City Council Agenda Item

September 4, 2012

TO: Mayor Pilar Turner
Vice Mayor Craig Fletcher
Councilmember Jay Kramer
Councilmember Tracy Carroll
Councilmember Dick Winger

FROM: James R. O'Connor, City Manager

DATE: August 28, 2012

SUBJECT: **Memorandum of Understanding among City of Vero Beach, Orlando Utilities Commission and Florida Power & Light Company**

REQUESTED BY: City Manager

The following is requested as it relates to the above-referenced agenda item:

____ Request Council review and approval based on the attached supporting documentation.

_X_ No action required. (Information only)

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("***MOU***"), is made and entered into as of this ____ day of September, 2012, by and among THE CITY OF VERO BEACH, a municipal corporation organized under the laws of the State of Florida (***"COVB"***), ORLANDO UTILITIES COMMISSION, a statutory municipal utility organized under the laws of the State of Florida ("***OUC***"), and FLORIDA POWER & LIGHT COMPANY, a corporation organized under the laws of the State of Florida (***"FPL"***). COVB, OUC and FPL are referred to individually as a ***"Party,"*** and collectively as the ***"Parties."***

WITNESSETH:

WHEREAS, OUC and COVB are parties to that certain Agreement for Purchase and Sale of Electric Energy and Capacity, Gas Transportation Capacity and Asset Management Services dated April 21, 2008, as amended (the "***OUC-COVB PPA***");

WHEREAS, COVB and Florida Municipal Power Agency ("***FMPA***") are parties to: (a) that certain St. Lucie Project Power Sales Contract dated June 1, 1982, as amended (the "***St. Lucie Power Sales Contract***"); (b) that certain St. Lucie Project Power Support Contract dated June 1, 1982, as amended (the "***St. Lucie Power Support Contract***"); (c) that certain Stanton Power Sales Contract dated January 16, 1984, as amended ("***Stanton I Power Sales Contract***"); (d) that certain Stanton Power Support Contract dated January 16, 1984, as amended ("***Stanton I Power Support Contract***"); (e) that certain Stanton II Power Sales Contract dated on or about May 24, 1991, as amended ("***Stanton II Power Sales Contract***"); and (f) that certain Stanton II Power Support Contract dated on or about May 24, 1991, as amended ("***Stanton II Power Support Contract***") (the contracts described in (a), (b), (c), (d), (e) and (f) being collectively, the "***FMPA Entitlement Agreements***");

WHEREAS, COVB and FPL are currently negotiating the purchase and assumption by FPL, and the sale and assignment by COVB, of certain electric utility assets and certain associated liabilities pursuant to terms and conditions as may be agreed upon, and set forth in a purchase and sale agreement to be executed, by COVB and FPL (such purchase and sale agreement, upon execution by COVB and FPL, shall be referred to herein as the "***COVB Electric Utility Purchase and Sale Agreement***");

WHEREAS, closing under the COVB Electric Utility Purchase and Sale Agreement ("***COVB Electric Utility Closing***") will be conditioned upon termination of the OUC-COVB PPA and assignment of the FMPA Entitlement Agreements by COVB to OUC;

WHEREAS, OUC and COVB desire to avoid potential litigation and settle the termination of the OUC-COVB PPA, as set forth herein;

WHEREAS, COVB and OUC desire as part of their proposed settlement that COVB waive its right under the OUC-COVB PPA to have the gas transportation contracts with Florida Gas Transportation permanently released back to the COVB, as further set forth herein;

WHEREAS, COVB and OUC desire as part of their proposed settlement for COVB to assign to OUC, and OUC to assume, the FMPA Entitlement Agreements, as set forth herein;

WHEREAS, COVB and OUC desire as part of their proposed settlement that OUC and FPL enter into power purchase and reliability call agreements, as set forth herein; and

WHEREAS, COVB and FPL desire as part of the proposed COVB Electric Utility Closing that OUC and FPL enter into power purchase and reliability call agreements, as set forth herein.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties do hereby agree as follows:

1. **Effective Date**. This MOU shall become effective upon execution by each Party and delivery thereof by each Party to the other Parties.

2. **Termination of OUC-COVB PPA**.

