

1 **DRAFT ORDINANCE 2020-02**
2 **TOWN OF LADY LAKE, FLORIDA**

3 **AN ORDINANCE GRANTING TO DUKE ENERGY FLORIDA, LLC. d/b/a DUKE ENERGY, A**
4 **NON-EXCLUSIVE ELECTRIC UTILITY RIGHTS OF WAY UTILIZATION FRANCHISE;**
5 **PRESCRIBING THE TERMS AND CONDITIONS RELATED TO THE OCCUPANCY OF**
6 **MUNICIPAL STREETS AND RIGHTS OF WAY IN TOWN OF LADY LAKE, FLORIDA, FOR THE**
7 **PURPOSE OF PROVIDING ELECTRIC SERVICE; PROVIDING FOR SEVERABILITY OF**
8 **PROVISIONS; AND PROVIDING AN EFFECTIVE DATE.**

9 **NOW, THEREFORE, BE IT ORDAINED** by the Town Commission of the Town of Lady Lake, Lake
10 County, Florida:

11 **SECTION 1 – Findings**

12 The Town deems it necessary, desirable and in the interest of its citizens to establish by
13 ordinance a rights of way utilization franchise (sometimes referred to herein as the
14 “Franchise”) granting the Company permission to occupy the Rights of Way in the Town of
15 Lady Lake, Florida, for the purpose of providing electric services.

16 **SECTION 2 – Short Title**

17 This ordinance shall be known and may be cited as the “Duke Energy Rights of Way Utilization
18 Franchise”.

19 **SECTION 3 – Definitions**

20 For the purposes of this ordinance, the following terms, phrases, words, and their derivatives
21 shall have the meaning given herein. When not inconsistent with the context, words in the
22 present tense include the future, words in the plural number include the singular number,
23 and words in the singular number include the plural number. The word “shall” is always
24 mandatory and not merely permissive.

25 (A) “Adversely Affected” — For the Company, a loss of one percent of Base Revenues within
26 the corporate Town limits due to Retail Wheeling. For the Town, a loss of one percent of
27 franchise fees due to Retail Wheeling.

28 (B) “Base Revenues” — All Company’s revenues from the retail sale of electricity, net of
29 customer credits, to residential, commercial and industrial customers and Town sponsored
30 street lighting all within the corporate limits of the Town.

1 (C) “Company” or Grantee” — Duke Energy Florida, LLC. d/b/a Duke Energy, its successors
2 and assigns.

3 (D) “Town” or “Grantor” — The Town of Lady Lake, Florida.

4 (E) “Electric Energy Provider” — Every legal entity or association of any kind (including their
5 lessees, trustees or receivers), including any unit of state, federal or local government
6 (including Town herein), which owns, maintains, or operates an electric generation,
7 transmission, or distribution system or facilities, or which otherwise provides, arranges for, or
8 supplies electricity or electric energy to the public, or which supplies electricity to itself
9 utilizing Company’s distribution or other facilities. Without limitation or the foregoing,
10 “Electric Energy Provider” shall also include every Electric Utility, electric power marketer or
11 electric power aggregator. It shall also include every entity providing such services as
12 metering, customer billing, payment collection and processing, and customer information
13 and data processing.

14 (F) “Electric Utility” — Shall have the meaning set out in Section 366.02(2), *Florida Statutes*
15 (2010), and shall also include every electric “Public Utility” as defined in Section 366.02(1),
16 *Florida Statutes* (2010). “Electric Utility” shall further include every investor owned,
17 municipally or governmentally owned, or cooperatively owned electric utility (including their
18 lessees, trustees or receivers), which owns, maintains, or operates an electric generation,
19 transmission, or distribution system in any State or County.

20 (G) “Electric Utility System” — An electric power system installed and operated in the
21 Franchise Area in accordance with the provisions of the Florida Public Service Commission
22 establishing technical standards, service areas, tariffs and operating standards, which shall
23 include but not to limited to electric light, heat, power and energy facilities, and a generation,
24 transmission, and distribution system, with such extensions thereof and additions hereto as
25 shall hereafter be made.

