

LEE COUNTY ORDINANCE NO. 17-02

AN ORDINANCE GRANTING TO FLORIDA POWER & LIGHT COMPANY, ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC FRANCHISE; IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO; PROVIDING FOR MONTHLY PAYMENTS TO LEE COUNTY; PROVIDING FOR MODIFICATIONS THAT MAY ARISE FROM CONSIDERATION AT PUBLIC HEARING; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Board of County Commissioners of Lee County, Florida (County) recognizes that the citizens of Lee County need and desire the continued benefits of electric service; and

WHEREAS, the provision of such service requires substantial investments of capital and other resources in order to construct, maintain and operate facilities essential to the provision of such service in addition to costly administrative functions, and Lee County does not desire to undertake to provide such services; and

WHEREAS, Florida Power & Light Company (FPL) is a public utility which has the demonstrated ability to supply such services; and

WHEREAS, there is currently in effect a franchise agreement between Lee County and FPL, the terms of which are set for in Lee County Ordinance No. 97-15, done and adopted August 12, 1997, and FPL's written acceptance thereof; and

WHEREAS, FPL and Lee County desire to enter into a new agreement (New Franchise Agreement) providing for the payment of fees to Lee County in exchange for the nonexclusive right and privilege of supplying electricity and other services within FPL's service territory in the unincorporated areas of Lee County free of competition from Lee County, pursuant to certain terms and conditions; and

WHEREAS, the Board of County Commissioners of Lee County deems it to be in the best interest of Lee County and its citizens to enter into the New Franchise Agreement prior to expiration of the Current Franchise Agreement.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA:

Section 1. The above recitations are hereby found to be true and correct and are adopted and approved as if set out herein at length.

Section 2. There is hereby granted to Florida Power & Light Company, its successors and assigns (hereinafter called the "Grantee") for the period of 30 years from the effective date hereof, the non-exclusive right, privilege and franchise (hereinafter called "franchise") to construct, operate and maintain in, under, upon, along, over and across the present and future roads, streets, alleys, bridges, easements, rights-of-way and other public places (herein called "public rights-of-way") throughout all of the unincorporated areas, as such unincorporated areas may be constituted from time to time, of Lee County, Florida, or its successors (herein called the "Grantor"), in accordance with the Grantee's customary practice with respect to construction and maintenance, electric light and power facilities, including, without limitation, conduits, poles, wires, transmission and distribution lines, and all other facilities installed in conjunction with or ancillary to all of the Grantee's operations (herein called "facilities"), for the purpose of supplying electricity and other electric utility related services to the Grantor and its successors, the inhabitants thereof, and persons beyond the limits thereof.

Section 3. The facilities of the Grantee shall be installed, located or relocated so as to not unreasonably interfere with public travel over the public rights-of-way or with

reasonable egress from and ingress to abutting property. To avoid conflicts with public travel, the location or relocation of all facilities shall be made as representatives of the Grantor may prescribe in accordance with Grantor's reasonable rules and regulations with reference to the placing and maintaining in, under, upon, along, over and across said public rights-of-way; provided, however, that such rules or regulations (a) shall not prohibit the exercise of the Grantee's right to use said public rights-of-way for reasons other than unreasonable interference with motor vehicular traffic, (b) shall not unreasonably interfere with the Grantee's ability to furnish reasonably sufficient, adequate and efficient electric service to all of its customers, and (c) shall not require the relocation of any of the Grantee's facilities installed before or after the effective date hereof in public rights-of-way unless or until widening or otherwise changing the configuration of the paved portion of any public right-of-way used by motor vehicles causes such installed facilities to unreasonably interfere with motor vehicular traffic, or the location of such facilities constitutes an unavoidable hazard to non-motor vehicular traffic exercising reasonable care taking into account established custom and practices in Lee County with respect to the placement of utility facilities, and other structures or obstructions commonly installed or located in and around sidewalks and other non-motor vehicular travel ways. Such rules and regulations shall recognize that above-grade facilities of the Grantee installed after the effective date hereof should be installed near the outer boundaries of the public rights-of-way to the extent possible. When any portion of a public right-of-way is excavated by the Grantee during the location or relocation of any of its facilities, the portion of the public right-of-way so excavated shall within a reasonable time be replaced by the Grantee at its expense and in as good a condition as

it was at the time of such excavation. The Grantor shall not be liable to the Grantee for any cost or expense in connection with any relocation of the Grantee's facilities required under subsection (c) of this Section, except, however, the Grantee shall be entitled to reimbursement of its costs from others and as may be provided by law.

