

ORDINANCE NO. 04- 18

AN ORDINANCE GRANTING TO LEE COUNTY ELECTRIC COOPERATIVE, INC., (LCEC) ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC FRANCHISE, IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO, PROVIDING FOR QUARTERLY PAYMENTS TO THE CITY OF MARCO ISLAND, FLORIDA; PROVIDING FOR INCORPORATION, CONFLICT AND SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the City Council of the City of Marco Island, Florida recognizes that the City of Marco Island 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 City of Marco Island does not desire to undertake to provide such services; and

WHEREAS, Lee County Electric Cooperative, Inc. is a corporation organized under the laws of Florida which has the demonstrated ability to supply such services; and

WHEREAS, Lee County Electric Cooperative, Inc. and the City of Marco Island desire to enter into a franchise agreement providing for the payment of fees to the City of Marco Island in exchange for the nonexclusive right and privilege of supplying electricity and other services within the City of Marco Island, free of competition from the City of Marco Island, and for the non-exclusive right to construct, operate and maintain in roads, streets, alleys, bridges, easements, rights-of-way and other public places, within the City, electric light and power facilities, pursuant to certain terms and conditions; and

WHEREAS, Lee County Electric Cooperative, Inc. understands and acknowledges that policies of the City of Marco Island strongly favor undergrounding of utilities and the improvement of safety and aesthetics and the City understands and acknowledges the LCEC tariff regarding undergrounding and the Florida Public Service Commission's position on allocation of costs of undergrounding utilities;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MARCO ISLAND, FLORIDA THAT:

Section 1. The City of Marco Island, a Florida municipal corporation (hereinafter called "City") hereby grants to Lee County Electric Cooperative, Inc., its successors and assigns (hereinafter called "LCEC"), for the period of twenty (20) 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 City, in accordance with LCEC's customary practice and practices prescribed herein, with respect to construction and maintenance, electric light and power facilities, including, without limitation, conduits, including underground conduits, poles, wires, transmission and distribution lines, fiber optic, and all other facilities installed in conjunction with or ancillary to all of LCEC's operations (herein called "facilities"), for the purpose of supplying electricity and other services to the City, the inhabitants thereof, and persons beyond the limits thereof. Franchise will renew automatically for one (1) ten (10) year extension unless either party provides written notification to the other party, at least one hundred eighty (180) days in advance of the date of automatic extension, of intent to amend or terminate the franchise.

Section 2. The facilities of LCEC shall be installed, located or relocated so as to not unreasonably interfere with traffic over the public rights-of-way or with reasonable egress from and ingress to abutting property. To avoid conflicts with traffic, the location or relocation of all facilities shall be made as representatives of the City may prescribe in accordance with the City'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 LCEC'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 LCEC'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 LCEC's facilities installed before or after the effective date hereof in public rights-of-way unless or until the installed facilities causes unreasonable interference to the alteration of the transportation, storm drainage, or City utility system. When any portion of a public right-of-way is excavated by LCEC in 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 LCEC at its expense and in as good condition as it was at the time of such excavation. The City shall not be liable to LCEC for any cost or expense in connection with any relocation of LCEC's facilities required under subsection (c) of this Section, except, however, LCEC

shall be entitled to reimbursement of its costs from others and as may be provided by law. If the City requests LCEC to relocate overhead lines to underground lines, the parties agree that they will use their best efforts to provide for undergrounding in accordance with currently applicable and successor LCEC tariffs. The City shall reimburse LCEC for costs associated with such relocation.

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

Section 4. As a consideration for this franchise and as the reasonable rental for the rights-of-way granted herein, LCEC shall pay to the City, commencing thirty (30) days after the end of the calendar quarter following the effective date hereof, and each calendar quarter thereafter for the remainder of the term of this franchise, an amount which will equal five percent (5%) of LCEC's billed revenues from the sale of electrical energy, less actual write-offs, to residential, commercial and industrial customers within the incorporated areas of the City (excluding public street, highway and private area lighting) for the quarterly billing period ending 30 days prior to each such payment. Effective date for the commencement of this five percent (5%)

franchise fee shall be within forty-five (45) days of the effective date of this ordinance. Further, upon the expressed condition that in the event LCEC is required by another municipality under which it is presently or may in the future be franchised to pay a greater percentage franchise consideration than that herein provided, LCEC shall also pay the same increased percentage fee to the City under this agreement upon the City giving written notice of such increase. Such increased fee shall be effective as of the date of imposition by such other municipality, and shall be payable upon the same terms and conditions as herein provided. LCEC shall promptly notify the City of any franchise fees paid to any other municipality in excess of that herein provided. The City reserves the right, at its sole discretion, to reduce the franchise fee from the initial level of five percent (5%), upon ninety (90) days written notice to LCEC.

