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VILLAGE OF ESTERO, FLORIDA

ORDINANCE NO. 2015 - 09

AN ORDINANCE OF THE VILLAGE OF ESTERO, FLORIDA, GRANTING TO FLORIDA POWER & LIGHT COMPANY, ITS SUCCESSORS AND ASSIGNS, A NON-EXCLUSIVE ELECTRIC FRANCHISE, IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO, PROVIDING FOR MONTHLY PAYMENTS TO THE VILLAGE OF ESTERO, AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Village Council of the Village of Estero, Florida recognizes that the Village of Estero, Florida and its citizens need and desire the 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 the Village of Estero, Florida 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, FPL and the Village of Estero, Florida desire to enter into a franchise agreement providing for the payment of fees to the Village of Estero, Florida in exchange for the nonexclusive right and privilege of supplying electricity and other services within the Village of Estero, Florida free of competition from the Village of Estero, Florida, pursuant to certain terms and conditions;

NOW, THEREFORE, BE IT ORDAINED BY THE VILLAGE COUNCIL OF THE VILLAGE OF ESTERO, FLORIDA:

Section 1. 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 nonexclusive 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 (hereinafter called "public rights-of-way") throughout all of the incorporated areas, as such incorporated areas may be constituted from time to time, of the Village of Estero, Florida, and its successors (hereinafter 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

45 electricity and other services to the Grantor and its successors, the inhabitants thereof, and persons
46 beyond the limits thereof.

47
48 Section 2. The facilities of the Grantee shall be installed, located or relocated so as to not
49 unreasonably interfere with traffic over the public rights-of-way or with reasonable egress from
50 and ingress to abutting property. To avoid conflicts with traffic, the location or relocation of all
51 facilities shall be made as representatives of the Grantor may prescribe in accordance with the
52 Grantor's reasonable rules and regulations with reference to the placing and maintaining in, under,
53 upon, along, over and across said public rights-of-way; provided, however, that such rules or
54 regulations (a) shall not prohibit the exercise of the Grantee's right to use said public rights-of-
55 way for reasons other than unreasonable interference with motor vehicular traffic, (b) shall not
56 unreasonably interfere with the Grantee's ability to furnish reasonably sufficient, adequate and
57 efficient electric service to all of its customers, and (c) shall not require the relocation of any of
58 the Grantee's facilities installed before or after the effective date hereof in public rights-of-way
59 unless or until widening or otherwise changing the configuration of the paved portion of any
60 public right-of-way used by motor vehicles causes such installed facilities to unreasonably
61 interfere with motor vehicular traffic. Such rules and regulations shall recognize that above-grade
62 facilities of the Grantee installed after the effective date hereof should be installed near the outer
63 boundaries of the public rights-of-way to the extent possible. When any portion of a public right-
64 of-way is excavated by the Grantee in the location or relocation of any of its facilities, the portion
65 of the public right-of-way so excavated shall within a reasonable time be replaced by the Grantee,
66 and any damages repaired, at its expense and in as good condition as it was at the time of such
67 excavation. The Grantor shall not be liable to the Grantee for any cost or expense in connection
68 with any relocation of the Grantee's facilities required under subsection (c) of this Section, except,
69 however, the Grantee shall be entitled to reimbursement of its costs from others and as may be
70 provided by law.

71
72 Section 3. The Grantor shall in no way be liable or responsible for any accident or damage
73 that may occur in the construction, operation or maintenance by the Grantee of its facilities
74 hereunder, and the acceptance of this ordinance shall be deemed an agreement on the part of the
75 Grantee to indemnify the Grantor and hold it harmless against any and all liability, loss, cost,
76 damage or expense which may accrue to the Grantor by reason of the negligence, default or
77 misconduct of the Grantee in the construction, operation or maintenance of its facilities hereunder.

78
79 Section 4. All rates and rules and regulations established by the Grantee from time to time
80 shall be subject to such regulation as may be provided by law.

