

ORDINANCE 2011-1275

AN ORDINANCE OF THE CITY OF POLK CITY, FLORIDA; REPEALING EXISTING CHAPTER 124, CODE OF ORDINANCES OF THE CITY OF POLK CITY, FLORIDA ENTITLED "WATER AND ELECTRIC FRANCHISE"; PROVIDING A SHORT TITLE; PROVIDING FINDINGS AND INTENT; GRANTING TO THE CITY OF LAKELAND, FLORIDA, A NON-EXCLUSIVE FRANCHISE TO USE THE PUBLIC STREETS, ALLEYS, HIGHWAYS, WATERWAYS, BRIDGES EASEMENTS AND OTHER PUBLIC WAYS OF THE CITY OF POLK CITY FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF AN ELECTRIC SYSTEM IN THE CITY OF POLK CITY; PRESCRIBING THE TERMS AND CONDITIONS UNDER WHICH SAID NONEXCLUSIVE RIGHTS AND PRIVILEGES MAY BE EXERCISED; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE.

NOW, THEREFORE, BE IT ENACTED BY THE CITY COUNCIL OF POLK CITY, FLORIDA:

SECTION 1. REPEAL OF CHAPTER 124. The Code of the City of Polk City is hereby amended by repealing Chapter 124, WATER AND ELECTRIC FRANCHISE.

SECTION 2. SHORT TITLE. This ordinance shall be known and may be cited as the "Lakeland Electric System Franchise."

SECTION 3. FINDINGS. The City Council of the City of Polk City, Florida (the "City") hereby makes the following findings and declares its legislative intent as follows:

- (1) The City exercises control over all publicly dedicated rights-of-way located within the limits of the City of Polk City (the "Franchise Area").
- (2) The City of Lakeland, Florida ("Lakeland") is an electric power utility whose rates, terms and conditions of service are self-regulated.
- (3) Lakeland was granted a franchise by Polk City for a period of 20 years to construct, maintain, equip, and operate a waterworks and electric light and power system for the 20-year period by the City of Polk City Ordinance 23 on February 7, 1949, by Ordinance 30 on October 12, 1979, and by Ordinance No. 91-6 on April 2, 1991.

- (4) The Franchise granted by such ordinances has or is about to expire.
- (5) The City and Lakeland are willing to enter into a new, twenty (20) year, non-exclusive Franchise to provide for the construction, maintenance and operation of electric facilities in the City's public rights-of-way pursuant to the terms and conditions set forth herein (the "Franchise").

SECTION 4. GRANT OF AUTHORITY. Subject to the terms and conditions herein and the provisions in Sections 39, 40, and 46, Chapter 11016, Laws of Florida (1925), there is hereby granted by the City to Lakeland, its successors and assigns, the following:

(1) The non-exclusive right, privilege and franchise to construct, maintain and operate in, under, over and across the present and future streets, alleys, bridges, easements, and other public places of the City of Polk City, Florida and its successors, in accordance with established practice with respect to electrical construction and maintenance, for a term of twenty (20) years from the date of acceptance hereof, electric light and power facilities (including conduits, poles, wires and transmission lines, and for its own use, telephone and telegraph lines) for the purpose of supplying electric energy to the City, its successors, inhabitants thereof, and persons and corporations beyond the limits thereof;

(2) The City's covenant that it will not engage in the business of distributing and selling electric energy during the term of this franchise or any extension thereof in competition with Lakeland, its successors and assigns, includes a grant of the City's right to own and operate an electric utility system as a revenue producing enterprise for municipal purposes within the area served by Lakeland during said term;

(3) Upon the annexation of any territory to the City of Polk City, the portion of Lakeland's facilities located within such annexed territory and upon the streets, alleys or public grounds thereof, shall thereafter be subject to all the terms of this franchise as though it were an extension made hereunder. Polk City agrees to provide a copy of any annexation ordinance to Lakeland after adoption thereof.

