IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

THE CITY OF CORAL GABLES,

Plaintiff,

vs.

FLORIDA POWER & LIGHT COMPANY,

Defendant.
_____/

CIRCUIT CIVIL DIVISION
CASE NO.: 17-26330 CA (01)

ORDER ON DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Palpably frustrated by – and clearly dissatisfied with – Florida Power & Light Company's ("FPL" or "Defendants") performance – both in preparation for and in the aftermath of Hurricane Irma – The City of Coral Gables ("City" or "Plaintiff") seeks judicial recourse. FPL – through its "Motion to Dismiss Amended Complaint" ("MTD") – insists that the claims advanced by the City fall comfortably within the "exclusive jurisdiction" of the Florida Public Service Commission ("PSC"), MTD, p. 4 - and – in the alternative – contends that the legal claims pled fail to state viable causes of action. The Court reviewed the parties' thorough written submissions, and entertained oral argument on April 9, 2018. The matter is now ripe for disposition.

II. FACTUAL ALLEGATIONS

The allegations of the Amended Complaint ("AC"), which at this point are assumed true, *see Fixel, Inc. v. Rosenthal & Rosenthal, Inc.*, 842 So. 2d 204 (Fla. 3d DCA 2003), are straightforward. "FPL holds an exclusive, thirty year franchise to

provide electrical power to the City and its residents." AC, p. 1. This "contract" – as interpreted by the City – imposes on FPL certain "non-delegable duties," including a duty to safely maintain "the vegetation and other obstructions that surround its power lines, its electrical facilities, and its ever-aging transformers," *Id.*, as well as a duty to ensure that its equipment (i.e., poles, lines, transformers, etc.) does not "fall into disrepair." AC, ¶ 2.[1] This is so – says the City – because the Agreement requires that FPL "construct, operate and maintain" its "conduits, poles, wires, transmission and distribution lines," as well as "all other facilities," in accordance with the company's "customary practice." Plaintiff insists that "customary practice" obligated FPL to: (a) be "solely responsible for the trimming of the trees and management of the vegetation" in order to prevent interference "with the electricity during a storm," *Id.*, and (b) to "properly maintain its electrical poles and transformers to withstand tropical storm or Category I force winds such that service will be restored and its customers will not be put in jeopardy by downed power lines or – suffer an unreasonably prolonged and widespread power outage after a storm." *Id.*, p. 6.[2]

[1] This Franchise Agreement was "adopted by the City in an ordinance and countersigned by FPL." *Id.*, pp. 4-5.

[2] The City also alleges that its "Code," which is incorporated into the Agreement, obligates FPL to maintain its plants and fixtures "at the highest practicable standard of efficiency." *Id.*, at p. 5.

According to the City, FPL's "failure to maintain both the vegetation surrounding its equipment and the equipment itself" resulted in "damages" caused by Irma that otherwise "would have been avoided," and also "caused unnecessary delays in the restoration of power after the storm had passed." Id., pp. 1-2. The City also claims that FPL's failure to honor its contractual obligations continues to expose the City (and its residents) to further risk of harm as "the next Atlantic hurricane season" – which is now only months away – is expected to be "active," thereby making it "imperative that FPL meet its obligations to the City in short order." *Id.*, p. 2.

A. **The Alleged Breaches and their Alleged Consequences**

The AC alleges that FPL breached the Franchise Agreement by: (a) failing to perform its "exclusive obligation to trim the trees and branches near its lines"; (b) failing "to properly service and maintain the wooden poles that support" its electrical lines; and (c) failing "to replace or repair antiquated transformers that should have been replaced…." *Id.*, pp. 6-9. As a result of these "failures," the City alleges that its residents "experienced widespread and unreasonably prolonged power outages" even though Irma's "strength in Miami-Dade County was considerably less powerful than had been predicted." AC, ¶¶ 23, 38 ("had FPL properly maintained its facilities, as it had the exclusive obligation to do, the power outages in the City would have been shorter and less widespread and the danger posed to the public from the downed power lines would have been diminished.").

