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

TOWN OF INDIAN RIVER SHORES,
a Florida municipality,

CASE NO.: 2014-CA-000748

Plaintiff,

v.

CITY OF VERO BEACH, a Florida
municipality,

Defendant.
_____/

THE TOWN OF INDIAN RIVER SHORES' RESPONSE IN OPPOSITION TO VERO BEACH'S MOTION TO DISMISS AMENDED COMPLAINT AND SUPPORTING MEMORANDUM OF LAW

Plaintiff, the Town of Indian River Shores (the "Town"), submits this response and memorandum of law in opposition to Vero Beach's Motion to Dismiss Plaintiff's Amended Complaint (the "Motion to Dismiss"). As described below, this Court should deny the Motion to Dismiss filed by Defendant, the City of Vero Beach (the "City"), because the Court has jurisdiction over the matters that are the subject of the Town's Amended Complaint and the Amended Complaint clearly states a cause of action in each of its four counts.

INTRODUCTION

Overview of Response to Motion to Dismiss

In its Motion to Dismiss, the City attempts to characterize the Amended Complaint as something which it is not. This lawsuit does not involve parties to a territorial agreement, a territorial dispute arising out of a territorial agreement, or any request to amend a territorial agreement. Those matters are admittedly within the jurisdiction of the Florida Public Service Commission (the "PSC"). Instead, the allegations within the four corners of the Amended

Complaint show that this lawsuit involves constitutional, statutory and contract issues clearly within the jurisdiction of this Court and beyond the jurisdiction of the PSC.

The allegations of the Amended Complaint involve a dispute in which one municipality, the City, seeks to exert extra-territorial powers within the corporate limits of another municipality, the Town, without the Town's consent. The City currently provides electric service within a portion of the Town, with the Town's express written consent pursuant to an electric franchise agreement between the City and the Town (the "Franchise Agreement") which will expire on November 6, 2016. The Town has notified the City that the Town will not renew the Franchise Agreement when it expires and that the City will no longer have the Town's consent to provide extra-territorial electric service within the Town's corporate limits at that time. Simply put, the Town believes that because of the limitations on extra-territorial powers imposed by the Florida Constitution, Chapter 166, Florida Statutes (the "Municipal Home Rule Powers Act"), and Chapter 180, Florida Statutes, the City does not have the requisite authority under current general or special law to exercise extra-territorial powers within the corporate limits of the Town without the Town's consent. This lawsuit also involves the City's charging of unreasonable electric utility rates to its customers within the Town in breach of the Franchise Agreement and in violation of Florida law. This lawsuit further involves the City's anticipatory breach of the Franchise Agreement based upon its unwillingness to accept that the bargained-for Franchise Agreement has a finite term of 30 years and does not give the City a perpetual easement to occupy the Town's rights-of-way and public areas.

This lawsuit does *not*, as the City mistakenly argues, request the Court to make rulings regarding the City's territorial service agreement (the "Territorial Agreement") with Florida Power & Light ("FPL"), or any PSC order approving the Territorial Agreement. Rather, Count I of the

Town's Amended Complaint asks for a declaration of the rights of the Town and the City upon expiration of the Franchise Agreement under: (a) the terms of the Franchise Agreement; (b) Article VIII, Section 2(c) of the Florida Constitution; (c) Section 166.021(3)(a), Florida Statutes, which is part of the Municipal Home Rule Powers Act; and (d) Section 180.02, Florida Statutes. As the PSC and the City itself have recognized, the PSC is not the proper forum to seek a declaration about a franchise agreement or about the application of the Florida Constitution and the statutes cited above to the Town's and City's municipal rights, as the PSC does not have jurisdiction to construe a franchise agreement or the constitutional or statutory provisions at issue in this case. Moreover, the Amended Complaint specifically alleges that "the Town is *not* seeking to challenge the PSC's authority under Section 366.04, Florida Statutes, to coordinate the statewide electric grid through its consideration and approval of territorial agreements." (Am. Compl. ¶ 53) (emphasis added). The Amended Complaint itself recognizes that the Territorial Agreement will need to be addressed after this Court resolves the separate legal issues which are properly before it and which cannot be addressed by the PSC. (*Id.*. ¶ 13.) For clarity, the Town acknowledges that only the PSC can approve a modification of the Territorial Agreement, and that until the PSC's order approving the Territorial Agreement is modified the City can continue to provide electric service in the Town. The PSC's jurisdiction over territorial agreements, however, in no way limits this Court's proper role in determining the rights of the Town and the City under the Franchise Agreement, the Florida Constitution, the Municipal Home Rule Powers Act, and Section 180.02, Florida Statutes.

The City is quick to cite Section 366.04(1), Florida Statutes, for the proposition that the jurisdiction "conferred" on the PSC is exclusive and superior to that of all other "municipalities [and] towns." (Motion to Dismiss, at 5-6.) But the City fails to apprise this Court of the rest of

the story—namely that the jurisdiction "conferred" on the PSC is by no means pervasive nor is it preclusive of the claims raised by the Amended Complaint. While the PSC has the authority to approve territorial agreements and resolve territorial disputes, nothing in that or any other aspect of the PSC's jurisdiction under Chapter 366, Florida Statutes, restricts the power of a municipality like the Town to govern and control the use of its rights-of-way and other public places pursuant to franchise agreements. *See* § 366.11(2), Fla. Stat. ("Nothing herein shall restrict the police power of municipalities over their streets, highways and public places…."). Furthermore, the PSC has expressly recognized that the jurisdictional limitation imposed by Section 366.11(2) precludes it from interceding into disputes such as this one that fundamentally relate to the terms and conditions of a franchise agreement between a Florida municipality and an electric utility. *In re: Petition of the City of Miami Beach for Emergency Hearing,* Order No. 10543, 82 F.P.S.C. 196 (1982) ("[T]he Commission may not interpose itself in the terms and conditions of the franchise contract. This view is required by the clear dictates of the Legislature in Section 366.11(2).").

The City also fails to point out that the PSC does not have jurisdiction over the City's electric utility rates. *City of Tallahassee v. Mann*, 411 So. 2d. 162, 163 (Fla. 1982) ("We agree that the [PSC] does not have jurisdiction over a municipal electric utility's rates."); *Amerson v. Jacksonville Elec. Auth.*, 362 So. 2d 433, 444 (Fla. 1978) ("The PSC's power to regulate is based upon the provisions of Chapter 366…. With limited exceptions, … the jurisdiction of the PSC is limited to 'public utilities' …. Thus, the statute by its very terms specifically excludes electric utilities operated by … municipalities from its rate change jurisdiction."). It is plain to see that the jurisdiction conferred on the PSC by the Florida Legislature does not preclude the Town's claims.

In Count II, the Town validly states a claim for anticipatory breach of the Franchise Agreement based on the City's assertion that it will continue to provide service in the Town and occupy the Town's rights-of-way after the Franchise Agreement's expiration on November 6, 2016. The City's assertion that it has some never-ending right to occupy the Town's rights-of-way and public areas after the Franchise Agreement expires is contradicted by Florida law. The Town sufficiently alleges that the City has a contractual obligation under the Franchise Agreement to vacate the Town's rights-of-way and public areas, which the City repudiates, and that the Town has been harmed. The City argues that the only damages claimed are attorneys' fees and costs, but that is not what the Amended Complaint alleges.

Count III is a claim for breach of contract based on the City's failure to operate its electric utility and furnish electric services in accordance with normally accepted electric utility standards and charge only reasonable rates for its electric service as required by the Franchise Agreement. The City makes numerous arguments about general ratemaking principles, but this count does not ask the Court to engage in ratemaking. Rather, it alleges that the City has breached its *contractual* obligations under the Franchise Agreement to provide reasonable rates and prudently operate its utility, and that the Town has been harmed as a result. The Town is certainly entitled to damages if these bargained-for obligations were breached, and has stated a valid claim on that basis.