(a) OUC-COVB PPA Termination Agreement. OUC and COVB hereby agree to negotiate in good faith, and execute by October 12, 2012, an agreement for the mutual, voluntary termination of the OUC-COVB PPA ("***OUC-COVB PPA Termination Agreement***"), providing for the release and waiver by COVB of all rights under the OUC-COVB PPA, for re-assignment of those certain Form of Service Agreement Applicable to Agreements Executed After April 1, 2002 Firm Transportation Service – Market Area FTS-2, dated January 1, 2010 and Form of Service Agreement Firm Transportation Service – Market Area FTS-1, dated January 1, 2010 between OUC and Florida Gas Transmission Company ("***FGT***"), as amended (collectively, the "***Gas Transportation Contracts***"). Such waiver and release and the termination of the OUC-COVB PPA shall become effective, if at all, upon the last of the following to occur ("***Termination Date***"): (i) the COVB Electric Utility Closing; (ii) a payment of twenty million dollars ($20,000,000) by COVB to OUC as consideration for such termination; (iii) execution and delivery by OUC and FPL of the Reliability Call Agreement (as defined below), (iv) the execution of and satisfaction or waiver of any conditions precedent in the FMPA Entitlement Agreements Assignment Agreement (as defined below) by OUC and COVB and consent thereto by FMPA; (v) a payment of thirty four million dollars ($34,000,000) by COVB to OUC as consideration for assumption of the Entitlement Agreements by OUC; and (vi) the execution of and satisfaction or waiver of any conditions precedent in the OUC-FPL Stanton I and Stanton II PPAs by OUC and FPL.

(b) Reliability Call Agreement. OUC and FPL hereby agree to negotiate in good faith, and execute by October 12, 2012, an agreement ("***Reliability Call Agreement***") that will entitle FPL, from time to time in its discretion where any of the generating units currently owned by the COVB (and that will be transferred to FPL at the COVB Electric Utility Closing (such units being the "***COVB Units***")) are dispatched in response to a reliability call (and not dispatched for economic reasons) by the FRCC security coordinator or FPL's transmission department, to require OUC to sell natural gas to FPL (on a day-ahead basis, or if OUC using

commercially reasonable efforts can accommodate an intra-day call, on an intra-day basis) delivered to such unit(s) and transported at the rates established under the gas transporter's filed rate schedules, which call rights by FPL shall become effective on the Termination Date and shall expire on the earlier of (i) retirement of such facility by FPL or (ii) the fourth (4th) anniversary of the COVB Electric Utility Closing. FPL's call option volume can be no greater than the gas transportation volumes per the gas transportation capacity contracts transferred to OUC as part of the OUC–COVB PPA. The fuel rate shall be set at the weighted average cost of gas (WACOG) for the respective day and shall be equal across all of the OUC units and the COVB Units (except that the reservation fee shall be priced at FGT's posted tariff rate per FTS-2 which reservation fee is currently $0.72/mmbtu), which fuel shall be billed to FPL in accordance with the process set forth in the "Base Contract For Short-Term Sale and Purchase of Natural Gas" between OUC and FPL originally dated June 26, 2000 and amended to a May 1, 2000 effective date.

3. <u>Assignment of FMPA Entitlement Agreements</u>.

(a) <u>FMPA Entitlement Agreements Transfer Agreement</u>. OUC and COVB hereby agree to negotiate in good faith, and execute by October 12, 2012, an agreement ("***FMPA Entitlement Agreements Transfer Agreement***") for the transfer of all of the FMPA Entitlement Agreements from COVB to OUC based on terms substantially similar to those contained in the form of the Agreement Between City Of Homestead And Kissimmee Utility Authority For Transfer Of Approximately 50% Of City Of Homestead's Power Entitlement Share Of Stanton And Stanton II Projects, Or In The Alternative, The Transfer Of All Of Homestead's Stanton II Power Entitlement Share dated April 10, 1995. The FMPA Entitlement Agreements Transfer Agreement (i) shall not terminate unless the COVB Electric Utility Purchase and Sale Agreement terminates prior to the COVB Electric Utility Closing, and (ii) shall include provisions regarding the termination of, and withdrawal of COVB from, the All-Requirements Power Supply Project Contract dated October 1, 1996 between FMPA and COVB, effective upon the COVB Electric Utility Closing.

