Memorandum
No. 13-331

City Attorney's Office

To: Diana Alarcon, Director / Transportation & Mobility

From: Robert B. Dunckel, Assistant City Attorney/5036

Date: December 31, 2013

Re: Future Utility Relocation FPL Easement
Florida East Coast Industries letter of October 2, 2013

In conjunction with the October 2, 2013 letter from Florida East Coast Industries ("FEC") to the City ("Letter") (Exhibit #1), it is my understanding that a portion of the lands to be conveyed from FPL to FEC will ultimately be dedicated to the City as right-of-way. The Letter indicates that in conjunction with the conveyance of lands from FPL to FEC that FPL will be retaining certain utility easements.

The Letter seeks the City's countersignature indicating the City's agreement that despite Chapter 337, Florida Statutes, any permit, franchise agreement or other law to the contrary, that the City's future right-of-way interests will be subordinate and inferior to FPL's retained utility easement.

Further, countersignature of the Letter has the City agreeing that it will accept the future conveyance by FEC to the City of the future right-of-way interests subject to the express condition that the City pay for any future relocation or adjustment of existing or future FPL facilities in the event of conflict between the FPL facilities and the City's right-of-way interests and uses ("Relocation Costs"). Such Relocation Costs may include the cost of acquiring replacement easements.

Countersignature of the letter by the City has the City agreeing that, with respect to its future rights-of-way that the City shall have the right to maintain the pavement or other roadway improvements within the FPL easement in a manner that does not interfere with FPL's easement rights.

In the event the City Commission authorizes countersignature of the Letter by the proper City officials, the Commission needs to be aware that there are various authorities that, under certain circumstances, would place the burden of future relocation costs on FPL, not the City. In that regard, please note the following authorities:

Franchise Agreement, Section 3. Facilities Requirements ("Exhibit #2)
Franchise Agreement, Section 4. Indemnification of Grantor (Exhibit #3)

Florida Statute § 337.402, Damage to public roads cause by utility (Exhibit #4)
Florida Statute § Interference caused by relocation of utility; expenses (Exhibit #5)
Florida Statute §337.404, Removal or relocation of utility facilities; notice and order; court review (Exhibit "6")

A review of the foregoing authorities reveals, under the circumstances outlined in the Letter, that the law and the bargained for Franchise Agreement would, subject to certain terms and conditions, place the burden of relocation costs on Florida Power & Light. Countersigning the Letter would reverse the burden the law and Franchise Agreement casts upon FPL and realign it as the City's burden.

At the end of the day, waiving those rights the City has under the foregoing authorities as to Relocation Costs is a policy decision to be made in the prudent discretion of the City Commission in accordance with their weighing of what is in the best interests of the City. However, such waivers should only be given "knowingly."

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Attachments
cc: Lee R. Feldman, City Manager
Cynthia A. Everett, City Attorney
Susanne Torriente, Assistant City Manager
Elizabeth Van Zandt, Mobility Manager

#856.01
#799

ALL ABOARD FLORIDA
2855 Le Jeune Road | 4th Floor
Coral Gables, FL 33134
T: 305.520.2300 | allaboardflorida.com

October 2, 2013

Public Works Department – Engineering Services
City of Fort Lauderdale
100 N Andrews Avenue
4th & 5th Floor
Fort Lauderdale, Florida 33301

Subject: Utility Easement and Future Utility Relocation

To whom it may concern:

An affiliate of Florida East Coast Industries is purchasing land from Florida Power and Light with the intent to dedicate a portion of the property to the City of Fort Lauderdale for Right of Way. As discussed, please acknowledge the following statement regarding future relocation costs that may be incurred because of the City of Fort Lauderdale's request to relocate existing utilities.

In the event that any portion of the Easement Area described in the Easement Agreement attached as Exhibit A is used or conveyed to the City of Fort Lauderdale for roadway purposes, City of Fort Lauderdale agrees that, notwithstanding Chapter 337, Florida Statutes, any permit, franchise agreement or other law, regulation, statute or rule, the Easement shall not be deemed subordinate to the City of Fort Lauderdale's rights and privileges in and to the Easement Area and the City of Fort Lauderdale shall accept the conveyance of all or a portion of the Easement Area with the express understanding and agreement that the City of Fort Lauderdale shall pay for any relocation or adjustment of existing or future facilities, if such relocation or adjustment is caused by present or future uses or occupancy of the Easement Area by the City of Fort Lauderdale, including, but not limited to, the cost of acquiring replacement easements. The City of Fort Lauderdale shall have the right to maintain pavement or other roadway improvements upon the Easement Area in a manner that does not interfere with Florida Power and Light's easement rights hereunder.