Count IV asserts a claim for declaratory and supplemental relief based on the City's violation of its legal duties as a municipal utility to charge only reasonable rates and to act prudently in managing its electric utility system in order to protect its customers from unreasonable rates and oppressive practices. The City makes mistaken arguments about the Town's request for supplemental relief and the use of a jury to address factual disputes, which are contradicted by the face of the Declaratory Judgment Act. Moreover, the City concedes that declaratory relief is

properly sought to challenge unreasonable rates and actually cites to a series of cases for the principle that the "courts will intervene to strike down unreasonable or discriminatory rates prescribed by the Legislature, a municipality or a municipal commission." (Motion to Dismiss at 23.) That is precisely what the Town is seeking. In disputes like this one, where the Motion to Dismiss itself demonstrates the disagreement and uncertainty over the parties' respective rights, the liberal construction of Chapter 86 requires allowing the claim for declaratory relief to proceed.

For these and other reasons set forth below, all of the Counts in the Amended Complaint state valid causes of action and the Motion to Dismiss should be denied.

Legal Standards

In considering a motion to dismiss, the trial court "may not properly go beyond the four corners of the complaint in testing the legal sufficiency of the allegations set forth therein." *Stubbs v. Plantation Gen. Hosp. Ltd. P'ship*, 988 So. 2d 683, 684 (Fla. 4th DCA 2008) (quotation omitted). The party moving for dismissal must "admit[ ] all well pleaded facts as true, as well as reasonable inferences that may arise from those facts." *Id.* (quotation omitted). Thus, "[i]f a Complaint contains any merit, it is to be liberally construed in favor of the pleader when subjected to a motion to dismiss." *Donaldson v. City of Titusville*, 345 So. 2d 800, 801 (Fla. 4th DCA 1977).

MEMORANDUM OF LAW

A review of the allegations of the Amended Complaint show that the Court has jurisdiction over this action and that all four Counts of the Amended Complaint state a claim upon which relief can be granted. Accordingly, the City's Motion to Dismiss must be denied.

I. The Town's Request for Declaratory Relief in Count I States a Valid Claim And This Court Has the Only Proper Jurisdiction to Resolve It

In Count I of the Amended Complaint, the Town states a valid claim for declaratory relief that, upon the imminent expiration of the Franchise Agreement, the City does not have the statutory authority required by Article VIII, Section 2(c) of the Florida Constitution, and Sections 166.021(3)(a) and 180.02(2), Florida Statutes, to exercise extra-territorial powers and provide electric service within the Town without the Town's consent. Count I also encompasses a valid claim for declaratory relief that the Town—obviously subject to the PSC's regulatory oversight and approval—has been given the statutory authority to decide how electric service is to be furnished to its inhabitants. The City's Motion to Dismiss makes three related arguments regarding the jurisdiction of the PSC over territorial agreements and the Town's purported administrative remedies, but all of these arguments are misplaced. The Town is *not* seeking a ruling from the Court on the Territorial Agreement and it is settled that this Court, and not the PSC, is the proper tribunal to address the issues that are the subject of the Town's request for declaratory relief.

A. Count I Validly States A Claim For Declaratory Relief

The purpose of the declaratory judgment statute is to "afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations," and it "is to be liberally construed." *Lutz v. Protective Life Ins. Co.*, 951 So. 2d 884, 888 (Fla. 4th DCA 2007) (citation omitted). "The test recognized in this state of whether or not a complaint will give rise to a proceeding under the Declaratory Judgment Act inquires whether or not the party seeking a

declaration shows that he is in doubt or is uncertain as to existence or non-existence of some right, status, immunity, power or privilege and has an actual, practical and present need for a declaration." *Id. at* 889. "There must be a bona fide controversy, justiciable in the sense that it flows out of some definite and concrete assertion of right, and there should be involved the legal or equitable relations of parties having adverse interests with respect to which the declaration is sought." *Id.* "A party is entitled to a declaration of rights where the ripening seeds of controversy make litigation in the immediate future appear unavoidable." *S. Riverwalk Invs., LLC v. City of Ft. Lauderdale*, 934 So. 2d 620, 623 (Fla. 4th DCA 2006).

Here, the Town has a bona fide controversy with the City over whether the City has the statutory powers required by Florida's Constitution, the Municipal Home Rule Powers Act, and Chapter 180, Florida Statutes, to exercise extra-territorial powers within the corporate limits of the Town and occupy the Town's rights-of-way and public areas after the expiration of the Franchise Agreement on November 6, 2016. The Town asserts that the City will no longer have the requisite powers under general or special law to serve inhabitants inside the Town's corporate limits following the expiration of the Franchise Agreement, but that the Town has the power under its enabling legislation to decide how electric service is to be furnished to its residents. (Am. Compl. ¶¶ 43-56.) The City has indicated that it intends to continue to provide extra-territorial electric service within the Town following expiration of the Franchise Agreement and prevent the Town from reasonably exercising its municipal police power with respect to its rights-of-way and electric service to Town residents. (*Id*. ¶ 57.) The Town has a clear legal and equitable interest in the declaration that the City has no inherent municipal authority to exert extra-territorial powers within the corporate limits of the Town without the Town's consent. That consent is currently furnished by the Franchise Agreement. As a corollary to this principle, the Town believes it has a right under

Florida's Constitution, the Municipal Home Rule Powers Act, and Chapter 180 to be protected from the City's extra-territorial encroachments to which the Town has not consented.

Indeed, Florida law reflects that these questions are particularly well-suited to be raised through a claim for declaratory relief. Declaratory relief is an appropriate mechanism to resolve a dispute over the rights of parties to a utility franchise agreement. *See, e.g., Lee Cnty. Elec. Co-op., Inc. v. City of Cape Coral*, 159 So. 3d 126, 132 (Fla. 2d DCA 2014) (affirming summary judgment for municipality that brought action against utility company seeking declaration of rights under franchise agreement), *rev. denied*, 151 So. 3d 1226 (Fla. 2014). Declaratory relief is also particularly appropriate to resolve a legal dispute between two municipalities over whether one is required to accept extra-territorial utility services from the other as a matter of law. *See City of Indian Harbour Beach v. City of Melbourne*, 265 So. 2d 422, 424 (Fla. 4th DCA 1972) (addressing whether "Indian Harbour Beach [must] permit the intrusion and maintenance of another municipality's utility lines and services contrary to its municipal will when its rates and services were not acceptable to Indian Harbour Beach," and declaring that "[i]n the absence of ameliorating action on the part of the cities and accord, such as a franchise agreement providing for future rate structures and regulations, Indian Harbour Beach is empowered to expel and Melbourne is entitled to withdraw as concerns the water furnishing system of Melbourne to Indian Harbour Beach").

B. This Court Has Subject Matter Jurisdiction

The City's first argument for dismissal attempts to recast the Town's first count as an attack on the PSC's order approving the Territorial Agreement between the City and FPL, since territorial agreements lie under the exclusive jurisdiction of the PSC.[1] There is nothing within the four

[1] By way of background, in 1972 the PSC approved the bi-lateral Territorial Agreement entered between the City and FPL. (Motion to Dismiss at Ex. E.) At the time, the City already operated within the Town pursuant to a franchise agreement entered into between the Town and City in 1968 which was the predecessor to the current Franchise Agreement. (Am. Compl. ¶ 17.) Since that time, the Territorial Agreement has been periodically amended by the

corners of the Amended Complaint, however, that indicates that the Town is asking the Court to construe, interpret, modify or amend the Territorial Agreement or any PSC order approving the Territorial Agreement.

Contrary to the City's assertion, the Town's lawsuit is not a collateral attack on the Territorial Agreement. Rather, the lawsuit asks this Court to determine, under Article VIII of the Florida Constitution and Sections 166.021(3)(a) and 180.02(2), Florida Statutes, whether the City has the requisite powers conferred by general or special law to provide extra-territorial service within the Town's corporate limits without the Town's consent. That consent is currently provided in the Franchise Agreement but will expire when that agreement expires in November of 2016. The Town believes that the Florida Constitution, the Municipal Home Rule Powers Act and Section 180.02, Florida Statutes—matters that are appropriate to be addressed by this Court's jurisdiction—protect it from such extra-territorial encroachments. The PSC does not have jurisdiction to interpret franchise agreements or to make declarations regarding the constitutional and statutory provisions at issue in the Amended Complaint. Those matters are within the jurisdiction of this Court. Of course, the Territorial Agreement can be addressed in due course by the PSC following this Court's rulings on the fundamental constitutional and statutory issues that are not within the PSC's jurisdiction.

