IN THE SUPREME COURT OF FLORIDA

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

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

Petitioner/Appellant,

v.

ART GRAHAM, ETC., ET AL.,

Respondent/Appellee,

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

ANSWER BRIEF OF APPELLEE, CITY OF VERO BEACH

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PRELIMINARY STATEMENT

For consistency and ease of reference, where possible this Answer Brief will utilize the nomenclature and abbreviations utilized by Appellant in its Initial Brief. Thus, Appellee, the City of Vero Beach will be identified as the "City. The Appellant, the Board of County Commissioners, Indian River County, Florida, will be identified as the "County." Appellee, the Florida Public Service Commission will be identified as the "PSC" or the "Commission."

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

The City will refer to the City's Petition for Declaratory Statement in Docket No. 140244-EM that led to the issuance of the City Order as the "City's Petition." The County's Petition for Declaratory Statement in Docket No. 140142-EM that led to the issuance of the County Order will be referred to as the "County's Petition." References to the fourteen separate questions posed in the County's Petition will be to the specific subparagraph, identified in Paragraph 7 of the County's Petition in the format "Question __."

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

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

"FPL" refers to Florida Power and Light Company, an investor owned electric utility and a "public utility" as defined in Section 366.02(1), Florida Statutes (2014). FPL was an intervenor below in the County's Petition docket but not the City's Petition docket.

The "Territorial Orders" shall refer to the PSC orders that approved territorial agreements or modifications between the City and FPL and which are more particularly described below in the Statement of the Case and Facts. The Territorial Orders are included in the Appendix to this Answer Brief. Citations to the Appendix will be in the format "App., Ex. ___ at ___."

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

STATEMENT OF THE CASE AND FACTS

Historical Background

The City was initially incorporated in 1919 as the City of Vero, and reincorporated as the City of Vero Beach in 1925. R 493. (Coincidentally, the County was also created in 1925.) Id. The City has operated a municipal electric utility system since 1920, when it purchased the original small power plant, poles, and lines from the privately-owned Vero Utilities Company. Id. Naturally, the City's service area has grown since 1920, and during the past 94 years, the City has served customers inside and outside the City limits, pursuant to its own ordinances, pursuant to requests by customers living outside the City limits, and, since at least

1972, pursuant to orders of the Commission approving the City's service area in territorial agreements with FPL. Id.

Today, the City serves within the service area described in its territorial agreement with FPL, which agreement has been approved, with amendments over time, by the following Commission orders: In re: Application of Florida Power and Light Company for approval of a territorial agreement with the City of Vero Beach, Docket No. 72045-EU, Order No. 5520 (August 29, 1972); In re: Application of Florida Power and Light Company for approval of a modification of territorial agreement and contract for interchange service with the City of Vero Beach, Florida, Docket No. 73605-EU, Order No. 6010 (January 18, 1974); In re: Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas, Docket No. 800596-EU, Order No. 10382 (November 3, 1981); In re: Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas, Docket No. 800596-EU, Order No. 11580 (February 2, 1983); and In re: Petition of Florida Power & Light Company and the City of Vero Beach for Approval of Amendment of a Territorial Agreement, Docket No. 871090-EU, Order No. 18834 (February 9, 1988) (collectively referred to as the "Territorial Orders"). R 493-94. These Territorial Orders are provided in the Appendix to this Answer Brief.

The City's service area, as approved by the Commission's Territorial Orders, includes the area within the City limits, as well as defined areas outside the City limits in unincorporated Indian River County. R 494. The earliest known documentary evidence of the City serving outside the City limits is found in

Chapter 599 of the City's ordinances, enacted on October 21, 1952. R 494-95. This ordinance clearly shows that the City was serving outside the City limits at least as early as that year. The City believes that it has served areas of unincorporated Indian River County, outside the City limits, since the 1930s, and probably earlier than that. R 495.

In 1972, FPL applied to the Commission to approve the original territorial agreement between FPL and the City.[1] Id. By that date, the City had been providing electric service outside the City limits, in unincorporated areas of Indian River County, for at least 20 years, and probably for close to 50 years. R 496. The 1972 territorial agreement was designed to eliminate destructive competition between FPL and the City in furnishing electric power outside the Vero Beach city limits. App., Ex. 1 at 1; R 495. Following a hearing, the Commission duly approved the FPL-City territorial agreement, finding that the evidence showed "a justification and need for the territorial agreement" and that the agreement should "enable the two utilities to provide the best possible utility services to the general public at a less cost" by avoiding duplicative facilities. App., Ex. 1 at 2; R 496. There is no evidence in the record that the County chose to participate in those proceedings. The Commission approved a slight modification to the territorial agreement in 1973. In re: Application of Florida Power & Light Company for Approval of a Modification of Territorial Agreement and Contract for Interchange

[1] In re: Application of Florida Power and Light Company for Approval of a Territorial Agreement with the City of Vero Beach, PSC Docket No. 72045-EU, Order No. 5520 at 1 (August 29, 1972).

Service with the City of Vero Beach, Florida, Docket No. 73605-EU, Order No. 6010 at 1 (January 18, 1974). App., Ex. 2; R 496.

In 1974, the Legislature enacted the Grid Bill, Chapter 74-196, Laws of Florida, which gave the Commission express jurisdiction over the "planning, development, and maintenance of a coordinated electric power grid throughout the state of Florida" and the "responsibility of avoiding the uneconomic duplication of facilities." Public Serv. Comm'n v. Fuller, 551 So. 2d 1210, 1212 (Fla. 1989); see Fla. Stat. § 366.04(5) (2014).

In 1980, FPL and the City again applied to the PSC for approval of an amended territorial agreement. In re: Application of Florida Power & Light Company and the City of Vero Beach for Approval of an Agreement Relating to Service Areas, Docket No. 800596-EU, Order No. 11580 (February 2, 1983). App., Ex. 4. In that docket, following a hearing held at the request of customers who did not want to be transferred to FPL, the Commission approved an updated territorial agreement between FPL and the City. The territorial agreement that the Commission approved by Order No. 11580 explicitly recognized the City's (and FPL's) "right and obligation to serve within" (emphasis supplied) the service areas reserved to each utility under the agreement. R 498. As in the previous proceeding, there is no evidence in the record that the County participated in the 1980 proceedings. Order No. 10382, Exhibit 1, Territorial Boundary Agreement Between Florida Power & Light Company and the City of Vero Beach, Florida, at 3; App. Ex. 3. (Note: Order No. 10382 was a "Notice of Intent to Approve Territorial Agreement" issued by the PSC on November 3, 1981, which led to the

hearing and the final order approving the territorial agreement, Order No. 11580. Both Order No. 10382 and Order No. 11580 are included in the Appendix.)

In 1987, the City and Indian River County entered into the Franchise Agreement. R 498. There was never a franchise agreement between the City and the County before 1987. Id. It bears noting that the Commission's express statutory territorial jurisdiction under the Grid Bill had been in effect for more than a decade before the Franchise Agreement was executed, and that the Commission's jurisdiction and power to approve territorial agreements had been in effect for two decades before the Franchise Agreement existed. See Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), cert. denied, 395 U.S. 909. Pursuant to the Franchise Agreement, the City has consistently collected and remitted franchise fees to the County. R 498.

In 1987, FPL and the City again petitioned the Commission for approval of an amendment to their territorial agreement, by which FPL and the City agreed that the City would serve a new subdivision, Grand Harbor, which straddled the existing territorial dividing line. R 499. In approving the amendment, the Commission stated the following:

> To avoid any customer confusion which may result from this situation [the new subdivision straddling the existing territorial boundary] and to ensure no disputes or duplication of facilities will occur, the City and FPL have agreed to amend the existing agreement by establishing a new territorial dividing line.
>
> * * *

> The amended agreement is consistent with the Commission's philosophy that duplication of facilities is uneconomic and that agreements eliminating duplication should be approved.

In re: Petition of Florida Power & Light Company and the City of Vero Beach for Approval of Amendment of a Territorial Agreement, Docket No. 871090-EU, Order No. 18834 (February 9, 1988); App., Ex. 5 at 1. Again, there is no evidence in the record that the County chose to participate in the 1987 proceedings.

Today, the City operates an electric generating plant, transmission lines and related facilities, and distribution lines and facilities (collectively the "City Electric System"), which 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 499-500. Some of the City's transmission and distribution facilities in the unincorporated areas of the County are located in County road rights-of-way; the balance are located in State rights-of-way, on private roads, and in private easements. R 500. The City's preliminary estimates indicate that only about 20 percent of the City's transmission and distribution lines in the unincorporated areas of the County are located in County road rights-of-way. Id.

The City for nearly a century has provided safe, adequate, and reliable service to its customers both inside and outside the City limits. R 500. In fulfilling this necessary public purpose, the City 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, in order to serve all of the City's customers in its service area approved by the Commission's Territorial Orders. R 500-01.

The Franchise Agreement

The Franchise Agreement is a voluntary contract between the City and the County, entered into on March 5, 1987. R 619. The term of the Franchise Agreement is 30 years, thus, the Franchise Agreement expires on March 4, 2017. R 60. The bargained-for exchange in the Franchise Agreement addresses certain obligations and duties of the City and the County, to each other as matters of contract. R 42-47 (the Franchise Agreement); see also R 696-98. The City's obligations are generally: to provide electric service, to maintain its electrical facilities safely and reliably and to locate them so as not to interfere with traffic, to indemnify the County against liability resulting from damages or accidents resulting from the City's construction and operation of its facilities, and to collect and remit franchise fees to the County. R 42-44; R 697. The County's obligations are generally to refrain from engaging in, or allowing any other entity to engage in, the provision of electric service in competition with the City. R 45; R 697. The bargained-for exchange does not affect the City's rights and obligations under the Commission's Territorial Orders, because the Franchise Agreement contains no provisions addressing such rights and obligations. In addition, the Franchise Agreement does not contain either a buy-out clause[2] or any other provision

[2] A buy-out clause is a provision by which the County might, if such a clause existed, purchase the City's facilities at the expiration of the Franchise term. See Florida Power Corp. v. City of Winter Park, 887 So. 2d 1237 (Fla. 2004).

addressing either the City's or the County's rights upon expiration of the Franchise Agreement. The expiration, renewal, and notice terms, R 42, 46, are what they are, but they only apply to the City's and County's obligations to each other to fulfill their contractual covenants to each other set forth in the Franchise Agreement; they do not address or apply to the City's rights under the PSC's Territorial Orders, or to any aspect of what happens to the City's rights and obligations to serve, or to the County's rights to use or regulate its rights-of-way upon the expiration of the Franchise. R 42, 46.

