



# CITY COUNCIL AGENDA ITEM

REQUESTED COUNCIL MEETING DATE 7/15/08

**SUBJECT:** Ordinance No. 2008-20 – Renewing Florida Power & Light Franchise

**DEPARTMENT:** Administration

**RECOMMENDED MOTION:**

To adopt Ordinance No. 2008-20 renewing Florida Power & Light Franchise

**SUMMARY:**

Attached is a memorandum outlining the options available to the City Council in renewing the FPL franchise agreement.

**ATTACHMENTS:**  Ordinance                       Resolution                       Budget Resolution

Other     Support Documents/Contracts Available for Review in Manager's Office

<b>DEPARTMENT HEAD</b>	Signed	Date
<b>FINANCE DEPARTMENT</b>	Approved as to Budget Requirements	Date
<b>CITY ATTORNEY</b>	Approved as to Form and Legality	Date
<b>CITY MANAGER</b> <i>Kear</i>	Approved Agenda Item For:	7/15/08

**COUNCIL ACTION:**     Approved as Recommended                       Disapproved                       Tabled Indefinitely  
 Continued to Date Certain                       Approved with Modification:

*Second Reading 7/22/08*

ORDINANCE NO. 2008-20

AN ORDINANCE OF THE CITY OF PORT ORANGE, VOLUSIA COUNTY, FLORIDA, GRANTING TO FLORIDA POWER & LIGHT COMPANY, ITS SUCCESSORS AND ASSIGNS AN ELECTRIC FRANCHISE, IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO, AND PROVIDING FOR MONTHLY PAYMENTS TO THE CITY OF PORT ORANGE, FLORIDA, AND PROVIDING FOR CONFLICTING ORDINANCES; PROVIDING FOR SEVERABILITY AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the City Council of the City of Port Orange, Florida recognizes that the City of Port Orange 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 City of Port Orange 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 City of Port Orange and FPL, the terms of which are set forth in City of Port Orange Ordinance No. 39.01, passed and adopted July 11, 1978, and FPL's written acceptance thereof dated July 28, 1978 granting to FPL, its successors and assigns, a thirty (30) year electric franchise ("Current Franchise Agreement"); and

WHEREAS, FPL and the City of Port Orange desire to enter into a new agreement (New Franchise Agreement) providing for the payment of fees to the City of Port Orange in exchange for the nonexclusive right and privilege of using public rights-of-way for supplying electricity and other services within the City of Port Orange free of competition from the City of Port Orange pursuant to certain terms and conditions, and

WHEREAS, the City Council of the City of Port Orange deems it to be in the best interest of the City of Port Orange 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 CITY COUNCIL OF THE CITY OF PORT ORANGE, 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 City of Port Orange, Florida, and its successors (hereinafter called the "Grantor"), in accordance with 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,

and all other facilities installed in conjunction with or ancillary to all of the Grantee's operations (hereinafter called "facilities"), for the purpose of supplying electricity and other ancillary operations, in support of the provision of electric service, to the Grantor and its successors, the inhabitants thereof, and persons beyond the limits thereof. Such ancillary operations shall not be sold to others.

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 egress from and ingress 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 or relocation of all facilities shall be made as representatives of the Grantor may prescribe in accordance with the Grantor's reasonable rules and regulations with reference to the placing and maintaining in, under, upon, along, over and across said public rights-of-way; provided, however, that such rules or regulations (a) shall not prohibit the exercise of the Grantee's right to install, locate or relocate its facilities in 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 otherwise changing the configuration of the paved portion of any public right-of-way used by motor vehicles causes such installed facilities

to unreasonably interfere with motor vehicular traffic. Notwithstanding the foregoing, the Grantor agrees to abide by the Grantor's municipal ordinances, rules and regulations as amended from time to time. The Grantor may include, but not limited to, in its Ordinances, rules and regulations references to the Manual of Uniform Traffic Control Devices, Maintenance of Traffic Standards, the Manual of Uniform Minimum Standards for Design, Construction, and Maintenance for Streets and Highways, May 2005 edition, and published by the Florida Department of Transportation; and the Utility Accommodation Guide, dated August 2004, as published by the Florida Department of Transportation. It is clearly understood that such Manuals and Guides may be amended from time to time. The Grantor agrees to use the most recent adopted edition for each publication referenced in its Ordinances, Rules and Regulations, and agrees not to unreasonably impair Grantee's reasonable use of the rights-of-way in the adoption, amendment and enforcement of said Ordinances, Rules and Regulations. 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 or damage that may occur in the construction, operation or maintenance by the Grantee of its facilities hereunder, and the acceptance of this ordinance shall be deemed an agreement on the part of the Grantee to indemnify the Grantor and hold it harmless against any and all liability, loss, cost, damage or expense which may accrue to the Grantor by reason of the negligence, default or misconduct of the Grantee in the construction, operation or maintenance of its facilities hereunder.

Section 4. All rates and rules and regulations established by the Grantee from time to time shall be reasonable as may be provided by law and Grantee's rates for electricity 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 including fuel adjustment charges, 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 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. If during the term of this franchise the Grantee enters into a franchise agreement with any other municipality located in Volusia, Brevard, Seminole, or Flagler County, Florida, where the number of Grantee's active electrical customers is equal to or less than 60,000, the terms of which provide for benefits which are greater than those provided to the Grantor herein, other than a "buy-out" provision, then the Grantee, upon written request of the Grantor, shall negotiate and enter into a new franchise agreement with the Grantor containing similar greater benefits provided, however, that such new

franchise agreement shall include additional benefits to Grantee, in addition to all benefits provided herein, at least equal to those provided by its franchise agreement with such other municipal corporation located in Volusia, Brevard, Seminole, or Flagler County. Subject to all limitations, terms and conditions specified in the preceding sentence, the Grantor shall have the sole discretion to determine those benefits to which it would be entitled, and the Grantee shall have the sole discretion to determine those benefits to which it would be entitled, under any such new franchise agreement.

