

MEMORANDUM

Date: April 29, 2014

TO: Town Commission
FROM: Dave Bullock, Town Manager
SUBJECT: Ordinance 2014-13, Florida Power & Light (FPL) Franchise Agreement

At the April 21, 2014 Special Meeting staff presented a revised Franchise Agreement to the Town Commission for consideration. Staff, Town advisor Schef Wright, and representatives of FPL explained the changes to the Franchise Agreement based on direction received at the March 17, 2014 Regular Workshop Meeting. The Commission forwarded the FPL Franchise Agreement to the May 5, 2014 Regular Meeting for second reading and public hearing.

This action also includes a binding letter from FPL dealing with pole attachments and associated facility relocation and usages. The Town will receive notice of planned pole relocation or replacement so the Town can evaluate underground or relocation opportunities. The Town will also be allowed to apply to use FPL's poles for telecommunication and cable device attachments.

Please don't hesitate to contact me if you have any questions.

ORDINANCE NO. 2014-13

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 THE TOWN OF LONGBOAT KEY, AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Town Commission of the Town of Longboat Key, Florida recognizes that the Town of Longboat Key and its citizens need and desire the continued benefits of electric service; and

WHEREAS, there is currently in effect a franchise agreement between the Town of Longboat Key and Florida Power and Light Company (FPL), the terms of which are set forth in Town of Longboat Key Ordinance No. 84-8, passed and adopted May 7, 1984, and FPL's written acceptance thereof dated May 29, 1984, granting to FPL, its successors, and assigns, a thirty (30) year electric franchise ("Current Franchise Agreement"); and

WHEREAS, FPL and the Town of Longboat Key desire to enter into a new agreement ("New Franchise Agreement") providing for the payment of fees to the Town of Longboat Key in exchange for the nonexclusive right and privilege of supplying retail electricity service within the Town of Longboat Key free of competition from the Town of Longboat Key, pursuant to certain terms and conditions, and

WHEREAS, the Town Commission of the Town of Longboat Key deems it to be in the best interests of the Town of Longboat Key and its citizens to enter into the New Franchise Agreement;

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COMMISSION OF THE TOWN OF LONGBOAT KEY, FLORIDA:

SECTION 1. There is hereby granted to Florida Power & Light Company (FPL), 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, and rights-of-way (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 Town of Longboat Key, 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 (hereinafter called "facilities"), for the purpose of supplying retail electricity service and other electricity-related services incidental thereto (which other electricity-related services are defined as FPL's facility to facility data capabilities over the lines to identify faults, load information, and other data necessary or helpful to the provision of electric service, and which do not include any services that are sold to others) to the Grantor and its successors, the inhabitants thereof, and persons beyond the limits thereof.

SECTION 2. (a) The facilities of the Grantee shall be so located, relocated, installed, constructed and so erected as to not unreasonably interfere with the convenient, safe, continuous use or the maintenance, improvement, extension or expansion of any public "road" as defined under the Florida Transportation Code, nor unreasonably interfere with reasonable egress from and ingress to abutting property.

(b) To minimize such conflicts with the standards set forth in subsection (a) above, the location, relocation, installation, construction, or erection of all facilities shall be made as representatives of the Grantor may prescribe in accordance with all applicable federal, state, and local statutes, laws, ordinances, rules, and regulations and pursuant to Grantor's valid rules and regulations with respect to utilities' use of public rights-of-way relative to the placing and maintaining, in, under, upon, along, over, and across said public rights-of-way, provided such rules and regulations:

- (i) shall be for a valid municipal purpose,
- (ii) shall not prohibit the exercise of Grantee's rights to use said public rights-of-way for reasons other than conflict with the standards set forth above,
- (iii) shall not unreasonably interfere with Grantee's ability to furnish reasonably sufficient, adequate, and efficient electric service to all its customers while not conflicting with the standards set forth above, or
- (iv) shall not require relocation of any of the Grantee's facilities installed before or after the effective date hereof in any public right-of-way unless or until the facilities unreasonably interfere with the convenient, safe, or continuous use, or the maintenance, improvement, extension, or expansion of any such public "road".

