

ORDINANCE 2009-24

AN ORDINANCE OF THE TOWN OF MALABAR, BREVARD COUNTY, 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 MALABAR; PROVIDING THAT THE GRANTOR SHALL NOT BE LIABLE FOR CERTAIN ACCIDENTS AND DAMAGES; PROVIDING THAT THE FRANCHISEE'S RATES AND REGULATIONS SHALL BE SUBJECT TO REGULATION AS PROVIDED BY LAW; SPECIFYING THE CONSIDERATION FOR THE FRANCHISE; PROVIDING FOR CERTAIN RESTRICTIONS UPON THE TOWN; SPECIFYING CERTAIN CONDITIONS UNDER WHICH THE FRANCHISEE MAY WITHHOLD CERTAIN PORTIONS OF FRANCHISE FEE PAYMENTS TO THE TOWN; SETTING FORTH THE RESULTS OF A DEFAULT BY THE TOWN OR BY THE FRANCHISEE; PROVIDING FOR TERMINATION OF THE FRANCHISE AGREEMENT; PROVIDING FOR AN EXAMINATION OF THE FRANCHISEE'S RECORDS; PROVIDING FOR A REPEAL OF ORDINANCE NO. 11-7-79; PROVIDING FOR AN EFFECTIVE DATE AND AN ADOPTION SCHEDULE.

WHEREAS, the Town Council of the Town of Malabar, Florida recognizes that the Town of Malabar 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 of Malabar does not desire to undertake to 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 of Malabar and FPL, the terms of which are set forth in Town of Malabar Ordinance No. 11-7-79, passed and adopted February 19, 1980, and FPL's written acceptance thereof dated February 27, 1980 granting to FPL, its successors and assigns, a thirty (30) year electric franchise ("Current Franchise Agreement"); and

WHEREAS, FPL and the Town of Malabar desire to enter into a new agreement (New Franchise Agreement) providing for the payment of fees to the Town of Malabar in exchange for the nonexclusive right and privilege of supplying electricity and other pursuant to certain terms and conditions, and

WHEREAS, the Town Council of the Town of Malabar deems it to be in the best interest of the Town of Malabar 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

MALABAR, FLORIDA:

Section 1. 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 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 of Malabar, Florida, and its successors (hereinafter called the "Grantor"), in accordance with the National Electrical Safety Code and the Grantee's customary practice with respect to construction and maintenance, electric light and power facilities, including, without limitation, conduits, poles, wires, transmission and distribution lines, substations, foundations, supports, supporting and containing structures 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 directly electric-related services to the Grantor and its successors, the inhabitants thereof, and persons beyond the limits thereof.

Section 2. The facilities of the Grantee shall be installed, located or relocated so as to not unreasonably interfere with traffic over the public rights-of-way or with reasonable ingress and egress to abutting property. It is the intent of the foregoing provision that all lanes of travel shall remain accessible for use by vehicular traffic. To avoid conflicts with traffic, the location and relocation of all facilities shall be made as representatives of the Grantor may prescribe in accordance with the Grantor's reasonable rules and regulations, as revised, repealed or promulgated from time to time, with reference to the placing and maintaining in, under, upon, along, over and across said public rights-of-way; provided, however, that such rules or regulations (a) shall not prohibit the exercise of the Grantee's right to use said public rights-of-way for reasons other than unreasonable interference with motor vehicular traffic, (b) shall not unreasonably interfere with the Grantee's ability to furnish reasonably sufficient, adequate and efficient electric service to all of its customers, and (c) shall not require the relocation of any of the Grantee's facilities installed before or after the effective date hereof in public rights-of-way unless or until widening or other work changing the configuration of the paved, or if the public right-of-way is unpaved, on the traveled portion of any public right-of-way used by motor vehicles causes such installed facilities to unreasonably interfere with motor vehicular traffic. Such rules and regulations shall recognize that above-grade facilities of the Grantee installed after the effective date hereof should be installed near the outer boundaries of the public rights-of-way to the extent possible. When any portion of a public right-of-way is excavated by the Grantee in the location or relocation of any of its facilities, the portion of the public right-of-way so excavated shall within a reasonable time be replaced by the Grantee at its expense and in as good condition as it was at the time of such excavation. The Grantor shall not be liable to the Grantee for any cost or expense in connection with any relocation of the Grantee's facilities required under subsection (c) of this Section, except, however, the Grantee shall be entitled to reimbursement of its costs from others and as may be provided by law.