Section 7(a). As a further consideration, during the term of this franchise or any extension thereof, the Grantor agrees: (a) not to engage in the distribution and/or sale, in competition with the Grantee, of electric capacity and/or electric energy to any ultimate consumer of electric utility service (herein called a "retail customer") or to any electrical distribution system established solely to serve any retail customer formerly served by the Grantee, (b) not to participate in any proceeding or contractual arrangement, the purpose or terms of which would be to obligate the Grantee to transmit and/or distribute, electric capacity and/or electric energy from any third party(ies) to any other retail customer's facility(ies), and (c) not to seek to have the Grantee transmit and/or distribute electric capacity and/or electric energy generated by or on behalf of the Grantor at one location to the Grantor's facility(ies) at any other location(s). Nothing specified herein shall prohibit the Grantor from engaging with other utilities or persons in wholesale transactions which are subject to the provisions of the Federal Power Act.



(b) Notwithstanding the foregoing, Grantor may (i) generate electric capacity and/or energy at any facility owned or leased by Grantor for utilization at that facility or other facilities owned or leased by Grantor, provided that delivery of that electric capacity and/or energy does not extend beyond the contiguous properties of Grantor for those facilities; and (ii) sell electric capacity and/or energy to Grantee in compliance with applicable state or federal rules and regulations controlling such transactions. For purposes of this section, the term "owned or leased by the Grantor" means properties owned, leased, held in trust by, or dedicated to, the Grantor, including properties held by any corporate entity or agency created by Grantor.

(c) 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, all of the remaining terms and conditions of this franchise shall remain in effect.

Section 8. 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 150 days advance written notice of its intent to terminate. Such notice shall, without prejudice to any of the rights reserved for the Grantee herein, advise the Grantor of such terms and conditions that it considers more favorable and the objective basis or bases of that determination. The Grantor shall then have 150 days in which to correct or otherwise remedy the terms and conditions complained of by the Grantee. If the Grantee reasonably determines that such terms or conditions are not remedied by the Grantor within said time period, or any mutually agreed-upon extension thereof, 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 9. If,

(i) as a result of action taken by and directly within the control of the Grantor

AND

(ii) 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, then 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 150 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 specific 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 150 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 Grantee may terminate this franchise agreement by delivering written notice to the Grantor's Clerk and termination shall take effect on the date of delivery of such notice. Notwithstanding the foregoing provisions in Section 8 and this Section 9, upon written request of the Grantor within the 150 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 Section 8 or this Section 9.

Section 10. 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. The provisions of this Section 10 are without prejudice to Grantor's rights to pursue legal or

equitable relief for damages or injunction arising from Grantee's improper failure to comply with this Franchise.

Section 11. 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 in accordance with the provisions of Section 2 of this Franchise; (b) imposing conditions for use of public rights-of-way contrary to Florida law or the terms and conditions of this franchise; (c) unreasonably delaying a determination on issuing the Grantee a use permit, if any is required, to construct its facilities in public rights-of-way, shall constitute breach of this franchise. 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 12. The Grantor may, upon reasonable notice and within 180 days after each annual anniversary date of this franchise, at the Grantor's expense, examine the records and data of the Grantee relating to the calculation of the franchise payment for the year preceding such anniversary date. Such examination shall be during normal business hours at the Grantee's office where such records are maintained. Records not prepared by the Grantee in the ordinary course of business may be provided at the Grantor's expense, and as the Grantor and the Grantee may agree in writing. Information identifying the Grantee's customers by name or their electric

consumption shall not be taken from the Grantee's premises. Such audit shall be impartial and all audit findings, whether they decrease or increase payment to the Grantor, shall be reported to the Grantee.

Grantor waives, settles and bars all claims relating in any way to the amounts paid by the Grantee under the Current Franchise Agreement embodied in Ordinance No. 39.01 not asserted in writing within 180 days after the effective date of this ordinance with a notice of intent to audit. Grantee agrees to provide all information reasonably requested by the auditor, and both parties agree to pursue the completion of the audit as diligently and expeditiously as possible. Grantor shall file legal action within 365 days after completion of audit.

Section 13. 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 14. 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. Ordinance No. 39.01, passed and adopted July 11, 1978 and all other ordinances and parts of ordinances and all resolutions and parts of resolutions in conflict herewith, are hereby repealed.

Section 16. As a condition precedent to the taking effect of this ordinance, the Grantee shall file its acceptance hereof with the Grantor's Clerk on or before July 28, 2008. The effective date of this ordinance shall be the date upon which the Grantee files such acceptance.

\_\_\_\_\_  
MAYOR ALLEN GREEN

ATTEST:

\_\_\_\_\_  
Kenneth W. Parker, City Manager

Passed on first reading on the \_\_\_\_ day of \_\_\_\_\_, 2008

Passed and adopted on second and final reading on the \_\_\_\_ day of \_\_\_\_\_, 2008.

Reviewed and Approved: \_\_\_\_\_  
City Attorney