B. **Relief Sought**

Based upon these allegations the City – through "Count I" – asks the Court for "a declaration that under the Franchise Agreement, FPL has the sole and exclusive responsibility to trim and manage trees and other vegetation near its electrical lines." AC, ¶ 43. Plaintiff also seeks a "declaration that FPL has an obligation to carefully maintain or replace its transformers and electrical poles." AC, ¶ 44. The AC alleges these matters of contract interpretation are in controversy because in the aftermath of Irma FPL executives claimed that it was the City's "'irresponsibly managed tree program' and its resistance to 'FPL's well-documented efforts to trim trees' that caused widespread and lengthy power outages," AC, ¶ 25, and further commented that "[c]ustomers need to know they are responsible for trimming in their backyards." AC, ¶¶ 25-26. The City points to these statements as evidence that the parties are in disagreement regarding the scope of FPL's contractual duties.

In "Count II" – titled "Breach of Contract/Specific Performance" – the City claims entitlement to "an equitable remedy requiring FPL to specifically perform in compliance with the terms and obligations of the Franchise Agreement," and claims that FPL's "unreasonable and unjustified refusal to perform it obligations… has left [it] with no adequate remedy at law." AC, ¶¶ 52, 53. And in "Count III" – which is presumably pled in the alternative, the City seeks the remedy "at law" it claims to be inadequate; economic damages for breach of contract. AC, ¶ 59.

Finally, in "Count IV" the City asks the Court to "enter an injunction requiring FPL to trim trees near its lines," alleging that absent such relief "there is a likelihood [it] will suffer irreparable harm," and the "safety and welfare of its residents" will remain in jeopardy. AC, ¶¶ 61-66.

III. FPL's MOTION TO DISMISS AND PLAINTIFF'S RESPONSE

A. The Motion to Dismiss

FPL launches its motion by first insisting that this litigation was brought not to redress legitimate legal claims, but rather because the City believed it was not being "respected" and wanted to "receive FPL's attention." MTD, p. 1. To support this contention FPL refers the Court to statements attributed to Mayor Valdes-Fauli, who it claims was "emphatic that the City was 'not looking' to litigate." MTD, pp. 1-2. Even if true these "facts" are – as FPL's able counsel undoubtedly knows – irrelevant to the issues before the Court.

Turning to what are relevant issues, FPL initially argues that the PSC has exclusive jurisdiction over the service related issues raised in the AC. MTD, pp 3-5. According to FPL the claims described in the AC "fall squarely and completely within the scope" of the "PSC's exclusive jurisdiction;" the PSC "dedicates enormous time and resources" addressing matters such as those alleged; and the PSC – which possesses "expertise" in this area – "does not require the intercession of Coral Gables and this Court…." MTD, p. 6. FPL also points out that the PSC – which has expressed the same "hurricane related concerns" recited in the AC – has

issued "copiously detailed orders" addressing "an array of storm preparedness issues, including, specifically, vegetation management…," and "requiring implementation of an inspection program for wooden transmission and distribution poles…." MTD, p. 7. Because the PSC has paid "continuous and continuing attention to these matters," FPL insists that a court "can have no productive or, respectfully, legitimate role in the process." *Id.* at 9.

FPL also represents that in response to a PSC "order," it has submitted a "vegetation management plan" that the PSC has found to be compliant with its "standards and requirements" and, as a result, it would defy the "express language of the PSC statute" for this Court to establish a different standard, and that doing so would "create chaos within the carefully calibrated state-wide requirement for utility control and management…" MTD, p. 7. Put simply, FPL asks the Court to decline Plaintiff's invitation to wade into these complex waters and thereby "convert [itself] into a mini-PSC." MTD, p. 3.

Moving off this threshold "jurisdictional" issue, FPL next says that: (a) declaratory relief is neither necessary nor permitted because the City's breach of contract claim "implicates the identical issues" raised and, as a result, "only the contract claim need proceed"; (b) the Court "cannot require FPL to take specific steps to replace or repair its equipment or to undertake a vegetation management or other maintenance program without running headway into the PSC's exclusive jurisdiction"; (c) the AC fails to identify any economic damages; and (d) injunctive

relief is unavailable as no irreparable harm has been identified, and Coral Gables certainly has adequate, available remedies, if only it pursues them with the PSC." MTD, pp. 14-15. FPL finally argues that even if the PSC's jurisdiction is not exclusive, the City is required to exhaust the administrative remedies afforded by this agency prior to resorting to the courts.

