BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement by the Town of Indian River Shores Regarding the Commission's Jurisdiction to Adjudicate the Town's Constitutional Rights	Docket No. 160013-EM Filed: February 3, 2016

/

THE TOWN OF INDIAN RIVER SHORES' REPLY TO THE CITY OF VERO BEACH'S RESPONSE IN OPPOSITION TO PETITION FOR DECLARATORY STATEMENT

The Town of Indian River Shores (the "Town") files this reply to the City of Vero Beach's ("Vero Beach's") Response in Opposition ("Response")[1] to the Town's Petition for Declaratory Statement ("Petition").

INTRODUCTION AND SUMMARY

The Town initiated this proceeding to seek a declaratory statement on one narrow question: whether the Florida Public Service Commission ("PSC" or "Commission") has jurisdiction under Chapter 366, Florida Statutes, or other statutory authority, to adjudicate whether the Town has a constitutional right, codified by statute, to be protected from unconsented exercises of extra-territorial powers by Vero Beach within the Town's corporate limits.[2] The Town came to the PSC with this question only after first asking the Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County (the "Circuit Court") to issue a declaration concerning the constitutional rights at issue. Vero Beach moved to dismiss the Town's constitutional claim in the Circuit Court arguing that the court lacked jurisdiction because the exclusive jurisdiction rests with the PSC. Counsel for the PSC appeared as *amicus curiae* in the Circuit Court proceeding in support of Vero

[1] Vero Beach filed its Response simultaneously with moving to intervene in this proceeding. Vero Beach's Motion to Intervene has not yet been granted.

[2] This proceeding does not involve the PSC's ultimate authority to approve or modify territorial agreements under Chapter 366, Florida Statutes. Rather, the Town's Petition only addresses the PSC's jurisdiction to adjudicate and resolve threshold constitutional issues as they apply to the Town's particular circumstances, which are preliminary to any exercise of the PSC's undisputed jurisdiction over modification of territorial agreements.

Beach's jurisdictional arguments. Following written and oral argument by counsel, including PSC counsel's assertions that the PSC had exclusive jurisdiction over the Town's constitutional claim, the Circuit Court dismissed the Town's claim for declaratory relief regarding its constitutional rights due to lack of jurisdiction. In its order of dismissal, the Circuit Court advised the Town that it could seek relief with the PSC. The positions taken by Vero Beach, and the statements of PSC counsel in the Circuit Court proceeding, appear to directly contradict prior PSC orders stating that the PSC cannot resolve constitutional questions or interpret statutes such as Section 166.021 that address local government powers. Those contradictions have left the Town in doubt whether the PSC in fact has the necessary jurisdictional tools to adjudicate and the resolve the threshold constitutional issues raised by the Town. In order to avoid costly administrative litigation by selecting the proper course of action in advance, the Town filed the very narrow request for declaratory relief in order to know where to adjudicate and enforce its rights under the Constitution.

Vero Beach's 54-page Response confirms that the Town's reasons for seeking formal clarification of this jurisdictional issue were well-founded. Vero Beach, having persuaded the Circuit Court to dismiss the Town's attempt to protect its constitutional rights in deference to the PSC's jurisdiction, now asks the PSC to deny the Town's Petition here in deference to the Circuit Court's ruling. In doing so, Vero Beach not only has reversed course yet again, but also wrongly argues that the Circuit Court addressed the substantive merits of the Town's constitutional claim, when it dismissed that claim for lack of jurisdiction. That argument defies Florida law which makes it clear that a dismissal for lack of jurisdiction is ***not*** an adjudication on the merits. But that is not all. Contrary to its prior arguments to the Circuit Court, Vero Beach now argues that it is "black-letter law" that only the Circuit Court has jurisdiction over the Town's constitutional questions. By a procession of inconsistent positions, Vero Beach seems intent on trying to put the

Town in a proverbial "Catch-22" where there will be no forum for the Town's constitutional claim to be timely heard. The PSC should not be deterred by this smokescreen.

Instead, the PSC should respond to the Town's Petition and provide a clear answer regarding whether or not it has jurisdiction to address the Town's constitutional claim. Somewhat surprisingly, in its Response, Vero Beach itself has answered this question from its perspective by stating that it is "a statement of basic, generally known, and commonly recognized black-letter law in Florida, i.e., that administrative agencies, including the PSC, cannot interpret the Florida Constitution." (Response at 31.) The Town is simply asking the PSC to apply this "black-letter law" to the Town's particular circumstances as set forth in its Petition.

DISCUSSION

I. Vero Beach Misrepresents The Circuit Court's Ruling, Which Dismissed the Town's Constitutional Claim Based On Lack Of "Subject Matter Jurisdiction" And Not On The Merits.

Vero Beach's Response asserts repeatedly that the Circuit Court has already ruled on the merits of Town's constitutional questions, arguing that "[t]he Town indeed got a ruling, but it was not the ruling that the Town wanted." (Response at 34 n.1.) Vero Beach states that the "Town's constitutional claim was in fact decided by the Circuit Court when it stated that Vero Beach 'provide[s] electric service in the territorial area approved in the Territorial Orders'…" (Response at 36.) Vero Beach furthermore states that "the Court addressed ***and*** ruled on the Town's constitutional claim." (Response at 37) (emphasis in original). This is a deliberate and blatant mischaracterization of the Circuit Court's Order, as Vero Beach well knows.

In fact, the Court expressly dismissed the Town's claim based only on a finding that it was "without subject matter jurisdiction to grant the relief requested." (Ex. C to Response and Ex. H to Petition, Order at 5.) Indeed, the only grounds raised for dismissal by Vero Beach and by the

PSC's counsel were jurisdictional. (Ex. A hereto, Vero Beach's Motion to Dismiss at 4-15; Ex. I to Petition, PSC's Memorandum.) The Circuit Court expressly ruled that the claims were dismissed for lack of jurisdiction, and specifically indicated that the Town could seek relief in the PSC. (Order at 6.) As a matter of law, there is nothing in this record that would support Vero Beach's facially indefensible assertion that the Circuit Court "ruled on the Town's constitutional claim." (Response at 37.)

First and foremost, Florida law makes clear that a dismissal for lack of jurisdiction is not an adjudication on the merits; indeed, a court that is without jurisdiction can make no ruling on the merits. Accordingly, "Florida Rule of Civil Procedure 1.420(b), specifically provides that dismissals for lack of jurisdiction, improper venue, and lack of indispensable party, are ***not on the merits***." *Smith v. M. St. Vil.*, 714 So. 2d 603, 604 (Fla. 4th DCA 1998); *see also* Fla. R. Civ. P. 1.420(b). This is true regardless of whether or not a court uses the term "with prejudice." *Miami Super Cold Co. v. Griffin Indus., Inc.*, 178 So. 2d 604, 605 (Fla. 3d DCA 1965) ("Although the dismissal of a complaint or crossclaim for want of jurisdiction is not an adjudication on the merits … it is proper to designate such a dismissal as being with prejudice, in order to preclude it from being refiled in that cause where there is a want of jurisdiction. But 'with prejudice', as so used in such order of dismissal, does not operate to bar the filing of suit thereon in a separate cause or court having jurisdiction.").

Second, the Court itself stated that "[a]lthough this Court is without jurisdiction to decide the relief requested in Count I, the Town may seek relief before the Commission and, if unsuccessful there, by direct appeal to the Florida Supreme Court." (Order at 5-6.) If the Circuit Court "ruled on the Town's constitutional claim," as Vero Beach argues, then why did the Court

advise the Town it could go to the PSC to seek relief? Vero Beach's argument completely defies the face of the Order.

Third, the only grounds raised in Vero Beach's motion to dismiss in the Circuit Court action, and which were supported by the memorandum filed by counsel for the PSC, were that the Court was without jurisdiction. (Ex. A at 4-15.) The caption summarizing Vero Beach's argument stated "Count I of Plaintiff's Amended Complaint Should be Dismissed Because the Declaratory Relief Requested by Plaintiff Falls Within the Exclusive Jurisdiction of the PSC, and as a Result This Court Lacks Subject Matter Jurisdiction Over Count I of Plaintiff's Amended Complaint." (Ex. A at 4.) Vero Beach made three specific arguments: (1) that the "PSC Has Exclusive and Superior Jurisdiction" (*id.*, §I.A at pages 5-12), (2) that the "PSC Has Primary Jurisdiction Over the Subject Matter" (*id.*, §I.B at pages 13-14), and (3) that the Town "Failed to Exhaust Its Administrative Remedies" by not going to the PSC first (*id.*, §I.C at pages 15). Vero Beach raised no arguments for dismissal on the merits of these constitutional issues, including none of the merits-based arguments discussed in Section II below, which Vero Beach raises only now and which Vero Beach admits in its response that the PSC does not have jurisdiction to resolve. (Response at 31.)

Ironically, Vero Beach expressly argued to the Circuit Court that dismissal was required because the PSC "has the primary jurisdiction ***to determine and declare its jurisdiction*** over any matter arguably within that jurisdiction." (Ex. A at 13 (emphasis added).) Indeed, the Town is invoking precisely that purported jurisdiction of the PSC "to determine and declare its jurisdiction" over the constitutional questions raised in the Petition. Now, however, Vero Beach inexplicably argues that the PSC cannot and should not issue such a declaration about its own jurisdiction.

Fourth, the fact that the Circuit Court's ruling was based on jurisdiction and not on the merits is also consistent with the position advocated to the Circuit Court by PSC counsel who appeared at the hearing on the motion to dismiss. At that hearing, the Town expressed concern that if the Court dismissed its constitutional claim for lack of jurisdiction and the Town raised this constitutional issue to the PSC, the Town could be whipsawed into jurisdictional "limbo", which is precisely what Vero Beach is advocating here. (Ex. G to Petition, at 52:1-10.) The PSC's counsel specifically addressed the Town's concern and told the Court:

> Furthermore, the statement of Town's counsel that if pushed to the PSC, if the Town were to ask for a declaratory statement, and in order to be consistent with the orders, the Public Service Commission will say we need to be in Circuit Court, I will disagree with that. Based upon what has been alleged in Count I in the amended complaint, I can represent to the Court that if the Town were to come with a declaratory statement asking the questions that it asks in the context of what it has asked to the Court, the Office of General Counsel would recommend to the Commission that a declaratory statement be issued.

