

State of Florida



## Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

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

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**DATE:** February 16, 2006

**TO:** Director, Division of the Commission Clerk & Administrative Services (Bayó)

**FROM:** Office of the General Counsel (Harris)  
Division of Economic Regulation (Kummer)

**RE:** Docket No. 050925-EI – Petition for declaratory statement that, pursuant to Rule 25-6.100(7), F.A.C., and Commission Orders 8035 and 8029, Progress Energy Florida, Inc. is permitted to collect franchise fees from its customers within the town limits of the Town of Belleair to comply with Town's November 15, 2005 demand for payment of franchise fees for period between September 24, 2002 and November 11, 2004, by Progress Energy Florida, Inc.

**AGENDA:** 02/28/06 – Regular Agenda – Interested Persons May Participate at the Commission's discretion.

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Administrative

**CRITICAL DATES:** March 21, 2006 – 90-day statutory deadline

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\050925.RCM.DOC

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### Case Background

On December 21, 2005, Progress Energy Florida, Inc. (PEF) filed a Petition for Declaratory Statement, seeking a determination from the Commission that it may recover franchise fees imposed by the Town of Belleair (the "town") from the residents of that municipality, pursuant to Rule 25-6.100(7), Florida Administrative Code. The exact question is whether PEF can collect franchise fees for the time period September 24, 2002 through November 11, 2004, which were not collected from the customer-residents due to a dispute

Docket No. 050925-EI  
Date: February 16, 2006

between PEF and the town regarding the franchise agreement, and which are now being demanded by the town.

PEF's petition is filed pursuant to Section 120.565, Florida Statutes, and Rule 25-105.002, Florida Administrative Code, governing declaratory statements. Notice of the Petition for Declaratory Statement was published in the Florida Administrative Weekly on January 6, 2006. On February 10, 2006, attorneys for the town sent a letter addressed to the individual Commissioners, which was copied to the docket file, PEF, and the Office of Public Counsel. The letter lists the town's concerns with PEF's Petition and objects to the Commission issuing the Statement requested by PEF. The Commission has jurisdiction pursuant to Sections 120.565, 366.04(2) and 366.05(1), Florida Statutes.

### **Discussion of Issues**

**Issue 1:** Should the Commission grant Progress Energy Florida's Petition for Declaratory Statement that it may collect franchise fees due to the Town of Belleair from the customer-residents of that town, for the time period September 24, 2002 through November 11, 2004?

**Recommendation:** No. The Commission should deny Progress Energy Florida's Petition and decline to issue a declaratory statement because unanswered questions remain regarding the Town of Belleair's legal authority to retroactively impose the franchise fee. (Harris, Kummer)

### **Staff Analysis:**

#### **Threshold Declaratory Statement Requirements:**

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement by an agency. In pertinent part it provides:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

PEF's substantial interests will be affected by the Commission's disposition of this petition as it will determine whether PEF will be allowed to collect franchise fees due to the Town of Belleair from its customers within the municipality.

The rule applicable to PEF's particular circumstances is Rule 25-6.100, Florida Administrative Code, "Customer Billings", and specifically subsection 25-6.100(7), "Franchise Fees". PEF's petition meets the statutory requirements for a declaratory statement. The Commission could choose to either issue a statement to resolve the question as presented or choose not to issue any statement. The Commission's resolution of the question presented should apply only to the particular circumstances expressed in PEF's petition. The Commission may rely entirely upon the facts presented by the petitioner and any material changes in the facts could substantially alter or void the declaratory statement.

#### **Progress Energy Florida's Petition**

Pursuant to its franchise agreement with the Town of Belleair, PEF collected franchise fees, in an amount equal to 6% of a customer's bill, from the residents of the Town of Belleair until December 1, 2001, the expiration date of the franchise agreement. Prior to the expiration of the franchise agreement, the Town obtained a temporary circuit court injunction requiring PEF to continue to collect the franchise fee after the expiration of the franchise agreement.

On August 30, 2002, the Second District Court of Appeals (DCA) reversed the circuit court's temporary injunction, ruling that the town did not have the clear legal right to require the continued collection of franchise fees subsequent to the expiration of the agreement.<sup>1</sup> On September 24, 2002, the Second DCA issued its mandate, and PEF discontinued collection of the franchise fees.

On March 10, 2005, the Florida Supreme Court issued its decision in *Town of Belleair v. Florida Power Corporation*, 897 So. 2d 1261 (Fla. 2005). The Supreme Court determined that the collection of municipal franchise fees subsequent to the expiration of a franchise agreement was proper, and reversed the Second DCA on this issue.

