



# Floridians for Solar Choice

## MEMORANDUM

**TO:** Financial Impact Estimating Conference

**FROM:** Floridians for Solar Choice, Inc.

**SUBJECT:** Financial Impact Statement for the Amendment: Limits or Prevents Barriers to Local Solar Electricity Supply

**DATE:** April 22, 2015

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This second memorandum from the sponsors of the Solar Amendment to the FIEC is intended to provide additional information on issues raised at the FIEC public hearing on April 10, 2015. This memorandum discusses the Solar Amendment's implications for the wheeling of local solar energy on the electric grid, the electric utilities' recovery of sunk costs, and local government franchise agreements. The memorandum considers these issues within the context of the FIEC's duty to issue a statement on the Solar Amendment's probable financial impact on the revenues and costs to the state and local governments.

### **Wheeling**

The Solar Amendment envisions a local solar electricity supplier directly providing electricity to its customer instead of using the electric utility's grid to transmit and distribute or "wheel" the electricity to its customer. The Solar Amendment neither prohibits nor requires wheeling through the electric grid to a customer the electricity generated by a local solar electricity supplier. In the event wheeling occurs, the Solar Amendment does not prohibit an electric utility from charging rates for such a service provided to a local solar electricity supplier or its customer when such rates are also charged for wheeling electricity generated by a source other than a local solar electricity supplier.

### ***Restriction on Regulating Local Solar Electricity Suppliers***

Paragraph (b)(1) of the Solar Amendment prohibits state or local government from regulating a local solar electricity supplier "with respect to its rates, service, or territory," and further provides that such a local solar electricity supplier may not be "subject to any assignment, reservation, or division of service territory between or

among electric utilities." In a scenario where a local solar electricity supplier desires to use the electric grid owned by an electric utility, nothing in paragraph (b)(1) prevents the electric utility from charging the local solar electricity supplier for the service of transporting the electricity on behalf of the local solar electricity supplier, and nothing prevents the entity regulating rates from approving any such rate or charge.

By its plain language, paragraph (b)(1) restricts government authority over rates and service of a local solar electricity supplier, but imposes no such restriction on regulation of rates and service of electric utilities. A state agency's or local government's requirement that the electric utility charge a particular rate or fee for "wheeling" services, and that such a rate or fee be established following prescribed procedures, is not a regulation of the local solar electricity supplier's rates, service or territory, because such requirements do not regulate the rates the solar electricity supplier charges to its customer, do not regulate the service that it provides to its customer, and do not enforce territorial boundaries in a way that restricts the local solar electricity supplier from providing service to its customer.

### ***Impairment of Solar Electricity from a Local Solar Electricity Supplier***

Paragraph (b)(2) of the Solar Amendment provides that "[n]o electric utility shall impair any customer's purchase or consumption of solar electricity from a local solar electricity supplier through any special rate, charge, tariff, classification, term or condition of service, or utility rule or regulation, that is not also imposed on other customers of the same type or class that do not consume electricity from a local solar electricity supplier." The Merriam-Webster Online dictionary defines the term "impair" to mean: "to damage or make worse by or as if by diminishing in some material respect." Additionally, Black's Law Dictionary, 6<sup>th</sup> Edition, defines the term "impair" to mean: "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." Applying either definition, it is clear that an electric utility's term of service or rule requiring either the local solar electricity supplier or the ultimate customer to pay for wheeling services will diminish in some material respect or lessen in some way the customer's purchase or consumption of the electricity produced by the local solar electricity supplier by imposing additional costs on the customer, either through higher rates for the solar electricity or through utility charges, depending on how the wheeling charges are collected by the electric utility. However, such a wheeling charge is one that would be charged under current law to any producer of electricity seeking to wheel power over the electric utility's distribution or transmission system whether it would be to a separate customer or to itself at a facility remote from the self-generating facility. Thus, every customer who receives electricity wheeled over the grid is subject to such "impairment." As such, the rate or charge that creates the impairment is one that is "also imposed on other customers of the same type or class that do not consume electricity from a local solar electricity supplier."

An example in current law where wheeling is authorized can be found in Section 366.051, Fla. Stat. That statute provides in part:

Public utilities shall provide transmission or distribution service to enable a retail customer to transmit electrical power generated by the customer at one location to the customer's facilities at another location, if the commission finds that the provision of this service, and the charges, terms, and other conditions associated with the provision of this service, are not likely to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all customers . . . .

This statute authorizes a utility customer to use the utility's distribution or transmission system to transport self-generated electricity to its facilities at a different location, and authorizes the electric utility providing the transportation to charge for the service. Because those generating the electricity are charged by the utility for wheeling the power to their remote facilities, they are in the same position as a customer of the same utility who receives electricity wheeled from a local solar electricity supplier's facility. The charge would not constitute an unauthorized impairment in violation of the Solar Amendment because other customers of the same type (customer's receiving electricity "wheeled" to them by the electric utility) are similarly impaired by the same kind of rate or charge for the same kind of service.

### **Authority to Recover Fixed or "Sunk" Costs by Dedicated Fee or Charge, or Through Base Rates**

What an electric utility charges its customer is set forth in a group of rate schedules, which each apply to a particular class of customer and set forth the charges that can appear on the customer's bill. For public utilities, these schedules are established by the utility, subject to review and approval by the Public Service Commission. For municipal electric utilities, these schedules are established by the utility, subject to review and approval by the authority with oversight responsibilities for the utility, usually the city governing body, but sometimes a separate board or authority answerable to the city governing body or residents. For rural electric cooperatives, these schedules are established by the utility and are subject to review and approval by a board of directors elected by the customer members of the cooperative.

The components of a customer's bill typically consist of several types of charges varying in amount depending on the class of customer. The first type of charge is called a customer charge. It is the minimum amount a customer is required to pay, regardless of the amount of electricity consumed. This charge is supposed to allow the utility to collect its fixed costs to serve a particular customer regardless of the amount of electricity consumed. These "fixed costs" typically include the costs to the utility of

maintaining and keeping the customer's account records active, such as data processing, meter reading, billing, and other administrative-type costs.

The second type of charge is a consumption (or energy) charge, which is a per kilowatt-hour rate that is charged to a customer depending on the amount of electricity consumed. This charge is designed to cover the customer's share of the utility's investment in the physical plant, the cost of maintenance and operations, and for an investor-owned public utility, the authorized shareholder return on investment (for a municipal utility some amount above actual utility costs may be charged to support general governmental operations).

These first two types of charges combine to make up what is referred to as the utility's "base rate." However, most utilities also charge one or more "additional charges" to cover either recurring operating costs that are outside of the utility's control, such as the cost of fuel to run generating plants, or temporary costs to the utility, such as the cost to pay for hurricane damages. Additional charges have historically been imposed for such things as fuel cost recovery, recovery of costs related to hurricane damage, and pass-through of franchise fees and taxes.

Assuming the Solar Amendment becomes law, and assuming for the sake of argument that electric utilities and their rate regulators determine that activities authorized by the Solar Amendment either inhibit cost recovery by utilities or shift too much of the cost burden to customers who do not consume electricity produced by a local solar electricity supplier, the Solar Amendment preserves sufficient flexibility for utilities and their rate regulators to address the matter.

The Solar Amendment does not prohibit imposition of utility rates, fees or charges that impair a customer's purchase or consumption of *solar electricity*. Rather, the amendment has a far narrower effect. It prohibits a utility from imposing a rate, fee or charge that impairs a customer's purchase or consumption of solar electricity *from a local solar electricity supplier*, and then, only if the rate, fee or charge is one that is not also imposed on other customers of the same type or class. The focus of the Amendment is to remove regulatory barriers inhibiting the third-party local solar supplier business model specifically, not to protect the use of distributed solar electricity generally.

To the extent that current law authorizes the imposition of a rate, fee or charge on a customer who uses solar electricity because such use reduces the revenue the electric utility anticipated collecting from that customer when it made its system investments, the Solar Amendment would allow the same rate, fee or charge to a customer purchasing or consuming electricity from a local solar electricity supplier. Such a rate, fee or charge imposed by the electric utility would not violate the Solar Amendment's "impairment" provision because it is likewise charged to customers of the same type (customers who consume solar electricity from a source other than the

regulated electric utility) who do not consume electricity from a local solar electricity supplier.

A utility may, for example, include a rider in its tariff (subject to approval of its rate regulator) allowing a surcharge or a rate adjustment for all customers of a certain class (such as residential, or commercial) who reduce their demand by using electricity produced from renewable generating equipment not owned by the utility. Such a rider does not violate the Solar Amendment because the rider does not impair the consumption or purchase of electricity solely for customers of a local solar supplier, but applies to others as well. If, however, the same utility attempts to impose a rider that applies the same surcharge or rate adjustment to customers of local solar electricity suppliers ONLY, such a rider would violate the impairment provisions of the Solar Amendment.

## **Revenue Requirement and Rates**

Every electric utility has what is known as a "revenue requirement." The revenue requirement is the amount of revenue that the utility must collect through its rates, fees and charges to recover all of its reasonable costs and meet all of its legitimate and reasonable obligations. For an investor-owned public utility, the revenue requirement includes the amount of revenue the utility must collect from its established rates, fees and charges to meet all of its operating and maintenance expenses, recover the amount of capital invested in the physical plant, service its debt, and pay to shareholders a return on investment that has been approved by the Public Service Commission and determined to be adequate to fairly compensate the shareholders for their investment. The Florida Supreme Court has determined that a utility's return on its shareholder's equity may vary within a range above or below the percentage established by the PSC and remain fair to shareholders and reasonable to customers. Court opinions have established that a realized rate of return on equity that falls within one percentage point of the percentage established by the PSC is presumptively reasonable. Therefore, a utility will typically not seek a change in its rates unless the return on equity is anticipated to fall below or rise above the ends of this established range.

Similarly, a municipal utility establishes rates to cover its revenue requirement. While no municipal utility pays shareholders a fair return on investment, some use utility revenues to fund non-utility operations, and therefore have a revenue requirement in excess of the actual costs of financing, constructing, operating and maintaining the utility system.

Whether a policy change such as that proposed in the Solar Amendment alters an investor-owned public utility's revenues enough so that it would be compelled to amend its rates or to impose an additional charge in order to meet its revenue requirement would likely depend on whether revenues declined to a degree that the utility no longer earned a return on its investment falling within the range established by

the PSC. Whether passage and application of the Solar Amendment increases distributed solar generation enough to decrease revenues and trigger the need to raise rates so that the utility may continue to earn a rate of return within the authorized range is speculative and uncertain. Whether any potential decrease in revenue caused by activities authorized by the Solar Amendment may be offset by separate increases in revenues brought about by increased operating efficiencies, management cost cutting, and customer growth is also unknown.

Likewise, whether increases in distributed solar prompted by the Solar Amendment would decrease municipal utility revenues to a level that jeopardizes non-utility governmental funding is uncertain, and whether any revenue decreases, should they materialize, will be offset by separate increases in revenues from increased operating efficiencies, management cost cutting, and customer growth, is also uncertain.

The FIEC notebook distributed after the public hearing includes papers on a variety of solar topics, including reports on electric utility rate implications of local solar, particularly whether non-solar customers cross-subsidize the rates of local solar customers. Appendix "A" includes a concise yet scholarly analysis of the debate by immediate past Chair of the Federal Energy Regulatory Commission Jon Wellinghoff and James Tong: "A Common Confusion Over Net Metering is Undermining Utilities and the Grid" at:<http://www.utilitydive.com/news/wellinghoff-and-tong-a-common-confusion-over-net-metering-is-undermining-u/355388/> The article suggests cross-subsidization of rates regularly occurs in other contexts, such as the snowbird discount mentioned at the FIEC public hearing, and points to studies demonstrating that local solar customers contribute more than their fair share.

## **Will the Solar Amendment Cause Cancellation of Franchise Agreements?**

Passage of the Solar Amendment will not result in the widespread cancellation of franchise agreements between cities and counties and the franchisee public electric utilities. Beginning in 1996, electric utilities began including within franchise agreements offered to local government provisions that could be exercised to cancel the agreement in the event that changes in state or federal law result in retail competition. These provisions typically state the following, or something substantially similar:

If as a direct or indirect consequence of any legislative, regulatory or other action by the United States of America or the State of Florida (or any department, agency, authority, instrumentality or political subdivision of either of them) any person is permitted to provide electric service within the incorporated areas of the Grantor to a customer then being

served by the Grantee, or to any new applicant for electric service within any part of the incorporated areas of the Grantor in which the Grantee may lawfully serve, and the Grantee determines that its obligations hereunder, or otherwise resulting from this franchise in respect to rates and service, place it at a competitive disadvantage with respect to such other person, the Grantee may, at any time after the taking of such action, terminate this franchise if such competitive disadvantage is not remedied within the time period provided hereafter. The Grantee shall give the Grantor at least 90 days advance written notice of its intent to terminate. Such notice shall, without prejudice to any of the rights reserved for the Grantee herein, advise the Grantor of the consequences of such action which resulted in the competitive disadvantage. The Grantor shall then have 90 days in which to correct or otherwise remedy the competitive disadvantage. If such competitive disadvantage is not remedied by the Grantor within said time period, the Grantee may terminate this franchise agreement by delivering written notice to the Grantor's Clerk and termination shall take effect on the date of delivery of such notice.

This example is excerpted from the initial form agreement offered by FPL to the City of South Miami during its recent negotiation for a franchise agreement renewal and is identical to language found in numerous FPL franchise agreements entered after 1996.

First, under these provisions, termination of the agreement is not automatic. The right of the utility to terminate is not triggered by a change in the law, rather it is triggered when the utility determines that the existence of the franchise agreement has placed it at a competitive disadvantage with respect to the new service provider, and the local government has failed to provide a remedy acceptable to the utility. The language in these agreements is usually silent as to the nature of the remedy required to avoid termination. It is uncertain and speculative that any utility will be placed at a competitive disadvantage with respect to a local solar electricity supplier who operates as authorized under the Solar Amendment. It is also uncertain and speculative that any franchise agreement will be terminated if a utility actually determines that it is at a competitive disadvantage, because the local government has the opportunity to propose a remedy or negotiate revised terms, which may or may not involve the amount of revenue paid to the local government. In a review of nearly 190 such agreements only one turned up which contained this kind of termination provision did not also provide an express opportunity to remedy prior to termination.

Second, franchise agreements are not uniform throughout the state and across utilities. Each utility offers its own form agreement, and every local government to varying degrees, negotiates its own terms which deviate from the form agreement. Several current agreements are attached as Appendix "B" for comparison purposes. Consider that agreements entered between 1985 and 1996 (all of which remain in effect – the term is almost uniformly 30 years) contain no right of termination due to competitive disadvantage.

Third, a franchise agreement is more than just an agreement as to the electric utility's payment of a fee to the local government. Such agreements grant significant benefits to the utility franchisee, including the city or county's agreement, for a 30-year term, not to take over and operate the portions of the utility system located within the local government's jurisdictional boundaries. Additionally, such agreements provide a means for addressing the utilities' uses of the public rights of way and public easements within the jurisdiction, which may be more advantageous to the utility than terms provided in statutes. In short, there are compelling reasons for a utility to continue operating under a franchise agreement notwithstanding changes in the law that allow third parties to provide electric service in the jurisdiction without being subject to the same franchise terms.

Finally, it is unclear whether provisions like those excerpted above, which are intended to apply in the event of a restructured retail electricity market, would even apply in the event that the Solar Amendment is approved and becomes law. The Solar Amendment will not be likely to cause any electric utility to lose its customer because of retail competition. Indeed, the express language contained in paragraph (b)(3) of the Solar Amendment provides that the electric utility may not be relieved of its obligation under law to provide electric service to any customer in its service territory on the basis that the customer also purchases electricity from a local solar electricity supplier. A customer of a local solar electricity supplier, therefore, remains a customer of the electric utility. If the utility does not lose its customer, is it at a competitive disadvantage with respect to a local solar electricity supplier? To the extent that ambiguity exists in any such termination provision within a franchise agreement, the Florida Supreme Court requires that the ambiguity be resolved in favor of the government and against the franchisee. See, Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc., 444 So.2d 926, 928 (Fla. 1983) (attached as Appendix "C").

## **Revenues and Costs to the State and Local Government**

The foregoing discussion about the Solar Amendment's electric utility rate implications and the franchise agreement consequences inform the FIEC's consideration of the revenue and cost consequences of the Solar Amendment. Section 100.371(5)(a), Florida Statutes, requires the FIEC to "complete an analysis and financial impact statement to be placed on the ballot of the estimated increase or decrease in any revenues or costs to state or local governments resulting from the proposed initiative." With regard to revenues, the state and local governments impose a variety of

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taxes and fees on electric utilities and can generate tax and fee revenues from local solar electricity suppliers and their customers. How much and whether the revenue amounts will vary from those received today depends on a variety of factors, including among others the extent to which customers choose to utilize local solar electricity suppliers and the state and local regulatory reaction to rate change requests, if any, from the electric utilities. Because the degree to which customers take advantage of new local solar authorized by the Amendment and the regulatory reactions are unknown, the state and local revenue effects are unknown. Likewise, those factors affect the analysis of the costs to state and local government as customers of electric utilities. There is no way to know whether the Solar Amendment will result in the state and local government becoming customers of local suppliers or will result in higher or lower costs for the purchase of electric utility power from rates adjusted upwards or downwards by state or local regulatory changes. Consequently, neither the revenue nor the cost impacts can be known with the degree of certainty constitutionally required for the FIEC to determine the "probable financial impact" of the Solar Amendment.