The County's Petition

On July 21, 2014, the County filed the County's Petition with the PSC. R 8-60. The County's Petition identified the following fourteen questions as individually labeled subparagraphs in Paragraph 7 of the County's Petition.

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 [City]-FPL territorial agreements and boundaries approved by the PSC? Will the territorial agreements and boundaries approved by the PSC between [the City] 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 [the City] 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 [the City] 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 [the City] 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 [the City] 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 [the City] 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 [the City'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 [the City] or any third parties for any [City] contracts for power generation capacity, electricity supply, or other such matters relating to electric service within the Franchise Area?

l. If the Board grants [the City] 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 [the City]?

n. Does the PSC have the legal authority to invalidate or otherwise supersede the Board's decision to terminate the Franchise and to designate [the City] the electric service provider in the Franchise Area?

R 10-12.

On November 25, 2014, the County requested that the Commission defer consideration of the County's Petition from the PSC's November 25, 2014 Agenda Conference and further stated: "The County anticipates filing an appropriate substantive filing in this docket on or about December 1, 2014, to revise or amend its Petition in this matter." R 475-77 (emphasis supplied). The County did not revise or amend its Petition prior to the Commission taking action at its February 3, 2015 Agenda Conference.

The City, FPL, and the Orlando Utilities Commission intervened in the docket.[3] In addition, Duke Energy Florida, Inc. ("Duke"), Tampa Electric Company ("TECO"), and the Florida Electric Cooperatives Association, Inc. ("FECA") were granted amicus curiae status in the docket and each filed

[3] See R 129-32 (order granting City's motion to intervene); R 269-77 (order granting FPL's motion to intervene); R 265-68 (order granting OUC's motion to intervene).

comments.[4] The intervenors and the amici curiae generally opposed issuance of the County's requested declaratory statement. See R 946.

The City's Petition

On December 19, 2014, the City filed the City's Petition with the PSC. The City's Petition requested the following two declarations from the PSC:

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

R 490.

The County intervened in the docket. R 728-31. Amicus curiae status was granted to Duke, TECO, FECA, and the Florida Municipal Electrical Association,

[4] See R 259-61 (order granting Duke's motion for leave to appear as amicus curiae); R 256-58 (order granting TECO's motion for leave to appear as amicus curiae); R 262-64 (order granting FECA's motion for leave to appear as amicus curiae).

Inc. ("FMEA").[5] Duke, TECO, FECA, and FMEA all filed comments generally in support of the City's Petition. R 1035.

The Proceedings Below at the PSC

The docket addressing the City's Petition and the docket addressing the County's Petition were not formally consolidated by the Commission. However, the Commission considered the City's Petition and the County's Petition at a consolidated oral argument at its February 3, 2015 Agenda Conference. R 881-83. In the City Order, the PSC effectively granted the City's Petition, declaring:

> ORDERED by the Florida Public Service Commission, for the reasons stated in the body of this Order, 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 1050.[6] The Commission denied the County's Petition in the County Order, finding that the County's Petition failed "to meet the statutory requirements necessary to obtain a declaratory statement." R 959.

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[5] See R 875-77 (order granting Duke's motion for leave to appear as amicus curiae); R 872-74 (order granting TECO's motion for leave to appear as amicus curiae); R 869-71 (order granting FECA's motion for leave to appear as amicus curiae); R 866-68 (order granting FMEA's motion for leave to appear as amicus curiae).

[6] The Court will note that the PSC's ordering language does not contain, as claimed by the County, a "super declaration of invincibility against ***any other action*** the County may take" relative to the City's right and obligation to serve. County's Brief at 9, 25 (emphasis in original). The City had asked for such a declaration, R 490, believing it to be fully consistent with the PSC's exclusive and superior jurisdiction over the matters addressed in its Territorial Orders, but the PSC did not issue such an order.

The Appeal

On March 16, 2015, the County initiated these consolidated appeals by filing a notice of appeal concerning the County Order, and a separate notice of appeal concerning the City Order. On May 11, 2015, this Court granted the County's Unopposed Motion to Consolidate, Schedule, and Establish Page Limits. This Answer Brief is filed pursuant to the schedule approved by the Court's Order concerning the County's unopposed motion.

Jurisdiction

This Court has jurisdiction pursuant to Article V, Section 3(b)(2) of the Florida Constitution and section 366.10, Florida Statutes (2014).

SUMMARY OF THE ARGUMENT

The PSC correctly issued the City Order based on the facts pled by the City, on the PSC's correct interpretations of the PSC's Territorial Orders and its governing statutes, and on controlling authority of this Court. The PSC further issued the County Order, denying the County's Petition, based on correct interpretations and applications of Florida law. The County's arguments that the PSC erred in issuing its declaration in the City Order and in denying the County's fourteen Questions in the County Order are erroneous, and the Court should accordingly affirm both the City Order and the County Order.

With regard to the City Order, the PSC correctly found that the City satisfied the requirements for issuance of a declaratory statement and correctly analyzed its Territorial Orders, its governing statutes, and relevant decisional law of this Court and other Florida courts. The County's arguments to the contrary are erroneous,

false, and misplaced, and in some cases, all of the foregoing. Taking the County's arguments against the City Order one by one, it is readily apparent that all of the County's arguments are erroneous, misplaced, and of no avail to the County's positions, and accordingly, the Court should affirm the City Order.

Contrary to the County's assertion that "the City did not present any facts relevant to the statutes" that the City cited as the basis for the City's requested declarations, the City directly pled facts sufficient to establish that the City is "substantially affected" by the PSC's statutes and the Territorial Orders issued pursuant thereto, and sufficient facts to establish the City's actual present and practical need for the requested declarations within the scope of the PSC's jurisdiction under the Grid Bill.

In rendering the declarations in the City Order, the PSC recognized that its Territorial Orders were issued as an exercise of its exclusive and superior jurisdiction over service territories and the planning, development, and maintenance of a coordinated power supply grid in Florida, and that the Franchise Agreement has no bearing on its jurisdiction or the Territorial Orders. R 1048. The PSC further recognized that its orders remain in effect until and unless modified by the PSC itself, Public Serv. Comm'n v. Fuller, 551 So. 2d 1210, 1212 (Fla. 1989), and correctly concluded that, since the Territorial Orders gave the City the right and obligation to serve, and since those Orders have not been modified, the City will continue to have the right and obligation to serve after the Franchise Agreement expires.

The County's various assertions that the City Order "nullifies the Franchise Agreement," that it would "override the termination date in the Franchise and eviscerate any County authority with respect to the City electric utility's operations and use of County property," Initial Brief at 8, that "the City Order invalidates the entire Franchise Agreement," Initial Brief at 25, that it would impair the County's rights to use and regulate the use of its property, Initial Brief at 10, and so on, are misplaced. The County simply fails to comprehend that the City Order has no effect whatsoever on the Franchise Agreement, because the Franchise Agreement is a separate contract between the City and the County that is completely unaffected by the City Order. Moreover, regarding the County's claimed franchising authority, (1) the permissive statutory authority to "grant a license" to a provider of electric power is not the power to select a provider, at least not in Florida, where the exclusive and superior jurisdiction to determine what electric utilities serve in what geographic areas has been expressly delegated to the PSC by the Florida Legislature, and (2) that the County has not had any such power since at least some time before 1968, see, e.g., City Gas Co. v. Peoples Gas Sys., 182 So 2d 429, 436 (Fla. 1965), and definitively not since 1974, when the Legislature unequivocally conferred that jurisdiction, expressly exclusive and superior to any jurisdiction or power of the County, on the Florida Public Service Commission. Fuller, 551 So. 2d at 1212.

The PSC did not construe or interpret the Franchise Agreement, the County's franchising authority, or chapter 125, Florida Statutes. See R 1048. The PSC interpreted the PSC's statutes and the PSC's Territorial Orders, R 1048, and

in light of its legislatively delegated exclusive and superior jurisdiction, the PSC had no need to, and did not, interpret any other statutes.

The County's arguments that the City Order somehow impairs the County's ability to regulate its rights-of-way or the property that the County actually owns, or that it interferes with the County's use of its own property, also miss the mark. The City Order simply says that "Vero Beach has the right and obligation to continue to provide electric service in the territory described in the Territorial Orders upon expiration of the Franchise Agreement." The City Order says nothing whatsoever about the City's potential continued use of the County's rights-of-way or other County property to provide service to the customers located in its PSC-approved service territory.[7]

Finally, the County's argument that the City Order somehow violates section 366.13, Florida Statutes, which provides that chapter 366 shall not affect any municipal tax or franchise tax, is also misplaced. The City Order does not affect the City's collection and remittance of the franchise fee before March 4, 2017, and it may well not affect the fees after that date. Florida Power Corp. v. City of Winter Park, 887 So. 2d 1237, 1241-42 (Fla. 2005). Moreover, the City Order does not affect the County's ability to negotiate a new franchise agreement with

[7] Though not relevant to the issues presented in this appeal, there are a host of legal issues, arguments, and affirmative defenses that would be invoked if the County were ever to attempt to prevent the City from using the County's rights-of-way to provide service. These issues relating to property rights will, if ever, be addressed by the courts of Florida. The issue as to whether the County can require the City to pay for the use of the County's property to provide service is discussed in a separate section below.

the City, nor its ability to collect fees that are reasonably related to the County's cost of regulation or the rental value of the property used by the City. Id. at 1241. Therefore, the City Order does not violate section 366.13.

