

AGREEMENT FOR UNDERGROUND UTILITIES

THIS AGREEMENT entered into this ____ day of _____, 2017, by and between the **CITY OF DELRAY BEACH**, a Florida municipal corporation, (hereinafter referred to as **CITY**) and **EDWARDS ATLANTIC AVENUE, LLC**, an Ohio limited liability company (“Edwards Atlantic”); **EDWARDS INTRACOASTAL, LLC**, an Ohio limited liability company (“Edwards Intracoastal”), (Edwards Atlantic and Edwards Intracoastal are collectively referred to herein as the “**Owners**”); and **EDWARDS CDS, LLC.**, a Delaware limited liability company (“Edwards CDS”) (Owners and Edwards CDS are collectively referred to herein as “**DEVELOPER**”) to provide as follows:

WHEREAS, **Owners** own certain real property located in the boundaries of the City of Delray Beach and generally located between N.E. 6th Avenue and Veterans Park and between East Atlantic Avenue and N.E. 1st Street and legally described on Exhibit “1” attached hereto and made a part hereof; and

WHEREAS, the **DEVELOPER** has submitted plans to the **CITY** to construct a project known as Atlantic Crossing (“Project”). As part of the Project, **DEVELOPER** shall convert all above-ground electric, telephone, cable, and data distribution facilities (“facilities”) currently located within the Project to underground facilities that will be located within the Project site, and within certain portions of City-owned right-of-way as shown in Exhibit “2”, and within certain portions of the state-owned right of way (“Undergrounding”); and

WHEREAS, the **CITY** has, simultaneous with approval of this Agreement, approved an agreement with Florida Power & Light Company ("FPL") entitled "City/County Right-Of-Way Agreement for Underground Conversion with FPL (WR#6086411 & 6086417)" (the "Conversion Agreement"), which is attached hereto as Exhibit "3" ; and

WHEREAS, as part of the Conversion Agreement, the **CITY** is obligated to pay FPL the cost of such Undergrounding and such other costs, fees, and expenses as described in the Conversion Agreement as required by FPL's electric tariff and the Florida Administrative Code; and

WHEREAS, as part of the Conversion Agreement, if the **CITY** or any agency with control over the **CITY** right-of-way or any other right-of-way requires the facilities that have been relocated pursuant to the Conversion Agreement to be further relocated either now or in the future, the **CITY** is obligated to provide a substitute location and appropriate easements, if required, and to pay all costs related to the subsequent relocation for the facilities; and

WHEREAS, **DEVELOPER** is willing to pay the costs of subsequent relocation of the electric distribution facilities in the event that the **CITY** or any agency with control over the city-owned right-of-way or any other right-of-way requires the electric distribution facilities to be relocated at any time in the future, pursuant to Paragraph 3 of the Conversion Agreement.

WHEREAS, at the time of **CITY** approval of this Agreement and the Conversion Agreement, FPL has not established a final design or budget for the Undergrounding; and

WHEREAS, **DEVELOPER** is willing to assume all of the costs of the Undergrounding and such other costs, fees, and expenses as described in the Conversion Agreement on behalf of the **CITY** and to restore the right-of-way after the Undergrounding is complete; and

NOW, THEREFORE, in consideration of the mutual covenants and undertakings set forth herein, the **DEVELOPER** and **CITY** hereby agree as follows:

1. **Recitals.** The above-stated recitals are incorporated herein as if fully set forth herein.

2. **Payment to FPL.** **DEVELOPER** agrees to be liable for and pay to FPL all of the costs of the Undergrounding as required by and described in the Conversion Agreement and to pay FPL for any subsequent relocation pursuant to Paragraph 3 of the Conversion Agreement, without limitation; provided however, as contemplated in the Conversion Agreement, any cost associated with providing increased capacity, improved reliability, future use facilities or other such enhancements over and above the FPL standards in effect at the time of the relocation, and any costs of relocation or removal when such relocation or removal is initiated by FPL shall not be the responsibility of the **DEVELOPER.**