(b) <u>FMPA Entitlement Agreements Assignment Agreement</u>. OUC and COVB hereby agree to negotiate in good faith, and execute by October 12, 2012, an agreement ("***FMPA Entitlement Agreements Assignment Agreement***") for the assignment of all of the FMPA Entitlement Agreements from COVB to OUC and the assumption by OUC of all of COVB's obligations under the FMPA Entitlement Agreements as of the Termination Date. The FMPA Entitlement Agreements shall be transferred based on terms substantially similar to those contained in the Agreement Between City Of Homestead And Kissimmee Utility Authority Of A 12.195% Power Entitlement Share In The Stanton Project dated July 26, 1995. The transfer of the St. Lucie Power Sales Contract and Power Support Contract shall be an assignment with no payment from COVB to OUC, and with OUC assuming all rights and liabilities thereunder. The transfer of the remainder of the FMPA Entitlement Agreements shall be an assignment in consideration of a payment of thirty-four million dollars ($34,000,000) by COVB to OUC payable immediately and solely upon the COVB Electric Utility Closing, and with OUC assuming all rights and liabilities under such FMPA Entitlement Agreements. The FMPA Entitlement Agreements Assignment Agreement (i) shall not include a right of first refusal for COVB to purchase or have transferred back to it any of the FMPA Entitlement Agreements, and

(iii) shall provide for a permanent assignment and assumption of the FMPA Entitlement Agreements solely upon, and concurrent with, the COVB Electric Utility Closing.

(c) OUC-FPL Stanton I PPA. OUC and FPL hereby agree to negotiate in good faith, and execute by October 12, 2012, a power purchase agreement ("***OUC-FPL Stanton I PPA***") for the purchase by FPL of 4.8193% of the Stanton I facility capacity (currently 20.5 MWs) and up to such percentage of energy for a term commencing on the Termination Date and ending on the earlier of December 31, 2017 or the third anniversary of the Termination Date, with (i) pricing for capacity equal to the costs described in the definition of "Monthly Power Costs" in the Stanton I Power Sales Contract (except that FPL will only be required to pay an equitable portion of costs that are not fixed, monthly costs, and OUC and FPL agree to negotiate methods for such equitable allocation between FPL and OUC for inclusion in the OUC-FPL Stanton I PPA, such as basing allocations on the term for amortization of such costs, the benefit to OUC beyond the term of the OUC-FPL Stanton I PPA from the incurrence of such cost, and/or other methods), relating to each month of the term of the OUC-FPL Stanton I PPA and on a pass-through basis without mark-up, (ii) pricing for energy equal to OUC's share (as assigned by COVB to OUC) of the Project Energy Related Costs (as defined in the Stanton I Power Sales Contract) under the Stanton I Power Sales Contract, relating to each month of the term of the OUC-FPL Stanton I PPA and on a pass-through basis without mark-up, and (iii) all obligations to sell, purchase and pay for capacity and energy conditioned upon the COVB Electric Utility Closing.

(d) OUC-FPL Stanton II PPA. OUC and FPL hereby agree to negotiate in good faith, and execute by October 12, 2012, a power purchase agreement ("***OUC-FPL Stanton II PPA***", and together with the OUC-FPL Stanton I PPA, the "***OUC-FPL PPAs***") for the purchase by FPL of 3.8314% of the Stanton II facility capacity (currently 16.4 MWs) and up to such percentage of energy for a term commencing on the Termination Date and ending on the earlier of December 31, 2017 or the third anniversary of the Termination Date, with (i) pricing for capacity equal to the costs described in the definition of "Monthly Power Costs" in the Stanton II Power Sales Contract (except that FPL will only be required to pay an equitable portion of costs that are not fixed, monthly costs, and OUC and FPL agree to negotiate methods for such equitable allocation between FPL and OUC for inclusion in the OUC-FPL Stanton II PPA, such as basing allocations on the term for amortization of such costs, the benefit to OUC beyond the term of the OUC-FPL Stanton II PPA from the incurrence of such cost, and/or other methods), relating to each month of the term of the OUC-FPL Stanton II PPA and on a pass-through basis without mark-up, (ii) pricing for energy equal to OUC's share (as assigned by COVB to OUC) of the Project Energy Related Costs (as defined in the Stanton II Power Sales Contract) under the Stanton II Power Sales Contract, relating to each month of the term of the OUC-FPL Stanton II PPA and on a pass-through basis without mark-up, and (iii) all obligations to sell, purchase and pay for capacity and energy conditioned upon the COVB Electric Utility Closing.

4. **COVB Electric Utility Closing**. COVB and FPL agree that the COVB Electric Utility Closing shall not occur earlier than January 1, 2014. For the avoidance of doubt, nothing in this MOU obligates FPL to purchase, or COVB to sell, COVB's electric utility assets.

5. **Further Assurances**. The Parties agree to dedicate sufficient personnel and resources to finalize the agreements required to be executed hereunder by October 12, 2012 or such later date as may be agreed by the Parties. OUC and COVB agree to use their best reasonable efforts to obtain all FMPA-related approvals and consents required for assignment and assumption of all of the FMPA Entitlement Agreements from COVB to OUC.

