

**JOINT PARTICIPATION AGREEMENT
BETWEEN
CITY OF ORLANDO
AND
TW TELECOM, INC.
FOR RELOCATION OF UTILITIES**

THIS JOINT PARTICIPATION AGREEMENT, entered into this ____ of _____, 2015, by and between the **City of Orlando**, a municipal corporation of the State of Florida, whose address is 400 South Orange Avenue, Orlando, Florida, 32802, hereinafter called the “City” and **TW Telecom, Inc.**, whose address is 485 N. Keller Road, Suite #551, Maitland, FL, hereinafter called “Company.”

WITNESSETH

WHEREAS, Central Florida Regional Transportation Authority, d/b/a “LYNX”, is constructing, reconstructing or otherwise changing a portion of Livingston Street and Terry Avenue, public roads, as part of the development of Creative Village, hereinafter identified as “the Project”; and

WHEREAS, City and LYNX entered into an Amended and Restated Interlocal Agreement on August 15, 2011, “Restated Interlocal Agreement,” which provided in part, for LYNX’s construction of the Parramore BRT Project; and

WHEREAS, the Parramore BRT Project consists of the design and construction of a bus rapid extension of the LYMMO system to serve the Parramore community west of I-4 and the Creative Village; and

WHEREAS, City and LYNX applied for and were awarded a Tiger II Grant, “GRANT”, from the Federal Transit Administration, “FTA”, in the amount of Ten Million Dollars (\$10,000,000.00), to construct the Parramore BRT Project; and

WHEREAS, the Project is a part of the Parramore BRT Project; and

WHEREAS, under the terms of the Restated Interlocal Agreement and the GRANT, the City will provide a local match, “Local Match” consisting of cash, labor, materials and in-kind services; and

WHEREAS, a part of the Local Match is the Company's reimbursement for the cost of the Utility Work, as defined herein; and

WHEREAS, the Company has certain utility infrastructure located within the limits of the Project, hereinafter referred to as the "Facilities"; and

WHEREAS, as part of the development of the Project, the Facilities must be removed and reconstructed hereinafter referred to as "Utility Work"; and

WHEREAS, the reconstructed portion of the Utility Work shall occur within existing City right-of-way for Livingston Street and Terry Avenue; and

WHEREAS, the City and Company desire to enter into this Agreement for the Utility Work to be accomplished by LYNX as part of the construction of the Project; and

WHEREAS, Company will bear the cost associated with the Utility Work.

NOW, THEREFORE, in consideration of the mutual covenants and promises of the parties hereto, Company and City agree as follows:

1. **Recitals.** The above recitals are true and correct and form a material part of this Agreement.
2. **Design.** LYNX's consultant, Cardno TBE Engineers, has completed the drawings, specifications and cost estimates, "Plans," for the Utility Work as part of the construction plans for the overall Project, dated August 27, 2013. See **Exhibit "A"**, attached hereto and made a part hereof by reference. Company has reviewed and hereby approves the Plans as shown in **Exhibit "A"**.
3. **Construction.** The parties understand that LYNX has assumed responsibility for the construction of the Utility Work pursuant to the Restated Interlocal Agreement and the Grant. City and Company acknowledge that LYNX intends to contract with a contractor, "Contractor," to accomplish said construction. The City shall ensure that LYNX incorporates into the contract for construction of the Project its standard insurance and performance and payment bond requirements with respect to the Utility Work and that the Contractor shall provide a warranty to insure the Utility Work for one year following completion and acceptance by the Company.
4. **Cost/Reimbursement.**
 - (a) **Cost.** The estimated cost for the Utility Work is **Sixty-Six Thousand One Hundred Seventy Five Dollars (\$66,175.00)**, as shown in **Exhibit "A"**. Company

confirms that it has reviewed the attached cost estimate and hereby approves same. However, the Company's financial obligation under this Agreement shall be reimbursement for the actual cost of the Utility Work and the Company understands that the aforesaid amount is only an estimate.

(b) **Reimbursement.** The costs actually incurred by LYNX for construction of the Utility Work shall be reimbursed by the Company to the City, "Reimbursement." City will then forward the Reimbursement to LYNX to be utilized as part of the Local Match under the terms of the Related Interlocal Agreement and the GRANT. Costs shall include, but are not limited to; construction change orders, surveying services, as-built drawing preparation, testing, inspections, permit fees, construction general conditions, environmental fees, and recording fees. The estimated fee at the beginning of the Project is \$66,175.00. After the Utility Work is complete, payment of the Reimbursement shall occur within thirty (30) days of the City's submittal of a reimbursement request to the Company, which request shall include all invoices and any and all other supporting data. Company shall pay such amount to City within thirty (30) days of the receipt of the invoice(s). The City may enforce its rights to payment in any manner provided by law to which remedies Company hereby consents. Company shall not be authorized to utilize, nor have access to, the Utility Work until full payment is made under this Agreement.

