

State of Florida



ORIGINAL

# Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

**DATE:** February 27, 2006  
**TO:** Blanca S. Bayó, Commission Clerk and Administrative Services Director  
**FROM:** Lawrence D. Harris, Senior Attorney, Office of the General Counsel *L.D.H.*  
**RE:** Docket No. 050925-EI

Please place the attached correspondence in the above-reference docket file.

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GRAY|ROBINSON  
ATTORNEYS AT LAW

SUITE 1400  
301 EAST PINE STREET (32801)  
P.O. BOX 3068  
ORLANDO, FL 32802-3068  
TEL 407-843-8880  
FAX 407-244-5690  
gray-robinson.com

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TAMPA

407-843-8880

TCLCLOUD@GRAY-ROBINSON.COM

February 27, 2006

VIA EMAIL TRANSMISSION

Commissioner Lisa Polak Edgar  
Commissioner J. Terry Deason  
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Commissioner Matthew M. Carter II  
Commissioner Katrina J. Tew  
Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Re: Docket No. 050925-EI - In re: Request for Declaratory Statement by Progress  
Energy Florida, Inc.  
Client-Matter No. 40363-2

Dear Commissioners:


We submit this correspondence on behalf of the Town of Belleair (the "Town") in reference to Docket No. 050925-EI (the "Docket"). The Town supports the recommendation of Commission Staff in its Memorandum of February 16, 2006 (the "Staff Memorandum"). The purpose of this letter is to address a factual error in the Staff Memorandum.

On Page 6 of the Staff Memorandum, Staff indicates that "Staff believes the question of whether *the Town of Belleair may require payment* of a franchise fee for this period [September 24, 2002 through November 11, 2004] is open, and thus, the declaratory statement cannot be issued." [emphasis added]. Later on Page 7, Staff states "Further, PEF's Petition for Declaratory Statement is not sufficiently clear about whether *the town has the legal authority to impose retroactively* franchise fees which were suspended pursuant to a District Court of Appeal mandate." [emphasis added]. Both of these statements assume the Town originally imposed a franchise fee on Progress Energy Florida ("PEF"), which PEF then failed to collect between September 24, 2002 and November 11, 2004 (the "Dispute Period"). As a result, Staff believes the Town is now seeking to "impose" the fees retroactively. The town does not seek to "impose" any franchise fees. The Town has simply requested that PEF live up to its contractual obligations to pay a negotiated franchise fee for the privilege of operating within the Town's rights-of-way during the Dispute Period. PEF elected not to collect and escrow the franchise fees from Town customers during the Dispute Period even though it continued to enjoy the use of the Town's rights-of-way. The Florida Supreme Court in *Florida Power Corporation vs. City*

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of *Winter Park*<sup>1</sup> characterized PEF's continuing obligation to pay for use of rights-of-way as an obligation arising from a "contract implied at law". There the Court stated that "...the decision reached today does not force either party to perform under the terms of the expired [franchise] agreement. To the contrary, each has maintained performance from the onset . . . The City has maintained the rights-of-way, and has kept them safe and presentable for the public, and . . . FPC has continued to accept and enjoy the benefits of access to the City's rights-of-way, and its status as the area's sole electricity provider."<sup>2</sup>

The Staff's characterization of the legal issue simply overlooks what the Florida Supreme Court has made very clear. The franchise fees the Town seeks to collect from PEF are not imposed like tariff rates, but rather, are permissible "bargained-for"<sup>3</sup> contract payments PEF is obligated to pay. Indeed, the Florida Supreme Court expressly rejected the notion that the Town has imposed anything: "...such a fee has not been unilaterally imposed . . ."<sup>4</sup> The Town is simply trying to enforce its contractual rights to receive such fees from PEF. Therefore, the issue raised in the Staff Memorandum is more properly characterized as the uncertainty regarding PEF's ability to retroactively impose these fees on the current Town customers to cover its contractual obligations to the Town.



Thomas A. Cloud, Esquire  
Florida Bar No. 293326

W. Christopher Browder, Esquire  
Florida Bar No. 883212

Attorneys for the Town of Belleair

TAC:WCB:ds

cc: Harold McLean, Office of Public Counsel, c/o The Florida Legislature  
James W. Walls, Carlton Fields Law Firm  
Paul Lewis, Jr., Progress Energy Florida, Inc.  
Alex Glenn, Progress Energy Service Company, LLC  
Lawrence Harris, Office of General Counsel, Public Service Commission  
Stephen J. Cottrell, Town Manager, Town of Belleair  
(Via Email Transmission)

<sup>1</sup> *Florida Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1241 (Fla. 2004).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 1240

<sup>4</sup> *Id.*