Filing # 31160346 E-Filed 08/21/2015 12:14:47 PM

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IN THE SUPREME COURT OF FLORIDA

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

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

Petitioner/Appellant,

v.

ART GRAHAM, ETC., ET AL.,

Respondent/Appellee,

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

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The County shall continue to utilize the abbreviations and short forms identified in its Initial Brief. In addition, the County shall refer to its Initial Brief as the "County Initial Brief" and cite it as the "County IB. __."

The PSC's Answer Brief shall be referred to as the "PSC Brief" and cited as "PSC B. __." The City's Answer Brief shall be referred to as the "City Brief" and cited as "City B. __."

Amici Curiae Escambia County, Florida, the Florida Association of Counties, and the Florida Association of County Attorneys will be referred to "County Amici" and their brief in support of the County will be cited as "County Amici B. __." Amicus Curiae Florida Electric Cooperatives Association, Inc. shall be referred to as "FECA" and its brief in support of the PSC shall be cited as "FECA B. __."

STATEMENT OF THE CASE AND FACTS

There is no dispute between the parties regarding the procedural history and basic facts. The PSC and City each provided some additional elaboration and argument regarding some of the facts that will be addressed as is relevant in the Argument Section below.

SUMMARY OF THE ARGUMENT

This is an appeal of two Florida Public Service Commission orders, but both cases involve the PSC's improper exercise of authority in violation of the County's

property rights and contract rights.

In the City Order case, the City did not have standing because the City now admits that there are no facts to support its statutory claims and there was no proposal to modify or terminate the Territorial Orders. Second, the City Order was outside the PSC's authority because it effectively interpreted the Franchise Agreement and the County's franchise authority. Third, the PSC's exclusive and superior jurisdiction is limited only to certain defined electric utility matters delegated in Chapter 366, Florida Statutes, which do not include any authority to grant the use of County property, establish exclusive service areas, or invalidate contractual terms the City agreed to in the Franchise Agreement. Finally, the City Order eliminated the County's ability to negotiate for and receive a franchise fee in violation of Section 366.13, Florida Statutes. The Court's reversal should be a denial on the merits.[1]

In the County Order case, the County Petition was premised on the expiration of the Franchise Agreement and information the County needed to assess what it may do; it was not a collateral attack on the Territorial Orders. There was nothing speculative about the County Petition, the County was not

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[1] The County clarifies that the City Order did not expressly grant either of the two declarations sought by the City, although the PSC did not specifically deny them. Rather, the PSC made its own declaration to the City to continue to serve notwithstanding the expiration of the Franchise Agreement, which should be reversed and denied on the merits.

seeking a general legal opinion or to determine the conduct of third parties, and there was no pending litigation limiting the PSC's ability to answer the Petition.

STANDARD OF REVIEW

City Order. The County agrees that generally this Court will defer to the PSC when the PSC is interpreting its statutes and orders.[2] However, here the PSC stepped ***outside*** Chapter 366, Florida Statutes, when it directed the City to continue to provide electric service "***upon the expiration of the Franchise Agreement***,"[3] which breaches the bargained-for exchange inherent in a Franchise Agreement. Since the PSC has no franchise authority, the PSC's determination that the 30-year term of the Franchise Agreement is not binding requires a *de novo* review. As for the threshold issue of whether the City had standing to seek a declaratory statement, the PSC agrees with the County that that the *de novo* standard of review applies. The City incorrectly asserts that under the *Ameristeel*[4] decision this Court should give deference to the PSC's standing decision, but in that case after reciting the general rule the Court conducted a *de novo* review of the PSC's standing decision, as it should here.

County Order. The PSC and the City agree with the County that the standard of review for the County petition is *de novo* since the PSC found the

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[2] PSC B 24-25; City B. 20-21.
[3] R. at 1050.
[4] *Ameristeel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997).

County lacked standing on all of its requested declarations.[5]

ARGUMENT

I. THE PSC ERRED IN ISSUING THE CITY ORDER BECAUSE THE CITY LACKED STANDING AND THE PSC ACTED OUTSIDE ITS AUTHORITY.

The PSC, City, and FECA would have this Court believe that the City Order case simply involves the PSC exercising its exclusive and superior jurisdiction over electric service providers. But the City Order has nothing to do with the PSC enforcing its Territorial Orders and everything to do with usurping the County's right and ability to control property and contract for a franchise for electric service.