(Ex. G to Petition, at 66:3-15.) The Town has not yet sought anything more than a declaration on the PSC's jurisdiction to adjudicate the Town's constitutional rights. But, as foreshadowed, Vero Beach is arguing that the Town is in the wrong place apparently in an effort to leave the Town without any forum to address its constitutional claim.

II. Vero Beach's Legal Arguments On The Merits Are Immaterial And, In Any Event, Erroneous.

Again, to be clear, the Town is not seeking a declaratory statement on the merits of its constitutional claim. It is only seeking a declaratory statement as to the PSC's jurisdiction to adjudicate the Town's constitutional claim as it applies to the Town's particular circumstances. In its Response, however, after arguing that the PSC should dismiss the Town's Petition, Vero Beach goes on to argue the merits over which it admits the PSC does not have jurisdiction.

Even though the Town is not seeking a ruling on the merits of its constitutional claim from the PSC in its Petition, the Town feels obliged to briefly address Vero Beach's merit arguments in its Response, which are wrong as a matter of law and which mischaracterize the Circuit Court's ruling. Article VIII, Section 2(c) of the Florida Constitution makes it clear that a municipality has no inherent extra-territorial powers; instead, the "exercise of extra-territorial powers by municipalities shall be as provided by general or special law."[3] No general or special law currently provides Vero Beach with extra-territorial powers within the corporate limits of the Town. Indeed, the general law in Section 180.02(2), Florida Statute, provides just the opposite -- it states that a municipality's "corporate powers shall ***not*** extend or apply within the corporate limits of another municipality." (emphasis added.)

Vero Beach argues, however, that its exercise of extraterritorial power in the Town is constitutionally valid because the PSC's territorial orders were issued "pursuant to" the general law found in Chapter 366, Florida Statutes. Thus, Vero Beach argues (and wrongly asserts the Circuit Court ruled on the merits) that an agency's order approving a bilateral territorial agreement "pursuant to" Chapter 366 supersedes the protections found in Article VIII, Section 2(c) of our Constitution. The Town fundamentally disagrees with that argument on the merits and will demonstrate at an appropriate hearing on the merits that the clause "provided by general or special law" in the Florida Constitution means that a municipality can only exercise extra-territorial power if the Legislature grants that power to the municipality. A statute giving authority ***to the PSC*** to approve a territorial agreement involving a municipality ***is not*** a legislative grant of extra-territorial power ***to the municipality***, and for Vero Beach to claim otherwise stands our Constitution on its

[3] This constitutional constraint on a municipality's extra-territorial municipal powers has been further codified in Section 166.021(3)(a), Florida Statutes, which states that "[t]he subjects of annexation, merger, and exercise of extraterritorial power … require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution."

head. Moreover, the PSC's jurisdiction under Chapter 366, broad as it may be, certainly does not trump the Florida Constitution. But those constitutional issues are debates for another day. All that the Town is asking in its Petition is whether the PSC ***has jurisdiction*** to adjudicate whether the Town has a constitutional right, codified by statute, to be protected from unconsented exercises of extra-territorial powers by Vero Beach within the Town's corporate limits. Vero Beach's efforts to expand this proceeding into something more than that question is exactly why a procedure for very narrowly-drawn declaratory relief is available: to avoid prematurely engaging in the debate that Vero Beach is trying to inject before there is determination of the proper forum to address those issues. It also illustrates the wisdom of the rule that intervenors must take a case as they find it, as discussed below.

In addition, Vero Beach's attempt to distinguish the PSC's administrative order involving the Reedy Creek Improvement District ("RCID")[4] fails to demonstrate any material difference between the extra-territorial power issues that arose there and the ones here, nor does it defeat the reasons why the Town needs the requested declaratory statement. Vero Beach argues that situation was different because an area was de-annexed from the RCID political boundary. But the pertinent point expressly stated in the PSC's order was that "pursuant to its charter***, RCID cannot furnish retail electric power outside of its boundary***." *Id*. at 2 (emphasis added). If the territorial order approving the bi-lateral agreement between RCID and Progress Energy had superseded the special law creating RCID, then RCID could have continued to furnish electric power outside of its boundary regardless of any change in its boundary, and no change to the territorial order would have been required. In just the same way, the Legislature has not granted Vero Beach the extra-territorial power to serve within the boundaries of the Town without the Town's consent, and that

[4] *In re: Joint petition for approval to amend territorial agreement between Progress Energy Florida, Inc. and Reedy Creek Improvement District*, Order No. PSC-10-0206-PAA-EU, 10 F.P.S.C. 4:23 (Apr. 5, 2010).

consent will expire with the franchise agreement in November 2016. In an appropriate proceeding, the PSC will need to consider that the Legislature has not granted Vero Beach extra-territorial power to serve within the boundaries of the Town just as the PSC did for RCID. But that proceeding is for another day after the jurisdictional question presented in the Town's Petition is answered, and after the appropriate forum properly adjudicates the merits of the threshold constitutional issue -- whether the Town has a constitutional right to be protected from unconsented exercises of extra-territorial power by Vero Beach.

Putting the merits aside, the Town alleged certain matters regarding the ruling in the Circuit Court proceeding, prior orders stating the PSC cannot resolve constitutional questions, and other legal issues, such as the RCID order, to illustrate why it needs clarification of the PSC's jurisdiction to adjudicate questions of constitutional import. Vero Beach's vigorous Response and shifting positions on jurisdiction certainly make clear why the Town should receive a declaration to identify the forum which has jurisdiction. Vero Beach's adversarial arguments on the merits of those issues can be resolved in that proper forum at a later time.

III. The Requested Declaratory Statement Would Not Improperly Interfere With Or Preempt Legal Issues In A Pending Judicial Proceeding.

Vero Beach also argues that it would be improper for the PSC to issue a declaratory statement since these issues are "pending" in the Circuit Court. First, the authorities discussed above make clear that a party whose claim is dismissed with prejudice is not barred from seeking relief as to the claim dismissed on jurisdictional grounds "in a separate cause or court having jurisdiction." *Miami Super Cold Co.*, 178 So. 2d at 605 (stating that a dismissal for lack of jurisdiction, even with prejudice, "does not operate to bar the filing of suit thereon in a separate cause or court having jurisdiction"). Here, Vero Beach obtained dismissal of the Town's claim by arguing that the PSC had jurisdiction, including the jurisdiction to determine its jurisdiction, and

that is what the Town is asking. Indeed, the Circuit Court advised the Town it could seek relief from the PSC. Surely Vero Beach is not prejudiced by the Town's going to the forum which Vero Beach argued to the Circuit Court was the only forum that can address the Town's constitutional claim.

Moreover, Vero Beach's reliance on *Padilla v. Liberty Mut. Ins. Co.*, 832 So. 2d 916 (Fla. 1st DCA 2002) is misplaced. That case stands merely for the proposition that an agency should not permit a party to a controversy to the

> use of the declaratory statement process … as a vehicle for obstructing an opposing party's pursuit of a judicial remedy, or as a means of obtaining, or attempting to obtain, administrative preemption over legal issues then pending in a court proceeding involving the same parties.

Id. at 920 (quoting *Suntide Condo. Ass'n v. Div. of Fla. Land Sales*, 504 So. 2d 1343, 1345 (Fla. 1st DCA 1987)). There is no potential for abuse here, since the Town -- ***not*** Vero Beach -- is the party that sought the judicial remedy in Circuit Court, a request that was dismissed based on Vero Beach's arguments that the PSC, not the Court, had jurisdiction. Nor is the Town "attempting to obtain, administrative preemption over legal issues then pending in a court proceeding," because the Circuit Court has already ruled that it does not have jurisdiction. Vero Beach is correct that the Town retains an appellate right to appeal the Circuit Court's ruling, but even if that could be considered a "pending" issue, Vero Beach expressly argued in the Circuit Court that the PSC must be allowed to declare its own jurisdiction. (Ex. A at 13-14.) This is exactly what the Town is asking for in its Petition. Moreover, the Court itself advised the Town that it "may seek relief before the Commission." (Order at 5-6.) Therefore, the Petition is far from of an abusive "end run" around the judicial process to the detriment of Vero Beach. *See Citizens of State ex rel. Office of Pub. Counsel v. Fla. Pub. Serv. Comm'n & Utils.*, Inc., 164 So. 3d 58, 62 (Fla. 1st DCA 2015) (reversing and remanding denial of petition for declaratory statement where "[t]here is no

indication here, however, that OPC is abusing the declaratory statement process to intrude upon or make an end run around ongoing judicial or administrative proceedings.").

IV. Vero Beach's Opposition And Proposed Intervention Are Procedurally Improper And Should Not Be Allowed To Affect These Proceedings.

Vero Beach's opposition also should be rejected because it seeks to use intervention as a tool to commandeer this otherwise narrow proceeding and expand it into something it is not. Under the PSC's intervention rule, Rule 25-22.039, "[i]ntervenors take the case as they find it." Vero Beach's attempt to improperly inject other legal issues and alleged factual omissions into this proceeding flatly contradicts the rule and purpose of intervention. The Town's Petition asks the PSC to issue a declaratory statement on a narrow question pertaining to the PSC's jurisdiction in order to know where to go to adjudicate and enforce its rights under the Florida Constitution. This narrow question was limited as to the Town's particular circumstances as set forth in the Petition -- not as to Vero Beach's circumstances. Moreover, while Vero Beach may have a substantial interest in the ultimate resolution of these constitutional issues on the merits, its 54-page Response and its Motion to Intervene still fail to clearly articulate its substantial interest in the narrow jurisdictional question presented by the Town.

