COUNCIL ITEM 13L
DATE 9/12/11

MEMORANDUM

TO: JERRY A. BENTROTT, CITY MANAGER

FROM: ROGER G. ORR, CITY ATTORNEY

DATE: SEPTEMBER 2, 2011

SUBJECT: FLORIDA POWER AND LIGHT COMPANY FRANCHISE AGREEMENT

Attached you will find a draft ordinance providing for a franchise agreement between the City of Port St. Lucie and Florida Power and Light Company for electric services.

There is currently in effect a franchise agreement between the City of Port St. Lucie and Florida Power and Light which is scheduled to expire in the year 2015. Over the past year the city and Florida Power and Light have engaged in negotiations to renew the franchise between the City and FPL in advance of the expiration of the existing franchise. The franchise represents an update of the current agreement but, by and large, follows the same format.

One of the significant differences in this new agreement is that the franchise fee which remains set at six percent (6%) is not offset by taxes and fees that FPL pays pertaining to its properties and operations inside the City. The current estimated impact of this change would result in an increase in franchise fees to the City in the sum of approximately $600,000 per year.

FPL has agreed to this franchise as presented, and it has been reviewed by the City's departments and is now presented for discussion by City Council.

Please advise if you have any questions regarding this.

RGO/dmf
Attach.

c: Jesus Merejo, Director, Utility Systems Department
Patricia Roebling, P.E. City Engineer
Marcia Dedert, Director, Finance

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City Manager's Office

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ORDINANCE 11-

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 PORT ST. LUCIE; PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the City Council of the City of Port St. Lucie, Florida recognizes that the City of Port St. Lucie 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

WHEREAS, the City of Port St. Lucie does not desire to construct, operate, and maintain electric facilities 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, the City of Port St. Lucie is vested with jurisdiction, authority, and control of certain public rights-of-way within its corporate boundaries and is responsible for the management and use of such rights-of-way and the promulgation and enforcement of rules and regulations regarding the administration of such public rights of ways; and

WHEREAS, there is currently in effect a franchise agreement between the City of Port St. Lucie and FPL, the terms of which are set forth in City of Port St. Lucie Ordinance No. 85-50, passed and adopted May 28, 1985, and FPL's written acceptance thereof dated June 26, 1985 granting to FPL, its successors and assigns, a thirty (30) year electric franchise ("Current Franchise Agreement"); and

WHEREAS, the City Council of the City of Port St. Lucie finds that it is in the best public interest to enter into a new agreement (New Franchise Agreement) providing for the payment of fees to the City of Port St. Lucie in exchange for and in consideration of the nonexclusive right and privilege of utilizing Grantor's public rights-of-way within Grantor's jurisdiction and control as herein defined for supplying electricity and services incidental to the supplying of electricity within the City of Port St. Lucie free of competition from the City of Port St. Lucie, pursuant to certain terms and conditions; and

WHEREAS, the City Council of the City of Port St. Lucie deems it to be in the best interest of the City of Port St. Lucie and its citizens to enter into the New Franchise Agreement prior to expiration of the Current Franchise Agreement;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF PORT ST. LUCIE, FLORIDA:

Section 1. Grant of Electric Utility Franchise; Term of Franchise. There is hereby granted to Florida Power & Light Company, its successors and assigns (hereinafter called the "Grantee"), 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 public roads, streets, alleys, bridges, public easements, public rights-of-way, and other public places (hereinafter called "public rights-of-way") throughout all of the incorporated area, as such incorporated area may be constituted from time to time, of the City of Port St. Lucie, Florida, and its successors (hereinafter called the "Grantor"), in accordance with the National Electrical Safety Code to the extent applicable, all other valid ordinances, rules

and regulations, and Grantee's customary practice with respect to construction and maintenance of 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 (hereinafter called "facilities"), for the purpose of supplying electricity and other related services to the Grantor and its successors, the inhabitants thereof, and persons beyond the limits thereof.