A. THE CITY DID NOT HAVE STANDING FOR THE RELIEF REQUESTED.

1. No Standing Under the Statutes Cited.

The City Petition did not cite to or rely upon any rule for its petition.[6] Rather, the City relied upon Section 366.04(2)(d), Florida Statutes (territorial agreement approval), Section 366.04(2)(e), Florida Statutes (territorial dispute), Section 366.04(5), Florida Statutes (uneconomic duplication of facilities), and the Territorial Orders for the substantive relief it was seeking.[7] However, in its Answer Brief, the City makes several critical admissions regarding its Petition that

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[5] PSC B. 26; City B. 22.

[6] R. at 501-503.

[7] The other two statutes cited by the City Petition do not provide any substantive relief – Section 120.565, Florida Statutes, is the declaratory statement statute, and Section 366.04(1), Florida Statutes, provides the PSC has "exclusive and superior" jurisdiction with respect to those certain powers granted to the PSC.

demonstrate that the City lacked standing to seek any relief from the PSC.

Most importantly, the City now acknowledges that there is no statutory basis for its requested declarations: "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 . . . . "[8] This admission by the City is a complete bar to its Petition since the City failed to meet the minimum standing requirements of Section 120.565, Florida Statutes. Under any review standard by this Court, it was arbitrary and unlawful for the PSC to consider the City Petition, let alone to direct the City to continue to provide electric service after expiration of the Franchise Agreement.[9]

In an effort to go around its lack of statutory authority, the City contends that the County Petition "per se" creates standing.[10] The City argues that the County's attempt "to usurp the PSC's jurisdiction over utility service areas" created "the City's actual practical and present need for the requested declarations."[11] But a

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[8] City B. 30.

[9] *See, MCI Telecommunications Corp. v. Florida Public Service Commission*, 491 So. 2d 539, 541 (Fla. 1986), where this Court reversed the PSC because it "acted arbitrarily and without substantial competent evidence to support its order" when it approved a rate reduction where "the Commission recognized that 'the data presented in this proceeding was imperfect.'" When the petitioning party admits it did not plead sufficient facts, reversal is equally applicable.

[10] City B. 30.

[11] City B. 30.

petition for declaratory statement cannot "usurp" the PSC's jurisdiction. It is well established, and argued by the City against the County Petition, that a declaratory statement is simply "an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency."[12] The County's request for the PSC's legal opinion is just that and nothing more – it does not create standing.

The City next agrees with the County on another key standing issue: "'[t]he 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 . . . ."[13] This is a very important admission since the City and PSC both acknowledge that the PSC is without any authority with respect to the Franchise Agreement.[14] The City attempts to mitigate this admission by stating that "the elephant in the courtroom"[15] is not the expiration of the Franchise Agreement but the County Petition. The City claims that the County Petition is an attempt to establish that the County has the power "to determine what utility would serve the areas in question after the Franchise Agreement expires."[16] But citing to the County Petition for the purpose of "bringing it directly into the City's Petition

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[12] Section 120.565(1), Florida Statutes. City B. 23-24.
[13] City B. 31.
[14] City B. 37; PSC B. 33.
[15] City B. 31.
[16] City B. 31.

docket,"[17] does not create jurisdiction when nothing in the County Petition involves approval of a territorial agreement, a territorial dispute between two utilities, or the uneconomic duplication of facilities by utilities. The City's admission that it lacks facts supporting statutory relief conclusively establishes the City's lack of statutory standing.

