a related issue, there is no bar to the PSC issuing the declaratory statement on Question j.

Second, while the Town's lawsuit triggered the Chapter 164, Florida Statutes, conflict resolution process, the litigation was abated during the term of the conflict resolution process. Thus, there were no pending judicial proceedings during the time in which the County Petition was pending before the PSC. Again, even if there was, the Board was not a party to such litigation.

Third, the conflict resolution process established by Chapter 164, Florida Statutes, is not a judicial or administrative proceeding. As Chapter 164, Florida Statutes, makes clear, the purpose of the Act is for "conflicts between governmental entities [to] be resolved to the greatest extent possible without litigation."[144] Thus, by definition, the Chapter 164, Florida Statutes, process is ***not*** litigation, judicial or administrative. This is borne out by the fact that Chapter 164,

[144] Section 164.102, Fla. Stat.

Florida Statutes, specifically provides that "court proceedings on the suit shall be abated, by order of the court, until the procedural options of this act have been exhausted."[145] The very specific multi-step process set forth in the statute involving conflict assessment by the relevant personnel including the chief administrator for each government entity,[146] a joint public meeting involving the government bodies,[147] and finally mediation[148] is by not litigation.

Fourth, the Chapter 164, Florida Statutes, process is not administrative litigation within the scope of Chapter 120, Florida Statutes. The process described in the preceding paragraph is not an administrative proceeding. Moreover, the independence of the Chapter 164, Florida Statutes, process from any administrative litigation was made clear in the statute, which specifically provides that "[t]he provisions of this act do not apply to administrative proceedings pursuant to chapter 120 or any appeal from any administrative or trial court judgment or decision."[149]

Finally, the legal basis for the Town's lawsuit is not applicable to the County. The Town's lawsuit is based upon Section 180.02, Florida Statutes, which provides that a municipality may not extend or apply its corporate powers within

[145] Section 164.1041(1), Fla. Stat.
[146] Section 164.1053, Fla. Stat.
[147] Section 164.1055(1), Fla. Stat.
[148] Section 164.1055(2), Fla. Stat.
[149] Section 164.1041(1), Fla. Stat.

another municipality. On its face, that statute does not apply to the City's electric service within the unincorporated areas of the County.

The County was not forum shopping by pursuing its declaratory statement and participating in the Chapter 164, Florida Statutes process. While there was a similar issue in common to the Town litigation and the County's declaratory statement petition, the County's involvement in the Chapter 164, Florida Statutes, process was ancillary to and did not constitute participation in judicial or administrative litigation or in any kind of binding, dispositive proceedings.[150] The County felt it important to participate in that the Chapter 164, Florida Statutes, process because there would be direct negotiations between the City, County, and Town that could lead to a global resolution for all of the community's issues with the City's electric service. Unfortunately, there was no resolution, and the Town is moving forward with its lawsuit, and the County is still not a party. Since the

[150] The County could have voluntarily agreed to a resolution of the issues in the Chapter 164, Florida Statutes., process that could have had the effect of partially or completely resolving the issues in the County Petition or otherwise rending it moot. But a voluntary resolution through the Chapter 164, Florida Statutes, process is different from the rule relied upon by the PSC that issues subject to litigation elsewhere should not be addressed in a petition for declaratory statement since the litigation will resolve the issues with finality. *See Couch, 377 So. 2d at 33; Fox v. State, Bd. of Osteopathic Med. Examiners*, 395 So. 2d 192, 193 (Fla. 1st DCA 1981)

Chapter 164, Florida Statutes, process is not litigation, it was reversible error for the PSC to refuse to answer Question j because the then pending Chapter 164, Florida Statutes, process.

CONCLUSION

Wherefore, the Board of County Commissioners, Indian River County, Florida, respectfully asks this Court to reverse both the City Order and the County Order. The reversal of the City Order, Case No. SC15-504, should be a denial on the merits of the two declarations. In reversing the County Order, Case No. SC15-505, the Court should remand the case back to the PSC with directions to address the merits of the County Petition's fourteen declaratory statement questions.

Respectfully submitted, this 3rd day of June, 2015

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on June 3, 2015, a true and correct copy of the foregoing was electronically filed with the Florida Courts E-Filing Portal with noticed furnished to all registered users, as indicated below:

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Counsel for Appellant hereby certifies that this Initial Brief is typed in 14 point Times New Roman, in compliance with Fla. R. App. P. 9.100(l).

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