The PSC order attached as Exhibit "G" to the City's Motion to Dismiss evidences that the City is well aware, and has admitted, that the PSC does not have jurisdiction to address the issues which the Town has properly brought before this Court. In that order, the PSC declined to address

City and FPL, and such amendments have been approved by the PSC. (Motion to Dismiss at Ex. E.) Through the course of all of these amendments, the City has had the Town's consent to provide extra-territorial electric service within the Town by virtue of the Franchise Agreement that will expire in November of 2016 or by virtue of its predecessor. The current Territorial Agreement between the City and FPL recognizes service areas by the City within the Town that are consistent with the Franchise Agreement. *Id.*

a series of questions presented by Indian River County concerning its rights under its franchise agreement with the City. In contrast to this case which involves one municipality encroaching upon a neighboring municipality's home rule powers, those proceedings before the PSC addressed whether the City can continue to serve the *unincorporated* portions of the County following the expiration of the County's franchise agreement with the City.[2] The PSC's order attached as Exhibit G to the City's Motion shows that the City expressly acknowledged, and in fact argued, that a circuit court, not the PSC, has jurisdiction to resolve issues requiring the interpretation of franchise agreements, statutes granting home rule and police powers to local governments, and real property issues with regards to rights-of-way:

> Vero Beach maintains that this threshold legal issue involving the interpretation of provisions of Chapter 125, F.S. **should be resolved in a circuit court**, not assumed in this declaratory statement proceeding.
>
> Vero Beach alleges that the Petition incorrectly assumes that if the Franchise Agreement [between the City and the County] terminates the County can require Vero Beach to remove its electric facilities from the County's rights-of-way. Vero Beach states that the resolution of this legal issue will involve the construction of the Franchise Agreement, the application of preemption doctrine, the application of various real property principles including the rights of hold-over tenants, the interpretation of easements, the analysis of eminent domain law, and the analysis of potential prescriptive rights. Vero Beach maintains that such real property issues **should be resolved by a circuit court** and not assumed away in this declaratory statement proceeding.

(Exhibit G to City's Motion to Dismiss, *In re: Petition for Declaratory Statement or Other Relief Regarding the Expiration of the Vera Beach Electric Service Franchise Agreement, by the Board of County Commissioners, Indian River County, Florida*, Order No. PSC-15-0101-DS-EM, 15 F.P.S.C. 2:090 at 19 (Feb. 12, 2015) (emphasis added).)[3]

[2] *See* Motion to Dismiss at Ex. F at 1 and at Ex. G at 1-3.

[3] The PSC's order denying Indian River County's requested declaratory statement, and a separate order granting a request for declaratory relief by the City, are currently 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.

Moreover, in denying the County's petition for declaratory statement, the PSC itself expressly stated that it had no "authority" to address statutes granting local governments' home rule and police powers, nor did it have any "authority" to address the powers of local governments under the Florida Constitution:

> We decline to issue a declaratory statement as to Questions a-c, e-i, and n because answering **those questions would require application of provisions of law not within our authority.**
>
> The Petition is premised on a legal assumption that Indian River County has statutory authority to assume ownership of Vero Beach's Electric Facilities and provide electric service within the Franchise Area (Questions a-c, e, g, i) and that it has legal authority to choose the electric service provider for the Franchise Area other than Vero Beach once the Franchise Agreement expires, notwithstanding our Territorial Orders (Questions c, f, h-i, and n). A complete determination of whether the County meets the statutory definition of "public utility" or "electric utility," whether it has the authority to provide electric service, or whether it has the authority to replace Vero Beach as the service provider, notwithstanding the Territorial Orders would involve an analysis of the powers of counties through interpretation of Chapter 125, F.S., and Florida Constitution Article VIII § 1(f) and (g). It would not be possible to give a complete and accurate declaration on these questions without addressing the County's statutory and constitutional powers. **We have no authority over Chapter 125, F.S., or over any provision of the Florida Constitution**. [citing *Carr v. Old Port Cove Prop. Owners Ass'n*, 8 So. 3d 403, 404-405 (Fla. 4th DCA 2009) (a declaratory statement is not the appropriate mechanism to interpret a constitutional provision); *PPI, Inc. Ha. Dep't of Bus. & Prof'l Regulation, Div. of Parimutuel Wagering,* 917 So. 2d 1020 (Fla. 1st DCA 2006) (the agency had the authority to deny the request for declaratory statement because it was not authorized under *section 120.565, F.S.*, to construe a constitutional amendment).] Giving an incomplete declaration that only addresses Chapter 366, F.S., would undermine the purpose of the declaratory statement, which is to aid the petitioner in selecting a course of action in accordance with the proper interpretation and application of the agency's statute. [citing *Carr*, 8 So. 3d at 405.]
>
> Additionally, the issue raised in Question i of **how expiration of the Franchise Agreement affects Vero Beach's use of the County's rights-of-way does not raise a matter within our jurisdiction**, and we therefore have no authority to address this issue in a declaratory statement. . . . **We have no jurisdiction over county franchise agreements and, therefore, no authority to issue a declaratory statement on Question 1 concerning the County's possible future actions concerning extension of its Franchise Agreement with Vero Beach**.

(*Id.* at 30-31 (emphasis added).)

The PSC's position that it does not have the jurisdiction to interpret or construe franchise agreements is nothing new. In 1982, the PSC confirmed that it was beyond its purview under Chapter 366, Florida Statutes, to interject itself into issues associated with the construction or interpretation of a franchise agreement between a Florida municipality and an electric utility:

> . . . the Commission may not interpose itself in the terms and conditions of the franchise contract. This view is required by the clear dictates of the Legislature in Section 366.11(2), Florida Statutes, that:
>
> > (2) Nothing herein shall restrict the police power of municipalities over their streets, highways, and public places or the power to maintain or require the maintenance thereof or the right of a municipality to levy taxes on public services under s. 166.231 or affect the right of any municipality to continue to receive revenue from any public utility as is now provided or as may be hereafter provided in any franchise.

In re: Petition of the City of Miami Beach for Emergency Hearing, Order No. 10543, 82 F.P.S.C. 196 (1982).[4]

The PSC's pronouncement that it has "no jurisdiction" to interpret franchise agreements fits with the case law holding that utility franchise agreements are enforceable contracts, and the interpretation of rights and responsibilities under those contacts is for the circuit courts to resolve. *See Fla. Power Corp. v. City of Casselberry*, 793 So. 2d 1174, 1177, 1181 (Fla. 5th DCA 2001). The *Casselberry* case is particularly instructive. In that case, the City of Casselberry filed a complaint for declaratory judgment with the circuit court seeking a determination of its rights under a franchise agreement with Florida Power Corporation ("FPC"). *Id.* at 1177. In response, FPC argued that "the court had no jurisdiction to hear the matter because the PSC had exclusive jurisdiction regarding matters of rates, service and territorial disputes involving electric utilities."

[4] In 1989, the PSC again reaffirmed that it lacked jurisdiction to interpret the terms of a franchise agreement involving a water utility explaining that "[c]oncerns of parties to such agreements would be more appropriately addressed in a circuit court action." *In re: Application of Topeka Group, Inc. to Acquire Control of Deltona Corp.'s Util. Subsidiaries*, Order No. 22307, 89 F.P.S.C. 12:54 (1989).

Id. The trial court rejected those arguments and ordered relief based on the rights of the parties under the franchise agreement. *Id.* The trial court's order was sustained on appeal where the Fifth District Court of Appeal noted that the issues regarding the PSC's "exclusive" jurisdiction raised by FPC were issues for another day and did not deprive the trial court of its jurisdiction to provide relief:

> [FPC] maintains that there are many obstacles to Casselberry's operation of an electrical distribution system within its city limits, the main one being that the PSC has exclusive jurisdiction over matters of rates, service and territorial disputes involving electrical utilities and that the Federal Energy Regulatory Commission (FERC) now exists which also would have jurisdiction over Casselberry's operations. It is indisputable that Casselberry will not be able to operate its own utility system without integrating its system within and being subject to regulation of a comprehensive system designed to serve the public with electrical energy. **But those complex matters are reserved for another day and are prematurely raised in this appeal.** The sole issue today is whether Casselberry is entitled to enforcement of a provision allowing it to seek the determination of a purchase price through arbitration.