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## **APPENDIX A**

## Utility Dive

OPINION

### Wellinghoff and Tong: A common confusion over net metering is undermining utilities and the grid

#### 'Cost-shifting' and 'not paying your fair share' are not the same thing.

By Jon Wellinghoff and James Tong | January 22, 2015

**Editor's Note:** The following is a guest post written by Jon Wellinghoff and James Tong. Wellinghoff is the former chairman of the Federal Energy Regulatory Commission and is currently a partner at law firm Stoel Rives LLP. Tong is the vice president of strategy and government affairs for Clean Power Finance, a financial services and software firm in the residential solar market. This article is the first in a series from Tong and Wellinghoff looking at issues surrounding utilities, distributed energy resources, and the grid. Tong and Wellinghoff's joint proposal to create an independent distribution system operator was covered in Utility Dive [here](http://www.utilitydive.com/news/jon-wellinghoff-utilities-should-not-operate-the-distribution-grid/298286/) (<http://www.utilitydive.com/news/jon-wellinghoff-utilities-should-not-operate-the-distribution-grid/298286/>).

**Correction:** A previous version of this post said a report by the California Public Utilities Commission (CPUC) found that net energy metering (NEM) customers in the state were paying 106% of the full cost of service. The report was, in fact, a draft. The final report found California NEM customers were paying 103% of the full cost of service.

Public discussion on net energy metering (NEM) has gone from heated to downright nasty. It started as an arcane and seemingly innocuous policy: solar customers get a one-for-one bill credit from their utility for each kWh they produce and send to the grid. NEM has become a full-blown wedge issue.

Critics assert NEM customers use the grid but do not pay their fair share of the costs. They say that NEM shifts grid costs to non-solar ratepayers, especially lower-income households and minorities. They invoke phrases such as "regressive tax", "reverse Robin Hood," or even "[robbin'](http://www.fortnightly.com/fortnightly/2013/07/reverse-robin-hood) (<http://www.fortnightly.com/fortnightly/2013/07/reverse-robin-hood>) the hood (<http://www.fortnightly.com/fortnightly/2013/07/reverse-robin-hood>)," to suggest that solar customers – purportedly far wealthier and whiter – are getting a free ride at everyone else's expense.

"Nonsense," reply NEM advocates. "NEM critics don't care about ratepayer fairness – they care about protecting profits and monopolies for utilities that have never faced competition." They contend that, far from shifting costs, NEM customers create net value to the grid and all grid users. One only need look to [a study commissioned by the neutral Nevada Public Utility Commission](http://puc.nv.gov/uploadedFiles/pucnvgov/Content/About/Media_Outreach/Announcements/Announcements/E3%20PUCN%20NEM%20Report%202014.pdf?pdf=Net-Metering-Study) ([http://puc.nv.gov/uploadedFiles/pucnvgov/Content/About/Media\\_Outreach/Announcements/Announcements/E3%20PUCN%20NEM%20Report%202014.pdf?pdf=Net-Metering-Study](http://puc.nv.gov/uploadedFiles/pucnvgov/Content/About/Media_Outreach/Announcements/Announcements/E3%20PUCN%20NEM%20Report%202014.pdf?pdf=Net-Metering-Study)) that shows NEM customers provide a net present value benefit of \$36M to non-NEM customers in Nevada.

However, both arguments miss the point. That is because both use "cost-shifting" and "not paying the fair share" interchangeably. This understanding is wrong – critically wrong. And it is resulting in needlessly fractious debates and bad policies, including arbitrary fixed fees on solar customers.

A telling example: In 2013, [the California Public Utilities Commission \(CPUC\) published a study](http://www.cpuc.ca.gov/NR/rdonlyres/75573B69-D5C8-45D3-BE22-3074EAB16D87/0/NEMReport.pdf) (<http://www.cpuc.ca.gov/NR/rdonlyres/75573B69-D5C8-45D3-BE22-3074EAB16D87/0/NEMReport.pdf>) that projected a cost shift of \$1.1 billion per year by 2020 due to NEM policy. NEM critics, including the [American Legislative Council](http://alec.org/docs/Net-Metering-reform-web.pdf) (<http://alec.org/docs/Net-Metering-reform-web.pdf>) (ALEC), [Americans for Prosperity](http://americansforprosperity.org/georgia/article/why-the-sun-isnt-free-by-joe-aaron-foster/) (<http://americansforprosperity.org/georgia/article/why-the-sun-isnt-free-by-joe-aaron-foster/>), and even some academics cited the study as proof that NEM customers were not paying their fair share. So they pushed harder for fixed fees for NEM customers, a policy that various states, including Wisconsin, Arizona, Kansas, and Oklahoma, have since either explored or enacted.

But critics (as well as NEM advocates) overlooked that the same CPUC report also found that NEM customers as a whole "appear to be paying slightly more than their full cost of service" – 103% of their costs, to be precise. In other words, NEM customers were not zeroing out their bills and "free-riding;" on average, they were paying more to utilities in fixed-cost recovery than non-NEM customers.

Why do so many policy wonks on both sides consistently conflate cost-shifting with not paying one's fair share? It could be that explaining these concepts is difficult and doesn't make for good sound bites. Or it could be that few people understand the arcane subject of utility rate design or are willing to admit that the [prevailing utility regulatory model is highly redistributive to begin with](http://www.utilitydive.com/news/why-the-net-metering-fight-is-a-red-herring-for UTILITIES/307061/) (<http://www.utilitydive.com/news/why-the-net-metering-fight-is-a-red-herring-for UTILITIES/307061/>).

According to the CPUC study, before going solar, all NEM customers (commercial and residential) had paid 133% of their full cost of service. The residential segment alone paid 154% of its cost. By going solar, NEM customers were mitigating or reversing the subsidies they had traditionally been paying to support the grid. This is the crux of what is called cost-shifting.

Cost-shifting should not be ignored. But the focus on NEM customers dangerously [obscures more critical problems with the utility model](http://www2.deloitte.com/us/en/pages/energy-and-resources/articles/the-math-series-solving-for-disruption-in-US-electric-power-industry.html) (<http://www2.deloitte.com/us/en/pages/energy-and-resources/articles/the-math-series-solving-for-disruption-in-US-electric-power-industry.html>), namely slowing demand, escalating costs, and disruptive innovations. In such an environment, any technology that reduces sales of electrons will challenge traditional practices of cross-subsidization.

For example, the energy economist Catherine Wolfram estimates that [adoption of LED lighting may shift costs as much as the adoption of distributed solar](https://energyathaas.wordpress.com/2014/03/17/why-arent-we-talking-about-net-energy-metering-for-leds/). (<https://energyathaas.wordpress.com/2014/03/17/why-arent-we-talking-about-net-energy-metering-for-leds/>) Does this mean we should condemn LED users for cheating the system, or charge them fixed fees? Or should we fix the system in which the mere adoption of LED lighting can hurt the poor?

Vulnerable customer segments should not bear more cost when others adopt [distributed energy resources \(DERs\)](http://www.epri.com/Our-Work/Pages/Distributed-Electricity-Resources.aspx) (<http://www.epri.com/Our-Work/Pages/Distributed-Electricity-Resources.aspx>), such as rooftop solar or efficiency technologies. But all customers – not just solar or DER customers – need to address the potential equity issues that new technologies, however promising, may raise. The [Regulatory Assistance Project's concept of a minimum bill](http://www.raponline.org/featured-work/the-minimum-bill-an-effective-alternative-to-high-customer) (<http://www.raponline.org/featured-work/the-minimum-bill-an-effective-alternative-to-high-customer>) – which [utilities and solar advocates in Massachusetts had agreed to](http://www.greentechmedia.com/articles/read/why-the-massachusetts-net-metering-compromise-could-be-a-model-for-other-st) (<http://www.greentechmedia.com/articles/read/why-the-massachusetts-net-metering-compromise-could-be-a-model-for-other-st>) before getting stuck in the legislature – can ensure that all grid users pay their fair share. While imperfect (we advocate for [more comprehensive reforms](http://www.fortnightly.com/fortnightly/2014/08/rooftop-parity?authkey=694f9b6d88b73bb34af7a1dfe32592897cf7300b810bfb7d7d2030eab37ffed0) (<http://www.fortnightly.com/fortnightly/2014/08/rooftop-parity?authkey=694f9b6d88b73bb34af7a1dfe32592897cf7300b810bfb7d7d2030eab37ffed0>)), the concept is more efficient and fairer than a sweeping fixed fee that singles out one technology with almost no regards of its benefits and costs to the grid.

The recent push for fixed fees is problematic for many reasons; for one, [it does not rely on actual data or results](http://www.utilitydive.com/news/utah-regulators-turn-down-rocky-mountain-powers-bid-for-solar-bill-charge/304455/) (<http://www.utilitydive.com/news/utah-regulators-turn-down-rocky-mountain-powers-bid-for-solar-bill-charge/304455/>), but rather on the faulty assumption that users of technologies that shift costs are necessarily not paying their fair share. This fallacy will handicap the deployment of all promising DERs, which, by virtue of being distributed, will necessarily create uneven benefits and costs. Even worse, it may ultimately harm those ratepayers that NEM critics are trying to protect.

Separate analyses from the [Rocky Mountain Institute](http://www.rmi.org/electricity_grid_defection) ([http://www.rmi.org/electricity\\_grid\\_defection](http://www.rmi.org/electricity_grid_defection)) and [Morgan Stanley](http://www.greentechmedia.com/articles/read/Solar-Fixed-Charges-May-Cause-Grid-Defection) (<http://www.greentechmedia.com/articles/read/Solar-Fixed-Charges-May-Cause-Grid-Defection>) show that grid defection will soon be economically viable, and that levying more fixed fees would accelerate defection. Even if "mass defection" is unlikely, defection by a small group will probably have an outsized impact. Utilities rely disproportionately on heavy users, who tend to be more affluent and thus more economically capable of going off-grid. If these users do start defecting en masse, then we really will have an unprecedented problem of cost-shifting from the "haves" to the "have-nots" – but we can't blame the "haves" for not paying their fair share for a grid they aren't using.

Let us hope that we never have to face this calamity to finally understand the distinction between cost-shifting and not paying one's fair share.

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Top Image Credit: [San Jose Inside](http://www.sanjoseinside.com/news/entries/4_19_13_sustainable_energy_solar_utilities/) ([http://www.sanjoseinside.com/news/entries/4\\_19\\_13\\_sustainable\\_energy\\_solar\\_utilities/](http://www.sanjoseinside.com/news/entries/4_19_13_sustainable_energy_solar_utilities/))

Filed Under:

## **APPENDIX B**

**ORDINANCE NO. 19-14-2197**

**AN ORDINANCE GRANTING TO FLORIDA POWER & LIGHT COMPANY, ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC FRANCHISE, IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO, PROVIDING FOR MONTHLY PAYMENTS TO THE CITY OF SOUTH MIAMI, AND PROVIDING FOR AN EFFECTIVE DATE.**

**WHEREAS**, the City Commission of the City of South Miami, Florida recognizes that the City of South Miami (the "City") and its citizens need and desire the continued benefits of electric service; and

**WHEREAS**, the provision of such service requires substantial investments of capital and other resources in order to construct, maintain and operate facilities essential to the provision of such service in addition to costly administrative functions, and the City does not desire to undertake to provide such services at this time; and

**WHEREAS**, Florida Power & Light Company ("FPL") is a public utility which has the demonstrated ability to supply such services; and

**WHEREAS**, there is currently in effect a franchise agreement between the City and FPL, the terms of which are set forth in City Ordinance No. 7-84-1202, passed and adopted May 15, 1984, and FPL's written acceptance thereof dated May 18, 1984 granting to FPL, its successors and assigns, a thirty (30) year electric franchise ("Current Franchise Agreement"). As a result of short extensions passed and adopted by the City on May 14, 2014 and on August 19, 2014, respectively, and accepted by FPL, the Current Franchise Agreement expires on September 18, 2014; and

**WHEREAS**, FPL and the City (collectively, the "Parties") desire to enter into a new agreement ("New Franchise Agreement") providing for the payment of fees to the City in exchange for the nonexclusive right and privilege of supplying electricity within the City free of competition from the City, pursuant to certain terms and conditions; and

**WHEREAS**, the City Commission deems it to be in the public interest to enter into this agreement addressing certain rights and responsibilities of the Parties as they relate to the use of the public rights-of-way within the City's jurisdiction.

**NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF SOUTH MIAMI, FLORIDA:**

Section 1. The foregoing recitals are hereby found to be true and correct, and are incorporated herein and adopted and approved as if set out at length.

Section 2. There is hereby granted to FPL, its successors and assigns, for the period of 30 years from the effective date hereof, the nonexclusive right, privilege and franchise (hereinafter called "franchise") to construct, operate and maintain in, under, upon, along, over and across the present and future roads, streets, alleys, bridges, easements, rights-of-way and other public places (hereinafter called "public rights-of-way") throughout all of the incorporated areas, as such incorporated areas may be constituted from time to time, of the City and its successors, in accordance with FPL's customary practices, and practices prescribed herein, with respect to construction and maintenance of the electrical light, power and related facilities, including, without limitation, conduits, underground conduits, poles, wires, transmission and distribution lines, and all other facilities installed in conjunction with

or ancillary to FPL's provision of electricity and other services (hereinafter called "facilities") to the City and its successors, the inhabitants thereof, and persons beyond the limits thereof.

Section 3. (a) FPL's facilities shall be so located, relocated, installed, constructed and so erected as to not unreasonably interfere with the convenient, safe, continuous use or the maintenance, improvement, extension or expansion of any public "road" as defined under the Florida Transportation Code, nor unreasonably interfere with reasonable egress from and ingress to abutting property.

(b) To minimize such conflicts with the standards set forth in subsection (a) above, the location, relocation, installation, construction or erection of all facilities shall be made as representatives of the City may prescribe in accordance with all applicable federal and state laws, and pursuant to the City's valid rules and regulations with respect to utilities' use of public rights-of-way relative to the placing and maintaining in, under, upon, along, over and across said public rights-of-way, provided such rules and regulations:

- (i) shall be for a valid municipal purpose;
- (ii) shall not prohibit the exercise of FPL's rights to use said public rights-of-way for reasons other than conflict with the standards set forth above;
- (iii) shall not unreasonably interfere with FPL's ability to furnish reasonably sufficient, adequate and efficient electric service to all its customers while not conflicting with the standards set forth above; or

- (iv) shall not require relocation of any of FPL's facilities installed, before or after the effective date hereof, in any public right-of-way, unless or until widening or otherwise changing the configuration of the paved portion of any public right-of-way causes the facilities to unreasonably interfere with the convenient, safe, or continuous use, or the maintenance, improvement, extension, or expansion of any such public "road," or unless such relocation is required by state or federal law.
- (c) Such rules and regulations shall recognize that FPL's above-grade facilities installed after the effective date hereof should, unless otherwise permitted, be installed near the outer boundaries of the public rights-of-way to the extent possible.
- (d) When any portion of a public right-of-way is excavated, damaged or impaired by FPL or any of its agents, contractors or subcontractors because of the installation, inspection, or repair of any of its facilities, the portion so excavated, damaged or impaired shall, within a reasonable time and as early as practicable after such excavation, be restored to a condition equal to or better than its original condition before such damage by FPL at its expense.
- (e) The City shall not be liable to FPL for any cost or expense incurred in connection with the relocation of any of FPL's facilities required under this Section, except, however, that FPL may be entitled to reimbursement of its costs and expenses from others and as provided by law.

Except as expressly provided, nothing herein shall limit or alter the City's existing rights with respect to the use or management of its rights-of-way that are not otherwise preempted by the state or federal government.

Section 4. The acceptance of this New Franchise Agreement shall be deemed an agreement on the part of FPL to the following: (a) to indemnify and save the City harmless from any and all damages, claims, liability, losses and causes of action of any kind or nature arising out of a negligent error, omission, or act of FPL, its Contractor or any of their agents, representatives, employees, or assigns, or anyone else acting by or through them, and arising out of or concerning the construction, operation or maintenance of its facilities hereunder; (b) to pay all damages, claims, liabilities and losses of any kind or nature whatsoever, in connection therewith, including the City's attorney's fees and expenses in the defense of any action in law or equity brought against the City, including appellate fees and costs and fees and expenses incurred to recover attorney's fees and expenses from FPL, arising from the negligent error, omission, or act of FPL, its Contractor or any of their agents, representatives, employees, or assigns, or anyone else acting by or through them, and arising out of or concerning the construction, operation or maintenance of its facilities hereunder.

