IN THE SUPREME COURT OF FLORIDA

BOARD OF COUNTY COMMISSIONERS
INDIAN RIVER COUNTY, FLORIDA

CASE NO.: SC15-504
SC15-505

Appellant,

LT Number: 140244-EM
140142-EM

v.

ART GRAHAM, ETC., ET AL.,

Appellees.
_____/

APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND REFERENCES

In this Answer Brief, the following designations will be used: Appellant Board of County Commissioners Indian River County, Florida, will be referred to as Indian River County or the County. The County's Initial Brief will be referred to as the County Brief. Indian River County Resolution 87-12, dated March 5, 1987, A Resolution of Indian River County, Florida, Granting to the City of Vero Beach, Florida, its Successors and Assigns, an Electric Franchise in Certain Unincorporated Areas of Indian River County, Florida; Imposing Provisions and Conditions Relating Thereto; and Providing an Effective Date, will be referred to as the Franchise Agreement. The unincorporated area of the County covered by the Franchise Agreement will be referred to at times as the Franchise Area. The County's Petition for Declaratory Statement will be referred to as the County Petition. The Commission's final order denying the County Petition, In re: Petition for declaratory statement by Indian River County, Order No. PSC-15-0101-DS-EM, 2015 Fla. PUC LEXIS 65 (2015), will be referred to as the County Order.

Amici Curiae Escambia County, Florida, the Florida Association of Counties, and the Florida Association of County Attorneys will be referred to together as County Amici Curiae. The County Amici Curiae Amicus Brief will be referred to as the County Amicus Brief.

Appellee City of Vero Beach will be referred to as Vero Beach. Vero Beach's Petition for Declaratory Statement will be referred to as the City Petition. The Commission's final order issuing Vero Beach's declaratory statement, In re: Petition for declaratory statement by the City of Vero Beach, Order No. PSC-15-0102-DS-EM, 2015 Fla. PUC LEXIS 66 (2015), will be referred to as the City Order.

Appellee Florida Public Service Commission will be referred to as the Commission. Florida Power & Light Company will be referred to as FPL; the Orlando Utilities Commission will be referred to as OUC; Duke Energy Florida, Inc., will be referred to as Duke; Tampa Electric Company will be referred to as TECO; Florida Municipal Electric Association, Inc., will be referred to as FMEA; and Florida Electric Cooperatives Association, Inc., will be referred to as FECA.

The Commission territorial orders approving territorial agreements between Vero Beach and FPL will be referred as follows: In re: Application of Florida Power and Light Company for approval of a territorial agreement with the City of Vero Beach, Order No. 5520, 1972 Fla. PUC LEXIS 104 (1972) will be referred to as 1972 Territorial Order; In re: Application of Florida Power & Light Company for approval of a modification of territorial agreement and contract for interchange service with the City of Vero Beach, Florida, Order No. 6010, 1974 Fla. PUC LEXIS 423 (1974) will be referred to as 1974 Territorial Order; In re:

Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas, Order No. 10382, 1981 Fla. PUC LEXIS 105 (1981) will be referred to as 1981Territorial Order; In re: Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas, Order No. 11580, 1983 PUC LEXIS 1002 (1983) will be referred to as 1983 Territorial Order; and In re: Petition of Florida Power & Light Company and the City of Vero Beach for Approval of Amendment of a Territorial Agreement, Order No. 18834, 1988 Fla. PUC LEXIS111(1988) will be referred to as 1988 Territorial Order. These orders will be referred to collectively as the Territorial Orders.

The following symbols will be used: (B. [Page #]) – The County's Initial Brief; (County Amicus B. [Page #]) – The County Amicus Brief); (R. [Vol. #]: [Page #]) – Record on Appeal; and (Appendix p. [Page #] – Appendix). All references to the Florida Statutes are to the Florida Statutes (2014).

STATEMENT OF THE CASE AND FACTS

This consolidated case is a direct appeal by Indian River County of two final orders of the Commission. Indian River County appeals the City Order, a Declaratory Statement issued to Vero Beach declaring 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. (R.

6: 1034-51; Appendix pp. 1-18) Indian River County also appeals the County Order, a final order denying the County Petition for Declaratory Statement for failure to meet the requirements of §120.565, Fla. Stat. (R. 5: 927-1033; Appendix pp. 19-25). This Court has mandatory jurisdiction pursuant to Art. V, § 3(b)(2), Fla. Const., and §§ 350.128(1), and 366.10, Fla. Stat., because these final orders relate to service of utilities providing electricity.

The Territorial Orders

Vero Beach provides electric service within its city limits and in certain parts of unincorporated Indian River County pursuant to the Commission Territorial Orders approving territorial agreements between FPL and Vero Beach. (R. 1: 25-28; R. 3: 493-99; R. 4: 621-32; Appendix pp. 129-138) The initial agreement, approved in 1972, states:

> [T]he Commission finds that the evidence presented shows a justification and need for the territorial agreement; and, that the approval of this agreement should better enable the two utilities to provide the best possible utility services to the general public at a less cost as the result of the removal of duplicate facilities.

1972 Territorial Order, 1972 Fla. PUC LEXIS 104, *5. (R 1: 26; R. 3: 495-96; Appendix pp. 126-28) A slight modification to the territorial agreement was approved by the Commission in 1974. 1974 Territorial Order, 1974 Fla. PUC LEXIS 423, *1. (R. 1: 26-27; R. 3: 496; Appendix p. 129)

In 1981, the Commission proposed approval of an amended territorial

agreement between Vero Beach and FPL, stating that such approval would assist in the avoidance of uneconomic duplication of facilities and provide higher quality electric service and economic benefits to customers. 1981 Territorial Order, 1981 Fla. PUC LEXIS 105, *3. (R. 1: 27, 49-51; R. 4: 621-23; Appendix p. 130-32). The territorial agreement approved by the Commission explicitly recognizes the "right and obligation" of Vero Beach and FPL to serve within the service areas designated to each utility in the agreement. (R. 1: 56; R. 3: 498; R. 4: 628) A hearing was held at the request of a group of Vero Beach customers who opposed being transferred to FPL because of concerns that their rates might increase and their service might suffer. 1983 Territorial Order, 1983 Fla. PUC LEXIS 1002 (1983), *2. (R. 1: 52-53; Appendix pp. 133-34) Following the hearing, the Commission adopted the 1981 Territorial Order as a final order, stating:

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

1983 Territorial Order, 1983 Fla. PUC LEXIS 1002 at *3. (R. 1: 52-53; Appendix pp. 133-34) The Commission further found that the customers' assertions did not justify reversing the 1981 Territorial Order, citing to the finding in Storey v. Mayo, 217 So. 2d 304, 307-308 (Fla. 1968), cert. denied, 395 U.S. 909 (1969), that an individual has no organic, economic or political right to service by a particular

utility merely because he deems it advantageous to himself. 1983 Territorial Order, 1983 Fla. PUC LEXIS 1002 at *4 (R. 1: 53; R. 3: 497; Appendix p. 134)

The Commission most recently modified the Territorial Orders by approving an amendment to the territorial agreement as being in the best interest of the public and the utilities and as being consistent with the Commission's philosophy of eliminating uneconomic duplication of facilities. 1988 Territorial Order, 1988 Fla. PUC LEXIS 111, *2. (R. 3: 499; Appendix p. 136)

The Franchise Agreement

Vero Beach and Indian River County entered into a Franchise Agreement dated March 5, 1987. (R. 1: 10-11, 42-48; R. 3: 498) The Franchise Agreement grants Vero Beach the exclusive right to supply electric service to certain parts of the unincorporated areas of Indian River County and the right to utilize the streets, bridges, alleys, easements, and public places for the placement of its facilities for a period of 30 years. (R. 1: 42, 45) The Franchise Agreement addresses location and relocation of facilities and liability issues. (R. 1: 43-44) Pursuant to the Franchise Agreement, Indian River County imposes and collects a franchise fee of 6 percent of applicable Vero Beach utility revenues. (R. 1: 44-45; R. 3: 498) Indian River County provided notice to Vero Beach that it will not renew the Franchise Agreement when it expires on March 4, 2017. (R. 1: 24, 60)

Indian River County's Petition for Declaratory Statement

On July 21, 2014, Indian River County filed a petition for declaratory statement with the Commission. (R. 1: 9-60) The County Petition alleges that upon expiration of the Franchise Agreement in March 2017, Indian River County's franchise authority gives it the right to replace Vero Beach as the electric service provider in the Franchise Area. (R. 1: 14, 19-21, 23-25, 31-40) The County Petition alleged that after the Franchise Agreement expires, the Commission does not have authority under Ch. 366, Fla. Stat., to designate Vero Beach as the electric service provider (R. 1: 37-38) and that the territorial agreements approved by the Territorial Orders "are called into question" and will become "invalid as void or voidable" as to the Franchise Area. (R. 1: 20, 33-34, 36, 39)

Based on this position, the County Petition requested declaratory statements on fourteen separate questions with subparts (R. 1: 11-13, 38-40) regarding Indian River County's rights, duties, and responsibilities once the Franchise Agreement expires in 2017 and how electric service may thereafter be provided to Franchise Area customers. (R. 1: 9) The questions asked were as follows:

> a. Will the Board become a "public utility" as that term is defined in Section 366.02(1), Florida Statutes, if the Board assumes ownership of the Electric Facilities and the Board supplies electric service through the Electric Facilities to those customers currently served by the Electric Facilities?
>
> b. Will the Board become an "electric utility" as that term is defined in Section 366.02(2), Florida Statutes, if the Board assumes ownership

of the Electric Facilities and the Board supplies electric service through the Electric Facilities to those customers currently served by the Electric Facilities?

c. Will the Board become a "public utility" as that term is defined in Section 366.02(1), Florida Statutes, or an "electric utility" as that term is defined in Section 366.02(2), Florida Statutes, if the Board assumes ownership of the Electric Facilities and the Board leases or otherwise conveys the Electric Facilities to FPL or some other provider of electric service (e.g., a public utility, another municipality, or a cooperative) that would supply electric service through the Electric Facilities and other necessary equipment to customers within the geographic area of the Franchise?

d. Once the Franchise 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)?

e. Once the Franchise expires and if 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), with respect to the PSC's jurisdiction under Chapter 366, Florida Statutes, if the Board chooses to supply electric service in the geographic area described by the Franchise, are there any limitations on the Board's ability to enter into a territorial agreement with FPL regarding their respective service areas within the county?

f. Once the Franchise expires and if 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), with respect to the PSC's jurisdiction under Chapter 366, Florida Statutes, are there any limitations on the Board's ability to grant FPL an exclusive franchise to supply electric service within the geographic area described by the Franchise and for FPL to serve such customers?

g. Once the Franchise expires and if the territorial agreements and boundaries approved by the PSC between [Vero Beach] and FPL

remain valid, do the PSC's orders regarding the territorial agreements and boundaries in any manner limit or otherwise preclude the Board from supplying electric service within the geographic area described by the Franchise?

h. Once the Franchise expires and if the territorial agreements and boundaries approved by the PSC between [Vero Beach] and FPL remain valid, do the PSC's orders regarding the territorial agreements and boundaries in any manner limit or otherwise preclude the Board from granting an exclusive franchise to FPL that would authorize FPL to supply electric service to customers within the geographic area of the Franchise and for FPL to serve such customers?

i. 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?

j. 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 Statutes, have any legal effect on the Franchise or the Board's duties and responsibilities for continued electric service within the Franchise area?

k. Once the Franchise expires, and customers in the Franchise Area are being served by a successor electric service provider, does the Board have any legal obligations to [Vero Beach] or any third parties for any [Vero Beach] contracts for power generation capacity, electricity supply, or other such matters relating to electric service within the Franchise Area?

l. If the Board grants [Vero Beach] a temporary extension in the Franchise for the limited purpose and for a limited time in order to seamlessly and transparently transition customers in the Franchise Area to a new electric service provider, are there issues or matters under Chapter 366 or the PSC's rules and orders that must be addressed by the Board for the transition period?

