ORIGINAL 050925-EI

Progress Energy

RECEIVED-FPSC

John T. Burnett
ASSOCIATE GENERAL COUNSEL
PROGRESS ENERGY SERVICE COMPANY, LLC

2005 DEC 21 AM 11:46

COMMISSION
CLERK

December 21, 2005

Ms. Balanca S. Bayo, Director
Division of Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Request for Declaratory Statement by Progress Energy Florida, Inc.; Undocketed

Dear Ms. Bayo:

Please find enclosed the original and fifteen (15) copies of Progress Energy Florida, Inc.' s Request for Declaratory Statement filed pursuant to Section 120.565, F.S., and Rule 28-105.002, F.A.C.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also, enclosed is a 31/2 inch diskette containing the request in Word format. Thank you for your assistance in this matter.

Respectfully,

John T. Burnett lms

John T. Burnett

JTB/lms
Enclosure

Progress Energy Florida, Inc.
106 E. College Avenue
Suite 800
Tallahassee, FL 32301

RECEIVED & FILED

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DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for Declaratory Statement by Progress Energy Florida, Inc.

Docket No. 050925-EI

Submitted for filing:
December 21, 2005

PETITION FOR DECLARATORY STATEMENT BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Progress Energy Florida, Inc. ("PEF", or "the Company"), pursuant to Section 120.565, Fla. Stat., and Rule 28-105.002, Fla. Admin. Code, petitions the Florida Public Service Commission ("the Commission") for a declaratory statement regarding the application of Rule 25-6.100(7), Fla. Admin. Code, Commission Order No. 8035 and Commission Order No. 8029, as approved by the Supreme Court of Florida in City of Plant City v. Hawkins, 375 So. 2d 1072 (Fla. 1979), to PEF's particular set of circumstances as described below. In support of this Petition, PEF states as follows:

1. Petitioner, PEF, is an investor-owned utility subject to the jurisdiction of the Commission under Chapter 366, Florida Statutes. PEF's name and address, and its telephone number and facsimile number for purposes of this Petition, are provided below.

Progress Energy Florida, Inc.
100 Central Avenue
St. Petersburg, Florida, 33701
(727) 820-5184
(727) 820-5249 (fax)

2. All notices, pleadings, and other communications required to be served on Petitioner should be directed to:

Alex Glenn, Esquire
alex.glenn@pgnmail.com

John T. Burnett, Esquire
john.burnett@pgnmail.com
Progress Energy Service Company, LLC
Post Office Box 14042
St. Petersburg, FL 33733-4042
Telephone: (727) 820-5184
Facsimile: (727) 820-5249

James Michael Walls
mwalls@carltonfields.com
Dianne M. Triplett
dtriplett@carltonfields.com
Carlton Fields
Corporate Center Three at International Plaza
4221 W. Boy Scout Boulevard
P.O. Box 3239
Tampa, Florida 33607-5736
(813) 223-7000
(813) 229-4133 (fax)

For express deliveries by private courier to the Petitioner, the address is as stated in paragraph 1.

3. The agency rule and agency orders on which this declaratory statement is sought are Rule 25-6.100(7), Fla. Admin. Code, Commission Order No. 8035, and Commission Order No. 8029 as approved by the Supreme Court of Florida in City of Plant City v. Hawkins, 375 So. 2d 1072 (Fla. 1979).

BACKGROUND AND INTRODUCTION

4. In 1971, PEF, through its predecessor Florida Power Corporation, entered into a thirty-year franchise agreement with the Town of Belleair ("Town" or "Belleair"). That franchise agreement required PEF to pay a franchise fee equal to six percent of PEF's revenues from the sale of electricity within the Town limits, as more specifically defined in the franchise agreement. That franchise agreement expired December 1, 2001.

5. Prior to the expiration of the franchise agreement, the Town sued PEF seeking relief in the part relevant here of an injunction forcing PEF to continue to collect and remit franchise fees to the Town after the Town's franchise agreement with PEF would expire. Before the franchise agreement expired, the trial court entered an order granting the injunction. As a result, when the franchise agreement expired on December 1, 2001, PEF continued to collect the franchise fees from its customers in the Town and remit payment of the fees to the Town in the same manner that PEF had collected and paid franchise fees before the franchise agreement expired.

6. PEF appealed the trial court's order to the Second District Court of Appeal. On August 30, 2002, the Second District Court of Appeal issued its decision, reversing the trial court's injunction order, and finding that, without the franchise agreement to support the franchise fee, the six percent of revenues franchise fee constituted an illegal tax under prior Florida Supreme Court precedent. The District Court concluded that the Town had no clear legal right to continue receiving the six percent of revenue franchise fee after expiration of the franchise. Later, on September 24, 2002, the Second District Court of Appeal issued its mandate requiring the trial court and all parties to comply with its decision.

