

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
RESOLUTION 2011-02
UTILITY AGREEMENT

FORM 710-010-13
UTILITIES
10/98

FPN				COUNTY	S.R.#	FAP NO.
425137	1	52	01	Polk	17	N/A

WHEREAS, the State of Florida Department of Transportation, hereinafter referred to as the **FDOT**, proposes to construct or reconstruct a transportation facility identified above, hereinafter referred to as the **Project**; and

WHEREAS, in order for the **FDOT** to proceed with the Project, it is necessary for the City of Lake Wales, hereinafter referred to as the **UAO**, to execute and deliver to the **FDOT** the agreement identified as 425137-1-52-01, hereinafter referred to as the **Agreement**;

NOW, THEREFORE, BE IT RESOLVED BY THE UAO:

That (Name) L. Jack Van Sickle, (Title) Mayor be hereby authorized and directed to execute and deliver the Agreement to the FDOT.

A certified copy of this Resolution be forwarded to the **FDOT** along with the executed Agreement.

Commissioner Commissioner
ON MOTION of Thornhill, seconded by Rogers, the above resolution was introduced and passed by the UAO on the 1st day of February, 2011.

NAME: L. Jack Van Sickle

Title: Mayor

ATTEST: Clara Blargan

Title: City Clerk

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Financial Project ID: 425137-1-52-01	Federal Project ID: N/A
County: Polk	State Road No.: 17
District Document No: 1	
Utility Agency/Owner (UAO): City of Lake Wales	

THIS AGREEMENT, entered into this 6 day of October, year of 2011, by and between the **STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION**, hereinafter referred to as the "FDOT", and **CITY OF LAKE WALES**, hereinafter referred to as the "UAO";

WITNESSETH:

WHEREAS, the **UAO** owns or desires to install certain utility facilities which are located on the public road or publicly owned rail corridor identified below, hereinafter referred to as the "Facilities" (said term shall be deemed to include utility facilities as the same may be relocated, adjusted, or placed out of service); and

WHEREAS, the **FDOT**, is currently engaging in a project which involves constructing, reconstructing, or otherwise changing a public road and other improvements located on a public road or publicly owned rail corridor identified as 425137-1-52-01, State Road No. 17, hereinafter referred to as the "Project"; and

WHEREAS, the Project requires the location (vertically and/or horizontally), protection, relocation, installation, adjustment, or removal of the Facilities, or some combination thereof, hereinafter referred to as "Utility Work"; and

WHEREAS, under the law of the State of Florida, the Utility Work must be performed at the sole cost and expense of the **UAO**; and

WHEREAS, the **FDOT** and the **UAO** desire to enter into an agreement which establishes the terms and conditions applicable to the Utility Work;

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, the **FDOT** and the **UAO** hereby agree as follows:

1. Performance of Utility Work

- a. The **UAO** shall perform the Utility Work in accordance with the utility relocation schedule attached hereto as Exhibit A and by this reference made a part hereof (the Schedule) and the plans and specifications for the Utility Work which have been previously approved by the **FDOT** (the Plans), said Plans being incorporated herein and made a part hereof by this reference. If the Schedule and the Plans have not been prepared as of the date of the execution of this Agreement, then the Utility Work shall be performed in accordance with the Plans, and the Schedule that are hereafter prepared in compliance with the notice previously sent to the **UAO** which established

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the terms and conditions under which those documents are to be prepared. The **FDOT's** approval of the Plans shall not be deemed to be an adoption of the Plans by the **FDOT** nor a substitution for the proper exercise of engineering judgment and the **UAO** shall at all times remain responsible for any errors or omissions in the Plans. The Utility Work shall include all Facilities located on the Project and neither the failure of the **UAO** to include all of the Facilities in the Schedule, nor the Plans, nor the failure of the **FDOT** to identify this omission during its review of the Plans shall relieve the **UAO** of the obligation to make those Facilities part of the Utility Work. Time shall be of the essence in complying with the total time shown by the Schedule for the Utility Work as well as any and all interim time frames specified therein. The Utility Work shall be performed in a manner and using such methods so as to not cause a delay to the **FDOT** or its contractors in the prosecution of the Project. The **UAO** shall be responsible for all costs incurred as a result of any delay to the **FDOT** or its contractors caused by errors or omissions in the Plans or the Schedule (including location of the Facilities and the proper inclusion of all Facilities as part of the Utility Work as stated above); failure to perform the Utility Work in accordance with the Plans and Schedule; or failure of the **UAO** to comply with any other obligation under this Agreement or under the law.