2. No Standing from the Territorial Orders

In the face of the City's admitted lack of any statutory authority for its Petition, the PSC's argument that the expiration of the Franchise Agreement impacts the Territorial Orders does not rescue the City's lack of standing.[18] The PSC has acknowledged that it has no authority over franchises.[19] Moreover, the County specifically told the PSC that it was not attempting to make any changes to the Territorial Orders.[20] Thus, none of the cases cited by the PSC are relevant to the City's standing since the County is not challenging the Territorial Orders and the City and FPL have no dispute regarding the Territorial Orders.[21] The PSC has

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[17] City B. 31.
[18] PSC B. 27-32.
[19] R. at 1048.
[20] R. at 322.
[21] The cases cited by the PSC are not relevant as follows: *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995) (electric customers direct challenge under federal antitrust laws to PSC territorial orders); *Pub. Serv. Com'n v. Fuller*, 551 So. 2d 1210, 1211 (Fla. 1989) (collateral attack by one party to a territorial agreement with another utility); *Roemmele-Putney v. Reynolds*, 106 So. 3d 78, 79 (Fla. 3d DCA 2013) (not a decision on the merits, but only threshold jurisdictional authority of PSC to address customer request for service pursuant to

authority to interpret its orders when there is a bona fide challenge to them, but none of the predicates for a declaratory statement are present. The City did not have standing for the PSC to answer the City Petition.

The City's lack of standing and the PSC's lack of jurisdiction to answer the City Petition are further exacerbated by the PSC's decision that the County was without standing to ask its questions.[22] At the time the City Petition was filed, the County Petition was pending before the PSC. Without conceding any City standing from the County Petition, if the "per se" basis for the City Petition was the County Petition, then the PSC's denial of the County Petition rendered the City Petition moot and eliminated any standing for the City. Of course, if this Court reverses the PSC and directs the PSC to address the County's questions, under the statutes, Franchise Agreement, and Territorial Orders already been discussed, the County Petition does not give the City standing.

Whether the City has standing should be reviewed *de novo*. The City's admission that there are no facts supporting any of the statutes it relied upon is dispositive on the City's lack of standing, the County Petition and Franchise

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a territorial order); *In re: Complaint of Reynolds*, Order No. PSC-13-0207 (follow on proceeding to *Roemmele-Putney v. Reynolds*, PSC determines county declaration of critical barrier island insufficient to prohibit electric service); Order No. 13998 (customer asked electric utility to serve it in violation of territorial agreement); Order No. 20400 (utility subject to territorial agreement challenged territorial agreement); Order No. 20808 (customer request to electric utilities violated their territorial agreement).

[22] R. at 959.

Agreement do not convey any standing, and there is no issue regarding the Territorial Orders providing standing. As a matter of law, the Court should reverse the PSC's City Order and deny any declaratory statement to the City.

B. THE CITY ORDER IS AN IMPROPER INTERPRETATION AND LIMITATION OF THE COUNTY'S FRANCHISE AUTHORITY.

Denials by the PSC and the City that the City Order did not interpret, limit, or otherwise address the Franchise Agreement or the County's franchise authority does not change the fact that the City Order did exactly that.

The plain language of the City's requested declarations demonstrate that the City's purpose was to eliminate its obligations under the Franchise Agreement and to circumvent the County's franchise authority. The City's first requested declaration began, "Neither the existence, non-existence, nor expiration of the Franchise Agreement," and posed that the Franchise Agreement has no effect on the City's right to serve in the franchise area. The second declaration similarly claimed that the City's obligation to continue to serve was "without regard to the existence or non-existence of a franchise agreement."[23] While both declarations reference the Territorial Orders, the relief sought was whether the City can ignore the Franchise Agreement's expiration date – a specific, voluntary contractual term – and permit the City to continue to serve without a franchise.

[23] R. at 1049-50.

The actual declaration issued by the PSC is also substantively and solely about restricting the Franchise Agreement and avoiding the County's franchise authority.[24] The City Order declaration states:

> Based upon our findings, we declare 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.[25]

If this declaration was not about the Franchise Agreement or the County's franchise authority, then the last phrase, "upon expiration of the Franchise Agreement," would have been unnecessary. But if you remove this last phrase from the declaration, the remaining statement is unnecessary since that declaration does not resolve or enforce the Territorial Orders. Indeed, the City, both in the City Petition and the City's response to the County Petition, expresses an "unequivocal[] belief" that the City's obligation to serve "will remain intact pursuant to the Commission's Territorial Orders,"[26] rendering an opinion on the City's obligations under the Territorial Orders completely unnecessary. Moreover, by the time the City filed its Petition, the County was on the record as saying that it "is not seeking to terminate the territorial agreements between FPL and [the City]

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[24] Since the PSC did not expressly grant the City's two declarations, it is problematic whether given the issue or deny language of Section 120.565(3), Florida Statutes, whether the PSC can write its own alternative declaration.