> m. What is the PSC's jurisdiction, if any, with respect to the Electric Facilities once the franchise has expired? Is there any limitation or other authority under Chapter 366 impacting a successor electric service provider from buying, leasing, or otherwise lawfully acquiring the Electric Facilities in the Franchise Area from [Vero Beach]?
>
> n. Does the PSC have the legal authority to invalidate or otherwise supersede the Board's decision to terminate the Franchise and to designate [Vero Beach] the electric service provider in the Franchise Area?

The County Petition alleged that Indian River County has a present need for the declarations so that it may "plan, prepare, and designate a successor electric service provider in the Franchise Area." (R. 1: 14, 30-31, 35) The County Petition identified §§120.565(1)-(2), 366.02(1)-(3), 366.04(1) and (2)(c)-(e), 366.04(7), 366.05(7) and (8), Fla. Stat., Fla. Admin. Code Rules 25-6.0439 and 25-6.0441(1), and the Territorial Orders, as relevant, applicable, and supportive of its requested declaratory statements. (R. 1: 14-19)

In explaining its need for the declaratory statements, Indian River County alleged that Vero Beach's electric service within the Franchise Area has become increasingly more contentious and controversial because the utility rates charged by Vero Beach are too high. (R. 1: 28-30; R. 3: 592-94; R. 4: 609) The County Petition alleged that the customers in the Franchise Area have no voice in the utility's operation and management and no redress to any governmental authority because they reside outside the city limits and have no vote in city elections. (R. 1:

28) The County Petition alleged that there is substantial subsidization of Vero Beach's general governmental operating budget from its county customers who receive no city services. (R. 1: 29) Indian River County further alleged that the City has violated the requirements of §366.04(7), Fla. Stat., by failing to conduct an election or to otherwise create an electric utility authority that would include representation of County customers. (R. 1: 21, 29) The County Petition stated that Indian River County supports the pending sale of the Vero Beach electric utility system to FPL, but was not certain that the sale would occur, stating that if it did occur, the questions asked in the County Petition would be unnecessary. (R. 1: 27-28, 30)

Responses to the County Petition were filed by intervenors Vero Beach (R. 1: 153-200, R. 2: 201-208), FPL (R. 2:307-311), and OUC (R. 2: 276-85) and amici curiae Duke (R. 1: 138-49), TECO (R. 2: 215-21), FMEA (R. 2: 286-306), and FECA (R. 2: 222-39). Intervenors and amici curiae all requested or supported denial and/ or dismissal in whole or in part of the County Petition.

Indian River County filed a consolidated response and objections to the motions to dismiss and other intervenor and amici curiae substantive responses to the County Petition (R. 2: 312-343). In its response, Indian River County argued that the Commission and County exercise concurrent authority (although not concurrent jurisdiction) and that under this concurrent authority, a franchise

agreement is required for an electric utility to provide service in Indian River County and that Indian River County may replace Vero Beach with a new electric service provider once the Franchise expires in 2017. (R. 2: 313-14, 321-22, 324, 326, 340-41)

On September 2, 2014, Indian River County filed a letter extending the 90-day requirement of § 120.565(3), Fla. Stat., for issuance of a final order until December 15, 2014, explaining that the extension would be appropriate in order for the County "to participate in good faith in the Chapter 164 conflict resolution process currently underway involving the Town of Indian River Shores, the City of Vero Beach, and Indian River County." (R. 2: 350)

On November 13, 2014, Commission staff filed its written recommendation that the County Petition be denied for failure to meet the requirements of §120.565, Fla. Stat. On November 25, 2014, the day of the public meeting at which the Commission was to consider this recommendation, Indian River County requested deferral of consideration of the County Petition until February 3, 2015, to allow it time to file a revised or amended petition. (R. 3: 475-77) No amended petition was filed, so the staff recommendation of November 13, 2014, with minor amendments, was heard by the Commission at the February 3, 2015 public meeting. (R. 3: 522-55)

Vero Beach's Petition for Declaratory Statement

On December 19, 2014, following Indian River County's request to defer consideration of the County Petition, Vero Beach filed a petition for declaratory statement with the Commission. (R. 3: 488-519) The City Petition stated that Indian River County, through the County Petition, threatens to evict Vero Beach from serving in unincorporated Indian River County upon expiration of the Franchise Agreement, contrary to the Commission's Territorial Orders. (R. 3: 489) Accordingly, Vero Beach asked the Commission to declare the status of its right to continue operating in its Commission-approved service territory by interpreting and applying the Territorial Orders pursuant to the Commission's jurisdiction under §§ 366.04(1), (2)(d) and (e), and (5), Fla. Stat., as applied to its particular set of circumstances. (R. 3:488-90, 492, 501-504, 514-16)

The facts alleged by Vero Beach show that it is a party to the territorial agreements with FPL that were approved by the Commission in the Territorial Orders. (R. 3: 493-99; Appendix pp. 126-38) Pursuant to the Territorial Orders, Vero Beach provides electric service within and outside of its municipal boundaries, including the Franchise Area. (R. 3: 494-97, 499) As the electric service provider for the territory described in the Territorial Orders, Vero Beach serves approximately 34,000 meters, of which approximately 12,900 meters are located within the city limits and approximately 21,000 meters are located outside

the city limits. (R. 3: 500-501) Currently, approximately 20 percent of Vero Beach's transmission and distribution lines in the Franchise Area are located in Indian River County road rights of way, with the remaining 80 percent located in state rights of way, private roads, or private easements. (R. 3: 500) In order to serve its customers in its approved service areas, Vero Beach has invested tens of millions of dollars, borrowed tens of millions of dollars and entered into long-term power supply projects and related contracts, also involving millions of dollars of long-term financial commitments. Id.

The City Petition alleged that Vero Beach's substantial interests will be directly affected because the Commission's interpretation and application of Ch. 366, Fla. Stat., and the Territorial Orders will determine whether Vero Beach's right and obligation to continue serving Franchise Area customers pursuant to the Territorial Orders are affected by the expiration of the Franchise Agreement. (R. 3: 503-504) The City Petition alleged that the Commission's declaration will directly and immediately impact Vero Beach's ability to plan its system and to make appropriate, efficient planning and investment decisions, including how Vero Beach may have to address significant cost impacts if Indian River County were allowed to remove Vero Beach as service provider in the Franchise Area upon expiration of the Franchise Agreement. (R. 3: 501, 504).

Indian River County filed a response in opposition to the City Petition (R. 3: 89-100; R. 4: 601-32). Comments or memoranda in support of the merits or legal position of the City Petition were filed by amici curiae TECO (R. 3: 556-65), FECA (R. 3: 575-88), Duke (R. 4: 637-50), and FMEA (R. 4: 668-83).

Vero Beach filed a reply to Indian River County's response in opposition to the City's Petition. (R. 4: 686-727) Vero Beach alleged that it was not requesting a declaratory statement addressing Vero Beach's use of the Indian River County's rights of way or concerning the validity of the Franchise Agreement, but, instead, asked the Commission to determine Vero Beach's rights and obligations under the Commission's Territorial Orders. (R. 4: 705-706, 712; R. 5: 907, 917)

On January 14, 2015, the Town of Indian River Shores filed a Notice of Pending Litigation in both the City Petition and County Petition proceedings that summarized the issues raised in its complaint in its pending circuit court litigation against Vero Beach[1] (R. 5: 961-1000; R. 6:1001-1031; Appendix pp. 53-123) and asked the Commission to refrain from issuing declaratory statements that would address any factual or legal issues related to that litigation (R. 4: 659-67), including whether Vero Beach violated the requirements of §366.04(7), Fla. Stat. (R. 4: 666-67; 5: 977-79)

[1] Town of Indian River Shores v. City of Vero Beach, Case No. 312014 CA 000748 (Fla. 19th Circuit in and for Indian River County, Complaint filed July 18, 2014). (R. 1: 186)

The City Petition and County Petition were considered together by the Commission at its February 3, 2015 public meeting (R. 5: 886-926)

The City Order

The Commission issued a Declaratory Statement 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. (R. 6: 1050; Appendix p. 17) The Commission found that the City Petition met the threshold requirements for issuance of a declaratory statement because it asked how provisions of §366.04, Fla. Stat., and the Territorial Orders apply to its circumstances as the electric service provider for the customers located in its territory described in the Territorial Orders. (R. 6: 1047; Appendix p. 14) The Commission specified that:

> Vero Beach is not asking us to interpret or apply the Franchise Agreement to its particular circumstances, and we are not doing so in this declaration. The Franchise Agreement is not a rule, order, or statutory provision of this Commission, and we would have no authority to issue a declaration interpreting that agreement.

