

CITY OF CAPE CORAL ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF CAPE CORAL GRANTING TO THE LEE COUNTY ELECTRIC COOPERATIVE, INC. ("LCEC"), ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC UTILITY FRANCHISE; IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO; PROVIDING FOR FRANCHISE FEE PAYMENTS TO THE CITY OF CAPE CORAL; PROVIDING FOR SEVERANCE, CONFLICTS, SEVERABILITY, AND AN EFFECTIVE DATE.

WHEREAS, the City of Cape Coral City Council ("Council") is the governing body in and for the City of Cape Coral, Florida ("City"), a Florida municipal corporation; and

WHEREAS, the City of Cape Coral City Council is lawfully authorized to enter into non-exclusive franchise agreements with electric utilities defining terms and conditions for the use of City Public Rights-of-Way and other City property for the purpose of supplying electricity and electric utility services (hereafter, "Grantor," "City," or Council"); and

WHEREAS, the Lee County Electric Cooperative, Inc. ("LCEC"), a not-for-profit electric cooperative organized under Chapter 425, Florida Statutes, is authorized to conduct business in the State of Florida and the City, and as such, is an electric utility desiring to enter into a non-exclusive franchise agreement with the City for such purpose (hereafter, "Grantee" or "LCEC"); and

WHEREAS, the City desires to grant a non-exclusive franchise to LCEC relating to LCEC's use of the City's Public Rights-of-Way and other City property for the purpose of supplying LCEC's customers with electricity within its service territory in the City free of competition from the City.

NOW THEREFORE, BE IT ORDAINED BY THE CITY OF CAPE CORAL CITY COUNCIL that:

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

SECTION 2. The City hereby grants to LCEC its successors and assigns, for the period of thirty (30) years from the Effective Date hereof, the nonexclusive right, privilege and franchise (hereafter, "Franchise") to construct, operate and maintain in, under, upon, along, over and across the present and future City owned or held roads, streets, alleys, bridges, and other City property (hereinafter, "Public Rights-of-Way") throughout the City. LCEC shall exercise its Franchise granted herein in accordance with its customary practices with respect to the construction and maintenance of the electric light and power related facilities, including, without limitation, conduits, underground conduits, poles, wires, communications facilities, transmission and distribution lines, fiber optic, and any other facilities installed in conjunction with or ancillary to all of LCEC's electric power operations (hereafter, "Facilities"), for the purpose of supplying its customers with electricity within its service territory in the City and

persons beyond the limits thereof as may be authorized by law or agreement. The City recognizes that LCEC must construct, maintain and own or have the lawful use of sites and facilities for the transmission and distribution of electric power in order to adequately serve its customers in the City and persons beyond the corporate limits thereof, and that the City will not unreasonably withhold from LCEC, permits to construct such facilities within the City's Public Rights-of-Way for such placement, unless the operation, construction and maintenance of such facilities would unreasonably interfere with the traveling public's safety and welfare. The City also recognizes and agrees that nothing in this Franchise constitutes or shall be deemed to constitute a waiver of LCEC's delegated and independent right of Eminent Domain.

SECTION 3.

(i) LCEC Facilities shall be installed, located or relocated, so as not to unreasonably interfere with the Public's travel over the Public Rights-of-Way or the reasonable egress from and ingress to abutting properties. To avoid conflicts with the Public's travel, the location or relocation of all LCEC Facilities shall be made in accordance with the City's adopted reasonable rules and regulations as they may be revised, amended, or re-numbered from time to time, for the placement and maintaining of electric utility infrastructure in, under, upon, along, over and across the City's Public Rights-of-Way.

(ii) The City's adopted rules and regulations for the placement of electric utilities in its Rights-of-Way (a) shall not unreasonably prohibit the exercise of LCEC's right to use said Public Rights-of-Way for reasons other than when such use creates an unreasonable interference with the safety of the Public's travel thereon, (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 any City Public Rights-of-Way unless or until: (1) the City's widening or reconfiguring of the paved portion of any Public Rights-of-Way used by motor vehicles causes such installed LCEC Facilities to unreasonably interfere with motor vehicular traffic, or (2) the location of the LCEC Facilities constitutes an unavoidable hazard to non-motor vehicular traffic exercising reasonable care, taking into account established customs and practices 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.