5. **Change Order.** During the course of the construction of the Project, if City or LYNX observes, or otherwise becomes aware of, any defects, conflicts, or necessary changes to the Utility Work, City shall notify Company of such defects, conflicts or necessary changes. If City or LYNX determine that a change is necessary to the construction of the Utility Work, then City shall invoice Company for any all and all costs attributable to the change, which invoice(s) shall be payable as described in Paragraph 4, above.
6. **Inspection.** City shall notify Company upon completion of the Utility Work and the Company, in coordination with LYNX and the City, shall schedule and conduct an inspection and then promptly notify the City in writing of its acceptance of the Utility Work. Upon acceptance, the Company shall assume permanent ownership of the Utility Work, including maintenance and operation responsibilities.
7. **Indemnification.** Company shall indemnify, release and hold harmless the City, its agents, employees and elected and appointed officials, from and against all claims, damages, losses and expenses (including all costs and attorney's fees and all costs and attorney's fees on appeal), arising out of or resulting from Company's negligence or intentional misconduct under this Agreement.
8. **Litigation and Attorneys' Fees.** In the event any party to this Agreement should bring suit to enforce or interpret any provision hereof, the predominantly prevailing party shall be entitled to recover reasonable attorneys' fees, paralegals' fees, and costs incurred, whether the same be incurred in pre-litigation negotiation, litigation at the trial level, or upon appeal.

9. **Binding Effect.** The terms and conditions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.
10. **No Waiver of Regulatory Authority.** Company acknowledges that nothing in this Agreement constitutes or is intended to operate as a waiver of the City's regulatory authority or the application of any applicable laws, rules or regulations.
11. **Amendment.** This Agreement may not be terminated, modified or amended except by an instrument in writing signed by each of the parties.
12. **Effective Date.** This Agreement shall become effective on the date of full and complete execution by all parties hereto.
13. **Default.** Failure by any party to comply with or perform any of the terms, conditions, covenants, agreements or obligations contained in this Agreement to be performed by each of them respectively, shall constitute a default under this Agreement, and (i) if such default is not cured or remedied within thirty (30) days after the non-defaulting party provides written notice to the defaulting party specifying with particularity the nature of such default, or (ii) if such default cannot be reasonably cured or remedied within such thirty (30) day period, the defaulting party fails to commence to cure or remedy the default within such thirty (30) day period and thereafter fails to diligently and expeditiously pursue such cure or remedy, the non-defaulting party, in its sole discretion, shall be entitled to exercise any and all rights and remedies available to it under this Agreement, at law and in equity, including without limitation, the right to terminate this Agreement. Upon any such termination, this Agreement and all rights and obligations created hereunder shall be deemed null and void and of no further force or effect, except as otherwise provided herein.
14. **Independent Contractors.** Company shall perform all activities that are outlined in this Agreement as an independent entity and not as agent, employee or representative of the City, or their employees or representatives.
15. **No Third Parties.** This Agreement is solely for the benefit of the parties herein and LYNX, and no right or cause of action shall accrue upon or by reason hereof, to or for the benefit of any third party that is not a party hereto or LYNX.
16. **Term.** The term of this Agreement shall be for the period necessary to complete the Project.
17. **Notice.** Any notice required or allowed to be delivered hereunder shall be in writing and be deemed to be delivered when (a) hand delivered to the official hereinafter designated, or (b) upon receipt of such notice when deposited in the United States mail, postage prepaid, certified mail return receipt requested, addressed to a party at the address set forth opposite the party's name below, or at such other address as the party shall have specified in written notice to the other party in accordance herewith.

LYNX: Central Florida Regional Transportation Authority
455 N. Garland Avenue
Orlando, FL 32801

CITY: Director of Public Works
City of Orlando
400 South Orange Avenue
Orlando, FL 32802

COMPANY: TW Telecom, Inc.
485 N. Keller Road, Suite 551
Maitland, FL 32751

18. **Severability.** If any court finds part of this Agreement invalid or unenforceable, such invalidity or unenforceability shall not affect the other parts of the Agreement if the rights and obligations of the parties contained therein are not materially prejudiced and if the intentions of the parties can continue to be affected. To that end, this Agreement is declared severable.
19. **Time of the Essence.** Time is hereby declared of the essence to the lawful performance of the duties and obligations contained in this Agreement.
20. **Laws of Florida.** This Agreement and the provisions contained herein shall be construed, controlled and interpreted according to the laws of the State of Florida.
21. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties and supersedes all previous discussions, understandings, and agreements between the parties relating to the subject matter of this agreement. Amendments to and waivers of the provisions herein, shall be made by the parties in writing by formal amendment.

DONE AND AGREED to on the date first written above.

SIGNATURES START NEXT PAGE

ATTEST:

CITY OF ORLANDO, FLORIDA, a municipal corporation, organized and existing under the laws of the State of Florida

By: _____
Alana Brenner, City Clerk

By: _____
Mayor / Mayor Pro Tem

Date: _____

STATE OF FLORIDA
COUNTY OF ORANGE

The foregoing was acknowledged before me this ____ day of _____, 2015 by _____, Mayor Pro Tem and _____, City Clerk, who is personally known to me who did (did not) take an oath.

Name
Notary Public
Serial Number: _____
My Commission Expires: _____

Approved as to form and legality for the use and reliance of the City of Orlando, Florida only

_____, 2015

By: _____
Chief Assistant City Attorney

COMPANY:
TW Telecom, Inc.

a _____ corporation
(Corporate Seal)

By: _____

Printed Name: _____

Title: _____

CORPORATE ACKNOWLEDGMENT

STATE OF FLORIDA
COUNTY OF ORANGE

PERSONALLY APPEARED before me, the undersigned authority,
_____, as _____, of TW Telecom,
Inc., a _____ corporation. He/she ☐ is personally known to me or ☐ who has
produced _____ as identification.

WITNESS my hand and official seal this _____ day of _____, 2015.

Notary Public
Print Name: _____
My commission expires: _____

Exhibit “A”