In addition, Vero Beach has nothing to add to this proceeding since there are no disputed facts involved -- it is a simple legal issue about whether or not the PSC has jurisdiction to rule on constitutional claims, and even Vero Beach in its Response admits that the PSC does not have that jurisdiction. *See State, Dep't of Admin., Div. of Retirement v. Univ. of Fla*., 531 So. 2d 377, 380 (Fla. 1st DCA 1988) (affirming declaratory statement over challenge by intervenor where "[t]he Commission found that the declaratory statement proceeding did not involve new disputed issues of material fact, other than the issue of the university's standing to request declaratory statement. That finding is supportable, given that the issue before the Commission was a question of law as

to whether the county extension agents were entitled to participate in ORP on the basis of their total salaries.")

Conclusion

The Town believes that it has a fundamental constitutional right under Florida's Constitution to be protected from unconsented exercises of extra-territorial powers by Vero Beach. The Town filed for a declaratory statement because it needs to know whether the PSC can adjudicate and resolve that constitutional issue. The Town deserves an answer to this narrow jurisdictional question so that, going forward, it can avoid costly administrative litigation by selecting the proper course of action to enforce its constitutional rights.

In its 54-page Response, Vero Beach lays out a series of inconsistent and hyper-technical arguments on why the PSC should refuse to answer the question. Moreover, much of Vero Beach's Response goes to the merits of whether it is constitutionally permissible for that municipality to exercise extra-territorial powers within the Town without the Town's consent. But those are merit-based, constitutional issues for another day.

As for the present, the PSC should respond to the Town's Petition and provide a clear answer regarding whether or not it has jurisdiction to adjudicate and resolve the Town's constitutional claim. Somewhat surprisingly, in its Response, Vero Beach itself has answered this question from its perspective by stating that it is "a statement of basic, generally known, and commonly recognized black-letter law in Florida, i.e., that administrative agencies, including the PSC, cannot interpret the Florida Constitution." (Response at 31.) The Town is simply asking the PSC to apply this "black-letter law" to the Town's particular circumstances as set forth in its Petition.

The Town respectfully requests that the PSC reject Vero Beach's arguments and grant the Town's Petition.

Respectfully submitted this 3rd day of February 2016.

HOLLAND & KNIGHT LLP

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

Attorneys for Petitioner Town of Indian River Shores

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was provided by electronic transmission to: Kathryn Cowdery, Esq. (kcowdery@psc.state.fl.us), Florida Public Service Commission, Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399 and Schef Wright, Esq. (schef@gbwlegal.com) and John T. LaVia, III, Esq. (jlavia@gbwlegal.com), Gardner, Bist, Bowden, Bush, Dee, LaVia & Wright, P.A., 1300 Thomaswood Drive, Tallahassee, Florida 32308 this 3rd day of February 2016.

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

EXHIBIT A

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

Case No.: 31-2014CA-000748

TOWN OF INDIAN RIVER SHORES,
A Florida municipality,

Plaintiff,

v.

CITY OF VERO BEACH,
A Florida municipality,

Defendant.

_____/

VERO BEACH'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendant, CITY OF VERO BEACH, FLORIDA (hereinafter referred to as "Vero Beach"), by and through its undersigned counsel and pursuant to Rule 1.140, *Florida Rules of Civil Procedure*, moves this Court to dismiss Plaintiff's, TOWN OF INDIAN RIVER SHORES (hereinafter referred to as "Plaintiff"), Amended Complaint in its entirety, and in support of this Motion would show:

1. On July 18, 2014, Plaintiff filed a four-count Complaint against Vero Beach, seeking declaratory and injunctive Relief. A copy of Plaintiff's Complaint is attached hereto as **Exhibit "A."**

2. On July 24, 2014, this Court entered an Order of Abatement Pursuant to Chapter 164, Florida Statutes. A copy of the Order is attached hereto as **Exhibit "B."**

3. On May 18, 2015, a Stipulated Motion to Lift Abatement and to Extend Deadline for Response to Anticipated Amended Complaint was filed with this Court. On

May 23, 2015, this Court entered an Order lifting Abatement and Extending Deadline for Response to Anticipated Amended Complaint, in which Vero Beach was granted fifty (50) days from the date of service of Plaintiff's Amended Complaint to respond to said Amended Complaint. A copy of the Order Lifting Abatement is attached hereto as **Exhibit "C."**

4. On May 18, 2015, Plaintiff filed Plaintiff's Amended Complaint. A copy of Plaintiff's Amended Complaint is attached hereto as **Exhibit "D."** The fiftieth day following May 18, 2015, is July 7, 2015, and therefore, this Motion to Dismiss is timely filed.

5. Plaintiff's Amended Complaint alleges the following causes of action: (1) Count I, for Declaratory Relief that Upon the Imminent Expiration of the Franchise Agreement the City Does Not Have the Legal Right to Provide Electric Service Within the Town, and that the Town has the Right to Decide How Electric Service is to be Furnished to Its Inhabitants; (2) Count II, for Anticipatory Breach of Contract; (3) Count III, for Breach of Contract; and (4) Count IV, for Declaratory and Supplemental Relief Relating to the City's Unreasonable and Oppressive Electric Rates.

6. Count I of Plaintiff's Amended Complaint should be dismissed because the declaratory relief requested by Plaintiff falls within the exclusive jurisdiction of the Florida Public Service Commission (hereinafter referred to as "PSC"). As a result, this Court lacks subject matter jurisdiction over Count I of Plaintiff's Amended Complaint. Moreover, the Town has failed to respect the fact that the PSC has the primary jurisdiction over this matter, and further, the Town has failed to exhaust its administrative remedies.

7. This Court should dismiss Count II of Plaintiff's Amended Complaint alleging anticipatory breach of contract for failure to state a cause of action upon which relief can be granted for three (3) reasons. First, Plaintiff has failed to allege that Vero Beach absolutely repudiated any of its obligations prior to the date in which performance for said obligations was required. Instead, Plaintiff merely alleged that Vero Beach intends to continue performance of all of Vero Beach's obligations by providing electric service to Plaintiff; which is wholly insufficient to state a cause of action for anticipatory breach of contract. Second, Vero Beach's right and obligation to provide electric service under governing orders of the PSC[1] are separate and distinct from the rights and obligations under the Franchise Agreement[2] between Vero Beach and Plaintiff. Third, the only damages alleged by Plaintiff in Count II of Plaintiff's Amended Complaint are attorneys' fees and costs. Said damages are not recoverable in the present action, and as a result, Plaintiff has failed to state a cause of action upon which relief can be granted.

8. Count III of Plaintiff's Amended Complaint for breach of contract seeks relief in the form of a refund, which this Court is not legally authorized to grant. As a result, this Court should dismiss Count III of Plaintiff's Amended Complaint for failure to state a cause of action upon which relief can be granted.

9. This Court should dismiss Count IV of Plaintiff's Amended Complaint seeking declaratory and supplemental relief for four (4) reasons. First, Count IV of Plaintiff's Amended Complaint fails to allege any of the necessary elements required to state a cause of action for declaratory relief. Second, rate-setting is purely a legislative

---

[1] These PSC orders are referred to herein as the "PSC's Territorial Orders" and are included in **Exhibit "E."**

[2] A copy of the Franchise Agreement between Vero Beach and Plaintiff is attached hereto as **Exhibit "H."**

function, and as such, review of legislative rate-setting is a function within the exclusive province of the court, not a jury. Plaintiff improperly seeks to have this Court delegate the exclusively judicial power of reviewing the legislative function of rate-setting to a jury. Third, Plaintiff's request for supplemental relief pursuant to Section 86.061, *Florida Statutes*, is procedurally improper. A party requesting supplemental relief pursuant to Section 86.061, *Florida Statutes*, must first obtain a declaratory judgment in that party's favor and then file a motion for supplemental relief pursuant to Section 86.061. Fourth, Count IV of Plaintiff's Amended Complaint for declaratory relief seeks relief in the form of a refund, which this Court is not legally authorized to award.

MEMORANDUM OF LAW

I. Count I of Plaintiff's Amended Complaint Should be Dismissed Because the Declaratory Relief Requested by Plaintiff Falls Within the Exclusive Jurisdiction of the PSC, and as a Result This Court Lacks Subject Matter Jurisdiction Over Count I of Plaintiff's Amended Complaint.

This Court lacks subject matter jurisdiction over Count I of Plaintiff's Amended Complaint, because the declaratory relief requested by Plaintiff—i.e., that, upon expiration of the Franchise Agreement, (a) the Plaintiff has the right to determine what electric utility will thereafter provide service within the Plaintiff's corporate limits, and (b) Vero Beach will no longer have the right to provide electric service to customers within the Plaintiff's corporate limits—falls within the exclusive jurisdiction of the PSC. Consequently, this Court should dismiss Count I of Plaintiff's Amended Complaint. Moreover, the Town has failed to respect the fact that the PSC has the primary jurisdiction over this matter, and further, the Town has failed to exhaust its administrative remedies,

and for these reasons as well, the Court should dismiss Count I of Plaintiff's Amended Complaint.

A. The PSC Has Exclusive and Superior Jurisdiction Over the Relief Requested in Count I of Plaintiff's Amended Complaint, and Accordingly, This Court Should Dismiss Count I.

Chapter 366, *Florida Statutes*, governs the provision of electric utility service in Florida. Section 366.04, *Florida Statutes*, explicitly sets forth the jurisdiction of the PSC with respect to the service areas of electric utilities in the State of Florida.[3] Specifically, Section 366.04(2) provides:

> In the exercise of its jurisdiction, the [PSC] shall have power over electric utilities for the following purposes:
>
> * * *
>
> (d) To **approve territorial agreements** between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction.
>
> * * *
>
> (e) To **resolve . . . any territorial dispute involving service areas** between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction.

Fla. Stat. § 366.04(2)(d)-(e) (2014) (emphasis added). Additionally, Section 366.04(5) provides:

> The [PSC] shall further have 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.

Fla. Stat. § 366.04(5).

Section 366.04(1), *Florida Statutes*, further states unequivocally that:

> The **jurisdiction conferred upon the [PSC] shall be exclusive and superior** to that of **all other** boards, agencies, political subdivisions,

[3] Under Section 366.02, *Florida Statutes*, the term "commission" is defined as "the Florida Public Service Commission."