3. **Invoices.** In the event that FPL generates and sends an invoice to **DEVELOPER** for any item related to the Undergrounding or to the subsequent relocation of facilities, **DEVELOPER** will forward a copy of the invoice to **CITY** upon receipt thereof, and **DEVELOPER** will pay to FPL the full amount of the invoice within thirty (30) days of **DEVELOPER's** receipt of said invoice. In the event that FPL

generates and sends an invoice to the CITY for any item related to the Undergrounding or subsequent relocation, the CITY will forward the invoice to DEVELOPER upon receipt thereof, and DEVELOPER will pay to FPL within thirty (30) days of DEVELOPER's receipt of said invoices. If the CITY, in its sole discretion elects to pay an invoice generated by FPL which has been sent to DEVELOPER and not paid within the prescribed timeframe above, DEVELOPER will reimburse the CITY for payment made to FPL. DEVELOPER agrees that upon receipt of any invoice related to the Undergrounding from CITY, Developer will pay said amount to the CITY within twenty (20) days.

4. **Bond.** In order to secure DEVELOPER'S obligations under this Agreement, DEVELOPER shall obtain and furnish to CITY a payment and performance bond payable to CITY in an amount equal to the cost of Undergrounding as described in this Agreement (the "Bond"). The Bond shall be required prior to issuance of a permit by CITY authorizing the Undergrounding, or if no permit is required, prior to contractor commencing the Undergrounding. The Bond must be in a form acceptable to the City Attorney.

5. **Restoration of ROW.** All restorations of the area affected by the Undergrounding or subsequent relocation of facilities, if any, shall be the responsibility of the DEVELOPER. The restorations shall be performed in accordance with the DEVELOPER'S approved engineering plans. The cost and expense for all restorations of the area affected by the Undergrounding or subsequent relocation of facilities, if any, shall be the responsibility of the DEVELOPER.

6. **Warranty.** **DEVELOPER** warrants and guarantees to the **CITY** that all work related to the restoration of the site shall be constructed in accordance with the applicable codes of the City of Delray Beach. The **DEVELOPER'S** warranty and guarantee shall remain in place as long as **DEVELOPER** owns the property. Unremedied defects identified for correction during the warranty/guarantee period shall be considered as part of the obligations of the guarantee and warranty. Defects in the restoration of the site, which are remedied as a result of obligations of the warranty/guarantee shall subject the remedied portion of the work to an extended warranty/guarantee period of one year after the defect has been remedied. **DEVELOPER** shall deliver this Agreement to its surety or insurance provider. **DEVELOPER's** surety or insurance provider shall be bound with and for the **DEVELOPER** in the **DEVELOPER'S** faithful observance of the guarantee.

7. **Indemnification.** **DEVELOPER** shall at all times hereafter indemnify, hold harmless and, at the City Attorney's option, defend or pay for an attorney selected by the City Attorney to defend **CITY**, its officers, agents, servants, and employees from and against any and all causes of action, demands, claims, losses, liabilities and expenditures of any kind, including attorney fees, court costs, and expenses, caused or alleged to be caused by any intentional, negligent, or reckless act of, or omission of, **DEVELOPER**, its employees, agents, servants, or officers, or accruing, resulting from, or related to the subject matter of this Agreement including, without limitation, any and all claims, losses, liabilities, expenditures, demands or causes of action of any nature whatsoever resulting from injuries or damages sustained by any person or property. In the event any lawsuit or other proceeding is brought against **CITY** by reason of any such claim, cause of action,

or demand, **DEVELOPER** shall, upon written notice from **CITY**, resist and defend such lawsuit or proceeding by counsel satisfactory to **CITY** or, at **CITY**'s option, pay for an attorney selected by City Attorney to defend **CITY**. The obligations of this section shall survive the expiration or earlier termination of this Agreement. To the extent considered necessary by the City Attorney, any sums due **DEVELOPER** under this Agreement may be retained by **CITY** until all of **CITY**'s claims for indemnification pursuant to this Agreement have been settled or otherwise resolved. Any amount withheld shall not be subject to payment of interest by **CITY**.

