TOWN OF PALM BEACH

Office of The Town Clerk

REPORT OF THE PUBLIC WORKS COMMITTEE MEETING HELD ON TUESDAY, FEBRUARY 1, 2011

I. <u>CALL TO ORDER AND ROLL CALL</u>

The Public Works Committee meeting was called to order on Tuesday, February 1, 2011, at 9:30 a.m. in the Town Council Chambers. On roll call, Chair Gail L. Coniglio and Committee Member Richard M. Kleid were present.

II. <u>APPROVAL OF AGENDA</u>

The Agenda was approved as printed.

III. <u>PUBLIC COMMENT</u>

There was none.

IV. <u>REVIEW OF THE PROPOSED FRANCHISE AGREEMENT BETWEEN THE TOWN AND FLORIDA POWER & LIGHT COMPANY FOR PROVISION OF ELECTRICAL POWER AND RELATED SERVICES WITHIN THE CORPORATE LIMITS OF THE TOWN</u>

Thomas Bradford, Deputy Town Manager, introduced Florida Power and Light (FPL) representatives Patrick Bryan, Senior Attorney, and Ethel Isaacs Williams, Area Manager, External Affairs.

On behalf of the Town, Committee Member Kleid thanked Ms. Williams for her assistance in the placement of Centennial banners on FPL light poles.

Mr. Bradford stated that the Town's Franchise Agreement with FPL was entered into in 1981 and would expire March 27, 2011. He further stated that the proposal was for another thirty year Agreement. He reviewed the pertinent sections.

Section 1 Granting and Term of Franchise - *Sets forth the term of the franchise (30 years), defines the non-exclusive electricity related services that may be provided and where those services and facilities may be provided and installed.* Mr. Bradford explained that the language was similar but more specific than the previous Agreement. He said it was made clearer that facilities need to be installed on the outer edges of rights-of-way with reasonable steps taken to not interfere with vehicular, pedestrian, and bicycle traffic. Chair Coniglio questioned the references to non-exclusive rights and the ability to

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terminate. Mr. Bradford answered that the franchises were not really non-exclusive but in fact no one else would come in and provide retail electric service. He stated that the terms for termination were specific. Town Attorney John Randolph asked if the 120 day notice for termination was enough time. Mr. Bryan replied that there was a difference between termination of the franchise and termination of service to Palm Beach. He stated that that the franchise was non-exclusive. He explained that FPL had a monopoly in the Town because of state law and state regulations. He stated that at this time no retail competition was lawfully allowed in the state. He further stated that even if the franchise was terminated, FPL would have a statutory responsibility to serve the Town, but the Town wouldn't receive any franchise fees. He said that the Town was agreeing that it would not go into the municipal electric business and serve the residents unless the franchise was terminated. Chair Coniglio asked about extending the 120 day notice. Mr. Bryan responded that FPL had to provide a 90-day notice to the Town if they believe there is something that needs to be cured and the Town had 90 additional days to cure. He added that the language makes it clear that if the Town believes FPL is in error and talking does not rectify the impasse, the Town can legally challenge FPL's determination at any point.

In response to a question from Attorney Randolph, Mr. Bryan stated that the Town is permitted to generate its own electricity, such as solar installations, and can produce its own power to serve a particular Town facility. He further stated that the Town could not take the excess power and sell it to residents or businesses but could sell it to FPL in a net metering program. He reported that the Town is permitted to build a power plant of any kind, such as trash burning or solar installation, and could serve its own facilities or sell that power wholesale back to FPL, if it is a qualifying facility, or to any other utility in the state. A discussion followed on the laws regarding the purchase of wholesale electricity.

Section 2. Facilities Requirements – *Sets forth the conditions associated with location and re-location of FPL facilities in right-of-way easements.*

Section 3. Indemnification of Grantor – *Requires FPL to indemnify and hold harmless the Town and its officers, etc. from claims, including reasonable attorney fees, for any injury, loss of life or property damage from negligence, default or misconduct of FPL, its employees, agents, etc. without any affect on the Town's sovereign immunity.* Mr. Bradford explained that this language was added to make it clear that nothing in this Section affected sovereign immunity. Attorney Randolph said he did not believe that the last sentence in Section 3 was necessary. He said the important language was that the grantor would indemnify the Town from any damages.

