

**Diamond Williams**

090524-EM

**From:** Dr. Stephen J. Faherty, Sr. [fahertydoc@earthlink.net]  
**Sent:** Tuesday, February 01, 2011 12:48 PM  
**To:** cvitunac@covb.org; rdulgar@yvlaw.net; Filings@psc.state.fl.us  
**Cc:** Heran, Glen  
**Subject:** Electronic Filing - Docket 090524-EM  
**Importance:** High  
**Attachments:** Response to Motion to Dismiss - 11-02-01.doc

a. Person responsible for this electronic filing:

Dr. Stephen J. Faherty

2120 Captains Walk

Vero Beach, Florida, 32963-2821

772-231-8139

fahertydoc@earthlink.net

b. 090525-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 Stephen J. Faherty and Glenn Fraser Heran

d. There are a total of six (6) pages attached

e. The document for electronic filing is a Response to Motion to Dismiss filed on December 18, 2009.

See attached file: Response to Motion to Dismiss – 11-02-01 (40 KB)

Thank you for your attention and assistance in this matter

Dr. Stephen J. Faherty, Sr.

772-231-8139

DOCUMENT NUMBER-DATE

00777 FEB-11

FPSC-COMMISSION CLERK

2/1/2011

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Response to Motion to dismiss Complaint Against )  
the City of Vero Beach, Florida, by Stephen J. Faherty ) DOCKET NO. 090524-EM  
and Glenn Fraser Heran ) FILED FEBRUARY 1st, 2011  
\_\_\_\_\_ )

**RESPONSE TO MOTION TO DISMISS DECLARATORY STATEMENT PETITION FILED BY  
ROBERT SCHEFFEL WRIGHT ON DECEMBER 18, 2009**

**BACKGROUND**

The following Florida Statute is relevant to our response.

**Fla. Statutes § 120.565 Declaratory Statement by Agencies**

- (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.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.
- (3) The agency shall give notice of the filing of each petition in the next available issue of the Florida Administrative Weekly and transmit copies of each petition to the committee. The agency shall issue a declaratory statement or deny the petition within 90 days after the filing of the petition. The declaratory statement or denial of the petition shall be noticed in the next available issue of the Florida Administrative Weekly. Agency disposition of petitions shall be final agency action.

**DISCUSSION**

1. Section 120.565(1) states any substantially affected person may seek a declaratory statement by an agency. Dr. Stephen J. Faherty, Sr., is a substantially affected person as a result of having a residence in the unincorporated area of Indian River County (County) and being required to have City of Vero Beach (City) electric utility service under the 1981 Public Service Commission (PSC) approved Territorial Agreement between City and Florida Power & Light (FPL) dividing the electric service area in the County between Florida Power & Light (FPL) and the City electric utilities. Glenn Heran is a substantially affected person as a result of having interests in rental properties and being required to have City of Vero Beach (City) electric utility service for some of them under the 1981 Public Service approved Territorial Agreement dividing the electric service area in the County between FPL and the City electric utilities.

Our properties are a few of the nearly 18,000 (51%) of the City electric customers in the unincorporated areas of the County which also has over 50,000 FPL customers. Similarly, the Town of Indian River Shores has about 3,400 (10%) of the City electric customers and about a similar number of

DOCUMENT NUMBER DATE  
00777 FEB -1 =  
FPSC-COMMISSION CLERK

FPL customers. At the time the 1981 Territorial Agreement was approved by the PSC, about 10% of the City electric customers were outside of the City. Now that percentage is about 61%.

Section 120.565(1) also refers to seeking an agency's opinion on the applicability of any order of an agency as it applies to the petitioners particular set of circumstances. The particular order is the 1981 PSC Territorial Agreement (Docket No. 800596-EU, Order No. 10382, dated November 3, 1981).

The 1981 Territorial Agreement, in its own words, reflects a number of comments which describe the set of circumstances which petitioners must have under Section 120.565(2). They appear particularly relevant in today's electric utility environment should cause this petition to be opened to public hearing under the Commission's own motion (Sec. 366.04 (2) (e)).

- A. In the fourth paragraph, page 1, the Territorial Agreement states that "the Commission finds no compelling reason to set this matter for hearing...there appears to be limited customer objection...moreover, the agreement is in the public interest."

Comment: The Commission should set this matter for hearing as there is significant customer objection to the City's electric utility, its inefficient operation, rates significantly higher than FPL, City Council siphoning of utility revenue for City budget purposes rather than utility operations or reserves, no voice with City elected officials for the 61 percent of customers outside of the City limits, mismanagement, negligence, breach of fiduciary responsibility, and the City Council knowingly ignoring PSC Section 366.04(7)(a) which would have provided the opportunity to all customers to vote on having a representative utility authority. If the Commission was concerned in 1981 about contacting the 168 customers affected by the modification in the Territorial agreement, why wouldn't it be concerned about the approximately 22,000 customers outside the City not having an opportunity for representation and comment, as in a 2008 Referendum?

- B. In the fifth paragraph, page 1, the Territorial Agreement states that "Nevertheless, to insure that all persons who would be affected by the agreement have the opportunity to object to the approval of the agreement, the Commission is issuing this Notice of Intent to Approve."

Comment: Similarly, the Commission should provide on its own motion for a public hearing in the Vero Beach area in order to allow direct public comment on the City's proposed changes to rates significantly higher than FPL, City Council siphoning of utility revenue for City budget

purposes rather than utility operations or reserves, no voice with City elected officials for the 61 percent of customers outside of the City limits, use of outside customers rate payments to fund a government for which they cannot vote, mismanagement, negligence, breach of fiduciary responsibility, noncompliance with PSC Section 366.04(7)(a), Territorial agreement, and other matters described herein.