Id. (emphasis added).

Likewise, the issues related to the PSC's jurisdiction to approve the Territorial Agreement and any modifications thereof should be "reserved for another day" following a declaration of the Town's rights under the Franchise Agreement, the Florida Constitution, the Municipal Home Rule Powers Act and Chapter 180, Florida Statutes, as requested in the Amended Complaint. As in *Casselberry*, the PSC jurisdiction issues are being "prematurely raised" by the City at this time. The Amended Complaint makes clear that the Town is not asking for a declaration regarding the Territorial Agreement or any order of the PSC approving the Territorial Agreement. Instead, the Amended Complaint expressly alleges that "the Town is *not* seeking to challenge the PSC's authority under Section 366.04, Florida Statutes, to coordinate the statewide electric grid through its consideration and approval of territorial agreements." (Am. Compl. ¶ 53.) Moreover, as stated above, the Town acknowledges that only the PSC can approve a modification of the boundaries of

the Territorial Agreement but that in no way limits this Court's role in resolving the separate legal issues in this lawsuit. (*Id.* ¶¶ 13, 53.)

The cases cited by the City on these issues are readily distinguishable. In *Roemmele-Putney v. Reynolds*, 106 So. 3d 78 (Fla. 3d DCA 2013), plaintiffs, including Monroe County, filed for injunctive and declaratory relief asserting that a local ordinance gave the County the right to bar Keys Energy Services ("KES") from providing electric service to No Name Key even though KES was authorized to serve the island under a territorial agreement that had been approved by the PSC. *Id.* at 79-80. The trial court dismissed the complaint on grounds that the matter fell within the PSC's jurisdiction over territorial agreements. *Id.* at 80. That decision was affirmed by the Third District Court of Appeal which found that the PSC "had continuing jurisdiction to review in advance for approval or disapproval any proposed modification to the [territorial] agreement." *Id.* at 81. The District Court obviously was troubled by the County's brutish attempt to use "circuit court injunctions" to modify a PSC-approved territorial agreement. *Id.* That is not at all what this lawsuit is about. Here, the Town does not seek to usurp the PSC's jurisdiction over territorial agreements. In fact the Town acknowledges that only the PSC can approve a modification of the Territorial Agreement, and that until the PSC's order approving that agreement is modified the City can continue to provide electric service in the Town. The Town is simply asking this Court to address questions of law the PSC has acknowledged it has no authority over so that any appropriate regulatory modification of the Territorial Agreement can be resolved by the PSC. Moreover the *Roemmele-Putney* case had nothing to do with the core constitutional and statutory issues in this case, where one municipality is attempting to exert extra-territorial powers within the corporate limits of another co-equal municipality. Nor did it involve a request that the court to construe the rights and obligations of the parties to a franchise agreement.

Likewise, *PSC v. Fuller*, 551 So. 2d 1210 (Fla. 1989), is inapposite. *Fuller* involved a circuit court action in which one party to a PSC-approved territorial agreement sought a declaration of its rights under the agreement. As previously explained, the Town is not a party to any territorial agreement, is not seeking a declaration of its rights under any territorial agreement, and has expressly alleged it is *not* seeking any modification of a territorial agreement in this case. Instead, the Town expressly recognizes that only the PSC can modify a territorial agreement.

The City's reliance on a recent PSC declaratory statement issued in the context of the City's service to *unincorporated* areas of Indian River County also is misplaced and provides no basis for dismissal. That declaratory statement simply said that the City could serve in unincorporated areas of Indian River County after the City's franchise agreement with the County expired and could continue to do so until the order approving the City's territorial agreement with FPL was modified. (Ex. F to Motion to Dismiss, at 15.) The declaratory statement has no bearing on the issues before this Court. It simply states what the Town has already acknowledged, namely that only the PSC can approve a modification to the Territorial Agreement and that until the PSC's order approving that agreement is modified the City can continue providing service in the Town. (*Id.*) But that in no way limits the Court's proper role in determining the rights and obligations of the Town and City under the Franchise Agreement, the Florida Constitution, the Municipal Home Rule Powers Act and Section 180.02(2), Florida Statutes. In fact, as clearly shown in Exhibit G to the Motion to Dismiss, the PSC has expressly stated that it does not have the jurisdiction to address those constitutional and statutory issues. (Ex. G to Motion to Dismiss, at 31-32.)

The City appears to be trying to use a petition for declaratory statement that it filed with the PSC—5 months *after* the Town initiated this lawsuit—to obtain administrative preemption

over legal issues in a pre-existing lawsuit between the parties.[5] As the PSC itself noted, that is an "abuse" of the declaratory statement process that defies established principles of administrative law. Indeed, the PSC was aware of this lawsuit in ruling on the petitions for declaratory statements by the City and County, and made very clear that its statements would not and could not affect the outcome of this lawsuit:

> Established case law and prior decisions of this Commission have held that a declaratory statement is not appropriate when another proceeding is pending that addresses the same question or subject matter. In such cases, it would be an abuse of the agency's authority to permit the use of the declaratory statement process as a means for the petitioner to attempt to obtain administrative preemption over legal issues involving the same parties.

(Ex. G to Motion to Dismiss, at 32.[6]) The PSC also noted that:

> In accordance with Rule 28-105.003, F.A.C., we rely on the facts contained in the City's Petition without taking a position on the validity of those facts. This declaratory statement order will be controlling only as to the facts relied upon and not as to other, different or additional facts. As our conclusions are limited to the facts described herein, any alteration or modification of those facts could materially affect the conclusions reached in this declaratory statement order.

(Ex. F to Motion to Dismiss, at 36 (footnote omitted).) The PSC made this particularly explicit with respect to addressing whether those administrative proceedings could in any way affect the instant lawsuit, which they cannot:

> On January 13, 2015, the Town of Indian River Shores filed a Notice of Pending Litigation in this docket that summarized the issues in its pending circuit court

[5] *See also* § 120.565(a), Fla. Stat. ("(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, **as it applies to the petitioner's particular set of circumstances**.") (emphasis added).

[6] *See also ExxonMobil Oil Corp. v. Dep't of Agric. & Consumer Servs.*, 50 So. 3d 755, 758 (Fla. 1st DCA 2010) ("[A]n administrative agency must decline to provide a declaratory statement when the statement would address issues currently pending in a judicial proceeding"); *Padilla v. Liberty Mut. Ins. Co.*, 832 So. 2d 916, 919-920 (Fla. 1st DCA 2002); *Suntide Condo. Ass'n, Inc. v. Div. of Fla. Land Sales, Condos. & Mobile Homes*, 504 So. 2d 1343, 1345 (Fla. 1st DCA 1987); *In re: Petition for declaratory statement regarding local exchange telecoms. network emergency 911 serv. by Intrado Commc'ns Inc.*, Order No. PSC-08-0374-DS-TP, 08 F.P.S.C. 6:15 (2008) ("[E]stablished case law and prior Commission orders have held that a declaratory statement is not appropriate where another proceeding is pending that addresses the same question or subject matter."); *In re: Petition for declaratory statement concerning urgent need for electrical substation in N. Key Largo by Fla. Keys Elec. Coop. Ass'n, Inc.*, Order No. PSC-02-1459-DS-EC, 02 F.P.S.C. 10:342 (2002) (noting that even though the legal issue before DOAH was different than the issue presented in the Petition, the subject matter was the same, and therefore not properly decided by the PSC).

> litigation against the City of Vero Beach and asked us to refrain from issuing declaratory statements that would address any factual or legal issues related to the town's pending litigation. Indian River Shores did not seek intervention or amicus curiae status in either docket. **The information provided in the Notice of Pending Litigation is not relevant to the City's Petition because it concerns the expiration of a franchise agreement between the Town of Indian River Shores and the City of Vero Beach, which is not addressed in this docket.**

(*Id.* at 14, n.12 (emphasis added).)

