CITY OF MIAMI
CITY ATTORNEY'S OFFICE
MEMORANDUM

TO: Stephanie N. Grindell, Director
Public Works

FROM: Jorge L. Fernandez, City Attorney

DATE: November 15, 2004

RE: FPL Energy Services – Chilled Water Franchise Agreement
(MIA 04-00009)

You have requested an opinion on substantially the following question:

> **WERE THE RIGHTS, INTERESTS, AND OBLIGATIONS OF THE FRANCHISE AGREEMENT ("AGREEMENT") EXECUTED BETWEEN FPL ENERGY SERVICES, INC. ("COMPANY") AND THE CITY OF MIAMI ("CITY") PROPERLY TRANSFERRED TO TECO SOLUTIONS, INC., ("TECO") AS A RESULT OF A STOCK PURCHASE?**

The answer to your question is in the negative. The rights, interests, and obligations of the Agreement were not properly transferred to TECO. The Company was obligated to provide notice to the City prior to the assignment or transfer of the Agreement. By providing notice to the City after the assignment had taken place, the notice requirement under the Agreement was violated. Therefore, the Company's assignment of Agreement was not effective; and a new franchise agreement with TECO may be required to establish the parties' contractual relationship.

DISCUSSION

The Agreement was authorized pursuant to Ordinance number 11662, which was passed and adopted by the City Commission on May 26, 1998. On June 8, 1998, the Company and City executed the Agreement. On September 1, 2001, the Company, without the City's knowledge, assigned the Agreement to its wholly-owned subsidiary, FPL Thermal Systems, Inc ("Assignee"). To accomplish the assignment, the Company and Assignee executed an Assignment and Assumption Agreement. (See "Attachment I").

The Agreement specifies the conditions under which the Agreement may be assigned or transferred. Section 5 of the Agreement provides, in pertinent part:

> No sale, assignment or transfer of the privilege granted under this Franchise Agreement or sale or lease of the System Facilities, or any portion thereof, shall be effective unless the Company shall have filed written notice thereof with the City Clerk ***at least sixty (60) days prior*** to the scheduled date of such sale, assignment, or transfer...

The Company assigned the Agreement to Assignee on September 1, 2001. Company's assignment of Agreement to Assignee required written notice with the City Clerk at least sixty days (60) prior to the assignment date. Under the Agreement, the Company had until July 2, 2001, to provide the City with notice of assignment. However, the Company failed to submit notice of assignment until September 10, 2001, or nine (9) days after the assignment. (See "Attachment II"). Company's submission of notice after the fact was contrary to the unambiguous language of Section 5. Additionally, the Company's failure to comply with Section 5 of the Agreement may be grounds for termination or forfeiture of Agreement by the City. Section 9 of the Agreement states, in pertinent part:

> (a) Failure on the part of the Company to comply in any substantial respect with any of the provisions of this Franchise Agreement shall be grounds for forfeiture....
>
> (b) A substantial breach by the Company shall include, but not be limited to: (iii) violations of any other material provision of this Franchise Agreement...

Under the terms of the Agreement, failure to provide timely notice rendered the assignment between Company and Assignee void. Furthermore, the Company's Assignment of Agreement to Assignee without the City's knowledge, may validate City's actions in favor of termination.

On December 31, 2003, after a series of stock purchases and name changes, TECO arose as the owner of Assignee. Under Florida law, the fact that there is a change in ownership of corporate stock does not affect the Company's contract rights or liabilities.[1] In acquiring 100 percent of the stock, TECO assumed all of Assignee's rights, titles, and interests rightfully belonging to Assignee. Neither a 100 percent purchase of corporate stock nor a corporate merger would affect the enforceability of an agreement.[2] TECO, as the surviving Company became

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[1] *Corporate Express Office Products, Inc. v. Phillips*, 847 So. 2d 406 (Fla. 2003).
[2] *Id.*

responsible and liable for all the liabilities and obligations of the merged Company.[3] However, TECO's ownership of Assignee could not have included the rights, titles, and interests of the Agreement, because the Agreement was not effectively transferred to Assignee by the Company. TECO could not have obtained that which Assignee did not possess at the time of its purchase.

CONCLUSION

TECO's ownership of Assignee did not include the rights, titles, and obligations of the Agreement. The assignment of the Agreement between Company and Assignee failed for lack of notice. Section 5 of the Agreement required Company to notify the City at least sixty (60) days before the assignment. Instead, the City was notified by the Company nine (9) days after the fact. Therefore, Assignee did not effectively possess the rights, interests, and obligations of the Agreement; and TECO's subsequent purchase of Assignee could not have included the rights, interests, and obligations of the Agreement. As between the Company and City, the Company's actions may trigger the forfeiture or termination clauses of Section 9. The City's best interests should dictate the next course of action, which may include a new franchise agreement with TECO or the enforcement of the Agreement with the Company.

PREPARED BY:

Roland C. Galdos
Assistant City Attorney

REVIEWED BY:

Rafael O. Diaz
Assistant City Attorney

c: Mayor and Members of the City Commission
Joe Arriola, City Manager
Priscilla Thompson, City Clerk

[3] § 607.1106(1)(c), Fla. Sta. (2004).