8. **Insurance.** At all times **DEVELOPER** or its contractor, at its expense, shall procure and maintain worker's compensation insurance in an amount required by law and General liability insurance with a minimum limit of \$1,000,000 per occurrence and \$2,000,000 in the aggregate annually, governing bodily injury and property damage in standard form, insuring **CITY** as additional named insured. Certificates of insurance shall be delivered to **CITY**, prior to the issuance of the permit by **CITY** to perform the Undergrounding, or if no permit is required, prior to the contractor commencing the Undergrounding. The required insurance must be in a form and amount acceptable to the City's Risk Manager.

9. **Venue.** Any claims, lawsuits or disputes that may arise under this Agreement shall be governed by the Laws of Florida, with venue in Palm Beach County, Florida. The **CITY** shall also have any other remedy available to it in law or equity. By entering into this Agreement, **DEVELOPER** and **CITY** expressly waive any rights either party may have to a trial by jury of any civil litigation related to or arising out of this Agreement.

10. **Entire Agreement.** This Agreement constitutes the entire agreement and understanding of the parties, as it pertains to the undergrounding, construction, installation, and relocation of the facilities and restoration of the site. There are no representations or understandings of any kind not set forth herein. Any amendments to this Agreement must be in writing and executed by both parties.

11. **Notice.** Any notice, invoice, instruction, or other communication to be given by either party hereunder shall be in writing and shall be hand delivered, telecopied, sent by Federal Express or a comparable overnight service or by U.S. registered or certified mail, with return receipt requested and postage prepaid to each party at their respective addresses set forth below:

As to CITY:

City Manager
200 NW 1st Avenue
Delray Beach, FL 33444

As to EDWARDS ATLANTIC AVENUE, LLC

Chief Financial Officer
495 South High Street, Suite 150
Columbus, OH 43215

As to EDWARDS INTRACOASTAL, LLC

Chief Financial Officer
495 South High Street, Suite 150
Columbus, OH 43215

As to EDWARDS CDS, LLC.

Chief Financial Officer
495 South High Street, Suite 150
Columbus, OH 43215

12. **Conflict.** The Conversion Agreement (attached hereto as Exhibit "3") also known as the "City/County Right-Of-Way Agreement for Underground Conversion with FPL (WR#6086411 & 6086417)", as may be amended, is hereby incorporated by reference. In the event of inconsistency between this Agreement and the Conversion Agreement, the terms of this Agreement will govern.

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the day and year first above written.

ATTEST:

City Clerk

Approved as to Form:

City Attorney

CITY OF DELRAY BEACH

By: _____
Cary D. Glickstein, Mayor

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the day and year first above written.

WITNESSES:

Susan Wilgus
Susan Wilgus
(Name Printed or Typed)

EDWARDS ATLANTIC AVENUE, LLC

By: [Signature]
Dean Kissos
Title: Chief Financial Officer

[Signature]
KAREN A. CIRIEL
(Name Printed or Typed)

EDWARDS INTRACOASTAL, LLC

By: [Signature]
Print Name: Dean G. Kissos
Title: CFU

EDWARDS CDS, LLC.

By: [Signature]
Print Name: Dean G. Kissos
Title: CFU

STATE OF OHIO
COUNTY OF Franklin

The foregoing instrument was acknowledged before me this 6th day of November, 2017, by Dean G. Kissos, as CFU (name of officer or agent, title of officer or agent), of **EDWARDS ATLANTIC AVENUE, LLC, EDWARDS INTRACOASTAL, LLC AND EDWARDS CDS, LLC**, all Ohio limited liability companies, on behalf of each limited liability company. He/~~She~~ is personally known to me or has produced (type of identification) as identification.



Susan Wilgus
Notary Public, State of Ohio
My Commission Expires 06-25-2020

[Signature]
Signature of Notary Public

EXHIBIT "1"
(Legal Description)

LEGAL DESCRIPTION

THE SOUTH 104.42 FEET OF THE WEST 175 FEET OF BLOCK 123, "TOWN OF LINTON", ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 1, PAGE 3, OF THE PUBLIC RECORDS OF PALM BEACH COUNTY, FLORIDA.

