

AN ORDINANCE GRANTING TO FLORIDA POWER CORPORATION A NON-EXCLUSIVE ELECTRIC UTILITY FRANCHISE TO OCCUPY MUNICIPAL STREETS AND RIGHTS-OF-WAY IN THE CITY OF CLEARWATER, FLORIDA, FOR THE PURPOSE OF PROVIDING ELECTRIC AND POWER SERVICES; PRESCRIBING THE TERMS AND CONDITIONS ACCOMPANYING THE GRANT OF FRANCHISE; PROVIDING FOR SEVERABILITY OF PROVISIONS; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF CLEARWATER, FLORIDA:

SECTION 1. Findings.

(A) The Grantor deems it necessary, desirable and in the interest of its citizens to establish by ordinance a franchise granting to Grantee the permission to occupy Rights-of-Way in the City of Clearwater, Florida, for the purpose of providing electric services.

(B) The Grantee is willing to undertake the installation and operation of its electric utility facilities under a franchise from Grantor.

SECTION 2. Short Title.

This Ordinance shall be known and may be cited as the "Florida Power Corporation Electric Franchise."

SECTION 3. Definitions.

For the purposes of this Ordinance, the following terms, phrases, words, and their derivations 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 directory.

(A) "Grantor" - The City of Clearwater, Florida.

(B) "Grantee" - Florida Power Corporation, its successors and assigns.

(C) "Electric Utility System" - 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.

(D) "Franchise Area" - That area for which Grantee provides Electric Utility Service which is within the corporate city limits of the Grantor.

(E) "Base Revenues" - Revenues from the sale of electricity, net of customer credits, to residential, commercial, and industrial customers and City sponsored streetlighting all within the the corporate limits of the City.

(F) "Person" - Any person, firm, partnership, association, corporation, company or organization of any kind.

(G) "Rights-of-Way" - All of the public streets, alleys, highways, waterways, bridges, easements, sidewalks and parks of 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.

(H) "Retail Wheeling" - A customer/supplier arrangement whereby an electric energy provider utilizes transmission and/or distribution facilities of Grantee to make energy sales directly to an end use customer located within the Franchise Area.

(I) "Adversely Affected" - For the Grantee, a loss of one percent (1%) of Base Revenues within the corporate city limits due to Retail Wheeling. For the Grantor, a loss of one percent (1%) of franchise fees due to Retail Wheeling.

SECTION 4. Grant of Authority.

(A) There is hereby granted by Grantor, to Grantee, the right and privilege to construct, erect, operate, own and maintain, in, upon, along, across, above, over and under Rights-of-Way now laid out or dedicated, and all extensions thereof, and additions thereto in the corporate city limits, poles, wires, cables, underground conduits, manholes, fiber optic cable for its own use and other fixtures necessary or proper for the maintenance and operation of its Electric Utility System, provided that all portions of the same shall conform to the National Electrical Safety Code. This Franchise is awarded subject to the provisions of general or special laws of Florida now existing or hereinafter enacted. This grant of authority is limited to the provision by Grantee of electric utility services. Grantee agrees that without the prior written permission of Grantor, it will not allow any entity providing a wireless communication system to acquire rights to occupy Rights-of-Way under this Franchise. In the event Grantee desires to use its existing facilities, or construct new facilities, in order to provide public communications, leased fiber optic capacity, or video services to existing or potential consumers, Grantee must obtain additional and separate permission from the City for such activities.

(B) Annexation or Contraction. Grantee agrees that the Franchise Area is subject to expansion or reduction by annexation and contraction of municipal boundaries. If Grantor approves any Franchise Area expansion or reduction by annexation or contraction, Grantor will provide written notice to Grantee. Grantee must revise its payments due to any expansion or reduction by annexation within a reasonable time after notice to Grantee, but no later than sixty (60) days after receipt of notice.