Section 5. All rates and rules and regulations established by FPL from time to time shall be subject to such regulation as may be provided by law.

Section 6(a). As a consideration for this franchise, FPL shall pay to the City, commencing 90 days after the effective date hereof, and each month thereafter for the remainder of the term of this franchise, an amount which added to the amount of

all licenses, excises, fees, charges and other impositions of any kind whatsoever (except ad valorem property taxes and non-ad valorem tax assessments on property) levied or imposed by the City against FPL's property, business or operations and those of its subsidiaries during FPL's monthly billing period ending 60 days prior to each such payment will equal six percent of FPL's billed revenues, less actual write-offs, from the sale of electrical energy to residential, commercial and industrial customers (as such customers are defined by FPL's tariff) within the incorporated areas of the City for the monthly billing period ending 60 days prior to each such payment. In no event shall payment for the rights and privileges granted herein exceed 6 percent of such revenues for any monthly billing period of FPL. For clarity, actual write-offs will be subtracted from FPL's billed revenues. In the event FPL subsequently collects previously written-off billed revenues from the sale of electrical energy to residential, commercial, and industrial customers, FPL shall pay to the City a franchise payment on such revenues in accordance with the formula set forth above in this Section 6(a). FPL shall continue to remit payment in a manner consistent with the Current Franchise Agreement until the first payment is due under this New Franchise Agreement.

The City understands and agrees that such revenues as described in the preceding paragraph are limited, as in the existing franchise Ordinance No. 7-84-1202, to the precise revenues described therein, and that such revenues do not include, by way of example and not limited to: (a) revenues from the sale of electrical energy for Public Street and Highway Lighting (service for lighting public ways and areas); (b) revenues from Other Sales to Public Authorities (service with eligibility

restricted to governmental entities); (c) revenues from Sales to Railroads and Railways (service supplied for propulsion of electric transit vehicles); (d) revenues from Sales for Resale (service to other utilities for resale purposes); (e) franchise fees; (f) Late Payment Charges; (g) Field Collection Charges; (h) other service charges.

(b) If during the term of this franchise FPL enters into a franchise agreement with any other municipality located in Miami-Dade County or Broward County, Florida, where the number of FPL's meters for active electrical customers does not exceed the number of meters for FPL's active electrical customers within the incorporated area of the City by more than one hundred and fifty (150) percent, the terms of which provide for the payment of franchise fees by FPL at a rate greater than 6 percent of FPL's residential, commercial and industrial revenues (as such customers are defined by FPL's tariff), under substantially similar terms and conditions as specified in Section 6(a) hereof, FPL, upon written request of the City, shall negotiate and enter into a new franchise agreement with the City in which the percentage to be used in calculating monthly payments under Section 6(a) hereof shall be no greater than that percentage which FPL has agreed to use as a basis for the calculation of payments to the other municipality, provided however, that such new franchise agreement shall include additional benefits to FPL, in addition to all benefits provided herein, at least equal to those, if any, provided by its franchise agreement with the other municipality. Subject to all limitations, terms and conditions specified in the preceding sentence, the City shall have the sole discretion to determine the percentage to be used in calculating monthly payments, and FPL shall

have the sole discretion to determine those benefits to which it would be entitled, under any such new franchise agreement.

(c) The City reserves the unilateral right at its sole discretion and at any time during the term of this franchise, but only once per calendar year, to reduce or increase the franchise fee percentage rate upon 120 days written notice to FPL, provided that the franchise fee percentage rate shall in no event exceed 6 percent or be reduced to zero percent.

(d) The City's options hereunder shall be limited solely to the percentages or calculations of the amount of the franchise fee to be paid by FPL as consideration for this franchise as specifically set forth in this Section 6. Except as provided in this Section 6, no other Section of this New Franchise Agreement may be altered, amended or affected by the City without the written concurrence of FPL, and nothing herein shall require the City to exercise any of its options hereunder.

Section 7. (a) As a further consideration, during the term of this franchise or any extension thereof, the City agrees: (a) not to engage in the distribution and/or sale, in competition with FPL, of electric capacity and/or electric energy to any other ultimate consumer of electric utility service (herein called a "retail customer") or to any electrical distribution system established solely to serve any retail customer formerly served by FPL other than the City, and (b) not to participate in any proceeding or contractual arrangement, the purpose or terms of which would be to obligate FPL to transmit and/or distribute electric capacity and/or electric energy from any third party(ies) to any other retail customer's facility(ies). Nothing specified

herein shall prohibit the City from engaging with other utilities or persons in wholesale transactions which are subject to the provisions of the Federal Power Act.

(b) Nothing herein shall prohibit or limit a customer of FPL, including the City, if permitted by law, from installing an approved renewable generation system to generate electric energy for use at the customer's or the City's premises respectively. Furthermore, nothing herein shall prohibit or limit a person, including the City, if permitted by law, from selling renewable energy or capacity to FPL.

Section 8. If the City grants a right, privilege or franchise to any other person to provide retail electric service within any part of the incorporated areas of the City in which FPL may lawfully serve or compete on terms and conditions which FPL reasonably determines are more favorable than the terms and conditions contained herein, FPL may at any time thereafter terminate this franchise if such terms and conditions are not revised within the time period provided hereafter. FPL shall give the City at least one hundred eighty (180) days advance written notice of its intent to terminate. Such notice shall, without prejudice to any of the rights reserved for FPL herein, advise the City of such terms and conditions that it considers more favorable and the objective basis or bases of the claimed competitive disadvantage. The City shall then have ninety (90) days in which to correct or otherwise remedy the terms and conditions complained of by FPL. If FPL determines that such terms or conditions are not remedied by the City within said time period, FPL may terminate this franchise agreement by delivering written notice by Certified United States Mail to the City's Clerk with copies to the Mayor, the City Manager and the City Attorney and termination shall be effective on the date of

delivery of such notice. Nothing contained herein shall be construed as constraining the City's rights to legally challenge at any time FPL's determination leading to termination under this section.

Section 9. If as a direct or indirect consequence of any legislative, regulatory or other action by the United States of America or the State of Florida (or any department, agency, authority, instrumentality or political subdivision of either of them) any person who offers retail electric service to the public is permitted to provide electric service within the incorporated areas of the City to any applicant for electric service within any part of the incorporated areas of the City in which FPL may lawfully serve, and FPL reasonably determines that its obligations hereunder, or otherwise resulting from this franchise in respect to rates and service, place it at a competitive disadvantage with respect to such other person, FPL may, at any time after the taking of such action, terminate this franchise if such competitive disadvantage resulting from this franchise is not remedied within the time period provided hereafter. FPL shall give the City at least 180 days advance written notice of its intent to terminate. Such notice shall, without prejudice to any of the rights reserved for FPL herein, advise the City of the consequences of such action which resulted in the competitive disadvantage. The City shall then have 90 days in which to correct or otherwise remedy the competitive disadvantage. If such competitive disadvantage is not remedied by the City within said time period, either by a franchise agreement with such other person or otherwise, FPL may terminate this franchise agreement by delivering written notice to the City's Clerk and termination shall take effect on the date of delivery of such notice. Agreement by the City with

such other person to enter into a franchise containing substantially the same terms as those provided herein shall be a sufficient, but not exclusive, remedy precluding FPL's termination of this franchise. Nothing contained herein shall be construed as constraining the City's rights to legally challenge at any time FPL's determination leading to termination under this section.

Section 10. Failure on the part of FPL to comply in any substantial respect with any of the provisions of this franchise shall be grounds for forfeiture, but no such forfeiture shall take effect if the reasonableness or propriety thereof is protested by FPL until there is final determination (after the expiration or exhaustion of all rights of appeal) by a court of competent jurisdiction that FPL has failed to comply in a substantial respect with any of the provisions of this franchise, and FPL shall have six months after such final determination to make good the default before a forfeiture shall result with the right of the City at its discretion to grant such additional time to FPL for compliance as necessities in the case may warrant.

Section 11. Failure on the part of the City to comply in substantial respect with any of the provisions of this New Franchise Agreement, including but not limited to: (a) denying FPL use of public rights-of-way for reasons other than as set forth in Section 3 of this New Franchise Agreement; (b) imposing conditions for use of public rights-of-way contrary to Federal or Florida law or the terms and conditions of this franchise; (c) unreasonable delay in issuing FPL a use permit to construct its facilities in public rights-of-way, shall constitute breach of this franchise. FPL shall notify the City of any such breach in writing sent by Certified United States Mail or via nationally recognized overnight courier and the City shall then remedy such breach as soon as

practicable. Should the breach not be timely remedied, FPL shall be entitled to seek a remedy available under law or equity from a court of competent jurisdiction, including the withholding of the payments provided for in Section 8 as a court of competent jurisdiction determines to be just and reasonable under all the circumstances hereof until such time as a use permit is issued or a court of competent jurisdiction has reached a final determination dispositive of the matter.

Section 12. The Parties to this franchise agree that it is in each of their respective best interests to avoid costly litigation as a means of resolving disputes which may arise hereunder. Accordingly, the Parties agree that prior to pursuing their available legal remedies, they will meet at the senior management level in an attempt to resolve any disputes. If such informal efforts are unsuccessful after a reasonable period of time, or when an impasse is declared by the Parties, then the Parties may exercise any of their available legal remedies.

Section 13. The City may, upon reasonable notice and within 90 days after each anniversary date of this franchise, at the City's expense, examine the records of FPL relating to the calculation of the franchise payment for the year preceding such anniversary date. Such examination shall be during normal business hours at FPL's office where such records are maintained. Records not prepared by FPL in the ordinary course of business or as required herein may be provided at the City's expense and as the City and FPL may agree in writing. Information identifying FPL's customers by name or their electric consumption shall not be taken from FPL's premises. Such audit shall be impartial and all audit findings, whether they decrease or increase payment to the City, shall be reported to FPL. The City's right to examine

FPL's records in accordance with this Section shall not be conducted by any third party employed by the City whose fee, in whole or part, for conducting such audit is contingent on findings of the audit.

The City waives, settles and bars all claims relating in any way to the amounts paid by FPL under the Current Franchise Agreement embodied in Ordinance No. 7-84-1202, however, this provision shall not be construed to waive, settle or bar claims relating to any amounts due after the effective date of this New Franchise Agreement, including those amounts to be paid in a manner consistent with the terms of the Current Franchise Agreement until the first payment is made under this New Franchise Agreement.

Section 14. The provisions of this ordinance are interdependent upon one another and if any of the provisions of this ordinance are found or adjudged to be invalid, illegal, void or of no effect by a court of competent jurisdiction (after the expiration of all rights of appeal), such finding or adjudication shall not affect the validity of the remaining provisions for a period of ninety (90) days, during which, this agreement may be amended by the Parties. If an agreement to amend the ordinance is not reached at the end of such ninety (90) day period, this entire ordinance shall then become null and void, and of no further force or effect.

Section 15. The City acknowledges it is fully informed concerning the existing franchise granted by Miami-Dade County, Florida, to FPL, and accepted by FPL as set out in Ordinance No. 60-16 adopted on May 3, 1960, and subsequently renewed and accepted by FPL as set out in Ordinance No. 89-81 adopted on September 5, 1989 by the Board of County Commissioners of Miami-Dade County,

Florida. The City agrees to indemnify and hold FPL harmless against any and all liability, loss, cost, damage and expense incurred by FPL in respect to any claim asserted by Miami-Dade County against FPL arising out of the franchise set out in the above referenced ordinances for the recovery of any sums of money paid by FPL to the City under the terms of this New Franchise Agreement. FPL acknowledges and the City hereby relies, in part, on then Dade County Resolution No. R-709-78 adopted on June 20, 1978 in the granting of this franchise.

Section 16. As used herein "person" means an individual, a partnership, a corporation, a business trust, a joint stock company, a trust, an incorporated association, a joint venture, a governmental authority or any other entity of whatever nature.

Section 17. Ordinance No. 7-84-1202, passed and adopted May 15, 1984 and all other ordinances and parts of ordinances and all resolutions and parts of resolutions in conflict herewith, are hereby repealed.

Section 18. This New Franchise Agreement shall be governed and construed by the laws and administrative rules of the State of Florida and the United States. In the event that any legal proceeding is brought to enforce the terms of this franchise, it shall be brought by either party hereto in Miami-Dade County, Florida, or, if a federal claim, in the U.S. District Court in and for the Southern District of Florida, Miami Division.

Section 19. This New Franchise Agreement is intended to constitute the entire agreement between the City and FPL with respect to the subject matters hereof, and it supersedes all prior drafts and verbal or written agreements,

commitments, or understandings, which shall not be used to vary or contradict the expressed terms hereof.

Section 20. Except in exigent circumstances, and except as otherwise may be specifically provided for in this franchise, all notices by either party shall be made by Certified United States Mail or via nationally recognized overnight courier service. Any notice given by facsimile or email is deemed to be supplementary, and does not alone constitute notice hereunder. All notices shall be addressed as follows:

To the City:

City Manager  
City Hall, 1<sup>st</sup> Floor  
6130 Sunset Drive  
South Miami, FL 33143

To FPL:

Vice President, External Affairs  
700 Universe Boulevard  
Juno Beach, FL 33408

Copy to:

City Attorney  
1450 Madruga Avenue  
Suite 202  
Coral Gables, FL 33146

Copy to:

General Counsel  
700 Universe Boulevard  
Juno Beach, FL 33408

Any changes to the above shall be in writing and provided to the other party as soon as practicable.

Section 21. As a condition precedent to the taking effect of the New Franchise Agreement, FPL shall file its acceptance hereof with the City's Clerk within 30 days of adoption of this ordinance. The effective date of the New Franchise Agreement shall be the date upon which FPL files such acceptance.

PASSED AND ENACTED this 16th day of September, 2014.

ATTEST:



CITY CLERK

1<sup>st</sup> Reading = 9/2/14

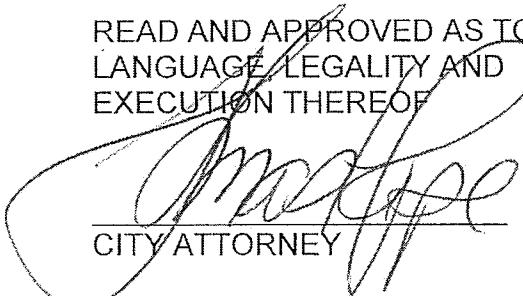
2<sup>nd</sup> Reading - 9/16/14

APPROVED:



MAYOR

READ AND APPROVED AS TO FORM,  
LANGUAGE, LEGALITY AND  
EXECUTION THEREOF

  
CITY ATTORNEY

COMMISSION VOTE: 4-1

Mayor Stoddard: Yea

Vice Mayor Harris: Yea

Commissioner Edmond: Nay

Commissioner Liebman: Yea

Commissioner Welsh: Yea

ACCEPTANCE OF ELECTRIC FRANCHISE  
ORDINANCE NO. 19-14-2197  
BY FLORIDA POWER & LIGHT COMPANY

City of South Miami, Florida

October 1, 2014

Florida Power & Light Company does hereby accept the electric franchise in the City of South Miami, Florida, granted by Ordinance No. 19-14-2197, being:

AN ORDINANCE GRANTING TO FLORIDA POWER & LIGHT COMPANY, ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC FRANCHISE, IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO, PROVIDING FOR MONTHLY PAYMENTS TO THE CITY OF SOUTH MIAMI, AND PROVIDING FOR AN EFFECTIVE DATE.

which was passed and adopted on September 16, 2014.

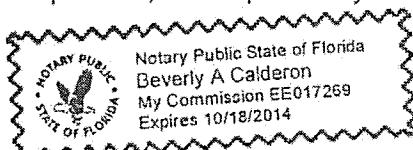
This instrument is filed with the City Clerk of the City of South Miami, Florida, in accordance with the provisions of Section 21 of said Ordinance.

FLORIDA POWER & LIGHT COMPANY

By Pamela M. Rauch  
Pamela M. Rauch, Vice President

STATE OF FLORIDA  
COUNTY OF PALM BEACH

The foregoing instrument was acknowledged before me this 30 day of September, 2014 by Pamela M. Rauch of Florida Power & Light Company, a Florida corporation, on behalf of the corporation, who is personally known to me.



Beverly A. Calderon  
NOTARY PUBLIC Signature

I HEREBY ACKNOWLEDGE receipt of the above Acceptance of Electric Franchise Ordinance No. 19-14-2197 by Florida Power & Light Company, and certify that I have filed the same for record in the permanent files and records of the City of South Miami, Florida on this 1st day of October, 2014.