If you are in agreement with the above, please sign below where indicated.

Please let us know if you have any questions or would like to discuss further.

Sincerely,

Jose Gonzalez
Vice President – Corporate Development
Florida East Coast Industries, Inc.

Acknowledged and agree this day of ___ October, 2013:

City of Fort Lauderdale

By:_____
Title:_____

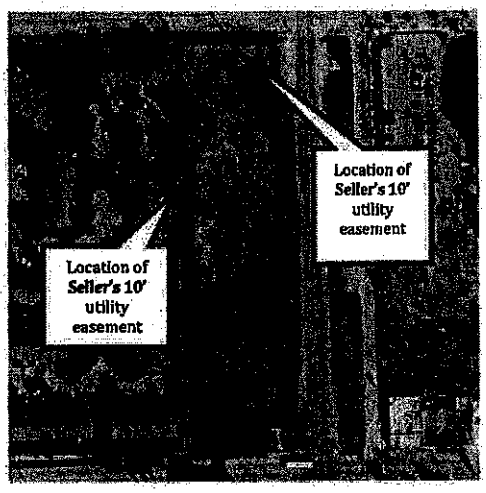
A WHOLLY OWNED SUBSIDIARY OF FLORIDA EAST COAST INDUSTRIES, INC.

EXHIBIT 1

EXHIBIT "B"

To Easement

Site Map



Section 3. Facilities requirements.

(a) That the facilities of grantee shall be so located, relocated, installed, constructed and so erected as to not unreasonably interfere with the convenient, safe, continuous use or the maintenance, improvement, extension or expansion of any public "road" as defined under the Florida Transportation Code, nor unreasonably interfere with reasonable egress from and ingress to abutting property.

(b) To minimize such conflicts with the standards set forth in subsection (a) above, the location, relocation, installation, construction or erection of all facilities shall be made as representatives of the grantor may prescribe in accordance with all applicable federal, state and local statutes, laws, ordinances, rules and regulations and pursuant to grantor's valid rules and regulations with respect to utilities' use of public rights-of-way relative to the placing and maintaining, in, under, upon, along, over and across said public rights-of-way, provided, such rules and regulations shall be

(i) for a valid municipal purpose,

(ii) shall not prohibit the exercise of grantee's right to use said public rights-of-way for reasons other than conflict with the standards set forth above,

(iii) shall not unreasonably interfere with grantee's ability to furnish reasonably sufficient, adequate and efficient electric service to all its customers while not conflicting with the standards set forth above, or

(iv) shall not require relocation of any of the grantee's facilities installed before or after the effective date hereof in any public right-of-way unless or until the facilities unreasonably interfere with the convenient, safe, or continuous use, or the maintenance, improvement, extension, or expansion, of such public "road".

(c) Such rules and regulations shall recognize that above-grade facilities of the grantee installed after the effective date hereof should, unless otherwise permitted, be installed near the outer boundaries of the public rights-of-way to the extent possible and such installation shall be consistent with the Florida Department of Transportation's Manual of Uniform Minimum Standards for Design, Construction and Maintenance for Streets and Highways.

(d) When any portion of a public right-of-way is excavated, damaged or impaired by grantee or any of its agents, contractors or subcontractors because of the installation, inspection, or repair of any of its facilities, the portion so excavated, damaged or impaired shall, within a reasonable time and as early as practicable after such excavation, be restored to its original condition before such damage by the grantee at its expense.

(e) In the event the grantor requires removal or relocation of grantee's facilities because the facilities unreasonably interfere with the standards set forth in subsection (a) above, and grantee fails to remove or relocate such facilities at grantee's expense within thirty (30) days after written notice from grantor, then grantor may proceed to cause the facilities to be removed or relocated and the expense therefore shall be charged against the grantee.

(f) The grantor shall not be liable to the grantee for any cost or expense incurred in connection with the relocation of any of the grantee's facilities required under this section, except, however, that grantee may be entitled to reimbursement of its costs and expenses from others and as provided by law.

