

ORDINANCE 2011 - 12

AN ORDINANCE AMENDING APPENDIX "A." FRANCHISES, ARTICLE II. FLORIDA POWER TO GRANT TO FLORIDA POWER CORPORATION d/b/a PROGRESS ENERGY FLORIDA, INC. A NON-EXCLUSIVE ELECTRIC UTILITY RIGHT OF WAY UTILIZATION FRANCHISE; PRESCRIBING THE TERMS AND CONDITIONS RELATED TO THE OCCUPANCY OF MUNICIPAL STREETS AND RIGHTS-OF-WAY IN THE CITY OF BELLEVUE, FLORIDA, FOR THE PURPOSE OF PROVIDING ELECTRIC SERVICE; PROVIDING FOR SEVERABILITY OF PROVISIONS; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, Florida Power Corporation d/b/a Progress Energy Florida, Inc. (hereinafter referred to as "Company") is providing electrical power to residents of the City of Belleview, Florida (hereinafter referred to as "City"); and

WHEREAS, Company is providing electrical power to residents of Marion County, whose property may be annexed into the corporate limits of the City; and

WHEREAS, Company and City have agreed for Company to continue to utilize the City's streets and rights of way to provide electrical power to such persons and their property; and

WHEREAS, Company has agreed to pay the fees as provided herein.

NOW THEREFORE, BE IT ORDAINED by the City Commission of the City of Belleview, Florida, that Appendix "A," Article II of the City Code of Ordinances regarding Franchises is hereby amended to read as follows, to wit:

SECTION 1. Findings.

The City deems it necessary, desirable and in the interest of its citizens to establish a right-of-way utilization franchise (sometimes referred to herein as the "Franchise") granting the Company permission to occupy the Rights-of-Way in the City of Belleview, Florida, for the purpose of providing electric services.

SECTION 2. Short Title.

This Ordinance shall be known as and may be cited as the "Progress Energy Florida, Inc. Right-of-Way Utilization Franchise."

SECTION 3. Definitions.

For the purposes of this ordinance, the following terms, phrases, words, and their derivatives shall have the meaning given herein. When not inconsistent with the context, words in the present tense include the future, words in the plural number include the singular number, and words in the singular number include the plural number. The word "shall" is always mandatory and not merely permissive.

- (A) "Adversely Affected"- For the Company, a loss of one percent (1%) of Base Revenues within the corporate city limits due to Retail Wheeling. For the City, a loss of one percent (1%) of franchise fees due to Retail Wheeling.
- (B) "Annexation" - the adding of real property to the incorporated area within the boundaries of the City, such addition making the real property in every way a part of the City of Belleview.
- (C) "Base Revenues" means all Company's revenues from the retail sale of electricity, net of customer credits, to residential, commercial, and industrial customers and City sponsored street lighting all within the corporate limits of the City.
- (D) "City" – The City of Belleview, Florida.
- (E) "Company" – Florida Power Corp. d/b/a Progress Energy Florida Inc., its successors and assigns.
- (F) "Contraction" - the reversion of real property within the City's municipal boundaries to an unincorporated status (sometimes referred to as "de-annexation").
- (G) "Electric Energy Provider" means every legal entity or association of any kind (including their lessees, trustees or receivers), including any unit of state, federal or local government (including City herein), which owns, maintains, or operates an electric generation, transmission, or distribution system or facilities, or which otherwise provides, arranges for, or supplies electricity or electric energy to the public, or which supplies electricity to itself utilizing Company's distribution or other facilities. Without limitation of the foregoing, "Electric Energy Provider" shall also include every Electric Utility, electric power marketer, or electric power aggregator. It shall also include every entity providing such services as metering, customer billing, payment collection and processing, and customer information and data processing.
- (H) "Electric Utility" shall have the meaning set out in Section 366.02(2), *Florida Statutes* (2010), and shall also include every electric "Public Utility" as defined Section 366.02(1), *Florida Statutes* (2010). "Electric Utility" shall further include every investor owned, municipally or governmentally owned, or cooperatively owned electric utility (including their lessees, trustees or receivers), which owns, maintains, or operates an electric generation, transmission, or distribution system in any State or Country