During the pendency of this litigation, on April 1, 2003, the Town of Belleair enacted an ordinance enabling it to collect a 10% Municipal Services Tax (MST), which the town intended to substitute for the revenue shortfall resulting from the non-collection of the franchise fee. After the Supreme Court's decision on March 10, 2005, the town notified PEF it did not intend for PEF to collect franchise fees for the period November 11, 2004 through November 15, 2005, and that it would notify PEF when to begin collecting the franchise fee after November 15, 2005.<sup>2</sup> It appears that the Town of Belleair intends to repeal the MST, and intends for PEF to begin collecting the franchise fee upon the termination of the MST.

The town also notified PEF that, pursuant to the Supreme Court's decision, it expected payment of the franchise fees that were not collected by PEF during the time period September 24, 2002 through November 11, 2004, the approximate time period the Second DCA's mandate was in effect. The town also notified PEF that it did not want PEF to collect these fees from the residents of the town, and would "use any means at its disposal to prevent PEF from collecting these fees from the residents of the town".<sup>3</sup>

As a result of the town's demand for payment of uncollected franchise fees, coupled with the town's opposition to the collection of those fees from the residents of the town, PEF has filed this Petition for Declaratory Statement with the Commission. PEF believes that it is required by Rule 25-6.100(7) and Commission Orders 8035 and 8029 to collect a franchise fee from the residents of the municipality to which the franchise fee is due, and not from its general body of ratepayers.

**Town of Belleair's response:**

On February 10, 2006, attorneys for the Town of Belleair sent a letter to the Commissioners, with copies to the docket file, PEF, and the Office of Public Counsel. As noted in the letter, pursuant to Section 350.042(1), Florida Statutes, declaratory statement proceedings are specifically excluded from the prohibition on ex parte communications with Commissioners.

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<sup>1</sup> *Florida Power Corporation v. Town of Belleair*, 830 So. 2d 852 (Fla. 2<sup>nd</sup> DCA 2002).

<sup>2</sup> Letter from the Town of Belleair to Progress Energy Florida dated November 15, 2005. This letter was attached as "Attachment A" to PEF's Petition for Declaratory Statement.

<sup>3</sup> Id.

In its letter, the town expresses two basic positions: first, that the Commission should decline to issue a declaratory statement, and second, if the Commission chooses to issue a statement, it should be the opposite of the statement requested by PEF. In regards to its position that the Commission should not issue any declaratory statement, the town alleges that the Petition fails to meet threshold requirements for declaratory statements, in that it fails to allege facts sufficient to support the declaration requested; the statement would amount to ratemaking outside of a rate case; and that issuance of the declaration would not resolve the issues raised.

In support of its arguments that the statement requested by PEF should be answered in the negative, the town essentially argues that PEF cannot charge current customers for past service. The town's argument seems to focus on the challenges PEF would face in equitably assessing any amounts due to the town on residents who consumed power during the time period in question.

As shown in the following analysis, staff agrees that, for various reasons, among them some of the concerns expressed by the town, the declaratory statement requested by PEF should not be granted.

**Analysis:**

Rule 25-6.100(7), Florida Administrative Code, states in pertinent part:

- (a) When a municipality charges a utility any franchise fee, the utility may collect that fee only from its customers receiving service within that municipality.
  
- (d) This subsection shall not be construed as granting a municipality or county the authority to charge a franchise fee. This subsection only specifies the method of collection of a franchise fee, if a municipality or county, having authority to do so, charges a franchise fee.

From the plain language of Rule, it appears clear that PEF should collect any franchise fees due and owing to the Town of Belleair from its customers resident in that municipality. This conclusion is reinforced by the holdings of Commission Orders 8035<sup>4</sup> and 8029<sup>5</sup>, along with other orders issued in the same line of decisions.<sup>6</sup> Were there no other circumstances involved in

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<sup>4</sup> In re: Petition of Florida Power Corporation to revise its treatment of franchise fees for ratemaking purposes. PSC Docket No. 770017-EU, Order No. 8035, 1977 Fla. PUC LEXIS 182, 1 FPSC 103, November 8, 1977.

<sup>5</sup> In re: Investigation and Show Cause Order to Florida Power and Light Company and Tampa Electric Company as to the proper treatment of franchise fees for ratemaking purposes. PSC Docket No. 770810-EU, Order No. 8029, 1977 Fla. PUC LEXIS 207, 1 FPSC 86, November 1, 1977.

<sup>6</sup> In re: Petition of Gulf Power Company to revise its treatment of franchise fees for ratemaking purposes, Docket No. 770001-EU, Order No. 8022, 1977 Fla. PUC LEXIS 223, October 20, 1977; In re: Investigation and show cause order to Tampa Electric Company as to the proper treatment of franchise fees for ratemaking purposes, Docket No. 770937-EU, Order No. 8439, 1978 Fla. PUC LEXIS 318, August 17, 1978; In re: Investigation and show cause order to Florida Power and Light Company as to the proper treatment of franchise fees, Docket No. 770810-EU, Order No. 8524, 1978 Fla. PUC LEXIS 146, October 11, 1978; *Plant City v. Mayo*, 337 So. 2d 966 (Fla. 1976); *Plant City v. Hawkins*, 375 So. 2d 1072 (Fla. 1979).

this declaratory statement, staff would likely recommend answering PEF's Petition in the affirmative and issuing a declaratory statement.