(SEAL)

Doris O. Menendez  
City Clerk, City of South Miami, Florida

## MIAMI DAILY BUSINESS REVIEW

Published Daily except Saturday, Sunday and  
Legal Holidays  
Miami, Miami-Dade County, Florida

STATE OF FLORIDA  
COUNTY OF MIAMI-DADE:

Before the undersigned authority personally appeared MARIA MESA, who on oath says that he or she is the LEGAL CLERK, Legal Notices of the Miami Daily Business Review f/k/a Miami Review, a daily (except Saturday, Sunday and Legal Holidays) newspaper, published at Miami in Miami-Dade County, Florida; that the attached copy of advertisement, being a Legal Advertisement of Notice in the matter of

### CITY OF SOUTH MIAMI NOTICE OF PUBLIC HEARING FOR 9/16/2014

in the XXXX Court,  
was published in said newspaper in the issues of

09/05/2014

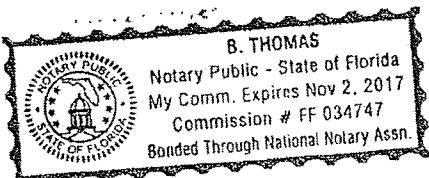
Affiant further says that the said Miami Daily Business Review is a newspaper published at Miami in said Miami-Dade County, Florida and that the said newspaper has heretofore been continuously published in said Miami-Dade County, Florida, each day (except Saturday, Sunday and Legal Holidays) and has been entered as second class mail matter at the post office in Miami in said Miami-Dade County, Florida, for a period of one year next preceding the first publication of the attached copy of advertisement; and affiant further says that he or she has neither paid nor promised any person, firm or corporation any discount, rebate, commission or refund for the purpose of securing this advertisement for publication in the said newspaper.

Sworn to and subscribed before me this

05 day of SEPTEMBER , A.D. 2014

(SEAL)

MARIA MESA personally known to me



### CITY OF SOUTH MIAMI NOTICE OF PUBLIC HEARING

NOTICE IS HEREBY given that the City Commission of the City of South Miami, Florida will conduct Public Hearing(s) at its regular City Commission meeting scheduled for Tuesday, September 16, 2014 beginning at 7:00 p.m. in the City Commission Chambers, 6130 Sunset Drive, to consider the following items:

An Ordinance granting to Florida Power & Light Company, its successors and assigns, an electric franchise, imposing provisions and conditions relating thereto, providing for monthly payments to the City of South Miami and providing for an effective date.

An Ordinance amending Section 207-12 of the City of South Miami Land Development Code concerning parking requirements for restaurants within the Hometown District Overlay (HD-OV) Zone.

An Ordinance of the City of South Miami, Florida, amending Section 217, Administrative department, functions and duties, creating a cost recovery administrative program, providing for repeal of ordinances in conflict and providing an effective date.

An Ordinance relating to the fee schedule, amending ordinance 04-11-2007 to change the title to "Schedule of Fees and Fines" and to increase some fees, adding new fees, and deleting some fees from the schedule.

ALL interested parties are invited to attend and will be heard.

For further information, please contact the City Clerk's Office at 305-663-6310.

Maria M. Menendez, GMC  
City Clerk

Pursuant to Florida Statutes 286.0105, the City hereby advises the public that if a person decides to appeal any decision made by this Board, Agency or Commission with respect to any matter considered at its meeting or hearing, he or she will need a record of the proceedings and that for such purpose, affected person may need to ensure that a verbatim record of the proceedings is made which record includes the testimony and evidence upon which the appeal is to be based.

9/5

14-3-345/2341375M



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**LEE COUNTY ORDINANCE NO. 14-06**

**AN ORDINANCE OF LEE COUNTY GRANTING TO THE LEE COUNTY ELECTRIC COOPERATIVE, INC. ("LCEC"), ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC UTILITY FRANCHISE; IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO; PROVIDING FOR FRANCHISE FEE PAYMENTS TO LEE COUNTY; PROVIDING FOR SEVERANCE, CONFLICTS, SEVERABILITY, AND AN EFFECTIVE DATE.**

**WHEREAS**, the Lee County Board of County Commissioners is the governing body in and for Lee County, Florida ("County"), a political subdivision and Charter County of the State of Florida; and

**WHEREAS**, the Board of County Commissioners is lawfully authorized to enter into non-exclusive franchise agreements with electric utilities defining terms and conditions for the use of County Public Rights-of-Way and other County property for the purpose of supplying electricity and electric utility services (hereafter, "Grantor," "County," or Board"); and

**WHEREAS**, the Lee County Electric Cooperative, Inc. ("LCEC"), a not-for-profit electric cooperative organized under Chapter 425, F.S., is authorized to conduct business in the State of Florida and Lee County, and as such, is an electric utility desiring to enter into a non-exclusive franchise agreement with the County for such purpose (hereafter, "Grantee" or "LCEC"); and

**WHEREAS**, the County desires to grant a non-exclusive franchise to LCEC relating to LCEC's use of the County's Public Rights-of-Way and other County property for the purpose of supplying its customers with electricity within its service territory in unincorporated Lee County free of competition from Lee County.

**NOW THEREFORE, BE IT ORDAINED BY THE LEE COUNTY BOARD OF COUNTY COMMISSIONERS that:**

**SECTION 1.** The above recitations are hereby found to be true and accurate and are adopted and approved as if set out herein at length.

**SECTION 2.**

Lee County hereby grants to LCEC its successors and assigns, for the period of thirty (30) years from the Effective Date hereof, the nonexclusive right, privilege and franchise (hereafter, "Franchise") to construct, operate and maintain in, under, upon, along, over and across the present and future County owned or held roads, streets, alleys, bridges, easements, and other County property (hereinafter, "Public Rights-of-Way") throughout the unincorporated area of Lee County. LCEC shall exercise its Franchise granted herein in accordance with its customary practices with respect to the construction and maintenance of the electric light and power related facilities, including, without limitation, conduits, underground conduits, poles, wires,

communications facilities, transmission and distribution lines, fiber optic, and any other facilities installed in conjunction with or ancillary to all of LCEC's electric power operations (hereafter, "facilities"), for the purpose of supplying its customers with electricity within its service territory in unincorporated Lee County and persons beyond the limits thereof as may be authorized by law or agreement. The County recognizes that LCEC must construct, maintain and own or have the lawful use of sites and facilities for the transmission and distribution of electric power in order to adequately serve its customers in unincorporated Lee County, and that the County will not unreasonably withhold from LCEC permits to construct such facilities within the County's Public Rights-of-Way or authorized County-held easements for such placement, unless the operation, construction and maintenance of such facilities would unreasonably interfere with the traveling public's safety and welfare. The County also recognizes and agrees that nothing in this Franchise constitutes or shall be deemed to constitute a waiver of LCEC's delegated and independent right of Eminent Domain.

### **SECTION 3.**

(i) LCEC Facilities shall be installed, located or relocated, so as not to unreasonably interfere with the Public's travel over the Public Rights-of-Way or the reasonable egress from and ingress to abutting properties. To avoid conflicts with the Public's travel, the location or relocation of all LCEC Facilities shall be made in accordance with the County's adopted reasonable rules and regulations as they may be revised, amended, or re-numbered from time to time, for the placement and maintaining of electric utility infrastructure in, under, upon, along, over and across the County's Public Rights-of-Way.

(ii) The County's adopted rules and regulations for the placement of electric utilities in its Rights-of-Way (a) shall not unreasonably prohibit the exercise of LCEC's right to use said Public Rights-of-Way for reasons other than when such use creates an unreasonable interference with the safety of the Public's travel thereon; (b) shall not unreasonably interfere with LCEC's ability to furnish reasonably sufficient, adequate and efficient electric service to all of its customers, and (c) shall not require the relocation of any of LCEC's Facilities installed before or after the Effective Date hereof in any County Public Rights-of-Way unless or until: (1) the County's widening or reconfiguring of the paved portion of any Public Rights-of-Way used by motor vehicles causes such installed LCEC Facilities to unreasonably interfere with motor vehicular traffic, or (2) the location of the LCEC Facilities constitutes an unavoidable hazard to non-motor vehicular traffic exercising reasonable care, taking into account established customs and practices with respect to the placement of utility facilities, and other structures or obstructions commonly installed or located in and around sidewalks and other non-motor vehicular travel ways.

(iii) The County's adopted rules and regulations for the County's electric utility construction permits will recognize and take into consideration that the installation of the above grade (surficial) LCEC Facilities that are installed or relocated in the County's Rights-of-Way after the Effective Date hereof will be installed or relocated at, or as close to the

outermost boundaries of the Rights-of-Way to the extent most reasonably possible, unless otherwise permitted by the County in a writing.

(iv) The County will not be liable to LCEC for any costs or expenses relating to any installations or relocations of LCEC's Facilities made pursuant to subparagraphs (i) and (ii), above. However, if the County directs LCEC in a writing signed by the County Manager, to locate or relocate its Facilities in a manner that is not consistent with LCEC's then-existing standard construction methods for such installations or relocations, the County will then be liable to LCEC for those costs under LCEC's then-existing contribution-in-aid of construction policies, unless during the term of this Franchise Ordinance, there are changes in law or rules, or judicial determination(s) that dictate otherwise.

(v) If any construction work is performed in a portion of a County Public Right-of-Way by LCEC in the course of the location or relocation of any of its Facilities, the portion of the Public Right-of-Way where such construction work is performed shall be restored by LCEC at its sole cost and expense to as good a condition as it existed at the time immediately prior to the commencement of such construction work within thirty (30) days after its completion.

(vi) For so long as LCEC remains in substantial compliance with the provisions of this Section, the County will not unreasonably deny LCEC the use of the County's Public Rights-of-Way as defined herein, and will not deny LCEC the necessary County permits to construct, maintain and operate its Facilities within such Public Rights-of-Way, other than what will be reasonable and necessary for the County to preserve the traveling public's safety and welfare from time to time.

**SECTION 4.** The County by the grant of this Franchise to LCEC, shall in no way be liable to or responsible for in any manner whatsoever for, any accident, personal injury, property damage, or any claim or damage that may occur in the construction, installation, operation or maintenance by LCEC, its employees, agents, contractors, sublicenses or licensees for any of its facilities hereunder, except for any damage specifically caused by or arising solely out the negligence, strict liability, intentional torts or criminal acts of the County. For and in consideration of the sum of One-Hundred and 00/100 Dollars (\$100.00) in hand paid, and other good and valuable consideration accepted by the County, LCEC agrees to indemnify and hold the County harmless from and against any and all liability, loss costs, damages or expenses, to include any reasonable attorney fees of the County which may accrue to the County as the result of or by reason of any negligence, default or misconduct by LCEC in the construction, operation and maintenance of its facilities hereunder in or on the County's Public Rights-of-Way or any other County granted properties. For the term of this Franchise, LCEC shall maintain general liability insurance in such amounts as are ordinary in the course of LCEC's electric utility business to further support this indemnification. Copies of LCEC's general liability insurance policies shall be provided to the County upon its written request.

## SECTION 5.

(i) As a consideration for this Franchise and as reasonable rent for LCEC's use of the County's Public Rights-of-Way granted herein, LCEC shall pay to the County, beginning on the first day of the month immediately following the month in which the Ordinance becomes effective, and then thereafter at the end of each calendar quarter for the remainder of the term of this Franchise; an amount which when added to the amount of all County licenses, excises, assessments, fees or charges (except ad-valorem property taxes), levied or imposed by the County against LCEC's property, business or operations during the quarterly billing period ending 30 days prior to each such payment, will equal no more than four and one-half percent (4.5%) of LCEC's billed revenues, less actual write-offs, from the sale of electricity to residential, commercial and industrial customers located within the unincorporated areas of the County within LCEC's service territory for the quarterly billing period ending thirty (30) days prior to each such payment (hereinafter, "Franchise Fee").

(ii) It is hereby provided and agreed to by LCEC, that the County shall have the unilateral option after the fifth (5<sup>th</sup>) anniversary date from the implementation of the Franchise Fee, or at any time thereafter, to increase the franchise percentage rate herein to no more than six percent (6.0%). Such increase will not be exercised more than twice by the County (if an initial increase is less than 6.0%) in years to be reasonably selected by the Board. The increase option(s) will be exercised through a County Ordinance, adopted by the Board at a duly advertised Public Hearing. A certified copy of which will be delivered to LCEC no later than ninety (90) days before the fifth (5<sup>th</sup>) anniversary date hereof on which such increase is to become effective following the Board's adoption of the Ordinance. Any such ordinance shall provide that LCEC shall pay to the County, no later than thirty (30) days after the end of LCEC's first quarterly billing period occurring after the fifth (5<sup>th</sup>) anniversary date as stated above, or after any subsequent year as the County may elect to exercise this option and the effective date of the County Ordinance establishing the new franchise rate percentage; and no later than thirty (30) days after the end of each succeeding quarterly billing of LCEC, an amount which, when added to the amount of all County licenses, excises, assessments, fees or charges (except ad-valorem property taxes), levied or imposed by the county against LCEC's property, business or operations during the quarterly billing period ending 30 days prior to each such payment, will equal no more than six percent (6.0%) of the billed revenues from the LCEC's sale of electricity, less actual write-offs, to residential, commercial and industrial customers located in the unincorporated area of the County within LCEC's service territory.

(iii) It is hereby further provided and agreed to by LCEC, that if during the term of this Franchise Agreement LCEC enters into a franchise agreement with any other municipality or county government, the terms of which provide for the payment of a Franchise Fee by LCEC at a rate greater than 6.0 percent of billed revenues from LCEC's residential, commercial and industrial customers under the same terms and conditions as specified in Section 5 (i) and (ii) hereof, then LCEC, upon written request of the County, shall negotiate and enter into a new franchise agreement with the County in which the percentage to be used in calculating the monthly payments under Section 5 (i) and (ii), using the same terms and conditions as specified

in said Section, shall be at the greater rate being paid to the other municipality or county, provided however, that if the franchise with such other municipality or county contains additional benefits given to LCEC in exchange for the increased Franchise Rate, and such additional benefits are not contained within this Franchise Agreement, then LCEC shall have the option to include within such new franchise agreement with the County, the additional benefits included in the initiating franchise (i.e., the new municipality or county franchise that initiated the negotiation of the new franchise as contemplated above).

(iv) In the event during the term of this Franchise that LCEC recovers and collects previously written-off and uncollected billed revenues from the sale of electrical energy to residential, commercial, and industrial customers, LCEC shall pay to the County in accordance with this Section and other relevant terms of this Ordinance, the then applicable Franchise Fee payment on such revenues so collected and received, such payment to be made in the next quarterly Franchise Fee payment to the County pursuant to the terms herein following the recovery of the funds.

(v) The County reserves the unilateral right, at its sole discretion and at any time during the term of this Franchise to reduce the Franchise Fee, by providing to LCEC a certified copy of an Ordinance adopted by the County Commission at a duly advertised Public Hearing, amending the Franchise Ordinance to reduce the Franchise Fee. The certified copy of the Amended Ordinance shall be provided to LCEC no later than thirty (30) days following the Board's adoption of the Ordinance. The reduced Franchise Fee will be applied by LCEC to its customers as of the date of the adoption of the Franchise Fee Reduction Ordinance unless otherwise provided for in the terms of the Ordinance.

(vi) The County's options hereunder shall be limited solely to the percentages or calculations of the amount of the Franchise Fee to be paid by LCEC as consideration for this Franchise as specifically set forth in this Section. No other Sections or provisions of this Franchise ordinance may be altered, amended or affected by the County without the written concurrence of LCEC. Nothing herein shall require the County to exercise any of its options as outlined under this Section.

## SECTION 6.

(i) As consideration during the term of this Franchise, the County agrees not to: (a) engage in the distribution and/or sale, in competition with LCEC, of electric capacity and/or electric energy (as set out above) to any ultimate consumer of electric utility service ("retail customer") or to any electrical distribution system established solely to serve any customer formerly served by LCEC, (b) participate in any proceeding or contractual arrangement, the purpose or terms of which would be to obligate LCEC to transmit and/or distribute, electric capacity and/or electric energy from any third party to any other LCEC customer's facility, or (c) seek to have LCEC transmit and/or distribute electric capacity and/or electric energy generated by or on behalf of the County at one location to the County's facility at any other location(s).

(ii) However, nothing herein shall prohibit the County, if permitted by law, or judicial determination, from purchasing electric capacity and/or electric energy from any third party, or (ii) seeking to have LCEC transmit and/or distribute to any facility of the County, electric capacity and/or electric energy purchased by the County from any third party; provided, however, that before the County elects to purchase electric capacity and/or electric energy from any third party, the County shall notify the LCEC in writing. Such written notice shall include a summary of the specific rates, terms and conditions of the proposed purchase which have been offered by the third party and identify the County's facilities to be served under the offer. LCEC shall thereafter have ninety (90) days to evaluate the offer and, if LCEC offers rates, terms and conditions to the County which are equal to or better than those offered by the third party, the County shall be obligated to continue to purchase electric power capacity from LCEC and/or electric energy to serve the identified facilities of the County at the revised rates, terms and conditions for a term no longer than the remainder term of this franchise. If LCEC does not agree to provide rates, terms and conditions which are equal to or better than the third party's offer, then the terms and conditions of this franchise shall continue to remain in full force and effect for its term, and the County shall have the right to proceed with the purchase of either electric capacity or electric energy from the third party; or prohibit the County from engaging with other utilities in wholesale transactions for the sale of any amount of the electric power generated by its Waste-to-Energy Facility.

