

Ruth Nettles

090524-EM

From: Rhonda Dulgar [rdulgar@yvlaw.net]
Sent: Friday, December 18, 2009 3:15 PM
To: Charles Vitunac; Stephen Faherty; Glenn Heran; J.R. Kelly; Filings@psc.state.fl.us; Martha Brown; Schef Wright
Subject: Electronic Filing - Docket 090524-EM
Attachments: VB.Mot.DismissDecStmnt.12-18-09.pdf

a. Person responsible for this electronic filing:

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b. 090524-EM

In Re: Complaint Against the City of Vero Beach, Florida, by Stephen J. Faherty and Glenn Fraser Heran.

c. Document being filed on behalf of the City of Vero Beach, Florida.

d. There are a total of 7 pages.

e. The document attached for electronic filing is the City of Vero Beach's Motion to Dismiss Declaratory Statement Petition by Stephen J. Faherty and Glenn Fraser Heran.

(see attached file: VB.Mot.DismissDecStmnt.12-18-09)

Thank you for your attention and assistance in this matter.

Rhonda Dulgar
Secretary to Schef Wright
Phone: 850-222-7206
FAX: 850-561-6834

12/18/2009

DOCUMENT NUMBER-DATE

12081 DEC 18 8

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint Against the City of)
Vero Beach, Florida, by Stephen J.) DOCKET NO. 090524-EM
Faherty and Glenn Fraser Heran) FILED: DECEMBER 18, 2009
_____)

MOTION TO DISMISS DECLARATORY STATEMENT PETITION
BY STEPHEN J. FAHERTY AND GLENN FRASER HERAN

The City of Vero Beach, Florida ("Vero Beach" or "City"), by and through its undersigned counsel and pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), respectfully moves the Florida Public Service Commission ("Commission") to dismiss the "Declaratory Statement Petition" ("Petition") filed within the above-styled docket on December 14, 2009. Dr. Faherty and Mr. Heran are referred to collectively in this Motion to Dismiss as the "Petitioners." In summary, the Petition, both on its face and considering the specific allegations contained therein, is a complaint that seeks relief of a type that might be granted in response to a complaint, but it is not a petition for a declaratory statement as to the applicability of any Commission statute, rule, or order as it applies to the Petitioners in their particular circumstances. Accordingly, it is not a proper petition for declaratory statement under Section 120.565, Florida Statutes,¹ and the Commission should dismiss the Petition.

¹ All references herein to the Florida Statutes are to the 2009 edition thereof.

In further support of this Motion to Dismiss, the City of Vero Beach states the following.

PROCEDURAL BACKGROUND REGARDING THE CITY OF VERO BEACH

1. The name, address, and telephone number of Respondent, the City of Vero Beach, are as follows:

City of Vero Beach, Florida
Attention: Charles P. Vitunac, City Attorney
1053 20th Place
Vero Beach, Florida 32960
Telephone: (772)978-4730
Facsimile: (772)978-4733

2. All pleadings, orders and correspondence should be directed to Petitioner's representatives as follows:

Robert Scheffel Wright, Attorney at Law
John T. LaVia, III, Attorney at Law
Young van Assenderp, P.A.
225 South Adams Street, Suite 200
Tallahassee, Florida 32301
(850) 222-7206 Telephone
(850) 561-6834 Facsimile
E-Mails - swright@yvlaw.net and jlavia@yvlaw.net

with a courtesy copy to

Charles P. Vitunac, City Attorney
City of Vero Beach, Florida
1053 20th Place
Vero Beach, Florida 32960
E-Mail: cvitunac@covb.org

3. The City of Vero Beach is a political subdivision of the State of Florida, which operates a municipal electric utility system and other utilities. The City provides electric service to customers within the City limits and outside the City limits, pursuant to Florida law and also consistent with a

Commission-approved territorial agreement between the City and Florida Power & Light Company.