Section 4. The County by the grant of this Franchise to FPL, shall in no way be liable to or responsible for in any manner whatsoever for, any accident, personal injury, property damage, or any claim or damage that may occur in the construction, installation, operation or maintenance by FPL, its employees, agents, contractors, sublicenses or licensees for any of its facilities hereunder, except for any damage specifically caused by or arising solely out the negligence, strict liability, intentional torts or criminal acts of the County. For and in consideration of the sum of One-Hundred and 00/100 Dollars (\$100.00) in hand paid, and other good and valuable consideration accepted by the County, FPL agrees to indemnify and hold the County harmless from and against any and all liability, loss costs, damages or expenses, to include any reasonable attorney fees of the County which may accrue to the County as the result of or by reason of any negligence, default or misconduct by FPL in the construction, operation and maintenance of its facilities hereunder in or on the County's Public Rights-of-Way.

Section 5. All rates, rules and regulations established by the Grantee from time to time shall be subject to such regulation as may be provided for by law.

Section 6(a). As a consideration for this franchise, the Grantee shall pay to the Grantor, commencing 60 days after the effective date hereof, and each month thereafter for the remainder of the term of this franchise, an amount which added to the amount of all licenses, excises, fees, charges and other impositions of any kind whatsoever (except

ad-valorem property taxes and non ad-valorem tax assessments on property), levied or imposed by the Grantor against the Grantee's property, business or operations and those of its subsidiaries during the Grantee's monthly billing period ending 60 days prior to each such payment will equal 4.5 percent of the Grantee's billed revenues, less actual write-offs, from the sale of electrical energy to residential, commercial and industrial customers (as such customers are defined by FPL's tariff) within the unincorporated areas of the Grantor for the monthly billing period ending 60 days prior to each such payment, and in no event shall payment for the rights and privileges granted herein exceed 4.5 percent of such revenues for any monthly billing period of the Grantee, except as otherwise expressly provided in the New Franchise Agreement. In the event Grantee subsequently collects previously written-off billed revenues from the sale of electrical energy to residential, commercial, and industrial customers, Grantee shall pay to the Grantor a franchise payment on such revenues in accordance with the formula set forth above in this Section.

Section 6(b). It is further provided that the Grantor shall have the option once annually, subject to all terms, conditions, and limitations specified below, to increase up to a maximum of 6.0% or decrease to a minimum of 1.0%, the percentage used to calculate the amount to be paid by the Grantee pursuant to this Section such percentage hereinafter sometimes referred to for purposes of this option as the "percentage". This option shall be exercised, if at all, by an ordinance duly adopted by the Grantor in accordance with law, a certified copy of which must be delivered to the Grantee. Such ordinance shall include a provision that the Grantor is exercising the option provided herein and state the new percentage to be used in accordance with and subject to the

terms, conditions and limitations set forth in this Section. The Grantor's option hereunder is limited solely to the percentage used to calculate the amount to be paid by Grantee pursuant to this Section, and no other section, provision or term of this franchise shall or may be altered, amended or affected by the Grantor's exercise of this option. Nothing herein shall require the Grantor to exercise its option hereunder.