> municipalities, **towns**, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the [PSC] shall in each instance prevail.

Fla. Stat. § 366.04(1) (emphasis added); *see also Public Service Com'n v. Fuller*, 551 So. 2d 1210 (Fla. 1989) (hereinafter, *PSC v. Fuller*, recognizing the PSC's exclusive jurisdiction); *Roemmele-Putney v. Reynolds*, 106 So. 3d 78 (Fla. 3d DCA 2013) (recognizing the PSC's exclusive jurisdiction).

Count I of Plaintiff's Amended Complaint seeks a declaratory judgment from this Court, asking the Court to do the following:

> (1) Declare that upon expiration of the Franchise Agreement [Plaintiff] has the right to determine how electric service should be provided to its inhabitants, which includes either through direct provision of service or by contracting with other utility providers of its choosing;
>
> (2) Declare that upon expiration of the Franchise Agreement [Vero Beach] has no legal right to provide extra-territorial electric service to customers residing within the corporate limits of the Town [of Indian River Shores].

Plaintiff's Amended Complaint at 14.

However, the declaratory relief requested by Plaintiff falls within the exclusive jurisdiction of the PSC as set forth in Sections 366.04(2)(d)-(e) and 366.04(5), *Florida Statutes*.

In sum and substance, the Plaintiff asks this Court to declare that, upon expiration of the Franchise Agreement, the Plaintiff has the right to determine what electric utility—e.g., Vero Beach, or Plaintiff itself, or another electric utility of Plaintiff's choosing—will thereafter provide electric service within the Plaintiff's corporate limits. The Plaintiff further asks this Court to declare that, upon expiration of the Franchise Agreement, Vero Beach will have no legal right to provide service within the Plaintiff's corporate limits. Pursuant to the above-cited statutes and well-developed decisional law of both the PSC

and the Florida Supreme Court, the jurisdiction to decide both of these matters is vested solely in the Florida Public Service Commission, and accordingly, as a matter of law, Count I of Plaintiff's Amended Complaint should be dismissed.

Under Florida's statutory framework, the PSC has the authority to approve territorial agreements between and among electric utilities, Fla. Stat. § 366.04(2)(d), and such territorial agreements merge with and become part of the PSC's orders approving them. *PSC v. Fuller* at 1212. The PSC's territorial orders determine which utilities provide electric service in the areas delineated in the territorial agreements, until and unless the PSC modifies or terminates such orders. *Id.* Jurisdictionally, then, the PSC—and not the Plaintiff—has the exclusive and superior jurisdiction to determine which utility serves in what service areas, and jurisdictionally, only a modification or termination of the PSC's orders can change which utilities are authorized to serve in what areas. Thus, the Court lacks subject matter jurisdiction to grant the Plaintiff's requested relief, and accordingly, the Amended Complaint should be dismissed. Moreover, as discussed below, Vero Beach provides service pursuant to such PSC orders, and those orders have not been modified or terminated.

Vero Beach provides electric utility service within the service area described in Vero Beach's territorial agreement with Florida Power & Light Company (hereinafter referred to as "FPL"). The territorial agreement between Vero Beach and FPL, including all amendments thereto, has been approved by the PSC by the following PSC 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 & 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 FPLL 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 and 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) (hereinafter collectively referred to as "PSC's Territorial Orders").[4] Vero Beach's service area, as approved by the PSC's Territorial Orders, includes an area within the Town of Indian River Shores, which is the subject of the present lawsuit.

In a recent case before the PSC involving virtually identical facts, the Commission considered a petition for declaratory statement filed by Vero Beach, in which Vero Beach sought the PSC's declaration that the expiration of a franchise agreement between Vero Beach and Indian River County would not affect Vero Beach's right and obligation to provide electric service in Vero Beach's designated service areas under the PSC's Territorial Orders, and that Vero Beach can lawfully continue to serve in its PSC-approved service areas after expiration of the Vero Beach-Indian River County franchise. The PSC fully considered the matter, including memoranda from Indian River County and oral argument, and issued its declaratory statement, stating that:

> 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.

[4] Copies of the PSC's Territorial Orders are attached hereto as **Composite Exhibit "E."**

In re: Petition of the City of Vero Beach, Florida, for a Declaratory Statement Regarding Effect of the Commission's Orders Approving Territorial Agreements in Indian River County, Docket No. 140244-EM, Order No. PSC-15-0102-DS-EM (February 12, 2015), a copy of which is attached hereto as **Exhibit "F."**[5]

Significantly for the jurisdictional issues here presented to this Court, the PSC reached its decision by the following analysis:

> ***Pursuant to Section 366.04(2), F.S., we have power over electric utilities to approve territorial agreements between and among municipal electric utilities and other electric utilities under our jurisdiction.*** Additionally, pursuant to Section 366.04(5), F.S., we have 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." ***Section 366.04(1), F.S., provides that the jurisdiction conferred upon us*** "shall be ***exclusive and superior to that of all other*** boards, agencies, political subdivisions, ***municipalities, towns, villages***, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the [C]ommission shall in each instance prevail."
>
> ***Territorial orders are subject to our power over all electric utilities pursuant to Section 366.04(2)(d) and (e), F.S***. Roemmele-Putney v. Reynolds, 106 So. 3d 78, 81 (Fla. 3d DCA 2013). ***Any modification or termination of a Commission-approved territorial order must first be made by this Commission*** pursuant to our exclusive jurisdiction. See Fuller, 551 So. 2d at 1212. ***We have this authority so that we may carry out our express statutory purpose of avoiding the uneconomic duplication of facilities and our duty to consider the***

[5] The PSC simultaneously denied a petition for declaratory statement filed by Indian River County, essentially seeking results opposite to the declaratory statement granted to Vero Beach, *In re: Petition for Declaratory Statement or Other Relief Regarding the Expiration of the Vero Beach Electric Service Franchise Agreement, by the Board of County Commissioners, Indian River County, Florida*, Docket No. 140142-EM, Order No. PSC-15-0101-DS-EM (February 12, 2015); a copy of this PSC order is included here as **Exhibit "G."** Both the PSC's order granting Vero Beach's requested declaratory statement and the PSC's order denying Indian River County's requested declaratory statement are pending on appeal to the Florida Supreme Court. *Indian River County v. Graham*, Case No. SC-15-504, and *Indian River County v. Graham*, Case No. SC15-505.

> ***impact of such decisions on the planning, development, and maintenance of a coordinated electric power grid in Florida***. Id.; Section 366.04(5), F.S. ***The statutory authority granted to us to approve and enforce territorial agreements is not subject to local regulation***. Roemmele-Putney, 106 So. 3d at 81 (where the Court stated that our statutory authority would be eviscerated if initially subject to local governmental regulation). As pointed out by Vero Beach, TECO [Tampa Electric Company], FECA [the Florida Electric Cooperatives Association], and FMEA [the Florida Municipal Electric Association], failure of this Commission to actively supervise the territorial decisions of utility service territories would be considered per se Federal antitrust violations under the Sherman Act, 15 USC §12. Parker, 317 U.S. at 350.
>
> ***Vero Beach provides electric service to the territory described in the Territorial Orders. We have given Vero Beach the right and the obligation to serve customers within the territory described in the Territorial Orders. These orders have not been amended or modified to delete the unincorporated Indian River County area from Vero Beach's service territory. Because the Territorial Orders are valid Commission orders, Vero Beach will retain its right and obligation to provide electric service to customers within the territory described in the Territorial Orders unless and until we modify those orders.***

Exhibit "F," p. 15 (emphasis added).

Thus, the PSC has the jurisdiction, and has exercised its jurisdiction, to determine that Vero Beach shall serve in the areas delineated in the PSC's Territorial Orders. This Court lacks the subject matter jurisdiction to issue any order that would grant to the Plaintiff, Town of Indian River Shores, the authority to make any such determinations, regardless of the presence or expiration of a franchise agreement. The Town's Amended Complaint is a blatant collateral attack on the PSC's exclusive jurisdiction and on the PSC's lawful orders issued in its exercise of that jurisdiction. The Court should reject this meritless collateral attack and dismiss Count I of the Amended Complaint.

In *PSC v. Fuller*, the Florida Supreme Court addressed a dispute concerning a territorial agreement that had been approved by the PSC. The subject territorial agreement approved the service areas of two utilities, FPL and the City of Homestead,

Florida (a municipal utility), whose service areas adjoined and abutted each other's. *PSC v. Fuller*, 551 So. 2d at 1210. The history of the proceedings included PSC proceedings in which some customers, expressing dissatisfaction with being served by one of the utilities, sought to have the PSC modify or terminate the territorial agreement; the customers' complaint was denied. *See Accursio v. Florida Power & Light Co.*, Order No. 9259 (February 26, 1980). In 1988, the City of Homestead notified FPL that it was terminating the territorial agreement. FPL objected and filed a petition for declaratory statement with the PSC, seeking a declaration as to the rights and obligations of FPL and Homestead under the territorial agreement and the PSC's order approving it. *PSC v. Fuller*, 551 So. 2d at 1211. While FPL's petition was pending at the PSC, the City of Homestead filed an action in the Dade County Circuit Court seeking a declaration of rights and a construction of the agreement. *Id.* FPL filed a motion to dismiss and a motion to abate the circuit court action, both of which were denied. *Id.* The PSC then brought an original action before the Florida Supreme Court seeking a writ prohibiting the Circuit Court from conducting further proceedings toward modifying or terminating the territorial agreement at issue. The Florida Supreme Court held that the circuit court was without jurisdiction over the subject matter of the City of Homestead's complaint, as the PSC had exclusive jurisdiction over the PSC's order with which the territorial agreement had merged. *Id.* at 1212-13.