Section 4. Rates, Rules and Regulations – *All FPL rates, rules, and regulations shall be pursuant to law or administrative rule applicable to FPL.*

Section 5(a). Franchise Fee, Calculation and Payment – *Currently at 6%, the new franchise fee is proposed at 5.9%. However, the formula employed is also different resulting in an estimated annual increase in revenue of approximately $20,000 per year to the Town.* Mrs. Isaacs Williams explained that the old formula included a lot of allowed expenses that could offset what was paid to the Town. She further explained that the equation had been changed and FPL no longer offset taxes. Mr. Bradford stated that the Town receives utility taxes and the franchise fees from FPL. He said the franchise fees vary based on consumption but are approximately $150,000 to $200,000 a month.

Section 5(b). Grantor's Option to Decrease or Increase the Franchise Fee Percentage Rate – *Allows the Town to increase or decrease the franchise fee not more than once per year in increments of not less than 1%, not to exceed 5.9% or go below 0.9%.* A brief discussion followed on the reason a municipality would choose to reduce the rate.

Section 6. Favored Nations – *Grants to the Town the ability to secure the same franchise fee, along with the same terms and conditions, if any, of any municipality in Palm Beach County that may receive a franchise fee greater than 5.9%, if the municipality granted a higher franchise fee rate has a number of FPL electrical customers equal to, or less than, the amount of FPL electrical customers in Town.* Attorney Randolph questioned why reference was made to the old ordinance. Mr. Bryan answered that it was standard language but could be deleted. It was agreed to delete the reference.

Section 7. Non-Competition by Grantor – *The Town agrees not to engage in the distribution or sale of electrical capacity or energy in competition with FPL, not to participate in a proceeding or contractual arrangement that would obligate FPL to transmit or distribute electrical capacity or energy from a third party to any other retail customer's facilities.*

Section 8(a). Renewable Energy and Conservation – *The parties agreed to work cooperatively in this regard.* Mr. Bradford stated that this Section was added because it was not known to what degree or if the Town would get into the pursuit of renewable energy sources.

Section 8(b). – *The Town may generate electric capacity and energy for its own facilities for its own use, including the use of renewable energy sources.* Mr. Bryan stated that a resident could also generate electricity for his/her own use.

Section 9. Competitive Disadvantage; Termination by Grantee – *Allows FPL to terminate the Franchise Agreement after having given the Town 90 days notice of intent to terminate if FPL determines the terms and conditions granted by the Town in another electric franchise agreement are more favorable than those contained within this FPL Franchise Agreement.* Mr. Bryan said that this provision was added because this is a long term Agreement. He explained that if the law changes to allow retail competition in Florida, other electric service providers could come in and the Town could enter into a franchise with that provider. He said that FPL would then ask that it be treated equally with their franchise rate, that the new provider would not be given a lower franchise rate.

Section 10. Legislative or Regulatory Action – *Allows FPL to terminate the franchise within 120 days after providing notice to the Town of the existence of a competitive disadvantage created by a law or regulation of the USA or Florida if the Town cannot remedy the competitive disadvantage within 120 days of receipt of FPL notice.* Attorney Randolph expressed concern with the 120 day time period. He asked if the Town would continue to receive service. Mr. Bryan responded that if the franchise was terminated by FPL the Town would continue to receive service but would not receive the franchise fee. He explained that it was 120 days notice and 120 days to cure plus the Town would have the right to legally challenge FPL's determination of competitive disadvantage.

Section 11. Default by Grantee; Forfeiture – *If FPL fails to perform the Town may cause FPL to forfeit the franchise, but if protested by FPL, the forfeit will not be valid until six months following expiration or exhaustion of any appeal.* Committee Member Kleid stated that six months seemed like a long period and asked if it could be the same 120 day provision as the in the other Section. Mr. Bryan responded that the provisions in Sections 8 and 9 are not default provisions. He suggested that the only time the Town would want to terminate the franchise would be if it wanted to form a municipal electric company. Committee Member Kleid stated that the appeal could take months and FPL was asking for an additional six months after that time. Mr. Bryan replied that the parallel provision to Section 11 was Section 12. He stated that FPL did not have the right to terminate based on default by the Town but did have the right to withhold franchise fees for a period time. He offered to add "through all appeals" so it would be more parallel to Section 12. There was consensus to add the language.

Section 12. Default by Grantor – *The Town defaults for denying use of public right-of-way contrary to the Franchise Agreement, imposing conditions on right-of-way use contrary to Florida law or the Franchise Agreement and unreasonable delay in permit issuance to construct FPL facilities in right-of-way. FPL can withhold franchise fee payments to the Town until the permit is issued or the court makes a final determination.*

Section 13. Grantor's Right to Audit - *The Town may audit once per year the calculation of the franchise payment for the proceeding year subject to the conditions of this section, including that the Town may not use a third party for such audits whose fee is contingent on the findings of the audit.* Chair Coniglio asked if the Town would receive accurate figures. Mr. Bryan responded that FPL's customer account records were maintained as confidential but for purposes of audits FPL provides computer records with premises numbers and addresses.