Section 7. As a further consideration, during the term of this franchise or any extension thereof, the Grantor agrees: (a) not to engage in the distribution and/or sale, in competition with the Grantee, of electric capacity and/or energy to any ultimate consumer of electric utility service (herein called a "retail customer") or to any electrical distribution system established solely to serve any retail customer formerly served by the Grantee; and (b) not to participate in any proceeding or contractual arrangement, the purpose or terms of which would be to obligate the Grantee to transmit and/or distribute, electric capacity and/or electric energy from any person to any other retail customer's facility(ies); and (c) not to seek to have the Grantee transmit and/or distribute electric capacity and/or electric energy generated by or on behalf of the Grantor at one location to the Grantor's facility(ies) at any other location(s). Notwithstanding the foregoing, the Grantor may seek and if approved by the Florida Public Service Commission (FPSC) pursuant to its self-service wheeling rule and applicable statutes, with or without the Grantee's intervention in order to protect its substantial interests pursuant to the FPSC's procedural rules, procure self-service transmission and/or distribution by the Grantee of up to Grantor's available electric output (net) of the Grantor's existing 60.7 megawatt Waste-to-Energy Facility or future electrical power facilities. Grantee hereby acknowledges and agrees that Grantor may exercise its right to self-service transmission

and/or distribution as provided herein and as provided by Florida law. Each party hereto expressly retains all rights to assert all legal arguments or positions, and/or to seek all remedies, that may be asserted or sought in good faith in any such proceeding. Nothing specified above shall prohibit the Grantor from engaging with other persons in wholesale transactions which are subject to the provisions of the Federal Power Act.

Nothing herein shall prohibit the Grantor, if permitted by law, (i) from purchasing electric capacity and/or energy from any other person, or (ii) from seeking to have the Grantee transmit and/or distribute to any facility(ies) of the Grantor electric capacity and/or electric energy purchased by the Grantor from any other person; provided, however, that before the Grantor elects to purchase electric capacity and/or electric energy from any other person for consumption in any facility(ies) being served by the Grantee before such election, the Grantor shall notify the Grantee in writing. Such notice shall include a summary of the specific rates, terms and conditions which have been offered by the other person and identify the Grantor's facilities to be served under the offer. The Grantee shall thereafter have 60 days to evaluate the offer and, if the Grantee offers rates, terms and conditions which are equal to or better than those offered by the other person, the Grantor shall be obligated to continue to purchase from the Grantee electric capacity and/or energy from to serve the previously-identified facilities of the Grantor for a term no shorter than that offered by the other person.

Section 8. If the Grantor grants a right, privilege or franchise to any other person or otherwise enables any other such person to construct, operate or maintain electric light and power facilities in any part of the unincorporated areas of the Grantor in which the Grantee may lawfully serve or compete on terms and conditions which the Grantee

determines are more favorable than the terms and conditions contained herein, the Grantee may at any time thereafter terminate this franchise if such terms and conditions are not remedied within the time period provided hereafter. The Grantee shall give the Grantor at least 60 days advance written notice of its intent to terminate. Such notice shall, without prejudice to any of the rights reserved for the Grantee herein, advise the Grantor of such terms and conditions that it considers more favorable. The Grantor shall then have 60 days in which to correct or otherwise remedy the terms and conditions complained of by the Grantee. If such terms or conditions are not remedied by the Grantor within said time period, the Grantee may terminate this Agreement by delivering written notice as provided in Section 12 hereof, and termination shall take effect on the date of delivery of such notice.

Section 9. If as a direct or indirect consequence of any legislative, regulatory or other action of the United States of America or the State of Florida (or any department, agency, authority, instrumentality, or political subdivision of either of them) any person is permitted to provide electric service within the unincorporated areas of the Grantor to a customer then being served by the Grantee, or to any new applicant for electric service within any part of the unincorporated areas of the Grantor in which the Grantee may lawfully serve, and the Grantee determines that its obligations hereunder, or otherwise resulting from this franchise in respect to rates and service, place it at a competitive disadvantage with respect to such other person, the Grantee may, at any time after the taking of such action, terminate this franchise if such competitive disadvantage is not remedied within the time period provided hereafter. The Grantee shall give the Grantor at least 90 days advance written notice of its intent to terminate. Such notice shall, without

prejudice to any of the rights reserved for the Grantee herein, advise the Grantor of the consequences of such action which resulted in the competitive disadvantage. The Grantor shall then have 90 days in which to correct or otherwise remedy the competitive disadvantage. If such competitive disadvantage is not remedied by the Grantor within said time period, the Grantee may terminate this Agreement by delivering written notice as provided in Section 12 hereof, and termination shall take effect on the date of delivery of such notice.

