

ORDINANCE NO. 2020-13

AN ORDINANCE GRANTING TO FLORIDA PUBLIC UTILITIES COMPANY, ITS SUCCESSORS AND ASSIGNS, A NON-EXCLUSIVE FRANCHISE FOR A PERIOD OF 30 YEARS TO SELL, DISTRIBUTE, TRANSPORT, AND TRANSMIT NATURAL, MANUFACTURED, OR MIXED GAS IN THE CITY OF WESTLAKE, FLORIDA; PRESCRIBING THE TERMS AND CONDITIONS UNDER WHICH SAID FRANCHISE MAY BE EXERCISED; MAKING FINDINGS; PROVIDING SEVERABILITY; PROVIDING AN EFFECTIVE DATE UPON FINAL PASSAGE.

WHEREAS, Florida Public Utilities has requested permission from the City to erect, construct, operate, and maintain a gas system; to import, transport, sell and distribute Gas (as defined herein) within the City; and for these purposes to establish the used or useful facilities and equipment and to lay and maintain gas mains, service pipes, and any other appurtenances, as are used or useful in the sale, transportation and distribution of Gas within the City limits; and

WHEREAS, the City and Florida Public Utilities acknowledge that the Rights of Way and utility easements within the City are under the jurisdiction of Seminole Improvement District and Florida Public Utilities will obtain permits from Seminole Improvement District to construct, operate and occupy a portion of the utility easement with its facilities.; and

WHEREAS, the utility easements owned by Seminole Improvement District to be used by Florida Public Utilities are properties acquired and maintained by the Seminole Improvement District at expense to the property owners within the City limits, and the right to use Seminole Improvement District's utility easements is a property right without which Florida Public Utilities would be required to invest capital and incur property acquisition costs; and

WHEREAS, the City desires to ensure that the utility easements used by Florida Public Utilities are promptly restored to a safe and secure condition to protect the health, safety, and welfare of the citizens and residents of the City; and

WHEREAS, state statutes and City ordinances authorize the City to grant a franchise for the purposes set forth herein; and

WHEREAS, the City finds that it is in the public interest of its citizens to enter into this Franchise Agreement as defined herein, with Florida Public Utilities.

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

1. **Definitions.** For the purposes of this Franchise Agreement as defined herein, the following terms, phrases, words, and their derivatives shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural.

- A. **"Business Day"** means a day other than a Saturday or Sunday or a day which is observed as a Federal holiday.

- B. “City” shall mean the City of Westlake, Florida, a municipal corporation organized under the laws of the State of Florida.
- C. “City Clerk” means the Person appointed, hired or otherwise designated or charged by the City to accept, organize, maintain and/or keep records of the City.
- D. “City Limits” shall mean the incorporated limits of the City, including any such territory as may be hereafter added or annexed to, or consolidated with, the City.
- E. “City Engineer” means the Person appointed, hired or otherwise designated or charged by the City to perform professional and technical engineering duties for the City which may include, by example, performing supervisory and administrative duties in planning and coordinating the operation of engineering services on behalf of the City.
- F. “City Manager” means the Person appointed, hired or otherwise designated or charged by the City to implement municipal policy and/or otherwise serve as the administrator for the City in connection with day-to-day functions, or, in the absence of such individual, the local governing body.
- G. “Rights-of-way” shall mean all rights-of-way, streets, alleys, highways, waterways, bridges, sidewalks, easements and other ways or places of whatever nature, publicly held or dedicated for public use and presently opened or to be opened to public use for vehicular or pedestrian movement, to include the space at, or below the right-of-way places located within the City Limits.
- H. “Commission” shall mean the Florida Public Service Commission.
- I. “Company” shall mean Florida Public Utilities Company, a Florida corporation, its successors, and assigns.
- J. “Customer” shall mean any Person supplied with Gas service by the Company within the City Limits.
- K. “Distribution System” shall mean any and all transmission pipe lines, main pipe lines, and service pipe lines, together with all necessary and desirable appurtenances, including, but not limited to, all tubes, traps, vents, vaults, manholes, meters, gauges, regulators, valves, conduits, attachments, structures, as are used or useful in the sale, importation, distribution, transportation, and transmission of Gas within the City Limits.
- L. “Effective Date” shall mean the date this Franchise Agreement becomes effective as described in Section 3 below.
- M. “Expenses” means court costs, including taxed and untaxed costs, and reasonable attorneys’ fees, whether suit be brought or not, and includes, without limitation, expenses incurred in any appellate or bankruptcy proceeding (including reasonable legal and investigative expenses).