Section 2. Facilities Requirements. The facilities of the Grantee shall be installed, located, or relocated so 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 Grantor-owned utility facilities existing at the time of installation or relocation of Grantee's facilities, or with reasonable egress from and ingress to abutting property. To avoid conflicts the location or relocation of all facilities shall be made as representatives of the Grantor may prescribe in accordance with the Grantor's valid ordinances, 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 conflict with the standards set above, (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 at Grantee's cost the relocation of any of the Grantee's facilities installed before or after the effective date hereof in any public right-of-way unless or until the facilities unreasonably interfere with the convenient, safe, or continuous use, or the maintenance, improvement, extension, or expansion, of such public

"road." 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 and shall be consistent with the Florida Department of Transportation's Manual of Uniform Minimum Standards for Design, Construction, and Maintenance for Streets and Highways. 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. In the event Grantor requests removal or relocation of Grantee's facilities because the facilities unreasonably interfere with the standards set forth in subsection (c) above, and Grantee fails to remove or relocate such facilities at Grantee's expense within a reasonable period of time, then Grantor may proceed to cause the facilities to be removed or relocated and the expense therefore shall be charged against Grantee.

Section 3. Indemnification of Grantor. 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, including, but not limited to, reasonable attorneys' fees, which may accrue to the Grantor

to the extent caused by the negligence, default, or misconduct of the Grantee, its officers, directors, agents, servants, employees, contractors, or subcontractors in the construction, operation, or maintenance of its facilities hereunder. The indemnity hereunder includes not only the reasonable costs, expenses, and attorneys' fees ("costs") incurred by the Grantor in defense of any third party claims (prior to and during all phases of litigation, including trial and post trial and appellate proceedings), it also includes the reasonable costs incurred by the Grantor in the event it must enforce the terms of this indemnity provision. This indemnity shall survive the termination of this franchise.

Section 4. Rates, Rules, and Regulations of Grantee. 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). Franchise Fee; Calculation; Payment. As a consideration for the nonexclusive right to use the Grantor's public rights-of-way pursuant to the terms of this franchise, the Grantor's agreement not to compete as set forth in Section 6 hereof, and other valuable consideration all as set forth herein, the Grantee shall pay to the Grantor a franchise fee, 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 Grantor against the Grantee's property, business or operations, and those of its subsidiaries during the Grantee's monthly billing period ending 60 days prior to each such payment will equal 6 percent of the Grantee'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 Grantor for the monthly billing period ending 60 days prior to each such payment, and in no event shall payment for the rights and privileges granted herein exceed 6 percent of such revenues for any monthly billing period of the Grantee.

The Grantor understands and agrees that such revenues as described in the preceding paragraph are limited to the precise revenues described therein, and that such revenues do not include, by way of example and not limitation: (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 as described in Grantee's tariff; (g) Field Collection Charges as described in Grantee's tariff; (h) other service charges permissible under Grantee's tariff or applicable regulation or law.

Section 5(b). Favored Nations. If during the term of this franchise the Grantee enters into a franchise agreement with any other municipality located in St. Lucie County, where the number of Grantee's active electrical customers is equal to or less than the number of Grantee's active electrical customers within the incorporated areas of Grantor, the terms of which provide for the payment of franchise fees by the Grantee at a rate greater than 6 percent of the Grantee's residential, commercial, and industrial revenues under the same terms and conditions as specified in Section 5(a) hereof, the Grantee, upon written request of the Grantor, shall negotiate and enter into a new franchise

agreement with the Grantor in which the percentage to be used in calculating monthly payments under Section 5(a) hereof shall be equal to but no greater than that percentage which the Grantee has agreed to use as a basis for the calculation of payments to the other St. Lucie County municipality; provided, however, that such new franchise agreement shall include benefits to the Grantee, in addition to all benefits provided herein, at least equal to those provided by its franchise agreement with the other St. Lucie County municipality. Subject to all limitations, terms and conditions specified in the preceding sentence, the Grantor shall have the sole discretion to determine the percentage to be used in calculating monthly payments, and the Grantee shall have the sole discretion to determine those benefits to which it would be entitled, under any such new franchise agreement.

Section 6. Non-Competition by Grantor. 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 electric 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 electric 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 electric 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.

Grantor may, if permitted by law, (i) generate electric capacity and/or energy at any facility owned by the Grantor for storage or utilization at that facility or other Grantor facilities, operations or equipment; (ii) use renewable energy sources to generate electric capacity and/or energy for use in demonstration projects or at Grantor's facilities, operations or its equipment; and (iii) sell electric capacity and/or energy to Grantee or other wholesale purchaser in compliance with applicable rules and regulations controlling such transactions.