- b. All Utility Work shall be performed by **UAO's** own forces or its contractor at the **UAO's** sole cost and expense. The **UAO** shall be responsible for obtaining any and all permits that may be necessary to perform the Utility Work. The **FDOT's** Engineer (as that term is defined by the **FDOT's** Standard Specifications for Road and Bridge Construction) has full authority over the Project and the **UAO** shall be responsible for coordinating and cooperating with the **FDOT's** Engineer. In so doing, the **UAO** shall make such adjustments and changes in the Plans and Schedule as the **FDOT's** engineer shall determine are necessary for the prosecution of the Project and shall stop work or modify work upon order of the **FDOT's** engineer as determined by the **FDOT's** engineer to be necessary for public health, safety or welfare. The **UAO** shall not be responsible for the cost of delays caused by such adjustments or changes unless they are attributable to the **UAO** pursuant to subparagraph 1 a.
- c. After the **FDOT** has received a proper Schedule and Plans, the **FDOT** will issue a notice to the **UAO** which authorizes the Utility Work to proceed. The **UAO** shall notify the appropriate **FDOT** office in writing prior to beginning the Utility Work and when the **UAO** stops, resumes, or completes the Utility Work. The Utility Work shall be performed under the conditions of, and upon completion of the Utility Work, the Facilities shall be deemed to be located on the public road or publicly owned rail corridor under and pursuant to, the Utility Permit _____. *(Note: Intent of this line is to allow either attachment of or separate reference to the permit).*

2. Claims Against UAO

- a. In the event the **FDOT's** contractor provides a notice of intent to make a claim against the **FDOT** relating to the Utility Work, the **FDOT** will, in accordance with the **FDOT's**

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procedure, notify the **UAO** of the notice of intent and the **UAO** will thereafter keep and maintain daily field reports and all other records relating to the intended claim.

- b. In the event the **FDOT's** contractor makes any claim against the **FDOT** relating to the Utility Work, the **FDOT** will notify the **UAO** of the claim and the **UAO** will cooperate with the **FDOT** in analyzing and resolving the claim within a reasonable time. Any resolution of any portion of the claim directly between the **UAO** and the **FDOT's** contractor shall be in writing, shall be subject to written **FDOT** concurrence and shall specify the extent to which it resolves the claim against the **FDOT**.

3. Out of Service Facilities

No Facilities shall be left in place on **FDOT's** Right of Way after the Facilities are no longer active (hereinafter Placed out of service/Deactivated) unless specifically identified as such in the Plans. The following terms and conditions shall apply to Facilities Placed out of service/Deactivated, but only to said Facilities Placed out of service/Deactivated:

- a. The **UAO** acknowledges its present and continuing ownership of and responsibility for Facilities Placed out of service/Deactivated.
- b. The **FDOT** agrees to allow the **UAO** to leave the Facilities within the right of way subject to the continuing satisfactory performance of the conditions of this Agreement by the **UAO**. In the event of a breach of this Agreement by the **UAO**, the Facilities shall be removed upon demand from the **FDOT** in accordance with the provisions of subparagraph 3. e. below.
- c. The **UAO** shall take such steps to secure the Facilities and otherwise make the Facilities safe in accordance with any and all applicable local, state or federal laws and regulations and in accordance with the legal duty of the **UAO** to use due care in its dealings with others. The **UAO** shall be solely responsible for gathering all information necessary to meet these obligations.
- d. The **UAO** shall keep and preserve all records relating to the Facilities, including, but not limited to, records of the location, nature of, and steps taken to safely secure the Facilities and shall promptly respond to information requests concerning the Facilities that are Placed out of service/Deactivated of the **FDOT** or other permittees using or seeking use of the right of way.
- e. The **UAO** shall remove the Facilities upon 30 days prior written request of the **FDOT** in the event that the **FDOT** determines that removal is necessary for **FDOT** use of the right of way or in the event that the **FDOT** determines that use of the right of way is needed for other active utilities that cannot be otherwise accommodated in the right of way. In the event that the Facilities that are Placed out of Service/Deactivated would not have qualified for reimbursement under this Agreement, removal shall be at the sole cost and expense of the **UAO** and without any right of the **UAO** to object or make

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any claim of any nature whatsoever with regard thereto. In the event that the Facilities that are Placed out of Service/Deactivated would have qualified for reimbursement only under Section 337.403 (1)(a), Florida Statutes, removal shall be at the sole cost and expense of the **UAO** and without any right of the **UAO** to object or make any claim of any nature whatsoever with regard thereto because such a removal would be considered to be a separate future relocation not necessitated by the construction of the project pursuant to which they were Placed out of service/Deactivated, and would therefore not be eligible and approved for reimbursement by the Federal Government. In the event that the Facilities that are Placed out of service/Deactivated would have qualified for reimbursement for other reasons, removal of the out of service Facilities shall be reimbursed by the **FDOT** as though the Facilities had not been Placed out of service/Deactivated. Removal shall be completed within the time specified in the **FDOT's** notice to remove. In the event that the **UAO** fails to perform the removal properly within the specified time, the **FDOT** may proceed to perform the removal at the **UAO's** expense pursuant to the provisions of Sections 337.403 and 337.404, Florida Statutes.