ASSIGNMENT AND ASSUMPTION AGREEMENT

ASSIGNMENT AND ASSUMPTION AGREEMENT (the "Assignment"), dated September 1, 2001, between FPL Energy Services, Inc., a Florida corporation with its principal business address at 700 Universe Boulevard, Juno Beach, Florida 33408 (the "Assignor"), and FPL Thermal Systems, Inc., a Florida corporation with its principal business address at 700 Universe Boulevard, Juno Beach, Florida 33408 (the "Assignee").

RECITALS:

The Assignor has entered into that certain Franchise Agreement dated June 8th, 1998, by and between the Assignor and the City of Miami (the "City"), a municipality of the State of Florida (as the same may be modified, amended and supplemented from time to time, the "Franchise Agreement");

The Assignee is wholly-owned subsidiary of the Assignor; and

The Assignor desires to assign, and the Assignee desires to acquire, all of Assignor's right, title and interest in the Franchise Agreement pursuant to the terms and conditions of this Assignment.

Accordingly, the parties agree as follows:

1. Assignment. The Assignor hereby transfers and assigns, without recourse, to the Assignee, and the Assignee hereby accepts and assumes, without recourse, from the Assignor, from and after the date hereof, all of the Assignor's rights and obligations under or relating to the Franchise Agreement (the "Assigned Interest").

2. Representations and Warranties. The Assignor and Assignee each hereby represents and warrants, for the benefit of the other and its affiliates and assigns, that (i) it is duly organized and existing and it has full right power and authority to take, and has taken, all action necessary to execute, deliver and perform this Assignment and the Franchise Agreement, and any other documents required or permitted to be executed or delivered by it in connection therewith, and to fulfill its obligations hereunder; (ii) no notices, consents, authorizations, filings or approvals of or to any person are required (other than any already given or obtained) for its due and lawful execution, delivery and performance of this Assignment; and (iii) this Assignment has been duly executed and delivered by it and constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, subject, as to enforcement only, to bankruptcy, insolvency and other laws of general application relating to or affecting creditors' rights and to general equitable principles. The Assignee hereby makes and agrees to be bound by all the representations, warranties and agreements of Assignor set forth in the Franchise Agreement.

3. Novation. From and after the Effective Date (i) the Assignee shall be a party to and be bound by the provisions of the Franchise Agreement and have the rights and obligations of the Assignor thereunder and (ii) the Assignor shall relinquish its rights and be released from its obligations under the Franchise Agreement.

4. Cooperation. The parties agree to execute, acknowledge, deliver and file, or cause to be executed, acknowledged, delivered and filed, all further instruments, agreements or documents as may be necessary to consummate the transactions provided for in this Assignment and to do all further acts necessary to carry out the purpose and intent of this Assignment.

5. Entire Agreement. This Assignment contains the entire agreement of the parties with respect to the assignment of the Assigned Interest and supersedes all prior agreements, written or oral, with respect thereto.

6. Successors and Assigns. This Assignment shall be binding upon the parties, and shall be for the benefit of the parties and their respective heirs, personal representatives, executors, legal representatives, successors and permitted assigns.

7. Counterparts. This Assignment may be executed by the parties in separate counterparts, each of which when executed and delivered shall be an original, but all counterparts shall together constitute one and the same instrument. Each counterpart may consist of a number of copies each signed by less than all, but together signed by all of the parties.

8. Governing Law; Venue and Jurisdiction. This Assignment shall be governed by and construed in accordance with the laws of the State of Florida without reference to its conflicts of law principles.

IN WITNESS WHEREOF, the parties have executed this Assignment as of the day and year first written above.

FPL ENERGY SERVICES, INC., Assignor

By: _____
Name: Dennis P. Coyle
Title: Secretary

FPL THERMAL SYSTEMS, INC., Assignee

By: _____
Name:
Title:

ATTACHMENT II

Agmt # 11937/
10512

FPL
ENERGY SERVICES, INC.

700 Universe Blvd.
P.O. Box 14000
Juno Beach, FL 33408-0420

September 10, 2001

City of Miami
Office of the City Manager
444 S.W. 2nd Avenue
Miami, FL 33130

City of Miami
Office of the City Clerk
3500 Pan American Drive
Miami, Florida 33133

Ladies and Gentlemen:

This is an informational notice being sent in connection with the Franchise Agreement dated June 8th, 1998 (the "Franchise Agreement") between FPL Energy Services, Inc. ("FPLES"), a Florida corporation, and the City of Miami (the "City"), a municipality of the State of Florida. This agreement covers the franchisee's providing of district cooling services.

FPLES has transferred all of its district cooling assets to its wholly-owned subsidiary FPL Thermal Systems, Inc. ("FPL Thermal"), a Florida corporation. The Franchise Agreement expressly provides that FPLES may "sell, transfer or assign this Franchise Agreement to its parent, or any subsidiary or affiliate without the consent of the City Commission." Under this provision FPLES has thus assigned its entire interest in the Franchise Agreement to its subsidiary, FPL Thermal.

A copy of the assignment is enclosed for your files. This is an informational notice only and no action on the part of the City is required. If you have any comments or questions regarding the above-described transaction, please do not hesitate to call me.

Sincerely yours,

FPL ENERGY SERVICES, INC.

By: _____
Name:
Title: V.P.

Enclosure

RECEIVED
2001 SEP 12 AM 8:40
WALTER J. FOEMAN
CITY CLERK
CITY OF MIAMI, FL

MIA2001