But even if the PSC declaratory statements in the proceedings involving the City and the County had any bearing here, the issues raised in those proceedings are far from "virtually identical facts" suggested by the City on page 8 of the Motion to Dismiss. Those proceedings did not address the distinct rights afforded under Florida law to a municipality like the Town, since the County by definition is not a municipality.[7] More importantly, Section 180.02(2), Florida Statutes—upon which the City itself relied in those same PSC proceedings for the basis of its extra-territorial power in the *unincorporated* portions of Indian River County (Ex. F to Motion to Dismiss, at 8)—provides that the City may *not* exercise extra-territorial powers in the Town without the Town's consent. § 180.02(2), Fla. Stat. (2014) ("Any municipality may extend and execute all of its corporate powers applicable for the accomplishment of the purposes of this chapter outside of its corporate limits, as hereinafter provided and as may be desirable or necessary for the promotion of the public health, safety and welfare or for the accomplishment of the purposes of this chapter; provided, **however, that said corporate powers shall not extend or apply within the corporate limits of another municipality**." (emphasis added)).

If the Court determines that the Town is entitled to the declaratory relief it seeks, the PSC will certainly retain discretion to modify the Territorial Agreement, which would include the

[7] *See* § 165.031(1) & (3), Fla. Stat. ("(1) 'County' means a political subdivision of the state established pursuant to s. 1, Art. VIII of the State Constitution…. (3) 'Municipality' means a municipality created pursuant to general or special law authorized or recognized pursuant to s. 2 or s. 6, Art. VIII of the State Constitution.").

discretion to conform the Territorial Agreement to the Court's order, just as it has approved modifications of the Territorial Agreement on multiple previous occasions.[8] Modification of the Territorial Agreement is an important regulatory step, but just as in *Casselberry*, it should be reserved for another day and certainly should not impede this Court's ruling on constitutional, statutory and contract issues that clearly are not within the jurisdiction of the PSC, but rest within the jurisdiction of this Court.

The Court has jurisdiction over this matter, that jurisdiction has been properly invoked and, therefore, dismissal of Count I for lack of subject matter jurisdiction would be in appropriate.

C. The PSC Does Not Have Primary Jurisdiction Over This Matter, and Even If It Did That Is Not The Basis For Dismissing The Complaint

As a second ground for dismissal of Count I, the City argues that the PSC has "primary jurisdiction." This argument fails for at least three reasons. First, the concept of "primary jurisdiction," is a doctrine of judicial deference and not restraint, and therefore not a ground for dismissal at all. *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1041 (Fla. 2001) (confirming that "even assuming the doctrine of primary jurisdiction to be applicable, the trial court erred in dismissing the amended complaint with prejudice"). As such, the doctrine merely "operates to postpone judicial consideration of a case to administrative determination of important questions involved by an agency with special competence in the area." *Id.* (quotation omitted). "It does not defeat the court's jurisdiction over the case, but coordinates the work of the court and the agency by permitting the agency to rule first and giving the court the benefit of the agency's views...." *Id.* (quotation omitted).

[8] *See* Ex. E to Motion to Dismiss, containing prior approvals of the Territorial Agreement and its modifications, issued in 1972, 1974, 1981 and 1988.

Second, as the PSC recognized, and the City argued in the recent PSC proceedings involving Indian River County, "the construction of the franchise agreement, the application of preemption doctrine, the application of various real property principles including the rights of hold-over tenants, the interpretation of easements, the analysis of eminent domain law, and the analysis of potential prescriptive rights … *should be resolved by a circuit court*." (Ex. G to Motion to Dismiss at 19.) Likewise, the PSC acknowledged in those proceedings that "[i]t would not be possible to give a complete and accurate declaration on these questions [raised by the County] without addressing the County's statutory and constitutional power," but that the PSC has "**no authority over Chapter 125, F.S.** [which explains a county's police powers and is akin to Chapter 166 which explains the Town's municipal home rule powers] **or over any provision of the Florida Constitution**." *Id.* at 31. As such, the PSC denied the County's petition for guidance on those issues. *Id.* Remarkably, after emphasizing the PSC's limited authority to address the County's questions that "must be resolved by a circuit court," the City now argues that this Court must not exercise its jurisdiction over fundamental questions about the construction of a franchise agreement and the Town's statutory and constitutional power, but instead should dismiss the claim in deference to the PSC's administrative determinations on those issues.[9]

Third, the City argues that Count I must be dismissed because the PSC has primary jurisdiction to determine its jurisdiction, and therefore, this Court is powerless to proceed. Essentially, the City's proposition is that any claims related to "any matter arguably within the [PSC's] jurisdiction" must always be dismissed because the Court cannot determine whether the Court or the PSC has jurisdiction—only the PSC can make that determination. Again, the Town

[9] Also as stated above, the Town acknowledges that the PSC does have special competence and exclusive jurisdiction to make administrative determination regarding proposed modifications of the Territorial Agreement. But that is a secondary issue that the PSC can address after this Court has determined the predicate constitutional, statutory and contractual legal questions presented here. *See Casselberry*, 793 So. 2d at 1177.

is not seeking a declaration about the Territorial Agreement nor is it asking for modification of the Territorial Agreement, issues which it agrees are matters within the PSC's exclusive jurisdiction. The Town has claims for declaratory relief based on constitutional and statutory law and contract rights, all of which happen to relate to the Town's rights as a contracting party to a franchise agreement and its rights as a municipality to be protected from extra-territorial encroachments by the City to which the Town has not consented. Taking the City's argument to its logical conclusion, any circuit court case involving utility service must be promptly dismissed because only the PSC, and not a circuit court, can determine who has jurisdiction. As the numerous circuit court cases cited in the City's Motion and this response illustrate, the circuit courts have an important role to play in interpreting contracts and Florida law, regardless of whether or not such issues relate to electric service, and while deference to the PSC is certainly required in situations where its jurisdiction is directly at issue, this is not such an occasion. *See Casselberry*, 793 So. 2d at 1177 (holding that regulatory matters involving PSC and FERC "**are reserved for another day and are prematurely raised** [because] [t]he sole issue today is whether Casselberry is entitled to enforcement of a provision" in its franchise agreement (emphasis added)).

Sprinkled throughout the City's Motion to Dismiss is the notion that the Florida Legislature, in Section 366.04(1), Florida Statutes, has "conferred" jurisdiction to the PSC that is exclusive and superior to that of municipalities and towns. But, as the PSC has properly acknowledged, the Legislature has not "conferred" upon that agency any jurisdiction to interpret the constitutional or statutory provisions at issue in this case. Nor has it extended the PSC's jurisdiction to construe or declare the rights of parties under a franchise agreement. In fact, the Legislature has made it clear that nothing in Chapter 366 restricts the power of a municipality like the Town to govern and control the use of its rights-of-way and other public places pursuant to

franchise agreements. *See* § 366.11(2), Fla. Stat. ("Nothing herein shall restrict the police power of municipalities over their streets, highways and public places…."). Notably, the PSC itself has expressly recognized that the jurisdictional limitation imposed by Section 366.11(2) precludes it from interceding into disputes such as this one that fundamentally relate to the terms and conditions of a franchise agreement between a Florida municipality and an electric utility. *In re: Petition of the City of Miami Beach for Emergency Hearing,* Order No. 10543, 82 F.P.S.C. 196 (1982) ("[T]he Commission may not interpose itself in the terms and conditions of the franchise contract. This view is required by the clear dictates of the Legislature in Section 366.11(2).").

Nor has the Legislature "conferred" jurisdiction on the PSC to regulate the rates of a municipally-owned electric utility like the City. *See* §§ 366.04 & 366.02(1), Fla. Stat. (providing the PSC with the jurisdiction to regulate rates and services of a "public utility," but excluding municipalities from the definition of "public utility"); *see also Mann,* 411 So. 2d. at 163 ("We agree that the [PSC] does not have jurisdiction over a municipal electric utility's rates."); *Amerson* 362 So. 2d at 444 (Fla. 1978) ("The PSC's power to regulate is based upon the provisions of Chapter 366…. With limited exceptions, … the jurisdiction of the PSC is limited to 'public utilities' …. Thus, the statute by its very terms specifically excludes electric utilities operated by … municipalities from its rate change jurisdiction. Furthermore, Section 366.11, Florida Statutes … provides certain exemptions from the PSC's jurisdiction stating in part 'No provision of this chapter shall apply in any manner, other than as specified in ss. 366.04(2), 366.05(7) and 366.055 to utilities owned and operated by municipalities , whether within or without any municipality.'").