[25] R. at 1050.

[26] R. at 689; *see also* R. at 181-182, 699.

nor otherwise to challenge the PSC's authority in this area."[27] Thus, the Territorial Orders were not at issue and not requiring any declaration on their effectiveness.

The only value of a declaration to the City regarding the Territorial Orders is in relationship to the expiration of the Franchise Agreement and escaping the County's franchise authority since there was no territorial dispute between FPL and the City. The City argues that City Order does not have any impact on the County or the Franchise Agreement.[28] The City Order did not expressly engage in an analysis of the County's powers under Chapters 125 and 337, Florida Statutes. However, the directive to continue to provide electric service after the expiration of the Franchise Agreement is a determination regarding the Franchise Agreement and the County's authority. It is a determination that renders the agreed upon 30-year term of the Franchise Agreement meaningless. It is a determination that eviscerates the County's ability to negotiate and grant an exclusive electric service franchise area and contract for the use of its property since the PSC told the City to continue to utilize the County's property without a franchise agreement, effectively in perpetuity.[29] The City Order affects the County and its franchise authority, which are beyond the PSC's statutory authority.

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[27] R. at 322.

[28] PSC B. 33-35; City B. 38-45.

[29] The PSC claims that the County has mischaracterized "the City Order as finding that the Territorial Orders are effective in perpetuity." PSC B. 35. The County's point is that if a territorial order controls the County's property, then the City can serve that area in perpetuity so long as there is a territorial order in effect.

The City, PSC, and FECA argue that the City Order does not preclude a new franchise agreement. However, a franchise agreement is based upon a bargained-for exchange.[30] In the City's enumeration of contractual obligations under the Franchise Agreement,[31] it conveniently omits two crucial elements: (1) the City's agreement to serve only 30 years unless the parties agree to an extension;[32] and (2) the City's acceptance of an exclusive franchise area.[33] If the PSC has the exclusive jurisdiction to tell the City to ignore the 30-year term and to continue to serve and use the County's property without a franchise, the City has everything it needs from the County without the County's involvement – the City gets the use of the County property and an exclusive service area.[34] As this Court has recognized, all of the elements of the Franchise Agreement are a part of the bargained-for exchange.[35] The PSC may not have expressly interpreted or addressed the County's franchise authority, but the effect of the declaration is to remove the County's ability to contract for an exclusive franchise service area and use County property,

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[30] *Santa Rosa County v. Gulf Power Co.*, 635 So.2d 96 (Fla. 1st DCA 1994), *rev. den.*, *Gulf Power Co. v. Santa Rosa County*, 645 So.2d. 452 (Fla. 1994); *Alachua County v. State*, 737 So. 2d 1065, 1068-69 (Fla. 1999).
[31] City B. 42-43.
[32] R. at 22-23, 42, 46.
[33] R. at 22-23, 42, 45.
[34] The City alleged below that only 20 percent of its property is in the City right of way or that the City could bypass the County property entirely. City B. 47; PSC B. 14. Regardless of the extent of the City's use of County property, the bottom line is that the PSC is seeking to control the use of the County's property and denying the County its right to grant a franchise for electric service.
[35] *Supra*, at note 30.

which is outside of the PSC's authority.

