

LEE COUNTY BOARD OF COUNTY COMMISSIONERS  
AGENDA ITEM SUMMARY

BLUE SHEET NO: 20030165-UTL

**1. REQUESTED MOTION:**

**ACTION REQUESTED:**

Approval of Fl. Dept. of Transportation (FDOT) Utility Agreement Resolution and Utility Work Agreement for utility relocations, adjustments, and new installations along Metro Parkway (SR 739) from Six Mile Cypress Parkway south to Alico Road/US 41.

**WHY ACTION IS NECESSARY:**

Proposed FDOT roadway project and drainage facilities will conflict with certain existing Lee County Utilities (LCU) water and sewer facilities. Also, LCU desires a new utility installation through the new FDOT Right-of-Way. The required utility work in FDOT Right-of-Way must be completed by formal agreement with FDOT.

**WHAT ACTION ACCOMPLISHES:**

Agreement with FDOT that LCU will complete the necessary utility relocations, adjustments and new installations as specified.

2. DEPARTMENTAL CATEGORY: 10  
COMMISSION DISTRICT #: 3, 5

C10I

3. MEETING DATE:

02-25-2003

4. AGENDA:

- CONSENT
- ADMINISTRATIVE
- APPEALS
- PUBLIC
- WALK ON
- TIME REQUIRED: \_\_\_\_\_

5. REQUIREMENT/PURPOSE:

- (Specify)
- STATUTE
  - ORDINANCE
  - ADMIN. CODE
  - OTHER Res. Agreement

6. REQUESTOR OF INFORMATION:

- A. COMMISSIONER: \_\_\_\_\_
- B. DEPARTMENT: Lee County - Public Works
- C. DIVISION/SECTION: Utilities Division
- BY: Rick Diaz, Utilities Director

DATE: 2/6/03

7. BACKGROUND:

The FDOT Project No. 195719-1-52-01 intends to construct a new roadway extending Metro Parkway from Six-Mile Cypress Parkway south to US 41/Alico Rd. The FDOT project includes installation of drainage structures and pipes, which will conflict with existing LCU water and sewer main facilities. This project will require relocation and adjustment of the LCU

(CONT'D.)

8. MANAGEMENT RECOMMENDATIONS:

*JAM* 2/6/03

9. RECOMMENDED APPROVAL

(A) DEPARTMENT DIRECTOR	(B) PURCH. OR CONTRACTS	(C) HUMAN RESOURCES	(D) OTHER	(E) COUNTY ATTORNEY	(F) BUDGET SERVICES				(G) COUNTY MANAGER
					OA	OM	Risk	GC	
<i>J. Lavender</i> Date: 2-7-03	N/A Date:	N/A Date:	<i>JAM</i> 2/10/03 N/A Date:	<i>JAM</i> 2/10/03 B. Owen Date:	<i>JAM</i> 2-10-03	<i>JAM</i> 2/11/03	<i>JAM</i> 2/10/03	<i>JAM</i> 2-10-03	<i>JAM</i> Date: 2-7-03

10. COMMISSION ACTION:

- APPROVED
- DENIED
- DEFERRED
- OTHER

Rec. by CoAtty  
Date: 2/10/03  
Time: 11:30 am  
Forwarded To:  
Budget  
2/10/03 1:33pm

RECEIVED BY  
COUNTY ADMIN.  
2-10-03  
2110  
COUNTY ADMIN.  
FORWARDED TO: DL  
2-11-03  
Alico

owned existing water and sewer mains in accordance with Section 337.403, Florida Statutes. Also, LCU desires to install a new water main through the new Metro Pkwy. Right-of-Way, in a manner consistent with Section 337.401, Florida Statutes.

LCU will be responsible for relocating and adjusting the existing water and sewer mains to accommodate the drainage structures and roadway improvements proposed by FDOT. LCU will also be responsible for installing a proposed new water main through the new Metro Pkwy. Right-of-Way.

Construction costs to complete these utility relocations, adjustments, and installations will be funded entirely by LCU. Funds will be available in Account No. 20714348730.506540.