- N. “Franchise” or “Franchise Agreement” shall mean this ordinance as adopted by the City and accepted by the Company.
 - O. “Franchise Fee” shall mean an amount equal to six percent (6%) of the Company’s Gross Revenues.
 - P. “Gas” shall mean natural gas and/or manufactured gas and/or a mixture of gases that are distributed in pipes and measured by meter on the Customer’s premise. It shall not mean propane gas or liquefied petroleum gas (commonly referred to as “bottled gas”).
 - Q. “Gross Revenues” shall mean all revenues received by the Company from any Customer, excluding deposits, prepayments, turn on/off charges, meter installation charges, and any other revenue not generated directly and solely from the sale, distribution, transportation, and transmission of Gas. Gross Revenues shall also exclude revenues from those Customer’s designated by Company as “interruptible,” “industrial,” and “other”, until and unless a franchise or utility tax is imposed on such Customers by City, either independently or collectively, of all other competing utility services in the City Limits, including, without limitation, the imposition of franchise or utility taxes on all grades of fuel oils or gases used for such Customers at a relatively equal basis on the Franchise Fee plus utility taxes as levied on Gas pursuant to statute and/or rule.
 - R. “Person” shall mean any individual, firm, partnership, estate, corporation, company or other entity, including, but not limited to, any government entity.
 - S. “Seminole Improvement District” or “SID” shall mean the independent improvement district created and existing pursuant to Chapter 2000-431, Laws of Florida which geographical boundaries that are co-terminus with the City’s boundaries.
2. **Grant of Authority.** City hereby grants to the Company the non-exclusive franchise for the provision of natural gas service within the City limits. The City grants the non-exclusive right, privilege, and franchise to erect, construct, operate, and maintain a distribution system in, on or under any rights-of-ways as they now exist or maybe hereafter constructed, opened, laid out or extended within the City limits. In the event the rights-of-ways are closed, vacated or otherwise abandoned, the Company shall be provided with an easement for the Distribution System in such form and content as is reasonably acceptable to the Company. The Company shall obtain all required permits, approvals, licenses or consents from Seminole Improvement District prior to constructing or operating any facilities within the City.
 3. **Term.** This Franchise Agreement shall take effect and be in force from and after the first day of the month following the final passage of this Franchise Agreement, as required by applicable law, and upon filing of the acceptance by the Company with the City Clerk (the “Effective Date”). Except as provided in Section 4 herein, the Franchise hereby granted by the City to the Company shall be thirty (30) years from the Effective Date (the “Initial Term”). Unless either party provides notice in writing in compliance with Section 19 hereof to the other party at least thirty (30) days prior to the expiration of the Initial Term, upon expiration

of the Initial Term, this Franchise Agreement shall continue on the same terms then in effect at the expiration of the Initial Term on a month-to-month basis.