81
82 Section 5(a). As a consideration for this franchise, the Grantee shall pay to the Grantor,
83 commencing 90 days after the effective date hereof, and each month thereafter for the remainder
84 of the term of this franchise, an amount which added to the amount of all licenses, excises, fees,
85 charges and other impositions of any kind whatsoever (except ad valorem property taxes and non-
86 ad valorem tax assessments on property) levied or imposed by the Grantor against the Grantee's
87 property, business or operations and those of its subsidiaries during the Grantee's monthly billing
88 period ending 60 days prior to each such payment will equal 4.5 percent of the Grantee's billed
89 revenues, less actual write-offs, from the sale of electrical energy to residential, commercial and

90 industrial customers (as such customers are defined by FPL's tariff) within the incorporated areas
91 of the Grantor for the monthly billing period ending 60 days prior to each such payment. Except
92 subject to the provisions of Section 5(b), in no event shall payment for the rights and privileges
93 granted herein exceed 4.5 percent of such revenues for any monthly billing period of the Grantee.

94 The Grantor understands and agrees that such revenues as described in the preceding
95 paragraph are limited to the precise revenues described therein, and that such revenues do not
96 include, by way of example and not limitation: (a) revenues from the sale of electrical energy
97 for Public Street and Highway Lighting (service for lighting public ways and areas); (b)
98 revenues from Other Sales to Public Authorities (service with eligibility restricted to
99 governmental entities); (c) revenues from Sales to Railroads and Railways (service supplied
100 for propulsion of electric transit vehicles); (d) revenues from Sales for Resale (service to other
101 utilities for resale purposes); (e) franchise fees; (f) Late Payment Charges; (g) Field Collection
102 Charges; (h) other service charges.

103
104 Section 5(b). It is further provided that the Grantor shall have the option once annually,
105 subject to all terms, conditions, and limitations specified below, to increase up to a maximum
106 of 6.0% or decrease to a minimum of 1.0%, the percentage used to calculate the amount to be
107 paid by the Grantee pursuant to this Section 5 (such percentage hereinafter sometimes referred
108 to for purposes of this option as the "percentage"). This option shall be exercised, if at all, by
109 an ordinance duly adopted by the Grantor in accordance with law, a certified copy of which
110 must be delivered to the Grantee. Such ordinance shall include a provision that the Grantor is
111 exercising the option provided herein and state the new percentage to be used in accordance
112 with and subject to the terms, conditions and limitations set forth in this Section 5. In no event
113 may the Grantor, in exercising this option, increase or decrease the percentage in increments
114 of less than 0.5% from the percentage then in effect. The Grantor's option hereunder is limited
115 solely to the percentage used to calculate the amount to be paid by Grantee pursuant to this
116 Section 5, and no other section, provision or term of this franchise shall or may be altered,
117 amended or affected by the Grantor's exercise of this option. Nothing herein shall require the
118 Grantor to exercise its option hereunder. As a condition precedent to the taking effect of the
119 ordinance exercising the option, the Grantee shall file its acceptance of the new rate with the
120 Grantor's Clerk within 30 days after receipt by Grantee of a certified copy of said ordinance.
121 The effective date of the new rate shall be the date upon which the Grantee files its acceptance.
122

123 Section 6. As a further consideration, during the term of this franchise or any extension thereof,
124 the Grantor agrees: (a) not to engage in the distribution and/or sale, in competition with the
125 Grantee, of electric capacity and/or electric energy to any ultimate consumer of electric utility
126 service (herein called a "retail customer") or to any electrical distribution system established solely
127 to serve any retail customer formerly served by the Grantee, (b) not to participate in any
128 proceeding or contractual arrangement, the purpose or terms of which would be to obligate the
129 Grantee to transmit and/or distribute, electric capacity and/or electric energy from any third
130 party(ies) to any other retail customer's facility(ies), and (c) not to seek to have the Grantee
131 transmit and/or distribute electric capacity and/or electric energy generated by or on behalf of the
132 Grantor at one location to the Grantor's facility(ies) at any other location(s). Nothing specified
133 herein shall prohibit the Grantor from engaging with other utilities or persons in wholesale
134 transactions which are subject to the provisions of the Federal Power Act.