(R. 6: 1048; Appendix p. 15)

The Commission found that because the Territorial Orders are subject to the Commission's exclusive and superior jurisdiction over electric grid planning and over territorial orders, the Territorial Orders may not be modified except by the Commission. (R. 6: 1047-48; Appendix pp. 14-15) The Commission further found

that the Territorial Orders are valid Commission orders which have not been modified to delete the Franchise Area from Vero Beach's service territory, and that, therefore, Vero Beach will retain its right and obligation to provide electric service to customers within the territory described in the Territorial Orders unless and until modified by the Commission. (R. 6: 1048; Appendix p. 15)

The County Order

The Commission denied the County Petition for failure to meet the threshold requirements of §120.565, Fla. Stat. for issuance of a declaratory statement. (R. 5: 927-1000; R. 6: 1001-33; Appendix pp. 927-1033) The Commission found that the County Petition failed to state with particularity a set of present, ascertained or ascertainable circumstances, and, instead, relied upon an incorrect legal conclusion that Indian River County has sole authority upon expiration of the Franchise Agreement to terminate Vero Beach as the electric service provider and to designate a successor electric utility. (R. 5: 953; Appendix p. 45)

The Commission further found that certain of the questions were based on alleged circumstances that are hypothetical, speculative, and did not demonstrate a present, ascertained or ascertainable statement of facts. (R. 5: 954; Appendix p. 46) The Commission found that the County Petition gave multiple scenarios of what general actions Indian River County might or might not take after the Franchise Agreement expires in 2017, including the County "acquiring" or

"assuming ownership" of Vero Beach's Electric Facilities, and then possibly "leasing or otherwise conveying" those facilities to FPL or "some other provider of electric service (e.g., a public utility, another municipality, or a cooperative)"; that Indian River County might supply electric service, an allegation not based on a present ascertained or ascertainable set of facts but, instead, on a legal assumption that Indian River County has statutory authority to assume ownership of the Vero Beach's Electric Facilities and provide electric service within the Franchise Area; or that FPL or another unnamed third party might become a successor electric service provider to Vero Beach. Id. The Commission concluded that Indian River County's admission that if the proposed transfer from Vero Beach to FPL is successfully concluded, "the questions posed herein will be unnecessary" and the wide variety of possible future scenarios presented in these questions underscored its conclusion that the County Petition failed to demonstrate a present, ascertained or ascertainable statement of facts and that Indian River County's alleged factual circumstances constituted a mere hypothetical, speculative situation not proper for a declaratory statement. Id.

Moreover, the Commission found that the County Petition failed to describe how any statutory provisions, rules, or orders may substantially affect the County under a particular set of circumstances, as required by Rule 28-105.002(5), F.A.C. (R. 5: 954-55; Appendix pp. 46-47) and failed to identify a controversy, questions

or doubts concerning the applicability of statutory provisions or orders over which the Commission has authority, as required by Rule 28-105.001, F.A.C. (R. 5: 954; Appendix p. 46)

The Commission found that question d asked general questions as to the legal status of the Territorial Orders; questions e and f asked general questions as to whether there are any limitations on Indian River County with respect to the Commission's jurisdiction under Ch. 366, Fla. Stat.; questions i and l asked very general questions about whether there are any issues for Indian River County to address under Ch. 366, Fla. Stat.; question j asked how Vero Beach's conduct under § 366.04(7), Fla. Stat., would affect Indian River County's responsibilities; question k failed to specify any rule, statute or order; and questions m and n asked about any limitations on an unspecified "successor electric service provider" "under Chapter 366." (R. 5: 955; Appendix p. 47) The Commission found that these general questions did not meet the requirements of Fla. Admin. Code. R. 28-105.002(5) because they failed to describe how a particular statutory provision or order applies to specific factual circumstances of Indian River County and, instead, asked for a general legal advisory opinion. Id.

In addition, the Commission found that the County Petition as a whole would directly and significantly impact Vero Beach and FPL and the conduct of their businesses in reliance on the Territorial Orders. The Commission also found

that individual questions asked for declarations that would directly determine the conduct of third persons as follows: Question d asked for a declaration concerning the legal status of the territorial agreements between Vero Beach and FPL question k asked for a declaratory statement concerning Indian River County's legal obligations to Vero Beach or any third parties contracting with Vero Beach relating to electric service, which the County Petition explained includes OUC and the Florida Municipal Power Agency; and question m asked for a declaration about the Commission's jurisdiction over Vero Beach's electric facilities and for a declaration concerning an unidentified third party who Indian River County alleged might provide service within the Franchise Area in the future. (R. 5: 959; Appendix p. 48).

The Commission found that in order to answer Indian River County's questions concerning whether the County meets the statutory definition of "public utility" or "electric utility" and whether Indian River County has the authority to assume ownership of Vero Beach's electric facilities and/or provide electric service within the Franchise Area, the Commission would need to determine the correctness of those assumptions by interpreting and analyzing the powers of counties authorized by Ch. 125, Fla. Stat., and Article VII § 1(f) and (g), Fla. Const. (R. 5: 956-57; Appendix p. 48-49) The Commission found that giving an incomplete declaration that only addresses Ch. 366, Fla. Stat., and ignores Ch. 125,

Fla. Stat., and the relevant constitutional provisions would undermine the purpose of the declaratory statement. (R. 5: 957; Appendix p. 49) Additionally, the Commission declined to answer questions asking how expiration of the Franchise Agreement would affect Vero Beach's use of Indian River County's rights-of-way, asking about Indian River County's possible future actions to address extension of its Franchise Agreement with Vero Beach, and addressing contracts between Vero Beach and third parties. Id. The Commission stated that it has no jurisdiction to interpret franchise agreements. Id.

The Commission found that in addition to the other reasons stated in the County Order, question j should be denied because it raised an issue the subject matter of which was pending in circuit court litigation and, at the time of issuance of the County Order, was the subject of a Ch. 164, Fla. Stat., governmental conflict resolution proceeding to which Indian River County was a party. (R. 5: 957-58; Appendix pp. 49-50)

Indian River County appeals both the City Order and the County Order.

SUMMARY OF ARGUMENT

Indian River County's appeal of the City Order and the County Order is a thinly veiled attempt to convince the Court that Indian River County has the right to modify the Commission's Territorial Orders by replacing Vero Beach as electric service provider when the Franchise Agreement expires in March 2017. The

Commission rejected this premise in the City Order and the County Order because the law is firmly established that Indian River County does not have this right. Instead, the Commission has superior and exclusive jurisdiction to determine matters concerning its Territorial Orders pursuant to §366.04, Fla. Stat.

The City Order correctly declares that Vero Beach retains the right and obligation to provide electric service pursuant to the Commission-approved Territorial Orders upon expiration of the Franchise Agreement. The City Order should be affirmed because the Commission complied with the essential requirements of law in issuing the declaratory statement and correctly applied the Territorial Orders and its § 366.04, Fla. Stat., exclusive jurisdiction over territorial agreements to Vero Beach's circumstances.

Indian River County's argument challenging Vero Beach's standing to request a declaratory statement is without merit. Vero Beach has standing to obtain a declaratory statement from the Commission because it met the requirements of §120.565, Fla. Stat., by alleging with particularity its set of circumstances to which the Commission applied its interpretation of the Territorial Orders and provisions of §366.04, Fla. Stat.

Indian River County's argument that the City Order exceeds Commission authority by interpreting the County's franchise authority and the Franchise Agreement, thereby interfering with Indian River County's property rights and

ability to collect franchise fees, is wholly without record support and should be rejected. The Commission's declaratory statement is limited to application of its Territorial Orders and § 366.04, Fla. Stat., to Vero Beach's particular circumstances, and does not interpret Indian River County's franchise authority, its property rights, or the Franchise Agreement.

Further, Indian River County's argument that the City Order interferes with the County's franchise authority and the Franchise Agreement is based on the incorrect legal presumption that under its franchise authority the County has the right to replace Vero Beach as the electric utility provider in the Franchise Area upon expiration of the Franchise Agreement in March 2017, notwithstanding the Commission Territorial Orders granting this right and obligation to Vero Beach. This argument must be rejected because accepting Indian River County's interpretation of the law would give Indian River County preemptive and superior jurisdiction over the Commission concerning territorial agreements, in direct conflict with the Territorial Orders and the Commission's § 366.04, Fla. Stat., superior and exclusive jurisdiction over territorial agreements.

The Commission's denial of the County Petition for declaratory statement properly interprets the requirements of §120.565, Fla. Stat., and complies with the essential requirement of law. The Commission correctly found that the County Petition and all questions failed to state with particularity a set of present,

ascertained or ascertainable circumstances; were based on an incorrect legal presumption that Indian River County has the right to remove Vero Beach as the electric utility provider upon expiration of the Franchise Agreement in March 2017; were based on speculation and hypothesis; failed to provide a description of how Indian River County may be substantially affected; and inappropriately sought to determine the conduct of third persons, including Vero Beach and third parties with whom Vero Beach has contracted. In addition, the Commission correctly found that questions in the County Petition improperly requested general legal advisory opinions; would require an analysis of statutory provisions not within the Commission's authority and/or analysis of provisions of the Florida Constitution; or raised an issue the subject matter of which is pending in circuit court litigation and, at the time the order was issued, a Ch. 164, Fla. Stat., governmental conflict resolution proceeding. Thus, the County Order declining to issue declaratory statements on each of the sixteen questions posed in the County Petition complies with the requirements of §120.565, Fla. Stat., and should be affirmed.

STANDARD OF REVIEW

The Commission's declaratory statement in the City Order may be reversed by the Court only if it finds that the Commission's interpretation of law is clearly erroneous. See Adventist Health Sys./Sunbelt, Inc. v. Agency for Health Care Admin., 955 So. 2d 1173, 1176 (Fla. 1st DCA 2007). Although the de novo

standard of review applies to the issue of Vero Beach's standing under §120.565, Fla. Stat., to request a declaratory statement, Indian River County's position that the merits of the City Order should be reviewed de novo (B. 13-15, 23) should be rejected by the Court. See Id. The declaratory statement issued in the City Order is based on the Commission's interpretation of the its Territorial Orders and provisions of § 366.04, Fla. Stat., (R. 6: 1047-1050) not on an interpretation of the Franchise Agreement or Indian River County's franchise authority, as argued by Indian River County, thus meriting review under the clearly erroneous standard. The Commission must be allowed to act when it has at least a colorable claim that the matter under consideration falls within its exclusive jurisdiction as defined by statute. Fla. Pub. Serv. Com'n v. Bryson, 569 So. 2d 1253, 1255 (Fla. 1990).

This Court has consistently held that it affords great deference to the Commission's findings, orders, and concomitant interpretations of statutes and legislative policies that the Commission is charged with enforcing. See Citizens v. Fla. Pub. Serv. Com'n, 146 So. 3d 1143, 1149 (Fla. 2014), and Choctawhatchee Elec. Coop. v. Graham, 132 So. 3d 208, 211 (Fla. 2014). The City Order interpreting the Commission's Territorial Orders and statutes come to the Court with the presumptions that it is reasonable and just, and to overcome these presumptions, Indian River County has the burden of showing a departure from the essential requirements of law and the legislation controlling the issue. Id.