4. **Termination by the City.** In the event that the Company commits a material breach of any of the material covenants, terms, and conditions of this Franchise Agreement, the City may terminate this Franchise Agreement; if the City shall have served the Company with a written notice pursuant to Section 19 herein, setting forth in reasonable detail all matters pertinent to such material violation or default, and the Company shall have failed within sixty (60) days after service of such notice or such longer period of time as may be reasonably necessary to present a plan to the City to effect such cure pursuant to such plan within a reasonable period of time after the City's approval of the plan. Approval of the plan by the City shall not be unreasonably withheld, conditioned or delayed.
5. **Non-exclusive Franchise.** The right to use and occupy the rights-of-ways for the purposes set forth herein shall not be exclusive, and the City reserves the right to grant a similar use to any other Person at any time during the period of this Franchise, so long as such grant shall not interfere with the Company's rights granted hereunder. This Franchise shall grant the privilege of carrying on the business in all of the City or in part of the City, with no promise that there will be no competition. In the event the City grants a franchise to the competitor of the company, the grant shall not interfere with the Company's rights granted hereunder, including the physical location of improvements, except as to matters that occur as a result of competition.
6. **Competition.** As further consideration of this Franchise Agreement the City hereby agrees that during the term of this Franchise it shall not engage in the business of selling, importing, distributing, transporting, transmitting Gas or otherwise compete with the Company within the City Limits.
7. **Assignment.** This Franchise hereby granted shall not be sold, leased, assigned or otherwise alienated or disposed of (each a "Transfer"; provided, however, in no event shall any transfer by operation of law be considered a "Transfer" under this Franchise, including, without limitation, by way of the merger of the Company with or into any other Person) except with the prior written consent of the City Manager, which shall not be unreasonably withheld or conditioned or unduly delayed (the "Consent"). In the event that the City neither grants nor denies the Consent forty-five (45) days after the Company's written request for Consent delivered pursuant to Section 19 below, then the Consent shall be deemed to have been granted by the City to the Company. No Transfer shall be effective until the Person to whom the Franchise is Transferred files a duly executed instrument reciting the fact of the Transfer, accepting the terms of the Franchise, and agreeing to perform all the conditions thereof in the office of the City Clerk whereupon the transferor shall be released of any further obligations under this Franchise Agreement without the necessity of any further action by any Person. Notwithstanding the foregoing, the Company may in its sole and absolute discretion, without consent, Transfer the Franchise in connection with: (i) the lease or sale of all or substantially all of the Distribution System, whether to a subsidiary or affiliate or unrelated Person; or (ii) the pledge or mortgage of this Franchise in connection with the physical property owned and used by the Company in the construction, maintenance, and operation of the Distribution System for the purpose of securing payment of monies borrowed by the Company.

- 8. Compliance with Applicable Laws.** To the extent consistent with Florida law, the Company shall be subject to all lawful exercises of the City's police power and shall abide by all such reasonable rules, regulations, and ordinances which the City has passed or might pass in the future, which shall not conflict or be inconsistent with the Promulgated Safety Rules and Regulations of the Commission and the Federal and/or Florida Departments of Transportation. Notwithstanding the foregoing, the City shall not pass any ordinance, regulation, rule or take any other similar action or exercise its police power or take any other action that results in a material change in or materially affects the rights or obligations of the Company under this Franchise Agreement.
- A. In the event the Company or any aspect of the Gas trade, as contemplated hereunder, is deregulated, the Company shall maintain and operate its Distribution System and render efficient service in accordance with the rules and regulations as are, or may be, promulgated by the City.
 - B. In the event the City has not promulgated rules and regulations at the time of deregulation, then, the Company shall maintain and operate its Distribution System in compliance with the rules and regulations by which they were governed prior to deregulation until such time as the City has had an opportunity to promulgate rules and regulations or pass an ordinance governing those items regulated by the Commission, governing service standards, safety standards, and quality controls.
 - C. In the event of deregulation, the City shall not regulate rates for the sale, distribution, transportation, or transmission of Gas.
- 9. Distribution System.** The Distribution System shall be erected, placed, laid, and maintained in a manner consistent with the following:
- A. The City, through its City Manager or other designee, shall have the authority, but shall not be required, to supervise all construction, location, restoration, relocation and installation work.
 - B. The Company shall provide reasonable egress from and ingress to abutting property.
 - C. While allowing the functioning of the Distribution System, the Distribution System shall be located in the Seminole Improvement District's Utility easements by permit so as not to unreasonably obstruct, disturb or interfere, on a permanent basis, with any traffic, water flow, water pipes, sewers, drains, catch basins, pavement, sidewalk, driveways, or any other structures installed or any other function of said structures of the delivery of municipal services by the Seminole Improvement District or the City.
 - D. In the event drain, sewer, catch basins, water pipes, pavements or other like improvements or the function of said improvements are materially damaged by erecting, placing, laying or maintaining the Distribution System, the Company shall repair the damage at its sole cost and expense to substantially the condition that existed prior to said damage. In this regard, the City shall give written notice

to the Company pursuant to Section 19 herein, of deficiencies that need to be cured by the Company. Said notice shall set forth a reasonable period of time, under the circumstances, in which the Company shall affect such repair.