Section 5. As a further consideration, during the term of this franchise or any extension thereof, the City agrees: (a) not to engage in the distribution and/or sale, in competition with LCEC, 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 LCEC, (b) not to participate in any proceeding or contractual arrangement, the purpose or terms of which would be to obligate LCEC to transmit and/or distribute, electric capacity and/or electric energy from any third party(ies) to any other retail customer's facility(ies), and (c) not to seek to have LCEC

transmit and/or distribute electric capacity and/or electric energy generated by or on behalf of the City at one location to the City's facility(ies) at any other location(s).

Nothing herein shall prohibit the City, if permitted by law, (i) from purchasing electric capacity and/or electric energy from any other person, or (ii) from seeking to have LCEC transmit and/or distribute to any facility(ies) of the City electric capacity and/or electric energy purchased by the City from any other person; provided, however, that before the City elects to purchase electric capacity and/or electric energy from any other person, the City shall notify LCEC. Such notice shall include a summary of the specific rates, terms and conditions which have been offered by the other person and identify the City's facilities to be served under the offer. LCEC shall thereafter have 90 days to evaluate the offer and, if LCEC offers rates, terms and conditions which are equal to or better than those offered by the other person, the City shall be obligated to continue to purchase from LCEC electric capacity and/or electric energy to serve the previously-identified facilities of the City for a term no shorter than that offered by the other person. If LCEC does not agree to rates, terms and conditions which equal or better the other person's offer, all of the terms and conditions of this franchise shall remain in effect.

Section 6. If the City 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 City in which LCEC may lawfully serve or compete on terms and conditions which LCEC determines are more favorable than the terms and conditions contained herein, LCEC may at any time thereafter terminate this franchise if such terms and conditions are not remedied within the time period provided hereafter. LCEC shall give the City at least sixty (60) days advance written notice of its intent to terminate. Such notice shall, without prejudice to any of the rights reserved for LCEC herein, advise the City of such terms and conditions that it considers more favorable. The City shall then have sixty (60) days in which to correct or otherwise remedy the terms and conditions complained of by LCEC. If LCEC determines that such terms or conditions are not remedied by the City within said time period, LCEC may terminate this franchise agreement by delivering written notice to the City Clerk and termination shall be effective on the date of delivery of such notice.

Section 7. 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 City to a customer then being served by LCEC, or to any new applicant for electric service within any part of the incorporated areas of the City in which LCEC may lawfully serve, and LCEC 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, LCEC 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 hereinafter. LCEC shall give the City at least ninety (90) days advance written notice of its intent to terminate. Such notice shall, without prejudice to any of the rights reserved for LCEC herein, advise the City of the consequences of such action which resulted in the competitive disadvantage. The City shall then have ninety (90) days in which to correct or otherwise remedy the competitive disadvantage. If such competitive disadvantage is not remedied by the City within said time period, LCEC may terminate this franchise agreement by delivering written notice to the City Clerk and termination shall take effect on the date of delivery of such notice.

Section 8. Failure on the part of LCEC 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 LCEC until there is final determination (after the expiration or exhaustion of all rights of appeal) by a court of competent jurisdiction that LCEC has failed to comply in a substantial respect with any of the provisions of this franchise, and LCEC shall have six (6) months after such final determination to make good the default before a forfeiture shall result with the right of the City at its discretion to grant such additional time to LCEC for compliance as necessities in the case require.

Section 9. Failure on the part of the City to comply in substantial respect with any of the provisions of this ordinance, including, but not limited to: (a) denying LCEC use of public rights-of-way for reasons other than unreasonable interference with motor vehicular traffic; (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 LCEC a use permit, if any, to construct its facilities in public rights-of-way, shall constitute breach of this franchise and entitle LCEC to withhold all or part of the payments provided for in Section 5 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 parties recognize and agree that nothing in this Franchise Agreement constitutes or shall be deemed to constitute a waiver of a party's delegated sovereign right of condemnation and that each party, in their sole discretion, may exercise this right.

Section 10. The City may, upon reasonable notice and within 90 days after each anniversary date of this franchise, at the City's expense, examine the records of LCEC relating to the calculation of the franchise payment for the year preceding such anniversary date. Such examination shall be during normal business hours at LCEC's office where such records are maintained. Records not prepared by LCEC in the ordinary course of business may be provided at the City's expense and as the City and LCEC may agree in writing. Information identifying LCEC's customers by name or their electric consumption

shall not be taken from LCEC's premises. Such audit shall be impartial and all audit findings, whether they decrease or increase payment to the City, shall be reported to LCEC. The City's right to examine the records of LCEC in accordance with this Section shall not be conducted by any third party employed by the City whose fee, in whole or part, for conducting such audit is contingent on findings of the audit.

Section 11. The franchise fees collected pursuant to this ordinance may be placed in a special utility fund and the expenditures therefrom shall be to pay the cost of placing current overhead utility facilities underground, to include costs associated with capital projects such as bond issuance costs, payment of interest and the repayment of principal on debt issued to fund capital projects, and administrative expenses. It is recognized by the City that all such expenditures shall be an exception to the Spending Cap of Section 1.03 of the City Charter as defined therein.