B. Plaintiff's Response

In its opposition the City first points out that FPL's arguments, if successful, would "render its Franchise Agreement… entirely toothless." Opp., P. 1. Plaintiff also says that the "PSC lacks the power to decree and enforce the requested equitable relief, and to award the monetary damages, that the City seeks in this action." *Id.* Plaintiff then contends that the AC "satisfies applicable notice pleading standards"; that the Court has "broad discretion to hear these claims, and that it would be "inappropriate to dismiss them at the pleading stage." *Id.*

As for FPL's proffered "jurisdictional" impediment, the City directs the Court to considerable precedent standing for the proposition that contractual disputes between a utility and its customers (or other parties) are matters to be resolved in a judicial forum, and that only a court may award monetary damages, or specific performance. *See, e.g., Trawick v. Florida Power & Light Co.*, 700 So. 2d 770 (Fla. 2d DCA 1997). For this same reason, the City says that it had no administrative remedies to exhaust, as it is not required to pursue an administrative remedy that is unavailable or inadequate. Opp., p. 7, citing *Winter Springs Dev. Corp. v. Florida*

Power Corp., 402 So. 2d 1225, 1228 (Fla. 5th DCA 1981) ("…where, as here, a plaintiff seeks money damages for breach of contract, which an administrative body is not empowered to award, the administrative remedy is not considered adequate and the plaintiff is not bound to exhaust it before seeking relief in court").

Turning to its particular claims, the City emphasizes that a complaint must contain no more than a short and plain statement of the ultimate facts showing the plaintiff is entitled to relief, *see* Fla. R. Civ. P. 1.110(b), and that its pleading alleges that "FPL's failure to maintain its equipment and to effectively clear its lines of vegetation caused unnecessarily widespread and prolonged power outages… causing more than $19 million in damages." Opp., pp. 8-9. Plaintiff also says that its declaratory relief count – pled in the alternative – seeks resolution of "a live dispute – who bears responsibility for clearing FPL's lines of vegetation." Opp., p. 9.

Finally, the City argues that the PSC has no power to grant injunctive relief, and that this Court may do so if necessary to prevent irreparable harm. Opp., p. 11.

IV. ANALYSIS

To place the issues framed in a proper context it is first necessary to discuss certain features of the "contract" relied upon in support of each claim pled by the City. This is so because, as this Court has written many times before, "contracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions of their agreement." *Okeechobee Resorts, L.L.C.*

v. E Z Cash Pawn, Inc., 145 So.3d 989, 993 (Fla. 4th DCA 2014); *City of Pompano Beach v. Beatty*, 222 So. 3d 598, 600 (Fla. 4th DCA 2017); *JDJ of Miami, Inc., v. Valdez, et. al.*, 23 Fla. L. Weekly Supp. 1026 (March 23, 2016). That freedom is indeed a constitutionally protected right. *Nw. Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 252–53, 27 S.Ct. 126, 51 L.Ed. 168 (1906); *Hoffman v. Boyd*, 698 So.2d 346, 348 (Fla. 4th DCA 1997). And when parties stipulate to the terms and conditions of their contract, it is not the province of the court to second-guess their wisdom or "substitute [its] judgment for that of the parties in order to relieve one from an alleged hardship of an improvident bargain." *Int'l Expositions, Inc. v. City of Miami Beach*, 274 So.2d 29, 30–31 (Fla. 3d DCA 1973). Rather, the court's task is to apply the parties' contract as written, not "rewrite" it under the guise of judicial construction. *Gulliver Schs., Inc. v. Snay*, 137 So.3d 1045, 1047 (Fla. 3d DCA 2014) ("Where contracts are clear and unambiguous, they should be construed as written, and the court can give them no other meaning.") (quoting *Khosrow Maleki, P.A. v. M.A. Hajianpour, M.D., P.A.*, 771 So.2d 628, 631 (Fla. 4th DCA 2000)); *Pol v. Pol*, 705 So.2d 51, 53 (Fla. 3d DCA 1997) ("[A] court cannot rewrite the clear and unambiguous terms of a voluntary contract.").