The City's primary jurisdiction arguments are misguided and afford no basis for the Court to dismiss this action.

D. The Town Has No Administrative Remedies to Exhaust

For many of the same reasons, the City's argument that the Town has failed to exhaust its administrative remedies is also misplaced. First, Section 86.111, Florida Statutes, clearly states that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief." *Orange Cnty. v. Expedia, Inc.*, 985 So. 2d 622, 627-29 (Fla. 5th DCA 2008) (rejecting argument on motion to dismiss that declaratory judgment action must be dismissed due to failure to exhaust administrative remedies).

More fundamentally, the Town has no administrative remedy to exhaust. The PSC's orders, the case law, and the City's own prior arguments to the PSC cited above, confirm that the PSC has no authority over issues of construction of a franchise agreement or over the constitutional and municipal powers at issue here. *See* § I.B. *supra*. And the City itself confirms that its "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." (Motion to Dismiss at 16.) A party is not required to exhaust administrative remedies that do not exist or would be futile. *Artz ex rel. Artz v. City of Tampa*, 102 So. 3d 747, 751 (Fla. 2d DCA 2012) ("The law requires no futile act."); *Winick v. Dep't of Children & Family Servs.*, 161 So. 3d 464, 469 (Fla. 2d DCA 2014) ("exhaustion of administrative remedies is not required where none are adequate or available to provide the requested relief").

II. The Town Has Stated a Claim for Anticipatory Breach of the Franchise Agreement

Count II of the Amended Complaint asserts a claim for anticipatory breach of contract based on the City's assertion it will not comply with the agreed-upon 30-year expiration term of the Franchise Agreement. The City asks the Court to dismiss the Town's anticipatory breach count based on the erroneous assertions that: (1) the Town has failed to allege that the City has repudiated

its obligations prior to the date in which performance for said obligations is required; (2) the City's right and obligation to provide service to the Town is found in the territorial agreement orders of the PSC which are separate and apart from the rights and obligations of the Franchise Agreement; and (3) the Town's only damages are attorneys' fees and costs and those damages are not recoverable in this action. All of these arguments must fail for the reasons set forth below.

A. Count II Sufficiently Alleges The Repudiation Of A Contractual Duty By The City

In its Motion to Dismiss, the City concedes the Franchise Agreement is a valid contract with a term that will expire on November 6, 2016 (Motion to Dismiss at 19-20), but then argues that the Town has not alleged any repudiation of any duty before the time has come to perform that duty. The City further asserts that because it intends to continue to provide service after the Town's consent has expired, it cannot possibly be deemed to have repudiated a duty to perform. These arguments ignore the express allegations in the Amended Complaint and misrepresent the City's duty to vacate the premises upon expiration of the Franchise Agreement.[10]

Anticipatory breach occurs when one party repudiates a contractual obligation before the time for its performance. *Alvarez v. Randon*, 953 So. 2d 702, 709 (Fla. 5th DCA 2009). "When an anticipatory breach occurs, the non-breaching party has the right … to elect to treat the repudiation as a breach by bringing suit…" *Dutra v. Kaplan*, 137 So. 3d 1190, 1192 (Fla. 3d DCA 2014). "The elements of a breach of contract action are: (1) a valid contract; (2) a material breach; and (3) damages." *Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP*, 137 So. 3d 1081, 1094-95 (Fla. 3d DCA 2014).

[10] The City argues in various places that it cannot leave because of the Territorial Agreement, but the City is fully empowered to take whatever steps are required to modify that regulatory approval as part of its departure from the Town, including advising the PSC that it no longer has the Town's consent to serve after the Franchise Agreement expires.

The Town specifically alleges that the City has asserted it will not honor the contract expiration date which was bargained-for in the Franchise Agreement, but will continue to operate extra-territorially within the Town and occupy the Town's rights-of-way and other public areas without the Town's permission after the Franchise Agreement expires on November 6, 2016. (Am. Compl. ¶¶ 64-65.) However, the Franchise Agreement on its face provides that the City is given the permission to operate its electric utility extra-territorially within the Town and occupy its rights-of-way and public areas for a *limited* period of 30 years. (*Id*. ¶¶ 18, 62, and Ex. A thereto at §§ 1, 2, 5 and 8.) Without the Town's permission, the City has no extraterritorial powers conferred by general or special law to operate within the Town. (*Id*. ¶¶ 10, 12.) Thus, the City has an obligation to vacate the Town's rights-of-way and other Town public places upon expiration of the Franchise Agreement.

The City appears to be arguing that regardless of the Franchise Agreement, it has some perpetual right to continue to occupy the Town's public rights-of-way and other public areas when the Franchise Agreement expires, but that claim is not supported by Florida law. The City has no authority to occupy the Town's rights-of-ways or serve extra-territorially within its municipal boundaries absent the Town's consent. Under Section 180.02(2), Florida Statutes, the corporate power of a municipality to extend its utility extra-territorially "shall not extend or apply within the corporate limits of another municipality." Under the Article VIII, § 2(c) of the Florida Constitution and Section 166.021(3)(a), Florida Statutes, a municipality's extra-territorial powers can only be granted by special or general law. The City has no such authorization, and the only statute that does expressly govern this situation, Section 180.02, expressly prohibits the City's encroachment

in the Town without the Town's consent. The City has no perpetual right to occupy Town property after the Franchise Agreement expires.[11]

The case of *Florida Power Corp. v. City of Winter Park*, 887 So. 2d 1237 (Fla. 2004), cited by the City, actually confirms these principles. In that case, a franchise agreement between an electric utility and the city expired before it was renegotiated. The utility continued to serve and occupy the city's rights-of-way with the consent of the franchisor city but no longer paid its franchise fees to the city. *Id.* at 1239. The Court, analogizing the situation to a holdover tenant, held that an implied contract continued to govern and that the franchise fees must continue to be paid for the rights to use the rights-of-way. *Id.* The Court also was careful to note that the parties had not been "forced" to continue to perform, but since they performed voluntarily and the city consented to occupation of its rights-of-way, an implied contract could be applied. *Id.* at 1241. Thus, contractual rights and duties dictated by the franchise cannot simply be ignored by a holdover franchisee when the franchise expires. Here, in contrast to the *Winter Park* case, the Town cannot be more clear that it no longer consents to the City remaining under an implied contract when the Franchise Agreement expires, but that the City would remain as a holdover franchisee without the Town's consent in violation of the Franchise Agreement, as well as the Florida Constitution, the Municipal Home Rule Powers Act and Section 180.02(2), Florida Statutes. Thus, it must take what steps are required to leave.

Stated simply, the duration and expiration date of a contract are material terms to any agreement and thus must be honored by the parties. The City's argument that it has "no obligation under the Franchise Agreement" to remove its facilities from the Town's rights-of-ways after the

[11] The law in Florida is that contracts are not to be construed to confer "a right in perpetuity … unless compelled by the unequivocal language of the contract." *See S. Bell Tel. & Tel. Co. v. Fla. E. Coast R. Co.*, 399 F.2d 854, 857 (5th Cir. 1968) (applying Florida law). Here there is no question that the Franchise Agreement had a limited 30-year duration, and the City cannot argue that it enjoys the right to occupy the Town's public places in perpetuity.

Franchise Agreement expires is a blatant repudiation of that performance obligation and a direct breach that violates the Town's rights under the Franchise Agreement, the Constitution, the Municipal Home Rule Powers Act and Section 180.02(2), Florida Statutes. (Motion to Dismiss, at 20.) The Town has sufficiently alleged an anticipatory breach.

B. The PSC's Territorial Agreement Does Not Invalidate the Town's Claim for Breach of Contract

The City appears to argue that even though there is no statutory authority for the City to provide extra-territorial electric service within the Town after the Franchise Agreement expires, and even though Section 180.02(2) expressly prohibits the exercise of such extra-territorial powers, the City does not need the Town's consent to exert extra-territorial powers within the Town by virtue of a PSC-approved agreement between the City and FPL. Taken to its logical conclusion, the City's argument renders its obligations to observe its duties under the Franchise Agreement meaningless and defies well-settled constitutional and statutory principles that protect the equal independence of municipalities by limiting the exercise of extra-territorial municipal powers.

