

ORDINANCE NO. 2024-237

AN ORDINANCE OF THE VILLAGE COUNCIL OF INDIAN CREEK VILLAGE, FLORIDA GRANTING TO FLORIDA POWER & LIGHT COMPANY, ITS SUCCESSORS AND ASSIGNS, A NON-EXCLUSIVE ELECTRIC FRANCHISE, IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO; PROVIDING FOR MONTHLY PAYMENT OF A FRANCHISE FEE TO THE VILLAGE; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Village Council of Indian Creek Village (the “Village”) recognizes that the Village and its citizens need and desire the continued benefits of electric service; and

WHEREAS, the provision of such electric 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 Village does not desire to undertake to provide such services at this time; and

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

WHEREAS, there is currently in effect a franchise agreement between the Village and FPL, the terms of which are set forth in Village Ordinance 102, passed and adopted on September 28, 1995, which grants a thirty (30) year non-exclusive electric franchise to FPL to utilize rights of way throughout the Village, in return for FPL paying the Village certain franchise fees, among other things as expressly provided therein; and

WHEREAS, FPL and the Village desire to enter into a new franchise agreement (“New Franchise Agreement”) providing for the payment of fees to the Village in exchange for the nonexclusive right and privilege of supplying electricity and other services within the Village free of competition from the Village, pursuant to certain terms and conditions; and

WHEREAS, the Village Council 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 rights-of-way within the Village’s jurisdiction.

NOW, THEREFORE, THE VILLAGE COUNCIL OF THE VILLAGE OF INDIAN CREEK, FLORIDA, HEREBY ORDAINS AS FOLLOWS:¹

Section 1. Incorporation of Recitals. The above-stated recitals are true and correct and are incorporated herein by this reference.

Section 2. Grant of Electric Utility Franchise; Term of Franchise. There is hereby granted to Florida Power & Light Company, its successors and assigns (hereinafter called "FPL"), 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 area, as such incorporated areas may be constituted from time to time, of Indian Creek Village, Florida, and its governmental successors by operation of law, if any, (hereinafter called the "Village"), in accordance with FPL's customary practices, and practices prescribed herein, with respect to construction and maintenance, electric light and power facilities, including, without limitation, conduits, underground conduits, poles, wires, transmission and distribution lines, and all other facilities installed in conjunction with or ancillary to all of FPL's operations (herein called "Facilities"), for the purpose of supplying electricity and other related services to the Village and its successors, the inhabitants thereof, and persons beyond the limits thereof.

Section 3. Facilities Requirements.

- a) FPL's Facilities shall be installed, constructed, erected, 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 traffic over the Public Rights-Of-Way, nor unreasonably interfere with reasonable egress from and ingress to abutting property.
- b) To minimize 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 Village may prescribe in accordance with the Village's reasonable rules and regulations with reference to the placing and

¹ Additions to existing code text are shown by underline; deletions from existing code text are shown by ~~striketrough~~. Changes between first and second reading are indicated with **highlight**.

maintaining in, under, upon, along, over and across said Public Rights-Of-Way; provided, however, that such rules or regulations (i) shall be for a valid municipal purpose; (ii) shall not prohibit the exercise of FPL's right to use said Public Rights-Of-Way for reasons other than unreasonable interference with traffic or transit; (iii) shall not unreasonably interfere with FPL's ability to furnish reasonably sufficient, adequate and efficient electric service to all of its customers; and (iv) shall not require the relocation of any of FPL'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 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 be installed near the outer boundaries of the Public Right-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 FPL's agents, contractors, or subcontractors) because of the installation, inspection, or repair of any of FPL's Facilities, the portion of the Public Right-Of-Way so excavated, damaged, or impaired shall, within a reasonable time after such excavation, damage, or impairment, be restored by FPL at its expense to a condition at least equal to its original condition before such damage.
- e) The Village shall not be liable to FPL for any cost or expense in connection with any relocation of FPL's Facilities required under this New Franchise Agreement, except, however, FPL shall be entitled to reimbursement of its costs from others.
- f) FPL shall comply with the Village's valid code and permit requirements and regulations, including those relating to rights-of-way. Except as expressly provided, nothing herein shall limit or alter the Village's existing rights with respect to the use or management of its rights-of-way. Any changes in law on utility easements shall not affect this New Franchise Agreement.