7. In compliance with the Second District Court of Appeal mandate, PEF stopped collecting the six percent of revenue franchise fee from its customers and, therefore, stopped remitting the franchise fees to the Town. PEF further requested, consistent with the District Court's Mandate, that the Town disgorge the franchise fees remitted to it between December 1, 2001, when the franchise agreement expired, and September 24, 2002, the date of the Second District's mandate, so that the fees could be returned to customers. Because the Town had sought review of the Second District's decision in the Florida Supreme Court, the trial

court ruled that the franchise fees collected and paid to the Town between the expiration of the franchise agreement and the Second District's mandate should be placed in escrow pending a ruling by the Florida Supreme Court.

8. Prior to expiration of the Town's franchise with PEF, the Town had not imposed a separate municipal utility tax on its residents. Florida law permits municipalities to impose a municipal utility tax on its residents up to ten percent of the electric revenues generated by their consumption of electricity. See Section 166.233, Florida Statutes. The Town, however, decided that it would adopt a municipal utility tax to cover any shortfall from the loss of the franchise fees, if the Town did not prevail on its position that PEF should continue to collect and pay franchise fees after the franchise expired. On April 1, 2003, the Town enacted an ordinance implementing a ten percent (10%) municipal utility tax.

9. Almost contemporaneously, the Florida Supreme Court had on certiorari review the decision of the Fifth District Court of Appeal in the City of Winter Park case to resolve a conflict between the Fifth District Court of Appeal and the Second District Court of Appeal in the Town of Belleair case. During the pendency of the certiorari review at the Florida Supreme Court to resolve the conflict between the District Courts of Appeal, PEF did not collect and remit the franchise fees to the Town, consistent with the mandate issued by the Second District Court of Appeal. Over two years later, on October 28, 2004, the Supreme Court of Florida issued its opinion in Florida Power Corporation v. City of Winter Park, 887 So. 2d 1237 (Fla. 2004). Later, 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).

10. In both the Winter Park and Town of Belleair decisions, the Florida Supreme Court addressed the municipal imposition of franchise fees after the municipality's franchise

agreement with PEF had expired. The Florida Supreme Court held that the imposition of a previously agreed-to franchise fee during the "holdover period" in which negotiation of a new arrangement occurs was proper. The Court specifically disapproved the Second District's decision to the extent that the Second District had ruled that courts cannot extend the terms of an expired franchise agreement through a holdover period during which the parties negotiate a new arrangement. The Florida Supreme Court issued its mandate requiring compliance with its rulings on March 10, 2005. Thereafter, on April 6, 2005, the Second District Court of Appeal adopted the Florida Supreme Court's mandate and withdrew its prior September 24, 2002 mandate.

11. Following the Florida Supreme Court's decision in Florida Power Corporation v. City of Winter Park, 887 So. 2d 1237 (Fla. 2004), the Town requested that PEF remit to the Town the escrowed franchise fees that were previously collected from customers and paid to the Town between expiration of the franchise agreement and the Second District Court of Appeal's decision, but placed in escrow by order of the trial court following the Second District decision. The Town also informed PEF that "[w]ith respect to the Town's directions regarding any further collection of franchise fees, [Belleair] will advise you as soon as the Town Commission can officially act upon that matter." The Town made no reference in that letter to the period of time the franchise fees were not collected from customers and paid to the Town in accordance with the Second District's mandate. A copy of the Town's November 11, 2004 letter to PEF is attached as Exhibit A to this Petition.

12. PEF complied with the Town's requests by wiring the escrowed franchise fees to the Town pursuant to the Town's instructions and refraining from collecting the franchise fees from its customers in the Town and remitting them to the Town. PEF has not received any

instructions or official requests from the Town to begin collection of the franchise fees and pay the fees to the Town.

13. Almost a full year later, on November 15, 2005, the Town sent PEF another letter, this time demanding payment of franchise fees for the period between the Second District's mandate and the Town's prior November 11, 2004 letter. In that letter, the Town again informed PEF that the Town had decided "not to seek payment of any fees after [November 11, 2004] to [November 15, 2005] at this time." With respect to future franchise fees, the Town expressed that it wanted PEF to begin collecting franchise fees from its customers within the Town and paying them to the Town when the Town repealed its ten percent (10%) municipal utility tax at some unknown future date. A copy of this letter is attached as Exhibit B to this Petition.