E. Notice of construction, location, restoration or relocation of the Distribution System shall be given to the Seminole Improvement District Engineer or his designee by delivery of a letter accompanied by plan drawings showing the proposed work. As soon as practical, but no more than fifteen (15) Business Days after completion of the work, the Company shall submit as-built drawings to the District Engineer or his designee, which shall complete the notice and approval requirement for said work.

F. In the event at any time during the period of this Franchise the Seminole Improvement District or City shall lawfully elect to alter, or change the grade of the Rights-of-way, the Company, upon reasonable notice from the SID or the City, shall remove, relay, and relocate any portion of the Distribution System as is necessary at the Company's own cost and expense.

10. Right to Inspect. During the term of this Franchise Agreement, the City or SID, through its designated agent, shall have the authority to inspect the Distribution System at a reasonable time and upon reasonable prior notice to insure compliance with governing law and the Commission's regulations at the City or SID's own cost and expense.

11. Franchise Fee. The Company shall pay the Franchise Fee to the City quarterly on January 1, April 1, July 1, and October 1 of each year during the term of this Franchise unless otherwise agreed. In the event that the Franchise Fee is more than twenty (20) days delinquent, the delinquent amount shall accrue interest at the highest rate allowable by law. In the event the Company makes any Franchise Fee payment in excess of the Franchise Fee due and owing to the City under this Franchise Agreement or if the City is otherwise indebted to the Company, the Company shall have the right to offset such overpayment and/or indebtedness against future payments of the Franchise Fee.

12. Other Fees and Taxes. Except as otherwise provided for herein, the Company shall pay to the City all legally authorized fees, taxes, assessments, and costs levied, imposed or validly adopted by the City during the term of this Franchise Agreement, which shall include, but are not limited to public service taxes, ad valorem taxes (intangible, personal, real), occupational taxes, licensing fees, permitting fees, development review fees, and inspection fees. The Company shall pay the rates promulgated by SID for review.

13. Franchise Parity. If, during the term of this Franchise Agreement, the City, by franchise agreement or ordinance, allows other Persons who sell, import, distribute, transport, and transmit Gas (the "Alternate Gas Providers") the right, privilege or franchise to erect, construct, operate, and maintain in, on or under any of the Rights-of-way within the City, as they now exist or may be hereafter constructed, opened, laid out or extended within the City Limits, a Distribution System for the purpose of selling, importing, distributing, transporting, and transmitting Gas to Persons in the City Limits or receiving such Gas from Persons other than the Company with the City Limits, and imposes a franchise compensation obligation or equivalent on such Alternate Gas Provider for any Person that is less than the Franchise Fee

imposed with respect to the same Customer under this Franchise Agreement, the Franchise Fee under this Franchise Agreement shall be automatically reduced so that the Franchise Fee is no greater than the franchise compensation obligation or equivalent when compared on a dollars-per-term basis. In the event that the City does not impose a franchise compensation obligation or equivalent on said Alternate Gas Providers, the Company's obligation to pay the Franchise Fee under this Franchise Agreement shall terminate.

14. Reciprocal Indemnification.

- A. The Company shall indemnify and save the City, its servants, agents, employees, licensees, contractors and invitees, harmless from and against any and all liability, actions, demands, claims, damages, losses and Expenses, which may be brought against or suffered, sustained, paid or incurred by the City, its servants, agents, employees, contractors, licensees and invitees, arising from, or otherwise caused by:
 - i. any breach by the Company of any of the provisions of this Franchise Agreement; or
 - ii. the gross negligence or willful misconduct of the Company, or any of its servants, agents, employees, licensees, contractors or invitees in carrying on its business within the City Limits.