Section 4. Indemnification of the Village. The acceptance of this New Franchise Agreement shall be deemed an agreement on the part of FPL to the following: (a) that FPL will defend, indemnify and save the Village harmless from any and all damages, claims, liability, losses and causes of action of any kind or nature arising out of an error, omission, or negligent act of FPL, its contractors 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; and (b) that FPL will pay all damages, claims, liabilities and losses of any kind or nature whatsoever, in connection therewith, including the Village's attorney's fees and costs in the defense of any action in law or equity brought against the Village, including appellate fees and costs and fees and costs incurred to recover attorney's fees and costs from FPL, arising from the error, omission, or negligent act of FPL, its contractors 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. Rates, Rules and Regulations of FPL. 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. Franchise Fee; Calculation; Payment.

- a) Notwithstanding any other provision in this New Franchise Agreement, as a consideration for this Franchise, FPL shall pay to the Village, commencing ninety (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 (except ad valorem property taxes and non-ad valorem tax assessments on property) levied or imposed by the Village against FPL's property, business or operations and those of its electric service subsidiaries during FPL's monthly billing period ending sixty (60) days prior to each such payment will equal six (6.0%) 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 Village's boundaries for the monthly billing period ending sixty (60) days prior to each such payment, and in no event shall payments for the rights and privileges granted herein exceed six (6.0%) percent of such revenues for any monthly billing period of FPL (except as expressly provided in this New Franchise Agreement). For

purposes of this section, the term “write-offs” refers to uncollectable billed revenues from the sale of electrical energy to residential, commercial, and industrial customers within the Village’s boundaries.

- b) The Village 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), so long as not done as a circumvention hereof; (e) Late Payment Charges; (f) Field Collection Charges; (g) other service charges.
- c) **Increased Benefits Clause.** If during the term of this New Franchise Agreement, FPL enters into a franchise agreement with any other municipality located in Miami-Dade County, Florida or Broward County, Florida, or with Miami-Dade County itself or with Broward County itself, each such municipality or county referred to herein as an "Other Governmental Entity," where the number of FPL’s active electrical customers is equal to or less than the number of FPL’s active electrical customers within the Village’s boundaries, the terms of which provide for the payment of franchise fees by FPL at a rate greater than six (6.0%) percent of FPL’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(a) hereof, FPL, upon written request of the Village, shall negotiate and enter into a new franchise agreement with the Village 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 any such Other Governmental Entity, provided, however, that if the franchise with such Other Governmental Entity contains additional benefits given to FPL in exchange for the increased franchise rate, which such additional benefits are not contained in this New Franchise Agreement, such new franchise agreement

shall include those additional or reasonably equivalent benefits to FPL. Subject to all limitations, terms and conditions specified in the preceding sentence, the Village 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.

Section 7. Non-Competition by Village. As a further consideration, during the term of this franchise or any extension thereof, the Village 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 presently served by FPL within the Village's limits; 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 Village from engaging with other utilities or persons in wholesale transactions which are subject to the provisions of the Federal Power Act, as may be amended from time to time.

The Village may, if permitted by law, (i) generate electric capacity and/or energy at any facility owned or leased by the Village for storage or utilization at that facility or other Village-owned or leased facilities as chosen by the Village, and (ii) use renewable energy sources to generate electric capacity and/or energy for use in demonstration projects or at Village facilities, including but not limited to, Village Hall, and (iii) sell electric capacity and/or energy to FPL or other wholesale purchasers in compliance with applicable tariffs, and/or federal or state laws, rules and regulations controlling such transactions. The term "retail customer," for purposes of this section shall not include the Village itself.

Subject to compliance with applicable tariffs, nothing herein shall prohibit or limit a customer of FPL, including the Village, if permitted by law, from installing an approved renewable generation system to generate electric energy for use at the customer's or the Village's premises, respectively. Furthermore, subject to compliance with applicable tariffs, nothing herein shall prohibit or limit a person, including the Village, if permitted by law, from selling renewable energy or capacity to FPL.

Nothing herein shall prohibit the Village, if permitted by law, (i) from purchasing electric capacity and/or electric energy from any other person, or (ii) from seeking to have FPL transmit

and/or distribute to any facility(ies) of the Village electric capacity and/or electric energy purchased by the Village from any other person; provided, however, that before the Village elects to purchase electric capacity and/or electric energy from any other person, the Village shall notify FPL. Such notice shall include a summary of the specific rates, terms and conditions which have been offered by the other person and identify the Village's facilities to be served under the offer. FPL shall thereafter have ninety (90) days to evaluate the offer and, if FPL offers rates, terms and conditions which are equal to or better than those offered by the other person, the Village shall be obligated to continue to purchase from FPL electric capacity and/or electric energy to serve the previously identified facilities of the Village for a term no shorter than that offered by the other person. If FPL does not agree to rates, terms and conditions which are equal to or better than the other person's offer, all of the remaining terms and conditions of this Franchise shall remain in effect.