SECTION 5. TERM OF FRANCHISE. This Franchise and rights herein granted shall take effect and be in force from and after the final passage hereof, as required by law and full execution by both parties, It shall continue in full force and effect for a term of twenty (20) years after the later of the date on which this Franchise Agreement has been (i) executed by Lakeland and (ii) the final passage and approval of this Ordinance by the City Council and execution of the same by the Mayor of the City ("Effective Date").

SECTION 6. CONSIDERATION FOR THE FRANCHISE; PAYMENT TO CITY. Calculation of the franchise amount to be paid by Lakeland to Polk City and the manner of its payment shall be as follows:

(1) Effective the first day of the second month beginning after the Effective Date hereof, Polk City shall be entitled to receive from Lakeland a monthly franchise payment (“Franchise Fee”), the amount of which will initially equal the product of 4.0 percent (4.0%) of Lakeland’s gross revenues from the sale of electric energy to all customers, including but not limited to residential, commercial, and industrial customers (hereafter “Base Revenues”) within the Franchise Area for the preceding month.

(2) The City may raise the rate of the Franchise Fee anytime during the term hereof up to an amount not to exceed six percent (6%) of Base Revenues. The City may raise the rate of the Franchise Fee by providing Lakeland written notice (in the manner provided for notice herein) of the amount of the increase. The City may raise the rate of the Franchise Fee to the maximum allowed in one notice or in multiple notices of increase not to exceed three (3) in number during the term of this Franchise. If the multiple increase approach is used, each notice shall be no less than one (1) year apart. Notwithstanding any such notice, Lakeland shall not be obligated to collect and remit the increased payment until the time frame provided in Section 6(3) below.

(3) The City may adopt any such adjustment or change to the rate of the Franchise Fee as described in Section 6(2) above in the sound discretion of the City, and such adjustment or change shall automatically become part of this Franchise effective as of the date so stated with the collection of such new or adjusted Franchise Fee rate subject to the notice provisions specified in Section 6. Such adjustment or change shall be conclusively evidenced when provided by written notice to Lakeland signed by the Mayor of the City of Polk City. Lakeland shall pay the City on or before the twentieth (20th) of each month a monthly franchise amount equal to the product of the then applicable Franchise Fee rate and the Base Revenues for the prior month. Upon any change in the rate of the Franchise Fee, Lakeland shall have until the twentieth (20th) day of the month beginning three (3) full months after the month in which the written notice of increase was received, (or such later date, if specified in the written notice) to begin charging the new amount reflecting the increased rate of the Franchise Fee.

SECTION 7. CONTROL OF PUBLIC PROPERTY RESERVED.

(1) This grant and franchise shall be subject to the right of the City to control at all times the distribution of space in, over and across or under all streets, alleys, or public grounds, occupied by Lakeland’s fixtures, and, when in the opinion of the City the public interest so requires, such fixtures may be caused to be reconstructed, relocated, altered or discontinued; and the City shall at all times have the power to pass all regulatory ordinances affecting such

utilities which, in the opinion of the City, are required in the interest of the public health, safety or accommodation. The reconstruction, relocation, alteration or discontinuance of Lakeland's fixtures shall be at the expense of Lakeland unless reimbursement is specifically allocated for Lakeland's benefit in a state or federal grant, or otherwise authorized by the City.

(2) Lakeland's facilities shall be so located or relocated and so erected as not to interface with traffic over the streets, alleys, bridges and public places within the City of Polk City, and with reasonable egress from and ingress to abutting property. The location or relocation of all facilities shall be under the supervision of and with the approval of the City Manager, but such supervision shall not reasonably interfere with the proper operation of Lakeland's facilities and service. When any portion of a street, alley, or public place is excavated by Lakeland in the location or relocation of any of its facilities, the portion of the street, alley, or public place so excavated shall be replaced by Lakeland at its expense and in as good condition as it was at the time of such excavation within such reasonable time as may be directed by the City Manager.