William Diamond, 220 Wells Road, ask if there was any relationship between possible future undergrounding and the Franchise Agreement. Mr. Bradford replied that the subject of undergrounding would be included in a proposed letter of intent. He stated that there was nothing in the Agreement that would be an impediment to undergrounding.

Attorney Randolph read the last sentence in Section 13: "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. 4-81." He said he believed it was included to insure that as the Town goes forward, it settles any and all disputes under Ordinance No. 4-81 and any audit would relate to the ongoing franchise. He asked if Town staff had reviewed the fees paid under Ordinance No. 4-81 and if they were comfortable waiving any claims in regard to the past franchise. Mr. Bradford responded that there had been an aberration in 2009 and the Finance Department had worked with FPL to satisfy it. Attorney Randolph advised that the Town needed to be sure it was not owed anything under the old franchise. Mr. Bryan explained why the provision was included in the Agreement saying the franchise fees in the past were technically a written Agreement and there were five years under the statute of limitations to bring a claim. He said that FPL wanted to encourage a quick resolution if there are any claims. He reported that in other franchises FPL had agreed to language that says all claims under the old franchise are waived if not asserted in writing within one year. He explained that receiving it in writing would preserve the claim for the five year statutory period. He stated that FPL wanted language that creates an incentive for the Town to resolve the claim. Attorney Randolph stated that without the language under the statute of limitations the Town would have five years. He proposed the FPL language with two years. Mr. Bryan responded that he had proposed the Town would have one year to put FPL on notice of the claim and then the five year statutory period would apply to the claim. Committee Member Kleid stated that the Town would be waiving its statutory five year statute of limitations in return for whether it discovers an issue within one year. Attorney Randolph recommended the committee not accept the language in the Agreement and negotiate some better language. Mr. Bryan said he would go back to management and ask.

Sections 14-Section 18 – *Each of these sections are fairly common ordinance conclusion sections with the exception of Section 15 which makes every provision interdependent as opposed to severable and Section 18 which requires FPL to file an acceptance letter with the Town on the form found in Exhibit A to the Franchise Agreement ordinance within 30 days of adoption so that the record will reflect FPL acceptance.* Committee Member Kleid questioned Section 15 saying he did not have much experience with a provision that if one Section is invalid it vitiates the entire Agreement. Mr. Bryan explained that this was a simple Agreement to say that for as long as FPL serves the Town, the Town agrees not to compete by forming a municipal electric company and, in return, the Town will receive a franchise fee. He stated that there were a few provisions in the Agreement that if deemed to be invalid there would be no reason for one side or the other to continue in the relationship. He reported that in other franchises the substantive provisions had been distinguished and a "hybrid" severability provision added. Committee Member Kleid suggested the language be limited to certain provisions. Attorney Randolph agreed saying that if one provision, such as the indemnity provision, is challenged and removed, the Town would still want the remainder of the Agreement to remain. Mr. Bryan proposed a hybrid that would include the following non severable provisions: the franchise fee payment, the non-compete, the level playing field, and the default provisions. Following further discussion, there was consensus from the Committee that Section 15 should be completely removed and a pure severability provision added. Mr. Bryan stated he would go back and ask management. Mrs. Isaacs Williams asked that if they were unable to remove the Section, that the process continue to move forward and they would come back with a more delineated clause. The Committee members agreed. Chair Coniglio asked that FPL be mindful of the sections for which the Town completely disagreed.

Operational Issues – Mr. Bradford addressed two operational issues: underground utilities and hardening, and vegetation management. He stated that he did not believe they should be included in the Franchise Agreement. He reported that FPL was willing to include a letter of intent that they agree to work cooperatively with the Town relative to underground utilities and hardening. He explained the hardening issue and spoke about some of the issues that had occurred in Town as a result of FPL's hardening efforts. He stated that if FPL informs the Town of a hardening project with sufficient notice and a copy of their annual site plan, then the Town could notify the residents. He further stated that if a resident is not pleased with hardening the only real alternative is to convert to underground utilities. He reported that the terms for underground services are included in the Public Service Commission (PSC) tariffs. Attorney Randolph asked, based on the past experience with underground utilities issues, if the Committee was comfortable with not putting any of the undergrounding or hardening language in the Franchise Agreement. He referred to Section 1 of the Agreement and expressed concern that FPL could say that their customary practice was not to do undergrounding in a particular location. Mr. Bryan responded that the Franchise had no bearing on the tariff or the PSC rules with respect to undergrounding. He suggested including a sentence in the Agreement with respect to undergrounding or all other services that this does not affect the tariff or the PSC rules in any way. There was consensus on Mr. Bryan's suggestion.