(c) Such rules and regulations shall recognize that above-grade facilities of the Grantee installed after the effective date hereof should, unless otherwise permitted, be installed near the outer boundaries of the public rights-of-way to the extent possible, and such installation shall be consistent with the Florida Department of Transportation's Manual of Uniform Minimum Standards for Design, Construction, and Maintenance for Streets and Highways.

(d) When any portion of a public right-of-way is excavated, damaged or impaired by Grantee or any of its agents, contractors, or subcontractors because of the installation, inspection, or repair of any of its facilities, the portion so excavated, damaged, or impaired shall, within a reasonable time and as early as practicable after such excavation, be restored to a condition equal to or better than its original condition before such damage by the Grantee at its expense.

(e) The Grantor shall not be liable to the Grantee for any cost or expense incurred in connection with the relocation of any of the Grantee's facilities required under this Section, except, however, that Grantee may be entitled to reimbursement of its costs and expenses from others and as provided by law.

SECTION 3. The Grantor shall in no way be liable or responsible for any accident or damage that may occur in the construction, operation, or maintenance by the Grantee of its facilities hereunder, and the acceptance of this ordinance shall be deemed an agreement on the part of the Grantee to indemnify the Grantor and hold it harmless against any and all liability, loss, cost, damage, or expense, including Grantor's reasonable attorneys fees and costs incurred in defending itself against any claims for such liabilities, losses, costs, damages, or expenses asserted against Grantor by others, which may accrue to the Grantor by reason of the negligence, default, or misconduct of the Grantee in the construction, operation or maintenance of its facilities hereunder.

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

SECTION 5. (a) As a consideration for this franchise, the Grantee shall pay to the Grantor, commencing 90 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 6.0 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 incorporated areas of the Grantor for the monthly billing period ending 60 days prior to each such payment. In no event shall payment for the rights and privileges granted herein exceed 6.0 percent of such revenues for any monthly billing period of the Grantee, provided, however, that this limitation shall not apply if the Grantor and Grantee have, pursuant to Section 5(b) below, entered into a new franchise agreement providing for a rate greater than 6.0 percent.

The Grantor understands and agrees that such revenues as described in the preceding paragraph are limited, as in the existing franchise Ordinance No. 84-8, to the precise revenues described therein, and that such revenues do not include, by way of example and not limitation: (a) revenues from the sale of electrical energy for Public Street and Highway Lighting (service for lighting public ways and areas); (b) revenues from Other Sales to Public Authorities (service with eligibility restricted to governmental entities); (c) revenues from Sales to Railroads and Railways (service supplied for propulsion of electric transit vehicles); (d) revenues from Sales for Resale (service to other utilities for resale purposes); (e) franchise fees; (f) Late Payment Charges; (g) Field Collection Charges; and (h) other service charges.

With each monthly payment remitted to Grantor, Grantee shall include a detailed calculation showing how the amount remitted was determined. Each such detailed calculation shall show: (i) the amount of Grantee's revenues subject to the franchise fee, (ii) the actual calculation of 6.0 percent of that amount, (iii) the resulting franchise fee amount before offsets and write-offs, (iv) the amount of actual write-offs deducted by Grantee, and (v) the resulting amount of the franchise fee payment being remitted to Grantor. Itemized information regarding any write-offs or deductions from the franchise fee shall be made available to the Grantor upon request to the Grantee.