With regard to the County Order, the PSC articulated multiple valid grounds for denying the County's Petition, any one of which is sufficient to support the denial of the County's Petition. The PSC correctly found that the County's Petition failed to comply with the threshold pleading requirements of section 120.565, Florida Statutes (2014) because the County's Petition: (1) erroneously assumed that the Commission's Territorial Orders are invalid; (2) failed to provide an adequate description of how the County would be substantially affected under a particular set of facts by the PSC's Territorial Orders or statutory provisions within the PSC's jurisdiction; (3) inappropriately requested the equivalent of a general legal advisory opinion from the PSC; (4) incorrectly sought a declaratory statement from the PSC that would unequivocally determine the conduct of the City, FPL, and other third parties; (5) would have unavoidably required the PSC to analyze statutes and constitutional provisions outside of its jurisdiction; and (6) improperly asked the PSC to issue a declaratory statement concerning issues that were at the time the subject of pending circuit court litigation in relation to which the County participated in the dispute resolution process pursuant to chapter 164, Florida Statutes. For these reasons, the County's Petition was fatally flawed and the PSC's denial of the County's Petition should be affirmed.

As summarized above, each and every argument set forth in the County's Brief is erroneous and affords no basis for reversing the City Order. The PSC's

City Order is based on correct comprehension of facts, correct legal analysis of the PSC's Territorial Orders and its governing statutes, and correct analysis and application of the decisions of this Court, and accordingly, the City Order must be affirmed.

STANDARD OF REVIEW

City Order

With regard to the standard of review concerning the City Order, it is well settled that "[a]n appellate court may not reverse a declaratory statement by an administrative agency unless the agency's interpretation of the law is clearly erroneous." Chiles v. Dep't of State, Div. of Elections, 711 So. 2d 151, 155 (1st DCA 1998) (citing Regal Kitchens, Inc. v. Dep't of Revenue, 641 So. 2d 158 (Fla. 1st DCA 1994)). Moreover, it is equally well-established that orders of the Commission "come to this Court clothed with the presumption that they are reasonable and just." Choctawhatchee Elec. Co-op., Inc. v. Graham, 132 So. 3d 208, 211 (Fla. 2014) (quoting W. Fla. Elec. Coop. Ass'n v. Jacobs, 887 So. 2d 1200, 1204 (Fla. 2004)). Accordingly, the County "cannot prevail on appeal unless the Commission departed from the essential requirements of law." Id. (citing W. Fla. Elec. Coop. Ass'n, 887 So. 2d at 1204; AmeriSteel Corp. v. Clark, 691 So. 2d 473, 477 (Fla. 1997)).

The County asserts that the standard of review concerning the City Order is de novo[8] and that the Commission is not due any deference because the

[8] With regard to the County's assertion that the City lacks standing to seek a declaratory statement (see Initial Brief at 16-22), the general rule is that a court

Commission "effectively interpreted and determined that Commission's franchise authority under Section 125.01, Florida Statutes, and Section 125.042, Florida Statutes." Initial Brief at 13. The County's assertion is misplaced. The City Order clearly provides that the Commission is applying the Commission's Territorial Orders and specific provisions of chapter 366, Florida Statutes (2014), to the facts alleged in the City's Petition. R 1047-48.

In addition, the City Order clearly states:

> 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 the agreement.

R 1049. Moreover, no provision or language in the City Order interprets or applies to the Franchise Agreement. Accordingly, the City Order is presumed to be reasonable and just and the City Order should not be reversed unless the Commission's interpretation of the Commission's Territorial Orders and chapter 366, Florida Statutes, is clearly erroneous.

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reviews standing de novo. See Adventist Health Sys./Sunbelt, Inc. v. Agency for Health Care Admin., 955 So. 2d 1173, 1176 (Fla. 1st DCA 2007). However, in Ameristeel Corp. v. Clark, 691 So. 2d at 477, this Court recognized that Commission orders concerning standing comes to the Court "'clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, that they are reasonable and just and such as ought to have been made.'" (quoting General Tel. Co. v. Carter, 115 So. 2d 554, 556 (Fla. 1959)). The Commission's determination that the City has established standing in this case should be granted the same deference.

County Order

The standard of review concerning the County Order is de novo. See Adventist Health Sys./Sunbelt Inc., 955 So. 2d at 1176.

ARGUMENT

As explained in detail below, the PSC properly issued the City Order based on correct analysis and application of Florida law regarding the City's standing to request the PSC's declarations and also regarding the City's right and obligation to continue providing electric service in its PSC-approved service areas in unincorporated Indian River County upon expiration of the Franchise Agreement. Further, the PSC correctly denied the County's fourteen requested declaratory statements based on correct application and analysis of governing Florida law.

I. THE PSC PROPERLY ISSUED THE CITY ORDER BASED ON CORRECT ANALYSIS AND APPLICATION OF FLORIDA LAW REGARDING THE CITY'S STANDING TO REQUEST THE PSC'S DECLARATIONS AND THE APPLICATION OF THE PSC'S TERRITORIAL ORDERS AND GOVERNING STATUTES TO THE CITY'S RIGHT AND OBLIGATION TO CONTINUE PROVIDING SERVICE AFTER THE FRANCHISE AGREEMENT EXPIRES.

The PSC properly issued the City Order based on correct analysis and application of Florida law regarding the City's standing to request the PSC's declarations, and also regarding the City's right and obligation to continue providing electric service in unincorporated Indian River County upon expiration of the Franchise Agreement. The City pled sufficient facts to establish its standing

to request, and its actual present and practical need for, the declarations sought in the City's Petition. The PSC properly relied upon these facts, as alleged and without taking a position as to their validity, R 1047, in reaching its decision to issue the City Order. The PSC correctly applied its governing statutes, its Territorial Orders, and decisions of this Court in issuing the City Order, and the County's alleged defects in the City Order – that the PSC interpreted the Franchise Agreement and parts of chapter 125 in excess of its jurisdiction, that the City Order impairs the County's ability to use or regulate its rights-of-way and other County property, that the PSC granted the City a perpetual franchise to use the County's property, and that the City Order violates section 366.13, Florida Statutes – are misplaced and erroneous. Accordingly, this Court should affirm the City Order.

A. THE CITY PLED FACTS THAT WERE SUFFICIENT TO ESTABLISH ITS STANDING TO REQUEST, AND NEED FOR, THE CITY ORDER, AND THE PSC CORRECTLY RECOGNIZED AND RELIED UPON THOSE FACTS IN ISSUING THE CITY ORDER.

Regarding the question of the City's having alleged sufficient facts to establish the basis for the City Order, section 120.565, Florida Statutes, provides in pertinent part as follows:

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

> (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

Similarly, rule 28-105.002, Florida Administrative Code, provides in pertinent part:

> A petition seeking a declaratory statement shall be filed with the clerk of the agency that has the authority to interpret the statute, rule, or order at issue and shall provide the following information:
>
> * * *
>
> (5) A description of how the statutes, rules, or orders may substantially affect the petitioner in the petitioner's particular set of circumstances.

A party seeking a declaratory statement must show that there is an "actual present and practical need" for the requested declaratory statement, and that the declaration addresses a "present controversy." Sutton v. Dep't of Env't'l Protection, 654 So. 2d 1047, 1048 (Fla. 5th DCA 1995).

In the City's Petition, the City set forth facts sufficient to establish both that it is substantially affected by the PSC's statutes and Territorial Orders, and that it has an actual present and practical need for its requested declarations as to matters squarely within the PSC's jurisdiction under the Grid Bill.

1. The City's Petition Alleged Sufficient Facts To Establish the City's Standing To Request the PSC's Declarations of the City's Rights and Obligations Pursuant to the Territorial Orders and the PSC's Statutes.

As relevant to the City's standing to request the PSC's declarations, the City pled facts establishing that it owns and operates a municipal electric utility system, that the City is an "electric utility" as that term is defined in section 366.02(2), and that the City is therefore subject to all provisions of chapter 366 that apply to electric utilities. Specifically, the City described the City's municipal electric utility system, its history and the history of its territorial agreements, its present operations, customers, and service areas, its long-term planning and investment decisions, and other facts, and recounted the PSC's Territorial Orders approving the City's service areas established under those Orders. R 493-501. The provisions to which the City is subject include provisions of the Grid Bill, part of Chapter 74-196, Laws of Florida, that authorize the PSC to approve territorial agreements and that give the PSC "jurisdiction over the planning, development, and maintenance of a coordinated electric power grid 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." §§ 366.02(2)(d) & 366.04(5), Fla. Stat.

These same facts confirm the obvious conclusion that the City is "substantially affected" by the cited statutes and the Commission's Territorial Orders issued pursuant thereto, and therefore these facts satisfy the requirements of section 120.565 for the City's standing to request a declaration from the PSC as to

the City's right and obligation to continue serving in its service areas described in the PSC's Territorial Orders, when and if that right and obligation is in doubt.

2. The City's Petition Alleged Sufficient Facts To Establish the City's Actual Present and Practical Need for the Requested Declarations.

As to the need for the requested declarations, and the present controversy addressed by the City's requests, the City alleged specifically that its ability to make long-term planning and investment decisions, necessary to its fundamental mission to provide safe, reliable service efficiently and cost-effectively, had been cast into serious doubt by the County's efforts to supplant the PSC as the state agency with the sole power to determine what utility would provide electric service in the areas covered by the Franchise Agreement upon expiration of the Franchise Agreement. Contrary to the County's assertion that "the City did not present any facts relevant to the statutes" that the City cited as the basis for the City's requested declarations, the City directly pled facts sufficient to establish that the City is "substantially affected" by the PSC's statutes and the Territorial Orders issued pursuant thereto, and sufficient facts to establish the City's actual present and practical need for the requested declarations within the scope of the PSC's jurisdiction under the Grid Bill. Specifically, the City stated, as facts, that "the City 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, in order to serve all of the City's customers in its service area approved by the Commission's

Territorial Orders," R 500-01 (emphasis supplied), that the PSC's "decisions will also have direct and immediate impacts on the City's ability to plan its system and to make appropriate, efficient planning and investment decisions," R 504, and that "Indian River County now threatens to attempt to evict the City from serving in the City's Commission-approved service areas in unincorporated Indian River County upon the expiration" of the Franchise Agreement. R 489. These alleged facts, properly taken as true by the PSC (without taking a position as to their validity, R 1047), bring the City's requests squarely within the scope of the PSC's plenary Grid Bill jurisdiction over the "planning, development, and maintenance of a coordinated electric power supply grid 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. In short, the declarations requested in the County's Petition created significant doubt as to the City's long-term continuing right and obligation to serve, which in turn invoked the PSC's jurisdiction over the long-term planning and investment decisions that the City must make to provide service.