- B. The City shall indemnify and save the Company, its servants, agents, employees, licensees, contractors and invitees, harmless from and against any and all liability, actions, demands, claims, damages, losses and Expenses, which may be brought against or suffered, sustained, paid or incurred by the Company, its servants, agents, employees, contractors, licensees and invitees, arising from, or otherwise caused by:
 - i. any breach by the City of any of the provisions of this Franchise Agreement; or
 - ii. the gross negligence or willful misconduct of the City, or any of its servants, agents, employees, licensees, contractors or invitees, in carrying on the business of the City.

- C. Notwithstanding anything to the contrary herein contained, in no event shall the City or the Company be liable under this Franchise Agreement, in any way, for any reason, for any indirect, special or consequential damages (including damages for pure economic loss, loss of profits, loss of earnings or loss of contract), howsoever caused or contributed to.

- D. Indemnification is conditioned upon the indemnified party providing notice to the indemnifying pursuant to Section 19 herein, within thirty (30) days after the indemnified party knew or should have known of the claim.

- E. Nothing herein is intended to act as a waiver of the City's rights, privileges, and immunities under the doctrine of sovereign immunity and/or limits of liability set forth in Section 768.28 of the Florida Statutes.
- F. The provisions of this Section 14 shall survive this Franchise Agreement for a period of one year.

15. Records. The Company shall maintain accounts and records in a manner consistent with Section 368.108 of the Florida Statutes and Chapter 25-7 of the Florida Administrative Code and that the Gross Revenues within the City Limits are able to be calculated. Upon a good faith request, the Company shall provide to the City any accounts and records relevant to this Franchise Agreement pursuant to a duly executed confidentiality agreement within a commercially reasonable amount of time after said request.

16. Governing Law; Venue; JURY WAIVER. This Franchise Agreement is made pursuant to and shall be governed by and construed in accordance with the laws of the State of Florida, without regard to the conflict of laws principles thereof. The parties hereby irrevocably submit to the exclusive jurisdiction of the courts in the State of Florida (state or federal), with venue in the county in which the City is located, over any dispute arising out of this Franchise Agreement and agree that all claims in respect of such dispute or proceeding shall be heard and determined in such courts. The parties hereby irrevocably waive, to the fullest extent permitted by applicable law, any objection that they may have to the venue of such dispute brought in such court or any defense of inconvenient forum for the maintenance of such dispute. THE PARTIES HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY, AFTER CAREFUL CONSIDERATION AND AN OPPORTUNITY TO SEEK LEGAL ADVICE, WAIVE THEIR RIGHT TO HAVE A TRIAL BY JURY IN RESPECT OF ANY LITIGATION ARISING OUT OF OR IN ANY WAY CONNECTED WITH ANY OF THE PROVISIONS OF OR MATTERS RELATED TO THIS FRANCHISE.

17. Entire Agreement. This Franchise Agreement, and the schedules and exhibits hereto, contain the entire understanding and agreement of the parties hereto relating to the subject matter of this Franchise Agreement and all prior agreements relative hereto which are not contained herein.

18. Attorney's Fees and Expenses. In the event either party initiates action to enforce its rights hereunder, the substantially prevailing party shall recover from the substantially non-prevailing party its Expenses. All such Expenses shall bear interest at the highest rate allowable under the laws of the State of Florida from the date the substantially prevailing party pays such Expenses until the date the substantially non-prevailing party repays such Expenses. Expenses incurred in enforcing this Section shall be covered by this Section. For this purpose, the court is requested by the parties to award actual costs and attorneys' fees incurred by the substantially prevailing party, it being the intention of the parties that the substantially prevailing party be completely reimbursed for all such costs and fees. The parties request that inquiry by the court as to the fees and costs shall be limited to a review of whether the fees charged and hourly rates for such fees are consistent with the fees and hourly rates routinely charged by the attorneys for the substantially prevailing party.