Section 8. Competitive Disadvantage; FPL's Rights. If the Village grants a right, privilege or franchise to any other person to construct, operate or maintain electric light and power facilities within any part of the Village's boundaries 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 remedied within the time period provided hereafter. FPL shall give the Village 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 Village of such terms and conditions that it considers more favorable and the objective basis or bases of the claimed competitive disadvantage. The Village shall then have ninety (90) days in which to correct or otherwise remedy the terms and conditions complained of by FPL, and the Village and FPL agree to negotiate in good faith toward a mutually acceptable resolution of FPL's claims during this 90-day period. If FPL reasonably determines that such terms or conditions are not remedied by the Village within said time period, and if no mutually acceptable resolution is reached by FPL and the Village through negotiation, FPL may terminate this Franchise agreement by delivering written notice to the Village's Clerk, Village's Manager, and Village's Attorney, and termination shall be effective ninety (90) days from the date of delivery of such notice. Nothing contained herein shall be construed as constraining the Village's rights to legally challenge at any time FPL's determination leading to termination under this Section.

Section 9. Legislative or Regulatory Action. If as a 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 Village's boundaries to a customer then being served by FPL, or to any new applicant for electric service within any part of the Village's boundaries 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 material 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 is not remedied as provided hereafter. Such competitive disadvantage can be remedied by either of the following methods: (i) if the Village either cannot legally, or does not, charge a franchise fee to other electricity supplier(s), then the Village can remedy the disadvantage by reducing FPL's franchise fee rate to zero; or (ii) if the Village is able to charge, and does charge, such other electricity supplier(s) a franchise fee at a rate less than the 6.0% rate calculated as provided in Section 6 of this Agreement, then the Village can remedy the disadvantage by reducing FPL's franchise fee rate to the same rate, with the same applicability and calculation methodology, as applies to such other electricity supplier(s). If the Village does not implement either of the foregoing solutions, FPL may terminate the Agreement, in accordance with the following process: FPL shall give the Village 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 Village of the consequences of such action which resulted in the competitive disadvantage and the objective basis or bases of the claimed competitive disadvantage, and the Village and FPL agree to negotiate in good faith toward a mutually acceptable resolution of FPL's claimed disadvantage during this 180-day period. If such competitive disadvantage is, in the reasonable determination of FPL, not remedied by the Village within said time period, and if no mutually acceptable resolution of the matter is reached through negotiation, FPL may terminate this franchise agreement by delivering written notice to the Village's Clerk and termination shall take effect ninety (90) days from the date of delivery of such notice. Nothing contained herein shall be construed as constraining the Village's rights to legally challenge at any time FPL's determination of competitive disadvantage leading to termination under this section.

Section 10. FPL's Failure to Comply. Failure on the part of FPL to comply in any material 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 within Miami-Dade County, Florida that FPL has failed to comply in a material respect with any of the provisions of this Franchise, and FPL shall have six (6) months after such final determination to make good the default before a forfeiture shall result with the right of the Village, at its discretion, to grant such additional time to FPL for compliance as necessities in the case require.

Section 11. Village's Failure to Comply. Failure on the part of the Village to comply in material respect with any of the provisions of this ordinance, 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 express terms and conditions of this Franchise; (c) unreasonable delay in issuing FPL a use permit, if any, to construct its Facilities in Public Rights-Of-Way, shall constitute breach of this Franchise. FPL shall notify the Village of any such breach in writing sent by United States Certified Mail, return receipt requested, or via a nationally recognized overnight courier service, and the Village shall then remedy such breach within ninety (90) days and if it is not a breach that can be remedied within ninety (90) days, then 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 remedy of obtaining judicial relief that permits the withholding of franchise fees. The Parties recognize and agree that nothing in this New Franchise Agreement constitutes or shall be deemed to constitute a waiver of either party's delegated sovereign right of condemnation and that either party, in its sole discretion, may exercise such right.

Section 12. Audit and Inspection. The Village may, at its expense, upon reasonable notice and within ninety (90) days after each anniversary date of this Franchise, examine FPL's records 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 Village's expense and as the Village 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 Village, shall be reported to FPL. The Village's examination of FPL's records in accordance with this Section shall not be conducted by any third party employed or retained by the Village whose fee,

in whole or part, for conducting such audit is contingent on findings of the audit. At the Village's request no more than once annually, FPL will provide to the Village an electronic version of a billing list of all FPL customer addresses within the incorporated areas of the Village. The Village will respect FPL's confidential documents. The Village will be given access to confidential documents while on FPL premises but shall not remove those confidential documents from FPL premises unless expressly authorized to do so by FPL. Information relative to this audit and likely to be deemed confidential by FPL includes, but is not limited to, nonpublic customer or customer account information, nonpublic policies and procedures, and any other nonpublic information that gives FPL an opportunity to gain an advantage over its competitors.