135 Nothing herein shall prohibit the Grantor, if permitted by law, (i) from purchasing
136 electric capacity and/or electric energy from any other person, or (ii) from seeking to have the
137 Grantee transmit and/or distribute to any facility(ies) of the Grantor electric capacity and/or
138 electric energy purchased by the Grantor from any other person; provided, however, that before
139 the Grantor elects to purchase electric capacity and/or electric energy from any other person, the
140 Grantor shall notify the Grantee. Such notice shall include a summary of the specific rates, terms
141 and conditions which have been offered by the other person and identify the Grantor's facilities
142 to be served under the offer. The Grantee shall thereafter have 60 days to evaluate the offer and,
143 if the Grantee offers rates, terms and conditions which are equal to or better than those offered
144 by the other person, the Grantor shall be obligated to continue to purchase from the Grantee
145 electric capacity and/or electric energy to serve the previously-identified facilities of the Grantor
146 for a term no shorter than that offered by the other person. If the Grantee does not agree to rates,
147 terms and conditions which equal or better the other person's offer, all of the terms and conditions
148 of this franchise shall remain in effect.

149
150 Section 7. If the Grantor grants a right, privilege or franchise to any other person or
151 otherwise enables any other such person to construct, operate or maintain electric light and power
152 facilities within any part of the incorporated areas of the Grantor in which the Grantee may
153 lawfully serve or compete on terms and conditions which the Grantee determines are more
154 favorable than the terms and conditions contained herein, the Grantee may at any time thereafter
155 terminate this franchise if such terms and conditions are not remedied within the time period
156 provided hereafter. The Grantee shall give the Grantor at least 60 days advance written notice of
157 its intent to terminate. Such notice shall, without prejudice to any of the rights reserved for the
158 Grantee herein, advise the Grantor of such terms and conditions that it considers more favorable.
159 The Grantor shall then have 60 days in which to correct or otherwise remedy the terms and
160 conditions complained of by the Grantee. If the Grantee determines that such terms or conditions
161 are not remedied by the Grantor within said time period, the Grantee may terminate this franchise
162 agreement by delivering written notice to the Grantor's Clerk and termination shall be effective
163 on the date of delivery of such notice.

164
165 Section 8. If as a direct or indirect consequence of any legislative, regulatory or other action by
166 the United States of America or the State of Florida (or any department, agency, authority,
167 instrumentality or political subdivision of either of them) any person is permitted to provide
168 electric service within the incorporated areas of the Grantor to a customer then being served by
169 the Grantee, or to any new applicant for electric service within any part of the incorporated areas
170 of the Grantor in which the Grantee may lawfully serve, and the Grantee determines that its
171 obligations hereunder, or otherwise resulting from this franchise in respect to rates and service,
172 place it at a competitive disadvantage with respect to such other person, the Grantee may, at any
173 time after the taking of such action, terminate this franchise if such competitive disadvantage is
174 not remedied within the time period provided hereafter. The Grantee shall give the Grantor at
175 least 90 days advance written notice of its intent to terminate. Such notice shall, without prejudice
176 to any of the rights reserved for the Grantee herein, advise the Grantor of the consequences of
177 such action which resulted in the competitive disadvantage. The Grantor shall then have 90 days
178 in which to correct or otherwise remedy the competitive disadvantage. If such competitive
179 disadvantage is not remedied by the Grantor within said time period, the Grantee may terminate

180 this franchise agreement by delivering written notice to the Grantor's Clerk and termination shall
181 take effect on the date of delivery of such notice.

182
183 Section 9. Failure on the part of the Grantee to comply in any substantial respect with any
184 of the provisions of this franchise shall be grounds for forfeiture, but no such forfeiture shall take
185 effect if the reasonableness or propriety thereof is protested by the Grantee until there is final
186 determination (after the expiration or exhaustion of all rights of appeal) by a court of competent
187 jurisdiction that the Grantee has failed to comply in a substantial respect with any of the provisions
188 of this franchise, and the Grantee shall have six months after such final determination to make
189 good the default before a forfeiture shall result with the right of the Grantor at its discretion to
190 grant such additional time to the Grantee for compliance as necessities in the case require.