The County's Petition itself proves this point: at subparagraph 57.h, the County asked the PSC to declare that, "Once the Franchise expires . . . the PSC's orders . . . do not limit or otherwise preclude the [County] from granting an exclusive franchise to FPL or a successor electric supplier that would authorize" such supplier to serve customers "within the geographic area of the Franchise." R. 39; see also paragraphs 57.d-57.g of the County's Petition, R 39, seeking similar

declarations as to what the County believes it can do upon expiration of the Franchise Agreement.

A clearer threat to evict the City from its status as the PSC-authorized provider of electric service, or stated differently, to nullify or abrogate the City's ability to serve, R 504, can hardly be imagined, and the City properly made that allegation to the PSC, together with its statement that "the City needs the Commission's affirmative declarations as to the City's continuing right and obligation to serve in its Commission-approved service territory, in order to continue planning and providing electric service in the most efficient and cost-effective way possible." R 489-90. The fact of the County's requested declarations and the City's factual allegations as to its actual present and practical need for the PSC's declaration, and as to an imminent controversy over which agency – the PSC or the Indian River County Board of County Commissioners – can determine who would serve the areas in question, provided more than enough factual basis for the PSC to issue its declaratory statement, and more than enough factual basis to establish the City's standing to request that declaration.

In sum and substance, the County thus asked the PSC to declare that, upon expiration of the Franchise Agreement, the PSC's Territorial Orders, upon which the City relies in making its long-term planning, expenditure, and investment decisions in the operation of its electric utility system, would become invalid or no longer apply, and that the County could then set up its own utility system or enter

into a territorial agreement with FPL[9] or another electric supplier and thus displace the City. These facts – the County's own efforts – fully establish the City's need for the Commission's declaration as to its right and obligation to serve upon expiration of the Franchise. As the City stated in the City's Petition, in providing the explanation of how the cited orders and statutes affect the City's substantial interests pursuant to Rule 28-105.002(5), F.A.C.:

> The substantial interests of the City of Vero Beach will be directly affected by the Commission's interpretation of Chapter 366 and the above-cited orders, in that the Commission's declarations will determine whether the City's right and obligation to serve in its Commission-approved service areas are subject to abrogation or nullification by the threatened actions of the County. These decisions will also have direct and immediate impacts on the City's ability to plan its system and to make appropriate, efficient planning and investment decisions. These planning considerations and decisions will include how the City may have to address significant impacts on the City arising from the substantial stranded costs with which the City would be burdened if the County were somehow to prevail in its attempted ouster of the City from its Commission-approved service territory.

R 504.

The foregoing facts and allegations by the City fully established its standing to request the declarations in the City's Petition, and also fully established the City's actual present and practical need for the requested declarations, and

[9] In fact, even if the County were to attempt to grant a new exclusive franchise to FPL, FPL would be barred from serving by operation of its territorial agreements with the City and by the PSC's Territorial Orders incorporating those agreements. See Fuller, 551 So. 2d at 1212-13.

accordingly, the PSC's actions were just, reasonable, proper, and fully justified under governing law. The City Order should be affirmed.

3. The County's Allegations That the City's Petition Did Not Assert Facts Sufficient To Establish the City's Standing and Need for the Requested Declarations Under the PSC's Statutes Are Misplaced and Misleading.

The County alleges that the City lacked standing to request the PSC's declarations "because there were no facts in the City Petition that triggered the PSC's jurisdiction under the statutes relied upon by the City, and that "there were no facts supporting the statutes the City relied upon for its questions." Initial Brief at 16-19. To the contrary, as explained above, the City's Petition alleged sufficient facts to establish both the City's standing as a "substantially affected" electric utility to request the PSC's declarations and also the City's "actual present and practical need" for the requested declarations. The County's allegations are at best misplaced, if not outright misleading. Where the County asserts that there is no territorial agreement to be approved, nor any territorial dispute to be resolved, nor any imminent threat of uneconomic duplication actually pending before the PSC, such allegations are true as far as they go, but they ignore the clear facts – established by the County's Petition per se – that the City is legitimately in doubt as to its rights and obligations upon the expiration of the Franchise Agreement, and it is that doubt, created by the County's own attempts to usurp the PSC's jurisdiction over utility service areas, that created the City's actual practical and present need for the requested declarations.

The County's statement that "the expiration of the Franchise Agreement in 2017 is not a sufficient trigger to invoke the PSC's jurisdiction" under the Grid Bill statutes cited by the City is true but grossly misleading. In making this argument, the County ignores the elephant in the courtroom: it is not the expiration of the Franchise per se that creates doubt regarding the City's rights and obligations, it is the County's own attempts to establish that the County, and not the PSC, would have power to determine what utility would serve the areas in question after the Franchise Agreement expires.

The County's suggestion that its "Petition . . . simply asks the PSC questions" and is therefore "not evidence and is not a part of the City Petition docket," is false and misleading: the City's Petition directly cited the County's Petition in the section of the City's Petition titled "Need for the Requested Declaratory Statement," R 501, thereby bringing it directly into the City's Petition docket.

The County asked the PSC to declare that, upon expiration of the Franchise Agreement, there would be nothing to prevent it from granting a franchise to another utility. It is exactly this threat that creates both doubt as to the City's rights and obligations and also its present need to know its status under the PSC's Territorial Orders and the PSC's statutes in order for the City to continue making efficient and cost-effective long-term operational, planning, and investment decisions. R 500-01.

The Court should reject the County's misleading arguments and affirm the City Order.

B. THE PSC PROPERLY DETERMINED AND DECLARED THAT, PURSUANT TO THE PSC'S TERRITORIAL ORDERS ISSUED PURSUANT TO ITS GOVERNING STATUTES IN THE EXERCISE OF ITS EXCLUSIVE AND SUPERIOR JURISDICTION, THE CITY WILL RETAIN THE RIGHT AND OBLIGATION TO CONTINUE SERVING UPON EXPIRATION OF THE FRANCHISE AGREEMENT.

Having determined that the City "met the threshold requirements for issuance of a declaratory statement," R 1047, the PSC determined that it had the jurisdiction to render the requested declarations, that its jurisdiction was and is exclusive and superior to that of any other state government entity, that its Territorial Orders had been validly and lawfully issued pursuant to its governing statutes, and that those Orders would continue in effect until and unless modified by the PSC. The PSC accordingly, concluded that, the City's right and obligation to provide service in its PSC-approved service areas in unincorporated Indian River County would continue after the Franchise Agreement expires.

1. The PSC Has the Jurisdiction To Determine Which Electric Utilities Will Serve in What Areas and Exercised that Jurisdiction in the Territorial Orders, Thereby Giving the City the Right and Obligation to Serve in the Areas Designated in Those Orders.

The PSC has, and has had, jurisdiction over utility services areas, both express and implied, since at least at early as 1965. In City Gas Co. v. Peoples Gas System, 182 So. 2d 429, 436 (Fla. 1965), involving a dispute as to whether a circuit court or the PSC had jurisdiction over territorial agreements and utility

services areas, this Court upheld the PSC's jurisdiction over such matters, stating as follows:

> In short, we are of the opinion that the commission's existing statutory powers over areas of service, both expressed and implied, are sufficiently broad to constitute an insurmountable obstacle to the validity of a service area agreement between regulated utilities, which has not been approved by the commission.

In Public Service Comm'n v. Fuller, 551 So. 2d 1210 (Fla. 1989), the Court was presented with a similar situation in which one electric utility, the City of Homestead, sought to have the circuit court invalidate a PSC-approved territorial agreement between Homestead and FPL as effectively terminated; the PSC opposed Homestead's efforts. This Court, citing to its opinion in City Gas Co., held in favor of the PSC, stating as follows:

> Clearly, the underlying purpose of this instant circuit action is to change the boundaries of the territorial agreement and to change the utility which should serve customers in the affected territories. The law is clear that the PSC has had the implicit power to approve and to modify territorial agreements since before the parties executed the instant agreement. Subsequently, in 1974, the Florida Legislature made the implicit authority explicit by enacting chapter 74-196, Laws of Florida. As a result, under section 366.04(2)(d), Florida Statutes (1989), the PSC now has the express authority "[t]o approve territorial agreements . . . ."

Fuller, 551 So. 2d at 1212 (emphasis supplied) (citations omitted).

In parallel to the circuit court action in Fuller, the County's Petition represented an attempt to "change the utility which should serve customers in the affected territories" of Indian River County, giving rise to the City's need for the declarations that the City requested and that the PSC granted. Clearly, the PSC has

jurisdiction, and equally clearly, the PSC has exercised its jurisdiction over the service territories at issue here in PSC's Territorial Orders.

2. The PSC's Jurisdiction Over the Subject Matter of the City's Petition Is Exclusive and Superior to That of the County and All Other State Entities.

The PSC's jurisdiction over which utility shall serve customers in the affected territories is, as a matter of black-letter statutory law, "exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties." § 366.04(1), Fla. Stat. (cited in Roemmele-Putney v. Reynolds, 106 So. 3d 78, 80-81 (Fla. 3d DCA 2013)); see also Fuller, 551 So. 2d at 1213, holding "that the PSC has exclusive jurisdiction over the instant PSC order, with which the territorial agreement has merged."

3. The PSC's Territorial Orders Have Not Been Modified, and Therefore Continue in Effect Until and Unless Modified by the PSC.

The PSC's Territorial Orders have not been modified or amended by the Commission. R 1048. Therefore, the PSC's Territorial Orders continue in effect until and unless modified by the PSC. Fuller, 551 So. 2d at 1212. The Court will note that this clear statement of the law also disproves the County's baseless assertions that the "PSC effectively grant[ed] a new franchise in perpetuity to the City," Initial Brief at 38, and that the "PSC has ordered the City to ignore the Franchise Agreement, the County's franchise authority, and serve in perpetuity on

the basis of the PSC's authority." Id. The PSC has correctly stated the law established by this Court that the PSC's orders can only be modified by the PSC.

The Franchise Agreement, as a separate contract between the City and the County, has no effect on the PSC's Territorial Orders in any way.