Section 12. Upon the City's annexation of any property and appropriate written notice to LCEC, the portion of the City's electrical system that may be located within such annexed territory, and upon the streets, alleys or public grounds, shall be subject to all the terms of this Franchise Agreement within ninety (90) days of receiving reasonable and sufficient written notice from the City.

Section 13. The provisions of this ordinance are 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, the

entire ordinance shall be null and void and of no force or effect. This ordinance embodies the entire agreement and understanding between the Parties, and there are no other agreements and understandings, oral or written, with reference to this subject that are not merged or superseded.

Section 14. 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 15. As a condition precedent to the taking effect of this ordinance, LCEC shall file its acceptance hereof with the City Clerk within 30 days of adoption of this ordinance. The effective date of this ordinance shall be the date upon which LCEC files such acceptance.

Section 16. Incorporation, Conflict and Severability.

- a. It is the intention of the City Council and it is hereby ordained that the provisions of this Ordinance shall become and be made a part of the Code of Ordinances of the City of Marco Island, Florida, and the sections of this ordinance may be renumbered or relettered and the word "ordinance" may be changed to "section", "article", or other appropriate word.
- b. Florida Statutes, all Collier County Ordinances or parts of ordinances and all Collier County Resolutions or parts of resolutions made applicable by the City Charter in conflict

herewith are hereby repealed to the extent of such conflict.

- c. If any word, phrase, clause, subsection, or section of this Ordinance is for any reason held unconstitutional or invalid by a court of competent jurisdiction, the invalidity thereof shall not affect the validity of any remaining portions of the Ordinance.

Section 17. Effective date.

This ordinance shall take effect immediately upon approval at second reading and acceptance by LCEC of the Electric Franchise in the City of Marco Island, Florida granted by Ordinance No. 04-18.

APPROVED AT FIRST READING THIS 20th DAY OF Sept., 2004.

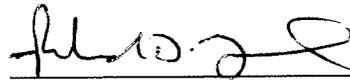
PASSED AND ADOPTED AT SECOND READING AND PUBLIC HEARING IN OPEN AND REGULAR SESSION OF THE CITY COUNCIL OF THE CITY OF MARCO ISLAND, FLORIDA THIS 4th DAY OF October, 2004.

  
\_\_\_\_\_  
Terri DiSciullo, Chairwoman

ATTEST:

Approved as to form  
and legality:

  
\_\_\_\_\_  
Laura Litzan, City Clerk

  
\_\_\_\_\_  
Rich Yovanovich, City Attorney

ACCEPTANCE OF ELECTRIC FRANCHISE  
ORDINANCE NO. 04-18  
BY LEE COUNTY ELECTRIC COOPERATIVE, INC.

City of Marco Island  
Marco Island, Florida

October 4, 2004

Lee County Electric Cooperative, Inc. does hereby accept the electric franchise in the City of Marco Island, Florida, granted by Ordinance No. 04-18, being:

**AN ORDINANCE GRANTING TO LEE COUNTY ELECTRIC COOPERATIVE, INC., (LCEC) ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC FRANCHISE, IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO, PROVIDING FOR QUARTERLY PAYMENTS TO THE CITY OF MARCO ISLAND, FLORIDA; PROVIDING FOR INCORPORATION, CONFLICT AND SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.**

Which was passed and adopted on October, 4, 2004.

This instrument is filed with the City Clerk of the City of Marco Island, Florida, in accordance with the provisions of Section 15 of said Ordinance.

LEE COUNTY ELECTRIC COOPERATIVE, INC.

By: \_\_\_\_\_

ATTEST:

\_\_\_\_\_  
Assistant Secretary

I HEREBY ACKNOWLEDGE receipt of the above Acceptance of Electric Franchise Ordinance No. \_\_\_\_\_ by Lee County Electric Cooperative, Inc., and certify that I have filed the same for record in the permanent files and records of the City of Marco Island, Florida on this \_\_\_\_ day of \_\_\_\_\_, 2004.

\_\_\_\_\_  
City Clerk  
City of Marco Island, Florida

ACCEPTANCE OF ELECTRIC FRANCHISE  
ORDINANCE NO. 04-18  
BY LEE COUNTY ELECTRIC COOPERATIVE, INC.

City of Marco Island  
Marco Island, Florida

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LEE COUNTY ELECTRIC COOPERATIVE, INC.

By: Pamela M. May

ATTEST:

Patricia M. Dorn  
Assistant Secretary

I HEREBY ACKNOWLEDGE receipt of the above Acceptance of Electric Franchise Ordinance No. 04-18 by Lee County Electric Cooperative, Inc., and certify that I have filed the same for record in the permanent files and records of the City of Marco Island, Florida on this 4<sup>th</sup> day of October, 2004.

[Signature]  
City Clerk  
City of Marco Island, Florida