- (I) "Electric Utility System" means an electric power system installed and operated in the Franchise Area in accordance with the provisions of the Florida Public Service Commission establishing technical standards, service areas, tariffs and operating standards, which shall include but not be limited to electric light, heat, power, and energy facilities, and a generation, transmission, and distribution system, with such extensions thereof and additions thereto as shall hereafter be made.
- (J) "Franchise Area" means that area for which Company provides electric utility service within the corporate City limits of the City.
- (K) "Facilities" has the meaning as set forth in Section 4.
- (L) "Person" means any person, firm, partnership, association, corporation, company or organization of any kind.
- (M) "Public Service Commission" means the Florida Public Services Commission.
- (N) "Right(s)-of-Way" - All of the public streets, alleys, highways, waterways, bridges, sidewalks and parks, and any other public ways or places owned by the City, as they now exist or may be hereafter constructed, opened, laid out or extended within the present limits of the City, or in such territory as may hereafter be added to, consolidated or annexed to the City.
- (O) "Retail Wheeling"- A customer/supplier arrangement whereby an Electric Energy Provider utilizes transmission and/or distribution facilities of Company to make energy sales directly to an end use customer located within the Franchise Area.

SECTION 4. Grant of Authority.

(A) This grant of authority is limited to the provision by Company to place its Facilities within the Rights-of-Way for its electric utility services. Accordingly, the City hereby grants to the Company, its successors and assigns the non-exclusive right, authority, and franchise to lay, erect, construct, maintain, repair and operate its Facilities in, under, upon, over and across the present and future Rights of Way, as they now exist or may be hereafter constructed, opened, laid out or extended within the present limits of the City, including but not limited to conduits, cables, poles, wires, supports and such other structures or appurtenances as may be reasonably necessary for the construction, maintenance and operation of an electric generation, transmission and distribution system, including information, telecommunication, and video transmission used solely for the provision of electric service (collectively the "Facilities"), provided that all portions of the same shall conform to accepted industry standards, including but not limited to the National Electrical Safety Code.

Nothing in this Franchise shall require Company to remove, de-energize, or cease using any poles, wires, or other things or Facilities identified hereinabove that were in place under previous ordinances or permits prior to the effective date of this Franchise, regardless of whether such poles, wires or other Facilities are located outside "Rights-of-Ways" as defined

herein. Nor shall anything in this Franchise prohibit Company from performing upgrades, replacements, maintenance or servicing of such poles, wires, or other Facilities after the Effective Date of this Franchise. Rather, all such preexisting poles, wires, or other Facilities shall be authorized under this Franchise. Because this Franchise is intended to grant Company the non-exclusive, but unrestricted right to place its Facilities within the Rights-of-Ways, the City expressly acknowledges and agrees that Company shall not be required to pay for permits to perform any work maintenance activities on or related to its Facilities within the Rights-of-Ways. Progress Energy Florida, Inc. will submit permit applications to the City for projects within City Rights-of-Way to confirm that its designs will not unreasonably interfere with the safe and continuous use of the public road system in accordance with Florida Statute 337.401 and, upon request of the City, will provide construction plans and design to assure compliance with the NESC safety and design guidelines. This is not to be construed to grant or imply authority upon the City to regulate the design, construction or maintenance of PEF's electric transmission and distribution facilities. Notice will not be required for emergency or maintenance activities.

(B) Annexation or Contraction. City and Company agree that the Franchise Area is subject to expansion or reduction by annexation and contraction of municipal boundaries. If City approves any Franchise Area expansion or reduction by annexation or contraction, City will provide written notice to Company's Annexation Coordinator, at the address provided below, within sixty (60) days of such approval and this Franchise shall automatically extend to include any such annexed areas.

Additionally, within sixty (60) days of any such annexation, contraction or platting process, City shall provide to Company an updated list containing the new or removed street names, known street name aliases, street addresses, and zip codes associated with each street name. All notices of annexation or contraction and address listings shall be addressed to the Annexation Coordinator as follows with the address subject to change:

Progress Energy
Annexation Coordinator
P. O. Box 33199
St. Petersburg, FL 33733-8199
Or by email to : AnnexationRequests@pgnmail.com

Company must revise its payments due to any expansion or reduction by annexation within a reasonable time after Company has received such notice and updated list from City, but no later than sixty (60) days after receipt of notice and the list. City understands and affirmatively acknowledges that the Company will exclusively rely upon the City to provide timely and accurate information to the Company regarding any such annexations or contractions, and that failure to do so will impair, inhibit, and/or preclude the Company's ability to revise any payments due to the City that are impacted by such annexations or contractions. Further, City acknowledges that if such information is not timely furnished to Company as required herein, any related obligation to collect payments shall be suspended during the period of delay.

(C) Non-Exclusive Use. The Company's right to use and occupy Rights-of-Way for the purposes herein set forth shall be non-exclusive as to entities not engaged in the provision of electric energy and service, and the City reserves the right to grant to others the right to utilize the Rights-of-Way, to any person at any time during the period of this Franchise so long as such grant does not create an unsafe condition or unreasonably conflict with the rights granted to Company herein.