The PSC and the City express the belief that it is the PSC that has the exclusive authority to select service providers. The City further contends that the County's authority to "grant a license" via a franchise "is completely separate from the power to determine what electric utility will provide service."[36] But the PSC and City do not understand the County's franchise authority. Notwithstanding the City's prior service history or the investments made in full knowledge of the 30-year term, the mutual execution of the Franchise Agreement became a binding contractual obligation of the parties addressing multiple responsibilities. Black's Law Dictionary's defines a franchise this way:

> The government-conferred right or privilege to engage in a specific business or to exercise corporate powers. . . . "When referring to government grants (other than patents, trademarks, and copyrights), the term 'franchise' is often used to connote more substantial rights, whereas the term 'license' connotes lesser rights. Thus, **the rights necessary for public utility companies to carry on their operations are generally designated as franchise rights**. On the other hand, the rights to construct or to repair, the rights to practice certain professions, and the rights to use or to operate automobiles are generally referred to as licenses."[37]

Consistent with this definition, this Court has said that "when a franchise is

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[36] City B. 40.

[37] Black's Law Dictionary (10th ed. 2014), quoting 1 *Eckstrom's Licensing in Foreign and Domestic Operations* § 1.02[3], at 1–10 to 1–11 (David M. Epstein ed., 1998) (emphasis added).

accepted, it becomes a contract irrevocable unless the right to invoke is expressly reserved and is entitled to the same protection under constitutional guaranties as other property."[38] Here, the right to revoke is reflected in the 30-year term. Moreover, this Court has said that absent a territorial agreement, territorial dispute, or uneconomic duplication of service, the PSC has no authority to designate a utility service area.[39] Thus, the 30-year term and exclusive right to serve were an inherent part of the bargained-for exchange. Decades after the fact, the PSC cannot direct the City to ignore these contractual terms.

To better understand how a franchise service area is integral to the bargained-for exchange in a franchise agreement, the Court should look to what franchising authorities say when a franchise and the PSC's authority are not at issue. The Florida Municipal Electric Association, Inc. ("FMEA"), of which the City is a member and which appeared below as an amicus in both the City Order docket and the County Order docket, not surprisingly agreed with the City below.[40] But FMEA has argued to this Court in another pending case that the bargained-for exchange between a utility and franchise authority includes the designation of an exclusive service area by the franchise grantor:

> The consideration from the municipality in exchange for the fees consists of three parts: (1) the privilege of using

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[38] *Winter v. Mack*, 142 Fla. 1, 8-9 (1940).
[39] *Gulf Coast Elec. Co-op., Inc. v. Johnson*, 727 So. 2d 259, 263 (Fla. 1999).
[40] R. at 240-246, 651-658, 902-903.

> the municipality's rights-of-way, (2) the municipality's agreement not to compete with the electric utility, or to not allow others to compete with the electric utility, during the term of the franchise, and (3) a fee paid to the municipality to offset the costs incurred by the municipality as a result of the electric utility's disparate and exclusive use of public property.[41]

While FMEA presents this information in the context of a municipality, the exclusive service area principle applies to any franchising authority, including counties.[42] The bottom line is that the City's amicus below is now telling this Court that the exclusive service authority of the franchisor is an integral part of the bargained-for exchange in a franchise agreement, contrary to the City's argument here.

As a final argument, the PSC claims that 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,"[43] but it punts those issues to future litigation. It is irresponsible for the PSC to issue an order telling the City to continue to serve while telling the County to sue the City in another judicial proceeding where the City's defense is going to be that it is simply doing what the PSC ordered. Moreover, as the County has demonstrated above, armed with the

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[41] Florida Supreme Court Case Numbers SC15-780 and SC15-890, Brief of Interested Parties Florida League of Cities, Inc., and Florida Municipal Electric Association, Inc., at 7 (June 10, 2015) (citations omitted).

[42] The *Santa Rosa County v. Gulf Power Co.*, 635 So. 2d 96 (1994), case cited by FMEA is a county franchise authority case.

[43] City B. 46. FECA makes a similar claim. FECA B. 13.

PSC directive to continue to serve without a franchise agreement, the City simply has no need for a franchise agreement and no incentive to charge and remit a franchise fee.[44] County Amici Brief provides the Court with additional information regarding how the franchise agreement process works in the context of a bargained-for exchange of rights, duties, and responsibilities for each side.[45]

In the final analysis, the City Order has the effect of interpreting and limiting the Franchise Agreement and the County's franchise authority. The City Order is outside the PSC's statutory authority, and otherwise arbitrary, and should be reversed and denied.