SECTION 8. RECORDS AND REPORTS. The City shall have access, at all reasonable business hours, to all of Lakeland's plans, contracts, engineering, accounting, finance, statistical, customer and service records relating to performance under this ordinance. As well, the City shall have access to all records on file with the Florida Public Service Commission. Lakeland does hereby acknowledge they have a statutory right to maintain confidentiality with regard to certain items filed with the Florida Public Service Commission. Lakeland does hereby permit the disclosure to City of any and all records and reports filed with the Florida Public Service Commission, which may be relevant to this ordinance, as may be requested by the City. The City shall maintain confidentiality of said records and reports provided the City is legally permitted to do so. In accordance herewith, Lakeland does hereby authorize the Florida Public Service Commission to furnish full and complete records and reports to the City, as may, from time to time, be requested by the City. As well, Lakeland shall provide directly to the City an annual summary report showing gross revenues received by Lakeland from its operations within the City during the preceding fiscal year and such other information as the City shall request with respect to properties, quality control, and expenses related to Lakeland's service within the City. The City may audit the financial records of the Lakeland for the purpose of determining that proper collection or payment of franchise fees is being made by Lakeland in accordance with this Ordinance at the City's initial expense. Lakeland shall cooperate with and make available those records necessary for City to perform the audit. If the audit demonstrates that payment or collection of franchise fees is more than 5% less than the monthly amount that should have been paid or collected the Lakeland shall, in addition to paying the fees that should have been paid or collected, pay the cost of the audit so long as Polk City has notified Lakeland of boundary changes.

SECTION 9. PROVISION OF SERVICE. Lakeland shall provide electric service, in accordance with its filed and approved tariffs and in compliance with the regulatory agencies having jurisdiction over Lakeland's operations, including safety and efficiency.

SECTION 10. APPROVAL OF TRANSFER. The Franchise hereby granted and any rights attendant thereto shall not be leased, assigned, or otherwise alienated or disposed of except with the express consent of the City to such lease, assignment, alienation or other disposition prior to the making of same; provided, however, that nothing herein contained, shall be so construed as to prohibit Lakeland from leasing, assigning or otherwise alienating and transferring this Franchise in connection with the lease or sale of its entire system or upon its merger and consolidation with any other corporation engaged in a similar business, nor as prohibiting the pledging or mortgaging of such franchise in connection with all the physical property owned and used by it in the operating of its electric system for the purpose of securing payment of moneys borrowed by Lakeland. Such transfer or assignment shall hereinafter be referred to as a "Permitted Transfer". Lakeland shall provide the City written notice of such Permitted Transfer 30 days in advance of closing. However, such notice shall not be construed as creating an express or implied right on the part of the City to approve or consent to such transfer. The express consent of the City is hereby given to Permitted Transfers, but such consent shall not be construed to accept, consent or join in the terms, covenants, provisions or warranties of such Permitted Transfers or any alteration of this Franchise.

SECTION 11. INDEMNITY. Subject to the conditions set forth in this Section 11, Lakeland agrees to indemnify and hold City harmless of and from any and all third party claims for personal injury, death or property damage, any other losses, damages, charges or out-of-pocket expenses, including reasonable attorneys' fees, witness fees, court costs and any orders, judgments or decrees which may be entered, but only to the extent that such claims arise from, in connection with, or attributable to, Lakeland's negligent acts or omissions in connection with its construction, operation, maintenance, relocation or removal of its Facilities or other action related hereto ("Indemnity Claims"). Upon receiving notice from City in time to reasonably conduct an investigation and prepare a defense, Lakeland shall undertake at its own expense the defense of any action which may be brought against City for damages, injunctive relief or for any other cause of action arising out of, in connection with or attributable to the foregoing, and, in the event any final judgment therein should be rendered against City resulting from the foregoing, Lakeland shall promptly pay the final judgment together with all costs relating thereto for such portion of the final judgment not attributable to City's sole, contributory or concurrent negligence or the sole, contributory or concurrent negligence of third parties, Lakeland being allowed, however, an appeal or appeals to the appropriate court or courts from the judgment rendered in any such suit or action upon the filing of such supersede as bond as shall be required to prevent levy or judgment against City during such appeal or appeals. The above notwithstanding, Lakeland shall have no