Similarly, in the present case, the territorial agreement between Vero Beach and FPL has been approved by the PSC. Vero Beach's service area, as set forth in said territorial agreement, includes a significant portion of the Town of Indian River Shores—i.e., Plaintiff. Further, the PSC's February 12, 2015 Declaratory Statement specifically

states that "Vero Beach will retain its rights and obligations to provide electric service to customers within the territory described in the Territorial Orders unless and until we modify those orders." *See* **Exhibit "F."** p. 15. Despite these facts, Plaintiff, by way of Count I of Plaintiff's Amended Complaint, requests this Court render a declaratory judgment in derogation of the PSC's Territorial Orders and the PSC's February 12, 2015 Declaratory Statement.[6]

The Plaintiff's requested relief is substantively no different from that sought by the City of Homestead in the proceedings that led to the Court's opinion in *PSC v. Fuller*. The Plaintiff, here in the posture of a customer (and a would-be competing utility), is asking this Court to modify the PSC's Territorial Order so as to change the service area of at least one of the utilities governed by that Order, *i.e.*, Vero Beach, as approved by the territorial agreement that is part of the Order. Like the Dade County Circuit Court, this Court lacks the subject matter jurisdiction to grant the relief requested by the Plaintiff, and accordingly, this Court should dismiss Count I of the Amended Complaint.

---

[6] Specifically, Paragraph Numeral Fifty-Three (53) of Plaintiff's Amended Complaint states:

> [U]pon the Court's declaration that [Vero Beach] does not have the statutory powers to provide extra-territorial electric service within the Town [of Indian River Shores] without [Plaintiff's] consent and that the [Plaintiff] has the right to decide how electric service is to be furnished to its inhabitants, **the PSC's order approving the territorial agreement should simply be conformed to the Court's order**.

The Court should note well what the Town is asking this Court to do, namely, to issue a declaratory judgment order that will modify an existing PSC order. This Court should reject this blatantly improper collateral attack by the Town on the PSC's jurisdiction and on the PSC's lawful Territorial Orders.

B. The Court Should Dismiss Count I of Plaintiff's Amended Complaint Because the PSC Has Primary Jurisdiction Over the Subject Matter Raised Therein, and Because the PSC Has the Jurisdiction, In the First Instance, To Determine and Declare Its Jurisdiction.

Beyond the legal fact that the PSC has exclusive and superior jurisdiction over the subject matter of Count I of Plaintiff's Amended Complaint, the PSC also has the primary jurisdiction to determine and declare its jurisdiction over any matter arguably within that jurisdiction. In a recent case, also involving the PSC's jurisdiction over provisions of a territorial agreement, Monroe County brought a complaint against a municipal utility, Keys Energy Services ("KES") and certain private landowners on No Name Key, an island that at the time had no utility-supplied electric service at all, who wanted KES to provide electric service to them; the County asserted that the provision of such service would violate express provisions of the Monroe County Code. *Roemmele-Putney v. Reynolds*, 106 So. 3d 78, 79-80 (Fla. 3d DCA 2013). The PSC filed an *amicus curiae* brief in the circuit court action, in which the PSC suggested to the Circuit Court that the PSC had "exclusive jurisdiction to resolve the issue, or at the very least . . . to determine the scope of [the PSC's] jurisdiction in the first instance.", *In re: Complaint of Robert D. Reynolds and Julianne C. Reynolds Against Utility Board of the City of Key West, Florida d/b/a Keys Energy Services Regarding Extending Commercial Electrical Transmission Lines to Each Property Owner of No Name Key, Florida*, Docket No. 120054-EM, Order No. PSC-13-0207-PAA-EM at 3 (May 21, 2013), The Circuit Court dismissed the County's action with prejudice, holding that the PSC does, in fact have the exclusive jurisdiction to determine whether service should be extended to No Name Key as sought by the landowners. *Roemmele-Putney*, 106 So. 3d at 80.

Monroe County appealed the dismissal to the Third District Court of Appeal.

The Third District affirmed the Circuit Court's dismissal of the County's action, stating as follows:

> ***As a threshold matter, and as the State entity charged by law with planning and regulating the generation and transmission of electrical power throughout Florida, the PSC is to determine its own jurisdiction.*** *Fla. Pub. Serv. Comm'n v. Bryson*, 569 So.2d 1253 (Fla.1990). Although *Bryson* involved a public utility, the case holds that "the PSC must be allowed to act when it has at least a colorable claim that the matter under its consideration falls within its exclusive jurisdiction as defined by statute." *Id.* at 1255. Any claim by the County or by the appellant homeowners that the PSC does not have jurisdiction may be raised before the PSC and, if unsuccessful there, by direct appeal to the Florida Supreme Court. Art. V, § 3(b)(2), Fla. Const.
>
> The appellees and the PSC also have argued, and we agree, that KES's existing service and territorial agreement (approved by the PSC in 1991) relating to new customers and "end use facilities" is subject to the PSC's statutory power over all "electric utilities" and any territorial disputes over service areas, pursuant to section 366.04(2)(e), Florida Statutes (2011). ***The PSC's jurisdiction, when properly invoked (as here), is "exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties."*** § 366.04(1). Section 4.1 of the 1991 KES territorial agreement approved by the PSC expressly acknowledges the PSC's continuing jurisdiction to review in advance for approval or disapproval any proposed modification to the agreement.
>
> * * *
>
> The Florida Legislature has recognized the need for central supervision and coordination of electrical utility transmission and distribution systems. ***The statutory authority granted to the PSC would be eviscerated if initially subject to local governmental regulation and circuit court injunctions of the kind sought by Monroe County in the case at hand.*** The appellants do retain, however, the right to seek relief before the PSC, and we express no opinion as to the merits of any such claims by the appellants in that forum.
>
> The circuit court's order dismissing the County's complaint with prejudice is affirmed.

Id. at 80-81 (emphasis added).

Thus, the PSC not only has the exclusive and superior jurisdiction over the subject matter presented by Plaintiff's Amended Complaint, the PSC also has the jurisdiction to determine its own jurisdiction, and this Court should dismiss Count I of Plaintiff's Amended Complaint.

C. The Court Should Dismiss Count I of Plaintiff's Amended Complaint Because Plaintiff Has Failed to Exhaust Its Administrative Remedies.

Additionally, Plaintiff's Amended Complaint failed to allege that Plaintiff has exhausted its administrative remedies. If Plaintiff genuinely believed that this Court has jurisdiction to render the declaratory relief requested in Count I of Plaintiff's Amended Complaint, then Plaintiff would have first petitioned the PSC for a declaratory statement regarding its ability to provide electric services within the Town of Indian River Shores under its "Home Rule Powers," notwithstanding the PSC's Territorial Orders governing that same service area. Consequently, even if the PSC's jurisdiction over the subject matter of Count I of Plaintiff's Amended Complaint was not "exclusive and superior" to that of this Court, this Court would lack jurisdiction over Count I of Plaintiff's Amended Complaint, since Plaintiff failed to exhaust its available administrative remedies.[7] As a result, this Court should Dismiss Count I of Plaintiff's Amended Complaint.

---

[7] As a general rule, parties are required to pursue administrative remedies before resorting to the courts to challenge agency action. *Central Florida Inv., Inc v. Orange County Code Enforcement Board*, 790 So. 2d 593, 596 (Fla. 5th DCA 2001); *City of DeLand v. Lowe*, 544 So. 2d 1165 (Fla. 5th DCA 1989). A reviewing court may not entertain a suit when the complaining party has not exhausted available administrative remedies. *Orange County, Fla. v. Game & Fresh Water Fish Comm'n*, 397 So. 2d 411 (Fla. 5th DCA 1981). Failure to exhaust administrative remedies goes to the subject matter jurisdiction of the court to hear a matter. *District Bd. Of Trustees of Broward Community College v. Caldwell*, 959 So. 2d 767, 770 (Fla. 4th DCA 2007).

II. This Court Should Dismiss Count II of Plaintiff's Amended Complaint for Failing to State a Cause of Action Upon Which Relief can be Granted, Since Plaintiff Has Failed to Allege that Vero Beach Absolutely Repudiated Any of Its Obligations Prior to the Date in Which Performance for Said Obligations Was Required, Since Vero Beach's Right and Obligation to Provide Electric Service to Plaintiff Under the PSC's Territorial Orders Are Separate and Distinct From the Franchise Agreement, and Since the Only Damages Alleged by Plaintiff in Count II are Attorneys' Fees and Costs.

This Court should dismiss Count II of Plaintiff's Amended Complaint alleging anticipatory breach of contract for failure to state a cause of action upon which relief can be granted for three (3) reasons. First, Plaintiff has failed to allege that Vero Beach absolutely repudiated any of its obligations prior to the date in which performance for said obligations was required. Instead, Plaintiff merely alleged that Vero Beach intends to continue to provide electric service to plaintiff after the Franchise Agreement ends; which is wholly insufficient to state a cause of action for anticipatory breach of contract. Second, Vero Beach's right and obligation to provide electric service under the PSC's Territorial Orders are separate and distinct from the rights and obligations under the Franchise Agreement[8] between Vero Beach and Plaintiff. Third, the only damages alleged by Plaintiff in Count II of Plaintiff's Amended Complaint are attorneys' fees and costs. Said damages are not recoverable in the present action, and as a result, Plaintiff has failed to state a cause of action upon which relief can be granted.

A. Plaintiff Has Failed to Allege that Vero Beach Absolutely Repudiated Any of Its Obligations Prior to the Date in Which Performance for Said Obligations Was Required.

"An anticipatory breach of contract occurs **before the time has come when there is a present duty to perform** as the result of words or acts evincing an intention to refuse

[8] A copy of the Franchise Agreement between Vero Beach and Plaintiff is attached hereto as **Exhibit "H."**

performance in the future." *Alvarez v. Randon*, 953 So. 2d 702, 709 (Fla. 5th DCA 2007) (emphasis added). Therefore, an anticipatory breach of contract requires an "**absolute repudiation** by one of the parties **prior to the time when his performance is due under the terms of the contract**." *Mori v. Matsushita Elec. Corp. of America*, 380 So. 2d 461, 463 (Fla. 3d DCA 1980) (emphasis added); *see also* 23 Richard A. Lord, *Williston on Contracts* § 63:29 (4th ed. 1990) ("an anticipatory breach of contract is one committed **before** the time when **there is a present duty of performance** . . . .") (emphasis added) (internal quotation marks omitted).