(iii) The City's adopted rules and regulations for the City's electric utility construction permits will recognize and take into consideration that the installation of the above grade (surficial) LCEC Facilities that are installed or relocated in the City's Rights-of-Way after the Effective Date hereof will be installed or relocated at, or as close to the outermost boundaries of the Rights-of-Way to the extent most reasonably possible, unless otherwise permitted by the City in a writing.

(iv) The City will not be liable to LCEC for any costs or expenses relating to any installations or relocations of LCEC's Facilities made pursuant to subparagraphs (i) and (ii),

above. However, if the City directs LCEC in a writing signed by the City Manager, to locate or relocate its Facilities in a manner that is not consistent with LCEC's then-existing standard construction methods for such installations or relocations, the City will then be liable to LCEC for those costs under LCEC's then-existing contribution-in-aid of construction policies, unless during the term of this Franchise Ordinance, there are changes in law or rules, or judicial determination(s) that dictate otherwise.

(v) If any construction work is performed in a portion of a City Public Right-of-Way by LCEC in the course of the location or relocation of any of its Facilities, the portion of the Public Right-of-Way where such construction work is performed shall be restored by LCEC at its sole cost and expense to as good a condition as it existed at the time immediately prior to the commencement of such construction work within thirty (30) days after its completion.

(vi) For so long as LCEC remains in substantial compliance with the provisions of this Section, the City will not unreasonably deny LCEC the use of the City's Public Rights-of-Way as defined herein, and will not deny LCEC the necessary City permits to construct, maintain and operate its Facilities within such Public Rights-of-Way, other than what will be reasonable and necessary for the City to preserve the traveling public's safety and welfare from time to time.

SECTION 4. The City by the grant of this Franchise to LCEC, 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 LCEC, 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 City. 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 City, LCEC agrees to indemnify and hold the City harmless from and against any and all liability, loss costs, damages or expenses, to include any reasonable attorney fees of the City which may accrue to the City as the result of or by reason of any negligence, default or misconduct by LCEC in the construction, operation and maintenance of its facilities hereunder in or on the City's Public Rights-of-Way or any other City granted properties. For the term of this Franchise, LCEC shall maintain general liability insurance in such amounts as are ordinary in the course of LCEC's electric utility business to further support this indemnification.

SECTION 5.

(i) As a consideration for this Franchise and as reasonable rent for LCEC's use of the City's Public Rights-of-Way granted herein, LCEC shall pay to the City, beginning on the first day of the month immediately following the month in which the Ordinance becomes effective, and then thereafter at the end of each calendar quarter for the remainder of the term of this Franchise; an amount which will equal three percent (3%) of LCEC's billed revenues from the sale of electrical energy, less actual write-offs, to residential, commercial and industrial customers located within the incorporated areas of the City within LCEC's service territory for the quarterly billing

period ending thirty (30) days prior to each such payment (hereinafter, "Franchise Fee").

(ii) The City reserves the unilateral right, at its sole discretion and at any time during the term of this Franchise to reduce the Franchise Fee, by providing to LCEC a certified copy of an Ordinance adopted by the City Council at a duly advertised Public Hearing, amending the Franchise Ordinance to reduce the Franchise Fee. The certified copy of the Amended Ordinance shall be provided to LCEC no later than thirty (30) days following the Council's adoption of the Ordinance. The reduced Franchise Fee will be applied by LCEC to its customers as of the date of the adoption of the Franchise Fee Reduction Ordinance unless otherwise provided for in the terms of the Ordinance.

(iii) The City's options hereunder shall be limited solely to the percentages or calculations of the amount of the Franchise Fee to be paid by LCEC as consideration for this Franchise as specifically set forth in this Section. No other Sections or provisions of this Franchise ordinance may be altered, amended or affected by the City without the written concurrence of LCEC. Nothing herein shall require the City to exercise any of its options as outlined under this Section.

SECTION 6. As consideration during the term of this Franchise, the City agrees not to: (a) 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 or to any electrical distribution system established solely to serve any customer formerly served by LCEC, (b) 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 to any other LCEC customer's facility, or (c) 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 any other location(s).