obligation to indemnify the City for those claims resulting from: (i) a Force Majeure (as defined in Section 23 below); or (ii) the acts, omissions or negligence of third parties who were not acting as Lakeland employees, agents, representatives or independent contractors. Furthermore, Lakeland shall have no obligation to indemnify the City to the extent that such claims result from the sole, contributory and/or concurrent negligence of City or the sole, contributory or concurrent negligence of third parties. The City covenants to promptly notify Lakeland of any Indemnity Claims in order to allow Lakeland sufficient time to reasonably conduct an investigation and prepare a defense of any such Indemnity Claim brought against City. If any allegation is made with respect to City negligence, whether sole, contributory, or concurrent, or any combination thereof arising or directly related to activities under this Franchise, the City shall have the right to represent itself directly with respect to those Issues, and if the City prevails in that regard and Lakeland is found negligent, the reasonable costs, fees and expenses shall be paid by Lakeland.

SECTION 13. REPAIR AND REPLACEMENT OF DAMAGE TO PROPERTY.

(1) Except as otherwise provided herein, neither Party hereto shall in any way displace, damage or destroy any facility of the other Party without such party's consent. In the event of such occurrence, to the extent authorized by law, the responsible Party shall be liable to the other party for the cost of any repairs made necessary by any such displacement, damage or destruction and shall pay such costs upon demand; provided, that no such liability shall exist in the event the Party whose facilities were displaced, damaged or destroyed incorrectly marked or located such facilities.

(2) Upon notice from City's Public Works and Utility Services Administrator or designee, Lakeland shall promptly, at its own cost, replace and repair any sidewalk, street, alley, highway, waterway, bridge, or other public place that has been excavated, broken, removed, displaced or disarranged by it in the conduct of its construction, maintenance, removal and operation of any portion of its facilities, or as a result of the deterioration of any portion of its Facilities, and restore the same to as good a condition as the same existed prior to Lakeland commencing its work. Lakeland shall, to the reasonable satisfaction of the City's Public Works and Utility Services Administrator or designee, maintain any repairs it makes pursuant to this Section 14 for a period of one (1) year following the date of such repair, when required as the result of poor workmanship or materials quality. Should Lakeland fail to make such repairs within a reasonable time following notification, the City may, upon five (5) business days advance written notification to Lakeland make such repairs and replacements as it deems reasonably necessary, and Lakeland shall pay City all reasonable costs of such repairs and replacements.

SECTION 15. FORFEITURE OF FRANCHISE: VIOLATIONS. The failure on the part of Lakeland upon reasonable notice from the City to

reasonably comply with any of the conditions of this ordinance, or otherwise fail to provide the service for which this franchise is granted, shall be grounds for forfeiture of this franchise; provided that nothing herein prevents Lakeland from seeking appropriate remedy in a court of competent jurisdiction (subject to appellate review) to ascertain whether compliance with the City's request is required by this ordinance and whether such non-compliance can be grounds for forfeiture. Upon a finding that compliance is required and can result in forfeiture, it is the intention of these parties that the court shall allow Lakeland a reasonable time (no less than 6 months) to correct and cure the deficiency before forfeiture shall become effective. Nothing contained in this Section shall prevent either party hereto from bringing an action for specific performance of any term, condition, provision or covenant hereof.

SECTION 16. NO GRANT OF OR BAR TO OTHER FRANCHISE.

Neither this Franchise as a whole, nor any of its parts, portions or terms, shall be construed as granting or intending to grant to Lakeland a franchise to use the Public Rights-of-Way or Lakeland's Facilities therein for cable television; but nothing herein shall preclude Lakeland from entering into a contract for the use of its facilities with any person, firm, partnership or corporation which hereafter may be granted a franchise for cable television by the City of Polk City. Nor shall this Ordinance be a bar to Lakeland seeking or obtaining any such franchise or other approval authorized by federal or state law to the extent required by law.

SECTION 17. SEVERABILITY. Should any section or provision of this Franchise or any portion thereof, the deletion of which would not adversely affect (in the general sense) the receipt of any material benefits or, substantially increase the burden of any party hereunder, be declared by a judicial or administrative tribunal of competent jurisdiction to be invalid, such decision shall not affect the validity of the remainder, as a whole or any part thereof, other than the part declared to be invalid. In the event of any such partial invalidity, the City and Lakeland shall meet and negotiate in good faith to obtain a replacement provision that is in compliance with the judicial or administrative authority's decisions and consistent with the original intent of the parties as contained herein. If such decision is fundamental to or alters the essence of this Franchise, then the parties agree to negotiate a new franchise agreement.