**SECTION 7.** If the County grants a right, privilege or franchise to any other party or otherwise enables any other such party to construct, operate or maintain electric light and power facilities within any part of the service territory of LCEC within the unincorporated area of the County on terms and conditions which LCEC determines are more favorable than the terms and conditions contained herein, LCEC may at any time thereafter terminate this Franchise if such terms and conditions are not revised by the County within the time period provided for herein. LCEC shall give the County at least sixty (60) Business Days advance written notice of its intent to terminate. Such notice shall, without prejudice to any of the rights reserved for LCEC herein, advise the County of such terms and conditions offered to the other party that it considers more favorable. The County shall then have sixty (60) Business Days in which to correct or otherwise remedy the terms and conditions complained of by LCEC. If LCEC determines that such terms and conditions are not remedied by the County within said time period, LCEC may terminate this Franchise agreement by delivering written notice by Certified United States Mail to the Chairman of the Board of County Commissioners with copies to the County Manager, County Attorney and the Lee County Clerk of Courts, and thereafter shall not be obligated to pay any Franchise Fee to the County for the use of County Public Rights-of-Way.

**SECTION 8.** If as a direct or indirect consequence of any legislative, judicial, regulatory or other action by the United States or the State of Florida (or any department, agency, authority, instrumentality or political subdivision of either of them) enacted after the Effective Date of this Ordinance, any person is permitted to provide electric service within LCEC service territory in the unincorporated area of the County to a customer then being served by LCEC, or to any new applicant for electric service within any part of the unincorporated area of

the County in which LCEC may lawfully provide service, and LCEC determines that its obligations hereunder or otherwise resulting from this Franchise in respect to rates and service, place it at a competitive disadvantage with respect to such other person providing the electric service, LCEC may, at any time after the taking of such action, terminate this Franchise if such competitive disadvantage, and which is within the jurisdiction and authority of the County to remedy, is not remedied within the time period provided for in this Section 9. LCEC shall give the County at least sixty (60) Business Days advance written notice sent by United States Mail of its intent to terminate. Such notice shall, without prejudice to any of the rights reserved for LCEC herein, advise the County of the consequences of such action which resulted in the competitive disadvantage. The County shall then have sixty (60) Business Days or such other time as may be agreed to by LCEC in consultation with the County, for the County to correct or otherwise remedy the competitive disadvantage, if it is within the County's jurisdiction and authority to do so. If such competitive disadvantage is not remedied by the County within the determined time period and such remedy is within the County's jurisdiction and authority to do so, LCEC may terminate this Franchise agreement by delivering written notice by Certified United States Mail to the Chairman of the Board of County Commissioners with copies to the County Manager, County Attorney and Lee County Clerk of Courts, and thereafter shall not be obligated to pay any Franchise Fee to the County for the use of County Public Rights-of-Way.

**SECTION 9.** Failure on the part of LCEC to comply in any substantial respect with any of the provisions of this Franchise shall be grounds for a forfeiture of this Franchise by the County, but no such forfeiture shall take effect if the reasonableness or propriety thereof is protested by LCEC through either administrative or judicial proceedings until there is final determination by a court of competent jurisdiction (after the expiration or exhaustion of all rights of appeal) that LCEC has failed to comply in a substantial manner with any of the provisions of this Franchise. Thereafter, LCEC shall have six (6) months after such final determination to remedy the default before a forfeiture shall result, with a right of the County at its sole discretion to grant such additional time to LCEC for its compliance, if found to be warranted. If the default is not cured within the prescribed time, LCEC shall then immediately forfeit this Franchise.

**SECTION 10.** Failure on the part of the County to substantially comply with any of the provisions of this Ordinance, including: (a) denying LCEC the use of County Public Rights-of-Way in the LCEC service territory for reasons other than the unreasonable interference with public travel; (b) imposing conditions for the use of Public Rights-of-Way contrary to Florida law or the terms and conditions of this Franchise; or (c) an unreasonable delay in issuing LCEC a use permit, if any such permit is required, to construct facilities in County Public Rights-of-Way pursuant to this Franchise, shall constitute a County breach of this Franchise. LCEC shall notify the County of any such breach in writing sent by United States Mail and the County shall then remedy such breach as soon as practicable, taking into account LCEC's obligation(s) to provide reasonably sufficient, adequate and efficient electric service to its customers; otherwise, within no later than thirty (30) Business Days. Should the breach not be remedied within the specified thirty (30) Business Days, LCEC shall be entitled to withhold up to the maximum of thirty percent (30%) of the payments to the County as provided for in Section 5 herein until such time

as the use permit is issued, or a court of competent jurisdiction has reached a final determination with respect to the issue(s) in dispute. In the event that such final determination by the court is in favor of the County as to such issue(s) in dispute, LCEC shall promptly remit to the County all payments withheld hereunder together with simple interest, for the period withheld at the then established rate for judgments pursuant to Florida law.

**SECTION 11.** The Parties to this Franchise agree that it is in each of their respective best interests to avoid costly litigation as a means of resolving disputes which may arise hereunder. Accordingly, the Parties agree to notify one another in writing sent by United States Mail and any other available electronic means commonly used in the ordinary course of business when such dispute arises, and agree that prior to pursuing their available legal remedies, they will meet at the senior management level in an attempt to resolve any disputes within no later than thirty (30) Business Days from such notice. If such efforts are unsuccessful, and after an impasse is declared by either of the Parties, then the Parties may exercise any of their other available legal remedies.

**SECTION 12.** The County may, upon reasonable notice and within ninety (90) days after each annual anniversary date from the Effective Date of this Franchise, at the County's sole expense, examine the records of LCEC relating to the calculation of the franchise payments for the year preceding such anniversary date. Such examination shall be made during normal business hours at the LCEC office where such records are generally maintained. Records not prepared by LCEC in the ordinary course of its business may be provided to the County at the County's expense, and as the Parties may agree in writing. Any information identifying individual LCEC customers by name, address or individual electric consumptions shall not be recorded in any manner, or taken from LCEC's premises by County auditors. Such audit shall be impartial and all audit findings, whether they decrease or increase payment to the County, shall be reported to LCEC. The County's right to examine the records of LCEC in accordance with this section shall not be conducted by any third party employed by the County whose fee, in whole or in part, for conducting such audit is contingent upon the third party's findings of the audit.

**SECTION 13.** The provisions of this ordinance are hereby deemed by the Parties to be interdependent upon one another and if any of the provisions of this ordinance are found or adjudged to be invalid, illegal, void or of no effect by a court of competent jurisdiction (after the expiration of all rights of appeal), such finding or adjudication shall not affect the validity of the remaining provisions for a period of sixty (60) days, during which, this Ordinance may be amended by the Parties. If an agreement to amend the ordinance is not reached at the end of the such sixty (60) day period, this entire ordinance shall then become null and void, and of no further force or effect.

**SECTION 14.** Any County ordinances and/or parts of County ordinances in conflict herewith are hereby repealed to the extent that they may be in conflict with the terms and provisions as set out herein.

**SECTION 15.** This Ordinance shall be governed and construed by the Laws, Administrative Rules and judicial determinations of the United States and the State of Florida. Nothing in this Franchise shall be either construed or considered as an abrogation, surrender or mitigation by the County of any of its rights and authority to use and to require the relocation of any uses within its Public Rights-of-Way as provided in Section 3. In the event that any legal proceeding is brought to enforce the terms of this Franchise, it shall be brought by either Party hereto in state court in Lee County, Florida, or, if a federal claim, in the U.S. District Court in and for the Middle District of Florida, Fort Myers Division. In any legal action between the Parties arising out of this Franchise, any attempts to enforce this Franchise, or any breach of this Franchise, the prevailing Party may recover its expenses from such legal action including, but not limited to, costs of litigation and reasonable attorneys' fees from the other party together with reasonable fees and costs on appeal.

**SECTION 16.** Except in exigent circumstances, and except as otherwise may be specifically provided for in this Franchise, all notices by either Party shall be made by either depositing such notice into the United States Mail or by facsimile or other electronic transmission. Certified Mail shall be deemed delivered five (5) days following the date of such deposit into the United States Mail unless otherwise provided. Any notice given by facsimile or email is deemed to be received on the same Business Day. "Business Day" for purposes of this Ordinance shall mean Monday through Friday, with Saturday, Sunday and observed holidays excepted. All notices shall be addressed as follows:

**To the County:**

Chairman, Board of County Commissioners  
2120 Main Street  
Fort Myers, Florida 33901  
Telephone: (239) 533-2227  
Facsimile: (239) 485-2021  
Email: [dist3@leegov.com](mailto:dist3@leegov.com)

**To LCEC:**

Lee County Electric Cooperative, Inc.  
Chief Executive Officer  
4980 Bayline Drive  
North Fort Myers, Florida 33917-3910  
Telephone: (239) 995-2121  
Facsimile: (239) 995-7904  
Email: [ceooffice@lcec.net](mailto:ceooffice@lcec.net)

**Copy to:**

Lee County Attorney  
P.O. Box 398  
Fort Myers, Florida 33902  
Telephone: (239) 533-2236  
Facsimile: (239) 485-2106  
Email: [rwsch@leegov.com](mailto:rwsch@leegov.com)

**Copy to:**

LCEC General Counsel  
John Noland, Esq.  
Henderson Franklin Starnes & Holt, P.A.  
1715 Monroe Street  
Fort Myers, Florida 33907  
Telephone: (239) 344-1140  
Facsimile: (239) 344-1515  
Email: [John.Noland@henlaw.com](mailto:John.Noland@henlaw.com)

Any changes to the Parties' representatives above shall be made in writing and provided to the other Party as soon as practicable by U.S. Mail or other electronic conveyance.

**SECTION 17.** This Ordinance is intended to constitute the entire agreement between the County and LCEC with respect to the subject matters herein, and supersedes all prior drafts and verbal or written agreements, commitments, or understandings, which shall not be used to vary or contradict the expressed terms hereof.

**SECTION 18.** As used herein for the purposes of this Franchise Ordinance, the term "person" means an individual, or, a partnership, corporation, business trust, joint stock company, trust, unincorporated association, joint venture, governmental authority or any other entity authorized to conduct business in Florida.

**SECTION 19.** The Board of County Commissioners intends that this Ordinance will be made part of the Lee County Code. Sections of this Ordinance can be renumbered or relettered and the word "ordinance" can be changed to "section," "article," or other appropriate word or phrase to accomplish such codification. Regardless of whether this Ordinance is ever codified, this Ordinance can be renumbered or relettered and typographical errors that do not affect the intent or substantive provisions herein may be administratively corrected upon the authorization of the County Manager and County Attorney, without the need for a further public hearing. Any such administrative revisions made hereto will be provided to LCEC within five (5) Business Days of their being made and incorporated into this Ordinance.

[REMAINDER OF THIS PAGE LEFT INTENTIONALLY BLANK]

**SECTION 20.**

(i) A certified copy of this Ordinance shall be filed by the County with the Florida Department of State within ten (10) days following its adoption.

(ii) As a condition precedent to the taking effect of this Ordinance, LCEC shall file a written acceptance hereof on its official letterhead stationery and executed by the Chief Executive Officer of LCEC, within thirty (30) days after the adoption of this Ordinance. The effective date ("Effective Date") of this Ordinance shall then be the date upon which LCEC files such written acceptance with the Clerk to the Lee County Board of County Commissioners, with copies to the Chairman of the Board of County Commissioners, the County Manager and the County Attorney.

The foregoing Ordinance was offered by Commissioner Manning who moved its adoption. The motion was seconded by Commissioner Mann and being put to a vote, the vote was as follows:

JOHN MANNING	Aye
CECIL PENDERGRASS	Nay
LARRY KIKER	Aye
BRIAN HAMMAN	Nay
FRANK MANN	Aye

DULY PASSED AND ADOPTED this 18<sup>th</sup> day of March, 2014.

ATTEST: LINDA DOGGETT  
CLERK OF THE COURT

By: Marcia Wilson  
Deputy Clerk



BOARD OF COUNTY COMMISSIONERS  
OF LEE COUNTY, FLORIDA

By: Larry Kiker  
Larry Kiker, Chairman

APPROVED AS TO FORM:

By: Andrea B. Fauer  
Office of the County Attorney



## FLORIDA DEPARTMENT OF STATE

**RICK SCOTT**  
Governor

**KEN DETZNER**  
Secretary of State

March 20, 2014

Honorable Linda Doggett  
Clerk of the Circuit Courts  
Lee County  
Post Office Box 2469  
Fort Myers, Florida 33902-2469

Attention: Lisa Pierce, Deputy Clerk

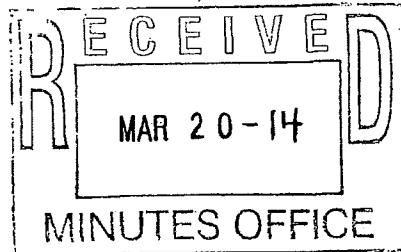
Dear Ms. Doggett:

Pursuant to the provisions of Section 125.66, Florida Statutes, this will acknowledge receipt of your electronic copy of Lee County Ordinance No. 14-06, which was filed in this office on March 20, 2014.

Sincerely,

Liz Cloud  
Program Administrator

LC/eler



R. A. Gray Building • 500 South Bronough Street • Tallahassee, Florida 32399-0250  
Telephone: (850) 245-6270 • Facsimile: (850) 488-9879  
[www.dos.state.fl.us](http://www.dos.state.fl.us)



Lee County Electric Cooperative, Inc.  
Post Office Box 3455  
North Fort Myers, FL 33918-3455  
(239) 995-2121 • FAX (239) 995-7904  
[www.lcec.net](http://www.lcec.net)

March 20, 2014

Ms. Linda Doggett  
Clerk of the Circuit Court & Comptroller  
Lee County Justice Center  
1700 Monroe Street  
Fort Myers, FL 33901

Dear Ms. Doggett:

Re: Lee County Ordinance No. 14-06

The Board of Trustees of Lee County Electric Cooperative, Inc. accepted Lee County Ordinance No. 14-06 at its meeting held on March 20, 2014. This letter serves as the written acceptance as required by paragraph 20 (ii) of the Ordinance.

Respectfully,

William D. Hamilton  
Executive Vice President  
and Chief Executive Officer

cc: Larry Kiker, Chairman, Board of County Commissioners  
Roger Desjarlais, County Manager  
Richard Wesch, County Attorney  
David M. Owen, Esq.  
John A. Noland, Esq.

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*Expired  
6-1-2036*

City of Boca Raton



This is a true copy. No. of Pages 10  
IN WITNESS WHEREOF, I hereunto set my hand  
and affix the Seal of the City of Boca Raton,  
Florida, this 22<sup>nd</sup> day of April  
A.D. 2004. Jeanne Casanave  
City Clerk

## ORDINANCE

4937

1  
2 AN ORDINANCE OF THE CITY OF BOCA RATON  
3 GRANTING TO FLORIDA POWER AND LIGHT COMPANY,  
4 ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC  
5 FRANCHISE; IMPOSING PROVISIONS AND CONDITIONS  
6 RELATING THERETO; PROVIDING MONTHLY PAYMENTS  
7 TO THE CITY OF BOCA RATON; PROVIDING FOR  
8 REPEALER; PROVIDING AN EFFECTIVE DATE  
9

10 WHEREAS, the City Council of the City of Boca Raton recognizes that the City of  
11 Boca Raton and its citizens need and desire the continued benefits of electric service; and

12 WHEREAS, the provision of such service requires substantial investments of capital  
13 and other resources in order to construct, maintain and operate facilities essential to the  
14 provision of such service in addition to costly administrative functions, and the City of Boca  
15 Raton does not desire to undertake to provide such services; and

16 WHEREAS, Florida Power & Light Company (FPL) is a public utility which has the  
17 demonstrated ability to supply such services; and

18 WHEREAS, FPL and the City of Boca Raton desire to enter into a franchise  
19 agreement providing for the payment of fees to the City of Boca Raton in exchange for the

1 nonexclusive right and privilege of supplying electricity and other services within the City of  
2 Boca Raton free of competition from the City of Boca Raton, pursuant to certain terms and  
3 conditions; and

4 WHEREAS, the City Council of the City of Boca Raton deems it to be in the best  
5 interest of the City of Boca Raton and its citizens to enter into the New Franchise Agreement  
6 prior to expiration of the Current Franchise Agreement; now therefore

7

8                   THE CITY OF BOCA RATON HEREBY ORDAINS:

9

10                 Section 1. There is hereby granted to Florida Power & Light Company, its successors  
11 and assigns (hereinafter called the "Grantee"), for the period of 30 years from the effective date  
12 hereof, the nonexclusive right, privilege and franchise (hereinafter called "franchise") to  
13 construct, operate and maintain in, under, upon, along, over and across the present and future  
14 roads, streets, alleys, bridges, easements, rights-of-way and other public places (hereinafter  
15 called "public rights-of-way") throughout all of the incorporated areas, as such incorporated  
16 areas may be constituted from time to time, of the City of Boca Raton, Florida, and its  
17 successors (hereinafter called the "Grantor"), in accordance with the Grantee's customary  
18 practice with respect to construction and maintenance, electric light and power facilities,  
19 including, without limitation, conduits, poles, wires, transmission and distribution lines, and all  
20 other facilities installed in conjunction with or ancillary to all of the Grantee's operations  
21 (hereinafter called "facilities"), for the purpose of supplying electricity and other services to the  
22 Grantor and its successors, the inhabitants thereof, and persons beyond the limits thereof.