C. THE PSC'S EXCLUSIVE JURISDICTION IS LIMITED TO CHAPTER 366, FLORIDA STATUTES, AND THE PSC MUST RESPECT THE COUNTY'S PROPERTY AND CONTRACT RIGHTS.

The County does not contest that the PSC has been granted exclusive and superior jurisdiction by the Legislature over those certain matters set forth in Chapter 366, Florida Statutes. But contrary to the assertions of the PSC and City,

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[44] To this end, Thomas Cloud's discussion of how at least one utility attempted to get out of its franchise fee obligations after the *Alachua County v. State*, 737 So. 2d 1065 (Fla. 1999), decision is especially instructive. *See Birch Rods In The Cupboard: The Link Between Municipal Franchise Purchase Options And Franchise Fees In Florida*, 35 Stetson L. Rev. 383. While the *Winter Park* decision, discussed by Mr. Cloud and *infra* , pages 18-19, made clear a holdover utility's franchise fee obligations, that was in the context of a transition to a new utility and not like the instant case where there is no transition because the PSC has told the utility to continue to serve and not give up service.

[45] County Amici B. 6-14.

the PSC does not have absolute and total authority with respect to electric utilities. A plain reading of Chapter 366, Florida Statutes, reveals that while the Legislature has granted the PSC exclusive and superior jurisdiction over those matters specifically enumerated, those powers do not include any authority regarding exclusive service franchises or the property rights of county governments.

The powers at issue in the City Order case – the PSC's exclusive and superior authority under Chapter 366, Florida Statutes, with respect to electric utilities and the County's rights under the Florida Constitution and Chapters 125 and 337, Florida Statutes, with respect to its control of public property through a franchise – are not irrevocably in conflict. The Legislature has assigned to the PSC authority to address issues between utilities regarding service area boundaries and the uneconomic duplication of facilities. But an electric service territorial agreement is a private contact between electric utilities resolving between them which shall serve where without competition by the other. Once a territorial agreement is approved by the PSC, that state action provides the parties with antitrust immunity, which is consistent with the PSC's authority over utility-to-utility relationships.[46] But PSC approval of a contract between utilities does not

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[46] PSC B. 41. Reflecting the PSC's utility authority, this Court has even gone so far as to direct the PSC to approve territorial agreements over the objections of customers who may not receive substantial benefits so long as "[t]he agreement as a whole contained no detriment to the public." *Utilities Commission of City of*

magically transform a territorial agreement into authority to ignore the County's authority with respect to franchises and property rights.

The Legislature has assigned to the County complete control over its public property along with exclusive utility service areas for the benefit of the public. But even the County's authority is not complete. Other governmental authorities and laws regulate electric utilities in such matters as power plant and transmission line siting, construction standards, easements, leases, property use regulations like zoning and permitting, and environmental requirements.[47] Thus, the County's powers operate concurrently with the PSC and in conjunction with other governmental authorities, and it is the duty of this Court to respect those separate spheres of authority and give effect to each exactly as set out by the Legislature.

The PSC dismisses the cases cited by the County, in particular the Winter Park case, arguing that they are not relevant since there were no underlying territorial orders or there was a right to purchase in the respective franchise agreements.[48] But these cases demonstrate that the entity with the underlying property authority determines the use of the property, and the result is no different

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New Smyrna Beach v. Florida Public Service Commission, 469 So. 2d 731, 733 (Fla. 1985).

[47] See, e.g., Section 366.8255, Florida Statutes, where the PSC addresses environmental compliance costs imposed on utilities by other agencies through an annual proceeding where the PSC determines whether and how such costs are to be recovered through rates.

[48] PSC B. 42-46.

even where there is a territorial agreement.

In a recent case where the underlying electric utilities had a territorial agreement and PSC order, the PSC's actions were right in line with the actions it took in the Winter Park case the County discussed in its Initial Brief.[49] The Reedy Creek Improvement District ("Reedy Creek") and Florida Power Corporation ("FPC") were electric utilities with a PSC approved territorial agreement. Reedy Creek was authorized by the Legislature to provide electric service only within its legal boundaries. After the territorial agreement was approved by the PSC, part of Reedy Creek's property area was de-annexed, meaning it lost the underlying property right to provide electric service within the de-annexed area. In view of the change in underlying property rights, the PSC stood aside and approved an amendment to the territorial order removing the de-annexed area.[50] However, applying the PSC's argument in the instant case to the Reedy Creek situation, the PSC should have directed Reedy Creek to continue to serve irrespective of the change in underlying property rights due to the PSC's claimed superior and exclusive jurisdiction. But that is not what happened.