In order to secure the right to provide electricity to the City (and its residents) FPL *voluntarily* accepted – and *voluntarily* obligated itself to comply with – City Ordinance No. 3306; a contract which requires FPL to construct, operate and maintain its "electric light and power facilities, including, without limitation,

conduits, poles, wires, transmission and distribution lines, and all other facilities installed in conjunction with or ancillary to" its operations consistent with its "customary practice." AC, Ex. A.[3] While FPL's "customary practice" is without doubt the "standard" that must be contractually met, the agreement does not attempt to define, or in any way illuminate upon, what FPL's "customary practice" was (or would in the future be) as it relates to the operation or maintenance of its facilities. So to assess whether FPL complied with the contract, a fact finder would be required to ascertain what FPL's "customary practice" was at the time of any alleged breach, and whether FPL acted consistent with that "customary practice."[4]

The Ordinance (i.e., Franchise Agreement) also permits the City to purchase "electric capacity and/or energy from any other person," provided it: (a) notifies FPL of the "specific rates, terms and conditions which have been offered"; (b) gives FPL "90 days to evaluate the other person's offer"; and (c) grants FPL the opportunity to match (or better) the proposed "rates, terms and conditions" being offered. AC, Ex.

[3] The parties agree that this Ordinance, which was countersigned and accepted by FPL, constitutes what is referred to as a "Franchise Agreement" and is a binding contract. *See, e.g., Bishop v. State, Div. of Ret.*, 413 So. 2d 776 (Fla. 1st DCA 1982) (pension scheme set forth in ordinance and accepted by parties created contractual relationship); *Williams v. Cordis Corp.*, 30 F.3d 1429 (11th Cir. 1994).

[4] The fact that extrinsic evidence may have to be considered in order to ascertain what FPL's "customary practice" was at any given time does not affect the enforceability of the contract. *See, e.g.,* Restatement (Second) of Contracts §§ 219 -223; *NCP Lake Power, Inc. v. Florida Power Corp.*, 781 So. 2d 531, 536 (Fla. 5th DCA 2001) (when a contract contains terms "that may not be understood by the court, extrinsic evidence may be introduced to explain it"); *Carr v. Stockton*, 92 So. 814 (Fla. 1922) ("[i]t is well settled that an established custom or trade usage respecting a commercial transaction may annex incidents to a written contract, and that a contract involving such a transaction should be interpreted in the light of such custom or usage"); *Fred S. Conrad Const. Co. v. Exch. Bank of St. Augustine*, 178 So. 2d 217 (Fla. 1st DCA 1965) (responsibility for deciding the "custom or trade usage" required by a commercial transactions falls within the province of the trier of fact).

A, §7(b). The contract therefore contemplates the possibility of the City negotiating better terms with other utility providers – and actually contracting with one – if FPL chose not to exercise its right to match (or better) any third party proposal. What this demonstrates – and what the parties conceded at oral argument – is that FPL is not the "only game in town." Rather the City (like many municipalities do) has the option to handle its utility service "in-house" or contract with another provider if dissatisfied with FPL's service.

Finally, and on a related note, nothing in the contract purports to foreclose or alter any common law rights and remedies either party would have in the event of a breach including, but not limited to, the right of a party to declare a material breach which would relieve them of any further contractual obligations. *See, e.g., Benemerito & Flores, M.D.'s, P.A. v. Roche*, 751 So. 2d 91, 93 (Fla. 4th DCA 1999) ("… the general rule is that a material breach of the Agreement allows the non-breaching party to treat the breach as a discharge of his contract liability"); *Bradley v. Health Coal., Inc.*, 687 So. 2d 329 (Fla. 3d DCA 1997) (same).