The PSC's Territorial Orders remain in effect until and unless modified by the PSC, and accordingly provide the foundation for the PSC's declarations that, until and unless those Orders are modified by the PSC, the City will retain the right and obligation to serve in its PSC-approved service areas in unincorporated Indian River County. R 1048, 1050.

C. IN THE CITY ORDER, THE PSC DID NOT INTERPRET THE FRANCHISE AGREEMENT, THE COUNTY'S LIMITED FRANCHISE AUTHORITY, OR ANY PART OF CHAPTER 125, FLORIDA STATUTES.

In the City Order, the PSC simply declared that, on the facts presented in the City's Petition, the City would continue to have the right and obligation to serve in its PSC-approved service areas in unincorporated Indian River County after the Franchise Agreement expires. Contrary to the County's numerous assertions, the PSC neither construed nor interpreted the Franchise Agreement, the County's franchise authority, or any provision of chapter 125. Indeed, the City Order has no effect whatsoever on the Franchise Agreement or on the County's ability to issue or grant franchises to the extent that it is empowered to do so. The County's assertions are without any basis and without merit, and the Court should affirm the City Order.

1. The PSC Did Not Interpret the Franchise Agreement.

The PSC did not interpret the Franchise Agreement in any way. First, nowhere in the City's Petition did the City request that the PSC interpret the Franchise Agreement. Logically and reasonably, it follows that nowhere in the City Order is there any statement purporting to make any interpretation of the Franchise Agreement or demonstrating that the PSC did any such thing; nor is there a single citation in the County's Brief to support its allegations. In fact, the City Order clearly states

> 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 1048. As noted above, the PSC never needed to, and did not, rely on, interpret, or apply the Franchise Agreement to its analysis in any way, because it was completely unnecessary to the PSC's analysis and application of the Territorial Orders and the applicable provisions of section 366.04, Florida Statutes, to the facts presented in reaching the conclusions set forth in the City Order,

In its Initial Brief, at 23, the County first incorrectly asserts that "the PSC specifically directed the City to continue to provide service beyond the expiration of the Franchise Agreement and without regard to any other authority or permission of the County." In fact, the PSC simply declared that, pursuant to the PSC's Territorial Orders and its statutes, the City "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 1050. The PSC's declaration was simply and expressly an interpretation and application of its Territorial Orders and its statutes, following controlling authority of this Court, Fuller, 551 So. 2d at 1212, and was in no way an interpretation of the Franchise Agreement. Again, the PSC acknowledged that it would have no authority to issue a declaration interpreting the Franchise Agreement, and the PSC did not do so. R 1048. The PSC applied its substantive Grid Bill authority pursuant to its exclusive and superior jurisdiction conferred by the Florida Legislature, no more and no less. The County's effort to characterize the City Order as "very much an interpretation and construction of the Franchise Agreement and the County's franchise authority," Initial Brief at 23, is of no avail. The PSC never had any reason to interpret or construe either the Franchise Agreement or the County's franchise authority and did not do so.

2. The PSC Did Not Interpret the County's Limited Franchise Authority.

The City Order did not interpret or construe the County's limited franchise authority under chapter 125. Rather, the PSC interpreted its Territorial Orders, its statutes, particularly the Grid Bill provisions invoked by the City, and applicable decisions of this Court, especially Fuller, in concluding that the City's right and obligation to serve pursuant to the Territorial Orders will continue after expiration of the Franchise. The County's authority to issue franchises is what it is, but it is

irrelevant to the PSC's exclusive and superior jurisdiction over utility service areas pursuant to the Grid Bill.

3. The PSC Did Not Interpret Any Part of Chapter 125, Florida Statutes.

The PSC did not interpret any part of chapter 125, Florida Statutes. The PSC simply interpreted and applied its Territorial Orders, its statutes, including the Grid Bill provisions invoked by the City, and applicable decisions of this Court, in granting its declaration. Given the Florida Legislature's express delegation of "exclusive and superior" jurisdiction over the matters at issue to the PSC, specifically superior to any power that the County might have with respect to any such matter, see § 366.04(1), Fla. Stat., the PSC had no need to look to any other statutes in issuing the City Order. Accordingly, the County's assertions are without basis or merit, and the Court should affirm the City Order.

D. THE CITY ORDER HAS NO EFFECT ON THE FRANCHISE AGREEMENT NOR ON THE COUNTY'S LIMITED FRANCHISE AUTHORITY.

The County's various assertions that the City Order "nullifies the Franchise Agreement," that it would "override the termination date in the Franchise and eviscerate any County authority with respect to the City electric utility's operations and use of County property," Initial Brief at 8, that "the City Order invalidates the entire Franchise Agreement" and "exempt[s] the City from the Franchise Agreement," Initial Brief at 25, that it would impair the County's rights to use and regulate the use of its property, Initial Brief at 10, and other similar allegations,

are at best misplaced. They are based, at best, on a failure to comprehend that the City Order has no effect whatsoever on the Franchise Agreement, because the Franchise Agreement is a separate contract between the City and the County that is completely unaffected by the City Order.

The City Order has no effect on the existing Franchise Agreement nor on the County's limited authority to enter into a franchise agreement with the electric utilities that serve within its geographic boundaries. The existing Franchise Agreement will continue in full force and effect, and the City will faithfully perform its duties thereunder, as it has since 1987, until the Franchise Agreement expires; what happens after that, at least relative to the County's ability to continue receiving franchise fees, depends on the County's wishes to a large degree, in light of this Court's decisions in City of Winter Park and Alachua County v. State, 737 So. 2d 1065 (Fla. 1999). (See discussion below.)

The City never promised or covenanted to remove its electrical facilities, nor to give the County any rights whatsoever regarding what would happen to the City's right and obligation to continue serving upon expiration of the Franchise Agreement; the City agreed to do what the Franchise Agreement requires it to do for the term of the Franchise Agreement, nothing more and nothing less, and the City has fully performed its end of that bargain. The County simply wants the bargain to be different from the one it agreed to in the Franchise.

Similarly, the County improperly attempts to extrapolate the expiration date in the Franchise Agreement into an absolute termination of the City's rights to serve, but this argument is erroneous: the expiration of the Franchise Agreement

terminates the City's and County's contractual obligations to each other, but, just as the County observed that the Territorial Orders have no effect on the Franchise Agreement, neither does the Franchise Agreement have any effect on the Territorial Orders.

The County's legal ability to "issue a license" to the City pursuant to section 125.42, F.S. (incorrectly cited by the County as section 125.042, F.S.) is not impaired by the City Order, but the ability to issue a license to an electric provider is not the superior power to determine what electric utilities will serve in what areas. That power rests with the PSC. § 366.04(1), Fla. Stat.; Fuller, 551 So. 2d at 1212. The County can certainly enter into a new franchise agreement with the City, and in lieu of a new, bargained-for franchise fee arrangement, the County can in fact require a fee from the City based on either the "cost of regulation or the rental value of the occupied land." City of Winter Park, 887 So. 2d at 1241 (citing Alachua County, 737 So. 2d at 1067.

The County has attempted to extrapolate its legal authority to issue a license, i.e., to grant a franchise, into the power to select "FPL or some other successor electric supplier" of the County's choosing to provide service where the City now serves pursuant to the Territorial Orders. R 39. While the County's observation that its franchise authority under section 125.42 is "not limited by or subject to the PSC's Territorial Orders" is true, it is completely irrelevant to the issues presented here. The statutory authority to "grant a license" – to grant a franchise or enter into a franchise agreement with an electric utility – is completely separate from the power to determine what electric utility will provide service; that power has been

exclusively reserved by the Florida Legislature to the superior jurisdiction of the PSC by section 366.04(1), whether exercised through approval of a territorial agreement pursuant to section 366.04(2)(d), or through resolution of a territorial dispute pursuant to section 366.04(2)(e), or through exercise of the PSC's broad "jurisdiction over the planning, development, and maintenance of a coordinated electric power grid 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" pursuant to section 366.04(5).

In this case, the PSC has determined that the City will serve in the areas designated for the City in the PSC's Territorial Orders and that FPL will serve in the areas designated for FPL in the PSC's Territorial Orders. While the County can choose whether to issue a license or enter into a franchise agreement with either or both the City and FPL, with regard to their respective PSC-approved service areas, the County cannot pick and choose which utility will supply which areas. See Fuller, 551 So. 2d at 1212. As the state of applicable Florida statutory and decisional law has evolved, the County never had such power: it had no authority before the 1968 Constitution, and by 1968, the Florida Supreme Court had recognized the PSC's authority to prevent uneconomic duplication or wasteful competition. See Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), cert. denied, 395 U.S. 909. As of 1974, with the enactment of the Grid Bill, the Legislature expressly reserved the exclusive and superior jurisdiction over such matters to the PSC. Fuller, 551 So. 2d at 1212. This was the statutory framework and the

decisional law framework in which the County entered into the Franchise Agreement in 1987, and thus was part of that Franchise Agreement, and the County simply cannot change it. Its efforts to extrapolate or elevate the authority to issue a license to the Commission-approved provider (and to require payment of a reasonable fee for the use of its rights-of-way) is simply not the right to determine who the electric utility service provider will be.

The bargained-for exchange in the Franchise Agreement addresses certain obligations and duties of the City and the County, to each other as matters of contract. The bargained-for exchange does not affect the City's rights and obligations under the Commission's Territorial Orders, because the Franchise Agreement contains no provisions addressing such rights and obligations.

A brief examination of the City-County Franchise Agreement shows that the City's obligations to the County are as follows:

1. To provide – as a matter of contract between the City and the County – electric service to customers within the City's service area as defined by the City-FPL Territorial Agreements (Franchise Section 2), R 42-43;

2. To construct, maintain, and operate its electric system in accordance with applicable federal and state regulations, and to provide service that is "not inferior to the applicable standards for such service" (Franchise Section 2), R 42-43;

3. To locate and relocate its facilities so as to interfere as little as practicable with traffic in the County's rights-of-way, and in compliance with the reasonable requirements of the County (Franchise Section 3), R 43;

4. To restore any excavations within a reasonable time and as early as practicable (Franchise Section 3), R 43;

5. To indemnify the County against liability for damage or accident that occurs in connection with the City's construction, operation, or maintenance of its facilities (Franchise Section 4), R 43-44;

6. To charge rates that are reasonable and "subject to such regulation as may be provided by State law" (Franchise Section 5), R 44; and

7. To collect and remit Franchise Fees to the County (Franchise Sections 6 & 7) R 44.

Similarly, the County's obligations to the City are as follows:

1. To refrain from engaging in, or permitting any entity other than the City to engage in, the business of providing retail electric service in competition with the City. R 45.