SECTION 18. GOVERNING LAW AND VENUE. The rights and privileges granted to Lakeland by this Franchise shall at all times be subordinate and inferior to the rights of the public in and to the ordinary use of the Public Rights-of-Way and nothing in this Franchise shall be considered as a surrender by the City of its right and power to use and relocate the use of its rights-of-way. In the event that any legal proceeding is brought to enforce the terms of this Franchise, the same shall be brought in Polk County, Florida.

SECTION 19. NOTICES. Except in exigent circumstances, and except as otherwise specifically provided in this Franchise, all notices by either City or Lakeland to the other shall be made by either depositing such notice in the

United States Mail, Certified Mail return receipt requested or by facsimile. Any notice served by certified mail return receipt shall be deemed delivered five (5) days after the date of such deposit in the United States Mail unless otherwise provided. Any notice given by facsimile is deemed received by next Business Day. "Business Day" for purposes of this section shall mean Monday through Friday, with Saturday, Sunday and City and Lakeland observed holidays excepted. All notices shall be addressed as follows:

To City:

Mayor
City of Polk City
123 Broadway Blvd. SE
Polk City, FL 33868-9225
Fax No.: 863-984-2334

To Lakeland:

Mayor,
City of Lakeland
228 S. Massachusetts Ave.
Lakeland, FL 33801
Fax No. 863-834-8402

Copy to:

City Attorney
City of Polk City
301 East Pine Street, Suite 1400
Orlando, FL 32801
Fax No.: 407-244-5690

Copy to:

City Attorney
City of Lakeland
228 S. Massachusetts Ave.
Lakeland, FL 33801
Fax No.: 863-834-8402

Notice shall be given as required by this Franchise and for all other emergencies. Notice shall be provided to the above-named addressees unless directed otherwise in writing by the City or Lakeland.

SECTION 20. NON-WAIVER PROVISION. The failure of either Party to insist in anyone or more instances upon the strict performance of anyone or more of the terms or provisions of this Franchise shall not be construed as a waiver or relinquishment for the future of any such term or provision, and the same shall continue in full force and effect. No waiver or relinquishment shall be deemed to have been made by either party unless said waiver or relinquishment is in writing and signed by the Parties.

SECTION 22. COMPLETE AGREEMENT. This Franchise together with the exhibits (as may be amended from time to time in accordance with the terms hereof) represents the entire agreement of the Parties and supersedes all prior representations whether oral or in writing with respect to the rights of the Parties.

SECTION 23. FORCE MAJEURE. Except as otherwise expressly provided herein, neither Party shall be liable for any delay or other non-compliance with the terms of this Franchise due to causes not reasonably within its control, including, but not limited to, acts of civil or military authority, including

courts and regulatory agencies, acts of God, war, riot or insurrection, blockades, embargoes, sabotage, epidemics, fires, floods, strikes, lockouts or other labor difficulties. Failure of contractors and subcontractors for reasons other than those specified above shall not be considered as a force majeure delay. In the event of any delay resulting from any force majeure cause provided herein, upon notice to the other Party within five (5) days of the occurrence of the event giving rise to the delay, the time for performance hereunder shall be extended for a period of time reasonably necessary to overcome the effects of the delay. Each Party has the duty to mitigate the impact of any such Force Majeure event, and to take all reasonable actions to prevent, avoid, or mitigate the effect of any Force Majeure event as described herein.

SECTION 24. OTHER OBLIGATIONS OF THE CITY OF LAKELAND. All rights of the franchise herein granted are made subject to the performance by Lakeland of the following conditions:

(1) The rates for electricity which shall be charged the residents, citizens, and businesses of Polk City shall not be greater than the rates charged the residents, citizens, and businesses of Polk County who are being furnished such service outside of the corporate limits of Lakeland.

(2) All lines, mains, extensions, and other improvements shall be constructed, installed and maintained according to required engineering standards.