Section 3. The Grantor shall in no way be liable or responsible for any accident, personal injury, property damage or any claim or damage that may occur in the construction, installation, operation, removal, repair, relocation, or maintenance by the Grantee its employees, agents, contractors, subcontractors, sub-lessees or licensees, in connection with or relation to its facilities hereunder. The acceptance of the franchise granted pursuant to this New Franchise Agreement by the Grantee shall be deemed an agreement on the part of the Grantee to indemnify the Grantor, its officials, employees, and agents, 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 or other third party arising from the construction, installation, operation, removal, repair, or maintenance of its facilities hereunder. The Grantor agrees that neither it nor its officers, employees, or agents, all in their official capacity, shall be indemnified to the percentage of its or their fault in an accident or other occurrence that Grantor or its officers, employees, agents, or volunteers, all in their official capacity, is responsible for in any incident for damages or injuries (including but not limited to injury or death) arising from the gross negligence and wanton, willful, and intentional misconduct of the Grantor or its officers, employees, agent, or volunteers. For an additional Ten Dollars (\$10.00) paid to the Grantee, and for other good and valuable consideration, the receipt of which is hereby acknowledged by the Grantee, the Grantee agrees that it has received sufficient consideration for its agreement to indemnify the Grantor as set forth above.

Section 4. Except as otherwise provided by this Franchise Agreement, 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. 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 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 5.9 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 5.9 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, as in the existing franchise Ordinance No. 11-7-79, 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 6. As a further consideration, during the term of this franchise or any extension thereof, the Grantor agrees: (a) not to engage in the distribution and/or sale, in competition with the Grantee, of electric capacity and/or 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 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 terms and conditions of this franchise shall remain in effect as otherwise provided herein.

Section 7. If the Grantor grants a right, privilege or franchise to any other person or otherwise enables any other such person to construct, operate or maintain electric light and power facilities within any part of the incorporated areas of the Grantor in which the Grantee may lawfully serve or compete on terms and conditions which the Grantee 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 include the terms and conditions that it considers more favorable and the objective basis or bases of the claimed competitive disadvantage. The Grantor shall then have 90 days in which to correct or otherwise remedy the terms and conditions complained of by the Grantee. If the Grantee determines that such terms or conditions are not remedied by the Grantor within said time period, the Grantee may terminate this 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 8. If as a direct or indirect consequence of any legislative, regulatory or other action by the United States of America or the State of Florida (or any department, agency, authority, instrumentality or political subdivision of either of them) any person is permitted to provide electric service within the incorporated areas of the Grantor to a customer then being served by the Grantee, or to any new applicant for electric service within any part of the incorporated areas of the Grantor in which the Grantee may lawfully serve, and the Grantee 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 the Grantee, 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, and the objective basis or bases of 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, in the reasonable determination of the Grantee, not remedied by the Grantor within said time period, the Grantor's Clerk and termination shall take effect on the date of delivery of such notice. Notwithstanding

the foregoing, upon written request of the Grantor within the 90 day period for a face to face meeting between representatives of the Grantor and Grantee, Grantee agrees that it shall meet with Grantor prior to terminating the franchise agreement. Nothing contained herein shall be construed as constraining Grantor's rights to legally challenge FPL's reasonable determination of competitive disadvantage leading to termination under Sections 7 and/or 8.