SECTION 7. If the law permits and the City grants a right, privilege or franchise to any other party or otherwise enables any other such party to construct, operate or maintain electric light and power facilities within any part of the service territory of LCEC within the incorporated area of the City 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 revised by the City within the time period provided for herein. LCEC shall give the City at least sixty (60) Business 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 offered to the other party that it considers more favorable. The City shall then have sixty (60) Business Days in which to correct or otherwise remedy the terms and conditions complained of by LCEC. If LCEC determines that such terms and conditions are not remedied by the City within said time period, LCEC may terminate this Franchise agreement by delivering written notice by Certified United States Mail to the Mayor of the City of Cape Coral City Council with copies to the City Manager, City Attorney and the Lee County Clerk of Courts, and thereafter shall not be obligated to pay any Franchise Fee to the City for the use of City Public Rights-of-Way.

SECTION 8. If as a direct or indirect consequence of any legislative, judicial, regulatory or other action by the United States or the State of Florida (or any department, agency, authority, instrumentality or political subdivision of either of them) enacted after the Effective Date of this Ordinance, any person is permitted to provide electric service within LCEC service territory in the incorporated area 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 area of the City in which LCEC may lawfully provide service, 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 providing the electric service, LCEC may, at any time after the taking of such action, terminate this Franchise if such competitive disadvantage, and which is within the jurisdiction and authority of the City to remedy, is not remedied within the time period provided for in this Section. LCEC shall give the City at least sixty (60) Business Days advance written notice sent by United States Mail 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 sixty (60) Business Days or such other time as may be agreed to by LCEC in consultation with the City, for the City to correct or otherwise remedy the competitive disadvantage, if it is within the City's jurisdiction and authority to do so. If such competitive disadvantage is not remedied by the City within the determined time period and such remedy is within the City's jurisdiction and authority to do so, LCEC may terminate this Franchise agreement by delivering written notice by Certified United States Mail to the Mayor of the City of Cape Coral City Council with copies to the City Manager, City Attorney and Lee County Clerk of Courts, and thereafter shall not be obligated to pay any Franchise Fee to the City for the use of City Public Rights-of-Way.

SECTION 9. Failure on the part of LCEC to comply in any substantial respect with any of the provisions of this Franchise shall be grounds for a forfeiture of this Franchise by the City, but no such forfeiture shall take effect if the reasonableness or propriety thereof is protested by LCEC through either administrative or judicial proceedings until there is final determination by a court of competent jurisdiction (after the expiration or exhaustion of all rights of appeal) that LCEC has failed to comply in a substantial manner with any of the provisions of this Franchise. Thereafter, LCEC shall have six (6) months after such final determination to remedy the default before a forfeiture shall result, with a right of the City at its sole discretion to grant such additional time to LCEC for its compliance, if found to be warranted. If the default is not cured within the prescribed time, LCEC shall then immediately forfeit this Franchise.

SECTION 10. Failure on the part of the City to substantially comply with any of the provisions of this Ordinance, including: (a) denying LCEC the use of City Public Rights-of-Way in the LCEC service territory for reasons other than the unreasonable interference with public travel; (b) imposing conditions for the use of Public Rights-of-Way contrary to Florida law or the terms and conditions of this Franchise; or (c) an unreasonable delay in issuing LCEC a use permit, if any such permit is required, to construct facilities in City Public Rights-of-Way pursuant to this Franchise, shall constitute a City breach of this Franchise. LCEC shall notify the

City of any such breach in writing sent by United States Mail and the City shall then remedy such breach as soon as practicable, taking into account LCEC's obligation(s) to provide reasonably sufficient, adequate and efficient electric service to its customers; otherwise, within no later than thirty (30) Business Days. Should the breach not be remedied within the specified thirty (30) Business Days, LCEC shall be entitled to withhold up to the maximum of one hundred percent (100%) of the payments to the City as provided for in Section 5 herein until such time as the use permit is issued, or a court of competent jurisdiction has reached a final determination with respect to the issue(s) in dispute. In the event that such final determination by the court is in favor of the City as to such issue(s) in dispute, LCEC shall promptly remit to the City all payments withheld hereunder for the period withheld.

SECTION 11. 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 sent by United States Mail and any other available electronic means commonly used in the ordinary course of business when such dispute arises, and agree that prior to pursuing their available legal remedies, they will meet at the 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 12. 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 a period of sixty (60) days, during which, this Ordinance may be amended by the Parties. If an agreement to amend the ordinance is not reached at the end of the such sixty (60) day period, this entire ordinance shall then become null and void, and of no further force or effect.

