



MINUTES
THE TOWN OF INDIAN RIVER SHORES
6001 North Highway A1A, Indian River Shores, FL 32963

SPECIAL CALLED TOWN COUNCIL MEETING

Friday, July 18, 2014
9:00 a.m.

PRESENT:	Brian M. Barefoot, Mayor	Thomas F. Slater, Councilman
	Thomas W. Cadden, Councilman	
STAFF PRESENT:	Robert Stabe, Town Manager	Laura Aldrich, Town Clerk
	Capt. Mike Jacobs, Public Safety	Heather Christmas, Town Treasurer
OTHERS PRESENT:	Bruce May, Esq. (Holland & Knight)	Dan Ward (Holland & Knight)
	Dylan Reingold, Indian River County Atty.	Janet Begley, Press Journal
	Glenn Heran, Resident Indian River County	Lisa Zahner, VB 32963
EXCUSED ABSENCE:	Gerard A. Weick, Vice Mayor	Richard M. Haverland, Councilman

1. Call to Order

- a. Pledge of Allegiance
- b. Invocation (Councilman Slater)
- c. Roll Call

Mayor Barefoot called the meeting to order at 9:00 a.m. with the Pledge of Allegiance and Invocation performed, followed by the Council roll call by the Town Clerk as reflected above. She stated that Vice Mayor Jerry Weick and Councilman Dick Haverland were both on the phone. Mayor Barefoot said that written requests to participate by phone were received from both elected officials (family travel in Pennsylvania and a prior commitment out of town) prior to the meeting. In accordance with Town Resolution 10-8, **a motion to allow telephonic attendance by Vice Mayor Weick and Councilman Haverland** made by Councilman Slater with support by Councilman Cadden **passed 3-0.**

2. Update from Outside Legal Counsel on Electric Issue With Possible Action

Mayor Barefoot introduced Mr. Bruce May, partner with the law firm of Holland and Knight to discuss the situation we face with the City of Vero Beach electric utility. Mr. May said over the last 30 years, his practice has focused on public utility law, primarily in the areas of electric, natural gas and water. The firm was retained by the Town about two and a half months ago to evaluate legal options to protect the Town's residents regarding electric rates charged by the City of Vero Beach.

A report of the analysis to be presented includes:

- 1) a summary of the scope of their analysis;
- 2) review of the key factors identified;
- 3) an outline of some fundamental rights relevant to the electric rate issue; and
- 4) discussion of options they believe are available to the Town to protect its citizens.

1. **Scope.** The scope is broad, with volumes of public records, contracts, statutes, and constitutional issues analyzed over the past two months. To facilitate their analysis, a consultant, Mr. Terry Deason, a utility rate expert and the former Chairman of the Board of Public Service Commission, was retained. Together, they have analyzed the audited financial statement of the City of Vero Beach, the cost of service studies, and other reports the City and consultants have done on the City's cost of utility operations. They reviewed the City's electric tariff and compared its tariff rates with other utilities in Florida. Filings made by the City of Vero with the Federal Energy Regulatory Commission and other state regulatory agencies, as well as Florida Statute 366.047 regarding customers of small utilities (resident and non-resident alike) having a voice in the governance of utility operations have been reviewed. They have researched Federal and State court decisions on the rights of non-resident electric utility customers, and reviewed the Special Act that established both cities. They have analyzed the franchise agreement that began in 1986, and for all powers to grant or deny franchise agreements under the Florida Constitution and under the Municipal Home Rule Power Act. The territorial agreement between the City and FPL has been analyzed, and they have researched jurisdiction of the Florida Public Service Commission and how it applies to the Town's broad power to deny franchises.

2. **Key Factors.** Based on this analysis, there are several important facts for the Council to be aware of concerning the City's electric rates. Vero has some of the highest rates in the State of Florida, approximately 30% higher than FPL. Municipal electric rates are not regulated by the Public Service Commission (PSC) because there is an expectation that citizen rate payers have a voice for regulating their own rates. There is an assumption under Florida law that the citizen can vote the elected official out of office. That assumption is incorrect when it comes to the Vero Beach's electric utility. In Vero, the City's electric utility is governed and its electric utility rates are set exclusively by the City Council, which is elected by City voters alone who reside inside the City limits.

What makes this case somewhat unique is that the City has approximately 34,000 customers, and 22,000 of those customers live outside the City. They have the highest percentage of non-resident customers over any other utility run by any other municipality in the State of Florida. There are 65% of the customers that have no voice on the governance of the utility or over how the rates are established.

The Town's situation is also unique, with approximately 4,239 electric customers in the Town, which has a service area straddled by FPL and City of Vero. The City services 80% (approximately 3,500) of the electric utility customers, and the remaining 20% (739 customers) are serviced by FPL. Research also revealed Town residents collectively are paying \$2 million more than they would be per year if they were under electric service by FPL. The Town's non-City residential customers serviced by the City electric are also subsidizing a large portion, 24% of the overall budget, of the City's operations that have nothing to do with furnishing electricity.