Section 9. Failure on the part of the Grantee to comply in any substantial respect with any of the provisions of this franchise shall be grounds for forfeiture, but no such forfeiture shall take effect if the reasonableness or propriety thereof is protested by the Grantee until there is final determination (after the expiration or exhaustion of all rights of appeal) by a court of competent jurisdiction that the Grantee has failed to comply in a substantial respect with any of the provisions of this franchise, and the Grantee shall have six months after such final determination to make good the default before a forfeiture shall result with the right of the Grantor at its discretion to grant such additional time to the Grantee for compliance as necessities in the case require. Such final determination by a court of competent jurisdiction, including any final appellate determination or ruling, shall allow Grantor to proceed with its choice of remedies, provided, however, that the Grantor may, in its discretion, grant such additional time to the Grantee for compliance as the Grantor determines are in the best interests of Grantor and Grantor's citizens. Non-substantial or non-material defaults or failures by the Grantee shall be remediable pursuant to any available legal remedies.

Section 10. 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; (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. That the Grantor and Grantee agree that the New Franchise Agreement created by this ordinance and Grantee's acceptance hereof, shall terminate by its own terms at 12:01 a.m. thirty (30) years after the effective date of the Franchise Agreement.

Section 12. 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; provided that, in all events, Grantee agrees that all said records shall be made available at Grantee's expense to Grantor in Palm Beach, Miami-Dade, or Brevard County, Florida. 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.

Grantor may, upon reasonable notice given within one year following the Grantee's acceptance of this New Franchise Agreement, conduct a final audit of the Grantee's records relating to the calculation of the franchise payments that have been made to Grantor pursuant to the Current Franchise Agreement embodied in Ordinances No. 11-7-79. Other than any claims arising from alleged fraud, deceit, misrepresentation, intentional withholding of information, or other similar intentional misconduct by Grantee in relation to the calculation or remittance of the franchise payments under the Current Franchise Agreement, Grantor waives, settles and bars all claims relating to the amounts paid by the Grantee under the Current Franchise Agreement embodied in Ordinances No. 11-7-79. Grantor agrees that this instrument waives, settles and bars any claim by Grantee, its successors or assigns of, and any right of Grantee, its successors or assigns to claim, a breach, material or otherwise, of the franchise by the Grantor embodied in Ordinance No. 11-7-79.

Section 13 That upon the Grantor's annexation of any property and appropriate written notice to Grantee, the portion of Grantee's electrical system located within such annexed territory, and in, under, over, and upon the streets, alleys, rights-of-way, or public grounds of such annexed territory, shall be subject to all the terms of this New Franchise Agreement within ninety (90) days of the Grantee's receiving written notice by U.S. certified mail return receipt requested of such annexation from the Grantor, which notice shall include the legal description(s) of the property annexed and the addresses of the individual properties within the annexed property to the extent that information is available to the Town.

Section 14. The provisions of this ordinance are interdependent upon one another, and if any of the provisions of this ordinance are found or adjudged to be invalid, illegal, void or of no effect, the entire ordinance shall be null and void and of no force or effect.

Section 15. 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 16. Ordinance No. 11-7-79 passed and adopted February 19, 1980 and all other ordinances and parts of ordinances and all resolutions and parts of resolutions in conflict herewith, are hereby repealed.

Section 17. 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 foregoing Ordinance was moved for adoption by Council member Rivet. The motion was seconded by Council member Vail and, upon being put to a vote, the vote was as follows:

Council Member Nancy Borton	<u>Aye</u>
Council Member Brian Vail	<u>Aye</u>
Council Member Steven (Steve) Rivet	<u>Aye</u>
Council Member Jeffrey (Jeff) McKnight	<u>Aye</u>

Council Member Patricia (Pat) Dezman

Aye

Passed and adopted by the Town Council, Town of Malabar, Brevard County, Florida this 17th day of August, 2009.

BY:

TOWN OF MALABAR

Thomas M. Eschenberg

Mayor Thomas M. Eschenberg, Chair

First Reading: 08/03/2009

Second Reading: 08/17/2009

ATTEST:

Debby K. Franklin

Debby K. Franklin
Town Clerk/Treasurer

APPROVED as to form and content:

Karl W. Bohne, Jr.

Karl W. Bohne, Jr.
Town Attorney