Nothing herein shall prohibit the Grantor, if permitted by law, (i) from purchasing electric capacity and/or electric 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 electric energy purchased by the Grantor from any other person; provided, however, that before the Grantor elects to purchase electric capacity and/or electric 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 90 days to evaluate the offer and, if the Grantee offers rates, terms and conditions which are equal to or better than those offered by the other person, the Grantor shall be obligated to continue to purchase from the Grantee electric capacity and/or electric 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 rates, terms and conditions which equal or better the other person's offer, all of the terms and conditions of this franchise shall remain in effect.

Section 7. Competitive Disadvantage; Termination by Grantee. 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 reasonably 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 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 such terms and conditions that it considers more favorable and the objective basis or bases for same. The Grantor shall then have 120 days in which to correct or otherwise remedy the terms and conditions complained of by the Grantee. If the Grantee reasonably determines that such terms or conditions are 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 be effective on the date of delivery of such notice. Nothing contained herein shall be construed as constraining Grantor's rights to legally challenge at any time Grantee's determination of competitive disadvantage leading to termination under this Section 7.

Section 8. Legislative or Regulatory Action. 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 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, the Grantee may, at any time after the taking of such action, terminate this franchise if such competitive disadvantage is, in the reasonable determination of Grantee, not remedied within the time period provided hereafter. The Grantee shall give the Grantor at least 120 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 and the objective basis or bases of the competitive disadvantage. The Grantor shall then have 120 days in which to correct or otherwise remedy the competitive disadvantage. If such competitive disadvantage is, in the reasonable determination of the Grantee, 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. Nothing contained herein shall be construed as constraining Grantor's rights to legally challenge at any time Grantee's determination of competitive disadvantage leading to termination under this Section 8.

Section 9. Default by Grantee; Forfeiture. 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 of the Grantor at its discretion to grant such additional time to the Grantee for compliance as necessities in the case require.

Section 10. Default by Grantor. Failure on the part of the Grantor to comply in substantial respect with any of the provisions of this ordinance, including but not limited to: (a) denying the Grantee use of public rights-of-way for reasons other than as set forth in Section 2; (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 agreement 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. Grantee's Books & Records; Audit; Maintenance. The Grantor may, upon reasonable notice and within 180 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, in whole or part, for conducting such audit is contingent on findings of the audit. Records shall be retained by the Grantee for a period of five (5) years. The provisions of this Section 11 shall survive termination of this franchise.

Grantor waives, settles and bars all claims relating in any way to the amounts paid by the Grantee under the Current Franchise Agreement embodied in Ordinance No. 85-50 not asserted in writing by Grantor within 365 days after the effective date of this Ordinance.

Section 12. Smart Grid Technology. Grantee acknowledges that Grantor's policies strongly favor the widespread dissemination of electric meters featuring "smart grid technology" which utilize an active monitoring network capable of providing real time electrical usage information to both Grantee and Grantee's customers via an advanced, two-way communication device. Grantee shall utilize its best practicable efforts to provide Retail Customers located in the City of Port St. Lucie this technology as it becomes available.

Section 13. Severability. If any of the provisions of this ordinance are found or adjudged to be invalid, illegal, void or of no effect, then said holding in no way affects the validity of the remaining portions of this ordinance. Notwithstanding the foregoing, if any of the provisions of Sections 1, 2, 5, 6, 7, and 8 of this Ordinance are held invalid or unconstitutional, the parties shall attempt in good faith to negotiate a new lawful agreement that restores the fundamental terms of the original agreement. In the event the parties are unable to reach a new lawful agreement, the ordinance shall be null and void and of no force and effect.

Section 14. Person. 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 15. Repeal of Ordinance No. 85-50. Ordinance No. 85-50, passed and adopted May 28, 1985 and all other ordinances and parts of ordinances and all resolutions and parts of resolutions in conflict herewith, are hereby repealed.

Section 16. Condition Precedent; Acceptance by Grantee. As a condition precedent to the taking effect of this ordinance, the Grantee shall file its acceptance hereof with the Grantor's Clerk within 30 days of adoption of this ordinance.

Section 17. Effective Date. The effective date of this ordinance shall be the date upon which the Grantee files such acceptance, subject to the time limitation prescribed in Section 16 above.

PASSED AND APPROVED by the City Council of the City of Port St. Lucie, Florida, this _____ day of _____, 2011.

CITY COUNCIL
CITY OF PORT ST. LUCIE

ATTEST:

BY:_____
JoAnn M. Faiella, Mayor

_____
Karen A. Phillips, City Clerk

APPROVED AS TO FORM:

BY:_____
Roger G. Orr, City Attorney