3. **Fundamental Rights.** The Town has very broad regulatory powers to grant or deny franchises to other electric utilities that use the right of way on public property. The Town entered into a franchise agreement with the City in 1986 which granted the City an exclusive franchise to provide electric utility service to the Town for 30 years. That area was south of Old Winter Beach Road. In return, the City agreed in the franchise agreement to only charge "reasonable rates." This agreement will expire November 6, 2016. It contains nothing that prohibits the Town from requiring the City to remove its electric utility equipment from the Town's rights of way and public areas. There is also nothing in the Franchise Agreement that requires the Town to purchase the City's electrical facilities in the Town or to pay for the relocation of those facilities upon expiration of the franchise. Mr. May continued that in their opinion, the PSC's jurisdiction does not restrict the Town's broad rights to grant or deny a franchise to the City.
4. **Options.** Mr. May outlined four fundamental legal principals he focused on today:
 - 1) Florida law requires the City to charge reasonable rates to the Town and its residents;
 - 2) The City has a corresponding legal duty to prudently manage its utilities, and the Town and its residents should not be required to bear the cost of imprudent utility management decisions;
 - 3) Town has a right to exercise broad regulatory powers over its public property to protect citizens from excessive rates and unreasonable utility practices; and
 - 4) The Town and other non-resident customers have a statutory and a constitutional right to have a voice in electing the governing board of their municipal utility.

Their analysis shows that they have no voice at the PSC to challenge the City's unreasonable rates, because the PSC has no jurisdiction over the level of a municipal utility's rates. The Town has no voice to challenge the rates with the City of Vero Beach, because they have no electoral votes as non-residents of the City.

Therefore, there are two options: do nothing or bring legal action to challenge the rates. While there are no guarantees in litigation, there are four identified causes of action. First, they could challenge the reasonableness of Vero Beach's rates in a court of law and the prudence of Vero Beach's electric utility management. Second, the Town could ask the court to require the City to remove its electric facilities from the Town at the imminent expiration of the franchise agreement, and allow the Town to obtain substitute electric service from other providers. He referenced the Town of Indian Harbor Beach with City of Melbourne, briefly explaining a very similar suit whereby Melbourne provided utility service, and the residents complained. The Court said Indian Harbor Beach had the right to sue the City of Melbourne if they did not mutually resolve the issue. The Town of Indian Harbor Beach was also in the 4th District Court of Appeal, which is the trial court authority in Indian River County.

The third cause of action is to challenge the City of Vero Beach's refusal to conduct a referendum election as required by FS Section 366.047. This law required the affected municipal electric utility to give its non-resident customers an opportunity to decide by referendum election whether they will have representation in managing that utility. The definition of "affected municipal utility" means a municipal utility that serves two cities in the same county which has between 30,000 and 35,000 customers as of

September 30, 2007. The City clearly meets that definition and should have conducted a referendum election. Before the law was passed, the City quantified its retail customers by counting the number of separate meter accounts. Using this customer count method the City prepared its audited financial statement that notified the public that the City had 33,442 retail customers as of September 30, 2007. Research also shows that the City reported to the PSC and to the credit rating agencies that it had over 33,000 customers. After this law took effect, the City adopted a new way of counting, saying they no longer had to have a referendum election because they did not have over 30,000 customers. Now the multiple customers using a single meter only count as one, which seems to be a contrived scheme to artificially lower number of customers below the statutory threshold.

The fourth cause of action centers around the refusal to hold a referendum, which violates the resident's constitutional rights. An individual resident of the Town, Mr. Michael Ochsner, has expressed an interest in joining this suit as a plaintiff.

If the Town decides to pursue litigation, Holland and Knight is prepared to file a lawsuit based on these four counts of action. He has discussed the details at length with Town Attorney Chester Clem.

Also, if the Town decides to pursue litigation and since the Town would be litigating against another municipality, Chapter 164 of the Florida Statutes requires that litigation be temporarily abated for up to 100 days while the two municipalities and other stake holders conduct a series of public meetings and mediation designed to resolve this suit take place, which requires a resolution be passed that complies with this. Draft Resolution 14-05 was provided, stating

**A RESOLUTION OF THE TOWN OF INDIAN RIVER SHORES, FLORIDA
INITIATING INTERGOVERNMENTAL CONFLICT RESOLUTION PROCEDURES
WITH THE CITY OF VERO BEACH.**

As another matter of process, Counsel recommended sending a formal letter notifying the City of Vero Beach advising them of the three facts: 1) advising that as of November 6, 2016 the Franchise Agreement expires, and thereafter the City will no longer have the Town's permission to operate within the Town's corporate limits; 2) advise the City of the lawsuit, and 3) advise the City that the lawsuit would be temporarily abated while the parties participated in the dispute resolution procedures.