Florida law is clear and explicit: the PSC's authority is to approve territorial agreements, resolve territorial disputes, and avoid the further uneconomic

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[49] County IB. 32-35.

[50] Docket No. 090530-EU, Order No. PSC-10-0206-PAA-EU (April 5, 2010), consummated by Order No. PSC-10-0269-CO-EU (April 29, 2010).

duplication of facilities under the Grid Bill is not unlimited.[51] Contrary to the PSC, City, and FECA arguments, this exclusive statutory authority does not include the right to set service areas in derogation of underlying property rights.[52] The City Order assigns and determines the County's property rights in excess of the PSC's statutory jurisdiction, and the City Order should therefore be reversed and denied.

D. THE CITY ORDER VIOLATES SECTION 366.13, FLORIDA STATUTES

The County has extensively addressed above how the City Order, in directing the City to continue to provide service after the expiration of the Franchise Agreement, means that the City can serve without a franchise. Directing the City to serve without a franchise means the City does not need a franchise agreement to serve and the County is without any bargaining authority to require a franchise fee in violation of Section 366.13, Florida Statutes. The PSC's argument that this issue was not raised below is without merit.[53] It is the PSC's direction to continue service without a franchise that gives rise to the County's Section 366.13, Florida Statutes, claim before this Court. Accordingly, the City Order violates Section 366.13, Florida Statutes, and the City Order should be reversed and denied.

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[51] Sections 366.04(2)(d)-(e), 366.04(5), Florida Statutes. The PSC's further authority over rates and service are not at issue. *Ameristeel*, 691 So. 2d at 478.

[52] City B. 34. *Gulf Coast Electric Cooperative, Inc. v. Johnson*, 727 So. 2d 259 (Fla. 1999).

[53] PSC B. 47-48.

II. THE COUNTY PETITION MET ALL OF THE REQUIREMENTS FOR STANDING TO SEEK A DECLARATORY STATEMENT.

The PSC did everything it could to not answer the County's questions, ignoring the requirements of Section 120.565, Florida Statutes, its own precedents, and the facts presented by the County that the PSC was required to accept as true.

A. THE COUNTY ALLEGED PRESENT, ASCERTAINABLE FACTS.

Contrary to the claims of the PSC and City, the County was not collaterally attacking or otherwise seeking to modify or terminate the Territorial Orders.[54] The County expressly advised the PSC that it was not seeking to overturn or modify the Territorial Orders.[55] The stated purpose of the County Petition was to understand the PSC's authority and the effect, if any, of the expiration of the Franchise Agreement on those matters within the PSC's authority.[56] Only two of the County's 14 questions used the phrase "if the territorial agreements and boundaries approved by the PSC between [the City] and FPL become invalid,"[57] whereas two other questions expressly assumed the validity of the Territorial Orders and a third question asked a generic question regarding the legal status of the Territorial

[54] PSC B. 51-52; City B. 54.
[55] R. 321, 610.
[56] R. at 14, 20, 40 (County Petition, paras. 8, 18, 59).
[57] R. at 12 (County Petition, Questions e and f).

Orders.[58] The reference the County made in its Petition to the expiration of the Franchise Agreement "calling into question" the Territorial Orders is not an assumption that the Territorial Orders are invalid and has been taken out of context. The County Petition specifically recognized that the Territorial Orders can be changed only through lawful process at the PSC.[59] This is not a collateral attack on the Territorial Orders. Pursuant to the *Citizens*[60] case, the County Order should be remanded and the PSC directed to answer the County Petition.

B. THE COUNTY IS SUBSTANTIALLY AFFECTED AND IS NOT SEEKING A GENERAL LEGAL OPINION OR TO DETERMINE THE CONDUCT OF THIRD PARTIES.