(b) If during the term of this franchise the Grantee enters into a franchise agreement with any other municipality located in Sarasota County, Manatee County, Charlotte County, Collier County, or Lee County, Florida, where the number of Grantee's active electrical customers is equal to or less than the number of Grantee's active electrical customers within the incorporated areas of Grantor, the terms of which provide for the payment of franchise fees by the Grantee at a rate greater than 6.0% of the Grantee's residential, commercial and industrial revenues (as such customers are defined by FPL's tariff), under the same terms and conditions as specified in Section 5(a) hereof, the Grantee, upon written request of the Grantor, shall negotiate and enter into a new franchise agreement with the Grantor in which the percentage to be used in calculating monthly payments under Section 5(a) hereof shall be equal to that percentage which the Grantee has agreed to use as a basis for the calculation of payments to the other municipality, provided, however, that such new franchise agreement shall include additional benefits to the Grantee, in addition to all benefits provided herein, at least equal to those provided by its franchise agreement with such other municipality.

SECTION 6. 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 electric 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 third party(ies) to any other retail customer's facility(ies), provided that the Grantor shall not be considered a "third party" or an "other retail customer" for purposes of this provision. Nothing specified herein shall prohibit the Grantor from engaging with other utilities or persons in wholesale transactions, which are subject to the provisions of the Federal Power Act, or from utilizing generators and/or other electricity or energy-generating equipment during emergency situations. Nothing herein is intended to restrict the Grantor from providing services other than retail electricity service, which is the subject of the Grantor's agreement not to compete set forth in this paragraph.

Nothing herein shall prohibit the Grantor, if permitted by law, (i) from purchasing electric capacity and/or electric 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, the Grantor shall notify the Grantee. 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 90 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 electric energy to serve the previously-identified facilities of the Grantor for a term no shorter than that offered by the other person. If the Grantee does not agree to rates, terms and conditions which equal or better the other person's offer, then Grantor may purchase such electric capacity and/or electric energy from such other person and all of the remaining terms and conditions of this franchise shall remain in effect.

SECTION 7. 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 within any part of the incorporated 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, or if the dispute between Grantee and Grantor is not resolved, as provided hereafter. The Grantee shall give the Grantor at least 180 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 and the objective basis or bases of the claimed competitive disadvantage. The Grantor shall then have 90 days in which to correct or otherwise remedy the terms and conditions complained of by the Grantee, and the Grantor and Grantee agree to negotiate in good faith toward a mutually acceptable resolution of Grantee's claims during this 90-day period. If the Grantee reasonably determines that such terms or conditions are not remedied by the Grantor within said time period, and if no mutually acceptable resolution is reached by Grantee and Grantor through negotiation, the Grantee may terminate this franchise agreement by delivering written notice to the Grantor's Clerk, and termination shall be effective on the date of delivery of such notice. Nothing contained herein shall be construed as constraining Grantor's rights to legally challenge at any time Grantee's determination leading to termination under this Section.

SECTION 8. If as a direct or indirect consequence of any legislative, regulatory or other action by 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 incorporated 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 incorporated areas of the Grantor in which the Grantee may lawfully serve, and such person is authorized, whether by federal or state law or regulations, or by the Grantor, to provide electric service without paying a franchise fee equal to that paid by the Grantee hereunder (such unequal application of franchise fees being hereafter referred to as the "competitive disadvantage" resulting from the legislative, regulatory, or other governmental action), the Grantee may, at any time after the taking of such action, terminate this franchise if such competitive disadvantage created by the unequal application of franchise fees on the Grantee and other persons supplying retail electricity is not remedied as provided hereafter. Such competitive disadvantage can be remedied by either of the following methods: (i) If the Grantor either cannot legally, or does not, charge a franchise fee to other electricity supplier(s), then the Grantor can remedy the disadvantage by reducing the Grantee's franchise fee rate to zero; or (ii) if the Grantor is able to charge, and does charge, such other electricity supplier(s) a franchise fee at a rate less than the 6.0% rate calculated as provided in Section 5 of this franchise, then the Grantor can remedy the disadvantage by reducing the Grantee's franchise fee rate to the same rate, with the same applicability and calculation methodology, as applies to such other electricity suppliers. If the Grantor does not implement either of the foregoing solutions, the Grantee may terminate the franchise, in accordance with the following process. The Grantee shall give the Grantor at least 180 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 claimed competitive disadvantage and the objective basis or bases of the claimed competitive disadvantage. The Grantor shall then have 90 days in