There is absolutely nothing in the Franchise Agreement that provides the City with a privilege to ignore the Franchise Agreement's terms upon regulatory approval of the service area. It would make no sense. Why would the parties enter into the Franchise Agreement if it were not needed to confer authority upon the City and memorialize the Town's consent for the City to occupy the Town's rights-of-way? Moreover, there is nothing preventing the City from informing the PSC that it will no longer have the Town's consent to provide electric service within the Town following expiration of the Franchise Agreement in November 2016, and ask the PSC for modification of the territorial boundaries.

C. The Town Has Sufficiently Alleged Damages

The Town alleges that it has been damaged by the City's refusal to comply with the Franchise Agreement's express statement as to its duration, specifically alleging that it "has been harmed by the City's anticipatory breach of the Franchise Agreement's expiration terms because it has been required to take formal action to protect its rights as a franchising municipality from continued service and occupation of the Town's rights-of-way and public areas by the City without the Town's consent." (Am. Compl. ¶ 66.) The City argues that this is merely a claim for attorney's fees incurred for prosecuting this lawsuit, even though that appears nowhere in the allegation. The allegation on its face would relate to actual damages incurred for any steps the Town has taken and may continue to be required to take in the future to protect itself and its citizens following the City's repudiation of its contractual obligations under the Franchise Agreement, which would certainly encompass more than the attorneys' fees in this lawsuit. Given that the Town is losing its contractual protections against unreasonable rates and unauthorized use of its rights-of-way upon expiration of the Franchise Agreement on November 6, 2016, the Town must certainly consider and potentially implement other means of regulating the utility service to protect its inhabitants.

In addition, there is no question that if the Town has adequately alleged a breach, then as a matter of law it has been harmed by the breach itself and is entitled to at least nominal damages. *Abbott Labs., Inc. v. Gen. Elec. Capital*, 765 So. 2d 737, 740 (Fla. 5th DCA 2000) (holding that "nominal damages had been sustained" at the time of breach).

Count II states a valid cause of action and should not be dismissed.

III. Count III of the Amended Complaint States a Valid Claim

The City argues that the Court should dismiss the Town's claim for breach of contract in Count III because the Town's requested relief is a refund and the Court cannot order a refund of

moneys paid for utility services. To support this argument, the City cites numerous cases involving general ratemaking principles which are not relevant to the breach of contract allegations in Count III. This count does not ask the Court to engage in ratemaking. Rather, it sets forth a breach of contract claim based on specific allegations that the City has breached its *contractual* obligations under the Franchise Agreement to provide reasonable rates and prudently operate its utility, and that the Town has been harmed as a result. The Town is certainly entitled to damages if these bargained-for obligations were breached, and has stated a valid claim on that basis.

As set forth above, a claim for breach of contract must allege: (1) a valid contract, (2) a material breach, and (3) damages. *Grove Isle Ass'n, Inc.*, 137 So. 3d at 1094-95. All of these elements are alleged in Count III. The Town alleges the Franchise Agreement is a valid contract between the City and the Town. (Am. Compl. ¶ 70.) The Franchise Agreement requires that the City operate its electric utility and furnish electric services in accordance with normally accepted electric utility standards, and to charge only reasonable rates for the electric services it provides. (*Id.*, Ex. A, Franchise Agreement, §§ 1, 2 and 5.) The Town alleges that the City has not operated its electric utility and furnished its electric services in accordance with normally accepted electric utility standards, but rather has acted imprudently in the management of its utility. (*Id.* ¶ 70.) The City also alleges that the City has not charged reasonable rates for the electric services it provides, but rather has charged unreasonable, excessive rates for those services. (*Id.* ¶ 71.) In particular, the Town has alleged numerous specific activities of the City's operation of its utility which are imprudent and which have led to the excessive rates that are being charged to the Town. (*Id.* ¶ 38.) The Town furthermore alleges that the City has used its unregulated electric monopoly to force the Town and many of its occupants to pay electric rates that have been consistently and substantially higher than the electric rates paid by Town citizens receiving electric utility service

from FPL. (*Id*. ¶ 29.) The City cites several authorities on pages 22 and 23 of the Motion to Dismiss to argue that because rate-setting is legislative and prospective function, a Court cannot award damages even if it strikes down a rate as excessive. None of the authorities cited by the City, however, involve a claim for damages based on the breach of an express *contractual* obligation to charge reasonable rates, as is the case here with the Franchise Agreement.

Finally, the Town has been harmed by the breach itself even if the City were only required to pay nominal damages for the harm it has caused. *Abbott Labs., Inc.*, 765 So. 2d at 740 (holding that "nominal damages had been sustained" at the time of breach).

For all of these reasons, the Town has adequately stated a claim for breach of contract in Count III on which relief can be granted.

IV. The Town Validly Requests for Declaratory Relief in Count IV Based on the City's Charging of Unreasonable and Oppressive Rates Based on Imprudent Utility Management

Count IV requests declaratory and supplemental relief for the City's breach: (i) of its duties under the Franchise Agreement, and (ii) of its duties a matter of law, to act prudently in managing its electric utility system in order to protect its customers from unreasonable and oppressive rates. Florida law is clear that this is a validly stated cause of action. The City concedes in its Motion to Dismiss that declaratory relief is proper to challenge the reasonableness of rates. But then the City argues that Count IV: (1) fails to allege the necessary element required to state a cause of action for declaratory relief, (2) improperly seeks to have the Court delegate its "exclusive" powers to review a rate to the jury, (3) is "procedurally improper" under section 86.061 by requesting "supplemental relief," and (4) is improper because it seeks relief in the form of a refund which this Court is not legally authorized to award. The City's arguments do not support dismissal of Count IV.

A. The Town Has Properly Pled The Necessary Elements For Declaratory Relief

The City first argues that the Town has not adequately pled its entitlement to declaratory relief. This argument fundamentally ignores that the Declaratory Judgment Act is to be "liberally administered and construed." § 86.101, Fla. Stat. The Town's allegations, recited above, make clear that there is a dispute between the Town and the City over the unreasonableness of its rates, and according to principles cited in the City's own motion, Florida's "courts will intervene to strike down unreasonable or discriminatory rates prescribed by the Legislature, a municipality, or municipal commission." (Motion to Dismiss at 23 (citing *Mohme v. City of Cocoa*, 328 So. 2d 422, 424-25 (Fla. 1976)).

As described above, the City has a contractual duty under the Franchise Agreement to operate its utility prudently and not charge unreasonable rates. (Am. Compl., Ex. A, §§ 1, 2 and 5.) Independent of that contractual duty, Florida law is clear that a municipal electric utility has an inherent legal duty to its customers to operate and manage its municipal electric utility with the same degree of business prudence, conservative business judgment and sound fiscal management as required of private investor-owned electric utilities. *State v. City of Daytona Beach*, 158 So. 300, 305 (Fla. 1934). Moreover, customers of an electric utility are not required to bear the cost of imprudent utility management decisions. *See Gulf Power Co. v. FPSC*, 487 So. 2d 1036, 1037 (Fla. 1986).

The Town has alleged that the City has imprudently managed its utility and is imposing unreasonable rates resulting from that imprudent management on its customers, including the Town. The City continues to charge these rates. As in Count I, the Town has a bona fide controversy with the City concerning whether the unreasonable rates which it has charged and continues to charge are permissible under Florida law and can be charged in the future. The Motion

to Dismiss itself clearly indicates a difference of opinion concerning the parties' rights regarding these issues under the Franchise Agreement and under Florida law. This alone illustrates the necessity of a declaratory judgment here, particularly under the liberal construction of the Declaratory Judgment Act. *See, e.g., Jensen v. DiPaolo's Italian Foods Co.*, 244 So. 2d 513, 514-15 (Fla. 2d DCA 1970) (reversing dismissal of declaratory action over franchise agreement, and stating that "the motion to dismiss clearly discloses a difference in interpretation of the contract … and our declaratory judgment law gives a right to seek interpretation of contracts in the circuit court in such a circumstance. Fla.Stat. s 86.011.... The law is to be liberally construed. Fla.Stat. s 86.101 …. The existence of another remedy is not disqualifying. Fla.Stat. s 86.111 (1969)…. These parties have a continuing relationship under this contract and are entitled to know what it means."); *see also Donaldson v. City of Titusville,* 345 So. 2d 800, 801 (Fla. 4th DCA 1977) (reversing order dismissing declaratory judgment counts and holding that "[i]f a Complaint contains any merit, it is to be liberally construed in favor of the pleader when subjected to a motion to dismiss.").