AND

BEGINNING AT A POINT 157 FEET (156.75 MEASURED) NORTH OF THE SOUTHWEST CORNER OF BLOCK 123 ON THE SOUTH LINE OF THE PLAT OF "SEESTEDT-STEVEN'S SUBDIVISION", PLAT BOOK 18, PAGE 3; THENCE EAST 175 FEET; THENCE SOUTH 52 FEET 4 INCHES; THENCE WEST 175 FEET; THENCE NORTH 52 FEET 4 INCHES TO THE POINT OF BEGINNING, ALL IN BLOCK 123, "TOWN OF LINTON", ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 1, PAGE 3 OF THE PUBLIC RECORDS OF PALM BEACH COUNTY, FLORIDA.

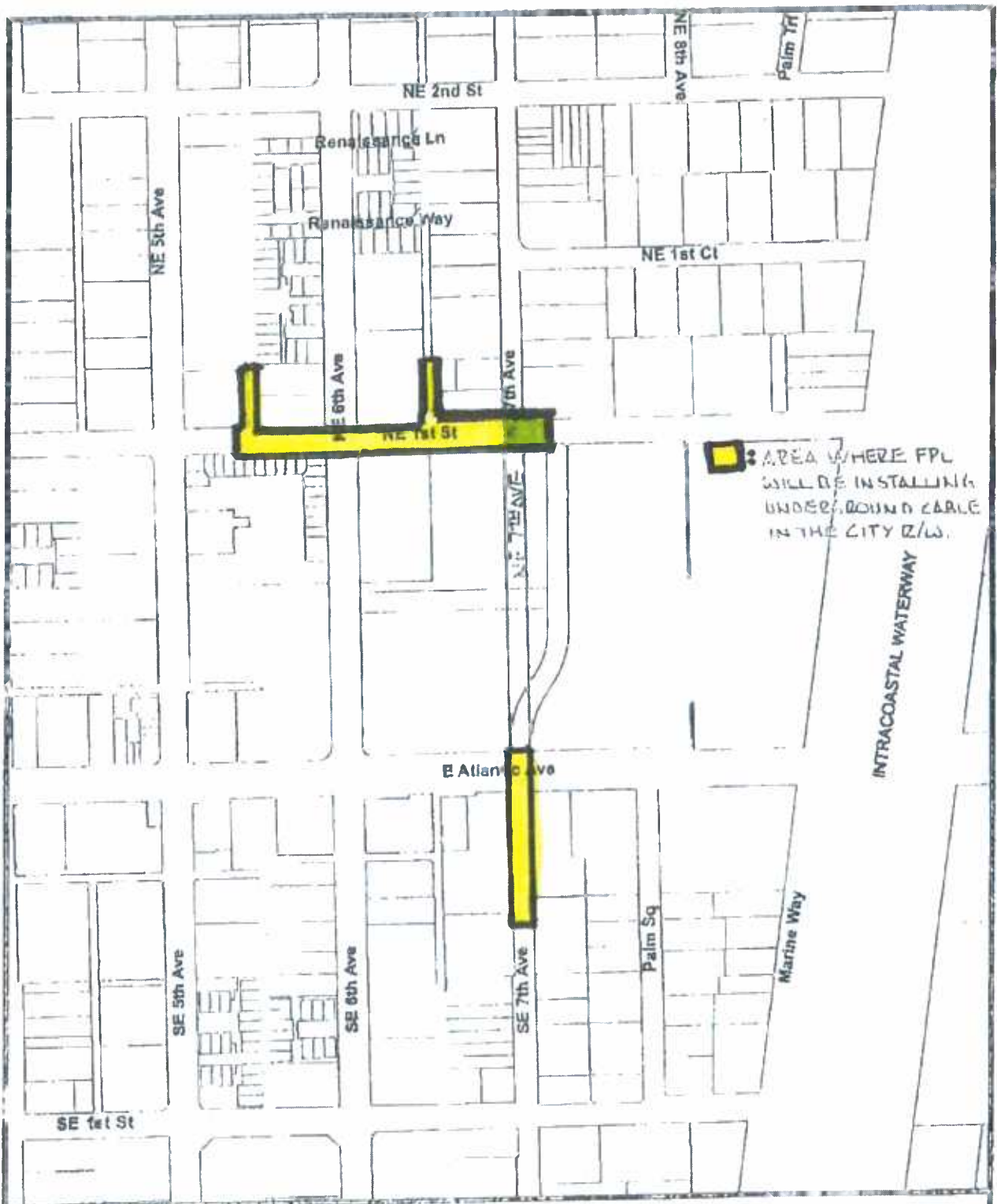
AND

ALL OF "CDS DELRAY REDEVELOPMENT", ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 116 AT PAGES 172 THROUGH 182 OF THE PUBLIC RECORDS OF PALM BEACH COUNTY, FLORIDA, LESS AND EXCEPT TRACT "F" THEREOF.