The Commission must adopt some methodology to allow for periodic review of Territorial Agreements as to their current applicability and possible adverse financial and economic impact as well as the infringement of constitutional rights related to representative government and taxation or levying of fees without representation as the PSC is allowing by approving a municipal utility having captive electric customers who do not reside in that jurisdiction.

- C. In the first paragraph, page 2, the Commission noted the attempts by FPL and/or the City to contact the affected customers and determine their reaction to the proposal for changes to the prior territorial agreements. The City has ignored PSC Section 366.04(7) (a) which was passed by Legislators to give over 34,000 customers the opportunity to vote their preference for a representative utility authority to run the City's electric utility. Similarly, the City has ignored the submission of over 800 names of customers on petitions for similar action.

Comment: Customers are again seeking the third piece of Local Legislation to modify the Commission's statutes to now provide for the City electric utility to be placed under PSC jurisdiction in order to allow customers outside of the City to raise the issue to the PSC on switching electric service to FPL which is totally regulated by the PSC unlike the municipal utilities which are only partially regulated by the PSC.

- D. In the second paragraph, page 2, the Commission stated "Approval of this territorial agreement should assist in the avoidance of uneconomic duplication of facilities on the part of the parties, thereby providing economic benefits to the customers of each.

Comment: The City is uneconomical compared to FPL historically and presently. For the past 10 years, the City has averaged rates 24% higher than FPL. Additional cheaper capacity is coming on line from FMPA and from FPL between 2009 and 2012 which will make the City's power plant used even less than its current 10 % of use which will directly affect the proposed future

revenue and therefore further increase the projected rate differential between the two. FPL surrounds the City and it thus could substitute for the City's electric utility.

It should also be noted that in the Request for Proposal (RFP) competition for the selection of the FMPA electric supplier, the City required that the bidders agree: 1) not to protest the City's actions in the RFP process and 2) request that the selection file be kept confidential for the longest period possible. A mistaken release of some of the documents by the City revealed that confidential evaluation sheet of the final three bidders which showed that 33% of the rating related to how the bidder compared to FPL's rates, not the higher rates under the current electric provider, FMPA. Thus, mathematically a bid by FPL would at best make it average - it couldn't get above that, but it also couldn't protest!

Customers of the City's electric utility are being adversely affected financially and economically by the impact of the significantly higher utility rates the City charges in its service areas. This is particularly significant in the County and in the Shores where parts are served by the City and parts are served by FPL. Real estate brokers and agents report that in showing properties to potential buyers or lessees, they ask if ANY of the utilities are provided by the City. If the answer is "yes", then the buyers and lessees generally request to see other properties not serviced by City utilities. This creates a significant financial and economic disadvantage to having City electric service as opposed to the FPL electric service in the rest of the County and in the Shores areas.

- E. In the second paragraph, page 2, the Commission also stated "The territory will better conform to natural or permanent landmarks and to present land development."

2. In addition, section 366.04(2) (e) states "To resolve, upon petition of a utility or on its own motion (underlining added), any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its

proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services.

3. With regard to Section 120.565(3), much has changed over the last 30 years since the last Territorial Agreement modification in 1981. FPL has the capability to expand services in comparison to the City's electric utility which is deficit ridden, has inadequate cash reserves, and runs its antiquated plant about 10% of the year. In addition, the City purchases about 45 % of its electric power under a 20 year, \$ 20 Billion, contract signed in 2008 with the Orlando Utility Commission (OUC) and receives another 45% of its power from interests it owns in the Florida Municipal Power Agency's (FMPA) interests in Stanton I and II and St. Lucie coal and nuclear power plants. To supply additional customers, it would have to purchase it, not generate it. The County and the Shores are each faced with situations where one side of a street in their jurisdiction is served by the City and the other side of the same street is served by FPL. This leads to there being significant rate differentials between the two sides of the same street. Also, the percent of outside City customers has increased from about 10 percent in 1981 to 61 percent outside of the City now.

Furthermore, Section 366.04(2)(f), second paragraph, states "...No provision of this chapter shall be construed or applied to impede, prevent, or prohibit any municipally owned electric utility system from distributing at retail electrical energy within its corporate limits, as such corporate limits exist on July 1, 1974; however, existing territorial agreements shall not be altered or abridged hereby. This provision appears to support the concept of protecting the municipal boundaries of electric providers. Minor changes to the City's territorial boundaries have occurred over the past 28 years, primarily by the addition of a few properties at a time. It should be noted that in our discussions with residents of Indian River County, they have no interest in being annexed by the City based on their observations of City management, administration, operations, etc.

We are not asking for the City to be deprived of supplying electricity to its own residents. We are asking that you review the 1981 Territorial Agreement in the light of current facts and circumstances and permit the 61 percent (about 22,000) of the customers now outside of the City

to change electric supplier under which they would have representation by the PSC. City residents and customers can remain with the City as their electric supplier. The customers outside of the City are asking under section 366.04(2) (e) that the Commission, on its own motion, allows the 61 percent of customers outside of the City to switch franchise territories from the City to FPL.

**CONCLUSION AND RELIEF REQUESTED**

Based on the foregoing, we respectfully ask that the Commission reject the Motion to Dismiss filed by Mr. Wright on December 18, 2009. Furthermore, we respectfully ask that the Commission order a review of the 1981 Territorial agreement in relation to current facts and circumstances and economic and financial impacts. Respectfully submitted this 1st day of February, 2011.

---

s/ Dr. Stephen J. Faherty, Sr.

---

s/ Glenn Fraser Heran