The de novo standard of review applies to the Court's review of the County Order, which denied the County Petition for declaratory statement for failing to meet the requirements of §120.565, Fla. Stat. See Adventist Health Sys., 955 So. 2d at 1176.

ARGUMENT

I. THE COMMISSION'S DECLARATION THAT VERO BEACH HAS THE RIGHT AND OBLIGATION TO CONTINUE TO PROVIDE SERVICE PURSUANT TO THE TERRITORIAL ORDERS UPON EXPIRATION OF THE FRANCHISE AGREEMENT COMPLIES WITH THE ESSENTIAL REQUIREMENTS OF LAW AND SHOULD BE AFFIRMED.

The Commission correctly exercised its jurisdiction over the Territorial Orders and pursuant to § 366.04, Fla. Stat., by declaring that Vero Beach has the right and obligation to continue to provide service pursuant to the Territorial Orders upon expiration of the Franchise Agreement. (R. 6: 1050; Appendix p. 17)

Indian River County agrees that a territorial order may determine which utility has the right to serve as between utilities. (B. 10) The County further acknowledges that the Commission's Territorial Orders are not affected by expiration of the Franchise Agreement in March 2017. (B. 11, 20) However, at odds with this acknowledgement, Indian River County takes an unyielding and contradictory position that its franchise authority gives it the right to replace Vero Beach as the electric service provider upon expiration of the Franchise Agreement. (R. 1: 14, 19-24, 31-34, 36-40; R. 3: 598, 600, 610; B. 31-36) This position is

contrary to well established law that the Commission has superior and exclusive jurisdiction over territorial agreements pursuant to § 366.04, Fla. Stat.

A. VERO BEACH HAS STANDING TO SEEK A DECLARATORY STATEMENT BECAUSE THE CITY PETITION ALLEGED FACTS IN COMPLIANCE WITH §120.565, FLA. STAT.

Indian River County's argument that Vero Beach lacked standing to request a declaratory statement (B. 16-23) is incorrect. Vero Beach is entitled to a declaratory statement because it asked the Commission to declare the status of its right to continue operating in its Commission-approved service territory by interpreting and applying the Territorial Orders pursuant to the Commission's jurisdiction under §§ 366.04(1), (2)(d) and (e), and (5), Fla. Stat., as applied to its particular set of circumstances. §120.565(1) and (2); Fla. Admin. Pro. Rules 28-105.001 and 28-105.002. (R. 3:488, 492-501-504, 514-16; R. 4: 614-15, 621-32)

The facts alleged by Vero Beach show that it is a party to the territorial agreements with FPL that were approved by the Commission in the Territorial Orders. (R. 3: 493-99; R. 4: 621-32; Appendix pp. 126-138) As the electric service provider for the territory described in the Territorial Orders, Vero Beach serves approximately 34,000 meters, of which approximately 12,900 meters are located within Vero Beach's city limits and approximately 21,000 meters are located outside the city limits. (R. 3: 500-501) In order to serve its customers in its approved service areas, Vero Beach has invested tens of millions of dollars,

borrowed tens of millions of dollars, and entered into long-term power supply projects and related contracts, also involving millions of dollars of long-term financial commitments. Id. Vero Beach provides electric service within and outside of its municipal boundaries, including territory in unincorporated Indian River County. (R. 3: 494-97, 499)

The City Petition alleged that in 1987, Vero Beach and Indian River County entered into in a 30-year Franchise Agreement, pursuant to which Vero Beach has remitted franchise fees to Indian River County. (R. 3: 498; R. 4: 614-15) Currently, approximately 20 percent of Vero Beach's transmission and distribution lines in the Franchise Area are located in Indian River County road rights of way, with the remaining 80 percent located in state rights of way, private roads, or private easements. (R. 3: 500)

The facts show that Indian River County has been dissatisfied with the electric utility rates charged by Vero Beach to County residents. (R. 3: 592-94; R. 4: 609) By letter of February 22, 2012, Indian River County notified Vero Beach that it will not renew the Franchise Agreement when it expires on March 4, 2017. (R. 4: 632) Indian River County takes the firm position that Vero Beach will lose its right to serve the unincorporated areas of the County covered by the Territorial Orders upon expiration of the Franchise Agreement, and claims that it has the

authority to choose a successor utility provider. (R. 1: 14, 19-24, 31-34, 36-40; R. 3: 598, 600, 610; B. 31-36)

Based on these facts, the City Petition alleged that Vero Beach's substantial interests will be directly affected because the Commission's interpretation and application of Ch. 366, Fla. Stat., and the Territorial Orders will determine whether Vero Beach's right and obligation to continue serving Franchise Area customers pursuant to the Territorial Orders are affected by the expiration of the Franchise Agreement. (R. 3: 503-504) The City Petition alleged that the Commission's declaration will directly and immediately impact Vero Beach's ability to plan its system and to make appropriate, efficient planning and investment decisions, including how Vero Beach may have to address significant cost impacts if Indian River County were allowed to remove Vero Beach as service provider in unincorporated Indian River County upon expiration of the Franchise Agreement. (R. 3: 501, 504)

The City Petition thus met the requirements of §120.565(1), Fla. Stat., and Fla. Admin. Code R. 28-105.002(5) because it described how the Territorial Orders and statutory provisions may substantially affect its circumstances upon expiration of the Franchise Agreement. See, e.g., State, Dep't of Admin., Div. of Retirement v. Univ. of Fla., 531 So. 2d 377, 379-80 (Fla. 1st DCA 1988)(finding that the petitioner had standing to request the declaratory statement because the allegations

of substantial interest in the petition for declaratory statement were sufficient to show that the agency order being interpreted by the agency had an impact upon petitioner).

Although Indian River County agrees that the Commission has authority to approve, modify, resolve disputes, or enforce territorial agreements through territorial orders, the County ignores entirely the Commission's authority to issue a declaratory statement interpreting the Territorial Orders. (B. 16-23) Vero Beach is entitled to seek the Commission's opinions as to the applicability of the Territorial Orders to its specific circumstances. §120.565(1), Fla. Stat. The Commission has clear authority to interpret its Territorial Orders in declaratory statements. See Praxair, Inc. v. Florida Power & Light, 64 F. 3d 609, 614 (11th Cir. 1995), cert. denied, 517 U.S. 1190 (1996) (finding that the Commission's declaratory statement "reasonably interpreted" FPL's territorial agreement), Pub. Serv. Com'n v. Fuller, 551 So. 2d 1210, 1211-12 (Fla. 1989) (finding that the Commission has exclusive jurisdiction over territorial agreement orders and rejecting the city's argument that the circuit court had jurisdiction to interpret those orders), Roemmele-Putney v. Reynolds, 106 So. 3d 78, 80-81 (Fla. 3d DCA 2013)(finding that the Commission-approved territorial agreement is subject to the Commission's exclusive and continuing jurisdiction), and In re: Complaint of Reynolds, Order No. PSC-13-0207-PAA-EM, 2013 Fla LEXIS PUC 128 (2013), at *31 (stating that the

Commission "certainly" may interpret and enforce the terms of a service area agreement).

The City Order is consistent with prior Commission orders that issued declaratory statements to a utility asking for interpretation of Commission-approved territorial orders to which it was a party. In re: Petition of Florida Power and Light Company for a Declaratory Statement, Order No. 20808, 1989 Fla. PUC LEXIS 341 (1989)[2] (where the Commission issued a declaratory statement to FPL addressing whether Union Carbide's request of FPL to wheel power would violate its territorial agreement order); In re: Petition of Florida Power and Light Company for a Declaratory Statement Regarding Territorial Agreement with the City of Homestead, Order No. 20400, 1988 Fla. PUC LEXIS 1809 (1988)[3] (where the Commission issued a declaratory statement to FPL interpreting its Commission-approved territorial agreement as a valid agreement and rejected the city's argument that the real issue was one of interpreting a franchise agreement that should be resolved in circuit court); In re: Petition of Florida Power and Light Company for declaratory statement, Order No 13998, 1985 Fla. PUC LEXIS 1006

[2] This is the declaratory statement referenced in Praxair, 64 F. 3d at 612-614, finding that Florida law and regulations concerning territorial agreements clearly articulated a policy to displace utility competition. See Point I. C. 2., below.

[3] This is the declaratory statement addressed in Fuller, 551 So. 2d at 1211 and referenced in the related case, Homestead v. Beard, 600 So. 2d 450 (Fla. 1992).

(1985)(issuing a declaratory statement to FPL concerning FPL's obligation to provide service pursuant to a Commission-approved territorial agreement).

Moreover, the Commission must be allowed to act when it has at least a colorable claim that the matter under consideration falls within its exclusive jurisdiction as defined by statute. Fla. Pub. Serv. Com'n v. Bryson, 569 So. 2d at 1255. The Commission must be allowed to exercise its § 366.04, Fla. Stat., exclusive jurisdiction to interpret the Territorial Orders because that exclusive jurisdiction is more than a colorable claim, it is well established law. Fuller, 551 So. 2d at 1211-12, Roemmele-Putney, 106 So. 3d at 80-81. See also Point I. C. below.

B. THE CITY ORDER DOES NOT INTERPRET INDIAN RIVER COUNTY'S FRANCHISE AUTHORITY OR FRANCHISE AGREEMENT.

The declaration in the City Order is based upon the Commission's exclusive jurisdiction over its Territorial Orders, as discussed in detail in Point I. C., below, and is not based on an analysis of franchise authority or Franchise Agreement questions. Vero Beach specifically stated that it was not requesting a declaratory statement addressing its use of Indian River County's rights of way or concerning the validity of the Franchise Agreement (R. 4: 705-706, 712; R. 5: 907, 917), and the Commission specified in the City Order that it was not interpreting the Franchise Agreement, stating that:

> [Vero Beach] is not asking us to interpret or apply the Franchise Agreement to its particular circumstances, and we are not doing so in this declaration. The Franchise Agreement is not a rule, order, or statutory provision of this Commission, and we would have no authority to issue a declaration interpreting that agreement.

(R. 6: 1048; Appendix p. 15) The declaratory statement in the City Order is limited to stating specifically 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." (R. 6: 1050; Appendix p. 17)

The City Order does not address any franchise authority or Franchise Agreement issues. The many statements made in the County Brief that the Commission in the City Order made findings or declarations interpreting Indian River County's franchise authority and property rights (B. 8, 10, 11, 23-25, 27, 35-38), the Franchise Agreement (B. 8, 25, 29, 36-38) and other statutes outside the Commission's authority (B. 27-28) ignore the City Order's plain language and meaning, is wholly without record support, and should be rejected by the Court as without merit. See, e.g. Pensalcola Beach Pier, Inc. v. King, 66 So. 3d 321, 322, 326 (Fla. 1st DCA 2011)(rejecting appellant's argument as lacking merit because it misconstrued the trial court's order to reach an issue that was not explicitly addressed).