(D) The parties acknowledge certain areas within the incorporated areas of the City of Belleview are provided eclectic service by Sumter Electric Cooperative Inc. Parties further acknowledge that certain areas in the surrounding unincorporated area of Marion County which were currently being served by Sumter Electric Cooperative Inc. may be annexed into the corporate limits of the City. Nothing in this agreement was intended nor shall be construed to interfere with or disallow providing such electrical service by Sumter Electric Cooperative Inc.

SECTION 5. Notice of Acceptance and Term of Franchise.

This Ordinance shall become effective upon being legally passed and adopted ("Effective Date") by the City Commission; and it is further agreed that Company shall accept this Franchise as of the date set forth in the Franchise between Company and City. If Company fails to enter the franchise agreement within thirty (30) days of the date of this Ordinance, this Ordinance shall be null and void, and of no force and effect of any kind. The term of the Franchise granted herein shall be for a period of ten (10) years commencing on the Effective Date.

SECTION 6. Payment to City.

(A) Effective the first day of the second month beginning after the Effective Date of this Franchise, City shall be entitled to receive from Company a monthly franchise amount that will equal six percent (6%) of Company's Base Revenues (the "Franchise Fee") for the preceding month, which amount shall be the total compensation due City for any and all rights, authority and privileges granted by this Franchise, including compensation for any required permits, parking fees, or any other fee or cost related to the rights granted hereunder or to do business within the Franchise Area. Any franchise amounts that will be paid to the City will be collected by the Company from Company's customers in the Franchise Area and passed through to the City in the manner described herein. The City expressly acknowledges that no additional or other amounts shall be due or remitted by Company for the exercise of its rights granted hereunder.

(B) Payment shall be made to City for each month no later than the twentieth (20th) day of the following month. The monthly payment shall be made by wire transfer. Any monthly payment or any portion thereof made twenty (20) days after the due date shall be subject to interest calculated at 10% per annum until all payments are made in full.

(C) Only disputed amounts shall be allowed to be withheld by Company, and any such amounts shall not accrue any interest during the pendency of any such dispute.

(D) The City acknowledges that all classifications and categories of customers of Company shall be subject to the payment of the Franchise Fee due hereunder.

SECTION 7. Favored Nations.

(A) In the event Company shall hereafter accept an electric utility franchise agreement or ordinance from any municipality providing for the payment of a franchise fee in excess of that provided for in Section 6 above, Company shall notify City, and City reserves the right to amend this Franchise to increase the franchise fee payable under this Ordinance to no more than the greater franchise fee that Company has agreed to pay to such other municipality. Company's obligation to pay such greater franchise fee to City shall apply prospectively beginning with the next monthly franchisee fee payment following City's timely notice of its exercise of its amendment right to which Company may collect such increased fee from its customers. Company's failure to notify City of such additional payments does not limit City's right to amend to require such additional franchise fees.

(B) It is the intent of this Franchise that Company shall not be required to pay City a franchise fee under Section 6 of a percentage greater than that paid to City by any other Electric Utility or Electric Energy Provider utilizing City's Rights-of-Way on such Electric Utility's or Electric Energy Provider's revenues attributable to services that are the same or substantially the same as those performed by Company. It is further the intent of this Franchise that Company should not be placed at a competitive disadvantage by the payments required by Section 6 of this Franchise in the event other Electric Utilities or Electric Energy Providers provide services in competition with Company without utilizing City's Rights-of-Way.

(C) If City imposes a lesser fee, or no fee, or is unable to impose a fee on another Electric Utility or Electric Energy Provider providing or seeking to provide services in competition with Company to customers within City's municipal boundaries, whether utilizing City's Rights-of-Way or not utilizing City's Rights-of-Way, Company's fee under Section 6 for such services shall be automatically reduced to the lesser fee charged the other Electric Utility or Electric Energy Provider (or to zero, if no fee is charged such other Electric Utility or Electric Energy Provider). In all events, City shall not grant more favorable treatment to other Electric Energy Providers than is granted to Company under this Franchise, it being the intent of the parties that no future provider of electric service, be it generation, transmission or distribution service, to customers within the corporate limits of City shall be given a competitive advantage over Company.

SECTION 8. City Rights.

The right is hereby reserved to the City to adopt such regulations as it shall find necessary in the exercise of its police power, provided that such regulations, by agreement or otherwise, shall be reasonable, and shall not be in conflict with the laws of the State of Florida or the lawful regulations of any state agency possessing the power to regulate the activities of the Company, or conflict with or otherwise interfere with the benefits conferred on the Company hereunder. In the event of a conflict between this Franchise and any other ordinance or regulation adopted by the

City relating to Company's rights to perform work in and/or occupancy of the Rights-of-Way as permitted hereunder, the rights under this Franchise shall govern and control.