EXHIBIT 2

Section 4. Indemnification of grantor.

Acceptance of this ordinance by grantee shall be deemed an agreement on the part of grantee to indemnify grantor, its officers, agents, servants, employees, or contractors and hold it harmless against any and all liability, loss, costs, damages, attorneys' fees, or expense which may accrue to or be incurred by or charged or sought against grantor or any of its officers, agents, servants, employees or contractors by reason of installation, location, relocation, construction, reconstruction, operating, maintenance or repair of grantee's facilities or acts or omissions of negligence, gross negligence or intentional torts, default or misconduct of the grantee, its officers, directors, agents, servants, employees, contractors or subcontractors. The indemnity hereunder includes not only the reasonable costs, expenses and attorneys' fees incurred by the grantor in defense of any third party's claim (prior to and during all phases of litigation, including trial and post trial and appellate proceedings) and also includes the reasonable costs, expenses and attorneys' fees incurred by the grantor in the event it must enforce the terms of this indemnity prior to and during all litigation including trial, post trial and appellate proceedings. This indemnity shall survive termination of this franchise.

EXHIBIT 3

The Florida Senate

2013 Florida Statutes

Title XXVI PUBLIC TRANSPORTATION	Chapter 337 CONTRACTING; ACQUISITION, DISPOSAL, AND USE OF PROPERTY Entire Chapter	SECTION 402 **Damage to public road caused by utility.**

337.402 Damage to public road caused by utility.—When any public road or publicly owned rail corridor is damaged or impaired in any way because of the installation, inspection, or repair of a utility located on such road or publicly owned rail corridor, the owner of the utility shall, at his or her own expense, restore the road or publicly owned rail corridor to its original condition before such damage. If the owner fails to make such restoration, the authority is authorized to do so and charge the cost thereof against the owner under the provisions of s. 337.404.

History.—s. 128, ch. 29965, 1955; s. 142, ch. 84-309; s. 27, ch. 94-237; s. 969, ch. 95-148.

Note.—Former s. 338.18.

EXHIBIT 4

The Florida Senate

2013 Florida Statutes

Title XXVI PUBLIC TRANSPORTATION	Chapter 337 CONTRACTING; ACQUISITION, DISPOSAL, AND USE OF PROPERTY Entire Chapter	SECTION 403 **Interference caused by relocation of utility; expenses.**

337.403 Interference caused by relocation of utility; expenses.—

(1) If a utility that is placed upon, under, over, or along any public road or publicly owned rail corridor is found by the authority to be unreasonably interfering in any way with the convenient, safe, or continuous use, or the maintenance, improvement, extension, or expansion, of such public road or publicly owned rail corridor, the utility owner shall, upon 30 days' written notice to the utility or its agent by the authority, initiate the work necessary to alleviate the interference at its own expense except as provided in paragraphs (a)-(g). The work must be completed within such reasonable time as stated in the notice or such time as agreed to by the authority and the utility owner.

(a) If the relocation of utility facilities, as referred to in s. 111 of the Federal-Aid Highway Act of 1956, Pub. L. No. 627 of the 84th Congress, is necessitated by the construction of a project on the federal-aid interstate system, including extensions thereof within urban areas, and the cost of the project is eligible and approved for reimbursement by the Federal Government to the extent of 90 percent or more under the Federal Aid Highway Act, or any amendment thereof, then in that event the utility owning or operating such facilities shall perform any necessary work upon notice from the department, and the state shall pay the entire expense properly attributable to such work after deducting therefrom any increase in the value of a new facility and any salvage value derived from an old facility.

(b) When a joint agreement between the department and the utility is executed for utility work to be accomplished as part of a contract for construction of a transportation facility, the department may participate in those utility work costs that exceed the department's official estimate of the cost of the work by more than 10 percent. The amount of such participation shall be limited to the difference between the official estimate of all the work in the joint agreement plus 10 percent and the amount awarded for this work in the construction contract for such work. The department may not participate in any utility work costs that occur as a result of changes or additions during the course of the contract.

(c) When an agreement between the department and utility is executed for utility work to be accomplished in advance of a contract for construction of a transportation facility, the department may participate in the cost of clearing and grubbing necessary to perform such work.