Against this contractual background the Court will now address the grounds raised by FPL in support of its request for dismissal.

A. <u>Jurisdiction</u>

There is no doubt that our Legislature has the constitutional authority and power to regulate public utilities for the protection of the public. *See* § 366.02, Fla. Stat. (2018). In the exercise of that police power the Legislature has granted the PSC – a

creature of statute – "jurisdiction" to regulate and supervise each public utility "with respect to its rates and service," and declared that this jurisdiction "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 commission shall in each instance prevail." § 366.04, Fla. Stat. (2018).

To carry out its jurisdictional charge the PSC has been legislatively authorized to, among other things, "prescribe a rate structure for all electric utilities"; "require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes"; approve territorial agreements amongst sovereigns; "resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas"; "prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, including the ability to adopt construction standards that exceed the National Electrical Safety Code, for purposes of ensuring the reliable provision of service"; and – most importantly for present purposes – "*require repairs, improvements, additions, replacements, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto…*" § 366.04, Fla. Stat. (2018); § 366.05, Fla. Stat. (2018).

As this exhaustive list amply demonstrates, the PSC has "broad powers in the exercise of its 'exclusive and superior' jurisdiction." So as the statute itself plainly says, local governments may not exercise their sovereignty in a manner that would infringe upon the PSC's authority. *See, e.g., Florida Power Corp. v. Seminole County*, 579 So. 2d 105, 106 (Fla. 1991) (city had no authority to order FPL – through ordinance – to bear the entire cost of placing power lines underground, as requiring FPL to place its lines underground would "clearly affect its rates if not its service"); *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989) (city had no authority to regulate utilities payment of worker's compensation benefits, as municipality may not legislate on any matter explicitly or implicitly preempted to state governments). Nor may courts infringe on the PSC's exclusive territory. *See, e.g., Florida Pub. Serv. Com'n v. Bryson*, 569 So. 2d 1253 (Fla. 1990) (circuit court lacked jurisdiction to enjoin the PSC from reviewing a customer's complaint alleging that management company overcharged condominium owner for gas and electricity, as "… PSC had, at the very least, a colorable claim of exclusive jurisdiction").

What these cases generally hold is that local governmental entities may not – *as a matter of sovereignty* – encroach upon authority vested in the PSC by enacting "laws" imposing upon utilities a burden that would impact rates and service. This is so because – as one court put it:

> If [the City] had the right by its ordinance to specify how [the utility] should design and install its transmission lines or to require it to spend this substantially greater sum in constructing said lines, then other municipalities would have like authority.... If 100 such municipalities each had the right to impose its own requirements with respect to installation of transmission facilities, a hodgepodge of methods of construction could result and costs and resulting capital requirements could mushroom. As a result, the supervision and control by the Public Service Commission with respect to the company, its facilities, its method of operation, its service, its indebtedness, its investment, and its rates which the General Assembly obviously contemplated would be nullified.

Union Elec. Co. v. City of Crestwood, 499 S.W.2d 480, 483 (Mo.1973), cited with approval in *Florida Power Corp. v. Seminole County*, 579 So. 2d at 107.

On the other hand, and as the City forcefully points out, precedent makes it equally clear that courts have jurisdiction to adjudicate claims for money damages premised upon a utility's failure to comply with the standards set forth by the PSC, or in a privately negotiated contract, as "nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide… service meeting the statutory standards; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, s 5(b), Fla.Const." *S. Bell Tel. & Tel. Co. v. Mobile Am. Corp., Inc.*, 291 So. 2d 199, 202 (Fla. 1974). *See also Trawick v. Florida Power & Light Co.*, 700 So. 2d 770 (Fla. 2d DCA 1997) (PSC did not have exclusive jurisdiction over claims brought by customer alleging that FPL caused "live oak trees in [his] yard to be severely trimmed," as the subject matter of the action was "not within" the PSC's jurisdiction, and "the remedies

sought are outside [PSC's] authority as well"); *Winter Springs Dev. Corp. v. Florida Power Corp.*, 402 So. 2d 1225 (Fla. 5th DCA 1981) (action by subdivision developers alleging that FPL breached contract by failing to install underground service at no cost was "actually and essentially" an "action on a contract" and – as a result – plaintiff was not required to take the dispute to the Florida Public Service Commission").