26 (H) “Franchise Area” — That area for which Company provides electric utility service within
27 the corporate Town limits of the Town.

28 (I) “Facilities” — The meaning as set forth in Section 4.

29 (J) “Person” — Any person, firm, partnership, association, corporation, company or
30 organization of any kind.

31 (K) “Public Service Commission” — The Florida Public Service Commission.

1 (L) “Rights of Way” — All of the public streets, alleys, highways, waterways, bridges,
2 easements, sidewalks and parks, and any other public ways or places owned by the Town, as
3 they now exist or may be hereafter constructed, opened, laid out or extended within the
4 present limits of the Town, or in such territory as may hereafter be added to, consolidated or
5 annexed to the Town.

6 (M) “Retail Wheeling” — A customer/supplier arrangement whereby an Electric Energy
7 Provider utilizes transmission and/or distribution facilities of Company to make energy sales
8 directly to an end use customer located within the Franchise Area.

9 **SECTION 4 — Grant of Authority**

10 (A) This grant of authority is limited to the provision by Company to have, maintain, or place
11 its Facilities within the Rights of Way for its electric utility services. Accordingly, the Town
12 hereby grants to the Company, its successors and assigns the non-exclusive right, authority,
13 and franchise to lay, erect, construct, maintain, repair and operate its Facilities in, under,
14 upon, over and across the present and future Rights of Way, as they now exist or may be
15 hereafter constructed, opened, laid out or extended within the present limits of the Town,
16 including but not limited to conduits, cables, poles, wires, supports and such other structures
17 or appurtenances as may be reasonably necessary for the construction, maintenance and
18 operation of an electric generation, transmission and distribution system, including
19 information, telecommunication, and video transmission used solely for the provision of
20 electric service (collectively the “Facilities”), provided that all portions of the same shall
21 conform to accepted industry standards, including but not limited, to the National Electrical
22 Safety Code. Nothing in this Ordinance shall require Grantee to remove, de-energize, or cease
23 using any poles, wires, or other things or Facilities identified hereinabove that were in place
24 under previous ordinances or permits prior to the Effective Date of this Ordinance, regardless
25 of whether such poles, wires or other Facilities are located outside “Rights of Way” as defined
26 herein. Nor shall anything in this Ordinance prohibit Company from performing upgrades,
27 replacements, maintenance or servicing of such poles, wires, or other Facilities after the
28 Effective Date of this Ordinance. Rather, all such preexisting poles, wires, or other Facilities
29 shall be authorized under this Ordinance. Because this Franchise is intended to grant
30 Company the non-exclusive, but unrestricted right to place its Facilities within the Rights of
31 Way, the Town expressly acknowledges and agrees that Company shall not be required to
32 pull or pay for permits to place its Facilities or perform any work maintenance activities on or
33 related to its Facilities within the Rights of Way.

1 (B) Annexation or Contraction. Town and Company agree that the Franchise Area is subject to
2 expansion or reduction by annexation and contraction of municipal boundaries. If Town
3 approves any Franchise Area expansion or reduction by annexation or contraction, Town
4 shall provide written notice to Company's Annexation Coordinator, at the address provided
5 below, within 60 days of such approval and this Franchise shall automatically extend to
6 include any such annexed areas.

7 Additionally, within 60 days of any such annexation or contraction, Town shall provide to
8 Company an updated list containing the new or removed street names, known street name
9 aliases, street addresses, and zip codes associated with each street name. All notices of
10 annexation or contraction and address listings shall be addressed to the Annexation
11 Coordinator as follows with the address subject to change:

12 Duke Energy

13 Tax Team DT02-V

14 9700 David Taylor Drive

15 Charlotte NC 28262

16 Or by email to: TaxTeam@duke-energy.com

17 Company must revise its payments due to any expansion or reduction by annexation within a
18 reasonable time after Company has received such notice and updated list from Town, but no
19 later than 60 days after receipt of notice and the list. Town understands and affirmatively
20 acknowledges that the Company will exclusively rely upon the Town to provide timely and
21 accurate information to the Company regarding any such annexations or contractions, and
22 that failure to do so will impair, inhibit, and/or preclude the Company's ability to revise any
23 payments due to the Town that are impacted by such annexations or contractions. Further,
24 Town acknowledges that if such information is not timely furnished to Company as required
25 herein, any related obligation to collect payments shall be suspended during the period of
26 delay.