This concluded Counsel's report, and Mr. May asked for **questions of the Council**.

Councilman Slater thanked him for his detailed report and the many hours spent by him and his firm to thoroughly research the subject. He asked Mr. May about how the mediation procedures work. Mr. May said the Mediation Act was adopted in 1999 as a way to reduce costs for intergovernmental disputes. The conflict resolution process is initiated by a municipality by passing a resolution and sending it to the other municipality, along with a full description of other governmental entities identified who should be invited as part of the process. Mr. May recommend inviting the County, the Hospital District and possibly the School Board District to participate in this process who are also large users and have a stake in the resolution. It requires three (3) separate public meetings subject to the Sunshine Law. The first meeting is the Conflict Assessment Meeting, which is a preliminary organizational meeting held within 30 days. The parties begin to develop issues to be addressed later. If this meeting does not produce a settlement, another meeting would be held 50 days later with parties expected to address the previously identified issues in more detail. If it was not resolved at the second meeting, a third meeting for mediation would be held. If that does not result in settlement, then it becomes a full litigation in approximately 81 days. The timelines are negotiable and somewhat flexible if there are scheduling conflicts, with rights granted under 164.1061. Councilman Slater asked if the lawsuit would be on hold while this is all in process, which was answered affirmatively.

Mayor Barefoot asked the Town Manager if he had an estimate as to the cost to the Town to proceed along this route. The Town Manager said he thoroughly discussed this with Mr. May earlier this week, and based on his firm's exhaustive analysis, and his understanding, it could be about \$250,000 this fiscal year.

Mayor Barefoot summarized that our residents have been paying more than \$2 million a year for many years, and it will continue unless we do something. This is a tax on our citizens, and the excess rates are doing nothing more than transferring as revenue to their general fund, for which our residents get no benefit. Legal counsel has recommended that we inform the City of Vero Beach that we intend to let our franchise agreement expire in November 2016. They also recommended that we file a lawsuit for rate relief against the City for our citizens. Third, they recommended that we advise the City of our intent to enter into a conflict resolution process as outlined by Mr. May. Mr. Stabe has advised that a budget amendment of \$250,000 is necessary to cover costs through the end of this fiscal year.

Mayor Barefoot made a **motion that the Town formally notify the City of Vero Beach that the**

Town will not renew its franchise agreement with the City that expires on November 6, 2016, and that after that date, the City will no longer have the Town's permission to occupy the Town's rights-of-way and public areas. A second to the motion was made by Councilman Slater, which **passed 5-0.**

Councilman Cadden said he has been working on this electric franchise agreement problem for more than five years, and for the reporters in the room he stated that he lives in the FPL service district and enjoys the lower electric rates. He agreed with the Mayor's comments about the tax on our residents as absolutely accurate, and supports this action 100% as the most effective way to get the people we need to the table to try to get a resolution to this problem. Councilman Cadden then made a **motion that the Town authorize legal counsel to file a lawsuit against the City of Vero Beach structured around the causes of action that Mr. May outlined,** which was seconded by Councilman Slater. The **motion passed 5-0.**

The third **motion to authorize an amendment to the 2013-2014 Budget in the amount of \$250,000 to cover legal and consulting expenses related to litigation against the City of Vero Beach through the end of this year** was made by Mayor Barefoot with support by Councilman Slater, which **passed 5-0.**

Finally, a **motion to approve Town Resolution 14-05 initiating intergovernmental conflict resolution procedures with the City of Vero Beach, that it will abide by the mandatory conference and mediation procedures set forth in Florida's Governmental Conflict Resolution Act** was made by Mayor Barefoot with support from Councilman Cadden which **passed 5-0.**

Mayor Barefoot said it was unfortunate that it came to this point. If there is more discussion, the Regular Town Council meeting will be held next Thursday, he added.

3. **Public Comment**

Dylan Reingold, Indian River County Attorney, said it was their intent to be involved with the Town and be supportive. Mayor Barefoot said we would like to work together to achieve the common goal of rate relief, and asked that Mr. Reingold work with Mr. May and Mr. Clem to accommodate their needs.

4. **Adjournment**

The meeting was adjourned at 9:33 a.m.

Respectfully submitted,

/s _____

Laura Aldrich, Town Clerk

(Approved by the Town Council at the July 24, 2014 meeting)

Please Note: The Town of Indian River Shores does not routinely keep verbatim minutes. Any party interested in such an appeal relating to any decision made by the Council with respect to any matter considered at this meeting is responsible to record the meeting and include the testimony and evidence upon which the appeal is to be based.