These cases stand for the unremarkable proposition that private contract and tort disputes are not within the purview of the PSC even if: (a) the circuit court might "utilize the expertise of the PSC" in assessing whether the utility breached a standard of care contractually owed, or was "in statutory compliance as to service," *Mobile Am. Corp., Inc., supra* at 201; or (b) the plaintiff's damages for breach of contract are "measured by the amount [they] had to pay as a rate…" *Winter Springs, supra* at 1229. In other words, "[t]he mere fact that the action was filed by a FPL customer does not relegate it to the exclusive jurisdiction of" the PSC. *Trawick, supra* at 771.

Here the City has done no more than bring claims based upon an express written contract – claims of the type circuit courts routinely handle. *See Mobile, supra* (adjudicating claims brought against a utility for "past failure" to provide service is a judicial function … pursuant to Art. V, s 5(b)" of our Constitution). *Id.* It has not attempted to exercise any "sovereign" authority by enacting legislation that could impact FPL's rates or services. Rather, it brings garden variety contract claims based upon an express written agreement between itself and FPL; the type of

grievance routinely brought by private litigants. But, as FPL points out, in *Florida Power & Light Co. v. Albert Litter Studios, Inc.*, 896 So. 2d 891 (Fla. 3d DCA 2005), our appellate court concluded that even "private" contract (at least *implied* contract) and tort claims may be preempted if the complaint seeks relief that the PSC has jurisdiction to grant; a circumstance FPL insists is present here.

In *Albert Litter* plaintiff brought a putative class action claiming that a certain type of thermal demand meters installed by FPL "miscalculated the amount of electricity, resulting in overcharges" paid by a "subset of its commercial electricity users" (i.e., the putative class). The issue presented to the Third District – on a writ of prohibition – was whether "the Florida Public Service Commission… has exclusive jurisdiction over the plaintiff's claims, or whether concurrent jurisdiction lies in the circuit court." *Id.* at 892. In order to resolve that issue the court began by looking to "the nature of the relief sought by the plaintiff because it is the *nature of the relief sought*, not the language of the complaint, that ultimately determines which tribunal has jurisdiction over the claim." *Id.* at 893. *See also Utilities, Inc. of Florida v. Corso*, 846 So. 2d 1159, 1161 (Fla. 5th DCA 2003).

Reviewing the claims pled the *Albert Litter* court concluded – with little difficulty – that what plaintiff sought was a "refund of overcharges"; a type of dispute that the PSC had "exclusive jurisdiction to adjudicate." *Id.* at 895. The purported class was, in the court's view, "essentially seeking a massive refund, and… the Commission has exclusive jurisdiction to consider just such a refund." *Id.*

see also Richter v. Florida Power Corp., 366 So. 2d 798, 799 (Fla. 2d DCA 1979) (PSC has exclusive jurisdiction over claims seeking damages against a utility which allegedly charged "illegal rates" – a matter squarely within the PSC's exclusive jurisdiction "to regulate and supervise each public utility with respect to its rates...").

Significantly, the *Albert Litter* court – after looking at the "nature of the relief sought" – emphasized "that this [case] is not a tort or contract claim beyond the Commission's jurisdiction." *Id.* Despite the legal labels used the case was – at its core – an action seeking no more than "a refund of money customers paid FP&L for electricity they did not actually use." *Id.* at 896. For this reason, the Third District found the dispute distinguishable from *Mobile Am. Corp., supra*. *Albert Litter*, however, is easily distinguishable from the case *sub judice* because: (a) it did not involve claims under an *express* written contract between the litigants; (b) plaintiff's claim was solely for a refund of charges for electricity *not* "for consequential damages," *id.* at 894, which is precisely what the City seeks here; and (c) the PSC had jurisdiction to "adjudicate disputes and challenges to … rates and charges," whereas it has no jurisdiction to adjudicate claims seeking consequential damages for breach of contract, or to grant equitable relief. So even assuming *Albert Litter* was correctly decided, and consistent with *Mobile Am. Corp.*, it does not resemble the situation at hand.