B. The Town Is Not Asking The Court To Delegate Is Powers To The Jury But Only To Refer Pertinent Questions Of Fact To The Jury Which Is Routinely Permitted In Declaratory Judgment Proceedings

The City argues that Count IV should be dismissed because it requests that the Court refer factual questions to a jury for determination. First, the insertion of a request that the Court use a jury for factual questions is not a valid basis to dismiss Count IV for failure to state a claim. At the appropriate time, the Court can consider which questions can or should be submitted to a jury, and even then can reserve the discretion to use or not use the jury's findings on those issues. If the Court ultimately concludes that some or all of the issues are not appropriate for a jury, the Town's claim for declaratory relief can obviously still proceed. In any event, "the Legislature clearly contemplated fact-finding in declaratory actions." *Higgins v. State Farm Cas. Co.*, 894 So.

2d 5, 12 (Fla. 2005). Indeed, "Section 86.071 expressly provides a mechanism for jury trials when an action under the Act concerns the determination of an issue of fact." *Id.* The Declaratory Judgment Act also specifically provides that "[w]hen an action under this chapter concerns the determination of an issue of fact, the issue may be tried as issues of fact are tried in other civil actions in the court in which the proceeding is pending. To settle questions of fact necessary to be determined before judgment can be rendered, the court may direct their submission to a jury...." § 86.071, Fla. Stat.; *see also F.R.W.P., Inc. v. Home Ins. Co.*, 450 So. 2d 914, 915 (Fla. 4th DCA 1984).

Contrary to the City's argument, the Amended Complaint does not request that a jury make any ultimate determination regarding the reasonableness of the City's rates. Rather, the Amended Complaint only requests that factual questions be referred by the Court to a jury, where the Court deems appropriate, with the Court making the ultimate decision on Count IV.

C. The Town's Request For Supplemental Relief Is Procedurally Proper

The City also argues that the Town's request for supplemental relief in the Amended Complaint is procedurally improper. To the contrary, the Declaratory Judgment Act expressly provides that "[a]ny person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action." § 86.011, Fla. Stat. Thus, the relevant statutory provisions contemplate the opportunity to provide notice of claim for relief in the Amended Complaint itself as well as through the procedures under Section 86.061, Florida Statutes.[12] Florida law does not prohibit a request for supplemental relief in an initial

[12] Section 86.061, Florida Statutes, provides that

> 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.

complaint seeking declaratory relief, but quite the opposite. Giving notice in the Amended Complaint of the relief sought under Chapter 86, Florida Statutes, helps preserve and resolve the claims at issue. *Lassetter v. Blalock*, 139 So. 2d 726, 728-29 (Fla. 1st DCA 1962) ("The plaintiffs, by thus praying only for a declaration, failed to take advantage of the provisions of [predecessor] Section 87.01, Florida Statutes, . . . which provided in pertinent part: 'Any person seeking a declaratory decree, judgment or order may, in addition to praying for a circuit court declaration, also pray for additional, alternative, coercive, subsequent or supplemental relief in the same action.'"). As the *Lasseter* court explained, the Declaratory Judgment Act's "supplement relief" section simply provided "[o]ne **other** statutory avenue of relief …to the plaintiffs if they wished relief in addition to the declaration of rights." *Id.* (quoting § 87.07, Fla. Stat. (predecessor to § 87.061)). Furthermore, even if the Town were ultimately entitled to no supplement relief, a request for supplemental relief in the pleading would not necessitate a dismissal for failure to state a claim on which relief can be granted. The Court could simply deny the supplemental relief requested following adjudication of the underlying request for declaratory relief.

D. The Court Is Not Legally Precluded From Requiring The City To Disgorge Ill-Gotten Gains.

The City further argues that Count IV's request for a refund as supplemental relief is improper. Again, the Court may or may not determine later in this proceeding that the Town is entitled to a particular form of supplementary relief, but that is not a question to be resolved on a motion to dismiss. *See Mills v. Ball*, 344 So. 2d 635, 638 (Fla. 1st DCA 1977) ("Unlike other actions, a motion to dismiss a petition for declaratory judgment does not go to the merits but goes only to the question of whether or not the plaintiff is entitled to a declaration of rights-not to whether or not he is entitled to a declaration in his favor.").

Moreover, the Amended Complaint alleges that the City is using the electric rate payments from the Town and other customers outside the City's limits as a means to keep ad valorem taxes on property within the City artificially low and to cover costs that had nothing to do with the operation of the City's electric utility. (Am. Compl. ¶ 38d & e.) The City's use of its electric rates as a surrogate for taxation is one of the factors that has made its rates excessive, and therefore it is a component of the unreasonable rate burden being improperly imposed on the Town. (*Id*. ¶ 38.) As such, it is fundamentally no different than numerous instances under Florida law in which "the courts have mandated the refund of illegally extracted monies" collected by municipalities. *Bill Stroop Roofing, Inc. v. Metro. Dade Cnty.*, 788 So. 2d 365, 366 (Fla. 3d DCA 2001) (collecting authorities). The Court should be able to consider these issues and, if appropriate, refund electric utility revenues that were improperly extracted by the City.

For all these reasons, Count IV states a claim on which relief can be granted and should not be dismissed.

CONCLUSION

At its core, this lawsuit is about the Florida Constitution, the Municipal Home Rule Powers Act, Section 180.02(2), Florida Statutes, and the rights and responsibilities of the Town and City under a Franchise Agreement that is scheduled to expire in less than two years. It is about settled constitutional and statutory principles that respect the equal independence of municipalities by limiting the exercise of extra-territorial municipal powers. It is about whether the City has the necessary statutory authority to exert extra-territorial powers within the corporate limits of the Town and occupy the Town's public places in perpetuity without the Town's consent after the Franchise Agreement expires. This Court, and only this Court, is the proper forum to adjudicate these important questions.

This lawsuit is not about modifying a service territory agreement approved by the PSC, and the Amended Complaint acknowledges that issues relative to modification of that agreement are for another day and will need to be taken up by the PSC. But the PSC's jurisdiction over territorial agreements in no way limits the Court's proper role in ruling on the questions that are before it. The PSC has no authority over the interpretation of the rights of the City and the Town under the Franchise Agreement, the Florida Constitution, the Municipal Home Rule Powers Act, and Section 180.02, Florida Statutes, which are all pertinent to the questions raised here regarding extra-territorial municipal powers. In fact, the PSC has stated that these types of issues are for the circuit courts to decide.

The Town also has raised valid claims for anticipatory breach of contract based on the City's repudiation of the Franchise Agreement's express expiration date, for breach of the City's obligations under Franchise Agreement to charge only reasonable rates and prudently manage its electric utility, and for declaratory relief that the City's electric rates it charges the Town are unreasonable.

For all of these reasons, there is no basis for dismissal of the Amended Complaint and the Amended Complaint should stand.

WHEREFORE, the Town asks that the Court deny the City's Motion to Dismiss, and provide the Town such other and further relief as this Court deems just and proper.

Respectfully submitted this 17th day of July, 2015.

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CERTIFICATE OF SERVICE

I 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 Motion to John W. Frost, II, and Nicholas T. Zbrezeznj, Frost Van Den Boom, P.A., Post Office Box 2188, Bartow, FL 33831-2188 [Jfrost1985@aol.com; nzbrzeznj@fvdblaw.com; paulaw1954@aol.com; pwilkinson@fvdlaw.com], and that a true and correct copy of the foregoing has been sent by electronic mail to Wayne R. Coment, City Hall, 1053 20th Place, Vero Beach, FL 32960 [cityatty@covb.org] and to Robert Scheffel Wright, Esq., Gardner, Bist, Bowden, Bush, Dee, LaVia & Wright, P.A., 1300 Thomaswood Dr., Tallahassee, FL 32308-7914 [schef@gbwlegal.com], counsel for the City all on this 17th day of July, 2015.

/s/D. Bruce May, Jr.
Attorney