In the instant case, however, PEF has asked whether it is permitted to collect from current customers franchise fees which otherwise would have been collected from customers of record during the September 24, 2002 through November 11, 2004 time frame. Subsection (4) of the rule clearly states that the rule is not intended to grant authority to charge a franchise fee; it is only intended to specify the method of collection of a lawful fee. Staff believes the question of whether the Town of Belleair may require payment of a franchise fee for this period is open, and thus, the declaratory statement cannot be issued.

The Supreme Court resolved the issue whether franchise fees should continue to be collected for a municipality subsequent to the expiration of a franchise agreement but prior to the execution of a new agreement via its conflict jurisdiction from two different Florida District Courts of Appeal. The Second DCA held in *Belleair v. Florida Power Corporation* that continued collection of the franchise fees was illegal after the expiration of the underlying franchise fee agreement. In a case with the same issues, *Florida Power Corporation v. City of Winter Park*<sup>7</sup>, the Fifth DCA reached exactly the opposite conclusion. The Supreme Court accepted jurisdiction to resolve the conflict.

In *Belleair*, the Second DCA reasoned that a franchise fee could only be authorized by the town as part of its franchise agreement with PEF. Upon the expiration of the underlying franchise agreement, the municipality's authority to impose the fee also disappeared, making continued collection of the fee in effect an illegal tax. It was upon this authority that PEF discontinued collection of the Belleair franchise fee in 2002.

In *Winter Park*, the Fifth DCA reached the opposite conclusion. Drawing on landlord-tenant and contract law principles, the Court held that the franchise fee should continue to be collected in the holdover period between the expiration of one agreement and the negotiation of another.

The Supreme Court, in *Florida Power Corporation v. City of Winter Park*, 887 So. 2d 1237 (Fla. 2004), agreed with the reasoning of the Fifth DCA, while expressly disapproving of the decision in *Belleair*. Accordingly, the Supreme Court reversed the Second DCA, directly leading to the town's demand for payment of uncollected franchise fees and PEF's Petition for Declaratory Statement.

Language in the Supreme Court's decision in *Winter Park* gives staff concern. The Supreme Court stated that:

Moreover, any argument that franchise fee payments should cease during the pendency of protracted contract negotiations and follow-on litigation ignores the economic realities of utility service. By virtue of natural attrition and replacement, FPC's customer base in the City of Winter Park is constantly

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<sup>7</sup> *Florida Power Corporation v. City of Winter Park, Florida*, 827 So. 2d 322 (Fla. 5<sup>th</sup> DCA 2002)

changing. Retroactive application of a pass-through fee would, therefore, unfairly benefit some customers and penalize others.”<sup>8</sup>

Retroactive collection of the franchise fees would seem to be exactly the situation the Supreme Court intended to avoid by its ruling in *Winter Park*. As noted by the Court, staff is concerned about how PEF would collect the retroactive fees that would not pose an inter-generational equity problem among the customers.

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. Staff believes this is a threshold issue which needs to be resolved before the Commission can determine how the fee, if lawful, should be collected from the town’s customer residents. Staff believes that resolution of this issue is not appropriate via a declaratory statement, as the substantive interests of various groups (the customer residents of the town, the town, and PEF) will be affected by the resolution of this question.

Staff believes there are two issues that must be resolved prior to any determination being made on whether PEF should collect the franchise fees retroactively. First is the uncertainty about whether the franchise fee can lawfully be retroactively imposed by the town. Second is the uncertainty of whether the town would impose retroactive franchise fees, understanding that they could ultimately be collected from its current residents. Because the instant petition does not provide answers to these questions, and the Commission is not the appropriate forum for their resolution, staff recommends that the Commission decline to issue a declaratory statement. Staff notes that should the issues regarding retroactive imposition of the franchise fee be resolved, the text of Rule 25-6.100(7), F.A.C. appears to clearly control the simple question of whether, once lawfully imposed, the fee should be collected from the customer residents of the Town of Belleair.

Based upon staff’s recommendation and analysis, staff does not believe it is necessary for the Commission to decide any of the town’s objections.

**Issue 2:** Should this docket be closed?

**Recommendation:** Yes, if the Commission votes to dispose of the petition for declaratory statement, the docket should be closed.

**Staff Analysis:** A declaratory statement is issued as a final order and the docket may be closed after the deadline for filing an appeal has passed.

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<sup>8</sup> *Florida Power Corporation v. City of Winter Park*, 887 So. 2d 1237, 1242.