27 (C) Non-Exclusive Use. The Company's right to use and occupy Rights of Way for the purposes
28 herein set forth shall be non-exclusive as to entities not engaged in the provision of electric
29 energy and service, and the Town reserves the right to grant to others the right to utilize the
30 Rights of Way, to any person at any time during the period of this Franchise so long as such
31 grant does not create an unsafe condition or unreasonably conflict with the rights granted to
32 Company herein.

1 **SECTION 5 — Notice of Acceptance and Term of Franchise**

2 This ordinance shall become effective upon being legally passed and adopted (“Effective
3 Date”) by the Town Commission; and it is further agreed that Grantee shall accept this
4 Franchise as of the date of the passage and adoption by the Town Commission and shall
5 signify its acceptance in writing within 30 days after the Town Commission approval of this
6 ordinance by filing its written acceptance with the Town Clerk. If Grantee fails to accept this
7 franchise within 30 days of its date of passage and adoption, then this Ordinance shall be null
8 and void, and of no force and effect of any kind. Commencing on the Effective Date, the term
9 of the Franchise granted herein shall be for a period of ten years.

10 **SECTION 6 — Payment to Town**

11 (A) Effective the first day of the second month beginning after the Effective Date of this
12 ordinance, Town shall be entitled to receive from Company a monthly franchise amount that
13 will equal six percent of Company’s Base Revenues (the “Franchise Fee”) for the preceding
14 month, which amount shall be the total compensation due Town for any and all rights,
15 authority and privileges granted by this Franchise, including compensation for any required
16 permits, parking fees, or any other fee or cost related to the rights granted hereunder. Any
17 franchise amounts that will be paid to the Town will be collected by the Company from
18 Company’s customers in the Franchise Area and passed through to the Town in the manner
19 described herein. The Town expressly acknowledges that no additional or other amounts
20 shall be due or remitted by Company for the exercise of its rights granted hereunder.

21 Payment shall be made to Town for each month no later than the 20th day of the following
22 month. The monthly payment shall be made by wire transfer. Any monthly payment or any
23 portion thereof made 20 days after the due date without good cause shall be subject to
24 interest at the rate of ten percent per annum.

25 (B) Only disputed amounts shall be allowed to be withheld by Company, and any such
26 amount shall not accrue any interest during the pendency of any such dispute.

27 (C) The Town acknowledges that all classifications and categories of retail customers of
28 Company shall be subject to the payment of the Franchise Fee due hereunder.

29 **SECTION 7 — Favored Nations**

30 (A) In the event Grantee shall hereafter accept an electric utility franchise ordinance from any
31 municipality providing for the payment of a franchise fee in excess of that provided for in
32 Section 6 above, Grantee shall notify Grantor, and Grantor reserves the right to amend this
33 Franchise to increase the franchise fee payable under this ordinance to no more than the

1 greater franchise fee that Grantee has agreed to pay to such other municipality. Grantee's
2 obligation to pay such greater franchise fee to Grantor shall apply prospectively beginning
3 with the next monthly franchise fee payment following Grantor's timely notice of its exercise
4 of its amendment right to which Grantee may collect such increased fee from its customers.
5 Grantee's failure to notify Grantor of such additional payments does not limit Grantor's right
6 to amend to require such additional franchise fees.