14. In its November 15, 2005 letter, the Town further expressed its belief that PEF had "no right" to collect from its customers in the Town the payment of franchise fees for the period following the Second District mandate on September 24, 2002 to the Town's November 11, 2004 letter. The Town informed PEF that it would use "every power in its means to stop such a collection." Under the Town's demands, therefore, PEF is supposed to now pay franchise fees to the Town for the period following the Second District's mandate on September 24, 2002 to November 11, 2004, but PEF is not supposed to collect these franchise fees from its customers in the Town. When PEF is required to pay franchise fees to a municipality, however, PEF may collect the franchise fees from its customers in the municipality pursuant to Rule 25-6.100(7), Fla. Admin. Code, Commission Order No. 8035, and Commission Order No. 8029, as approved by the Supreme Court of Florida in City of Plant City v. Hawkins, 375 So. 2d 1072 (Fla. 1979).

SUBSTANTIAL AFFECT ON PEF UNDER THE PARTICULAR SET OF CIRCUMSTANCES

15. Rule 25-6.100(7)(a) of the Florida Administrative Code states that when a municipality imposes a franchise fee upon a utility, the utility may collect that fee from its customers receiving service within that municipality. Rule 25-6.100(7)(a), F.A.C. The Rule, by its express terms, does not grant the municipality the authority to charge a franchise fee. Rather, the Rule specifies the method for collecting a franchise fee if a municipality "having authority to do so" charges the utility a franchise fee. Rule 25-6.100(7)(d), F.A.C.

16. Further, in Commission Order No. 8035, the Commission denied PEF's petition (through its predecessor Florida Power Corporation), to spread franchise fee costs across the entire customer base because, the Commission determined, franchise fees "represent a cost which should more appropriately be borne by the consumers within those municipalities." In re: Petition of Florida Power Corporation to revise its treatment of franchise fees for ratemaking purposes, Order No. 8035, Docket No. 770017(EU), 1977 Fla. PUC LEXIS 182, *21 (November 8, 1977). The Commission issued a similar order approving implementation of the "direct method" of collecting from customers within a municipality the costs of the franchise fees imposed on a utility by the municipality in Commission Order No. 8029. 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, Order No. 8029, Docket No. 770810-EU, 1977 Fla. PUC LEXIS 207 (November 1, 1977). Commission Order No. 8029 was approved by the Florida Supreme Court in City of Plant City v. Hawkins, 375 So. 2d 1072 (Fla. 1979).

17. This Petition arises because of a change in the law. Following the Second District's mandate on September 24, 2002, the imposition of franchise fees after the Town's franchise had expired was held to be an illegal tax. By November 11, 2004, the Florida Supreme Court had ruled that franchise fees may be imposed during a "holdover period" after the franchise expired and until a new franchise was negotiated. The Town has demanded payment from PEF of franchise fees between September 24, 2002 and November 11, 2004 and demanded that such fees should not be collected from PEF's customers in the Town. In fact, the Town made clear that it will use "every power in its means" to stop PEF from collecting these franchise fees from its customers in the Town. See Exhibit B.

18. Because the Town has demanded that PEF pay the Town franchise fees for the periods between September 24, 2002 and November 11, 2004, PEF believes it may now begin to collect these franchises fees from its customers in the Town pursuant to Rule 25-6.100(7)(a), (d), Fla. Admin. Code, and Commission Order Nos. 8035 and 8029. The Town's claim that PEF has no such right and that the Town will seek to enjoin PEF from collecting these franchise fees from its customers in the Town raises a doubt with respect to the right to collect these franchise fees under the Commission's Rules and Orders that PEF needs the Commission to resolve. PEF faces substantial costs not only to implement the collection of these franchise fees but to defend it, given the Town's claims that it will do whatever it can to stop PEF from collecting these franchise fees. PEF, therefore, will be substantially affected by the Commission's determination of whether the franchise fees in question can be collected from PEF's customers in the Town under PEF's particular circumstances.

PROPOSED QUESTION TO BE ANSWERED BY THE COMMISSION

19. In light of the foregoing paragraphs of this Petition, the proposed question to be answered by the Commission in this Petition for a Declaratory Statement is:

> Pursuant to Rule 25-6.100(7), Fla. Admin. Code, and Commission Order Nos. 8035 and 8029, is PEF permitted to collect franchise fees from its customers within the town limits of the Town of Belleair to comply with the Town of Belleair's November 15, 2005 demand for payment of franchise fees for the period between September 24, 2002 and November 11, 2004?

WHEREFORE, PEF respectfully requests that the Commission answer the proposed question by declaring that PEF may collect from its customers in the Town of Belleair franchise fees imposed on PEF by the Town of Belleair for the period September 24, 2002 to November 11, 2004 pursuant to the Commission's Rule and Orders.

Respectfully submitted,

PROGRESS ENERGY FLORIDA, INC.

By _____
JOHN T. BURNETT

JAMES MICHAEL WALLS
Florida Bar No. 0706272
DIANE M. TRIPLETT
Florida Bar No. 0872431
CARLTON FIELDS, P.A.
Post Office Box 3239
Tampa, FL 33601-3239
Telephone: (813) 223-7000
Facsimile: (813) 229-4133

JOHN T. BURNETT
Fla. Bar No. 173304
Post Office Box 14042
St. Petersburg, FL 33733-4042
Telephone: (727) 820-5184
Facsimile: (727) 820-5249

Exhibit A

TEW, BARNES & ASSOCIATES, L.L.P.