Moreover, and contrary to FPL's insistence otherwise, the fact that the standard adopted in the parties' agreement ("customary practice") may be informed

by the PSC is of no moment, and does not impact this Court's ability to hear this private contractual dispute, as the questions of what the contract's "standard" required with respect to any given issue, and whether FPL complied with it, may – if appropriate – be answered with the PSC's input and assistance. *See Mobile Am. Corp., supra*, ("[t]he PSC is uniquely qualified to determine difficult technical questions regarding the adequacy of… service, and has a technical staff whose functions include dealing with such difficult issues. The parties would of course be entitled to be heard and to cross-examine witnesses before the PSC in event of such a reference by the trial court to that body. The ultimate issues raised in a suit for money damages for a completed, past failure to meet the statutory standards are, however, a matter of judicial cognizance and determination. Whether the circumstances of a particular case are such as to indicate that the circuit court should refer the matter to the PSC for findings is a determination resting solely within the sound discretion of the circuit court"). *Id.* at 202.

This Court sees no reason why a party to a private contract should be unable to seek – and if appropriate secure – *any* judicial remedy that would otherwise be available to private litigants simply because the party alleged to be in breach is regulated by the PSC. This is so even if the plaintiff seeks a remedy the PSC also has the ability to provide. There is simply nothing in Chapter 366 that says – or suggests – that such private contractual rights are preempted. Nor has FPL cited a

single case where a party to an express written contract with a utility has been denied the right to seek relief that would *otherwise* be available to any private litigant.

The Court rejects Defendant's preemption argument.[5]

V. THE INDIVIDUAL CLAIMS

A. Declaratory Relief

Having disposed of FPL's jurisdictional challenge, the Court will next turn to the issue of whether the City has the right to proceed with the claims pled. As for Count I – seeking Declaratory Relief – the Court finds, based upon representations made by FPL at oral argument, that there is no "live-controversy" in need of judicial resolution. FPL has acknowledged that the Franchise Agreement obligates it – and it only – to maintain the areas adjacent to its electrical poles and lines, which includes the obligation to "trim and manage trees and other vegetation" that could adversely affect service, *see* AC, ¶ 43, and that it has the obligation to maintain its plants and equipment. Because FPL has now acknowledged precisely what the City has asked the Court to "declare," there is simply no need for Declaratory relief. *See, e.g.*, *Kelner v. Woody*, 399 So. 2d 35, 37 (Fla. 3d DCA 1981) ("[t]o trigger jurisdiction under the declaratory judgment act, the moving party must show that he is in doubt

[5] Though the Court finds that the claims made here are not "preempted," nothing prevents FPL from including – within its private agreements – a provision requiring that any disputes be resolved by the PSC to the extent it has jurisdiction to award relief. This contract, however, compels no such alternative dispute mechanism.

as to the existence or nonexistence of some right or status, and that he is entitled to have such doubt removed").

B. Counts II and IV – Specific Performance/Injunctive Relief

At oral argument the City clarified that the *only* relief it seeks through its claims for "Specific Performance/Injunctive Relief" is an order compelling FPL to maintain vegetation near its power lines or, in other words, "trim… trees and branches." AC, pp. 6-9. This requested "order" (i.e., mandatory injunction) would not compel a "one-time" event, such as the transfer of unique real property, or performance of a single identifiable act required by a contract. Rather, the type of mandatory injunctive relief sought here would require ongoing monitoring and supervision on the part of the Court, as trees and bushes constantly grow. And FPL has represented that the PSC has adopted – and imposed upon it – maintenance plans in order to ensure that equipment is not impaired by vegetation, *and* that the PSC is actively monitoring FPL's compliance.[6] Under the circumstances the equitable relief and ongoing judicial supervision the City seeks is wholly impracticable. *See, e.g., Collins v. Pic-Town Water Works, Inc.*, 166 So. 2d 760 (Fla. 2d DCA 1964) (specific