Contrary to Indian River County's representations, the Commission's declaration does not adopt or declare the specific language proposed by Vero

Beach in its request for declaratory statement (B. 9-10, 24-26, 28-29, 36-37); it does not state anywhere that the Commission "nullifies the Franchise Agreement and imposes restrictions on the County's ability to act in its own interests" (B. 8, 24); it has not "conveyed the County's property rights to the City without any franchise agreement" (B. 10); it does not "declare the term of the Franchise Agreement meaningless" (B. 14); it does not "grant the City the use of the County's property for an unregulated monopoly in perpetuity" (B. 15-16); it has not "specifically directed the City to continue to provide service …without regard to any other authority or permission of the County" (B. 23); it does not "[invalidate] the entire Franchise Agreement" (B. 25); it does not exempt Vero Beach from the Franchise Agreement (B. 25); it does not "[purport] to control the County's future actions" (B. 25); it does not give "direction to the City to . . . utilize the County's property in perpetuity" (B. 27); it has not "unquestionably construed Chapter 125, Florida Statutes" or §§ 337.401-337.404, Fla. Stat. (B. 27-28); it has not declared "that a franchise is unnecessary and without any legal effect" (B. 29); it does not "order an unregulated municipal electric utility to utilize the County's property" (B. 35); it has not "directed the City to continue to serve and provide electric service in perpetuity without any regard to the Franchise Agreement" (B. 36); it does not "grant the City authority to use the County's property without the County's permission" (B. 37); it has not "ruled" that the

Franchise Agreement is "without any legal effect" (B. 37); and it has not "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" (B. 38). These allegations are wholly without record support and should be rejected.

Indian River County's mischaracterization of the City Order as finding that the Territorial Orders are effective in perpetuity (B. 16, 29, 35-36) is contrary to the language of the City Order. If anything, the Commission found the opposite by recognizing that territorial orders are subject to modification or termination; however, any such modification or termination must first be made by the Commission under its superior and exclusive jurisdiction in a proper proceeding. (R. 6: 1048; Appendix p. 15) Fuller, 551 So. 2d at 1212, and Homestead, 600 So. 2d at 452-55.

C. THE COMMISSION HAS SUPERIOR AND EXCLUSIVE JURISDICTION OVER THE TERRITORIAL ORDERS AND THESE ORDERS MAY NOT BE MODIFIED UNILATERALLY BY INDIAN RIVER COUNTY.

The essence of Indian River County's argument that it has the power to replace Vero Beach as service provider upon expiration of the Franchise Agreement is that its franchise authority gives it concurrent authority (R. 2: 313-14, 321-22, 324, 326, 340-41) or superior jurisdiction (R. 1: 14, 19-21, 23-25, 31-40) as to the Commission's jurisdiction over territorial agreements. This argument is in direct conflict with § 366.04, Fla. Stat. Indian River County does not have

authority to replace Vero Beach as service provider upon expiration of the franchise agreement because that would be an unlawful modification of the Territorial Orders by the County and infringement on the Commission's jurisdiction, contrary to § 366.04, Fla. Stat.

1. § 366.04, Fla. Stat., gives the Commission exclusive and superior jurisdiction over territorial agreements.

The Commission has superior and exclusive jurisdiction to answer the question of whether Vero Beach has the right and obligation to continue to provide electric service pursuant to the Territorial Orders upon expiration of the Franchise Agreement. § 366.04(1) and (2), Fla. Stat. This jurisdiction is, by statute, exclusive and superior authority to that of counties to enforce, regulate, and resolve issues concerning territorial agreements, and "in case of conflict therewith, all lawful acts, orders, rules, and regulations of the [C]omission shall in each instance prevail." § 366.04(1), Fla. Stat.[4] The subject matter of the territorial agreements approved by the Commission's Territorial Orders is within the particular expertise and exclusive jurisdiction of the Commission. See Fuller, 551 So. 2d at 1212-13 (holding that the Commission had exclusive jurisdiction over its order approving a

[4] Amici curiae in the proceeding below agree that the Commission has the exclusive jurisdiction to grant electric utilities the right and obligation to serve in defined geographic areas. (R. 3: 560-61, 563-65, 577, 580-83; R. 4: 641-42, 644-49, 652, 670-80) County Amici Curiae before this Court also appear to recognize the Commission's exclusive jurisdiction over territorial agreements. (County Amicus B. 3, 6, 9, 13, 14, 16)

territorial agreement). See also Roemmele-Putney, 106 So. 3d at 80-81 (stating that Commission-approved territorial agreements are subject to the Commission's exclusive and superior jurisdiction and statutory power over all electric utilities and any territorial disputes pursuant to §§366.04(1) and (2), Fla. Stat.)

In 1974, the Florida Legislature codified in the Grid Bill[5] the Commission's authority to approve and review territorial agreements involving investor-owned utilities and expressly granted the Commission jurisdiction over rural electric cooperatives and municipal electric utilities for approving territorial agreements and resolving territorial disputes.[6] (R. 3:581-84; R. 4: 672-73) The Grid Bill provides that in the exercise of its exclusive jurisdiction, the Commission has the authority to require electric power conservation and reliability within a coordinated grid, to approve territorial agreements, and resolve any territorial disputes involving municipal electric utilities and other electric utilities under its jurisdiction. [7] §366.04(2)(c) – (e), Fla. Stat. Importantly, the Grid Bill also states:

> The [C]ommission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid

[5] Ch. 74-196, 1974 Fla. Laws 538, codified at §§366.04(2) and 366.05(7) and (8), Fla. Stat., (1974) (R. 3: 581; R. 4: 672; R. 5: 935-36)

[6] See Richard C. Bellak and Martha Carter Brown, Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida, 19 Fla. St. L. Rev. 407-413 (1991). (R. 5: 936, n. 26; R. 6: 1037, n. 9)

[7] The Commission implements § 366.04, Fla. Stat., under Fla. Admin. Code Rules 25-6.0439, Territorial Agreements and Disputes for Electric Utilities – Definitions; 25-6.0440, Territorial Agreements for Electric Utilities; 25-6.0441, Territorial Disputes for Electric Utilities; and 25-6.0442, Customer Participation.

> throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.

§366.04(5), Fla. Stat. The Commission exercises its authority over territorial agreements so that it may carry out these express statutory purposes. Chapter 366, Fla. Stat., is deemed to be an exercise of the police power of the State for the protection of the public welfare, and it must be liberally construed for the accomplishment of that purpose. § 366.01, Fla. Stat.; Accord Peoples Gas System v. City Gas Co., 167 So. 2d 577, 582, 584 (Fla. 3d DCA 1964), aff'd, 182 So. 2d 429 (Fla. 1965). The Commission approved the Vero Beach – FPL territorial agreements for reasons consistent with the exercise of its Grid Bill authority.

The initial agreement, approved in 1972, states:

> [T]he Commission finds that the evidence presented shows a justification and need for the territorial agreement; and, that the approval of this agreement should better enable the two utilities to provide the best possible utility services to the general public at a less cost as the result of the removal of duplicate facilities.

1972 Territorial Order, 1972 Fla. PUC LEXIS 104, *5. (R 1: 26; R. 3: 495-96; Appendix p. 126-28). In 1981, the Commission amended the territorial agreement between Vero Beach and FPL, stating that such approval would assist in the avoidance of uneconomic duplication of facilities and to provide higher quality electric service and economic benefits to customers. 1981 Territorial Order, 1981 Fla. PUC LEXIS 105, *3. (R. 1: 27, 49-51; R. 4: 621-23; Appendix p. 131). The

Commission most recently modified the Territorial Orders by approving an amendment to the territorial agreement as being in the best interest of the public and the utilities and as being consistent with the Commission's philosophy of eliminating uneconomic duplication of facilities. 1988 Territorial Order, 1988 Fla. PUC LEXIS 111, *2. (R. 3: 499; Appendix p. 136) The Territorial Orders are the subject of the Commission's exclusive and superior jurisdiction that cannot be superseded by Indian River County. §366.04, Fla. Stat., Fuller, 551 So. 2d at 1212-13, and Roemmele-Putney, 106 So. 3d at 80-81.

2. Indian River County does not have authority to replace Vero Beach as service provider upon expiration of the franchise agreement because that would be an unlawful modification of the Territorial Orders.

The Florida Legislature recognized the importance of providing by statute for a comprehensive framework for the Commission to allocate exclusive electric service territories to utility providers with territorial agreements. See Roemmele-Putney, 106 So. 3d at 80-81. This exclusive statutory authority granted to the Commission would be eviscerated if initially subject to local governmental regulation. Id. The exercise by the Commission of the State's police power under §366.04, Fla. Stat., over territorial agreements cannot be interfered with by franchise agreement.[8] Cf. Plantation v. Utilities Operating Co., 156 So. 2d 842,

[8] Amici curiae in the proceeding below agree (R. 3: 511-13; 560-61, 563-65, 580-85; R. 4: 641-42, 644-45, 647-49, 652, 670-71, 675-80, 710-12), and County

843-44 (Fla. 1963), appeal dismissed, 379 U.S. 2 (1964)(finding that the Florida Railroad and Public Utilities Commission's authority to regulate rates, representing the State's continuing right to exercise the police power, cannot be intercepted by franchise agreement between the city and utility). Any modification or termination of a territorial order must first be made by the Commission in order to carry out its statutory duties under § 366.04, Fla. Stat. Fuller, 551 So. 2d at 1212.

Indian River County does not have authority to unilaterally terminate Vero Beach's right and obligation to provide service to the Franchise Area pursuant to a territorial agreement approved by Commission orders. Cf. Homestead, 600 So. 2d at 452-55 (affirming the Court's decision in Fuller and holding that the territorial agreement between the parties was not terminable at will and could be modified or terminated only by the Commission in a proper proceeding), and State ex rel. Triay v. Burr, 79 Fla. 290, 319-21, 339-40 (Fla. 1920) (finding that, among other reasons, the statute limiting to 30 years the term for which Jacksonville could grant a franchise or right to use the street did not confer a right to fix street car fares by contract ordinance, because that ratesetting authority was delegated by the Legislature to the Florida Railroad Commission). See also Springfield Utility Bd. v. Emerald People's Utility Dist., 125 P. 3d 740, 749, fn. 13 (Ore. 2005) (finding

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Amici Curiae before this Court appear to agree, that counties' franchise agreements do not establish service areas for electric utilities, and do not interfere, determine, amend, alter, or regulate service areas that are resolved by Commission territorial orders. (County Amicus B. 13,14)

that the city had no authority to exclude a utility from providing electrical services in an area when the Public Utility Commission of Oregon had previously allocated that area to the utility as part of the utility's exclusive service territory); Town of Easton v. Pub. Serv. Com'n of Md., 838 A. 2d 1225 1231,1234, 1236 (Md. 2003) (where the state supreme court held that the municipality could not oust the electric utility cooperative from its service area that was approved by the state utility commission pursuant to its exclusive jurisdiction, unless the commission modifies that territorial designation order); and Berlin v. Delmarva Power & Light Co., 622 A. 2d 763, 765, 766 (Md. Ct. Spec. App. 1993), cert denied 628 A. 2d 1067 (Md. 1993)(affirming the state utility commission's order that the town could not abrogate the utility's exclusive commission-approved service territory on its own, but was relegated to filing a petition with the commission, and that the utility did not need the Town's consent to provide service in that area, based on the commission's statutory authority to allocate service territories).