SECTION 9. Work In Rights-Of-Way.

The Company is hereby granted the right, authority and privilege to perform all necessary work and excavations in said Rights-of-Way of the City related to its Facilities and necessary or incidental to carrying out such rights and obligations as permitted hereunder. The Company shall have the right to fasten and to stretch and lay along the lines of said poles, conduits, pipes and cables necessary for transmitting and conveying the electric current to be used in the Company's business, together with all the right and privileges necessary or convenient for the full use including the right to trim, cut and keep clear all trees and limbs near or along Company's Facilities that may in any way endanger the proper operation of same. Moreover, the Company shall have the right to construct, erect, operate and maintain within the City an electric system consisting of its Facilities for carrying on the Company's business; provided that, in accomplishing these purposes, the streets of said City shall not be unnecessarily obstructed for an unreasonable amount of time and work in connection therewith shall be done and carried on in conformity with such reasonable rules, standards, regulations and local ordinances with reference thereto as may be adopted by the City for the protection of the public and which are not in conflict with or otherwise interfere with the benefits conferred on the Company hereunder.

SECTION 10. Indemnification.

(A) The acceptance of this Franchise by Company shall be deemed an agreement on the part of Company to indemnify City and hold it harmless against any and all direct damages, claims, expenses, reasonable attorneys' fees (including appellate fees) and costs that City may incur to the extent arising out of or resulting from the negligence, default, or misconduct of Company, its contractors and agents in the construction, repair, operation, or maintenance of its electric utility Facilities hereunder. In no event shall Company be liable to City for any consequential, incidental, punitive, exemplary, multiple, or indirect damages, lost profits or other business interruption damages, by statute, in tort (including negligence or strict liability), in contract, or under any indemnity provision or otherwise.

(B) Company shall maintain throughout the term of this Franchise sufficient financial resources to provide self-insurance insuring City and Company with regard to all damages set forth in Section 8(A) in the minimum amounts of:

- (i) \$1,000,000 for bodily injury or death to a person;
\$3,000,000 for bodily injury or death resulting from any one accident.
- (ii) \$1,000,000 for property damage resulting from any one accident.
- (iii) \$1,000,000 for all other types of liability resulting from any one accident.

(C) City acknowledges that Company provides its own liability insurance (self-insured). The City will require access to Company's annual report demonstrating that Progress has

sufficient financial resources to provide the minimum self-insurance coverage set forth in Section 10.B.

SECTION 11. Records and Reports.

(A) Company Rules and Regulations. The following records and reports shall be available to City upon City's reasonable request: copies of rules, regulations, terms and conditions adopted by Company that relate to Company's use of City's Rights-of-Way.

(B) Accounting. Company shall use the system of accounts and the form of books, accounts, records, and memoranda prescribed by the Florida Public Service Commission or such other applicable governing agency having jurisdiction over Company.

(C) Reports. Company will submit monthly a statement of its estimated Base Revenues for the period on which such payment is based. The acceptance of any statement or payment shall not prevent the City from asserting that the amount paid is not the amount due, or from recovering any deficit by any lawful proceeding, including interest to be applied at the rate set forth in Section 6(B).

(D) Availability of Records and Reports. Company shall supply information that City or its representatives may from time to time reasonably request relative to the calculation of franchise fees. Such records shall, on written request of City, be open for examination and audit by City and City's representatives at Company's headquarters in St. Petersburg, Florida, during ordinary business hours and such records shall be retained by Company for a period of three (3) fiscal years, provided the applicable audits have been released and resolved.

(E) Audit. City may require, upon prior written notice and during Company's normal business hours, an audit of Company's books related to this Ordinance at minimum once every five (5) years, and then only for the preceding three years. Company will reimburse City's audit costs if the audit identifies errors in Company's Franchise Base Revenues of five percent (5%) or more for the period audited. If an underpayment of franchise fees has occurred due to the Company's error, interest will be calculated for each month of the underpayment period at a rate of 10% per annum. Both the underpayment and interest shall be paid within ninety (90) days from completion of the audit.

(F) Customer Report. In addition to City's obligations in Section 4(B), within 90 days of the Effective Date of this Franchise, City shall provide to Company a report in a format acceptable to Company setting forth a listing of all addresses within the corporate limits of the City and annually thereafter a report identifying any changes to the address listing provided the previous year.

SECTION 12 Retail Wheeling.