Section 10. Failure on the part of the Grantee to comply in any substantial respect with any of the provisions of this franchise shall be grounds for forfeiture, but no such forfeiture shall take effect if the reasonableness or propriety thereof is protested by the Grantee until there is final determination (after the expiration or exhaustion of all rights of appeal) by a court of competent jurisdiction that the Grantee has failed to comply in a substantial respect with any of the provisions of this franchise, and the Grantee shall have six months after such final determination to make good the default before a forfeiture shall result, with the right in the Grantor at its discretion to grant such additional time to the Grantee for compliance, as necessities in the case require.

Section 11. Failure on the part of the Grantor to comply in substantial respect with any of the provisions of this Ordinance, including but not limited to: (a) denying the Grantee use of public rights-of-way for reasons other than unreasonable interference with public travel; (b) imposing conditions for use of public rights-of-way contrary to Florida law or the terms and conditions of this franchise; (c) unreasonable delay in issuing the Grantee a use permit, if any, to construct its facilities in public rights-of-way, shall constitute a breach of this franchise entitle the Grantee to withhold a maximum of thirty

percent (30%) payments provided for in Section 6(a) hereof until such time as a use permit is issued or a court of competent jurisdiction has reached a final determination in the matter. The Grantor recognizes and agrees that nothing in this franchise agreement constitutes or shall be deemed to constitute a waiver of the Grantee's delegated sovereign right of condemnation and that the Grantee, in its sole discretion, may exercise such right.

Section 12. Notice. Except in exigent circumstances, and except as may otherwise be specifically provided for in this franchise, all notices by either party shall be made by United States Certified Mail, return receipt requested, or via a nationally recognized overnight courier service. Any notice given by facsimile or email is deemed to be supplementary, and does not alone constitute notice hereunder. All notices shall be addressed as follows:

To The County:

Chairman, Board of County Commissioners
2120 Main Street
Fort Myers, FL 33901
(239) 533-2227 (Telephone)
(239) 485-2021 (Facsimile)
Dist1@leegov.com

To FPL:

Vice President, External Affairs
700 Universe Boulevard
Juno Beach, FL 33408

Copy to:

Lee County Attorney
P.O. Box 398
Fort Myers, FL 33902-0398
(239) 533-2236 (Telephone)
(239) 485-2106 (Facsimile)
rwesch@leegov.com

Copy to:

General Counsel
700 Universe Boulevard
Juno Beach, FL 33408

Any changes to the above shall be in writing and provided to the other party as soon as practicable.

Section 13. The Grantor may, upon reasonable notice and within 90 days after each anniversary date of this franchise, at the Grantor's expense, examine the records of the Grantee relating to the calculation of the franchise payment for the year preceding such anniversary date. Such examination shall be during normal business hours at the Grantee's office where such records are maintained. Records not prepared by the Grantee in the ordinary course of business may be provided at the Grantor's expense and as the Grantor and as the Grantee may agree in writing. Information identifying the Grantee's customers by name or their electric consumption shall not be taken from the Grantee's premises. Such audit shall be impartial and all audit findings, whether they decrease or increase payment to the Grantor, shall be reported to the Grantee. The Grantor's right to examine the records of the Grantee in accordance with this section shall not be conducted by any third party employed by the Grantor whose fee, in whole or part, for conducting such audit is contingent on findings of the audit.