SAID LANDS SITUATE IN THE CITY OF DELRAY BEACH, PALM BEACH COUNTY, FLORIDA AND CONTAIN 9.229 ACRES, MORE OR LESS.

EXHIBIT "2"

(Undergrounding facilities in the City owned Right-of-Way)



■ AREA WHERE FPL
WILL BE INSTALLING
UNDERGROUND CABLE
IN THE CITY R/W.

INTRACOASTAL WATERWAY

ATLANTIC CROSSING LOCATION MAP

NOT TO SCALE



EXHIBIT "3"

**(City/County Right-of-Way Agreement for Underground Conversions)
(WR #'s 6086411 & 6086417)**

SEE ATTACHED

**CITY/COUNTY RIGHT-OF-WAY
AGREEMENT FOR UNDERGROUND CONVERSIONS**
(WR #'s 6086411 & 6086417)

THIS AGREEMENT (the "Agreement") is made and entered into this ____ day of _____, 20____ by and between City of Delray Beach ("*Local Government*"), a Florida municipal corporation or county with an address of 100 N.W. 1st Ave., Delray Beach, FL 33444 and Florida Power & Light Company ("*FPL*"), a Florida corporation with an address of P.O. Box 14000, 700 Universe Boulevard, Juno Beach, FL 33408-0429.

WHEREAS, Local Government has requested that FPL convert certain overhead electric distribution facilities located within the following boundaries (the "*Conversion*"):

1. SE 7th Ave. from 300 ft S/O Atlantic Avenue to the N/S of Atlantic Ave.
2. NE 1st St. from 300 ft. W/O NE 6th Ave. to the E/S/O NE 7th Ave.
3. Existing Alley Between NE5th Ave. and NE 6th Ave. north for 100 ft.
4. Existing Alley Between NE 6th Ave. and NE 7th Ave. north for 100 ft.

(collectively, the "*Existing Overhead Facilities*") to underground facilities, including transformers, switch cabinets and other appurtenant facilities some of which may be installed above ground (collectively, the "*Underground Facilities*") and has further requested that certain of the Underground Facilities be placed in certain of its road rights-of-way ("*Local Government ROW*") and/or certain road rights-of-way owned by or under the jurisdiction of other agencies ("*Other ROW*"). Local Government ROW and Other ROW may be referred to collectively as "*ROW*"; and

WHEREAS, the Local Government has agreed to pay FPL the cost of such Conversion as required by FPL's electric tariff and Section 25-6.115 of the Florida Administrative Code and has or will enter into a separate Underground Facilities Conversion Agreement with FPL; and

WHEREAS, FPL is willing, subject to the terms and conditions set forth in this Agreement, FPL's electric tariff and Section 25-6.115 of the Florida Administrative Code, to place certain of the Underground Facilities in the ROW.

NOW THEREFORE, in recognition of the foregoing premises and the covenants and agreements set forth herein, and other consideration the sufficiency of which is hereby acknowledged, intending to be legally bound hereby, the parties covenant and agree as follows:

1. The foregoing recitals are true and correct, and are hereby incorporated by reference into this Agreement.

2. Conditions Precedent to Placement of Underground Facilities in ROW

- (a) Local Government covenants, represents and warrants that:
- (i) Local Government has full legal right and authority to enter into this Agreement;
 - (ii) Local Government has full legal right and authority to take all actions and measures necessary to fulfill Local Government's obligations under this Agreement;
 - (iii) Local Government hereby authorizes the use of the ROW by FPL for the purposes stated herein.
- (b) All applicable permits for FPL to install, construct, or maintain Underground Facilities in ROW must be issued on a timely basis by the appropriate agency, subject to the timely filing for permits by FPL.
- (c) Local Government agrees to provide, at its expense, a legal description that is acceptable to FPL of the ROW to be occupied by the Underground Facilities at a time before FPL initiates the design of the Underground Facilities. Said legal description shall be made part of this Agreement and attached as Exhibit "A".
- (d) FPL agrees to identify and document all existing FPL underground facilities within the ROW that will not be included under this Agreement. Local Government shall reimburse FPL's reasonable costs and expenses to deliver said documentation. Said documentation shall be made part of this Agreement and attached as Exhibit "B".
- (e) FPL warrants that the design of the Underground Facilities to which Local Government has agreed are in compliance with all operational and safety guidelines, codes and standards. FPL and Local Government have mutually agreed upon the location of the facilities within the ROW as per the construction drawings. Said construction drawings shall be attached as Exhibit "C" to this agreement, are part of this agreement, and may be amended to reflect changes to location of facilities as required.

3. Relocation and Rearrangement of FPL Facilities. If the Local Government or other agency with control over the Local Government ROW or Other ROW, for any reason whatsoever, requires that FPL relocate or rearrange, in whole or in part, any Underground Facilities (as they are to exist as a result of this Conversion, or as they may later be modified, upgraded, or otherwise altered) from or within the Local Government ROW or Other ROW, the Local Government, notwithstanding any language to the contrary in any applicable permit or franchise agreement, and prior to any such relocation by FPL, shall provide FPL with a substitute location, satisfactory to FPL, obtain any easements that may be necessary, and shall pay FPL for the costs of any such relocation, adjustment or rearrangement, now or in the future. Local Government shall reimburse FPL for all costs to locate, expose, protect or support the Underground Facilities, whether underground or above ground, in the event of future construction or excavation in close proximity to the Underground Facilities, when such services are required by Local Government or other agency with control over the Local Government

ROW or Other ROW Local Government shall use its best efforts in any design and construction of its future road improvement projects to avoid or mitigate the necessity of relocating or adjusting the Underground Facilities in Local Government ROW and, to the extent reasonably practicable, in Other ROW.

Local Government shall only be responsible for relocation costs associated with replacement facilities conforming to FPL standards in effect at the time of relocation. Any costs associated with the replacement facilities to provide increased capacity, improved reliability, future use facilities, or other such enhancements over and above the FPL standards in effect at the time of the relocation shall not be the responsibility of Local Government.

Nothing herein shall preclude Local Government from obtaining reimbursement for any and all costs requiring FPL to relocate or rearrange any of its Underground Facilities from that entity which initiated the requirement for the relocation or rearrangement of the facilities, excluding only other agencies which own or have jurisdiction over the ROW.

FPL shall be responsible for any and all costs of removal or relocation when such removal or relocation is initiated by FPL. Additionally, FPL agrees that when any portion of a street is excavated by FPL in the location, relocation or repair of any of its facilities when said location, relocation or repair is initiated by FPL, the portion of the street so excavated shall, within a reasonable time and as early as practical after such excavation, be replaced by FPL at its expense in a condition as good as it was at the time of such excavation.

4. **Abandonment or Sale of Local Government ROW.** If the Local Government desires to subsequently abandon or discontinue use of the Local Government ROW, and ownership of the land is transferred to a private party, the Local Government, as a condition of and prior to any such sale, abandonment, or vacation, shall grant FPL an easement satisfactory to FPL for the Underground Facilities then existing within the ROW or require the transferee to so grant FPL an easement satisfactory to FPL at the time of transfer. If ownership of the Local Government ROW is transferred to another public entity, that public entity shall take the ROW subject to the terms and conditions of this Agreement.

5. **Term.** This Agreement shall remain in effect for as long as FPL or any successor or assign owns or operates the Underground Facilities placed in the ROW.

6. **Title and Ownership of Underground Facilities.** Title and ownership of Underground Facilities installed by FPL as a result of this Agreement shall, at all times, remain the property of FPL.