ATTORNEYS AT LAW

ROBERT L. BARNES, JR.
LARRY J. GONZALES
RICHARD C. MILLIAN
JOEL R. TEW
TONY J. TUNTASIT

CLEARWATER OFFICE
2655 MCCORMICK DRIVE
CLEARWATER, FLORIDA 33759

TAMPA OFFICE
2905 BAYSHORE BOULEVARD
SUITE 200
TAMPA, FLORIDA 33629

PLEASE REPLY TO:
2655 MCCORMICK DRIVE
CLEARWATER, FLORIDA 33759-5124

CLEARWATER OFFICE
(727) 799-2882
FAX
(727) 726-0058

TAMPA OFFICE
(813) 902-8500
FAX
(813) 902-8599

Web site: www.tbalaw.com
Email: jtew@tbalaw.com

November 11, 2004

VIA FACSIMILE AND U.S. MAIL

John Burnett, Esquire
4221 W. Boy Scout Boulevard
Tampa, FL 33607

Re: Town of Belleair/Progress Energy/Escrow Release

Dear John:

Pursuant to our recent telephone conversation, this letter is to provide directions for the deliver of the escrow funds held by your firm in the above-referenced matter, based upon the decision of the Florida Supreme Court. Please deliver the escrow funds, with accrued interest, to the Town of Belleair via wire transfer, as follows:

SunTrust Bank
401 East Jackson Street
Tampa, FL 33602
ABA # 61000104
For credit to Town of Belleair, Florida. Account # 0032020397679

With respect to the Town's directions regarding any further collection of franchise fees, will advise you as soon as the Town Commission can officially act upon that matter.

Very truly yours,

TEW, BARNES & ASSOCIATES, L.L.P.

Joel R. Tew
Town Attorney

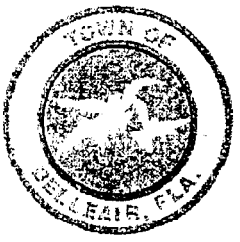
JRT/lbs

pc: Mayor George Mariani
Town Manager Steve Cottrell
Tony J. Tuntasit, Esquire

{A0223656.DOC}

Exhibit B

TOWN OF BELLEAIR



INC. 1925

901 PONCE DE LEON BOULEVARD
BELLEAIR, FLORIDA 33756-1096
PHONE (727) 588-3769
FAX (727) 588-3778
SUNCOM (727) 513-2032
WWW.TOWNOFBELLEAIR-FL.GOV

November 15, 2005

Mr. J. Dale Oliver
Vice President
South Coastal Region
Progress Energy Florida, Inc.
P. O. Box 14042
St. Petersburg, FL 33733

Dear Mr. Oliver:

This letter is in response to your November 1, 2005 letter. Your recitation of history is not entirely accurate. For example, Mr. Tew's letter of November 11, 2004 stated that the Town's "directions regarding any further collection of franchise fees" would be forthcoming. Your letter falsely claims that his notice related to "whether or not to reinstitute the franchise fee." The fee has been in place and a legal requirement since your company executed the 1971 franchise. Your company voluntarily chose not to continue collection of the franchise fee during the pendency of the Supreme Court appeal. Collection and payment are two different issues. Therefore, for the period of time from which your company wrongfully withheld payment of the franchise fees to the Town until November 11, 2004, we hereby demand payment from your company of those fees. If you wrongfully seek to collect a dime from our citizens to try to recoup any of these monies, we will use every means within our power to stop such a collection and bring your company to justice.

With respect to the fees from November 11, 2004 on, since you were arguably waiting on instructions from the Town regarding the going forward status of the fee, we chose not to seek payment of any fees after that date to this date at this time. The Town Council has determined to repeal the tax. It is our intent to have you begin collections coterminous with the ending of the collection of the tax.

We have every intention of facilitating the recollection of the franchise fee such that our citizens do not also pay the tax. We also feel that some accommodation should be made for that time period following Mr. Tew's letter. However, your company owes the Town for the period of time in which you chose to stop collecting and escrowing the franchise fees (we understand you collected and escrowed in other towns). Further, your company has no right to go back and seek these fees from our citizens.

We are in the process of determining what would be appropriate compensation to the Town for prior periods and the terms under which the Town would continue to grant an electric utility franchise to Progress Energy. We expect to inform you of the Town's position on these issues shortly.

Sincerely,

Mayor George E. Mariani, Jr.

cc: Tom Cloud
Gray/Robinson, P.A.
Orlando, FL