Further, the clearly articulated state policy to regulate retail electric service areas and the Commission's extensive control over territorial agreements gives Florida electric utilities state action immunity for antitrust liability under the Sherman Act, 15 U.S.C. §12. See Praxair, 64 F. 3d at 611-13(finding that Florida's regulatory scheme and the Commission's oversight and approval of the territorial agreement between Florida Power Corp. and FPL conferred state action

antitrust immunity on those utilities). The failure of the Commission to carry out its Legislative directive to actively supervise the territorial decisions of utility service territories would be considered per se Federal antitrust violations under the Sherman Act, 15 U.S.C. §12. See Id. (R. 3: 510-11, 584; R. 4: 671; R. 6: 1048) This Commission has warned that:

> if we cannot decide who can receive electric service in territory covered by a territorial agreement, and in contravention of its terms, it could be argued that we are without power to enforce our own orders and actively supervise the agreements we have approved. This result could place electric utilities who are parties to territorial agreements throughout the state in jeopardy of antitrust liability.

In re: Complaint of Reynolds, Order No. PSC-13-0207-PAA-EM at 20, 2013 Fla. PUC LEXIS 128 *53-54 (2013). The County's argument that it has the power to remove Vero Beach as service provider, contrary to the terms of the Commission's Territorial Orders, likewise threatens the Commission's power to enforce its own orders and actively supervise the approved territorial agreements, which could have antitrust liability consequences to Florida electric utilities.

The cases relied upon by Indian River County to support its argument that it has the right to replace Vero Beach as service provider when the Franchise Agreement expires, notwithstanding the Territorial Orders (B. 32-36), are distinguishable from the instant case because although franchise agreements were involved or referred to in those cases, no Commission territorial orders were involved, and thus the Commission's exclusive jurisdiction was not called into

question. Indian River County infers that City of Indian Harbour Beach v. City of Melbourne, 265 So. 2d 422 (Fla. 4th DCA 1972), stands for the proposition that a local government's franchise authority allows it to require a utility to cease providing electric service, notwithstanding any Commission territorial order that may exist. (B. 31-32) Indian Harbour Beach does not stand for that proposition because the Commission was not involved and no territorial agreements were involved. Id. at 424. Rather, Indian Harbour Beach held that two cities' water rate ordinances were valid because both had statutory grants of regulatory authority, and neither party was under any obligation to the other with respect to providing or accepting water because there was no franchise agreement between them. Id. at 425. Because of this conclusion, the Court determined that if the cities could not reach some type of agreement, "Indian Harbour Beach is empowered to expel and Melbourne is entitle to withdraw as concerns the water furnishing system." Id. Thus, Indian Harbour Beach is not relevant to the instant case.

Indian River County appears to argue that Florida Power Corp. v. City of Casselberry, 793 So. 2d 1174 (Fla. 5th DCA 2001), stands for the proposition that Indian River County may unilaterally require Vero Beach to cease providing electric service because the Franchise Agreement's 30-year term is enforceable, notwithstanding the Territorial Orders. (B. 33) City of Casselberry does not stand for this proposition and is irrelevant to the instant case because, again, the

Commission's exclusive jurisdiction over territorial orders was not an issue in the case.

Likewise, Lee County Electric Cooperative, Inc. v. City of Cape Coral, 159 So. 3d 126 (Fla. 2d DCA 2014), rev. denied, 151 So. 3d 1226 (Fla. 2014), is not on point. In Lee County Electric Cooperative, the court held that the utility had to pay the costs to relocate its lines to a different public utility easement when the road was widened. Id. This holding has no relevance to the issue before this Court because neither the Commission nor territorial agreements or orders were involved.

Florida Power Corp. v. City of Winter Park, 887 So. 2d 1237 (Fla. 2004), does not support Indian River County's argument that upon expiration of the Franchise Agreement, Vero Beach may no longer provide service in the Franchise Area, as is suggested by the County. (B. 32-33) Once more, no territorial agreement was involved, and therefore the question of the Commission's authority and jurisdiction over territorial agreements was not raised or addressed. The Court in City of Winter Park found that after the franchise agreement expired, the city and utility operated under an implied contract, with the utility being treated like a holdover tenant, and that the utility would have to continue to pay the franchise fee to avoid unjust enrichment. Id. At 1241-42. Indian River County's argument that this holding does not apply to its situation because the Commission "has ordered the City to ignore the Franchise Agreement" (B. 38) is without merit because the

City Order made no such declaration and did not limit Indian River County's ability to collect franchise fees or renew or enter into a new Franchise Agreement. (R. 6: 1047-1050; Appendix pp. 14-17) See Point I.B., above.

There is no merit to Indian River County's argument that in City of Winter Park and subsequent proceedings the Commission "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." (B. 34) Proceedings between Florida Power Corp. and the City of Winter Park subsequent to City of Winter Park did not involve conflict or dispute between the parties concerning their franchise agreement and there was no Commission-approved territorial agreement. For these reasons there was no need for the Commission to address the Winter Park franchise agreement or the transfer of the facilities from Winter Park.

In 2005, subsequent to City of Winter Park, the Commission granted successor utility Progress Energy's petition asking the Commission to relieve it of the obligation to provide electric service after Winter Park decided to purchase the utility's facilities, as allowed by the franchise agreement, and establish a municipal utility. See In re: Petition to relieve Progress Energy Florida, Inc. of the statutory obligation to provide electrical service to certain customers within the City of Winter Park, pursuant to Section 366.03 and 366.04, F.S., Order No. PSC-05-

0453-PAA-EI, 2005 Fla. PUC LEXIS 813 (2005). Notably, the Commission exercised its authority under §§366.03 and 366.04, Fla. Stat., to relieve Progress of its obligation to provide service, notwithstanding the lack of a territorial agreement between the parties. Id. The Commission stated that it would be the forum to resolve any territorial disputes that might arise between Progress and Winter Park and "we encourage them to return as soon as possible with a territorial agreement." Id. Subsequently, the Commission, pursuant to §366.04(2)(d) and Rule 25-6.0449, F.A.C., approved a territorial agreement between the parties in order to more clearly define the boundaries of each utility's service area. See In re: Joint petition for approval of territorial agreement by the City of Winter Park and Duke Energy Florida, Inc., Order No. PSC-14-0108-PAA-EU, 2014 Fla. PUC LEXIS 67 (2014). Neither of these Commission orders involving the City of Winter Park supports Indian River County's position that it has the right to remove Vero Beach as service provider in the Franchise Area upon expiration of the Franchise Agreement.

Indian River County does not have the authority to pick a new service provider to replace Vero Beach when the Franchise Agreement expires. This would amount to Indian River County unilaterally modifying the Territorial Orders contrary to the Commission's §366.04, Fla. Stat., exclusive and preemptive

statutory authority over territory agreements. Homestead, 600 So. 2d at 452-55, Fuller, 551 So. 2d at 1212, Roemmele-Putney, 106 So. 3d at 80-81.

D. THE CITY ORDER DOES NOT VIOLATE §366.13, FLA. STAT., AND INDIAN RIVER COUNTY IS PRECLUDED FROM RAISING THIS ARGUMENT ON APPEAL BECAUSE IT DID NOT RAISE IT IN THE PROCEEDING BELOW.

Indian River County raises for the first time on appeal the argument that the City Order violates §366.13, Fla. Stat.[9] (B. 36-39) The City Petition did not request the Commission to interpret §366.13, Fla. Stat., as part of its request for a declaratory statement. (R. 3: 488-519) Indian River County's response filed in opposition to the City Petition did not raise §366.13, Fla. Stat., (R. 3: 589-600; R. 4: 601-32) and the County did not raise the argument before the Commission. (R. 5: 886-925) In order to be preserved for further review by a higher court, an issue must be presented to the lower tribunal and the specific legal argument or ground to be argued on appeal or review must be part of that presentation. E.g. Pensacola Beach Pier, Inc. v. King, 66 So. 3d at 325 (holding that the appellants' arguments not raised in the proceeding below cannot be a ground for reversing the lower tribunal).

Further, as shown in Point I. B., above, the City Order does not address or affect Indian River County's right to collect franchise fees from Vero Beach.

[9] Section 366.13, Fla. Stat., states that no provision of Ch. 366, Fla. Stat., shall in any way affect any municipal tax or franchise tax in any manner whatsoever.

Indian River County's argument is therefore not supported by its citation to Santa Rosa County v. Gulf Power Co., 635 So. 2d 96 (Fla. 1st DCA 1994), rev. denied, 645 So. 2d 452 (Fla. 1994),[10] where the issue concerned county home-rule authority to impose franchise fees for electric utilities use of counties' rights of way. Because the City Order does not address collection of franchise fees by Indian River County, the County's argument that the City Order violates § 366.13, Fla. Stat., is without merit and should be rejected.

II. THE COUNTY ORDER COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW AND SHOULD BE AFFIRMED.

In order to obtain from the Commission "definitive binding advice as to the applicability of agency-enforced law to a particular set of facts" a petitioner must meet the requirements of § 120.565, Fla. Stat. The Commission properly denied the County Petition for failing to meet the threshold requirements of § 120.565, Fla. Stat. (R. 5: 952-59; Appendix pp. 44-51) Contrary to Indian River County's argument (B. 41), the Commission's denial of the County Petition as to all questions complies with the Legislative purpose of § 120.565, Fla. Stat., and comports with the Court's holding in Florida Department of Business and Professional Regulation, Division of Pari-Mutual Wagering v. Investment Corp. of Palm Beach, 747 So. 2d 374, 385 (Fla. 1999). The main point of contention

[10] Santa Rosa County did not involve a territorial agreement or a Commission-approved territorial order, and the Commission was not a party to that case.

resolved in Investment Corp. of Palm Beach, 747 So. 2d at 385, was that a declaratory statement may not be denied on the basis that the declaration could apply to other similarly situated persons. None of the questions in the County Petition were denied for this reason. (R. 5: 952-59; Appendix pp. 44-51)

A. THE COMMISSION'S DENIAL OF THE COUNTY PETITION FOR DECLARATORY STATEMENTS FOR FAILURE TO ALLEGE A PRESENT, ASCERTAINED OR ASCERTAINABLE SET OF FACTS COMPLIES WITH THE REQUIREMENTS OF §120.565, FLA. STAT.

