

TOWN OF GOLDEN BEACH, FLORIDA

ORDINANCE NO. 538.09

AN ORDINANCE OF THE TOWN OF GOLDEN BEACH, FLORIDA, 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 GOLDEN BEACH, AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Town Council of the Town of Golden Beach, Florida (the "Town") recognizes that the Town 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 Town does not desire to undertake to directly provide such services; 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 Town and FPL, the terms of which are set forth in Town Ordinance No. 244, passed and adopted December 21, 1982, and FPL's written acceptance thereof dated December 28, 1982 granting to FPL, its successors and assigns, a thirty (30) year electric franchise ("Current Franchise Agreement"); and

WHEREAS, FPL and the Town desire to enter into a new agreement (the "New Franchise Agreement") providing for the payment of fees to the Town in exchange for the nonexclusive right and privilege of supplying electricity and other directly related services

within the Town free of competition from the Town, pursuant to certain terms and conditions, and

WHEREAS, the Town Council deems it to be in the best interest of the Town 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 TOWN COUNCIL OF THE TOWN OF GOLDEN BEACH, FLORIDA:

Section 1. Recitals Adopted. That the above stated recitals are hereby adopted and confirmed.

Section 2. Franchise Granted. That there is hereby granted to Florida Power & Light Company, its successors and assigns (hereinafter called the "Grantee"), for the period of thirty (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 Town, and its successors (hereinafter called the "Grantor" or "Town"), in accordance with the Grantee's customary and lawful 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 (hereinafter called "facilities"), for the purpose of supplying electricity and other directly related services

to the Grantor and its successors, the inhabitants of the Town, and persons beyond the limits thereof.

Section 3. Facilities.

A. 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 or other existing utilities, (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.

B. 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 this Section, except, however, the Grantee shall be entitled to reimbursement of its costs from others and as may be provided by law. Grantee's activities pursuant to this subsection shall be subject to reasonable regulation pursuant to any right-of-way permit ordinance of general applicability of Town.

Section 4. No Liability. 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 defend, 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. Rules and Rates. 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 6. Compensation to Town.

A. As a consideration for this franchise, the Grantee shall pay to the Grantor, commencing 90 days after the effective date hereof, and each month thereafter for the remainder of the term of this franchise, an amount which when added to the amount of all licenses, excises, fees, charges and other impositions of any kind whatsoever of the Town (except ad valorem property taxes and non-ad valorem tax assessments on property and

fees paid for actual services rendered such as water and sewer; garbage collection, etc.) 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 Five and Nine-Tenths percent (5.9%) 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 Five and Nine-Tenths percent (5.9%) of such revenues for any monthly billing period of the Grantee.

B. The Grantor understands and agrees that such revenues as described in the preceding paragraph are limited, as in the existing franchise Ordinance No. 244, 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; (g) Field Collection Charges; (h) other service charges.

Section 7. Equality of Treatment. If during the term of this franchise the Grantee enters into a franchise agreement with any other municipality located in Miami-Dade County, Florida, 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 area of the Grantor, the terms of which provide for the payment of franchise fees by the Grantee at a rate greater than 5.9% of the Grantee's residential, commercial and industrial revenues (as such customers are defined by FPL's tariff), under the same terms and conditions as specified in Section 6 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 6 hereof shall be no greater than that percentage which the Grantee has agreed to use as a basis for the calculation of payments to the other Miami-Dade County municipality, provided, however, that such new franchise agreement shall include additional benefits to the Grantee, in the form of benefits which are at least equal to those provided by its franchise agreement with the other Miami-Dade 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 8. No Competition by Town.

A. 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. Nothing herein shall prohibit Grantor from adopting or complying with environmental initiatives which enable or require Town to generate electrical energy for consumption at facilities owned or operated by the Town provided that such initiatives and the implementation of same do not violate any of the terms or conditions of this New Franchise Agreement.

B. 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, then Grantor may proceed with the other person's offered sale and purchase arrangement and all of the other terms and conditions of this New Franchise Agreement shall remain in effect except as otherwise provided herein.

Section 9. Equal Treatment to 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 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 60 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 New Franchise Agreement by delivering written notice to the Grantor's Clerk and termination shall be effective on the date of delivery of such notice.

Section 10. Regulatory Impact. 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 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 New Franchise Agreement by delivering written notice to the Grantor's Clerk and termination shall take effect on the date of delivery of such notice.

Section 11. Compliance by Grantee. 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 12. Compliance by Town. 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 unreasonable interference with motor vehicular traffic or with existing utilities; (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 reasonably withhold all or part of the payments provided for in Section 6 hereof (segregated in an escrow account) 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 New 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 in accordance with Florida law.

Section 13. Access to Records.

A. The Grantor may, upon reasonable notice and within 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 may be exercised with the use of a consultant or third party, but shall not be conducted by any consultant or third party employed by the Grantor whose fee, in whole or part, for conducting such audit is contingent on findings of the audit.

B. 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. 244, subject to completion of payments owed to Grantor prior to commencement of the term of this New Franchise Agreement.

Section 14. Non-Severable. 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 15. Miami-Dade County Franchise. Grantor acknowledges it is fully informed concerning the existing franchise granted by Miami-Dade County, Florida, to the Grantee herein, and accepted by the Grantee as set out in County Ordinance No. 60-16 adopted on May 3, 1960, and subsequently renewed and accepted by the Grantee as set out in County Ordinance No. 89-81 adopted on September 5, 1989 by the Board of County

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

Section 16. Definition. 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. Repeal. Ordinance No. 244, passed and adopted December 21, 1982 and all other ordinances and parts of ordinances and all resolutions and parts of resolutions in conflict herewith, are hereby repealed as superceded, except that any franchise fees which are due and owing shall remain in effect until paid, and any obligation of Grantee to defend, indemnify and hold harmless Grantor for damages or injuries sustained by others shall continue as to any damage or injury which has occurred prior to the effective date of the New Franchise which shall apply only to the extent such claims are not barred by any other statute of limitations.

Section 18. Acceptance. 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. The effective date of this ordinance shall be the date upon which the Grantee files such acceptance.

The Motion to adopt the foregoing Ordinance was offered by Councilmember Rojas, seconded by Councilmember Bernstein, and on roll call the following vote ensued:

Mayor Glenn Singer	<u>Aye</u>
Vice Mayor Judy Lusskin	<u>Aye</u>
Councilmember Ben Einstein	<u>Aye</u>
Councilmember Amy Rojas	<u>Aye</u>
Councilmember Ken Bernstein	<u>Aye</u>

PASSED AND ADOPTED on first reading this 26th day of August, 2009.

The Motion to adopt the foregoing Ordinance was offered by Vice Mayor Lusskin, seconded by Councilmember Bernstein, and on roll call the following vote ensued:

Mayor Glenn Singer	<u>Aye</u>
Vice Mayor Judy Lusskin	<u>Aye</u>
Councilmember Ben Einstein	<u>Aye</u>
Councilmember Amy Rojas	<u>Aye</u>
Councilmember Ken Bernstein	<u>Aye</u>

PASSED AND ADOPTED on second reading this 22nd day of September, 2009.

ATTEST:


MAYOR GLENN SINGER


ELIZABETH SEWELL
TOWN CLERK

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY:


STEPHEN J. HELFMAN *attorney in fact.*
TOWN ATTORNEY