19. Notices. All notices and other communications under this Franchise shall be in writing and shall be deemed given when (a) delivered personally to that party, (b) sent by facsimile transmission (with electronic confirmation) to that party at the facsimile number for that party set forth below, (c) on the fifth (5th) Business Day after being mailed by certified mail (postage prepaid and return receipt requested) to that party at the address for that party set forth below, or (d) on the day delivered by Federal Express or any similar express delivery service for delivery to that party at that address. All notices shall be addressed as follows:

If to Company: Florida Public Utilities Company
105 6th Street NW
Winter Haven, Florida 33881
Attention: Director, Natural Gas Operations
Facsimile: _____

with a copy to: Florida Public Utilities Company
1641 Worthington Road, Suite 220
West Palm Beach, Florida 33409
Attn: Director of Regulatory Affairs
Facsimile: (561) 366-1525

with a copy to: Baker & Hostetler LLP
200 S. Orange Avenue, Suite 2300
Orlando, Florida 32801
Attention: Jeffrey E. Decker
Facsimile: (407) 841-0168

If to City: City of Westlake
4001 Seminole Pratt Whitney Road
Westlake, FL 33470
Attention: Kenneth G. Cassel, City Manager
Facsimile: (561)790-5466

with a copy to: City of Westlake
4001 Seminole Pratt Whitney Road
Westlake, FL 33470
Attention: Pam Booker, City Attorney
Facsimile: (561)790-5466

Any party may change its facsimile number or address for notices under this Franchise at any time by giving the other parties notice of such change delivered in conformity with this Section 19.

20. Force Majeure. Any prevention, delay or stoppage of work or other obligations to be performed by either party that are due to strikes, labor disputes, inability to obtain labor, materials, equipment or reasonable substitutes, acts of nature, governmental restrictions,

regulations or controls, judicial orders, enemy or hostile government actions, civil commotion, fire or other casualty or other causes beyond the reasonable control of the party shall excuse performance and other obligations by the party for a period equal to the duration of that prevention, delay or stoppage. In no event shall any material default by Company due to any of the foregoing constitute a grounds for termination of this Franchise.

21. **Non-waiver**. The failure of any party to insist in any one or more instances upon the strict performance of any one or more of the terms or provisions of this Franchise Agreement shall not be construed as a waiver or relinquishment for 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 both parties.
22. **Severability**. If any provision of this Franchise Agreement or application to any party or circumstances shall be determined by any court of competent jurisdiction to be invalid or unenforceable to any extent, the remainder of this Franchise Agreement or the application of such provision to such Person or circumstances, other than as to which it is so determined invalid or unenforceable, shall not be affected thereby, and each provision shall be valid and shall be enforced to the fullest extent permitted by law.
23. **Scrivener's Error**. Sections of this Franchise Agreement may be renumbered or relettered and the correction of typographical and/or scrivener's errors which do not affect the intent may be authorized by the City Manager or his designee, without need for a public hearing by filing a corrected or recodified copy of same with the City Clerk.
24. **Ordinances Repealed**. All ordinances and parts of ordinances in conflict or inconsistent with the provisions of this Franchise Agreement are hereby repealed as of the Effective Date.

INTRODUCED on first reading this _____ day of September, 2020.

PASSED on second reading this _____ day of October, 2020.

CITY OF WESTLAKE FLORIDA

ROGER MANNING, MAYOR

ATTEST:

ZOIE BURGESS, CITY CLERK

APPROVED AS TO FORM:

PAM E. BOOKER, CITY ATTORNEY

UNCONDITIONAL ACCEPTANCE BY THE COMPANY

I, the undersigned official of Florida Public Utilities Company, am authorized to bind the Company and to unconditionally accept the terms and conditions of the foregoing Franchise (Ordinance No. _____), which are hereby accepted by the Company this _____ day of October, 2020

Florida Public Utilities Company

By: _____

Name: _____

Title: _____

Subscribed and sworn to before me this _____ day of _____, 2020.

Notary Public in and for the State of Florida

My commission expires _____

Received on behalf of the City this _____ day of _____, 2020.

Name: _____ Title: _____