It is obvious that the County now wishes that the Franchise Agreement contained a "buyout clause" such as the provisions that controlled the City of Winter Park case (discussed below) or other provisions by which the County might have obtained – but did not obtain – the contractual right to designate a successor electric service provider upon expiration of the Franchise Agreement. However, the Franchise Agreement contains no such provisions. The Franchise Agreement simply does not address in any way what happens upon expiration of the Franchise Agreement, and it certainly does not contain any provisions that would give the County any rights – as a matter of contract between it and the City – to override the Commission's Territorial Orders or to otherwise control anything that the City might do after the Franchise Agreement expires.

Accordingly, the County's attempt to assert that the City's right to serve is extinguished by the expiration of the Franchise Agreement is simply incorrect as a matter of law. The City's right and obligation to serve are expressly recognized in the Territorial Agreements and in the Commission's Territorial Orders, into which the Territorial Agreements merged. See Fuller 551 So. 2d at 1212. Moreover, as the County acknowledges, the Commission's orders can only be modified by appropriate proceedings held by the Commission. Initial Brief at 49. Thus, territorial agreements and the orders approving them remain in effect indefinitely, until and unless the orders of which the agreements are part are modified by the Commission. Id. As the Florida Supreme Court held in City of Homestead v. Beard, "the law surrounding the modification or termination of a PSC order is applicable to the instant territorial settlement agreement. Therefore, the instant agreement is not terminable at will by the parties and may only be modified or terminated by the PSC in a proper proceeding as set forth in Peoples Gas." City of Homestead v. Beard, 600 So. 2d 450, 455 (Fla. 1992).

The City is not obligated by the Franchise Agreement or by any other provision of Florida law to cease serving when the Franchise Agreement expires. All that will happen when the Franchise Agreement expires is that the City and the County will be relieved of their contractual obligations to each other under the Franchise Agreement. There will be no effect on the Commission's Territorial Orders, which include the City's right and obligation under those Orders to serve within its service areas as described in those Orders.

Thus, to the extent such obligations arose pursuant to the Franchise Agreement, as a matter of contract between the City and the County, the City will, absent other controlling law,[10] be contractually relieved of its obligations to: collect and remit Franchise Fees to the County, indemnify the County against liability for damages caused by the City's operations, locate its facilities so as not to interfere with traffic in the County's rights-of-way and in compliance with the reasonable requirements of the County, and restore excavations as required under the Franchise Agreement. The City's obligations to charge reasonable rates subject to Florida law, and to maintain and operate its system in compliance with all applicable federal, state, and local regulations will remain in effect pursuant to that applicable state and federal law, but no longer as a matter of contract. The City's obligation to serve all customers located in its Commission-approved service area will remain intact pursuant to the Commission's Territorial Orders.

[10] This Court's opinions in City of Winter Park and Town of Belleair hold that an incumbent utility, continuing to use a franchising government's rights-of-way to provide service, is legally required to continue collecting and remitting franchise fees to the franchising government under certain circumstances, including where the government is in the process of buying the incumbent's facilities, City of Winter Park, 887 So. 2d at 1241-1242, and where the government and the utility are negotiating a new franchise agreement. Town of Belleair v. Florida Power Corp., 897 So. 2d 1261, 1262 (Fla. 2005).

E. THE CITY ORDER HAS NO EFFECT ON THE COUNTY'S ABILITY TO USE ITS PROPERTY OR ON ITS ABILITY TO REGULATE THE USE OF ITS RIGHTS-OF-WAY PURSUANT TO SECTIONS 337.401-.406, FLORIDA STATUTES

The City Order has no impact on the County's use of its rights-of-way or other County property – there is no ruling, nor even any discussion, in the City Order whatsoever that even suggests that the PSC attempted to rule that the City will be able to continue to use the County's property once the Franchise Agreement expires. The County erroneously characterizes the City Order as giving "expressed . . . direction to the City to continue to provide service and utilize the County's property in perpetuity . . . ," Initial Brief at 27, and stated directly that "[b]y ordering the City to continue to serve 'upon the expiration of the Franchise Agreement' the PSC effectively granted the City a franchise for the use of the County's property." Initial Brief at 37. The County further characterizes the PSC's City Order as having granted "the City authority to use the County's property without the County's permission." Id. Again, the County has provided no citations to the City Order that say any such thing, again because there are no such provisions or statements in the PSC's City Order.

The City Order has no effect on the County's ability to use its property or on its ability to continue to collect at least reasonable fees for the use of its property. If the County truly desires to force the City to remove its facilities from County property so that it can use such property for other purposes, it can attempt to bring an action under applicable principles of Florida property law to attempt to force the

City to remove its facilities from its rights-of-way. Again, such action will involve complex and numerous legal issues that would have to be resolved by the courts, but in the meantime, the County could collect at least reasonable fees for the use of its property during the pendency of such litigation, and permanently if it were to be unsuccessful in efforts to remove the City. As noted in its statement of facts above, the City estimates that no more than 20 percent of its facilities in unincorporated Indian River County are located in the County's rights-of-way.

Finally, the power to force the City to move or remove its facilities from County property, assuming for the sake of argument that the County would prevail in its hypothesized legal actions, is in no way the power to determine what utility would provide service. The City does not need the County's rights-of-way, and all the County's actions would do would be to increase the City's cost of serving customers in the unincorporated areas of the County, which increased costs would properly be charged to those customers.

Similarly, the City Order has no impact on the County's ability to regulate the use of its rights-of-way pursuant to sections 337.401-406. The County applies such regulations independently of the Franchise Agreement today, and its ability to exercise valid regulatory authority over its rights-of-way is not affected either by the City Order or the Franchise Agreement.

F. THE CITY ORDER HAS NO IMPACT ON FRANCHISE FEES OR TAXES UNDER SECTION 366.13, FLORIDA STATUTES.

The County's final argument – that the City Order somehow violates section 366.13 which provides that chapter 366 shall not affect any municipal tax or franchise tax – is also misplaced. Section 366.13 provides in its entirety as follows:

> **366.13 Taxes, not affected.—**No provision of this chapter shall in any way affect any municipal tax or franchise tax in any manner whatsoever.

This argument is misplaced and erroneous because, again, the City Order has no impact on the Franchise Agreement, just as the Franchise Agreement has no effect on the Territorial Orders. The City Order does not affect the City's collection and remittance of the franchise fee before March 4, 2017, and pursuant to this Court's opinion in City of Winter Park, it may well not affect the fees after that date. In City of Winter Park, this Court held that as a holdover tenant, the serving utility was obligated to continue collecting and remitting the franchise fee while the City of Winter Park went through the legal procedures necessary to purchase the previous incumbent's facilities pursuant to the buy-out clause in the expired franchise agreement. City of Winter Park, 887 So. 2d at 1241-42.

Moreover, the City Order does not affect the County's ability to negotiate a new franchise agreement with the City, which could reasonably be expected to provide for continued collection and remittance of franchise fees at the current levels. Further, in City of Winter Park, the Court also reiterated that its decision in

Alachua County v. State, 737 So. 2d 1065 (Fla. 1999) "validates fees that are reasonably related to the government's cost of regulation or the rental value of the occupied land, as well as those that are the result of a bargained-for exchange." City of Winter Park, 887 So. 2d at 1241, citing Alachua County, 737 So. 2d at 1067. Similarly, in Town of Belleair, 897 So. 2d at 1262, this Court held that the utility was required to continue collecting and remitting franchise fees while the Town and utility negotiated a new franchise. Therefore, the County's ability to collect at least reasonable fees for the use of its property remains intact upon expiration of the Franchise, and the City Order does not violate section 366.13.

The County's arguments that the PSC granted to the City a franchise for the use of the County's property and that the PSC granted the City the authority to use its property without the County's permission, Initial Brief at 37, are equally flawed. The City Order did no such thing: the City Order simply declared that the City may continue to serve in its PSC-approved service areas after expiration of the Franchise, but it said nothing whatsoever about whether the City could continue to use the County's rights-of-way or other property to thus provide service to its customers in those areas. Again, the Court will note that the County failed to provide any citations whatsoever for its baseless allegations, relying instead on its sweeping, conclusory allegations as though stating them often enough might make them true. As noted above, whether the City may continue to use the County's rights-of-way, or whether the County may force the City to remove its facilities from those rights-of-way, are potentially complex issues of real property law that will be determined, if ever presented, by the courts of Florida.

Of course, it is readily apparent from the County's requested declarations, R 39, that the County has no interest whatsoever in its franchise fees, but only in its desire to evict the City and "grant FPL or some other successor electric supplier an exclusive franchise to supply electric service within the geographic area described by the Franchise and for that successor electric supplier to service such customers." R 39.

Regardless, the County's ability to collect at least reasonable fees for the use of its property remains intact upon expiration of the Franchise Agreement, and the City Order does not violate section 366.13. Accordingly, the Court should affirm the City Order.

In summary, the PSC properly issued the City Order, and the County's arguments afford no basis to overturn the PSC's City Order. The PSC issued the City Order based on its correct recognition of the facts in the City's Petition that established both the City's standing as a "substantially affected" electric utility to request a declaratory statement and that also established the City's actual present and practical need for the requested declarations. The PSC further correctly applied its Territorial Orders and its governing statutes, and correctly followed applicable and controlling decisions of this Court and other Florida courts, in granting the declaratory statement requested by the City, reaching the conclusion that the City's right and obligation to provide electric service in those portions of unincorporated Indian River County designated in the Territorial Orders would continue following expiration of the Franchise Agreement. The PSC did not interpret either the Franchise Agreement or the County's limited franchise

authority, nor did it interpret chapter 125, Florida Statutes. The City Order has no effect on either the Franchise Agreement or the County's limited franchise authority, or on any franchise fee or tax that County imposes or may impose in the future, subject, of course, to applicable law. Accordingly, the "parade of horribles" proffered by the County – e.g., that the City Order "nullifies the Franchise Agreement," that it would "override the termination date in the Franchise and eviscerate any County authority with respect to the City electric utility's operations and use of County property," Initial Brief at 8, that "the City Order invalidates the entire Franchise Agreement" and "exempt[s] the City from the Franchise Agreement," Initial Brief at 25, that it would impair the County's rights to use and regulate the use of its property, Initial Brief at 10, that the "PSC effectively grant[ed] a new franchise in perpetuity to the City," Initial Brief at 38, and other similar allegations, are at best misplaced. The Court should accordingly affirm the City Order in its entirety.