[6] FPL has not cited – and the Court could not find – any specific provision in Chapter 366 which addresses vegetation management, or grants the PSC the authority to regulate this activity. As the Court pointed out earlier, the statute does grant the PSC authority to "… require repairs, improvements, additions, replacements, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service…," § 366.05, Fla. Stat. (2015). Apparently the PSC – and FPL – agree that this provision permits the PSC to dictate – and supervise – FPL's vegetation management program. While this "interpretation" may or may not be correct, the point is that the PSC is addressing this issue; something it is far more equipped than this Court is to do.

performance and injunctive relief properly denied, as such an order would require that "the court… assume an endless duty, inappropriate to its functions"); *Amelio v. Marilyn Pines Unit II Condo. Ass'n, Inc.*, 173 So. 3d 1037, 1042 (Fla. 2d DCA 2015) Lucas, J., concurring; ("… it must be conceded, the entry of a mandatory injunction that necessitates ongoing judicial monitoring presents unique challenges as it distends the traditional role of a court as an arbiter of disputes…"). *See also Johnson v. Killian*, 157 Fla. 754, 27 So.2d 345, 347 (1946) (stating that the "drastic" remedy of injunctive relief should be granted "cautiously and sparingly," particularly when it is mandatory, because mandatory injunctions are looked upon with disfavor); *Grant v. GHG014, LLC*, 65 So.3d 1066, 1067 (Fla. 4th DCA 2010) ("Mandatory injunctions, which compel an affirmative action by the party enjoined, are looked upon with disfavor, and the courts are even more reluctant to issue them than prohibitory ones.").

Moreover, and aside from the fact that the PSC is addressing this issue, the Court finds that the City has an adequate remedy at law if it suffered damages (or suffers damages in the future) as a result of FP's failure to maintain the vegetation surrounding its facilities. The "City" – unlike a natural person – can suffer only *one* type of damage as a result of a power outage or delay in restoring power; namely, economic loss. And if the City can demonstrate that it suffered economic loss as a result of any breach of contract by FPL it will be entitled to recover whatever sum is necessary in order to place it in the same *economic* condition it would have been

in had FPL not breached. *See Mnemonics, Inc. v. Max Davis Associates, Inc.*, 808 So. 2d 1278 (Fla. 5th DCA 2002) ("[a]n award of damages for breach of contract is intended to place the injured party in the position he or she would have been in had the breach not occurred").

Finally, and as the Court said earlier, if the City is dissatisfied with FPL's performance, nothing prevents it from either: (a) hiring another contractor to maintain the vegetation surrounding FPL's equipment and seeking damages for the cost of having that third party "perform" FPL's obligation; or (b) terminating the contract on grounds of material breach and hiring another utility provider to serve the City and its residents.

C. Count III – Breach of Contract/Economic Damages

Notwithstanding a scrivener's error in paragraph 60, which claims an entitlement to an "equitable remedy" – the Court finds that the City has properly pled the elements of a breach of contract claim, and that it is entitled to seek consequential damages, if any, flowing from the Defendant's alleged breaches. *See, e.g., Havens v. Coast Florida, P.A.*, 117 So. 3d 1179 (Fla. 2d DCA 2013) ("[a] cause of action for breach of contract has three elements: (1) a valid contract, (2) a material breach, and (3) damages").

VI. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED**:

A. Defendant's Motion to Dismiss Counts I, II, and IV is **GRANTED**.

B. Defendant's Motion to Dismiss Count III is **DENIED**. Defendant shall file its Answer and Affirmative Defenses to Count III, within twenty (20) days of the date of this Order.

C. The parties are ordered to participate in mediation within sixty (60) days. The Court appoints Bruce Greer, Esquire as mediator. The parties shall share equally all costs of mediation.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 04/13/18.

MICHAEL HANZMAN
CIRCUIT COURT JUDGE

No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.
Copies furnished to:
Alvin B. Davis, Esquire
Javier A. Lopez, Esquire
Charles L. Schlumberger, Esquire
Corali Lopez-Castro, Esquire