23                 Section 2. The facilities of the Grantee shall be installed, located or relocated so as to  
24 not unreasonably interfere with traffic over the public rights-of-way or with reasonable egress  
25 from and ingress to abutting property. To avoid conflicts with traffic, the location or relocation of  
.6 all facilities shall be made as representatives of the Grantor may prescribe in accordance with

1 the Grantor's reasonable rules and regulations with reference to the placing and maintaining in,  
2 under, upon, along, over and across said public rights-of-way; provided, however, that such  
3 rules or regulations (a) shall not prohibit the exercise of the Grantee's right to use said public  
4 rights-of-way for reasons other than unreasonable interference with motor vehicular traffic, (b)  
5 shall not unreasonably interfere with the Grantee's ability to furnish reasonably sufficient,  
6 adequate and efficient electric service to all of its customers, and (c) shall not require the  
7 relocation of any of the Grantee's facilities installed before or after the effective date hereof in  
8 public rights-of-way unless or until widening or otherwise changing the configuration of the  
9 paved portion of any public right-of-way used by motor vehicles causes such installed facilities  
10 to unreasonably interfere with motor vehicular traffic. Such rules and regulations shall  
11 recognize that above-grade facilities of the Grantee, installed after the effective date hereof,  
12 should be installed near the outer boundaries of the public rights-of-way to the extent possible.  
13 When any portion of a public right-of-way is excavated by the Grantee in the location or  
14 relocation of any of its facilities, the portion of the public right-of-way so excavated be replaced  
15 by the Grantee at its expense and in as good condition as it was at the time of such excavation  
16 within the time provided in any permit for excavation issued by the Grantor or extension thereof  
17 or if no permit is issued within a reasonable time. The Grantor shall not be liable to the Grantee  
18 for any cost or expense in connection with any relocation of the Grantee's facilities required  
19 under subsection (c) of this Section, except, however, the Grantee shall be entitled to  
20 reimbursement of its costs from others and as may be provided by law.

21       Section 3. The Grantor shall in no way be liable or responsible for any accident or  
22 damage that may occur in the construction, operation or maintenance by the Grantee of its  
23 facilities hereunder, and the acceptance of this ordinance shall be deemed an agreement on the  
24 part of the Grantee to indemnify the Grantor and hold it harmless against any and all liability,  
25 loss, cost, damage or expense which may accrue to the Grantor by reason of the negligence,

1 default or misconduct of the Grantee in the construction, operation or maintenance of its  
2 facilities hereunder.

3           Section 4. All rates, rules, and regulations established by the Grantee from time to  
4 time shall be subject to such regulation as may be provided by law.

5           Section 5. As a consideration for this franchise, the Grantee shall pay to the Grantor,  
6 commencing 90 days after the effective date hereof, and each month thereafter for the  
7 remainder of the term of this franchise, an amount which when added to the amount of all  
8 licenses, excises, fees, charges and other impositions of any kind whatsoever (except ad  
9 valorem property taxes and non-ad valorem tax assessments on property) levied or imposed by  
10 the Grantor against the Grantee's property, business or operations and those of its subsidiaries  
11 during the Grantee's monthly billing period ending 60 days prior to each such payment will equal  
12 5.9 percent of the Grantee's billed revenues, less actual write-offs, from the sale of electrical  
13 energy to residential, commercial and industrial customers (as such customers are defined by  
14 FPL's tariff) within the incorporated areas of the Grantor for the monthly billing period ending 60  
15 days prior to each such payment, and in no event shall payment for the rights and privileges  
16 granted herein exceed 5.9 percent of such revenues for any monthly billing period of the  
17 Grantee.

18           The Grantor understands and agrees that such revenues as described in the  
19 preceding paragraph are limited, as in the existing franchise Ordinance No. 2310, to the precise  
20 revenues described therein, and that such revenues do not include, by way of example and not  
21 limitation: (a) revenues from the sale of electrical energy for Public Street and Highway Lighting  
22 (service for lighting public ways and areas); (b) revenues from Other Sales to Public Authorities  
23 (service with eligibility restricted to governmental entities); (c) revenues from Sales to Railroads  
24 and Railways (service supplied for propulsion of electric transit vehicles); (d) revenues from  
25 Sales for Resale (service to other utilities for resale purposes); (e) franchise fees; (f) Late  
26 Payment Charges; (g) Field Collection Charges; and (h) other service charges.

1           Section 6. As a further consideration, during the term of this franchise or any  
2 extension thereof, the Grantor agrees: (a) not to engage in the distribution and/or sale, in  
3 competition with the Grantee, of electric capacity and/or electric energy to any ultimate  
4 consumer of electric utility service (herein called a "retail customer") or to any electrical  
5 distribution system established solely to serve any retail customer formerly served by the  
6 Grantee, (b) not to participate in any proceeding or contractual arrangement, the purpose or  
7 terms of which would be to obligate the Grantee to transmit and/or distribute, electric capacity  
8 and/or electric energy from any third party(ies) to any other retail customer's facility(ies), and (c)  
9 not to seek to have the Grantee transmit and/or distribute electric capacity and/or electric  
10 energy generated by or on behalf of the Grantor at one location to the Grantor's facility(ies) at  
11 any other location(s). Nothing specified herein shall prohibit the Grantor from engaging with  
12 other utilities or persons in wholesale transactions which are subject to the provisions of the  
13 Federal Power Act.

14           Nothing herein shall prohibit the Grantor, if permitted by law, (i) from purchasing electric  
15 capacity and/or electric energy from any other person, or (ii) from seeking to have the Grantee  
16 transmit and/or distribute to any facility(ies) of the Grantor electric capacity and/or electric energy  
17 purchased by the Grantor from any other person; provided, however, that before the Grantor  
18 elects to purchase electric capacity and/or electric energy from any other person, the Grantor shall  
19 notify the Grantee. Such notice shall include a summary of the specific rates, terms and  
20 conditions which have been offered by the other person and identify the Grantor's facilities to be  
21 served under the offer. The Grantee shall thereafter have 90 days to evaluate the offer and, if the  
22 Grantee offers rates, terms and conditions which are equal to or better than those offered by the  
23 other person, the Grantor shall be obligated to continue to purchase from the Grantee electric  
24 capacity and/or electric energy to serve the previously-identified facilities of the Grantor for a term  
25 no shorter than that offered by the other person. If the Grantee does not agree to rates, terms

1 and conditions which equal or better the other person's offer, all of the terms and conditions of this  
2 franchise shall remain in effect.

3           Section 7. If the Grantor grants a right, privilege or franchise to any other person or  
4 otherwise enables any other such person to construct, operate or maintain electric light and  
5 power facilities within any part of the incorporated areas of the Grantor in which the Grantee  
6 may lawfully serve or compete on terms and conditions which the Grantee determines are more  
7 favorable than the terms and conditions contained herein, the Grantee may at any time  
8 thereafter terminate this franchise if such terms and conditions are not remedied within the time  
9 period provided hereafter. The Grantee shall give the Grantor at least 120 days advance written  
10 notice of its intent to terminate. Such notice shall, without prejudice to any of the rights reserved  
11 for the Grantee herein, advise the Grantor of such terms and conditions that it considers more  
12 favorable. The Grantor shall then have 120 days in which to correct or otherwise remedy the  
13 terms and conditions complained of by the Grantee. If the Grantee determines that such terms  
14 or conditions are not remedied by the Grantor within said time period, the Grantee may  
15 terminate this franchise agreement by delivering written notice to the Grantor's Clerk and  
16 termination shall be effective on the date of delivery of such notice.

17           Section 8. If during the term of this franchise the Grantee enters into a franchise  
18 agreement with any other municipality located in Palm Beach County, Florida, the population of  
19 which is equal to or less than that of the Grantor, the terms of which provide for the payment of  
20 franchise fees by the Grantee at a rate greater than 6.0% of the Grantee's residential,  
21 commercial and industrial revenues (as such customers are defined by FPL's tariff), under the  
22 same terms and conditions as specified in Section 5 hereof, the Grantee, upon written request  
23 of the Grantor, shall negotiate and enter into a new franchise agreement with the Grantor in  
24 which the percentage to be used in calculating monthly payments under Section 5 hereof shall  
25 be no greater than that percentage which the Grantee has agreed to use as a basis for the  
26 calculation of payments to the other County municipality, provided, however, that such new

1 franchise agreement shall include additional benefits to the Grantee, in addition to all benefits  
2 provided herein, at least equal to those provided by its franchise agreement with the other Palm  
3 Beach County municipality. Subject to all limitations, terms and conditions specified in the  
4 preceding sentence, the Grantor shall have the sole discretion to determine the percentage to  
5 be used in calculating monthly payments, and the Grantee shall have the sole discretion to  
6 determine those benefits to which it would be entitled, under any such new franchise  
7 agreement.

8         Section 9. If, as a direct or indirect consequence of any legislative, regulatory or other  
9 action by the United States of America or the State of Florida (or any department, agency,  
10 authority, instrumentality or political subdivision of either of them), any person is permitted to  
11 provide electric service within the incorporated areas of the Grantor to a customer then being  
12 served by the Grantee, or to any new applicant for electric service within any part of the  
13 incorporated areas of the Grantor in which the Grantee may lawfully serve, and the Grantee  
14 determines that its obligations hereunder, or otherwise resulting from this franchise in respect to  
15 rates and service, place it at a competitive disadvantage with respect to such other person, the  
16 Grantee may, at any time after the taking of such action, terminate this franchise if such  
17 competitive disadvantage is not remedied within the time period provided hereafter. The  
18 Grantee shall give the Grantor at least 120 days advance written notice of its intent to terminate.  
19 Such notice shall, without prejudice to any of the rights reserved for the Grantee herein, advise  
20 the Grantor of the consequences of such action which resulted in the competitive disadvantage.  
21 The Grantor shall then have 90 days in which to correct or otherwise remedy the competitive  
22 disadvantage. If such competitive disadvantage is not remedied by the Grantor within said time  
23 period, the Grantee may terminate this franchise agreement by delivering written notice to the  
24 Grantor's Clerk and termination shall take effect on the date of delivery of such notice.

25         Section 10. Failure on the part of the Grantee to comply in any substantial respect  
26 with any of the provisions of this franchise shall be grounds for forfeiture, but no such forfeiture

1 shall take effect if the reasonableness or propriety thereof is protested by the Grantee until there  
2 is final determination (after the expiration or exhaustion of all rights of appeal) by a court of  
3 competent jurisdiction that the Grantee has failed to comply in a substantial respect with any of  
4 the provisions of this franchise, and the Grantee shall have six months after such final  
5 determination to make good the default before a forfeiture shall result with the right of the  
6 Grantor at its discretion to grant such additional time to the Grantee for compliance as  
7 necessities in the case require.

8           Section 11. Failure on the part of the Grantor to comply in substantial respect with  
9 any of the provisions of this ordinance, including but not limited to: (a) denying the Grantee use  
10 of public rights-of-way for reasons other than unreasonable interference with motor vehicular  
11 traffic; (b) imposing conditions for use of public rights-of-way contrary to Florida law or the terms  
12 and conditions of this franchise; (c) unreasonable delay in issuing the Grantee a use permit, if  
13 any, to construct its facilities in public rights-of-way, shall constitute breach of this franchise and  
14 entitle the Grantee to withhold all or part of the payments provided for in Section 5 hereof until  
15 such time as a use permit is issued or a court of competent jurisdiction has reached a final  
16 determination in the matter. The Grantor recognizes and agrees that nothing in this franchise  
17 agreement constitutes or shall be deemed to constitute a waiver of the Grantee's delegated  
18 sovereign right of condemnation and that the Grantee, in its sole discretion, may exercise such  
19 right.

20           Section 12. The Grantor may, upon reasonable notice and within 120 days after each  
21 anniversary date of this franchise, at the Grantor's expense, examine the records of the Grantee  
22 relating to the calculation of the franchise payment for the year preceding such anniversary  
23 date. Such examination shall be during normal business hours at the Grantee's office where  
24 such records are maintained. Records not prepared by the Grantee in the ordinary course of  
25 business may be provided at the Grantor's expense and as the Grantor and the Grantee may  
26 agree in writing. Information identifying the Grantee's customers by name or their electric

1      consumption shall not be taken from the Grantee's premises. Such audit shall be impartial and  
2      all audit findings, whether they decrease or increase payment to the Grantor, shall be reported  
3      to the Grantee.

4            Section 13. The provisions of this ordinance are interdependent upon one another,  
5      and if any of the provisions of this ordinance are found or adjudged to be invalid, illegal, void or  
6      of no effect, the entire ordinance shall be null and void and of no force or effect.

7            Section 14. As used herein "person" means an individual, a partnership, a  
8      corporation, a business trust, a joint stock company, a trust, an incorporated association, a joint  
9      venture, a governmental authority or any other entity of whatever nature.

10           Section 15. Ordinance No. 2310, passed and adopted October 12, 1976, and all other  
11     ordinances and parts of ordinances and all resolutions and parts of resolutions in conflict  
12     herewith, are hereby repealed.

13           Section 16. As a condition precedent to the taking effect of this ordinance, the  
14     Grantee shall file its acceptance hereof with the Grantor's Clerk within 30 days of adoption of  
15     this ordinance. The effective date of this ordinance shall be the date upon which the Grantee  
16     files such acceptance, but not sooner than 10 days after the date of adoption of this ordinance.

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PASSED AND ADOPTED by the City Council of the City of Boca Raton this 25<sup>th</sup>

day of April, 2006.

CITY OF BOCA RATON, FLORIDA

ATTEST:

Sharma Carannante  
Sharma Carannante, City Clerk

Steven L. Abrams  
Steven L. Abrams, Mayor

Approved as to form:

Diana Grub Frieser  
Diana Grub Frieser  
City Attorney

	COUNCIL VOTE		
	YES	NO	ABSTAINED
MAYOR STEVEN L. ABRAMS	✓		
DEPUTY MAYOR SUSAN WHELCHL	✓		
COUNCIL MEMBER M. J. MIKE ARTS	✓		
COUNCIL MEMBER PETER BARONOFF	✓		
COUNCIL MEMBER BILL HAGER	✓		



100

## 101 Legal Notices

needling special accommodation to participate in this proceeding should contact the Office of the City Clerk at 393-7741 at least three business days prior to the proceeding (whenever possible) to request such accommodation.

Sharma Carannante CMC  
City Clerk  
City of Boca Raton Florida

PUBLISH: April 13, 2006  
ACCOUNT NO. 98842  
FURNISH PROOF OF PUBLICATION:  
PO30429 (49-A)

## 101 Legal Notices

### CITY OF BOCA RATON NOTICE OF REGULAR PUBLIC HEARINGS

NOTICE IS HEREBY GIVEN that the City Council of the City of Boca Raton, Florida will hold public hearings on the following proposed ordinances at the Regular Meeting on Tuesday, April 25, 2006 at 6:00 p.m., or as soon thereafter as possible, at which time they will consider their adoption. Presentations may be made by staff at the City Council Workshop Meeting on Monday, April 24, 2006 at 1:30 p.m., or as soon thereafter as possible.

Both meetings will be held in the Council Chamber at Boca Raton City Hall, 201 West Palmetto Park Road, Boca Raton, Florida. The ordinances in their entirety may be inspected at the Office of the City Clerk during regular business hours. All interested parties are invited to attend either or both meetings and be heard with respect to the proposed ordinances.

#### Ordinance No. 4936

An ordinance of the City of Boca Raton providing for the vacation and abandonment of the unimproved portion of Banyan Trail located south of N.W. Spanish River Boulevard and east of North Military Trail, as more specifically described herein; providing conditions for vacation and abandonment; providing for severability; providing for repealer; providing an effective date (AB-05-03)

#### Ordinance No. 4937

An ordinance of the City of Boca Raton granting to Florida Power and Light Company, its successors and assigns, an electric franchise; imposing provisions and conditions relating thereto; providing monthly payments to the City of Boca Raton; providing for repealer; providing an effective date

NOTICE: If any decision of City Council affects you, and you decide to appeal any decision made at this meeting with respect to any matter considered, you may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. (The above NOTICE is required by State Law. If you desire a verbatim transcript, you shall have the responsibility, at your own cost, to arrange for the transcript.)