II. THE COUNTY'S PETITION FAILED TO COMPLY WITH THE REQUIREMENTS OF SECTION 120.565, FLORIDA STATUTES, AND THE PSC'S COUNTY ORDER DECLINING TO ISSUE THE REQUESTED DECLARATORY STATEMENTS SHOULD BE AFFIRMED.

The County's Petition requested that the Commission issue a declaratory statement under section 120.565, Florida Statutes (2014), concerning fourteen enumerated questions. Section 120.565, Florida Statutes, provides for issuance of an agency's opinion as to the applicability of a statutory provision or order of that

agency, as it applies to the particular set of circumstances of the party requesting the declaratory statement. The County's Petition failed to comply with the threshold pleading requirements of section 120.565 because the County's Petition: 1) improperly assumed that the Commission's Territorial Orders are invalid; 2) did not provide a sufficient description of how the County may be substantially affected under a particular set of facts by the Commission's Territorial Orders or statutory provisions within the Commission's jurisdiction; 3) improperly requested a general legal advisory opinion; 4) improperly sought a declaratory statement determining the conduct of the City and other third parties; 5) improperly required the PSC to analyze statutes and constitutional provisions outside of the PSC's jurisdiction; and 6) erroneously requested the Commission to issue a declaratory statement concerning issues that were the subject of pending circuit court litigation at the time the Commission issued the County Order. For these reasons, the County's Petition failed to meet the requirements of section 120.565, Florida Statutes, and the Commission's denial of the County's Petition should be affirmed.

A. THE PSC ARTICULATED VALID GROUNDS FOR DENYING THE COUNTY'S PETITION.

In the County Order, the Commission specifically enumerated six distinct grounds for denial of the County's Petition. Any one of the six grounds for denial articulated in the County Order is sufficient to support the Commission's denial of the County's Petition.

1. The County's Petition Improperly Assumed that the Commission's Territorial Orders are Invalid.

In Retail Grocers Assoc. of Florida Self-Insurers Fund v. Dep't of Labor and Employment Sec., 474 So. 2d 379, 382 (Fla. 1st DCA 1985), the Court stated:

> . . . we reiterate what the purpose of the declaratory statement is. It is simply a means of establishing "the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his particular set of circumstances only." Section 120.565. Since the declaratory statement procedure provides a means for resolving controversies or answering questions of doubts concerning the applicability of statutes, rules or orders, "the validity of the statute, rule or order is assumed. Therefore, the declaratory statement petition is not a vehicle for testing the validity of the matter on which the declaration is sought."

Id. at 382 (emphasis in original) (quoting Waas, Initiating Agency Action: Petitions for Declaratory Statement and Rulemaking Under the Florida Administrative Procedures Act, 55 Fla. Bar. J. 43 (1981)); see also Citizens v. Florida Pub. Serv. Comm'n, 164 So. 3d 58, 61 (Fla. 1st DCA 2015) (agreeing that " 'the declaratory statement petition is not a vehicle for testing the validity of the [statute or agency actions about] which the declaration is sought.'" (citation omitted)). Stated simply, in a declaratory statement proceeding an agency's orders must be assumed to be valid.

The County is attempting to turn this rule on its head. In the Initial Brief, the County asserts that the County's Petition is "neither a challenge to the PSC's order authority nor an assumption that the [Commission's] Territorial Orders will be invalid." Initial Brief at 45. The County's assertion is inconsistent with the

plain language of the County's Petition. The County clearly identifies the Commission's Territorial Orders as relevant to the Commission's decision. See R 17-18. However, instead of assuming the validity of the orders, the County asks if the orders are invalid (see Question d), or, alternatively assumes that the orders are, in fact, invalid (see Questions e and f). The County's Petition further states:

> This means that the territorial agreements and boundaries must therefore become invalid as well, or at least invalid with respect to the Franchise Area. The expiration of the Franchise, and thus the underlying legal authority for the territorial agreements and boundaries calls into question the PSC's orders approving such agreements . . . .

R 32 (emphasis supplied). This statement is clear evidence that the County is attempting to use this declaratory statement proceeding to collaterally attack the validity of orders that the Commission was required to assume to be valid. See Retail Grocers Assoc., 474 So. 2d at 382.

Moreover, while a petition for declaratory statement may properly assume facts to be true, it cannot properly assume legal conclusions, here the County's assumption that the Commission's Territorial Orders would no longer be valid. This follows directly from the fundamental principles that a petitioner may only ask for a declaration as to the applicability of statutes, rules, and orders to the petitioner in its particular circumstances (see § 120.565, Fla. Stat. 2014), and the principle that agency orders must be assumed to be valid. Retail Grocers Assoc., 474 So. 2d at 382. Here, the County violates these principles by asking the Commission to assume a legal falsehood – the invalidity of the Commission's

Territorial Orders.[11] The requested declarations in the County's Questions a-i, k, l and m are similarly based on circumstances that have not occurred or that are purely hypothetical.

The County's reliance on Citizens as support for its requested declaratory statements is misplaced because the facts of Citizens are distinguishable from the facts of this case. In Citizens, the Court found that the PSC discovery order at issue was not being collaterally attacked by the requested declaratory statement. Citizens, 164 So. 3d at 62. That is not the case here: the County's Petition plainly contends that the granting of its requested declaratory statements "calls into question" the Commission's Territorial Orders. See R 32. Accordingly, the Commission's denial of the County's Petition on the basis that it improperly assumed the invalidity of the Commission's Territorial Orders should be affirmed.

2. The County's Petition Did Not Provide a Sufficient Description of How the County May be Substantially Affected Under a Particular Set of Facts by the Statutory Provisions or Orders it Identifies.

As noted in Section I of this Answer Brief, section 120.565, Florida Statutes, provides in pertinent part

> (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

[11] Territorial agreements that have been approved by the Commission have the full legal effect of the Commission's orders, because they are, in legal fact, part of those orders. City Gas Co. v. Peoples Gas Sys., Inc., 182 So. 2d 429, 436 (Fla. 1965); Public Serv. Comm'n v. Fuller, 551 So. 2d 1210, 1212 (Fla. 1989).

> (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

Similarly, rule 28-105.002, Florida Administrative Code, provides in pertinent part:

> A petition seeking a declaratory statement shall be filed with the clerk of the agency that has the authority to interpret the statute, rule, or order at issue and shall provide the following information:
>
> * * *
>
> (5) A description of how the statutes, rules, or orders may substantially affect the petitioner in the petitioner's particular set of circumstances.

A party seeking a declaratory statement must show that there is an "actual present and practical need" for the requested declaratory statement, and that the declaration addresses a "present controversy." Sutton v. Dep't of Env't'l Protection, 654 So. 2d 1047, 1048 (Fla. 5th DCA 1995).

The allegations of the fourteen Questions for declaratory statement in the County's Petition fail to meet the threshold pleading requirements of section 120.565(2), Florida Statutes, and rule 28-105.002(5), Florida Administrative Code, because each of the Questions is hypothetical and speculative in nature and does not sufficiently articulate how the County will be substantially affected under a specific set of facts by the statutory provisions or orders within the PSC's jurisdiction. It is noteworthy that after the City moved to dismiss the County's Petition, the County informed the Commission that it intended to amend its

pleading, R 475-77, to presumably correct these pleading deficiencies; however, without further explanation, the County did not follow through on its representation to the Commission.[12] The City believes that the County should have amended its pleading to correct its pleading deficiencies and it failed to do so at its own peril.

The County Order explains in detail why each of the fourteen Questions fails to meet the pleading requirements of section 120.565(2), Florida Statutes, and rule 28-105.002(5), Florida Administrative Code; however, an analysis of Question e of the County's Petition is particularly instructive. Question e provides:

> Once the Franchise expires, and **if** the territorial agreements and boundaries approved by the PSC between COVB 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?

[12] At the Agenda Conference, Commissioner Brown asked the County's counsel "back in November you asked for a deferral to amend your pleadings, your petition, but we never had any supplemental modifications or amendments. Could you explain why not?" R 923. The County's counsel responded

> We drafted something, and when we got done and looked at the original and compared it to the amended one, we determined that it was in the County's best interest to proceed, to proceed with the original.

Id.

R 11 (emphasis supplied). This Question is based on a circumstance that would not have occurred for more than two and a half years at the time the County posed the Question (the expiration of the franchise), if ever, and a completely hypothetical and speculative scenario (in which currently valid orders of the Commission become "invalid"). Quite simply, this requested declaratory statement is too hypothetical and too speculative for the County to explain how it will be substantially affected under a particular set of facts. Accordingly, the Commission's denial of the County's Petition should be affirmed.

3. The County's Petition Improperly Requested a General Legal Advisory Opinion.

A declaratory statement[13] should not be issued if it "amounts to an advisory opinion at the instance of parties who show merely the possibility of legal injury on the basis of a hypothetical 'state of facts which have not arisen' and are only 'contingent, uncertain [and] rest in the future.'" Santa Rosa County v. Admin. Comm'n, 661 So. 2d 1190, 1192-93 (Fla. 1995) (emphasis in original) (quoting Williams v. Howard, 329 So. 2d 277, 283 (Fla. 1976)); Apthorp v. Detzner, 162 So. 3d 236, 240 (Fla. 1st DCA 2015).

As described in the previous section, the requested declaratory statements are based wholly on hypothetical and speculative assumptions. For example, Questions a-e of the County's Petition are based on a hypothetical assumption (the

[13] It is well-settled that when determining the availability of a declaratory statement under section 120.565, Florida Statutes, the agency may be guided by the law of declaratory judgments in civil proceedings. See Couch v. State, 377 So. 2d 32, 33 (Fla. 1st DCA 1979).