(d) If the utility facility was initially installed to exclusively serve the authority or its tenants, or both, the authority shall bear the costs of the utility work. However, the authority is not responsible for the cost of utility work related to any subsequent additions to that facility for the purpose of serving others.

(e) If, under an agreement between a utility and the authority entered into after July 1, 2009, the utility conveys, subordinates, or relinquishes a compensable property right to the authority for the purpose of accommodating the acquisition or use of the right-of-way by the authority, without the agreement expressly addressing future responsibility for the cost of necessary utility work, the authority shall bear the cost of removal or relocation. This paragraph does not impair or restrict, and may not be used to interpret, the terms of any such agreement entered into before July 1, 2009.

(f) If the utility is an electric facility being relocated underground in order to enhance vehicular, bicycle, and pedestrian safety and in which ownership of the electric facility to be placed underground has been transferred from a private to a public utility within the past 5 years, the department shall incur all costs of the necessary utility work.

EXHIBIT 5

(g) An authority may bear the costs of utility work required to eliminate an unreasonable interference when the utility is not able to establish that it has a compensable property right in the particular property where the utility is located if:

1. The utility was physically located on the particular property before the authority acquired rights in the property;

2. The utility demonstrates that it has a compensable property right in all adjacent properties along the alignment of the utility; and

3. The information available to the authority does not establish the relative priorities of the authority's and the utility's interests in the particular property.

(2) If such utility work is incidental to work to be done on such road or publicly owned rail corridor, the notice shall be given at the same time the contract for the work is advertised for bids, or no less than 30 days before the commencement of such work by the authority, whichever occurs later.

(3) Whenever a notice from the authority requires such utility work and the owner thereof fails to perform the work at his or her own expense within the time stated in the notice or such other time as agreed to by the authority and the utility owner, the authority shall proceed to cause the utility work to be performed. The expense thereby incurred shall be paid out of any money available therefor, and such expense shall, except as provided in subsection (1), be charged against the owner and levied and collected and paid into the fund from which the expense of such relocation was paid.

History.—s. 129, ch. 29965, 1955; s. 1, ch. 57-135; s. 1, ch. 57-1978; ss. 23, 35, ch. 69-106; s. 143, ch. 84-309; s. 12, ch. 87-100; s. 28, ch. 94-237; s. 970, ch. 95-148; s. 25, ch. 99-385; s. 10, ch. 2009-85; s. 35, ch. 2012-174.

Note.—Former s. 338.19.

The Florida Senate

2013 Florida Statutes

Title XXVI PUBLIC TRANSPORTATION	Chapter 337 CONTRACTING; ACQUISITION, DISPOSAL, AND USE OF PROPERTY Entire Chapter	SECTION 404 **Removal or relocation of utility facilities; notice and order; court review.**

337.404 Removal or relocation of utility facilities; notice and order; court review.—

(1) Whenever it becomes necessary for the authority to perform utility work as provided in s. 337.403, the owner of the utility or the owner's chief agent shall be given notice that the authority will perform such work and, after the work is completed, shall be given an order requiring the payment of the cost thereof and a reasonable time, which may not be less than 20 or more than 30 days, in which to appear before the authority to contest the reasonableness of the order. Should the owner or the owner's representative not appear, the determination of the cost to the owner shall be final. Authorities considered agencies for the purposes of chapter 120 shall adjudicate removal or relocation of utilities pursuant to chapter 120.

(2) A final order of the authority shall constitute a lien on any property of the owner and may be enforced by filing an authenticated copy of the order in the office of the clerk of the circuit court of the county wherein the owner's property is located.

(3) The owner may obtain judicial review of the final order of the authority within the time and in the manner provided by the Florida Rules of Appellate Procedure by filing in the circuit court of the county in which the utility was relocated a petition for a writ of certiorari in the manner prescribed by said rules or in the manner provided by chapter 120 when the respondent is an agency for purposes of chapter 120.

History.—s. 130, ch. 29965, 1955; s. 16, ch. 63-512; s. 1, ch. 69-267; ss. 23, 35, ch. 69-106; s. 56, ch. 78-95; s. 144, ch. 84-309; s. 500, ch. 95-148; s. 36, ch. 2012-174.

Note.—Former s. 338.20.

EXHIBIT 6