In the event the appropriate governmental authorities authorize Retail Wheeling, then either party, if Adversely Affected thereby, may reopen this Ordinance upon thirty (30) days written notice to the other for the sole purpose of addressing the Franchise Fee payments between The

Company and The City. If the parties are unable to agree within ninety (90) days of reopening, either party may declare an impasse and may file an action in the Circuit Court in Marion County, Florida for declaratory relief as to the proper Franchise Fee in light of Retail Wheeling.

SECTION 13. Severability. Should any section or provision of this Franchise Ordinance or any portion thereof, the deletion of which would not adversely affect the receipt of any material benefits or, substantially increase the burden of any party hereunder, 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 any part thereof, other than the part declared to be invalid. In the event of any such partial invalidity, City and Company shall meet and negotiate in good faith to obtain a replacement provision that is in compliance with the judicial authority's decision.

SECTION 14. Governing Law and Venue.

(A) This Franchise Ordinance shall be construed and interpreted according to the laws of the State of Florida.

(B) In the event that any legal proceeding is brought to enforce the terms of this Franchise, the same shall be brought in Marion County, Florida, or, if a federal claim, in the U.S. District Court in and for the Middle District of Florida, Ocala Division.

SECTION 15. Merger.

This Franchise Ordinance embodies the full, complete and entire understanding of the parties, as set forth in their non exclusive franchise agreement, and the written terms supersede all prior contemporaneous representations, discussions, negotiations, understanding and agreements relating to the subject matter of this Franchise. The parties shall not be bound or liable for any statement, prior negotiations, correspondence, representation, promise, draft agreements, inducements, or other understanding of any kind or nature not set forth or provided in their written non exclusive franchise agreement and reiterated herein.

SECTION 16. Notices.

Except in exigent circumstances, all notices by either City or Company to the other shall be made by depositing such notice in the United States Mail, Certified Mail return receipt requested or by recognized commercial delivery, e.g. FedEx, UPS or DHL or facsimile. Any notice served by certified mail return receipt shall be deemed delivered five (5) days after the date of such deposit in the United States mail unless otherwise provided. Any notice given by facsimile is deemed received by next Business Day. "Business Day" for purposes of this section shall mean Monday through Friday, with Saturday, Sunday and City and Company observed holidays excepted. All notices shall be addressed as follows:

To City:

City Clerk/Administrator
5343 Southeast Abshier Boulevard
Bellevue, FL 34420

To Company:

External Relations Department
Progress Energy Services Company, LLC
P.O. Box 14042

Phone: (352) 245-7021
Facsimile No.: (352) 245-6532

St. Petersburg, FL 33733-4042
Facsimile No.: (727) 820-5715

SECTION 17. Non-Waiver Provision.

The failure of either party to insist in any one or more instances upon the strict performance of any one or more of the terms or provisions of this Franchise shall not be construed as a waiver or relinquishment for the future of any such term or provision, and the same shall continue in full force and effect. No waiver or relinquishment shall be deemed to have been made by either party unless said waiver or relinquishment is in writing and signed by the parties.

SECTION 18. Repealer And Superseding Provision.

This Ordinance shall supersede, as to the rights, privileges and obligations between City and Company, all Ordinances and parts of Ordinances in conflict with the terms of this Ordinance. Ordinance No. 2001-08 and any amendments thereto, are hereby deemed null and void and will be repealed upon the effective date of the this Ordinance, and none of the provisions of such repealed Ordinance No. 2001-08 and any amendments thereto shall have any further force and effect.

SECTION 19. Dispute Resolution.

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 in an attempt to resolve any differences. If such informal effort is unsuccessful, then the Parties may exercise any of their available legal remedies.

EFFECTIVE DATE. This Ordinance shall be effective as provided hereinabove.

CERTIFICATE OF ADOPTION AND APPROVAL

The above and foregoing Ordinance was duly read and adopted upon First Reading by a 5-0 vote of the City Commission of the City of Belleview, Florida, at a Regular Meeting held on May 17, 2011. Said Ordinance was duly read, passed and adopted upon Final Reading by a 5-0 vote of the City Commission of the City of Belleview, Florida, at a Public Meeting held on the June 7, 2011.

TAMMY C. MOORE
Mayor/Commissioner

ATTEST:

SANDI McKAMEY, MMC, CPM
City Clerk/Administrator

APPROVED AS TO FORM AND LEGALITY:

FREDERICK E. LANDT, III
City Attorney

CERTIFICATE OF POSTING

I HEREBY CERTIFY that copies of the foregoing Ordinance were posted at City Hall, and the Chamber of Commerce, in the City of Belleview, Florida, this ____ day of _____, 2011.

MARGARET DeGENNARO, MMC, CPS
Deputy City Clerk