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February 27, 2006

VIA EMAIL TRANSMISSION
Commissioner Lisa Polak Edgar
Commissioner J. Terry Deason
Commissioner Isilio Arriaga
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*

of Winter Park[1] 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."[2]

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"[3] 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 . . . ."[4] 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.

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Stephen J. Cottrell, Town Manager, Town of Belleair
(*Via Email Transmission*)

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[1] *Florida Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1241 (Fla. 2004).
[2] *Id.*
[3] *Id.* at 1240
[4] *Id.*