- f. Except as otherwise provided in subparagraph e. above, the **UAO** agrees that the Facilities shall forever remain the legal and financial responsibility of the **UAO**. The **UAO** shall reimburse the **FDOT** for any and all costs of any nature whatsoever resulting from the presence of the Facilities within the right of way. Said costs shall include, but shall not be limited to, charges or expenses which may result from the future need to remove the Facilities or from the presence of any hazardous substance or material in the Facilities or the discharge of hazardous substances or materials from the Facilities. Nothing in this paragraph shall be interpreted to require the **UAO** to indemnify the **FDOT** for the **FDOT's** own negligence; however, it is the intent that all other costs and expenses of any nature be the responsibility of the **UAO**.

4. Default

- a. In the event that the **UAO** breaches any provision of this Agreement, then in addition to any other remedies which are otherwise provided for in this Agreement, the **FDOT** may exercise one or more of the following options, provided that at no time shall the **FDOT** be entitled to receive double recovery of damages:
- (1) Terminate this Agreement if the breach is material and has not been cured within 60 days from written notice thereof from the **FDOT**.
 - (2) Pursue a claim for damages suffered by the **FDOT**.
 - (3) Suspend the issuance of further permits to the **UAO** for the placement of Facilities on **FDOT** property if the breach is material and has not been cured within 60 days from written notice thereof from the **FDOT** until such time as the breach is cured.

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- (4) Pursue any other remedies legally available.
 - (5) Perform any work with its own forces or through contractors and seek repayment for the cost thereof under Section 337.403(3), Florida Statutes.
- b. In the event that the **FDOT** breaches any provision of this Agreement, then in addition to any other remedies which are otherwise provided for in the Agreement, the **UAO** may exercise one or more of the following options:
- (1) Terminate this Agreement if the breach is material and has not been cured within 60 days from written notice thereof from the **UAO**.
 - (2) Pursue any other remedies legally available.
- c. Termination of this Agreement shall not relieve either party from any obligations it has pursuant to other agreements between the parties and from any statutory obligations that either party may have with regard to the subject matter hereof.

5. Indemnification

FOR GOVERNMENT-OWNED UTILITIES:

To the extent provided by law, the **UAO** shall indemnify, defend, and hold harmless the **FDOT** and all of its officers, agents, and employees from any claim, loss, damage, cost, charge, or expense arising out of any acts, action, error, neglect, or omission by the **UAO**, its agents, employees, or contractors during the performance of the Agreement, whether direct or indirect, and whether to any person or property to which **FDOT** or said parties may be subject, except that neither the **UAO**, its agents, employees, or contractors will be liable under this section for damages arising out of the injury or damage to persons or property directly caused by or resulting from the negligence of the **FDOT** or any of its officers, agents, or employees during the performance of this Agreement.

When the **FDOT** receives a notice of claim for damages that may have been caused by the **UAO** in the performance of services required under this Agreement, the **FDOT** will immediately forward the claim to the **UAO**. The **UAO** and the **FDOT** will evaluate the claim and report their findings to each other within fourteen (14) working days and will jointly discuss options in defending the claim. After reviewing the claim, the **FDOT** will determine whether to require the participation of the **UAO** in the defense of the claim or to require the **UAO** to defend the **FDOT** in such claim as described in this section. The **FDOT's** failure to notify the **UAO** of a claim shall not release the **UAO** from any of the requirements of this section. The **FDOT** and the **UAO** will pay their own costs for the evaluation, settlement negotiations, and trial, if any. However, if only one party participates in the defense of the claim at trial, that party is responsible for all costs.

FOR NON-GOVERNMENT-OWNED UTILITIES;

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The **UAO** shall indemnify, defend, and hold harmless the **FDOT** and all of its officers, agents, and employees from any claim, loss, damage, cost, charge, or expense arising out of any acts, action, error, neglect, or omission by the **UAO**, its agents, employees, or contractors during the performance of the Agreement, whether direct or indirect, and whether to any person or property to which **FDOT** or said parties may be subject, except that neither the **UAO**, its agents, employees, or contractors will be liable under this section for damages arising out of the injury or damage to persons or property directly caused by or resulting from the negligence of the **FDOT** or any of its officers, agents, or employees during the performance of this Agreement.