In accordance with the Americans with Disabilities Act and Florida Statutes 286.26, persons with disabilities

ACCEPTANCE OF ELECTRIC FRANCHISE  
ORDINANCE NO. 4937  
BY FLORIDA POWER & LIGHT COMPANY

Boca Raton, Florida

June 1, 2006

Florida Power & Light Company does hereby accept the electric franchise in the City of Boca Raton, Florida, granted by Ordinance No. 4937, being:

**AN ORDINANCE OF THE CITY OF BOCA RATON GRANTING TO FLORIDA POWER AND LIGHT COMPANY, ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC FRANCHISE; IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO; PROVIDING MONTHLY PAYMENTS TO THE CITY OF BOCA RATON; PROVIDING FOR REPEALER; PROVIDING AN EFFECTIVE DATE.**

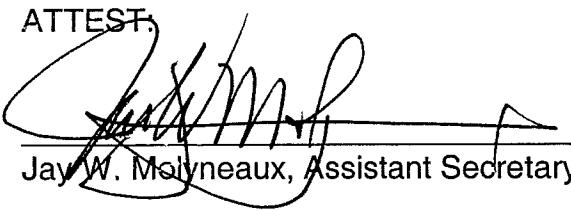
which was passed and adopted on April 25, 2006.

This instrument is filed with the City Clerk of the City of Boca Raton, Florida, in accordance with the provisions of Section 16 of said Ordinance.

FLORIDA POWER & LIGHT COMPANY

By   
Jeffrey S. Bartel  
Vice President

ATTEST,

  
Jay W. Molynaux, Assistant Secretary

I HEREBY ACKNOWLEDGE receipt of the above Acceptance of Electric Franchise Ordinance No. 4937 by Florida Power & Light Company, and certify that I have filed the same for record in the permanent files and records of the City of Boca Raton, Florida, on this 1st day of June, 2006.

  
Ahima Cuccinato  
City Clerk, City of Boca Raton, Florida

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**ORDINANCE NO. 00-08**

**AN ORDINANCE OF THE CITY OF BONITA SPRINGS  
GRANTING FLORIDA POWER & LIGHT COMPANY,  
ITS SUCCESSORS AND ASSIGNS, A NON-  
EXCLUSIVE ELECTRIC UTILITY FRANCHISE,  
IMPOSING CITY-WIDE PROVISIONS AND  
CONDITIONS RELATING THERETO, PROVIDING FOR  
MONTHLY PAYMENTS TO THE CITY OF BONITA  
SPRINGS, AND PROVIDING FOR AN EFFECTIVE  
DATE.**

**WHEREAS**, the City Council of the City of Bonita Springs ("City" or "Grantor") recognizes that the citizens of the City need and desire the benefits of electric service; and

**WHEREAS**, the provision of such service requires substantial investments of capital and other resources in order to construct, maintain and operate facilities essential to the provision of such service in addition to costly administrative functions, and the City does not desire to undertake to provide such services; and

**WHEREAS**, Florida Power & Light Company ("FPL" or "Grantee") is a public utility which has the demonstrated ability to supply such services; and

**WHEREAS**, FPL and the City desire to enter into a franchise agreement providing for the payment of fees to the City in exchange for the nonexclusive right and privilege of supplying electricity and other services within the City free of competition from the City, pursuant to certain terms and conditions.

**NOW, THEREFORE, THE CITY COUNCIL OF BONITA SPRINGS**

**HEREBY ORDAINS:**

Section 1. There is hereby granted to Florida Power & Light Company, its successors and assigns (herein called the "Grantee"), for the period of 25 years from the effective date hereof, with one additional five (5) year extension at FPL's sole option the non-exclusive right, privilege and franchise, (herein called "franchise") to construct, operate and maintain in, under, upon, along, over and across the present and future roads, streets, alleys, bridges, easements, rights-of-way and other public places (herein called "public rights-of-way") throughout all of the incorporated areas; as such incorporated areas may be constituted from time to time, of the City of Bonita Springs, Florida, and its successors (herein called the "Grantor"), in accordance with the Grantee's customary practice with respect to construction and maintenance, 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 all of the Grantee's operations (herein called "facilities"), for the purpose of supplying electricity and other services to the Grantor and its successors, the inhabitants thereof, and persons beyond the limits thereof.

Section 2. The facilities of the Grantee shall be installed, located or relocated so as to not unreasonably interfere with traffic over the public rights-of-way or with reasonable egress from and ingress to abutting property. To avoid conflicts with traffic, the location or relocation of all facilities shall be made as representatives of the Grantor may prescribe in accordance with the Grantor's reasonable rules and regulations with reference to the placing and maintaining in,

under, upon, along, over and across said public rights-of-way; provided, however, that such rules or regulations (a) shall not prohibit the exercise of the Grantee's right to use said public rights-of-way for reasons other than unreasonable interference with motor vehicular traffic, (b) shall not unreasonably interfere with the Grantee's ability to furnish reasonably sufficient, adequate and efficient electric service to all of its customers, and (c) shall not require the relocation of any of the Grantee's facilities installed before or after the effective date hereof in public rights-of-way unless or until widening or otherwise changing the configuration of the paved portion of any public right-of-way used by motor vehicles causes such installed facilities to unreasonably interfere with motor vehicular traffic. Such rules and regulations shall recognize that above-grade facilities of the Grantee installed after the effective date hereof should be installed near the outer boundaries of the public rights-of-way to the extent possible. When any portion of a public right-of-way is excavated by the Grantee in the location or relocation of any of its facilities, the portion of the public right-of-way so excavated shall within a reasonable time be replaced by the Grantee at its expense and in as good condition as it was at the time of such excavation. The Grantor shall not be liable to the Grantee for any cost or expense in connection with any relocation of the Grantee's facilities required under subsection (c) of this Section, except, however, the Grantee shall be entitled to reimbursement of its costs from others and as may be provided by law.

Section 3. The Grantor shall in no way be liable or responsible for any accident or damage that may occur in the construction, operation or maintenance

by the Grantee of its facilities hereunder, and the acceptance of this ordinance shall be deemed an agreement on the part of the Grantee to indemnify the Grantor and hold it harmless against any and all liability, loss, cost, damage or expense which may accrue to the Grantor by reason of the negligence, default or misconduct of the Grantee in the construction, operation or maintenance of its facilities hereunder.

Section 4. All rates and rules and regulations established by the Grantee from time to time shall be subject to such regulation as may be provided by law.

Section 5(a). As a consideration for this franchise, the Grantee shall pay to the Grantor, commencing sixty (60) days after the effective date of this Ordinance and each month thereafter for the remainder of the term of this franchise, an amount which added to the amount of all licenses, excises, fees, charges and other impositions of any kind whatsoever (except ad valorem property taxes and non-ad valorem tax assessments on property) levied or imposed by the Grantor against the Grantee's property, business or operations and those of its subsidiaries during the Grantee's monthly billing period ending sixty (60) days prior to each such payment will equal three (3%) percent of the Grantee's billed revenues, less actual write-offs, from the sale of electrical energy to residential, commercial and industrial customers within the incorporated areas of the Grantor for the monthly billing period ending sixty (60) days prior to each such payment, and in no event shall payment for the rights and privileges granted herein exceed three (3%) percent of such revenues for any monthly billing period of the Grantee.

Section 5(b): Notwithstanding the above, for the first eighteen months of

this franchise, the Grantee shall pay to the Grantor an amount equal to four (4%) percent of the Grantee's billed revenues, as specified in Section 5(a).

Section 5(c). It is further provided that the Grantor shall have the option, subject to the limitations specified below, once each calendar year to increase or reduce the amount to be paid by the Grantee as consideration for this franchise, such option to be exercised by the adoption of an ordinance, a certified copy of which must be delivered to the Grantee no later than 90 days before any such increase or reduction is to become effective. Such ordinance shall provide that the Grantee shall pay to the Grantor, no later than thirty (30) days after the end of the Grantee's first billing period and no later than 30 days after the end of each succeeding monthly billing of the Grantee during the term of this franchise, an amount which when added to the amount of all City licenses, excise fees or charges (except ad valorem property taxes and non-ad valorem special assessments on property) levied or imposed by the Grantor against the Grantee's property, business or operations and those of its subsidiaries during the Grantee's monthly billing period ending thirty (30) days prior to each such payment will equal five (5%) percent (or such lesser percentage as the Grantor may elect) of the Grantee's billed revenues, less actual write-offs, from the sale of electricity to residential, commercial and industrial customers within the incorporated areas of the Grantor for the monthly billing period ending thirty (30) days prior to each such payment, and in no event shall the Grantee's payment for the rights and privileges granted herein exceed five (5%) percent, or such percent of such revenues as specified by the Grantor in the exercise of its option, for any monthly billing period

of the Grantee. In no event may the Grantor increase the amount by more than one (1%) percent from the percentage then being collected in any given year. The Grantor shall have the option to reduce the amount to be paid by the Grantee to zero, but in no event shall the Grantor have the option to increase the percentage used to calculate the amount to be paid by the Grantee as consideration for this franchise to any percentage which is greater than five (5%) percent. The Grantor's option hereunder shall be limited solely to the percentage to be used in the calculation of the amount to be paid by the Grantee as consideration for this franchise and as specifically set forth in this subsection, and no other section or provision of this franchise ordinance may be altered, amended or affected by the Grantor without the concurrence of the Grantee. Nothing herein shall require the Grantor to exercise its option hereunder.

Section 6. As a further consideration, during the term of this franchise or any extension thereof, the Grantor agrees: (a) not to engage in the distribution and/or sale, in competition with the Grantee, of electric capacity and/or energy to any ultimate consumer of electric utility service (herein called a "retail customer") or to any electrical distribution system established solely to serve any retail customer formerly served by the Grantee, (b) not to participate in any proceeding or contractual arrangement, the purpose or terms of which would be to obligate the Grantee to transmit and/or distribute, electric capacity and/or energy from any third party(ies) to any other retail customer's facility(ies), and (c) not to seek to have the Grantee transmit and/or distribute electric capacity and/or energy generated by or on behalf of the Grantor at one location to the Grantor's facility(ies) at any other

location(s). Nothing specified herein shall prohibit the Grantor from engaging with other utilities or persons in wholesale transactions which are subject to the provisions of the Federal Power Act.

Nothing herein shall prohibit the Grantor, if permitted by law, (i) from purchasing electric capacity and/or energy from any other person, or (ii) from seeking to have the Grantee transmit and/or distribute to any facility(ies) of the Grantor electric capacity and/or energy purchased by the Grantor from any other person; provided, however, that before the Grantor elects to purchase electric capacity and/or energy from any other person, the Grantor shall notify the Grantee.

Such notice shall include a summary of the specific rates, terms and conditions which have been offered by the other person and identify the Grantor's facilities to be served under the offer. The Grantee shall thereafter have sixty (60) days to evaluate the offer and, if the Grantee agrees to meet or beat the other person's offer, the Grantor shall be obligated to continue to purchase from the Grantee electric capacity and/or energy to serve the previously-identified facilities of the Grantor for a term no shorter than that offered by the other person. If the Grantee does not agree to meet or beat the other person's offer, all of the terms and conditions of this franchise shall remain in effect.

Section 7. If the Grantor grants a right, privilege or franchise to any other person or otherwise enables any other such person to construct, operate or maintain electric light and power facilities within any part of the incorporated areas of the Grantor in which the Grantee may lawfully serve or compete on terms and conditions which the Grantee determines are more favorable than the terms and

conditions contained herein, the Grantee may at any time thereafter terminate this franchise if such terms and conditions are not remedied within the time period provided hereafter. The Grantee shall give the Grantor at least sixty (60) days advance written notice of its intent to terminate. Such notice shall, without prejudice to any of the rights reserved for the Grantee herein, advise the Grantor of such terms and conditions that it considers more favorable. The Grantor shall then have sixty (60) days in which to correct or otherwise remedy the terms and conditions complained of by the Grantee. If the Grantee determines that such terms or conditions are not remedied by the Grantor within said time period, the Grantee may terminate this agreement by delivering written notice to the Grantor's Clerk and termination shall be effective on the date of delivery of such notice.

Section 8. If as a direct or indirect consequence of any legislative, regulatory or other action by the United States of America or the State of Florida (or any department, agency, authority, instrumentality or political subdivision of either of them) any person is permitted to provide electric service within the incorporated areas of the Grantor to a customer then being served by the Grantee, or to any new applicant for electric service within any part of the incorporated areas of the Grantor in which the Grantee may lawfully serve, and the Grantee determines that its obligations hereunder, or otherwise resulting from this franchise in respect to rates and service, place it at a competitive disadvantage with respect to such other person, the Grantee may, at any time after the taking of such action, terminate this franchise if such competitive disadvantage is not remedied within the time period provided hereafter. The Grantee shall give the Grantor at least ninety

(90) days advance written notice of its intent to terminate. Such notice shall, without prejudice to any of the rights reserved for the Grantee herein, advise the Grantor of the consequences of such action which resulted in the competitive disadvantage. The Grantor shall then have ninety (90) days in which to correct or otherwise remedy the competitive disadvantage. If such competitive disadvantage is not remedied by the Grantor within said time period, the Grantee may terminate this agreement by delivering written notice to the Grantor's Clerk and termination shall take effect on the date of delivery of such notice.

Section 9. Failure on the part of the Grantee to comply in any substantial respect with any of the provisions of this franchise shall be grounds for forfeiture, but no such forfeiture shall take effect if the reasonableness or propriety thereof is protested by the Grantee until there is final determination (after the expiration or exhaustion of all rights of appeal) by a court of competent jurisdiction that the Grantee has failed to comply in a substantial respect with any of the provisions of this franchise, and the Grantee shall have six months after such final determination to make good the default before a forfeiture shall result with the right in the Grantor at its discretion to grant such additional time to the Grantee for compliance as necessities in the case require.

Section 10. Failure on the part of the Grantor to comply in substantial respect with any of the provisions of this ordinance, including: (a) denying the Grantee use of public rights-of-way for reasons other than unreasonable interference with motor vehicular traffic; (b) imposing conditions for use of public rights-of-way contrary to Florida law or the terms and conditions of this franchise;

(c) unreasonable delay in issuing the Grantee a use permit, if any, to construct its facilities in public rights-of-way, shall constitute breach of this franchise and entitle the Grantee to withhold all or part of the payments provided for in Section 5 hereof until such time as a use permit is issued or a court of competent jurisdiction has reached a final determination in the matter. The Grantor recognizes and agrees that nothing in this franchise constitutes or shall be deemed to constitute a waiver of the Grantee's delegated sovereign right of condemnation and that the Grantee, in its sole discretion, may exercise such right.

Section 11. The Grantor may, upon reasonable notice and within ninety (90) days after each anniversary date of this franchise, at the Grantor's expense, examine the records of the Grantee relating to the calculation of the franchise payment for the year preceding such anniversary date. Such examination shall be during normal business hours at the Grantee's office where such records are maintained. Records not prepared by the Grantee in the ordinary course of business may be provided at the Grantor's expense and as the Grantor and the Grantee may agree in writing. Information identifying the Grantee's customers by name or their electric consumption shall not be taken from the Grantee's premises. Such audit shall be impartial and all audit findings, whether they decrease or increase payment to the Grantor, shall be reported to the Grantee. The Grantor's right to examine the records of the Grantee in accordance with this section shall not be conducted by any third party employed by the Grantor whose fee for conducting such audit is contingent on findings of the audit.

Section 12. The provisions of this ordinance are interdependent upon

one another, and if any of the provisions of this ordinance are found or adjudged to be invalid, illegal, void or of no effect, the entire ordinance shall be null and void and of no force or effect.

Section 13. As used herein "person" means an individual, a partnership, a corporation, a business trust, a joint stock company, a trust, an incorporated association, a joint venture, a governmental authority or any other entity of whatever nature.

Section 14. All ordinances and parts of ordinances in conflict herewith are hereby repealed.

Section 15. As a condition precedent to the taking effect of this ordinance the Grantee shall file its acceptance hereof with the Grantor's Clerk within forty (40) days of adoption of this ordinance. The effective date of this ordinance shall be the date on which Grantee files its acceptance.

DULY PASSED AND ENACTED by the City Council of the City of Bonita Springs, Florida this 19th day of July, 2000.

AUTHENTICATION:



MAYOR



CITY CLERK

APPROVED AS TO FORM:

  
City Attorney

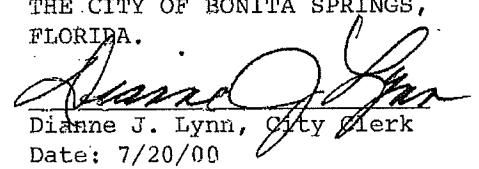
7/20/00

Date

Vote:	Arend	<u>Aye</u>	Piper	<u>Aye</u>
	Edsall	<u>Aye</u>	Wagner	<u>Aye</u>
	Nelson	<u>Aye</u>	Warfield	<u>Aye</u>
	Pass	<u>Aye</u>		

Date Filed with City Clerk: 7/20/00

I CERTIFY THAT THIS IS A  
CORRECT COPY OF AN OFFICIAL  
PUBLIC RECORD ON FILE WITH  
THE CITY OF BONITA SPRINGS,  
FLORIDA.