7 (B) It is the intent and agreement of Grantor and Grantee that Grantee shall not be required to
8 pay Grantor a franchise fee under Section 6 of a percentage greater than that paid to Grantor
9 by any other Electric Utility or Electric Energy Provider utilizing Grantor's Rights of Way on
10 such Electric Utility's or Electric Energy Provider's revenues attributable to services that are
11 the same or substantially the same as those performed by Grantee. It is further the intent and
12 agreement of Grantor and Grantee that Grantee should not be placed at a competitive
13 disadvantage by the payments required by Section 6 of this Ordinance in the event other
14 Electric Utilities or Electric Energy Providers provide services in competition with Grantee
15 without utilizing Grantor's Rights of Way.

16 (C) If Grantor imposes a lesser fee, or no fee, or is unable to impose a fee on another Electric
17 Utility or Electric Energy Provider providing or seeking to provide services in competition with
18 Grantee to customers within Grantor's municipal boundaries, whether utilizing Grantor's
19 Rights of Way or not utilizing Grantor's Rights of Way, Grantee's fee under Section 6 for such
20 services shall be automatically reduced to the lesser fee charged the other Electric Utility or
21 Electric Energy Provider (or to zero), if no fee is charged such other Electric Utility or Electric
22 Energy Provider). In all events, Town shall not grant more favorable treatment to other
23 Electric Energy Providers than is granted to Company under this ordinance, it being the intent
24 of the parties that no future provider of electric service, be it generation, transmission or
25 distribution service, to customers within the corporate limits of Town shall be given a
26 competitive advantage over Company.

27 **SECTION 8 – Grantor Rights**

28 The right is hereby reserved to the Town to adopt such regulations as it shall find necessary in
29 the exercise of its police power, provided that such regulations, by ordinance or otherwise,
30 shall be reasonable, and shall not be in conflict with the laws of the State of Florida or the
31 lawful regulations of any state agency possessing the power to regulate the activities of the
32 Company, or conflict with or otherwise interfere with the benefits conferred on the Company
33 hereunder. In the event of a conflict between this Franchise Agreement and any other
34 ordinance or regulation adopted by the Town relating to Company's rights to perform work in

1 and/or occupancy of the Rights of Way as permitted hereunder, the rights under this
2 Franchise Agreement shall govern and control.

3 **SECTION 9 — Work In Rights of Way**

4 The Company is hereby granted the right, authority and privilege to perform all necessary
5 work and excavations in said Rights of Way of the Town related to its Facilities and necessary
6 or incidental to carrying out such rights and obligations as permitted hereunder. The
7 Company shall have the right to fasten and to stretch and lay along the lines of said poles,
8 conduits, pipes and cables necessary for transmitting and conveying the electric current to be
9 used in the Company's business, together with all the rights and privileges necessary or
10 convenient for the full use including the right to trim, cut and keep clear all trees and limbs
11 near or along Company's Facilities that may in any way endanger the proper operation of
12 same. Moreover, the Company shall have the right to construct, erect, operate and maintain
13 within the Town an electric system consisting of its Facilities for carrying on the Company's
14 business; provided that, in accomplishing these purposes, the streets of said Town shall not
15 be unnecessarily obstructed for an unreasonable amount of time and work in connection
16 therewith shall be done and carried on in conformity with such reasonable rules, standards,
17 regulations and local ordinances with reference thereto as may be adopted by the Town for
18 the protection of the public and which are not in conflict with or otherwise interfere with the
19 benefits conferred on the Company hereunder. Company will endeavor to notify Town in
20 advance of significant activities performed in rights-of-way. Notice will not be provided for
21 emergency or maintenance activities.

22 **SECTION 10 — Indemnification**

23 (A) The acceptance of this Franchise by Company shall be deemed an agreement on the part
24 of Company to indemnify Town and hold it harmless against any and all direct damages,
25 claims, expenses, reasonable attorneys' fees (including appellate fees) and costs that Town
26 may incur to the extent arising out of or resulting from the negligence or willful misconduct of
27 Company, its contractors and agents in the construction, repair, operation, or maintenance
28 of its electric utility Facilities hereunder. In no event shall Company be liable to Town for any
29 consequential, incidental, punitive, exemplary, multiple, or indirect damages, lost profits or
30 other business interruption damages, by statute, in tort (including negligence or strict
31 liability), in contract, or under any indemnity provision or otherwise.