(C) Non-Exclusive Use. The right to use and occupy Rights-of-Way for the purposes herein set forth shall be non-exclusive, and the Grantor reserves

the right to grant a similar use of said Rights-of-Way, to any person at any time during the period of this Franchise so long as such grant does not materially and adversely impact Grantee's right to use and occupy Rights-of-Way as aforesaid.

SECTION 5. Term of Franchise.

(A) Except as otherwise provided herein, the Franchise and rights herein granted shall take effect and be in force from and after the final passage hereof, as required by law and upon the filing of an acceptance by Grantee of all the terms thereof with the Grantor and shall continue in force and effect for a term of thirty (30) years after the effective date of this Franchise ordinance.

(B) However, if 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 franchise fee payments between Grantee and Grantor. 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 Pinellas County, Florida for declaratory relief as to the proper franchise fee in light of Retail Wheeling.

(C) Each party shall bear its own costs in such a proceeding. During the pendency of any negotiations pursuant to the reopener or any declaratory action arising therefrom the current franchise payment as set forth in Section 6 shall continue to apply. Provided, however, if as a result of such negotiations or any declaratory action arising therefrom, a different franchise payment is determined, that new franchise payment shall apply retroactively to the first full month following the date this ordinance is reopened and the parties shall balance their accounts accordingly.

(D) In all events, Grantor shall not grant more favorable treatment to providers of Retail Wheeling than is granted to Grantee under this ordinance, 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 Grantor shall be given a competitive advantage over Grantee.

SECTION 6. Payment to Grantor.

(A) Effective the first day of the second month beginning after the effective date of this ordinance, Grantor shall be entitled to receive from Grantee a monthly franchise amount which will equal six percent (6%) of Grantee's Base Revenues for the preceding month which amount shall be the total compensation due Grantor for the rights, authority and privileges granted by this Franchise.

(B) Payment shall be made to the Grantor 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 received twenty (20) days after the due date shall be subject to interest at the rate of 10% percent per annum until all payments are paid in full .

SECTION 7. Favored Nations

(A) In the event Grantee shall hereafter accept an electric utility franchise ordinance from any municipality providing for the payment of a franchise fee in excess of the amount provided for per Section 6 above, the Grantee shall immediately notify the Grantor and the Grantor reserves the right to amend this Franchise to require the Grantee to pay the Grantor such additional franchise fees. The Grantee's failure to notify Grantor of such additional payments does not limit Grantor's rights to such additional franchise fees nor limit Grantee's liability with respect thereto including late payments outlined in Section 6 (B).

(B) In no event shall Grantor receive a franchise fee that is less, in terms of percentage and/or Base Revenues, than any other governmental entity within Grantee's service area, except that, in the event Grantor shall hereafter grant an electric utility franchise to any other electric energy supplier providing for the payment of a franchise fee less than the amount provided for in Section 6 above, then Grantor shall be obligated to accept an amendment of this ordinance providing for a decrease in the franchise fee to such lesser amount.

SECTION 8. Rates and Services Provided.

The rates to be charged and services provided by the Grantee for electric service within the corporate limits of Grantor during the term of this franchise shall be as provided in the Grantee's tariffs now or hereafter approved by the Florida Public Service Commission, or such agency of the State of Florida as may have proper jurisdiction over such rates and charges of Grantee.

SECTION 9. Character of Service.

Grantee agrees that the materials to be used in the construction, operation and maintenance of the electric distribution system and the service to be rendered thereby shall be in every respect equal to those provided to Grantee's other franchised communities. Grantee shall maintain a business office or locations within the City which shall be open during normal business hours for the purpose of accepting payments of electric bills and receiving customer inquiries.

SECTION 10. Indemnification.

(A) Grantor shall in no way be liable or responsible for any accident or damage that may occur in the construction, operation or maintenance by Grantee of its facilities thereunder, and the acceptance of this franchise by Grantee shall be deemed an agreement on the part of the Grantee to indemnify Grantor and hold it harmless against any and all liability, loss, cost, damage or expense which Grantor may incur by reason of the neglect, default, or misconduct of Grantee in the construction, operation, or maintenance of its electric utility facilities thereunder.