Section 14. The provisions of this ordinance are hereby deemed by the Parties to be interdependent upon one another and if any of the provisions of this ordinance are found or adjudged to be invalid, illegal, void or of no effect by a court of competent jurisdiction (after the expiration of all rights of appeal), such finding or adjudication shall not affect the validity of the remaining provisions for the period of sixty (60) days, during which the Parties will negotiate in good faith to amend this ordinance so as to restore to the maximum extent permissible, the original economic bargain embodied in this ordinance. If an agreement to amend the ordinance is not reached at the end of such

thirty (30) day period, this entire ordinance shall then become null and void and of no further force or effect.

Section 15. As used herein, "person" means an individual, a partnership, a corporation, a business trust, a joint stock company, a trust, an unincorporated association, a joint venture, a governmental authority or any other legal entity of whatever nature authorized to conduct business in Florida.

Section 16. Ordinance No. 97-15, done and adopted August 12, 1997 and all other ordinances and parts of ordinances and all resolutions and parts of resolutions in conflict herewith are hereby repealed to the extent of any such conflict.

Section 17. The parties to this Franchise agree that it is in each of their respective best interests to avoid costly litigation as a means of resolving disputes which may arise hereunder. Accordingly, the Parties agree to notify one another in writing in accordance with the provisions of Section 12 hereof when such dispute arises, and agree that prior to pursuing their available legal remedies, they will meet at their senior management level in an attempt to resolve any disputes within no later than thirty (30) Business Days from such notice. If such efforts are unsuccessful, and after an impasse is declared by either of the Parties, then the Parties may exercise any of their other available legal remedies.

Section 18. The Board of County Commissioners intends that this ordinance will be made part of the Lee County Code. Sections of this Ordinance can be renumbered or relettered and the word "ordinance" can be changed to "section", "article", or other appropriate word or phrase to accomplish such codification. Regardless of whether this Ordinance is ever codified, this ordinance can be renumbered or relettered and

typographical errors that do not affect the intent or substantive provisions herein may be administratively corrected upon the authorization of the County Manager and County Attorney, without the need for a further public hearing. Any such administrative revisions made hereto will be provided to Grantee within five (5) Business Days of their being made and incorporated into this ordinance.

Section 19. Modifications That May Arise From Consideration At Public Hearing. It is the intent of the Board of County Commissioners that the provisions of this Ordinance may be modified as a result of consideration that may arise during Public Hearing(s). Such modifications shall be incorporated into the final version.

Section 20. A certified copy of this Ordinance shall be filed by the Grantor with the Florida Department of State within 10 days after its adoption. As a condition precedent to the taking effect of this Ordinance, the Grantee shall file its written acceptance hereof with the Clerk of the Lee County Board of County Commissioners within thirty (30) days after the adoption of this Ordinance, with notice as provided in Section 12. The effective date of this Ordinance shall be the date upon which the Grantee files such acceptance.

Commissioner Mann made a motion to adopt the foregoing ordinance, seconded by Commissioner Hamman. The vote was as follows:

John Manning	Aye
Cecil L Pendergrass	Aye
Larry Kiker	Aye
Brian Hamman	Aye
Frank Mann	Aye

DULY PASSED AND ADOPTED this 16th day of May, 2017.

ATTEST:
LINDA DOGGETT, CLERK

BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY, FLORIDA

BY: Chris Sue
Deputy Clerk

BY: John Manning
John Manning, Chair



APPROVED AS TO FORM FOR THE
RELIANCE OF LEE COUNTY ONLY

Richard M. Clark
Office of the County Attorney



FLORIDA DEPARTMENT *of* STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

May 18, 2017

Honorable Linda Doggett
Clerk of the Circuit Courts
Lee County
Post Office Box 2469
Fort Myers, Florida 33902-2469

Attention: Chris Du

Dear Ms. Doggett:

Pursuant to the provisions of Section 125.66, Florida Statutes, this will acknowledge receipt of your electronic copy of Ordinance No. 17-02, which was filed in this office on May 18, 2017.

Sincerely,

Ernest L. Reddick
Program Administrator

ELR/lb

RECEIVED
MINUTES OFFICE
2017 MAY 18 PM 2:34