Section 13. Severability. 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, the Parties will negotiate in good faith to amend this New Franchise Agreement so as to restore to the maximum extent permissible, the original economic bargain embodied in this ordinance. If an agreement to amend the ordinance is not reached at the end of such ninety (90) day period, this entire ordinance shall become null and void and of no further force or effect.

Section 14. Definitions. 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. All ordinances and parts of ordinances and all resolutions and parts of resolutions in conflict herewith are hereby repealed to the extent of such conflict.

Section 16. Effective Date. As a condition precedent to the taking effect of this Ordinance, FPL shall file its acceptance hereof with the Village's Clerk within thirty (30) days of adoption of this Ordinance. The effective date of this Ordinance shall be when the Current Agreement terminates by the expiration of time or on the effective date of a new franchise agreement between Miami-Dade County and FPL, whichever occurs first.

Section 17. Pre-Suit 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 they will meet at the senior management level in an attempt to resolve any disputes within thirty (30) days of notification of the dispute.

Section 18. Governing Laws. This New Franchise Agreement shall be governed and construed by the applicable laws of the Federal Government, State of Florida, Miami-Dade County, and the Codes and Ordinances of the Village.

Section 19. Venue. In the event that any legal proceeding is brought to enforce the terms of this New Franchise Agreement, 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 20. Entire Agreement. This New Franchise Agreement is intended to constitute the sole and entire agreement between the Village and FPL with respect to the subject matter hereof and correctly sets forth the rights, duties, and obligations of each of the other as of its date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force or effect, and this agreement supersedes all prior drafts and verbal or written agreements, commitments, or understandings, which shall not be used to vary or contradict the expressed terms herein. Both parties have been represented by counsel of their choosing with regard to this New Franchise Agreement.

Section 21. Modification. It is further understood that no modification, amendment or alteration in the terms or conditions contained herein shall be effective unless contained in a written document executed with the same formality and of equal dignity herewith and approved by the Village Council.

Section 22. Notice. Except in exigent circumstances, and except as may otherwise be specifically provided for in this Franchise, all notices by either party shall be made by United States Certified Mail, return receipt requested, or via a 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 Village:

Village Manager
Village Hall
9080 Bay Drive
Indian Creek Village, FL 33154

To FPL:

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

Copy to:

Village Attorney
Weiss Serota Helfman
Cole & Bierman, P.L.
2800 Ponce de Leon Boulevard
Suite 1200
Coral Gables, FL 33134

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 23. Compliance with Federal, State and Local Laws. The Village and FPL agree to comply with and observe all applicable Federal, State and valid and non-preempted local laws, rules, regulations, codes and ordinances, as they may be amended from time to time.

Section 24. Nondiscrimination. FPL represents and warrants to the Village that FPL does not and will not engage in discriminatory practices and that there shall be no discrimination in connection with FPL's performance under this Franchise on account of race, color, sex, religion, age, handicap, marital status or national origin. FPL further covenants that no otherwise qualified individual shall, solely by reason of his/her race, color, sex, religion, age, handicap, marital status or national origin, be excluded from participation in, be denied services, or be subject to discrimination under any provision of this Franchise.

Section 25. Approval of Agreement. Execution of this Ordinance by the Village Manager, the Village Attorney, and the Village Clerk, shall constitute evidence of the New Franchise Agreement's approval after public hearing by the Village Council.

Section 26. Attorney's Fees and Costs. In the event either the Village or FPL must initiate litigation to enforce this New Franchise Agreement, the prevailing party shall be entitled to an award of all reasonable attorney's fees and costs, at all levels of litigation, including trials and appeals, including but not limited to fees for litigating entitlement to and amount of attorney's fees.

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PASSED on the first reading on the 16th day of April 2024.

PASSED AND ADOPTED on the second reading on the 8th day of July 2024.



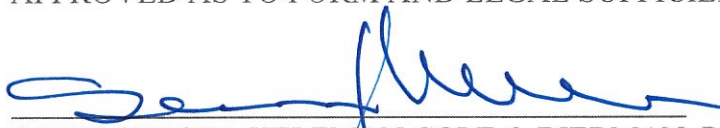
BERNARD KLEPACH
MAYOR

ATTEST:



ROSEANN PRADO, VILLAGE CLERK

APPROVED AS TO FORM AND LEGAL SUFFICIENCY:



WEISS SEROTA HELFMAN COLE & BIERMAN, P.L.
VILLAGE ATTORNEY