(B) Grantee shall maintain throughout the term of this Franchise sufficient financial resources to provide self insurance insuring the Grantor and Grantee with regard to all damages set forth in Section 10 (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) \$50,000 for property damage resulting from any one accident.
- (iii) \$1,000,000 for all other types of liability.

(C) It is acknowledged by the Grantor that Grantee provides its own liability insurance (self insured). Grantee must submit on an annual basis, when submitting its annual audited financial report, documentation that clearly demonstrates that it has accumulated sufficient financial resources in order to provide insurance coverage as indicated in Section 10(B) above.

SECTION 11. Approval of Transfer.

(A) The rights and privileges granted by this Franchise shall not be sold, or assigned in whole or in part without the Grantor's prior written approval; however, such consent shall not be unreasonably withheld. No such sale or assignment shall be effective until the vendee or assignee has filed with the Grantor an instrument, duly executed, reciting the fact of such sale, or assignment and agreeing to perform all the conditions thereof.

(B) Grantee shall annually submit to Grantor, Attention: City Clerk's Department, a copy of its Audited Annual Financial Report upon its normal issuance of same. By acceptance of this Franchise, the Grantee specifically agrees that in the event of any violation of this Section, after thirty (30) days written notice and an opportunity for Grantee to cure, Grantor may cause the Franchise granted herein to be terminated.

SECTION 12. Grantor Rights in Franchise.

The right is hereby reserved to the Grantor to adopt, in addition to the provisions herein contained and existing applicable ordinances, such additional regulations as it shall find necessary in the exercise of its police power, provided that such regulations, by ordinance 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 Grantee or materially interfere with the benefits conferred on Grantee hereunder.

SECTION 13. Work in the Right-of-Way.

The Grantee is hereby granted the right, authority and privilege to make all necessary excavations in said square, streets, avenue, alleys, thoroughfares, public grounds and other parts of Grantor. The Grantee 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 Grantee'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 along said lines that may in any way endanger the proper operation of same. Moreover, the Grantee shall have the right to construct, erect, operate and maintain in said City an electric system consisting of central plant or plants, with all the engines, boilers, dynamos, machines and devices, and appliances that may be required for generating electricity, together with necessary substations, lines and related facilities and for carrying Grantee's business; provided that, in accomplishing these purposes, the streets of said City shall not be unreasonably obstructed and work in connection therewith shall be done and carried on in conformity with such reasonable rules, regulations, and local ordinances with reference thereto as may be adopted by the Grantor for the protection of the public.

SECTION 14. Records and Reports.

The following records and reports shall be filed with or available to Grantor:

(A) Grantee Rules and Regulations. Copies of rules, regulations, terms and conditions adopted by Grantee that relate to Grantee's use of Grantor's Right-of-Way shall be available upon request by Grantor.

(B) Accounting. Grantee shall use the system of accounts and the form of books, accounts, records, and memoranda prescribed by the Florida Public Service Commission, or as mutually agreed to by Grantor and Grantee. Should the Florida Public Service Commission cease to exist, the City retains the right to require the Grantee to maintain a system of accounts and forms of books and accounts and memoranda prescribed by the Federal Energy Regulatory Commission or any other applicable agency.

(C) Reports. The Grantee will attach to each payment a statement of its estimated Base Revenues by revenue account for the period on which such payment is based, signed by an authorized representative of the Grantee, in such reasonable form and detail as Grantor may from time to time prescribe, sufficient to show the source and method of computation of Base Revenues. The acceptance of any statement or payment shall not estop the Grantor 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. Grantee shall supply all accounts and records of the Grantee and/or all such information that the Grantor or its representatives may from time to time reasonably request or require relative to the calculation of franchise fees. Such financial records shall be kept and maintained in accordance with generally accepted accounting principles. All of these records shall, on written request of Grantor, be open for examination and audit by Grantor and Grantor's representatives during ordinary business hours, in the Clearwater Area Office of Grantee and such records shall be retained by Grantee for a minimum of five (5) years.