(3) Lakeland, shall promptly repair damages to the streets and sidewalks occasioned by reason of construction and/or maintenance of poles or conduits to the reasonable satisfaction of Polk City.

(4) Lakeland shall in good faith extend to Polk City the services contemplated by the franchise granted herein and at all times make all additions and extensions necessitated by any increased public demand as requested by Polk City.

SECTION 25. RIGHTS OF THE CITY OF LAKELAND.

(1) Lakeland shall have the right and privilege to make rules, regulations, and restrictions to be binding between itself and the users of water and electricity in regard to the time of the payment of bills, the type of electric appliances to be supplied with power, and such other matters as may be necessary in the convenient and efficient operation of its business.

(2) Lakeland may extend its facilities and services beyond the corporate limits of Polk City as it may deem expedient, provided such extension shall not impair the standard of service within the corporate limits of Polk City.

SECTION 26. POLK CITY'S PURCHASE OPTION RIGHT.

(1) At any time at and after the expiration of this franchise, Polk City reserves the right to purchase properties, facilities, and other rights of Lakeland used

in connection with the right of the franchise granted herein at a price to be agreed upon between the parties, or in the absence of such agreement, by arbitration as may now or hereafter be provided by general law, as set out in section 46 of the 1925 Polk City charter, which was preserved as an ordinance by article VII, section C-31 of the 1986 charter of the City of Polk City.

(2) The franchise hereby granted shall not be sold, transferred, or assigned until Polk City shall first have had the opportunity of purchasing the electric utilities system and properties within the corporate limits of Polk City used in connection with the exercise of the franchise granted herein upon as favorable a basis as that proposed by any prospective purchaser.

SECTION 27. NEW INSTALLATIONS. The usual electric rules of public safety shall prevail in connection with the installations made by Lakeland in the exercise of the franchise granted herein, including applicable provisions of federal, state, county, or other regulatory agencies. Where new installations shall be required for the extension of any requested service beyond existing facilities, such adjustments shall be consistent with the policies of Lakeland in its utilities operation.

SECTION 28. EFFECTIVE DATE. . This Ordinance granting a franchise to Lakeland shall take effect immediately upon becoming a law; provided, however, this Ordinance shall become effective only upon the written acceptance and execution of this document by Lakeland as specified below.

PASSED ON FIRST READING this ____ day of _____, 2011.

PASSED AND CERTIFIED AS TO PASSAGE ON SECOND READING this ____ day of _____, 2011.

CITY OF POLK CITY, FLORIDA

Joseph LaCascia, Mayor

ATTEST:

Patricia Jackson, City Clerk

APPROVED AS TO FORM AND
LEGALITY:

Thomas A. Cloud, Esquire
City Attorney

STATE OF FLORIDA
COUNTY OF POLK

The foregoing instrument was acknowledged before me this ____ day of _____, 2011 by Joseph LaCascia, as Mayor of the CITY OF POLK CITY, FLORIDA, on behalf of the CITY.

Signature of Notary Public

(Print Notary Name)

My Commission Expires: _____

Commission No.: _____

Personally known, or

Produced Identification

Type of Identification Produced:

AFFIX NOTARY STAMP

Lakeland hereby agrees to be mutually bound with Polk City to the terms of the foregoing Ordinance, franchise, and agreement provided for therein, and all of the terms and conditions thereof, are hereby accepted, approved and agreed to this ____ day of _____, A.D. 2011.

CITY OF LAKELAND, FLORIDA

Gow B. Fields, Mayor

ATTEST:

Kelly S. Koos, City Clerk

APPROVED AS TO FORM AND LEGALITY:

Timothy J. McCausland
City Attorney

STATE OF FLORIDA
COUNTY OF POLK

The foregoing instrument was acknowledged before me this ____ day of _____, 2011, by Gow Fields, as Mayor of the CITY OF LAKELAND, FLORIDA, on behalf of the CITY.

Signature of Notary Public

(Print Notary Name)
My Commission Expires: _____
Commission No.: _____

AFFIX NOTARY STAMP

Personally known, or
 Produced Identification
Type of Identification Produced: _____