  
Dianne J. Lynn, City Clerk  
Date: 7/20/00

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AN ORDINANCE GRANTING TO FLORIDA POWER & LIGHT COMPANY, ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC FRANCHISE, IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO, PROVIDING FOR MONTHLY PAYMENTS TO THE TOWN OF GLEN RIDGE, AND PROVIDING FOR AN EFFECTIVE DATE.

BE IT ORDAINED BY THE TOWN OF GLEN RIDGE, FLORIDA:

Section 1. There is hereby granted to Florida Power & Light Company (herein called the "Grantee"), its successors and assigns, the non-exclusive right, privilege or franchise to construct, maintain and operate in, under, upon, over and across the present and future streets, alleys, bridges, easements and other public places of the Town of Glen Ridge, Florida (herein called the "Grantor") and its successors, in accordance with established practice with respect to electrical construction and maintenance, for the period of 30 years from the date of acceptance hereof, electric light and power facilities (including conduits, poles, wires and transmission lines, and, for its own use, telephone and telegraph lines) for the purpose of supplying electricity to the Grantor and its successors, and inhabitants thereof, and persons and corporations beyond the limits thereof.

Section 2. As a condition precedent to the taking effect of this grant, the Grantee shall have filed its acceptance hereof with the Grantor's Clerk within 30 days hereof.

Section 3. The facilities of the Grantee shall be so located or relocated and so erected as to interfere as little as possible with traffic over said streets, alleys, bridges and public places, and with reasonable egress from and ingress to abutting property. The location or relocation of all facilities shall be made under the supervision and with the approval of such representatives as the governing body of the Grantor may designate for the purpose, but not so as to unreasonably interfere with the proper operation of the Grantee's facilities and service. When any portion of a street is excavated by the Grantee in the location or relocation of any of its facilities, the portion of the street so excavated shall <sup>APPENDIX B-60</sup>within a reasonable time and as early as

practicable after such excavation, be replaced by the Grantee at its expense and in a condition as good as it was at the time of such excavation..

Section 4. Grantor shall in no way be liable or responsible for any accident or damage that may occur in the construction, operation or maintenance by the Grantee of its facilities hereunder, and the acceptance of this ordinance shall be deemed an agreement on the part of the Grantee to indemnify the Grantor and hold it harmless against any and all liability, loss, cost, damage or expense which may accrue to the Grantor by reason of the negligence, default or misconduct of the Grantee in the construction, operation or maintenance of its facilities hereunder.

Section 5. All rates and rules and regulations established by the Grantee from time to time shall at all times be reasonable and the Grantee's rates for electricity shall at all times be subject to such regulation as may be provided by law.

Section 6. No later than 60 days after the first anniversary date of this grant, and no later than 60 days after each succeeding anniversary date of this grant, the Grantee, its successors and assigns, shall have paid to the Grantor and its successors an amount which added to the amount of all taxes as assessed, levied, or imposed (without regard to any discount for early payment or any interest or penalty for late payment), licenses, and other impositions levied or imposed by the Grantor upon the Grantee's electric property, business, or operations, and those of the Grantee's electric subsidiaries for the preceding tax year, will equal six percent of the Grantee's revenues from the sale of electrical energy to residential, commercial and industrial customers within the corporate limits of the Grantor for the 12 fiscal months preceding the applicable anniversary date.

Section 7. Payment of the amount to be paid to the Grantor by the Grantee under the terms of Section 6 hereof shall be made in advance by estimated monthly installments commencing 90 days after the effective date of this grant. Each estimated monthly installment shall be calculated on the basis of 90% of the

Grantee's revenues (as defined in Section 6) for the monthly billing period ending 60 days prior to each scheduled monthly payment. It is also understood that for purposes of calculating each monthly installment, all taxes, licenses, and other impositions shall be estimated on the basis of the latest data available for all such amounts imposed on the Grantee, before being prorated monthly. The final installment for each fiscal year of this grant shall be adjusted to reflect any underpayment or overpayment resulting from estimated monthly installments made for said fiscal year.

Section 8. As a further consideration of this franchise, the Grantor agrees not to engage in the business of distributing and selling electricity during the life of this franchise or any extension thereof in competition with the Grantee, its successors and assigns.

Section 9. Failure on the part of the Grantee to comply in any substantial respect with any of the provisions of this ordinance shall be grounds for forfeiture of this grant, but no such forfeiture shall take effect if the reasonableness or propriety thereof is protested by the Grantee until a court of competent jurisdiction (with right of appeal in either party) shall have found that the Grantee has failed to comply in a substantial respect with any of the provisions of this franchise, and the Grantee shall have six months after the final determination of the question to make good the default before a forfeiture shall result with the right in the Grantor at its discretion to grant such additional time to the Grantee for compliance as necessities in the case require.

Section 10. Should any section or provision of this ordinance or any portion hereof be declared by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remainder as a whole or as to any part, other than the part declared to be invalid.

Section 11. That all ordinances and parts of ordinances in conflict herewith be and the same are hereby repealed.

Section 12. This ordinance shall take effect on the date upon which the Grantee files its acceptance.

PASSED First Reading this 12<sup>th</sup> day of Sept 1991.

PASSED Second and Final Reading this 2<sup>nd</sup> day of Oct, 1991.

Jay Hennel Deeth

President of Council

ATTEST:

Mary Aulink  
Town Clerk

## **APPENDIX C**



**TAMPA-HILLSBOROUGH COUNTY EXPRESSWAY AUTHORITY, Petitioner,  
v. K.E. MORRIS ALIGNMENT SERVICE, Inc., Respondent**

**No. 62,281**

**Supreme Court of Florida**

*444 So. 2d 926; 1983 Fla. LEXIS 2899*

**November 10, 1983**

**SUBSEQUENT HISTORY:**      [\*\*1] Rehearing  
Denied February 22, 1984.

**PRIOR HISTORY:**      Application for Review of the  
Decision of the District Court of Appeal - Direct Conflict  
of Decisions Second District - Case No. 81-1714.

**COUNSEL:** William C. McLean, Jr., Tampa, Florida,  
for Petitioner.

Paul B. Johnson of Johnson, Paniello and Hayes, Tampa,  
Florida, for Respondent.

**JUDGES:** Boyd, J. Alderman, C.J., Overton, McDon-  
ald, Ehrlich and Shaw, JJ., concur. Adkins, J., dissents.

**OPINION BY: BOYD**

**OPINION**

[\*927] This case is before us on the petition of the Tampa-Hillsborough County Expressway Authority for review of a decision of the District Court of Appeal for the Second Appellate District of Florida. The decision of which review is sought is reported as *K.E. Morris Alignment Service, Inc. v. Tampa-Hillsborough County Expressway Authority*, 414 So.2d 299 (Fla. 2d DCA 1982). The decision is in conflict with *Division of Administration, Department of Transportation v. Ely*, 351 So.2d 66 (Fla. 3d DCA 1977). We therefore have jurisdiction to provide the requested review. Art. V, § 3(b)(3), Fla. Const.

The Tampa-Hillsborough County Expressway Authority instituted eminent domain proceedings against numerous parcels of land in Hillsborough [\*\*2] Coun-

ty, including a small tract owned by K.E. Morris Alignment Service, Inc. The Authority sought to take only a part of respondent's land, however, and respondent operated a business on remaining land adjoining the property taken.

In the course of the proceedings for determination of compensation, respondent made a claim for business damages under section 73.071(3)(b), *Florida Statutes* (1979). Although respondent had been in business at the location adjacent to the land being taken for only three years and two months, \* its business had been in continuous operation for more than thirty years. The trial court held that since the business had been in operation at the location for which business damages were claimed for [\*928] less than five years, no business damages were recoverable under section 73.071(3)(b). The landowner appealed.

\* Pursuant to chapter 74, Florida Statutes (1979), the court entered an order of taking on September 7, 1979, prior to the proceedings for determination of just compensation.

[\*\*3] The district court reversed and held that section 73.071(3)(b) does not require, as a prerequisite to an award of business damages, that the business have been in operation at the location for which business damages are claimed for more than five years.

Section 73.071(3)(b) provides in pertinent part as follows:

(3) The jury shall determine solely the amount of compensation to be paid, which compensation shall include:

....

(b) Where less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking, including, when the action is by the Division of Road Operations of the Department of Transportation, county, municipality, board, district or other public body for the condemnation of a right-of-way, and the effect of the taking of the property involved may damage or destroy an established business of more than 5 years' standing, owned by the party whose lands are being so taken, located upon adjoining lands owned or held by such party, the probable damages to such business which the denial of the use of the property so taken may reasonably cause.

The district court looked at the three criteria for business damages [\*\*4] and found that they were independent requirements: the business must be established for more than five years, the business must be owned by the party whose lands are being taken, and the business must be located upon adjoining land owned or held by such party. Thus the district court found that there was no requirement in the statute that the business for which damages are sought have been operated for more than five years at the location adjoining the land being taken. We believe contrarily that the words "located upon adjoining lands" and the words "established business of more than 5 years' standing" are intended to be read together and to qualify each other. We therefore hold that the district court erred in its construction of the statute. The statute indicates that the legislative intent is to allow business damages only to concerns having a physical existence for more than five years at the location where the partial taking is alleged to have caused business damages. Examined in the light of sound principles of statutory construction, the statute sustains the ruling of the circuit judge and demonstrates the error of the district court's holding.

The power of eminent domain [\*\*5] is an inherent feature of the sovereign authority of the state. *Daniels v. State Road Department*, 170 So.2d 846 (Fla. 1964). The constitution limits this power by requiring that full compensation be paid to the owner for the property taken. Art. X, § 6(a), Fla. Const. The payment of compensation for intangible losses and incidental or consequential damages, however, is not required by the constitution, but is granted or withheld simply as a matter of legislative grace. *Jamesson v. Downtown Development Authority*, 322 So.2d 510 (Fla. 1975). Business damages such as those sustained in the instant case fall in the category where compensation is not constitutionally re-

quired but depends on legislative authorization. *City of Tampa v. Texas Co.*, 107 So.2d 216 (Fla. 2d DCA 1958), cert. dismissed, 109 So.2d 169 (Fla. 1959).

The allowance of business damages in eminent domain proceedings, being a matter of legislative grace, is analogous to other forms of legislative largess, such as grants of franchise rights. The allowance of business damages can also be compared to a waiver of sovereign immunity. Legislative grants of property or franchise rights must, when construction [\*\*6] is necessary, be strictly construed in favor of the state and against the grantee. *Tampa & Jacksonville Railway v. Catts*, 79 Fla. 235, 85 So. 364 (1920). A waiver of sovereign immunity, similarly, should be strictly construed in favor of the state and against the claimant. *Arnold v. Shumpert*, 217 So.2d 116 (Fla. 1968); *Spangler v. Florida State Turnpike Authority*, 106 So.2d 421 (Fla. 1958). So, any ambiguity in section 73.071(3)(b) should be construed against the claim of business damages, and such damages should be awarded only when such an award appears clearly consistent with legislative intent.

Of course, the district court took the view that the plain language of the statute seemed to authorize an award, so that no resolution of ambiguity was necessary. But the district court gave the statute an interpretation it had never before received, and one that is at odds with the traditional understanding of the purpose and effect of the statutory business damages criteria. See, e.g., *State Road Department v. Bramlett*, 189 So.2d 481 (Fla. 1966); *State Road Department v. Lewis*, 170 So.2d 817 (Fla. 1964); *Glessner v. Duval County*, 203 So.2d 330 (Fla. [\*\*7] 1st DCA 1967); *Intercoastal Drydock, Inc. v. State Road Department*, 203 So.2d 19 (Fla. 3d DCA 1967), cert. denied, 210 So.2d 223 (Fla. 1968); *State Road Department v. Abel Investment Co.*, 165 So.2d 832 (Fla. 2d DCA), cert. denied, 169 So.2d 485 (Fla. 1964); *State Road Department v. Peter*, 165 So.2d 771 (Fla. 2d DCA 1964). It is true that none of the above-cited cases dealt with the precise issue that has arisen now. But in reasoning that "if the legislature had intended the requirement that the business be located on the adjacent land for five years, it could have used plain language to so provide," 414 So.2d at 300, the district court construed the statute as though there existed a presumption in favor of the claimant.

Statutes should be construed in light of the manifest purpose to be achieved by the legislation. *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693 (1918); *Curry v. Lehman*, 55 Fla. 847, 47 So. 18 (1908). The purpose of section 73.071(3)(b) is to mitigate the hardship that may result when the state exercises the power of eminent domain paying only the constitutionally required full compensation for the property actually taken. The legislature [\*\*8] in doing so has recognized that a business

location may be an asset of considerable value and susceptible of being substantially damaged by a partial taking. To assure the existence of a substantial business interest in the location as a prerequisite to an award of business damages, the legislature included the requirement of five years of operation at the location. The requirement of "more than 5 years' standing," seen in the light of the legislative purpose, obviously refers to the length of time the business has operated *at the location* where business damages are claimed to have been incurred due to condemnation of adjoining land. The length of time that the operator of the business has been in business at previous or other locations and the duration of its existence as a business entity are obviously irrelevant to the inquiry mandated by the statute.

When a statute is susceptible of and in need of interpretation or construction, it is axiomatic that courts should endeavor to avoid giving it an interpretation that will lead to an absurd result. *State ex rel. Florida Industrial Commission v. Willis*, 124 So.2d 48 (Fla. 1st DCA 1960), cert. denied, 133 So.2d 323 (Fla. [\*\*9] 1961). If we were to adopt the district court's view of section 73.071(3)(b), there could be absurd and unfair results in hypothetical situations that readily come to mind. Under the district court's approach, two property owners operating businesses, both equally damaged by a partial taking of their respective properties, and both having been in operation at the affected location for less than five years, would be treated differently insofar as their eligibility to claim business damages is concerned if one of them had been in existence as a business entity for more than five years and the other had not. Thus the different treatment of the two landowners on the question of eligibility to claim business damages would be based on a factor having nothing whatsoever to do with the duration of their operations at the respective locations and therefore the degree of hardship imposed upon them by the partial taking of their respective premises. This would be an irrational [\*\*930] distinction upon which to justify such differential treatment. "An interpretation of the language of a statute that leads to absurd consequences should not be adopted when, considered as a whole, the statute [\*\*10] is fairly subject to another construction that will aid in accomplishing the manifest intent and the purposes designed." *City of Miami v. Romfh*, 66 Fla. 280, 285, 63 So. 440, 442 (1913). Since the construction given the statute by the circuit judge comports with the obvious purpose of the statute, it should have been sustained by the appellate court.

Decisions of the appellate courts of Florida clearly indicate that the essential inquiry under the business damages statute is that of continuous operation of the business at the location where business damages are alleged to have been suffered. In *Hooper v. State Road*

*Department*, 105 So.2d 515 (Fla. 2d DCA 1958), the trial court refused to allow a claim for business damages because the landowners had been operating the business for only about one year. The district court of appeal reversed because the owners had acquired the business as a going concern and it had been in continuous operation at the location for more than five years. Conversely, in *Hodes v. Division of Administration, Department of Transportation*, 323 So.2d 275 (Fla. 2d DCA 1975), the district court affirmed the trial court's refusal of a business damages [\*\*11] claim because, although a business similar to the landowner's had some time previously been operated on the premises, the landowner had not acquired a business there but only a "business place" in which he opened a new business. 323 So.2d at 277. There was no continuous operation and the landowner's business had been in existence for less than five years. The same kind of situation produced a consistent holding in *Division of Administration, Department of Transportation v. Lake of the Woods, Inc.*, 404 So.2d 186 (Fla. 4th DCA 1981).

The district court of appeal in the instant case acknowledged that its decision was in conflict with *Division of Administration, Department of Transportation v. Ely*, 351 So.2d 66 (Fla. 3d DCA 1977). There a propane gas dealer claimed that the partial taking of a mobile home park with which it had a service agreement and where it had access easements for its facilities had taken its property and caused it business damages. The district court held that the service easement was not a kind of property the loss of which had to be compensated and rejected the claim of business damages for two reasons:

Business damages under Section 73.071(3)(b), [\*\*12] Florida Statutes (1975) are equally inapplicable in the instant case. Southeastern Propane Gas Co. did not own or have any property interest in the condemned land as required by the statute in order to qualify for business damages. Moreover, its business had not been operating on the adjoining land for more than five years as further required by the statute. The fact that Southeastern Propane Gas Co. as a company has been incorporated and doing business elsewhere throughout the state since the early 1950's does not satisfy this five year requirement under the statute.

351 So.2d at 69. The second reason given, of course, pertains to the issue in the instant case upon which our

conflict jurisdiction is predicated. Under our holding today, the *Ely* decision was correct.

The decision of the district court of appeal is quashed and the case is remanded with instructions that the ruling of the trial court be affirmed.

It is so ordered.

ALDERMAN, C.J., OVERTON, McDONALD,  
EHRLICH and SHAW, JJ., Concur.

ADKINS, J., Dissents.