By way of example, in *Twenty-Four Collection, Inc. v. M. Weinbaum Const., Inc.*, a corporation and a contractor entered into a contract in which the contractor agreed to make improvements to the corporation's leasehold. *Twenty-Four Collection, Inc. v. M. Weinbaum Const., Inc.*, 427 So. 2d 1110, 1111 (Fla. 3d DCA 1983). After the execution of the contract between the parties, the contractor informed the corporation that if the corporation did not agree to eliminate a "penalty clause" contained within the contract between the two parties, then the contractor would cease performance under the contract. *Id.* The Third District Court of Appeal held that the contractor's demand, coupled with his threat to walk off the job prior to completing his obligation under the contract was "as a matter of law, an anticipatory breach of the contract." *Id.* at 1112.

Similarly, in *Kaplan v. Laratte*, two parties agreed to the purchase and sale of real estate. *Kaplan v. Laratte*, 944 So. 2d 1074-75 (Fla. 4th DCA 2006). After the parties executed the contracts for sale, the seller contacted the buyer and informed him that the seller was not going to go through with the sale. *Id.* The Fourth District Court of Appeal held that once the seller informed the buyer that he was no longer going to perform his

obligations, the buyer had an immediate cause of action against the seller as a result of the seller's anticipatory breach of the contract. *Id.* at 1075.

In the present case, Count II of Plaintiff's Amended Complaint attempts to state a cause of action for Anticipatory Breach of Contract. However, there is not a single allegation under Count II of Plaintiff's Amended Complaint that Vero Beach absolutely repudiated any duty to perform prior to the time in which performance for said duty was due. Instead, Plaintiff's argument is not that Vero Beach will no longer perform its obligations under the contract between Plaintiff and Vero Beach, but instead, Plaintiff argues that Vero Beach will continue to provide electric service to Plaintiff.[9] Somehow, according to Plaintiff's novel argument, the continued provision of electric service amounts to an anticipatory breach of contract. Plaintiff's argument is illogical, not supported by any applicable law, and is utterly insufficient to state a cause of action for anticipatory breach of contract.

Indeed, the Florida Supreme Court has explicitly recognized that electric utilities may, even must, continue to provide service and to otherwise comply with contractual duties under franchise agreements after such franchise agreements expire. In *Florida Power Corp. v. City of Winter Park*, 887 So. 2d 1237 (Fla. 2004), the issue was whether the City of Winter Park could continue to receive a franchise fee from the incumbent utility under an expired franchise agreement for as long as the utility continued using the public rights-of-way to provide service within Winter Park. *Id.* at 1238. The Florida Supreme

[9] Specifically, Paragraph Numerals Sixty-Four (64) and Sixty-Five (65) of Plaintiff's Amended Complaint allege that Vero Beach has breached the Franchise Agreement by repudiating its obligation to recognize the expiration of the Franchise Agreement on November 6, 2016, and asserting that Vero Beach will continue to provide electric service to Plaintiff.

Court held that after the franchise agreement had expired, the parties operated under an implied contract, and that the utility had to continue paying the franchise fee. *Id.* at 1241. See also *Town of Belleair v. Florida Power Corp.*, 897 So. 2d 1261 (Fla. 2005). In this instance, Vero Beach's right and obligation to continue providing service are grounded firmly in the PSC's Territorial Orders, and the Plaintiff's asserted anticipatory breach claim in Count II has no merit or basis in law.

Consequently, this Court should dismiss Count II of Plaintiff's Amended Complaint, as it fails to state a cause of action upon which relief can be granted.

B. Count II of Plaintiff's Amended Complaint Should be Dismissed Since Vero Beach's Right and Obligation to Provide Electric Service Under the PSC's Territorial Orders Are Separate and Distinct From the Rights and Obligations Under the Franchise Agreement and Since Plaintiff Attempts to Impose Obligations on Vero Beach That Are Non-Existent Under the Franchise Agreement.

Paragraph Numeral Sixty-Four (64) of Plaintiff's Amended Complaint alleges that:

> [Vero Beach] has breached the Franchise Agreement by repudiating its obligation to recognize the expiration of the Franchise Agreement on November 6, 2016, and asserting that it will continue to exert extra-territorial monopoly powers and extract monopoly profits within the Town [of Indian River Shores] following the expiration of the Franchise Agreement.

Additionally, Paragraph Numeral Sixty-Five (65) of Plaintiff's Amended Complaint alleges "[Vero Beach] has repudiated its obligations under the Franchise Agreement and breached the Franchise Agreement by asserting that its electric facilities will continue to occupy [Plaintiff's] rights-of-way and other public areas after the Franchise Agreement expires."

However, Vero Beach does not contest, and has never contested, the expiration date of the Franchise Agreement as provided by the express terms of said Agreement. Nonetheless, Vero Beach has the right and obligation to provide electric service to Plaintiff

under the PSC's Territorial Orders. *See* **Exhibits "E"** and **"F."** Therefore, despite the impending expiration of the Franchise Agreement, which Vero Beach fully recognizes, Vero Beach has the right, and is obligated, to continue to provide electric service to Plaintiff under the PSC's Territorial Orders; which are separate and distinct from the Franchise Agreement. Somehow, according to Plaintiff, the intended performance of a future obligation, which is separate and distinct from any right or obligation under the Franchise Agreement and which occurs after the expiration of the Franchise Agreement, amounts to an anticipatory breach of contract. Plaintiff's faulty logic is not supported by any principle of Florida contract law. Consequently, Plaintiff has failed to state a cause of action upon which relief can be granted.

Under the express terms of the Franchise Agreement, Vero Beach has no obligation under the Franchise Agreement to remove its electric facilities from Plaintiff's rights-of-way upon the expiration of the Franchise Agreement. *See* **Exhibit "H."**[10] Since Vero Beach has no obligation to remove its electric facilities from Plaintiff's rights-of-way upon the expiration of the Franchise Agreement, it is impossible for Vero Beach to breach said Agreement by failing to remove its electric facilities upon the expiration of the Franchise Agreement. Consequently, Plaintiff has failed to state a cause of action for anticipatory breach of contract, and this Court should dismiss Count II of Plaintiff's Amended Complaint.

---

[10] A copy of the Franchise Agreement was attached to Plaintiff's Amended Complaint as Exhibit A. Any exhibits that are attached to a complaint are properly considered as part of the complaint for all purposes. *Bott v. City of Marathon*, 949 So. 2d 295, 296 (Fla. 3d DCA 2007); *Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So. 3d 1246, 1250 (Fla. 2d DCA 2011).

C. Count II of Plaintiff's Amended Complaint Should be Dismissed Since the Only Damages Pled by Plaintiff are Attorneys' Fees and Costs and Said Damages are Not Recoverable in the Present Action.

It is black-letter law in Florida that "attorneys' fees can derive only from either a statutory basis or an agreement between the parties." *Fla. Hurricane Prot. & Awning, Inc. v. Pastina*, 43 So. 3d 893, 895 (Fla. 4th DCA 2010); *see also Trytek v. Gale Industries, Inc.*, 3 So. 3d 1194, 1198 (Fla. 2009). Therefore, a claim for attorneys' fees must be supported by: (1) a specific statutory provision; or (2) a specific contractual provision.

Count II of Plaintiff' Amended Complaint attempted to state a cause of action for anticipatory breach of contract. However, the only damages pled by Plaintiff in Count II of Plaintiff's Amended Complaint are the attorneys' fees and costs that Plaintiff allegedly incurred as a result of initiating the present lawsuit. Specifically, Paragraph Numeral Sixty-Six (66) of Plaintiff's Amended Complaint alleges:

> [Plaintiff] has been **harmed** by [Vero Beach's] anticipatory breach of the Franchise Agreement's expiration terms **because <u>it has been required to take formal action to protect its rights</u>** as a franchising municipality from continued service and occupation of [Plaintiff's] right of way (sic) and public areas by [Vero Beach] without [Plaintiff's] consent.

However, Plaintiff failed to allege a statutory basis to support Plaintiff's claim for attorneys' fees and/or costs. Additionally, Plaintiff failed to allege that the Franchise Agreement, which was attached as an exhibit to Plaintiff's Amended Complaint, provides for an award of attorneys' fees and/or costs. The reason for Plaintiff's deficient pleadings is clear, as the Franchise Agreement is devoid of any provision permitting an award of attorneys' fees and/or costs, nor does any Florida Statute provide for such an award. It is well-settled Florida law that courts cannot and do not add terms to contracts. *See Pierce v. Isaac*, 184 So. 509 (Fla. 1938) ("Courts are without power to make contracts for parties, or to

rewrite, alter or change the same when made"). Consequently, this Court should dismiss Count II of Plaintiff's Amended Complaint, as it fails to state a cause of action upon which relief can be granted.

III. Count III of Plaintiff's Amended Complaint Seeks Relief in the Form of a Refund, Which This Court is Legally Precluded from Awarding.

Count III of Plaintiff Amended Complaint for breach of contract seeks relief, in the form of a refund, which this Court is not legally authorized to grant. As a result, this Court should dismiss Count III of Plaintiff's Amended Complaint for failure to state a cause of action upon which relief can be granted.

"In Florida, it is a well-recognized principle of law that **rate-setting** for municipal utilities is a **legislative function** to be performed by legislative bodies like local governments and the commissions to which these bodies delegate such authority." *Mohme v. City of Cocoa*, 328 So. 2d 422, 424 (Fla. 1976) (emphasis added) *see also Miami Bridge Co. v. Miami Beach Ry. Co.*, 12 So. 2d 438, 446 (Fla. 1943) ("[T]he power to make rates is legislative rather than judicial."); *City of Pompano Beach v. Oltman*, 389 So. 2d 283, 286 (Fla. 4th DCA 1980) ("Utility rate making by municipalities is a legislative function . . . ."). Separation of powers precludes a reviewing court from engaging in rate-setting[11]—i.e., from actually setting rates—since that would be an incursion into the legislative arena. *Oltman*, 389 So. 2d at 286 ("Courts may not engage in rate making, since this is an unlawful incursion in the legislative arena.").