SECTION 13. Any City ordinances and/or parts of City ordinances in conflict herewith are hereby repealed to the extent that they may be in conflict with the terms and provisions as set out herein.

SECTION 14. This Ordinance shall be governed and construed by the Laws, Administrative Rules and judicial determinations of the United States and the State of Florida. Nothing in this Franchise shall be either construed or considered as an abrogation, surrender or mitigation by the City of any of its rights and authority to use and to require the relocation of any uses within its Public Rights-of-Way as provided in Section 3. In the event that any legal proceeding is brought to enforce the terms of this Franchise, it shall be brought by either Party hereto in state court in Lee County, Florida, or, if a federal claim, in the U.S. District Court in and for the Middle District of Florida, Fort Myers Division. In any legal action between the Parties arising out of this Franchise, any attempts to enforce this Franchise, or any breach of this Franchise, the prevailing Party may recover its expenses from such legal action including, but

not limited to, costs of litigation and reasonable attorneys' fees from the other party together with reasonable fees and costs on appeal.

SECTION 15. Except in exigent circumstances, and except as otherwise may be specifically provided for in this Franchise, all notices by either Party shall be made by either depositing such notice into the United States Mail or by facsimile or other electronic transmission. Certified Mail shall be deemed delivered five (5) days following the date of such deposit into the United States Mail unless otherwise provided. Any notice given by facsimile or email is deemed to be received on the same Business Day. "Business Day" for purposes of this Ordinance shall mean Monday through Friday, with Saturday, Sunday and observed holidays excepted. All notices shall be addressed as follows:

To the City:

To LCEC:

Lee County Electric Cooperative, Inc.
Chief Executive Officer
4980 Bayline Drive
North Fort Myers, Florida 33917-3910
Telephone: (239) 995-2121
Facsimile: (239) 995-7904
Email: ceooffice@lcec.net

Copy to:

Copy to:

LCEC General Counsel
John Noland, Esq.
Henderson Franklin Starnes & Holt, P.A.
1715 Monroe Street
Fort Myers, Florida 33907
Telephone: (239) 344-1140
Facsimile: (239) 344-1515
Email: John.Noland@henlaw.com

Any changes to the Parties' representatives above shall be made in writing and provided to the other Party as soon as practicable by U.S. Mail or other electronic conveyance.

SECTION 16. This Ordinance is intended to constitute the entire agreement between the City and LCEC with respect to the subject matters herein, and supersedes all prior drafts and verbal or written agreements, commitments, or understandings, which shall not be used to vary or contradict the expressed terms hereof.

SECTION 17. As used herein for the purposes of this Franchise Ordinance, the term "person" means an individual, or, a partnership, corporation, business trust, joint stock company, trust, unincorporated association, joint venture, governmental authority or any other entity authorized to conduct business in Florida.

SECTION 18. The Cape Coral City Council intends that this Ordinance will be made part of the City of Cape Coral 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 City Manager and City Attorney, without the need for a further public hearing. Any such administrative revisions made hereto will be provided to LCEC within five (5) Business Days of their being made and incorporated into this Ordinance.

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SECTION 19.

(i) A certified copy of this Ordinance shall be filed by the City with the Florida Department of State within ten (10) days following its adoption.

(ii) As a condition precedent to the taking effect of this Ordinance, LCEC shall file a written acceptance hereof on its official letterhead stationery and executed by the Chief Executive Officer of LCEC, within thirty (30) days after the adoption of this Ordinance. The effective date ("Effective Date") of this Ordinance shall then be the date upon which LCEC files such written acceptance with the Clerk to the City of Cape Coral City Council, with copies to the Mayor of the City of Cape Coral City Council, the City Manager and the City Attorney.

The foregoing Ordinance was offered by Councilor _____ who moved its adoption. The motion was seconded by Councilor _____ and being put to a vote, the vote was as follows:

DULY PASSED AND ADOPTED this _____ day of _____, 2014.

ATTEST:
CLERK OF THE COURT

The CITY OF CAPE CORAL, CITY COUNCIL
OF LEE COUNTY, FLORIDA

By: _____

Deputy Clerk

By: _____

APPROVED AS TO FORM:

By: _____

Office of the City Attorney