Five original document sets are attached for the Chairman's signature:

Utility Agreement Resolution (also need a certified copy of each one)

Utility Work Agreement

All five sets need to be returned to LCU to obtain FDOT signatures. FDOT will return original(s) to Recording and then Minutes Dept. to retain one set and the remaining 4 sets are to be returned to LCU to return to FDOT.

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION  
**RESOLUTION**  
 UTILITY AGREEMENT

FORM 710-010-13  
 UTILITIES  
 10/98

FPN				COUNTY	S.R.#	FAP NO.
195719	1	52	01	Lee	739, Bus US-41	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 Lee County Utilities, hereinafter referred to as the "UAO", to execute and deliver to the **FDOT** the agreement identified as FPN #: 195719-1-52-01, hereinafter referred to as the "Agreement";

**NOW, THEREFORE, BE IT RESOLVED BY THE UAO:**

That **(Name)** Ray Judah, **(Title)** Chairman of BOCC 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.

**ON MOTION** of \_\_\_\_\_, seconded by \_\_\_\_\_, the above resolution was introduced and passed by the UAO on the \_\_\_\_ day of \_\_\_\_\_, 2003.

**NAME** : \_\_\_\_\_  
Ray Judah

**Title** :Chairman of BOCC

**ATTEST:** \_\_\_\_\_

**Title** :Deputy Clerk

APPROVED AS TO FORM

\_\_\_\_\_  
 OFFICE OF COUNTY ATTORNEY

**UTILITY WORK AGREEMENT**  
(AT UAO'S SOLE EXPENSE)

Financial Project ID:	195719-1-52-01	Federal Project ID:	N/A
Work Program Item No. (old):	N/A	County/Section No:	12014
State Job No. (old):	12014-6504	District Document No:	2

THIS AGREEMENT, entered into this \_\_\_\_\_ day of \_\_\_\_\_, year of 2003, by and between the STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, hereinafter referred to as the "FDOT", and LEE COUNTY UTILITIES, 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 installed, relocated, adjusted, or placed out of service); and

**WHEREAS**, the FDOT is currently engaged 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 FPI #: 195719-1-52-01

State Road No.: 739, 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 work 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 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 # \_\_\_\_\_ (to be issued later)
- (Note: It is the intent of this line 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 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 UAO. In the event of a breach of this Agreement by 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 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 sixty (60) days from written notice thereof from **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 sixty (60) days from written notice thereof from **FDOT** until such time as the breach is cured.
  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 sixty (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 nor 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,

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 estimated 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.

- 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 installation, adjustment or 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**:

Lee County Utilities  
 Director of Lee County Utilities  
 1500 Monroe Street  
 Ft. Myers, Florida 33901

If to the **FDOT**:

Florida Department of Transportation  
 District Utility Administrator  
 P.O. Box 1249  
 Bartow, Florida 33831-1249

**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 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."

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

- No changes have been made to this Forms 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 Forms Document."

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

UTILITY: LEE COUNTY UTILITIES

BY: (Signature) \_\_\_\_\_

DATE: \_\_\_\_\_

(Typed Name: Ray Judah)

APPROVED AS TO FORM

(Typed Title: Chairman of BOCC)

ATTEST: \_\_\_\_\_  
Deputy Clerk

OFFICE OF COUNTY ATTORNEY



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**Recommend Approval by the District Utility Office**

BY: (Signature) \_\_\_\_\_ DATE: \_\_\_\_\_

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**FDOT Legal Review**

BY: (Signature) \_\_\_\_\_ DATE: \_\_\_\_\_

District Counsel

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**STATE OF FLORIDA  
DEPARTMENT OF TRANSPORTATION**

BY: (Signature) \_\_\_\_\_ DATE: \_\_\_\_\_

(Typed Name: \_\_\_\_\_ )

(Typed Title: \_\_\_\_\_ )

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**FEDERAL HIGHWAY ADMINISTRATION (if applicable)**

BY: (Signature) \_\_\_\_\_ DATE: \_\_\_\_\_

(Typed Name: \_\_\_\_\_ )

(Typed Title: \_\_\_\_\_ )