A court's power to review the purely legislative function of ratemaking is **limited** to making a judicial determination that said rates are not unreasonable or discriminatory.

[11] The terms "ratemaking," "rate making," and "rate-setting" are equivalent. The word "ratemaking" is more frequently used in the context of utility rate regulation, e.g., by the PSC.

Id.; *see also Mohme*, 328 So. 2d at 424-25 ("Our courts will intervene to strike down unreasonable or discriminatory rates prescribed by the Legislature, a municipality, or municipal commission . . . ."); *Miami Bridge Co.*, 12 So. 2d at 445 (stating that "courts deal with the existing rates," and that "[t]heir power is confined to the determination of whether a given rate is a reasonable rate"). Additionally, rate-setting is prospective, not retroactive. *Westwood Lake, Inc. v. Dade County*, 264 So. 2d 7, 12 (Fla. 1972). As such, a reviewing court has no authority to fix prospective rates. *See Mohme*, 328 So. 2d at 425 ("[C]ourts will not themselves fix prospective rates."). "Thus, the court can strike down a rate, but it cannot impose some other rate." *Gargano v. Lee County Bd. Of County Com'rs*, 921 So. 2d 661, 666 (Fla. 2d DCA 2006). Similarly, a reviewing court cannot determine a reasonable rate "for the past and then order the difference returned." *Id.* at 668. Thus, a reviewing **court may not award a refund for amounts paid in the past**. A reviewing court is "only entitled to enter a prospective injunction declaring the current fee unreasonable and to make recommendations regarding what it would consider a maximum reasonable rate." *Id.*

Count III of Plaintiff's Amended Complaint attempted to state a cause of action for breach of contract. However, Plaintiff requested that this Court "[a]ward [Plaintiff] damages in an amount reflecting the difference between the amount [Vero Beach] has charged [Plaintiff] for electric rates and the amount [Plaintiff] would have paid if such rates were reasonable." Regardless of how eloquently Plaintiff attempted to word the relief requested under Count III of Plaintiff's Amended Complaint, it is clear that Plaintiff is seeking a refund of past payments for electric service. Furthermore, the law is very clear that this Court is not authorized to determine a reasonable rate "for the past and then

order the difference returned." *Gargano*, 921 So. 2d at 666. Instead, this Court is only authorized "to enter a prospective injunction declaring the current fee unreasonable and to make recommendations regarding what it would consider a maximum reasonable rate." *Id.* Consequently, Count III of Plaintiff's Amended Complaint for breach of contract seeks relief that this Court is not legally authorized to grant. As a result, this Court should dismiss Count III of Plaintiff's Amended Complaint for failure to state a cause of action upon which relief can be granted.

IV. This Court Should Dismiss Count IV of Plaintiff's Amended Complaint Since it Fails to State a Cause of Action Upon Which Relief Can be Granted, Since it Improperly Requests This Court Delegate the Exclusively Judicial Power of Reviewing the Purely Legislative Function of Rate-Setting to a Jury, and Since Plaintiff's Request for Supplemental Relief is Both Procedurally Improper and Legally Prohibited.

This Court should dismiss Count IV of Plaintiff's Amended Complaint seeking declaratory and supplemental relief for four (4) reasons. First, Count IV of Plaintiff's Amended Complaint failed to allege any of the necessary elements required to state a cause of action for declaratory relief. Second, rate-setting is purely a legislative function, and as such, review of legislative rate-setting is a function within the exclusive province of the court, not a jury. Plaintiff improperly seeks to have this Court delegate the exclusively judicial power of reviewing the legislative function of rate-setting to a jury. Third, Plaintiff's request for supplemental relief pursuant to Section 86.061, *Florida Statutes*, is procedurally improper. A party requesting supplemental relief pursuant to Section 86.061, *Florida Statutes*, must first obtain a declaratory judgment in that party's favor and then file a motion for supplemental relief pursuant to Section 86.061. Fourth,

Count IV of Plaintiff's Amended Complaint for declaratory relief seeks relief in the form of a refund, which this Court is not legally authorized to award.

A. Count IV of Plaintiff's Amended Complaint Fails to Allege Any of the Necessary Elements Required to State a Cause of Action for Declaratory Relief.

This Court should dismiss Count IV of Plaintiff's Amended Complaint seeking declaratory and supplemental relief since Plaintiff failed to allege any of the necessary elements required to state a cause of action for declaratory relief. Consequently, Count IV of Plaintiff's Amended Complaint fails to state a cause of action upon which relief can be granted.

A party seeking declaratory relief must plead the following elements: (1) a bona fide, actual, present practical need for the declaration; (2) the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; (3) some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; (4) there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; and (5) the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity. *City of Hollywood v. Petrosino*, 864 So. 2d 1175, 1177 (Fla. 4th DCA 2004); *see also Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 404 (Fla. 1996). "These elements are necessary in order to maintain the status of the proceedings as being judicial in nature and therefore within the constitutional powers of the courts." *Chiles*, 680 So. 2d at 404.

Count IV of Plaintiff's Amended Complaint is utterly deficient and failed to allege any of the above-referenced elements necessary to state a cause of action for declaratory relief. First, Plaintiff's Amended Complaint failed to allege that there is a "bona fide, actual, present practical need for the declaration." *City of Hollywood*, 864 So. 2d at 1177; *see also Chiles*, 680 So. 2d at 404.

Second, Plaintiff's Amended Complaint failed to allege that "the declaration . . . deal[s] with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts." *City of Hollywood*, 864 So. 2d at 1177; *see also Chiles*, 680 So. 2d at 404.

Third, Plaintiff's Amended Complaint failed to allege that "some immunity, power, privilege or right of the complaining party **is dependent upon the facts or the law applicable to the facts**." *City of Hollywood*, 864 So. 2d at 1177 (emphasis added); *see also Chiles*, 680 So. 2d at 404. Paragraph Numeral Eighty (80) of Plaintiff's Amended Complaint alleges that "[t]he [Plaintiff] has a clear legal right to pay only those electric rates which are reasonable, just, and equitable, and has been and continues to be harmed by the unreasonable, unjust, and inequitable electric rates charged by [Vero Beach.]" However, Paragraph Numeral Eighty (80) contains only the blanket assertion that Plaintiff has a legal right to pay reasonable electric rates, and fails to allege that said "right" is dependent upon the facts and/or the law applicable to the facts, which are before this Court.

Fourth, Plaintiff's Amended Complaint failed to allege that "there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law." *City of Hollywood*, 864

So. 2d at 1177; *see also Chiles*, 680 So. 2d at 404. Fifth, Plaintiff's Amended Complaint failed to allege that all adverse interests are properly before the Court, and that "the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity." *City of Hollywood*, 864 So. 2d at 1177; *see also Chiles*, 680 So. 2d at 404.

Clearly, Count IV of Plaintiff's Amended Complaint is lacking any of the necessary elements required to state a cause of action for declaratory relief. Consequently, this Court should Dismiss Count IV of Plaintiff's Amended Complaint, as it fails to state a cause of action upon which relief can be granted.

B. Rate-Setting is Purely a Legislative Function, and Review of Legislative Rate-Setting is a Function Within the Exclusive Province of the Court, Not a Jury.

This Court should dismiss Count IV of Plaintiff's Amended Complaint seeking declaratory and supplemental relief, since rate-setting is purely a legislative function, and as such, review of legislative rate-setting is a function within the exclusive province of the court, not a jury. Plaintiff improperly seeks to have this Court delegate the exclusively judicial power of reviewing the legislative function of rate-setting to a jury. Consequently, Plaintiff's request for declaratory relief seeks relief that cannot legally be granted. As a result, Count IV of Plaintiff's Amended Complaint fails to state a cause of action upon which relief can be granted.

It is well-settled law in Florida that utility rate-setting is exclusively a legislative function to be performed by legislative bodies such as local municipal governments and commissions which are delegated such authority. *See Mohme v. City of Cocoa*, 328 So. 2d 422, 424 (Fla. 1976) ("In Florida, it is a well recognized principle of law that rate-setting

for municipal utilities is a legislative function to be performed by legislative bodies like municipal governments and the commissions to which these bodies delegate such authority."); *Miami Bridge Co. v. Miami Beach Ry. Co.*, 12 So. 2d 438, 445 (Fla. 1943) (stating that "there is a well recognized distinction between the judicial and legislative powers over rates," and that "the power to make rates is legislative rather than judicial."); *Rosalind Holding Co. v. Orlando Utilities Commission*, 402 So. 2d 1209, 1210-11 (5th DCA 1981) ("Setting rates and methods to calculate them is a legislative function, whether it is done by a public service commission or the [Orlando Utilities Commission] board."); *City of Pompano Beach v. Oltman*, 389 So. 2d 283, 286 (4th DCA 1980) ("Utility rate making by municipalities is a legislative function . . . .").

Since rate-setting is purely a legislative function, review of legislative actions is exclusively a **judicial power**. *Miami Bridge Co.*, 12 So. 2d at 446 (stating that it is a "well settled **judicial power** to set aside and hold as invalid any unjust, unreasonable and discriminatory rate"). Judicial review of legislative rate-setting is limited to determining whether the existing rates are unreasonable or discriminatory. *Id.* The determination as to whether existing rates are reasonable is a question for the **court**, not a jury. *See City of Pompano Beach*, 389 So. 2d at 286 (noting that "[u]tility rate making by municipalities is a legislative function **reviewable by the courts** as are all legislative actions, but the **authority of the courts** in such matters **is limited to making a judicial determination** as to the validity of such rate ordinances.") (emphasis added); *see also Mohme*, 328 So. 2d at 424-25 ("Our **courts** will intervene to strike down unreasonable or discriminatory public utility service rates prescribed by the Legislature, a municipality, or municipal commissions; however, courts will not themselves fix prospective rates.") (emphasis

added); *Cooper v. Tampa Electric Co.*, 17 So. 2d 785, 787 (Fla. 1944) (stating that "**courts** may determine the validity or reasonableness" of legislative ratemaking) (emphasis added); *Miami Bridge Co.*, 12 So. 2d at 445-46 (distinguishing between the judicial and legislative power over rates and noting that "**courts** deal with existing rates," and that the **court's** "**power is confined to the determination of whether a given rate is a reasonable rate**.") (emphasis added).

