ORDINANCE NO. 2010-7

AN ORDINANCE OF THE VILLAGE COMMISSION OF THE VILLAGE OF BISCAYNE PARK, FLORIDA, GRANTING FLORIDA POWER & LIGHT COMPANY, ITS SUCCESSORS AND ASSIGNS, A NON-EXCLUSIVE ELECTRIC FRANCHISE; IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO; PROVIDING FOR MONTHLY PAYMENTS TO THE VILLAGE OF BISCAYNE PARK, FLORIDA; PROVIDING FOR CONFLICT; PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, the Village Commission of the Village of Biscayne Park, Florida recognizes that the Village of Biscayne Park and its citizens need and desire the continued benefits of electric service; and

WHEREAS, the provision of such service requires substantial investment of capital and other resources in order to construct, maintain and operate facilities essential to the provision of such service in addition to costly administrative functions, and the Village of Biscayne Park 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 Village of Biscayne Park and FPL, the terms of which are set forth in Village of Biscayne Park Ordinance No. 201, passed and adopted April 1, 1980, and FPL's written acceptance thereof dated April 28, 1980 granting to FPL, its successors and assigns, a thirty (30) year electric franchise ("Current Franchise Agreement"); and

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

WHEREAS, the Village Commission considers the Village of Biscayne Park to be a unique residential bedroom community whose residents' accounts with FPL are largely residential rather than industrial or commercial, and

WHEREAS, the Village Commission of the Village of Biscayne Park deems it to be in the best interest of the Village of Biscayne Park 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 VILLAGE COMMISSION OF THE VILLAGE OF BISCAYNE PARK, FLORIDA:

Section 1. The foregoing "WHEREAS" clauses are hereby ratified and confirmed as being true and correct and are hereby made a specific part of this Ordinance upon adoption hereof.

Section 2. 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 Village of Biscayne Park, 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 electric related services to the Grantor and its successors, the inhabitants thereof, and persons beyond the limits thereof.

Section 3. The facilities of Grantee shall be so located or relocated and so erected as to interfere as little as possible with traffic over said streets, alleys, bridges and public places, and with reasonable egress from and ingress to abutting property. The location or relocation of all facilities shall be made as representatives of the Grantor may prescribe in accordance with 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; but not so as unreasonably to interfere with the proper operation of Grantee's facilities and service. When any portion of a street is excavated by Grantee in the location or relocation of any of its facilities, the portion of the street so excavated shall, within a reasonable time and as early as practicable after such excavation, be replaced by the Grantee at its expense and in as good condition as it was at the time of such excavation, and said replacement shall be performed in accordance with all applicable reasonable rules and regulations of Grantor and any other governmental agency having permitting authority. Grantee's obligations with respect to replacement of streets as set forth above shall continue whether or not Grantee is notified by Grantor in any specific case.

This agreement does not affect any rights which the Grantor may otherwise possess pursuant to Florida law with respect to the siting of Grantee's transmission lines.

Section 4. 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 5. 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 6. 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 real and personal property taxes and non-ad valorem tax assessments on property) levied or imposed by the Grantor against the Grantee's electric utility property, business or operations and those of its electric utility 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 Grantee shall continue to receive franchise payments under the Current Franchise Agreement during the period between the effective date of this New Franchise Agreement and the first payment hereunder, provided that this New Franchise Agreement is adopted by the Village Commission prior to the date of expiration of the Current Franchise Agreement.

The Grantor understands and agrees that such revenues as described in the preceding paragraph are limited, as in the existing franchise Ordinance No. 201, 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 7. If during the term of this franchise the Grantee enters into a franchise agreement with any other municipality located in Miami-Dade County, Florida where the number of Grantee's active electrical customers is equal to or less than 52,000, the terms of which provide for the payment of franchise fees by the Grantor at a rate greater than 5.9% of the Grantee's residential, commercial and industrial revenues (as such customers are defined in FPL's tariff), under the same terms and conditions as specified in Section 6 hereof, the Grantee, upon written request of the Grantor, shall negotiate and enter into a new franchise agreement with the Grantor in which the percentage to be used in calculating monthly payments under Section 6 hereof shall be no greater than that percentage which the Grantee has agreed to use as a basis for the calculation of payments to the other Miami-Dade County municipality, provided, however, that such new franchise agreement shall include additional benefits to the Grantee, in addition to all benefits provided herein, at least equal to those provided by its franchise agreement with the other Miami-Dade County municipality. Subject to all limitations, terms and conditions specified in the preceding sentence, the Grantor shall have the sole discretion to determine the percentage to be used in calculating monthly payments, 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 8. (A) As a further consideration, during the term of this franchise or any extension thereof, the Grantor agrees: (i) 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, (ii) 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 (iii) 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 or from utilizing generators and/or generating equipment during emergency situations. Additionally, nothing herein shall prohibit Grantor from adopting or complying with environmental initiatives which enable or require Grantor to generate electrical energy for consumption at facilities owned or operated by Grantor, provided that such initiatives and the implementation of same do not violate any of the terms or conditions of this New Franchise Agreement, specifically including but not limited to the provisions enumerated in Section 8 herein.

(B) Grantor may, if permitted by law, (i) generate electric capacity and/or energy at any facility owned by the Grantor for storage or utilization at that facility or other facilities, operations or equipment, provided that delivery of that electric capacity and/or energy does not extend beyond Grantee's Point of Service for those facilities, and (ii) use renewable energy sources to generate electric capacity and/or energy for use in demonstration projects or at Grantor's facilities; and (iii) sell electric capacity and/or energy to Grantee in compliance with applicable rules and regulations controlling such transactions.