(E) Audit. Grantor may require an audit of Grantee's books at minimum of once every five years. Grantee will reimburse Grantor's audit costs if the audit identifies errors in the Grantee's franchise Base Revenues of five percent (5%) or more for the period audited. Errors identified during the audit process shall be projected for any additional time periods not covered during the audit if there is a reasonable probability these errors occurred during the unaudited period, but not for more than five (5) years. If an underpayment of franchise fees has occurred, interest will be computed at a rate of ten percent (10%) per annum. Both the underpayment and interest shall be paid within thirty (30) days after receipt of demand therefor from Grantor.

SECTION 15. Grantor's Authority.

(A) Nothing in this Franchise shall prevent Grantor from levying and collecting such taxes as Grantor may from time to time be empowered, by law, to levy and collect provided such taxes shall be applied uniformly to all persons within Grantor's corporate limits and shall not constitute an additional tax or fee for Grantee's use of the Rights-of-Way. Such taxes are not considered part of the franchise fees.

(B) In the event the Grantor acquires the property rights of Grantee as well as any extensions thereof within and without the City, used in or useful in or connected with Grantee's Electric Utility System and the extensions thereof, all grants or renewals shall at once terminate.

SECTION 16. Severability.

Should any section or provision of this Franchise Ordinance or any portion thereof, the deletion of which would not adversely affect (in the general sense) 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, the Grantor and Grantee shall meet and negotiate in good faith to obtain a replacement provision that is in compliance with the judicial authority's decision.

SECTION 17. Acceptance.

This ordinance shall become effective upon being legally passed and adopted by the City Commission of the City of Clearwater, as provided by law; and it is further agreed that Grantee shall accept this franchise as of the date of the passage and adoption by the City Commission and shall signify its acceptance in writing within thirty days after the City Commission's approval of this ordinance by filing its written acceptance with the City Clerk.

SECTION 18. Attorney's Fees and Expenses.

Except as otherwise provided for herein, Grantor and Grantee hereto agree that if litigation becomes necessary to enforce any of the obligations, terms and conditions of this Franchise, the prevailing party shall be entitled to recover a reasonable amount of attorney's fees and court costs, including fees and costs on appeal, from the non-prevailing party.

SECTION 19. Governing Law and Venue.

(A) The rights and privileges granted to Grantee by this Franchise shall at all times be subordinate and inferior to the rights of the public in and to the ordinary use of Grantor's Rights-of-Way and nothing in this Franchise shall be considered as a surrender by Grantor of its right and power to use and relocate the use of its Rights-of-Way.

(B) The Franchise and rights herein granted are subject to the provisions of existing Federal laws and the laws of the State of Florida and those hereafter enacted pertaining to the granting of franchises and to Retail Wheeling.

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

SECTION 20. Notices.

Except in exigent circumstances, all notices by either Grantor or Grantee to the other shall be made by either depositing such notice in the United States Mail, Certified Mail return receipt requested or by 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 Grantor and Grantee observed holidays excepted. All notices shall be addressed as follows:

To Grantor:

To Grantee:

City Manager
City of Clearwater
112 S. Osceola Avenue
Clearwater, FL 34616

General Counsel
Florida Power Corp.
P.O. Box 14042
St. Petersburg Fl.
33733-4042

Notice shall be given as required by this Franchise and for all other emergencies. Notice shall be provided to the above-named addressees unless directed otherwise in writing by Grantor or Grantee.

SECTION 21. 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 22. Effective Date

This Franchise shall take effect immediately upon adoption.

PASSED ON FIRST READING

November 16, 1995

PASSED ON SECOND AND FINAL
READING AND ADOPTED

December 7, 1995

Rita Garvey, Mayor-Commissioner

Attest:

Cynthia E. Goudeau, City Clerk

Approved as to form and legal
sufficiency:

Pamela K. Akin, City Attorney