7. **Conversion Outside ROW.** In the event that the FPL Underground Facilities are not, for any reason other than the sole error of FPL or its contractors,

constructed within the ROW, Local Government shall grant or secure, at Local Government's sole cost and expense, new easements or ROW grants for the benefit of FPL for the placement of the Underground Facilities in these areas, and shall secure subordinations of any mortgages affecting these tracts to the interest of FPL. In the alternative, at the discretion of Local Government, Local Government shall reimburse FPL for all costs incurred to remove said facilities which were constructed outside the ROW and for reinstallation within the ROW. FPL shall be responsible at completion of construction for notifying Local Government in writing of FPL's approval and acceptance of the conversion as being constructed within the ROW. Upon acceptance there shall be no further responsibility on the Local Government for relocations referenced in this paragraph.

8. **Agreement Subject to FPL's Electric Tariff.** This Agreement is subject to FPL's electric tariff, including but not limited to the general rules and regulations for electric service and the rules of the Florida Public Service Commission.

9. **Venue; Waiver of Jury Trial.** This Agreement shall be enforceable in Palm Beach County, Florida, and if legal action is necessary by either party with respect to the enforcement of any or all of the terms or conditions herein, exclusive venue for the enforcement of same shall lie in Palm Beach County, Florida. By entering into this Agreement, FPL and the Local Government expressly waive any rights either party may have to a trial by jury of any civil litigation related to or arising out of this Agreement. This Agreement shall be construed in accordance with the laws of the State of Florida.

10. **Attorney Fees.** In the event it becomes necessary for either party to institute or defend legal proceedings as a result of the failure of the other party to comply with the terms, covenants, or provisions of this Agreement, each party in such litigation shall bear its own cost and expenses incurred and extended in connection therewith, including, but not limited to attorneys' fees and court costs through all trial and appellate levels.

11. **Assignment.** The Local Government shall not assign this Agreement without the written consent of FPL.

12. **Recording.** This Agreement shall be adopted by the Local Government and maintained in the official records of Local Government for the duration of the term of this Agreement. This Agreement also shall be recorded in the Official Records of the County in which the Underground Facilities are located, in the place and in the manner in which deeds are typically recorded.

13. **Conflict between Terms of Permit or Franchise Agreement.** In the event of a conflict between the terms of this Agreement and any permit or franchise agreement entered into by Local Government and FPL, the terms of this Agreement shall control.

14. **Notice.** Any notice, instruction or other communication to be given to either party hereunder shall be in writing and shall be hand delivered, telecopied, sent by Federal Express or a comparable overnight service or by U. S. registered or certified mail, with return receipt requested and postage prepaid to each party at their respective addresses set forth below:

As to Local Government:

City of Delray Beach
c/o City Manager
100 NW 1st Ave
Delray Beach, FL 33444

With copies to:

City Attorney
200 NW 1st Ave.
City of Delray Beach, FL 33444

As to FPL:

FPL
700 Universe Blvd.
Juno Beach, FL 33408
Attn: FPL Legal Department

IN WITNESS WHEREOF, Florida Power & Light Company and Local Government have executed this Agreement on the date first set forth above.

For **CITY OF DELRAY BEACH:**

By: _____
(signature)

Name: _____
(print or type)

Title: _____
(print or type)

By: _____
(signature)

Name: _____
(print or type)

Title: _____
(print or type)

Approved as to Terms and Conditions: _____
(signature/title)

Approved as to Form and Legal Sufficiency: _____
(signature/title)

For **FLORIDA POWER & LIGHT COMPANY:**

By: _____
(signature)

Name: _____
(print or type)

Title: _____
(print or type)

Exhibit A

WR #'s 6086411 & 6086417

1. SE 7th Ave. from 300 ft S/O Atlantic Avenue to the N/S of Atlantic Ave.
2. NE 1st St. from 300 ft. W/O NE 6th Ave. to the E/S/O NE 7th Ave.
3. Existing Alley Between NE 5th Ave. and NE 6th Ave. north for 100 ft.
4. Existing Alley Between NE 6th Ave. and NE 7th Ave. north for 100 ft.

Exhibit B

WR #'s 6086411 & 6086417

Currently, there is no existing underground equipment within the road right-of-way.

WR #'s 6086411 & 6086417