(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, then Grantor may elect to purchase electric capacity and/or electric energy from the other person, and the balance of all of the terms and conditions of this franchise shall remain in effect.

Section 9. 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 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 60 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. The Grantor shall then have 60 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 10. 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 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 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. The Grantor shall then have 90 days in which to correct or otherwise remedy the competitive disadvantage. If such competitive disadvantage is 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.

Section 11. 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.

Section 12. 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 6 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 13. 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 three (3) years preceding such anniversary date. Such examination shall be during normal business hours at the Grantee's office where such records are maintained, and each party shall bear its own

costs, fees and expenses associated with any such reasonable examination of the records prepared and kept by Grantee in the ordinary course of Grantee's business. 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 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. 201 not asserted in writing within one hundred fifty (150) days after the effective date of this Ordinance.

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. Grantor acknowledges it is fully informed concerning the existing franchise granted by Miami-Dade County, Florida, to the Grantee herein, and accepted by the Grantee as set out in Ordinance No. 60-16 adopted on May 3, 1960, and subsequently renewed and accepted by the Grantee as set out in Ordinance No. 89-81 adopted on September 5, 1989 by the Board of County Commissioners of Miami-Dade County, Florida. Grantor agrees to indemnify and hold Grantee harmless against any and all liability, loss, cost, damage and expense incurred by Grantee in respect to any claim

asserted by Miami-Dade County against Grantee arising out of the franchise set out in the above referenced ordinances for the recovery of any sums of money paid by Grantee to Grantor under the terms of this New Franchise Agreement. Grantee acknowledges and Grantor hereby relies on the Dade County Resolution No. R-709-78 adopted on June 20, 1978 in the granting of this franchise.

Section 16. 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 17. Ordinance No. 201, passed and adopted April 1, 1980 and all other ordinances and parts of ordinances and all resolutions and parts of resolutions in conflict herewith, are hereby repealed.

Section 18. 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.

PASSED on first reading this 2nd day of March, 2010.

PASSED AND ADOPTED on second reading this 27th day of April, 2010.

The foregoing Ordinance was offered by Commissioner Childress, who moved its adoption. The motion was seconded by Commissioner Anderson and upon being put to a vote, the vote was as follows:

The foregoing ordinance upon being put to a vote, the vote was as follows:

Mayor Ross: Yes
Vice Mayor Childress: Yes
Commissioner Anderson: Yes

Roxanna Ross, Mayor

Attest:

Maria C. Camara

Maria Camara, Village Clerk

Commission Bernard: No
Commissioner Cooper: No

Approved as to form:

John J. Hearn, Village Attorney

ACCEPTANCE OF ELECTRIC FRANCHISE
ORDINANCE NO. 2010-7
BY FLORIDA POWER & LIGHT COMPANY

Village of Biscayne Park, Florida May 3, 2010

Florida Power & Light Company does hereby accept the electric franchise in the Village of Biscayne Park, Florida, granted by Ordinance No. 2010-7, being:

> **AN ORDINANCE OF THE VILLAGE COMMISSION OF THE VILLAGE OF BISCAYNE PARK, FLORIDA, GRANTING FLORIDA POWER & LIGHT COMPANY, ITS SUCCESSORS AND ASSIGNS, A NON-EXCLUSIVE ELECTRIC FRANCHISE; IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO; PROVIDING FOR MONTHLY PAYMENTS TO THE VILLAGE OF BISCAYNE PARK, FLORIDA; PROVIDING FOR CONFLICT; PROVIDING FOR AN EFFECTIVE DATE**

which was passed and adopted on April 27, 2010.

This instrument is filed with the Village Clerk of the Village of Biscayne Park, Florida, in accordance with the provisions of Section 18 of said Ordinance.

FLORIDA POWER & LIGHT COMPANY

By Pamela M. Rauch
Pamela M. Rauch, Vice President

ATTEST:

James Poppell
James Poppell, Assistant Secretary

I HEREBY ACKNOWLEDGE receipt of the above Acceptance of Electric Franchise Ordinance No. 2010-7 by Florida Power & Light Company, and certify that I have filed the same for record in the permanent files and records of the Village Clerk of Village of Biscayne Park, Florida on this 3rd day of May, 2010.

Maria C. Camara
Village Clerk, Village of Biscayne Park, Florida

(SEAL)

Law Offices of John J. Hearn, P.A.
1917 N.W. 81st Avenue
Coral Springs, Florida 33071
Phone: (305) 360-2547
Facsimile: (954) 227-7321

May 3, 2010

Ken Rubin, Esquire
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408

Re: Biscayne Park Ordinance 2010-7/FP&L Agreement

Dear Ken:

Attached please find for your files Ordinance 2010-7 providing FP&L a franchise agreement with the Village that has been executed by Village officials, consistent with approval of the Ordinance on second reading on April 27, 2010. Consistent with both of our interpretations, and with your representations at the public hearing held on March 2, 2010, this will confirm that Section 8 allows the Village to generate, utilize and distribute electric capacity at all the facilities owned by the Village, including their operations and equipment. It is further confirmed that, by distributing electric capacities from one Village building to another Village building is consistent with the Agreement and is not considered extending beyond "grantee's point of services for those facilities". If this is not your understanding, please confirm so in writing immediately. Thank you for your availability during these extensive negotiations.

Sincerely,

John J. Hearn
Village Attorney

cc: The Honorable Village Commission
Ana M. Garcia, Village Manager