The PSC and City both incorrectly claim that the County's requested declarations are hypothetical and speculative or otherwise seek a general legal opinion or to affect the conduct of third parties.[61] Read in context, the expiration of the Franchise Agreement in 2017 is a real, present, actual event with the County's questions focused on what it may be able to do, and nothing more.[62]

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[58] R. at 12-13 (County Petition Questions g and h expressly assumed that the Territorial Orders "remain valid" and Question d was the generic "what will be the legal status" of the Territorial Orders question).

[59] R. at 33 (County Petition, para. 46 and footnote 23).

[60] *Citizens of State ex rel. Office of Public Counsel v. Florida Public Service Commission,* 164 So. 3d 58 (Fla. 1st DCA 2015).

[61] PSC B. 55-59; City B. 55-60.

[62] While the County challenges the City's standing for its declaratory statement petition and the merits of its request, the County did not object to the City Petition for being hypothetical or speculative.

There is nothing speculative, hypothetical, or uncertain about what is going to happen in 2017 – the Franchise Agreement will no longer be effective. What happens thereafter will be shaped, at least in part, by what the PSC says in response to the County's questions. In the words of the case cited by the City, it is a present problem that is "'indicative of threatened litigation in the immediate future which seems unavoidable, even though the differences between such parties as to their legal rights have not yet reached the stage of an actual controversy', which involves the active pressing of the claim on the one side and active opposition thereto on the other."[63]

The County needs the PSC's responses so that the County can timely plan and thoughtfully implement whatever the County may do within its authority. Lawful process, and litigation, may occur to address the City's property on the County right of way and other City assets outside the City's limits. This is why the County asked so many questions all of which except three expressly ask about the County's status or what the County may or may not do.[64] These questions two-and-a-half years in advance of the franchise expiration are not too remote given the

[63] *Ready v. Safeway Rock Co.*, 24 So. 2d 808, 810-811 (Fla. 1946) (Brown, J., concurring specially and quoting 16 American Jurisprudence, *Declaratory Judgments,* section 10).

[64] R. at 11-13. Questions a, b, and c ask "Will the Board" become a utility questions; Questions e, f, g, and h ask about limitations on the Board's ability to act; and Questions i, j, k, and l ask what the Board can or should do. Questions d, m, and n ask specific questions about the PSC's jurisdiction.

Winter Park process took longer and the City felt compelled to ask its own questions.[65] The County does not need a definitive plan in order to file a declaratory statement – that plan realistically comes after the PSC addresses the County Petition.[66] The County met all of the standing requirements for a present controversy and was not seeking a general legal opinion.

C. THERE WAS NO PENDING LITIGATION BARRING QUESTION J OF THE COUNTY PETITION

The PSC and City mischaracterize the County's participation in the Chapter 164 process, which was for a substantially different purpose and separate and distinct from the question posed by the County Petition. The County Petition did not ask the PSC to resolve whether the City complied with the referendum, but rather whether the PSC had any jurisdiction with respect to Section 366.04(7), Florida Statutes, and whether the City's failure to conduct a referendum had any legal effect on the Franchise Agreement or the Board.[67] The PSC improperly denied this question, and the County Order should be reversed.[68]

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[65] R. at 319, 328-331; County IB. 32-35; City B. 58.
[66] PSC B. 55.
[67] PSC B. 60-63; City B. 63-66; R. at 13.
[68] What is especially disingenuous about the PSC's actions is that while the PSC used the Town lawsuit to avoid answering the County's question, now the PSC is telling the Circuit Court that the court has no jurisdiction to hear any of the Town's claims.

CONCLUSION

The City did not have standing for its Petition, the PSC does not have the authority to interfere with the Franchise Agreement or its contractual term of service or exclusive service area, and the PSC should have addressed the County Petition since the County has standing for the declarations it sought. Accordingly, the City Order, Case No. SC15-504, should be reversed and denied on the merits and the County Order, Case No. SC15-505, should be reversed and remanded to the PSC with directions to address the merits of the County Petition.

Respectfully submitted, this 21st day of August, 2015.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

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

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