A petition for declaratory statement must demonstrate a present, ascertained state of facts or present controversy as to a state of facts. §120.565(1) and (2), Fla. Stat.; Fla. Admin. Code R. 28-105.001 and 28-105.002(5). See Sutton v. Dep't of Envtl. Prot., 654 So. 2d 1047, 1048-49 (Fla. 5th DCA 1995). It may not allege merely a hypothetical situation, Santa Rosa County v. Department of Administrative Hearings, 661 So. 2d 1190, 1193 (Fla. 1995), or the possibility of a dispute in the future. Okaloosa Island Leaseholders Ass'n, Inc. v. Okaloosa Island Auth., 308 So. 2d 120, 122 (Fla. 1st DCA 1975). See also In re: Petition for declaratory statement by St. Johns County, Order No. PSC-01-1611-FOF-SU, p. 8, 2001 Fla. PUC LEXIS 936 (2001), *14 (petition for declaratory statement denied for failure to demonstrate a present, ascertained or ascertainable state of facts or a present controversy as to a state of facts that are not merely a hypothetical situation).

The plain language of questions a-c, e-i, and k-m (R. 5: 927-29; Appendix pp. 19-21) shows that the County's requested declarations are hypothetical, speculative, and did not demonstrate a present, ascertained, or ascertainable statement of facts. (R. 5: 954; Appendix p. 46) The County Petition gave multiple scenarios of what general actions Indian River County might or might not take after the Franchise Agreement expires in 2017, including Indian River County "acquiring" or "assuming ownership" of Vero Beach's Electric Facilities (questions a, b, c), and then possibly "leasing or otherwise conveying" those facilities to FPL or "some other provider of electric service (e.g., a public utility, another municipality, or a cooperative)" (question c, m); that Indian River County might supply electric service, an allegation not based on a present ascertained or ascertainable set of facts but, instead, on a legal assumption that Indian River County has statutory authority to assume ownership of Vero Beach's electric facilities and provide electric service within the Franchise Area (questions a, b, e, g, i); that FPL or another unnamed third party might become a successor electric service provider to Vero Beach (question f, h, I, k, l, m); and that if the proposed transfer from the City to FPL is successfully concluded, "the questions posed herein will be unnecessary." (R: 5: 954; Appendix p. 46) Thus, the Commission correctly concluded that these questions were not proper for a declaratory statement under §120.565, Fla. Stat. (R. 5: 953-54; Appendix pp. 45-46) See

Sutton, 654 So. 2d at 1048-49; Santa Rosa County v. DOAH, 661 So. 2d at 1193; and Okaloosa Island Auth., 308 So. 2d at 122.

In addition, Indian River County's statement and basic assumption that it has sole authority to terminate Vero Beach as service provider upon expiration of the Franchise Agreement and designate a successor provider or provide service itself is not a fact or set of circumstances upon which the Commission should apply law, contrary to the County's repeated arguments in its Petition (R. 1: 14, 19-24, 31-34, 36-40; R. 3: 598, 600, 610) and in County Brief Points I. C. (B. 31-36), II. B. 1 (B. 47-48), 2 (B. 50), 3 (B. 55-57), 4 (B. 57-58), and 5 (B. 60-62). These "underlying assumptions" are not fact but controverted legal opinions in dispute by the parties (R. 1: 33-34, 38, 173-74, 188, 197; R. 2: 327-28, 331-32; R. 4: 708-10) and amicus curiae below. (R. 3: 586-597) The Commission correctly found that the allegations were an incorrect legal conclusion that the Territorial Orders are inapplicable or invalid as to Indian River County because of its authority to issue franchise agreements. (R. 5:953; Appendix p. 45) Indian River County's arguments that it does not assume that the Territorial Orders are invalid (B. 11, 14, 45-46, 49) and that it agrees that the expiration of the Franchise Agreement has no effect on the Commission's Territorial Orders (B. 11, 20, 59) are contrary to the language of the County Petition, as shown above.

To accept as fact Indian River County's presumption that upon expiration of the Franchise Agreement Vero Beach will no longer have the right to provide service in the Franchise Area would give the County preemptive and superior jurisdiction to the Commission over territorial agreement. Further, it would allow the County, in essence, to modify the Territorial Orders, rendering them invalid as to Vero Beach's right and obligation to provide service in the Franchise Area, in direct conflict with §366.04, Fla. Stat. See I. A. 2, above. See also Homestead, 600 So. 2d at 453-54; Fuller, 551 So. 2d at 1212-13; Roemmele-Putney, 106 So. 3d at 80-81. The Commission correctly declined to issue declaratory statements answering questions based on the incorrect legal presumption that the Commission's Territorial Orders become invalid as to Indian River County upon expiration of the Franchise Agreement, thereby depriving Vero Beach of its right and obligation to provide service. (R. 5: 953-54; Appendix pp. 45-46)

The instant case is distinguishable from Citizens of State ex rel. Office of Public Counsel v. Florida Public Service Commission and Utilities, Inc., 164 So. 3d 58 (Fla. 1st DCA 2015), where the Court found that the Commission should have issued the declaratory statement requested because the petitioner was not collaterally attacking the order it questioned, but was asking the Commission to address what the petitioner perceived to be inconsistent orders. Id. The County Order found that Indian River County was wrongly characterizing as "fact" its

incorrect legal argument that it had a right to replace the City as electric provider upon expiration of the franchise agreement and that the basis of the 16 questions was the incorrect presumption that the Territorial Orders will be invalid as to the County upon expiration of the Franchise Agreement. (R. 5: 953; Appendix p. 45)

B. THE COMMISSION'S DENIAL OF THE COUNTY PETITION FOR DECLARATORY STATEMENTS FOR FAILURE TO SHOW HOW INDIAN RIVER COUNTY MAY BE SUBSTANTIALLY AFFECTED COMPLIES WITH THE ESSENTIAL REQUIREMENTS OF LAW.

A petition for declaratory statement must allege a bona fide, actual, present practical need for a declaration. Apthorp v. Detzner, 162 So. 3d 236, 240-41 (Fla. 1st DCA 2015), rev. denied, 2015 Fla. LEXIS 1029 (Fla. May 11, 2015). See also Rule 28-105.001, F.A.C. Thus, facts alleged by Indian River County about its disagreements with Vero Beach as to service or rates (B. 52-53) cannot form the basis of describing how its substantial interests are affected by the Territorial Orders. Under Florida law, a challenge to a city's rates or service is not to the Commission but to the courts or municipal council. Storey v. Mayo, 217 So. 2d at 306-308[11] (affirming Commission's territorial order, and stating that an individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself).

[11] Storey, 217 So. 2d 304, involved the same territorial agreement between the City of Homestead and FPL as was addressed in Fuller, 551 So. 2d 1210.

The facts and questions posed in the County Petition questions a-c, concerning the definitions of public utility and electric utility, (R. 5: 927; Appendix p. 19) are not comparable to these in the four Commission dockets cited by the County, which all involved very specific, particular facts concerning the planned sale of electricity. See In re: Petition of Monsanto Company, Order No. 17009, 1987 Fla. PUC LEXIS 36 (1987) (asking whether Monsanto's proposed lease-financing of its cogeneration facility would result in a sale of electricity that would then cause Monsanto's lessor to be a regulated public utility); In re: Petition of PW Ventures, Inc., for declaratory statement, Order No. 18302-A, 1987 Fla. PUC LEXIS 289 (1987)(asking whether the sale of electricity by PW Ventures would be considered "to the public," thus resulting in PW Ventures meeting the definition of public utility); In re: Petition for declaratory statement by Polk Power Partners, Order No. PSC-94-0197-DS-EQ, 1994 Fla. PUC LEXIS 201 (1994)(asking whether certain contemplated financing and ownership structures would be considered a sale of electricity resulting in Polk or individual partners to be deemed a public utility); and In re: Petition of Seminole Fertilizer Corporation for a Declaratory Statement, Order No. 23729, 1990 Fla. PUC LEXIS 1474 (1990)(asking whether a proposed expansion of a cogeneration project would result in a sale of electricity causing Seminole or others to be subject to Commission regulation as a public utility). Unlike petitioners in these cases,

Indian River County's allegations did not show a bona fide, actual present need for its declaratory statements requested in the County Petition, because there is no definite plan for Indian River County to provide service to Vero Beach's Franchise Area customers. Instead, the County Petition set forth a variety of possible means of providing service if the County could prevent Vero Beach from serving.

C. THE COMMISSION'S DENIAL OF THE COUNTY'S PETITION FOR DECLARATORY STATEMENTS FOR QUESTIONS d – f AND i – n COMPORTS WITH THE REQUIREMENTS OF §120.565, FLA. STAT., BECAUSE THOSE QUESTIONS IMPROPERLY REQUEST GENERAL LEGAL ADVISORY OPINIONS.

A petition for declaratory statement must include a description of how the statutes or orders may substantially affect the petitioner in the petitioner's particular circumstances. Rule 28-105.002(5), F.A.C. The County Order found that questions d-f and i-n (R. 5: 928-29; Appendix pp. 20-21) failed to describe how a particular statutory provision or order applies to specific factual circumstances of Indian River County[12] and, as a result, ask for a general legal advisory opinion. (R. 5: 955; Appendix p. 47)

Because a declaratory statement is intended to address a petitioner's particular factual circumstances, the Commission does not have authority in a declaratory statement proceeding to give a general legal advisory opinion. See Askew v. Ocala, 348 So. 2d 308, 310 (Fla. 1977) (declaratory relief properly

[12] See II. A., above

denied where petitioners sought judicial advice, where there was no present dispute, only a desire by public officials to take certain action in the future and ward off possible consequences). An agency may decline to issue a declaratory statement on the basis that it would be an advisory opinion, where petitioner fails to show that the declaration deals with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts, See Apthorp, 162 So. 3d at 240, or where the petition shows only the mere possibility of legal injury based on hypothetical facts which have not arisen. Fla. Dep't of Ins. v. Guar. Trust Life Ins. Co., 812 So. 2d 459, 460-61 (Fla. 1st DCA 2002).