Mr. Bradford reported that after the storms (2004 and 2005) FPL began to have a more systematic and organized vegetative management plan. He stated that FPL had said they would try to provide the designated person in the Town notice of the work. Paul Brazil, Director of Public Works, suggested the Town formalize what FPL had actually doing because it is successful. He stated that right-of-way permits are necessary, coordination meetings are necessary, and some conversation regarding one year cuts versus three-to-five year cuts and where it might be more appropriate. Mrs. Isaacs Williams clarified that the process had not been codified but was a practice that had improved over time. She stated that vegetative maintenance was one of the most sensitive areas within any utility company. Following further discussion, it was agreed that Mr. Brazil and Mrs. Isaacs

Williams would get together and codify the procedure. Mr. Bradford asked that to keep the process moving, the vegetative management language in the letter of intent be summarized to read that the Town and FPL agree to work cooperatively to come up with processes and procedures that will ultimately be in the Town's right-of-way manual. Mr. Brazil and Mrs. Isaacs Williams agreed that not including language in the Franchise Agreement would provide them with the time to get it right.

Clerk's Note: The next item discussed was V. Any Other Matters.

Attorney Randolph stated he may come back at the Town Council meeting with a suggested change regarding the inclusion of the sovereign immunity sentence. He said he would meet with staff and the FPL representatives. Mr. Bryan responded that FPL would agree to delete the sentence.

Regarding non-competes and the use of other service providers, Chair Coniglio asked if the Town had ownership of the electric lines and equipment. Mr. Bryan responded no, that the Town would have to purchase, condemn, or require FPL to tear down the poles and the Town would have to build their own. Mrs. Isaacs Williams added that FPL pays taxes on part of the infrastructure. Attorney Randolph asked if there had been discussion during the negotiations that at the conclusion of the Franchise Agreement the Town would have the right to purchase the facility. Mr. Bryan stated that buy out provisions in years past were required by law. He reported that the statute that required those provisions was repealed in 1973 and since that time it had been FPL's practice not to offer it in their franchises. Mr. Bradford stated that if the Town wanted the facility, it could condemn it which wasn't easy and was costly. Mr. Bryan said that FPL was not inclined to offer a buy-out provision. Chair Coniglio said she would like to have a buy-out provision brought back to the table because it was important to protect the residents. Mr. Bryan responded that he would take it back to management.

Mrs. Isaacs Williams noted that the current franchise expires March 27, 2011, and would require two readings as an ordinance. She asked if she should get something back to Mr. Bradford by the end of the week so the Agreement would stay on the time table of a February and March meeting. Chair Coniglio said she wanted to be sure that the Town was comfortable with any changes and did not want to miss anything that needed to be addressed. Mr. Bradford proposed that in his memorandum for the February 15 meeting he would include the issues discussed at the Committee meeting and FPL's response or outcome of the discussions. Committee Member Kleid added that the ordinance would be drafted initially in accordance with what the Committee had received as modified and by what had been agreed to between the Town and FPL. Attorney Randolph stated that if the Town and FPL were not able to complete the Agreement by March, FPL would continue to service the Town because it is statutorily obligated to so. He asked if FPL would collect the franchise fee. Mr. Bryan responded that FPL would discuss it with the Town. He stated that the law requires that if the parties need more time to negotiate in good faith, FPL has an obligation to continue paying the franchise. He stated that if FPL knows it can't agree and further negotiations would not be fruitful, at a certain time FPL would stop making the payments.

Mr. Bryan stated he would prepare a new redline draft with the changes that had been agreed to and he would go back to management on the other issues to see what is possible.

V. ANY OTHER MATTERS

Committee Member Kleid spoke about street lights. He proposed that the police department report the lights out because it is part of their patrol area and an enforcement issue. Mr. Brazil explained that there are three different responsibilities for street lights: Town owned lights, Department of Transportation (DOT) owned lights, and FPL owned lights. He stated that the Town takes care of and is reimbursed for the DOT lights and FPL is responsible to maintain their own. He said if Public Works is contacted about a light out, they will know who is responsible. Committee Member Kleid again stated that a police officer should be cognizant of any lights being out, what entity is responsible for it, and to report it. Chair Coniglio asked staff to coordinate the effort.

Clerk's Note: Following the discussion of street lights, the Committee continued the discussion of the Franchise Agreement.

VI. ADJOURNMENT

There being no further business, the Public Works Committee meeting of Tuesday, February 1, 2011, was adjourned at 10:53 a.m.

APPROVED:

Gail L. Coniglio

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Chair