In the present case, Count IV of Plaintiff's Amended Complaint attempted to bypass the above-referenced well-settled law, by requesting that this Court "[r]efer factual questions related to the prudency of the City's utility management practices to a jury for determination . . . ." The relief requested by Plaintiff amounts to requesting that a jury, not this Court, decide whether the existing electric utility rates are reasonable. Since the reasonableness of existing utility rates is exclusively a judicial determination, a jury is legally precluded from making said determination. Consequently, Plaintiff has failed to state a cause of action upon which relief can be granted.

Count IV of Plaintiff's Amended Complaint attempts to state a cause of action for "Declaratory and Supplemental Relief Relating to [Vero Beach's] ***Unreasonable and Oppressive Electric Rates***." Paragraph Numeral Seventy-Three (73) under Count IV of Plaintiff's Amended Complaint specifically states that "[t]his count is an action for declaratory and supplemental relief by [Plaintiff] against [Vero Beach] relating to [Vero Beach's] ***unreasonable and oppressive electric utility rates***." Paragraph Numeral Seventy-Six (76) under Count IV alleges that Vero Beach "has a legal duty to act prudently in managing its electric utility system in order to ***protect its customers from unreasonable and oppressive rates***." Lastly, Paragraph Numeral Seventy-Eight (78)

under Count IV of Plaintiff's Amended Complaint alleges that Vero Beach "breached its duty to prudently operate and manage its electric utility," and that "imprudent management decisions have driven [Vero Beach's] electric power supply costs to excessive levels and ***resulted in*** [Vero Beach] charging ***unreasonable electric rates*** to the [Plaintiff] and other Non-Resident Customers."

Clearly, Count IV of Plaintiff's amended Complaint is predicated on the allegation that Vero Beach's electric rates are unreasonable and oppressive. According to Plaintiff, the unreasonableness of Vero Beach's electric rates is intertwined with the imprudent management of Vero Beach's electric utility—i.e., if Vero Beach's electric utility was managed differently, there would be a reduction in the existing electric utility rate, resulting in a lower, reasonable, and non-oppressive rate. However, Plaintiff attempts to achieve an end-around the legal prohibition on permitting a jury to determine whether existing utility rates are reasonable by requesting that a jury determine whether a change in the management of Vero Beach's electric utility would result in a lower, reasonable, and non-oppressive rate.

Plaintiff's request that this Court "[r]efer factual questions related to the prudency of [Vero Beach's] utility management practices to a jury for determination" is legally prohibited. As a result, Plaintiff has failed to state a cause of action upon which relief can be granted and this Court should dismiss Count IV of Plaintiff's Amended Complaint.

C. Plaintiff's Request for Supplemental Relief Pursuant to Section 86.061, *Florida Statutes*, is Procedurally Improper.

Plaintiff's request for supplemental relief pursuant to Section 86.061, *Florida Statutes*, is procedurally improper. A party requesting supplemental relief pursuant to Section 86.061, *Florida Statutes*, must first obtain a declaratory judgment in that party's

favor and then file a motion for supplemental relief pursuant to Section 86.061. Consequently, this Court should dismiss Count IV of Plaintiff's Amended Complaint seeking declaratory and supplemental relief.

Section 86.061, *Florida Statutes*, provides trial courts with the authority to grant incidental or supplemental relief pursuant to a declaratory decree. *See Preuss v. Fire Ins. Co.*, 414 So. 2d 249, 250 (Fla. 4th DCA 1982) ("[T]he trial court, whenever necessary or proper, has the authority to consider and grant incidental or supplemental relief pursuant to a declaratory decree"). However, a party seeking supplemental relief pursuant to Section 86.061, *Florida Statutes*, must first obtain a declaratory judgment in that party's favor, and **then file a motion** for supplemental relief pursuant to Section 86.061. *See McAllister v. Breakers Seville Ass'n, Inc.*, 41 So. 3d 405, 408 (Fla. 4th DCA 2010) ("**Once a declaratory judgment is rendered in a party's favor** the court **then** considers any **motions for supplemental relief**.") (emphasis added); *Hill v. Palm Beach Polo, Inc.*, 805 So. 2d 1014, 1016 (Fla. 4th DCA 2001) ("Whenever necessary or proper, **further relief** may be granted upon reasonable notice to an adverse party, **whose rights have been adjudicated by the declaratory judgment** to show cause why further relief should not be granted.") (emphasis added); *Koscot Interplanetary, Inc. v. State ex rel. Conner*, 230 So. 2d 24, 25 (Fla. 4th DCA 1970) (stating that "[a]ppellants were seeking supplemental relief on a declaratory decree which is authorized by statute," and that "[s]uch relief contemplates an **additional adjudication** with reasonable notice to the adversary and a right to show cause why **further relief** should not be granted.") (emphasis added). This procedure is contemplated by the plain language of Section 86.061, *Florida Statutes*, which states:

> Further relief based on a declaratory judgment may be granted when necessary or proper. The **application therefor shall be by motion** to the court having jurisdiction to grant relief. **If the application is sufficient, the court shall require any adverse party whose rights have been adjudicated by the declaratory judgment** to show cause on reasonable notice, why further relief should not be granted forthwith.

Fla. Stat., § 86.061 (2014) (emphasis added).

Despite the explicit terms of Section 86.061, *Florida Statutes*, Count IV of Plaintiff's Amended Complaint requests this Court: "[a]ward [Plaintiff] supplemental relief under Section 86.061, Florida Statutes, in the form of a refund of any payment of rates it has made which were in excess of what was reasonable, just, and equitable." Plaintiff's request for supplemental relief is procedurally improper, as this Court has not yet addressed the merits of Plaintiff's request for declaratory relief, nor has this Court rendered a declaratory judgment in Plaintiff's favor. The rendering of a declaratory judgment in Plaintiff's favor is a condition precedent to Plaintiff ability to request supplemental relief pursuant to Section 86.061, *Florida Statutes*. *See McAllister*, 41 So. 3d at 408 ("The Declaratory Judgments Act contemplates this procedure for granting supplemental relief **following the entry of a declaratory judgment** . . . .") (emphasis added). Additionally, applications for supplemental relief pursuant to Section 86.061, *Florida Statutes*, must be made by **motion**, and not by Complaint. See Fla. Stat. § 86.061 (2014) ("The application therefor **shall be by motion** to the court . . . .") (emphasis added); *McAllister*, 41 So. 3d at 408 ("Once a declaratory judgment is rendered in a party's favor, the court then considers any **motions** for supplemental relief.") (emphasis added).

Consequently, Count IV of Plaintiff's Amended Complaint, For Declaratory and Supplemental Relief Relating to the City's Unreasonable and Oppressive Electric Rates,

is improperly asserted and this Court should dismiss Count IV of Plaintiff's Amended Complaint as it fails to state a cause of action upon which relief can be granted.

D. Count IV of Plaintiff's Amended Complaint Seeks Relief in the Form of a Refund, Which This Court is Legally Precluded from Awarding.

Count IV of Plaintiff's Amended Complaint for declaratory relief seeks relief that this Court is not legally authorized to grant. As a result, this Court should dismiss Count IV of Plaintiff's Amended Complaint for failure to state a cause of action upon which relief can be granted.

As indicated in Section III of this Motion, rate-setting is prospective, not retroactive. *Westwood Lake*, 264 So. 2d at 12. As such, a reviewing court has no authority to fix prospective rates. *See Mohme*, 328 So. 2d 425 ("[C]ourts will not themselves fix prospective rates."). "Thus, the court can strike down a rate, but it cannot impose some other rate." *Gargano*, 921 So. at 666. Similarly, a reviewing court cannot determine a reasonable rate "for the past and then order the difference returned." *Id.* at 668. Thus, a reviewing **court may <u>not</u> <u>award a refund</u> for amounts paid in the past**. A reviewing court is only "entitled to enter a prospective injunction declaring the current fee unreasonable and to make recommendations regarding what it would consider a maximum reasonable rate." *Id.*

Count IV of Plaintiff's Amended Complaint specifically requests this Court to "[a]ward [Plaintiff] supplemental relief under Section 86.061, Florida Statutes, in the form of a **<u>refund of any payments of rates it has made</u>** which were in excess of what was reasonable, just, and equitable." However, Plaintiff is seeking relief that this Court is legally precluded from granting. This Court is not authorized to determine a reasonable

rate "for the past and then order the difference returned." *Gargano*, 921 So. 2d at 666. Instead, this Court is only authorized "to enter a prospective injunction declaring the current fee unreasonable and to make recommendations regarding what it would consider a maximum reasonable rate." *Id.* Consequently, Count IV of Plaintiff's Amended Complaint for declaratory relief seeks relief that this Court is not legally authorized to grant. As a result, this Court should dismiss Count IV of Plaintiff's Amended Complaint for failure to state a cause of action upon which relief can be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed a copy of the foregoing with the Clerk of the Court, using the E-Portal system, which will automatically transmit a copy of this pleading to: D. Bruce May, Jr., Esquire, bruce.may@hklaw.com; Karen D. Walker, Esquire, Karen.walker@hklaw.com; and Kevin Cox, Esquire, Kevin.cox@hklaw.com, Holland & Knight, LLP, 315 S. Calhoun Street, Suite 600, Tallahassee, FL 32301, Attorneys for Plaintiff, this 7th day of July, 2015.

FROST VAN DEN BOOM, P.A.

By: /s/John W. Frost, II
John W. Frost, II
Florida Bar No: 114877
Nicholas T. Zbrzeznj
Florida Bar No: 98180
Post Office Box 2188
Bartow, FL 33831-2188
Phone: (863)533-0314
Facsimile: (863)533-8985
Primary: Jfrost1985@aol.com
Primary: nzbrzeznj@fvdblaw.com
Secondary: paulaw1954@aol.com
Secondary: pwilkinson@fvdlaw.com