The County Order addresses each question individually, stating that: question d asks general questions as to the legal status of the Territorial Orders; questions e and f ask whether there are any limitations on Indian River County with respect to the Commission's jurisdiction "under Chapter 366, Florida Statutes"; questions i and l, ask very general questions about whether there are any issues for Indian River County to address "under Chapter 366"; question j asks how Vero Beach's conduct under § 366.04(7), Fla. Stat., would affect Indian River County's responsibilities; question k fails to specify any rule, statute or order; and questions m and n ask about any limitations on an unspecified "successor electric service provider" "under Chapter 366." (R. 5:955; Appendix p. 47) The Commission complied with the requirements of §120.565, Fla. Stat., in finding that

these general questions do not meet the requirements of Fla. Admin. Code. R. 28-105.002(5) because they fail to describe how a particular statutory provision or order applies to specific factual circumstances of Indian River County and, instead, ask for a general legal advisory opinion. (R. 5: 955; Appendix p. 47).

D. THE COMMISSION'S DENIAL OF THE COUNTY PETITION BECAUSE IT ASKED TO DETERMINE THE CONDUCT OF THIRD PERSONS COMPORTS WITH THE REQUIREMENTS OF §120.565, FLA. STAT.

Because a declaratory statement is used to determine how an agency will apply the law to the petitioner's particular circumstances, it is not the appropriate means for determining the conduct of another person. Fla. Admin. Code R. 28-105.001. See In re: Petition for declaratory statement by Intrado Communications, Inc., Order No. PSC-08-0374-DS-TP, 2008 Fla. PUC LEXIS 228 (2008), * 41-42 (denying a petition for declaratory statement in part because it asked the Commission to determine the conduct of other parties, noting that the proper forum to pursue its claims would be a request for a Ch. 120, Fla. Stat., formal hearing).

The Commission properly found that if it issued declaratory statements on questions a-c and e-l (R. 5: 927-29; Appendix pp. 19-21) it would directly and significantly impact Vero Beach and FPL and the conduct of their businesses in reliance on the Territorial Order. (R. 956) This is because these questions are directly based on Indian River County's legal presumption that once the Franchise Agreement expires, Vero Beach must cease conducting its business in the

Franchise Area of the County, notwithstanding the Territorial Order. (R. 956) Indian River County admits that to ask whether the City must cease conducting its business in the unincorporated areas of the County once the Franchise Agreement expires would be an improper question regarding the City's conduct. (B. 58) Indian River County's insistence that its questions are "more nuanced" and relate to potential future conduct by the Board (B. 58-59) must be rejected as contrary to the County's position that the Commission must accept as fact that Vero Beach has no right to provide service in the Franchise Area upon expiration of the Franchise Agreement. (R. 1:14, 19-24, 31-34, 36-40; R. 3: 598, 600, 610; B. 31-36, 47-48, 50, 55-58, 60-62)

The Commission also found that questions k and m asked for declaratory statements determining the conduct of third persons. Question k asked for a declaratory statement concerning Indian River County's legal obligations to Vero Beach or any third parties contracting with Vero Beach relating to electric service, which the County Petition explains includes OUC and the Florida Municipal Power Agency. (R. 5: 956; Appendix p. 48) Question m asked about the Commission's jurisdiction over Vero Beach's electric facilities and about an unidentified third party who Indian River County alleges might provide service within the Franchise Area in the future. Id. Both of these questions specifically address the rights of third parties. The Commission's finding that the County

Petition should be denied because it asks for declaratory statements determining the conduct of third persons complies with the essential requirements of law and should be affirmed.

E. THE COMMISSION PROPERLY DECLINED TO ISSUE DECLARATORY STATEMENTS FOR QUESTIONS THAT WOULD REQUIRE AN ANALYSIS OF STATUTORY PROVISIONS NOT WITHIN THE COMMISSION'S AUTHORITY AND/OR ANALYSIS OF THE FLORIDA CONSTITUTION.

The purpose of declaratory statements is for an agency to interpret orders, rules, or statutes under its authority. Section 120.565(1), Fla. Stat.; Fla. Admin. Code R. 28-105.001. Chapter 125, Fla. Stat., and constitutional provisions are not laws under the authority of the Commission, and the Commission appropriately denied issuing declaratory statements that would require analysis of these laws. See Carr v. Old Port Cove Prop. Owners Ass'n, 8 So. 3d 403, 404-405 (Fla. 4th DCA 2009) (a declaratory statement is not the appropriate mechanism to interpret a constitutional provision); PPI, Inc. Fla. Dep't of Bus. & Prof'l Regulation, Div. of Pari-mutuel Wagering, 917 So. 2d 1020 (Fla. 1st DCA 2006)(the agency had the authority to deny the request for declaratory statement because it was not authorized under § 120.565, Fla. Stat., to construe a constitutional amendment).

Indian River County agrees that the Commission is without authority to address statutes outside its jurisdiction in a declaratory statement, including Ch. 125, Fla. Stat. (B. 10, 60; R. 4: 611) Yet, the County's questions concerning

whether the County meets the statutory definition of "public utility" or "electric utility," (questions a-c); whether Indian River County has the authority to assume ownership of Vero Beach's electric facilities and/or provide electric service within the Franchise Area (questions a-c, e, g, i); how expiration of the Franchise Agreement affects Vero Beach's use of Indian River County's rights-of-way (question i), and concerning Indian River County's possible future actions concerning extension of its Franchise Agreement with Vero Beach (question l) would all require the Commission to interpret and analyze the powers of counties authorized by Ch. 125, Fla. Stat., and Florida Constitution Article VII § 1(f) and (g). (R. 5: 956-957; Appendix pp. 48-49) Thus, the Commission properly declined to answer these questions.

F. QUESTION j WAS PROPERLY DENIED BECAUSE THE SUBJECT MATTER RAISED WAS PENDING IN CIRCUIT COURT LITIGATION AND A CH. 164, FLA. STAT., GOVERNMENTAL CONFLICT RESOLUTION PROCEEDING.

Question j asked in part, whether Vero Beach's failure to conduct an election under § 366.04(7), Fla. Stat., has any legal effect on the Franchise Agreement or Indian River County's duties and responsibilities for continued electric service within the Franchise Area. (R. 5: 929; Appendix p. 21) In addition to failing to meet the requirements of §120.565, Fla. Stat., for the reasons explained in Points II. A., B., C., and D., above, the County Order correctly declined to issue a declaratory statement answering this question because the record before the

Commission was that the issue of Vero Beach's compliance with the § 366.04(7), Fla Stat., referendum requirements was properly pending in circuit court and in a related Ch. 164, Fla. Stat., conflict resolution proceeding to which Indian River County participated pursuant to County Resolution as a primary conflicting governmental entity.[13] (R. 5: 957-58, Appendix pp. 49-50)

Three days prior to Indian River County filing the County Petition for declaratory statement, the Town of Indian River Shores filed a complaint against the City of Vero Beach.[14] (R. 1:186; R. 5: 961-1000; R. 6: 1001-1031) Count III of the complaint is for declaratory and injunctive relief relating to Vero Beach's alleged non-compliance with §366.04(7), Fla. Stat. (R. 5: 977-80; Appendix pp. 69-70) Further, Indian River County joined a Ch. 164, Fla. Stat., conflict resolution proceeding as a primary conflicting governmental entity, its County Resolution to that end stating that the County shares the same conflicts with the Town of Indian River Shores concerning Vero Beach's "refusal to comply with the referendum requirements set forth in § 366.04(7), Fla. Stat." (R. 6: 1032-33; Appendix pp. 124-25) In addition, the Town of Indian River Shores filed a Notice of Pending Litigation in both the City Petition and County Petition proceedings (R.

[13] Further, Question j is not appropriately addressed in a declaratory statement because it fails to meet the requirements of §120.565, Fla. Stat. as explained in Points II. A., B., C., and D., above.

[14] Town of Indian River Shores v. City of Vero Beach, Case No. 312014 CA 000748.

4: 659-67) asking the Commission to refrain from issuing declaratory statements that would address any factual or legal issues related to that litigation, noting that Vero Beach's "failure to comply with Section 366.04(7) is an issue raised by [Indian River] County in its Petition filed on July 21, 2014." (R. 4: 666-67)

Indian River County admits that it could have voluntarily agreed to a resolution of the issues in the Ch. 164, Fla. Stat., process that could have had the effect of partially or completely resolving the issues in the County Petition or otherwise rendering it moot, but that the conflict resolution proceeding recently concluded without any resolution and that the lawsuit has proceeded. (B. 62, 65) It does not matter that Indian River County is not a party to the pending litigation (B. 63) or that other issues particular to the Town of Indian River Shores are involved in the litigation (B. 64-65) because the specific issue of whether Vero Beach has or has not complied with §366.04(7), Fla. Stat., was pending in Circuit Court and it should be resolved in that forum. Suntide Condo. Ass'n Inc. v. Div. of Florida Land Sales, Condos. and Mobile Homes, 504 So. 2d 1343, 1345 (Fla. 1st DCA 1987)(finding that where the issue presented for declaratory statement was pending in circuit court with jurisdiction to decide the issue, the agency erred in failing to decline to issue the declaratory statement); See In re: Petition for declaratory statement by Intrado, Order No. PSC-08-0374-DS-TP at p. 15, 2008 Fla. PUC LEXIS 228, *39-40 (2008) (petition for declaratory statement denied because, inter

alia, the same subject matter or related issues were being addressed in several pending Commission arbitration dockets involving petitioner), and In re: Petition for declaratory statement by Florida Keys Elec. Coop. Ass'n, Inc., Order No. PSC-02-1459-DS-EC at p. 6, 2002 Fla. PUC LEXIS 868, *6, 9-10 (2002) (stating that a declaratory statement should not be issued by the Commission because, among other reasons, another proceeding was pending before DOAH that addressed the same question or subject matter).

CONCLUSION

The Commission properly interpreted §120.565, Fla. Stat., in compliance with the essential requirements of law in issuing a declaratory statement in the City Order. The City Order should be affirmed on the merits because Indian River County has failed to meet its heavy burden of overcoming the presumption of correctness that attaches to Commission orders. Citizens v. Fla. Pub. Serv. Com'n, 146 So. 3d at 1149. The Commission properly interpreted §120.565, Fla. Stat., in compliance with the essential requirements of law in declining to issue declaratory statements answering each of the sixteen questions posed in the County Petition. The City Order and the County Order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the individuals listed below by electronic mail this 17th day of July, 2015.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, that this brief was prepared using Times New Roman 14-point typeface, a font that is proportionally spaced.

/s/ Kathryn G. W. Cowdery
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