The **UAO's** obligation to indemnify, defend, and pay for the defense or at the **FDOT's** option, to participate and associate with the **FDOT** in the defense and trial of any damage claim or suit and any related settlement negotiations, shall arise within fourteen (14) days of receipt by the **UAO** of the **FDOT's** notice of claim for indemnification to the **UAO**. The notice of claim for indemnification shall be served by certified mail. The **UAO's** obligation to defend and indemnify within fourteen (14) days of such notice shall not be excused because of the **UAO's** inability to evaluate liability or because the **UAO** evaluates liability and determines the **UAO** is not liable or determines the **FDOT** is solely negligent. Only a final adjudication or judgment finding the **FDOT** solely negligent shall excuse performance of this provision by the **UAO**. The **UAO** shall pay all costs and fees related to this obligation and its enforcement by the **FDOT**. The **FDOT's** delay in notifying the **UAO** of a claim shall not release **UAO** of the above duty to defend.

6. Force Majeure

Neither the **UAO** nor the **FDOT** shall be liable to the other for any failure to perform under this Agreement to the extent such performance is prevented by an act of God, war, riots, natural catastrophe, or other event beyond the control of the non-performing party and which could not have been avoided or overcome by the exercise of due diligence; provided that the party claiming the excuse from performance has (a) promptly notified the other party of the occurrence and its estimate duration, (b) promptly remedied or mitigated the effect of the occurrence to the extent possible, and (c) resumed performance as soon as possible.

7. Miscellaneous

- a. The Facilities shall at all times remain the property of and be properly protected and maintained by the **UAO** in accordance with the then current Utility Accommodation Manual and the current utility permit for the Facilities.
- b. Pursuant to Section 287.058, Florida Statutes, the **FDOT** may unilaterally cancel this Agreement for refusal by the **UAO** to allow public access to all documents, papers, letters, or other material subject to the provisions of Chapter 119, Florida Statutes, and made or received by the **UAO** in conjunction with this Agreement.

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- c. This Agreement constitutes the complete and final expression of the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, or negotiations with respect thereto, except that the parties understand and agree that the **FDOT** has manuals and written policies and procedures which shall be applicable at the time of the Project and the relocation of the Facilities and except that the **UAO** and the **FDOT** may have entered into joint agreements for Utility Work to be performed by **FDOT's** highway contractor. To the extent that such a joint agreement exists, this Agreement shall not apply to Facilities covered by the joint agreement. Copies of **FDOT** manuals, policies, and procedures will be provided to the **UAO** upon request.
- d. This Agreement shall be governed by the laws of the State of Florida. Any provision hereof found to be unlawful or unenforceable shall be severable and shall not affect the validity of the remaining provisions hereof.
- e. Time is of the essence in the performance of all obligations under this Agreement.
- f. All notices required pursuant to the terms hereof may be sent by first class United States Mail, facsimile transmission, hand delivery, or express mail and shall be deemed to have been received by the end of five business days from the proper sending thereof unless proof of prior actual receipt is provided. The **UAO** shall have a continuing obligation to notify each District of the **FDOT** of the appropriate persons for notices to be sent pursuant to this Agreement. Unless otherwise notified in writing, notices shall be sent to the following addresses:

If to the **UAO**:

Public Works Director
210 West Central Avenue
Lake Wales, Florida 33853

If to the **FDOT**:

Florida Department of Transportation
District Utility Administrator
801 North Broadway Avenue
Bartow, Florida 33830

8. Certification

This document is a printout of an **FDOT** form maintained in an electronic format and all revisions thereto by the **UAO** in the form of additions, deletions, or substitutions are reflected only in an Appendix entitled Changes to Form Document and no change is made in the text of the document itself. Hand notations on affected portions of this document

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may refer to changes reflected in the above-named Appendix but are for reference purposes only and do not change the terms of the document. By signing this document, the **UAO** hereby represents that no change has been made to the text of this document except through the terms of the appendix entitled "Changes to Form Document."

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You MUST signify by selecting or checking which of the following applies:

- ☒ No changes have been made to this Form Document and no Appendix entitled "Changes to Form Document" is attached.
- ☐ No changes have been made to this Form Document, but changes are included on the attached Appendix entitled "Changes to Form Document."

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective the day and year first written.

UTILITY: City of Lake Wales

BY: (Signature) L. Jack Van Sickle

DATE: 2/1/2011

(Typed Name: L. Jack Van Sickle)

(Typed Title: Mayor)

Recommend Approval by the District Utility Office

BY: (Signature) [Signature]

DATE: 10/6/11

FDOT Legal review

BY: (Signature) Arthur G. Reed

DATE: 10-6-11

District Counsel

**STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION**

BY: (Signature) [Signature]

DATE: 10/06/11

(Typed Name: Dick Combs Jon SANDS)

(Typed Title: Interim Director Transportation Development)

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FEDERAL HIGHWAY ADMINISTRATION (if applicable)

BY: _____

DATE:

(Typed Name: _____ **N/A** _____)

(Typed Title: _____ **N/A** _____)