32 (B) Company shall maintain throughout the term of this Franchise sufficient financial
33 resources to provide self-insurance insuring Town and Company with regard to all damages
34 set forth in Section 10 (A) in the minimum amounts of:

1 (i) \$1,000,000 for bodily injury or death to a person; \$3,000,000 for bodily injury or death
2 resulting from any one accident.

3 (ii) \$50,000 for property damage resulting from any one accident.

4 (iii) \$1,000,000 for all other types of liability.

5 (C) Town acknowledges that Company provides its own liability insurance (self-insured).

6 **SECTION 11 — Records and Reports**

7 (A) Company Rules and Regulations. The following documents shall be available to Town
8 upon Town's reasonable request: copies of rules, regulations, and procedures adopted by
9 Company that relate to Company's use of Town's Rights of Way.

10 (B) Accounting. Company shall use the system of accounts and the form of books, accounts,
11 records, and memoranda prescribed by the Florida Public Service Commission or such other
12 applicable governing agency having jurisdiction over Company as determined by Company.

13 (C) Reports. Company will submit monthly a statement of its estimated Base Revenues for the
14 period on which such payment is based. The acceptance of any statement or payment shall
15 not prevent the Town from asserting that the amount paid is not the amount due, or from
16 recovering any deficit by any lawful proceeding, including interest to be applied at the rate
17 set forth in Section 6 (A).

18 (D) Availability of Records and Reports. Company shall supply information that Town or its
19 representatives may from time to time reasonably request relative to the calculation of
20 franchise fees. Such records shall, on written request of Town, be open for examination and
21 audit by Town and Town's representatives at Company's headquarters in St. Petersburg,
22 Florida, during ordinary business hours and such records shall be retained by Company for a
23 period of three years.

24 (E) Audit. Town may require, upon prior written notice and during Company's normal
25 business hours, an audit of Company's books related to this Agreement not more than once
26 every three years and then only for the preceding three years. Company will reimburse
27 Town's audit costs if the audit identifies errors in Company's franchise Base Revenues of five
28 percent or more for the period audited. If an underpayment of franchise fees has occurred
29 due to the Company's error, interest will be calculated at the rate of ten percent per annum.
30 Both the underpayment and interest shall be paid within 90 days from completion of the
31 audit.

1 (F) Customer Report. In addition to Town’s obligations in Section 4 (B), within 90 days of the
2 Effective Date of this Agreement, Town shall provide to Company a report in a format
3 acceptable to Company setting forth a listing of all addresses within the corporate limits of
4 the Town and annually thereafter a report identifying any changes to the address listing
5 provided the previous year.

6 **SECTION 12 — Retail Wheeling**

7 In the event the appropriate governmental authorities authorize Retail Wheeling, then either
8 party, if Adversely Affected thereby, may reopen this ordinance upon 30 days written notice
9 to the other for the sole purpose of addressing the Franchise Fee payments between the
10 Company and the Town. If the parties are unable to agree within 90 days of reopening, either
11 party may declare an impasse and may file an action in the Circuit Court in Lake County,
12 Florida for declaratory relief as to the proper Franchise Fee in light of Retail Wheeling.

13 **SECTION 13 — Severability**

14 Should any section or provision of this Franchise ordinance or any portion thereof, the
15 deletion of which would not adversely affect the receipt of any material benefits or,
16 substantially increase the burden of any party hereunder, be declared by a court of
17 competent jurisdiction to be invalid, such decision shall not affect the validity of the
18 remainder, as a whole or any part thereof, other than the part declared to be invalid. In the
19 event of any such partial invalidity, Town and Company shall meet and negotiate in good
20 faith to obtain a replacement provision that is in compliance with the judicial authority’s
21 decision.