which to correct or otherwise remedy the competitive disadvantage, and the Grantor and Grantee agree to negotiate in good faith toward a mutually acceptable resolution of Grantee's claimed disadvantage during this 90-day period. If such competitive disadvantage is, in the reasonable determination of Grantee, not remedied by the Grantor within said time period, the Grantee may terminate this franchise agreement by delivering written notice to the Grantor's Clerk and termination shall take effect on the date of delivery of such notice. Nothing contained herein shall be construed as constraining Grantor's rights to legally challenge at any time Grantee's determination of competitive disadvantage leading to termination under this Section.

SECTION 9. 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 of the Grantor at its discretion to grant such additional time to the Grantee for compliance as necessities in the case require.

SECTION 10. 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 as set forth in Section 2 of this New Franchise Agreement; (b) imposing conditions for use of public rights-of-way contrary to Florida law or the terms and conditions of this New Franchise Agreement; or (c) unreasonable delay in issuing the Grantee a use permit, if any, to construct its facilities in public rights-of-way, shall constitute breach of this franchise and entitle the Grantee to withhold such portion of the payments provided for in Section 5 hereof as a court of competent jurisdiction has, upon action instituted by Grantee, determined to be equitable, just, and reasonable, considering the totality of the circumstances, until such time as a use permit is issued or a court of competent jurisdiction has reached a final determination (after the expiration or exhaustion of all rights of appeal) 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 as provided by law. The Grantee recognizes and agrees that nothing in this franchise agreement constitutes or shall be deemed to constitute a waiver of the Grantor's delegated sovereign right of condemnation and that the Grantor, in its sole discretion, may exercise such right as provided by law, provided that the Grantor shall not exercise such right so as to violate the Grantor's covenant, set forth in Section 6 hereof, not to compete against the Grantee in the distribution and/or sale of electricity to ultimate consumers.

SECTION 11. 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 otherwise created, prepared, maintained, or kept by the Grantee in the ordinary course of business may be provided at the Grantor's expense and as the Grantor and 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.

Consistent with the foregoing, Grantor shall have 90 days following acceptance by the Grantee of the franchise granted by this New Franchise Agreement to initiate a final audit of Grantee's franchise fee payments pursuant to Ordinance No. 84-8. Upon the conclusion of any such audit, or upon the expiration of 90 days following Grantee's acceptance of the franchise granted by this New Franchise Agreement, whichever is later, any and all of Grantor's claims, other than such claims as may have been raised pursuant to the final audit contemplated by this section, relating in any way to the amounts paid by the Grantee under the Current Franchise Agreement embodied in Ordinance No. 84-8 shall be deemed waived, settled, and barred.

SECTION 12. Should any section or provision of this ordinance or any portion hereof be declared by a court of competent jurisdiction to be invalid, or otherwise rendered invalid or unenforceable as a direct or indirect consequence of any legislative, regulatory, or other action by the United States of America or the State of Florida (or any department, agency, authority, instrumentality or political subdivision of either of them), such decision or action shall not affect the validity of the remainder hereof as a whole or any part hereof, other than the part declared to be invalid. Grantor and Grantee further agree that, in the event that any material provision of this ordinance is thus declared to be invalid or rendered invalid or unenforceable, the Grantor and Grantee will negotiate in good faith to amend this Agreement so as to restore, to the maximum extent legally permissible, the original economic bargain embodied in this ordinance. The parties recognize that Sections 1, 2, 3, 5, and 6 are critical to the fundamental economic bargain of this Franchise Agreement, and accordingly, if any of the provisions of these sections are found or adjudged to be invalid, or rendered invalid or unenforceable, and the Grantor and Grantee are unable to agree on replacement language that restores the original economic bargain embodied in the ordinance to their mutual satisfaction, then either party may, in its sole discretion, terminate the franchise by giving 60 days written notice to the other party.