County supplying electric service) within another hypothetical assumption (the County assuming ownership of the City's electric system). Questions e and f of the County's Petition are similarly convoluted and based on multiple hypothetical assumptions (i.e., the expiration of the Franchise Agreement, invalidation of the Territorial Agreement between the City and FPL, and either the County's operation of the City's electric system or the granting of an exclusive franchise to FPL). Paragraph i of the County's Petition is particularly speculative: the County assumes a legal conclusion, outside the jurisdiction of the Commission and contested by the City, (that the City is not authorized to utilize the County's rights-of-way), assumes future action (unidentified action to ensure the uninterrupted delivery of electric service) by speculative parties (probably the Board, or maybe FPL, or an unidentified supplier). Moreover, Question i invites the Commission to answer an open-ended legal question: "are there any electric reliability or grid coordination issues that the Board must address with respect to the PSC's jurisdiction under Chapter 366?" That is precisely the type of advisory opinion that the Commission must refrain from issuing. Particularly telling is the County's own assertion that "The County Petition . . . simply asks the PSC questions . . . ." Initial Brief at 19.

In sum, because the declaratory statements requested in the County's Petition are based on speculation and hypothetical facts, the Commission properly rejected the County's invitation to issue what amounts to an advisory opinion and denied the County's Petition. See State v. Fla. Consumer Action Network, 830 So.

2d 148 (Fla. 1st DCA 2002) (reversing a grant of declaratory relief because all of the allegations in the complaint were based on speculation and hypothesis).

The County Order appropriately denied the County's Petition based on the specific allegations contained in the fourteen requests for declaratory statement. Moreover, the Commission correctly recognized in the County Order that

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

R 955. This essential question is clearly beyond the scope of the authority of the Commission to answer. Accordingly, the Commission's determination to deny the County's Petition because it calls for an advisory opinion should be affirmed.

4. The County's Petition Improperly Sought a Declaratory Statement Determining the Conduct of the City and Third Parties.

Rule 28-105.001, Florida Administrative Code, provides that a "declaratory statement is not the appropriate means for determining the conduct of another person." The County contends that the Commission ignored or modified the facts and questions in the County's Petition to fabricate a basis for denying the County's questions." Initial Brief at 37. The County asserts that it "carefully crafted its questions in such a manner to limit the scope of such questions solely to the Board

and its potential future actions . . .” Id. The City wholeheartedly agrees with the County -- the Court should focus on how the County “crafted” the requested declaratory statements. For example, the County’s Petition asks the Commission to declare that:

> Once the Franchise expires, the COVB-FPL territorial agreements and boundaries approved by the PSC will become invalid as void or voidable at least with respect to the Franchise Area.

R 39. In this requested statement, the County is asking the Commission to issue a declaratory statement concerning the Commission’s Territorial Agreements, to which the County is not even a party. The requested declaration will significantly and primarily affect the conduct of the City and FPL. Several of the requested Questions similarly appear to seek to determine FPL’s conduct. Moreover, Question k asks the Commission to issue a declaration concerning legal obligations to unknown “third parties.” In addition, a total of eleven of the fourteen requested declaratory statements specifically reference the City by name and will directly or indirectly determine the City’s conduct. As further evidence that the Petition seeks to determine the City’s conduct, the County explained in the County Petition:

> The Board requests the PSC’s confirmation that the termination of the Franchise is without consequence to the Board or any of the Franchise Area customers with respect to those municipal utility contracts of [the City], OUC, FMPA, or any other contracting party with [the City] and that these contracts do not provide [the City] with any authority to continue service in the Franchise Area after the Franchise expires.

R 35. The Commission appropriately rejected the County's attempt to improperly determine the City's (and other parties') conduct and substantial interests and denied the County's Petition for violating rule 28-105.001, Florida Administrative Code. The Commission's County Order should be affirmed.

5. The County's Petition Improperly Requested Declaratory Statements that Would Have Required the Commission to Analyze Statutory Provisions and Provisions of the Florida Constitution Not Within the Commission's Authority.

Rule 28-105.001, Florida Administrative Code, provides in pertinent part:

> A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority.

See also Carr v. Old Port Cove Prop. Owners Assoc., Inc., 8 So. 3d 403, 404 (Fla. 4th DCA 2009). In addition, a declaratory statement is not the appropriate mechanism to interpret a constitutional provision. Id. (citing Myers v. Hawkins, 362 So. 2d 926, 928 (Fla. 1978)).

The Commission declined to issue declaratory statements concerning Questions a-c, e-l, and n because the Questions are premised on legal assumptions concerning the County's alleged statutory authority that derive from statutes and constitutional provisions outside of the Commission's jurisdiction. For example, Question a asks:

> 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?

To answer Question a, the Commission would have had to assume that the County has the authority to take ownership of the City's electric facilities and that the County also has the authority to supply electric services to customers currently served by the City. The Commission has no authority or legal basis to draw these legal conclusions about statutory provisions outside of its jurisdiction.

The County cites no authority for the proposition that the Commission was required to issue declaratory statements premised on legal conclusions concerning statutes and constitutional provisions outside of its jurisdiction, and the Court should not force the Commission to do so. The Commission's denial of the requested declarations that would require analysis of statutory and constitutional provisions outside of the Commission's jurisdiction should be affirmed.

6. The Issues Raised in Question j Were the Subject of Pending Circuit Court Litigation at the Time the PSC Denied the County's Petition.

It is well-established in Florida that

> Where questions presented in a petition for declaratory statement are at issue in pending judicial proceedings, the administrative agency to whom the petition is addressed should refrain from issuing a declaratory statement until the proceedings in court conclude.

Padilla v. Liberty Mut. Ins. Co., 832 So. 2d 916, 919 (Fla. 1st DCA 2002) (citing Kruer v. Bd. of Trustees, 647 So. 2d 129, 134 (Fla. 1st DCA 1994); Suntide

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

> When a case is properly pending in a circuit court, a party cannot compel an agency through a declaratory statement petition to give opinions or decisions concerning the issues, or as to the outcome of controversies, then pending in the court.

Padilla, 832 So. 2d at 920 (citing Kruer, 647 So. 2d at 134).

The County concedes that a circuit court case styled Town of Indian River Shores v. City of Vero Beach, Case No. 31-2014CA-000748 (Fla. 19th Cir. in and for Indian River County, Complaint filed July 18, 2014) ("Town v. City") "did include an issue similar to that raised by Question j."[14] Initial Brief at 62-63. That concession is the end of the analysis -- the Commission was required to refrain from issuing a declaratory statement until the circuit court proceedings conclude. Padilla, 832 So. 2d at 919.

The County asserts that there is no bar to the PSC issuing the declaratory statement in response to Question j because the County is not a party to the Town v. City litigation. Initial Brief at 63. The County's assertion is misplaced. There is no requirement in the case law that the County be a party to the circuit court

[14] The discussion below reflects the state of proceedings at the time the PSC issued the County Order. However, since that time, the Town of Indian River Shores, plaintiff in the pending related litigation, has filed an Amended Complaint, and the Amended Complaint does not include the count that raised the issue similar to the issue raised in Question j in the County's Petition. However, this does not change the analysis -- at the time the PSC issued the County Order, the issue addressed in Question j was pending in circuit court.

litigation. See Kruer, 647 So. 2d at 134 (cited favorably in Padilla, 832 So. 2d at 919-20).

Second, the County argues that because the Town v. City litigation was abated pursuant to section 164.1041, Florida Statutes (2014), at the time the County's Petition was pending before the PSC, there were "no pending judicial proceedings." Initial Brief at 63. Again, the County's argument is misplaced. It is clear from chapter 164, Florida Statutes (2014), that the abatement provided for in section 164.1041, Florida Statutes, did not terminate the Town v. City litigation. Instead, a more reasonable construction of chapter 164, Florida Statutes, is that the abatement provided for by section 164.1041, Florida Statutes, merely suspended the litigation during the dispute resolution processes, upon completion of which, the litigation resumed pursuant to section 164.1056, Florida Statutes (2014), which allows participating parties to avail themselves of any otherwise available legal rights. See generally, Peck v. Ruckdeschel, 336 So. 2d 1230 (Fla. 2d DCA 1976) (abeyance does not result in dismissal of an action.)

The County also contends that the conflict resolution process provided for in chapter 164, Florida Statutes, is not a judicial proceeding and not administrative litigation under chapter 120, Florida Statutes. Initial Brief at 63-64. The County's contentions are in error. The governmental conflict proceedings of chapter 164, Florida Statutes, are triggered by the filing of a lawsuit by one governmental entity versus another. § 164.1041(i), Fla. Stat. A lawsuit clearly is a judicial proceeding. The fact that chapter 164 is not administrative litigation is wholly irrelevant to the

analysis. See Padilla, 832 So. 2d at 920 (pending circuit court action bars issuance of a declaratory statement).

Finally, the County's argument that the Town v. City litigation is based on section 180.02, Florida Statutes, Initial Brief at 64, is similarly irrelevant to the analysis. The County conceded that the Town v. City litigation involves an issue "similar to that raised in Question j." Nothing more is required to authorize the PSC to refrain from issuing the requested declaratory statement. See Padilla, 832 So. 2d at 919 ("where questions presented . . . are at issue in pending judicial proceedings, the administrative agency . . . should refrain from issuing a declaratory statement until the proceedings in court conclude.") (emphasis supplied). Accordingly, the Commission's denial of the declaratory statement concerning Question j should be affirmed.

CONCLUSION

WHEREFORE, as explained in the body of the City's Answer Brief, the PSC correctly issued its declaration in the City Order and correctly denied the County's Petition by the County Order, and accordingly, the Court should affirm both of the orders on appeal.

Respectfully submitted this 17th day of July, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 17, 2015, a true and correct copy of the foregoing was electronically filed with the Florida Courts E-Filing Portal with notice furnished to all registered users, as indicated below:

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Pursuant to Florida Rules of Appellate Procedure 9.210(a)(2), I certify that this Initial Brief of Appellant was generated using Times New Roman, a proportionately spaced font, and has a typeface of 14 points.

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