22 **SECTION 14 — Governing Law and Venue**

23 (A) This Franchise ordinance shall be construed and interpreted according to the laws of the
24 State of Florida.

25 (B) In the event that any legal proceeding is brought to enforce the terms of this Franchise,
26 the same shall be brought in Lake County, Florida, or, if a federal claim, in the U.S. District
27 Court in and for the Middle District of Florida, Orlando Division.

28 **SECTION 15 — Merger**

29 This Franchise agreement is the full, complete and entire understanding and agreements of
30 the parties as to its subject matter, and the written terms supersede all prior
31 contemporaneous representations, discussions, negotiations, understanding and
32 agreements relating to the subject matter of this agreement. The parties shall not be bound

1 or liable for any statement, prior negotiations, correspondence, representation, promise,
2 draft agreements, inducements, or other understanding of any kind or nature not set forth or
3 provided herein.

4 **SECTION 16 — Notices**

5 Except in exigent circumstances, all notices by either Town or Company to the other shall be
6 made by depositing such notice in the United States Mail, Certified Mail return receipt
7 requested or by recognized commercial delivery, e.g., Fed Ex, UPS or DHL or facsimile. Any
8 notice served by certified mail return receipt shall be deemed delivered five days after the
9 date of such deposit in the United States mail unless otherwise provided. Any notice given by
10 facsimile is deemed received by next Business Day. “Business Day” for purposes of this
11 section shall mean Monday through Friday, with Saturday, Sunday and Town and Company
12 observed holidays excepted. All notices shall be addressed as follows:

13 **To Town:**

14 Deputy Town Clerk

15 409 Fennell Blvd

16 Lady Lake, FL 32159

17 Phone: (352) 751-1501

18 Email: clerk@ladylake.org

19 **To Company:**

20 Government & Community Relations Department

21 Duke Energy

22 299 1st Street North — FL163

23 St. Petersburg, FL 33701

24 Phone: (727) 820-5474

25 Facsimile: (727) 820-5715

26 **SECTION 17 — Non-Waiver Provision**

27 The failure of either party to insist in any one or more instances upon the strict performance
28 of any one or more of the terms or provisions of this Franchise shall not be construed as a
29 waiver or relinquishment for the future of any such term or provision, and the same shall
30 continue in full force and effect. No waiver or relinquishment shall be deemed to have been

1 made by either party unless said waiver or relinquishment is in writing and signed by the
2 parties.

3 **SECTION 18 — Repealer and Superseding Provision**

4 This ordinance shall supersede, as to the rights, privileges and obligations between Town and
5 Company, all ordinances and parts of ordinances in conflict with the terms of this ordinance.
6 Ordinance 2010-08 and any amendments thereto, are hereby deemed null and void and/or
7 repealed upon the effective date of this ordinance and none of the provisions of such
8 repealed Ordinance 2010-08 and any amendments thereto shall have any further force and
9 effect.

10 **SECTION 19 — Dispute Resolution**

11 The parties to this Franchise agree that it is in each of their respective best interests to avoid
12 costly litigation as a means of resolving disputes which may arise hereunder. Accordingly, the
13 parties agree that prior to pursuing their available legal remedies they will meet in an attempt
14 to resolve any differences. If such informal effort is unsuccessful, then the Parties may
15 exercise any of their available legal remedies.

16 **This Ordinance shall become effective immediately upon adoption.**

17 **PASSED AND ORDAINED** this 2nd day of March, 2020 in the regular session of the Town
18 Commission of the Town of Lady Lake, Lake County, Florida, upon the Second and Final
19 Reading.

20 Town of Lady Lake, Florida

21 _____
22 Jim Richards, Mayor

23 Attest:

24 _____
25 Kristen Kollgaard, Town Clerk

26 Approved as to form and legality
27 for the use and reliance of the

28 Town of Lady Lake, Florida, only:

29 _____
30 Derek Schroth, Town Attorney

- 1 Duke Energy Florida, LLC:
- 2 _____
- 3 Catherine Stempien, State President