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

SECTION 14. Subject to the Grantor's right to conduct a final audit expressly reserved by Section 11 of this New Franchise Agreement, Ordinance No. 84-8, passed and adopted May 7, 1984 and all other ordinances and parts of ordinances and all resolutions and parts of resolutions in conflict herewith, are hereby repealed.

SECTION 15. Notwithstanding any provision of this Ordinance, nothing herein shall prevent, prohibit or in any way restrict the Grantor's ability to take advantage of all applicable services set forth in Grantee's tariffs as those tariffs are approved from time to time by Grantee's regulators, and nothing herein shall prevent, prohibit or in any way restrict the

Grantor's ability to avail itself of all rights accruing to Grantor as a retail customer of Grantee under Florida law and the rules and regulations of the Florida Public Service Commission.

SECTION 16. As a condition precedent to the taking effect of this ordinance, the Grantee shall file its acceptance hereof with the Grantor's Clerk within 30 days of adoption of this ordinance. The effective date of this ordinance shall be the date upon which the Grantee files such acceptance.

PASSED on first reading the 21st day of April, 2014.

PASSED AND ADOPTED on second reading and public hearing the _____ day of _____, 2014.

TOWN OF LONGBOAT KEY, FLORIDA

ATTEST:

By: _____
Jack G. Duncan, Vice Mayor

By: _____
Trish Granger, Town Clerk
Town of Longboat Key, Florida

(SEAL)

APPROVED AS TO FORM AND LEGALITY

Maggie Mooney-Portale, Town Attorney
Town of Longboat Key, Florida



May 5, 2014

The Honorable Jim Brown
Mayor
Town of Longboat Key
501 Bay Isles Road
Longboat Key, FL 34228

Re: Florida Power & Light Company

Dear Mayor Brown:

Please accept this letter as acknowledgment and agreement by FPL to the following:

(1) FPL will provide reasonable and sufficient advance notice to the Town of any planned relocation or replacement of three or more consecutive FPL poles within the incorporated areas of the Town so that the Town may: (i) evaluate underground conversions of such poles and associated facilities pursuant to FPL's applicable tariffs and Florida Public Service Commission rules; or (ii) request different locations for the poles and associated facilities as desired by the Town pursuant to FPL's applicable tariffs and Florida Public Service Commission rules. Additionally, FPL agrees that it will provide sufficient notice of any relocations or replacements of overhead distribution facilities that cross Gulf of Mexico Drive within the Town so that the Town can avail itself of such opportunities to have such facilities converted to underground service, pursuant to FPL's applicable tariffs and Florida PSC rules. Conversely, we would ask that the Town notify FPL within a reasonable period if it becomes aware of a construction project or other circumstance that may include or require the relocation or replacement of overhead distribution facilities that cross Gulf of Mexico Drive. The foregoing notice provisions shall not apply in emergencies, e.g., installing facilities to restore service following damage to FPL's system due to a hurricane, tropical storm, tornado, or other weather event or other event necessitating the emergency restoration of service by FPL.

(2) FPL acknowledges and agrees that the Town may apply to FPL for approval to attach telecommunications and cable devices to FPL's poles. All FPL authorized pole attachments will be made on a non-discriminatory basis and in compliance with all applicable federal, state, and local laws, rules, codes, and regulations. FPL's commitment in this paragraph (2) shall apply and continue throughout the term of the Franchise without regard to whether there is any legal mandate that FPL do so. Any pole attachments, if authorized, will be made by a separate agreement between FPL and the Town.

These commitments represent FPL's binding commitments with respect to the subjects of the foregoing paragraphs.

FPL sincerely appreciates the opportunity to serve the Town of Longboat Key and has enjoyed the ongoing cooperative relationship with the Town. We look forward to a continuing cooperative effort in the future.

Sincerely,

Rae Dowling
External Affairs Manager



End of Agenda Item