DISCUSSION

4. The City respectfully moves the Commission to dismiss the Declaratory Statement Petition filed herein by Dr. Faherty and Mr. Heran because it is substantively a complaint, and not a proper petition for a declaratory statement. The purpose of a declaratory statement is to address the applicability of a statute, rule, or order as it applies to the petitioner's particular circumstances. Fla. Statutes § 120.565 (2009); generally, see also, Chiles v. Department of State, Div. Of Elections, 711 So. 2d 151 (Fla. 1st DCA 1998). Commission Rule 25-22.036(2), F.A.C., describes a complaint as "appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order."

5. On its face, however, the Petition is substantively a complaint, and the Petitioners apparently acknowledge that fact: on page 1 of the letter that includes the Petition, they state that "we are re-filing that complaint per our understanding of Commission instructions." The Petitioners go on to ask that "the PSC's Territorial Agreement . . . be amended on the PSC's own motion" Aside from the fact that the Commission's jurisdiction extends to approving territorial agreements between

and among electric utilities and to resolving territorial disputes between and among electric utilities, Section 366.04(2)(d-e), Florida Statutes, and aside from the fact that there is no territorial dispute involving FPL and the City of Vero Beach, the relief requested by the Petitioners is amendment of the territorial agreement, which is clearly relief that, even if available under an applicable statute, would be appropriate for a complaint proceeding. It is simply not appropriate subject matter for a declaratory statement action.

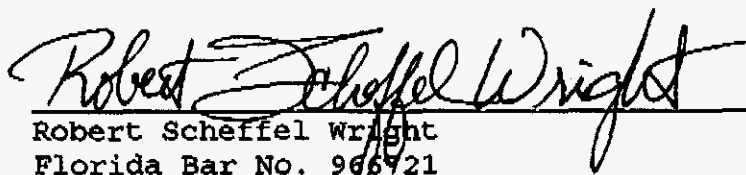
6. Without going into unnecessary detail, the City observes that many, if not all, of the Petitioners' allegations in the Petition are also matters that might be appropriate for a complaint-type proceeding, if they were cognizable at all. For example, the Petitioners' assertion that somehow the City's treatment of outside-the-City customers violates the United States and Florida Constitutions, if cognizable at all, is subject matter for a complaint. The Petitioners' assertions regarding the City's "inefficient operations" and high rates compared to those of Florida Power & Light Company, addressed on pages 2-3 of the Petition, if cognizable at all under Chapter 366, Florida Statutes, would likewise be subject matter for a complaint, but not for a declaratory statement pursuant to Section 120.565, Florida Statutes. Similarly, the Petitioners' alleged violation of Section 366.04(7), Florida Statutes, might be appropriate subject matter for a complaint, i.e., as an

alleged violation of part of the Commission's regulatory statutes, but not for a declaratory statement. As a last point, the City notes that the Petitioners' request that the Commission amend the approved territorial agreement between the City and FPL is simply not cognizable under Chapter 366, Florida Statutes, because there is no territorial dispute between FPL and the City and because there is no territorial agreement before the Commission for approval.

7. The City could cite other specifics, but believes that the above are sufficient to demonstrate that the Petitioners' complaints about the City's rates and other practices are, if cognizable under the Commission's statutes at all, of a type that might, at best, be susceptible to being addressed through a complaint proceeding. The Petitioners' claims and requests for relief are not proper for a declaratory statement under Section 120.565, Florida Statutes, and accordingly, the Commission should dismiss the Declaratory Statement Petition filed by Dr. Faherty and Mr. Heran.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, based on the foregoing, the City of Vero Beach respectfully moves the Commission for an order dismissing the Declaratory Statement Petition filed by Dr. Stephen J. Faherty and Mr. Glenn Fraser Heran on December 14, 2009, in this docket. Respectfully submitted this 18th day of December, 2009.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following, by electronic and U.S. Mail, on this 18th day of December, 2009.

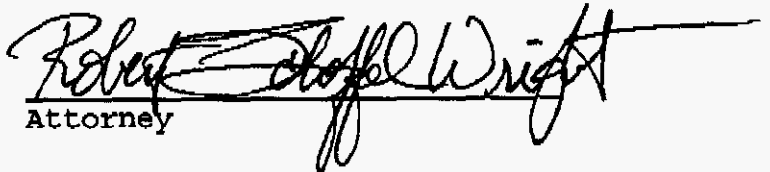
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