191
192 Section 10. Failure on the part of the Grantor to comply in substantial respect with any of
193 the provisions of this ordinance, including, but not limited to: (a) denying the Grantee use of
194 public rights-of-way for reasons other than unreasonable interference with motor vehicular traffic;
195 (b) imposing conditions for use of public rights-of-way contrary to Florida law or the terms and
196 conditions of this franchise; (c) unreasonable delay in issuing the Grantee a use permit, if any, to
197 construct its facilities in public rights-of-way, shall constitute breach of this franchise and entitle
198 the Grantee to withhold all or part of the payments provided for in Section 5 hereof until such
199 time as a use permit is issued or a court of competent jurisdiction has reached a final determination
200 in the matter. The Grantor recognizes and agrees that nothing in this franchise agreement
201 constitutes or shall be deemed to constitute a waiver of the Grantee's delegated sovereign right of
202 condemnation and that the Grantee, in its sole discretion, may exercise such right.

203
204 Section 11. The Grantor may, upon reasonable notice and within 90 days after each
205 anniversary date of this franchise, at the Grantor's expense, examine the records of the Grantee
206 relating to the calculation of the franchise payment for the year preceding such anniversary date.
207 Such examination shall be during normal business hours at the Grantee's office where such
208 records are maintained. Records not prepared by the Grantee in the ordinary course of business
209 may be provided at the Grantor's expense and as the Grantor and the Grantee may agree in writing.
210 Information identifying the Grantee's customers by name or their electric consumption shall not
211 be taken from the Grantee's premises. Such audit shall be impartial and all audit findings, whether
212 they decrease or increase payment to the Grantor, shall be reported to the Grantee. The Grantor's
213 right to examine the records of the Grantee in accordance with this Section shall not be conducted
214 by any third party employed by the Grantor whose fee, in whole or part, for conducting such audit
215 is contingent on findings of the audit.

216
217 Section 12. The provisions of this ordinance are interdependent upon one another, and if
218 any of the provisions of this ordinance are found or adjudged to be invalid, illegal, void or of no
219 effect, the entire ordinance shall be null and void and of no force or effect.

220
221 Section 13. As used herein "person" means an individual, a partnership, a corporation, a
222 business trust, a joint stock company, a trust, an incorporated association, a joint venture, a
223 governmental authority or any other entity of whatever nature.

224 Section 14. All ordinances and parts of ordinances and all resolutions and parts of
225 resolutions in conflict herewith, are hereby repealed.
226

227 Section 15. As a condition precedent to the taking effect of this ordinance, the Grantee
228 shall file its acceptance hereof with the Grantor's Clerk within 30 days of adoption of this
229 ordinance. The effective date of this ordinance shall be the date upon which the Grantee files
230 such acceptance.
231

232 **PASSED** on first reading this 3rd day of September, 2015
233

234 **PASSED AND ADOPTED BY THE VILLAGE COUNCIL** of the Village of Estero,
235 Florida this 16th day of September, 2015.
236

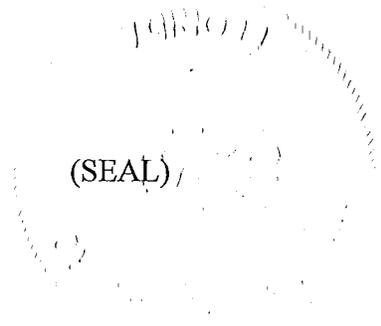
237
238 Attest: **VILLAGE OF ESTERO, FLORIDA**
239

240
241 By: *Kathy Hall*
242 Kathy Hall, MMC
243 Village Clerk
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241 By: *Nicholas Batos*
242 Nicholas Batos
243 Mayor
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247
248 Reviewed for legal sufficiency:
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250
251 By: *Burt Saunders*
252 Burt Saunders, Esq.
253 Village Attorney
254



255	Vote:	AYE	NAY
256	Mayor Batos	<u>✓</u>	_____
257	Vice Mayor Levitan	<u>✓</u>	_____
258	Councilmember Boesch	<u>✓</u>	_____
259	Councilmember Brown	<u>✓</u>	_____
260	Councilmember Errington	<u>✓</u>	_____
261	Councilmember Ribble	<u>✓</u>	_____
262	Councilmember Wilson	<u>✓</u>	_____
263			