6. **Governing Law.** This MOU shall be governed, construed and enforced in accordance with the laws of the State of Florida, without giving effect to the conflict of law provisions thereof.

7. **Waiver of Jury Trial.** EACH OF THE PARTIES HERETO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THE RIGHT SUCH PARTY MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS MOU AND ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONJUNCTION HEREWITH, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT FOR THE PARTIES ENTERING INTO THIS MOU.

8. **Entire Agreement.** This MOU constitute the entire final understanding and agreement of the Parties with respect to its subject matter, and there are no agreements, understandings, restrictions, representations or warranties among the Parties other than those set forth in this MOU.

9. **Expenses.** The Parties shall pay their own expenses incident to negotiating, entering into and carrying out this MOU and any agreements referenced herein.

10. **Third Party Beneficiary.** This MOU is intended solely for the benefit of the Parties, and the Parties expressly disclaim any intent to create any rights in any third party as a third-party beneficiary to this MOU.

11. **Assignment.** This MOU may not be assigned or transferred by any Party without the prior written consent of the other Parties. The provisions set forth herein shall be binding upon and inure to the benefit of the respective successors and permitted assigns of the Parties.

12. **Amendment**. This MOU may not be amended, modified or supplemented, except by written agreement of all of the Parties.

13. **Waiver**. No delay, failure or refusal on the part of any Party to enforce any provision of this MOU shall be construed as a waiver of such provision.

14. **Invalid Provision.** If any provision of this MOU is held to be illegal, invalid or unenforceable under any present or future law, such provision will be fully severable and this MOU will be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part hereof. The remaining provisions of this MOU will remain in full force

and effect and will not be affected by the illegal, invalid or unenforceable provision or by its severance herefrom and in lieu of such illegal, invalid or unenforceable provision, there will be added automatically as a part of this MOU a legal, valid and enforceable provision as similar in terms to such illegal, invalid or unenforceable provision as may be possible.

15. **Construction.** The Parties acknowledge and agree that the terms and conditions of this MOU have been freely and fairly negotiated. Each Party acknowledges that in executing this MOU they have relied solely on their own judgment, belief and knowledge, and such advice as they may have received from their own counsel, and they have not been influenced by any representation or statements made by any other Party or its counsel. No provision in this MOU is to be interpreted for or against any Party because that Party or its counsel drafted such provision.

16. **Confidentiality**. This MOU and any document submitted by a Party to the other under MOU or during the negotiation of this MOU or the agreements required to be executed hereunder (***"Confidential Documents"***) may be a public record (as defined in Section 119.011, Florida Statutes) and may be open for inspection or copying by any person or entity unless such document is exempted under Section 119.071, Florida Statutes. A Party may claim that one or all of the Confidential Documents is, or has been treated as, confidential and proprietary by such Party in accordance with Florida law, and is exempt from disclosure under Chapter 119, Florida Statutes. In the event that a Party is requested or required by legal or regulatory authority to disclose any Confidential Document, such Party shall within three (3) days notify the other Parties of such request or requirement prior to disclosure so that the other Parties may seek an appropriate protective order. This section shall terminate on the earlier of the COVB Electric Utility Closing or December 31, 2015.

17. **Press Releases**. Except as may be required by applicable law, the Parties shall not issue any press release or other public disclosure with respect to this MOU or the transactions contemplated hereby without first affording the non-disclosing Parties the opportunity to review and comment on such press release or public disclosure.

18. **Counterparts**. The Parties acknowledge and agree that this MOU may be executed in multiple counterparts, each such counterpart, when executed and delivered, shall constitute an integral part of one and the same agreement.

[Remainder of page is intentionally left blank; signatures on following page]

IN WITNESS WHEREOF, the Parties have caused this MOU to be signed by their respective duly authorized representatives as of the date first above written.

FLORIDA POWER & LIGHT COMPANY

By: _____
Name: _____
Title: _____

[NTD: VERO TO PROVIDE PROPER SIGNATURE BLOCK]

ATTEST:

_____
Tammy K. Vock
City Clerk

(City Seal)

Approved as to form and legal sufficiency:

_____
Wayne R. Coment
Acting City Attorney

CITY OF VERO BEACH, FLORIDA

_____
Pilar Turner
Mayor

Approved as conforming to municipal policy:

_____
James R. O'Connor
City Manager

ORLANDO UTILITIES COMMISSION

ATTEST:

By: _____
Kenneth P. Ksionek,
General Manager & CEO

_____
Secretary

Approved as to Form and Legality
OUC Legal Department

By: _____