

*EXECUTION VERSION*  
*JULY 31, 2012*

**COMPREHENSIVE AGREEMENT**  
**RELATING TO THE I-95 HOV/HOT LANES PROJECT**  
**DATED AS OF JULY 31, 2012**  
**BY AND BETWEEN**  
**VIRGINIA DEPARTMENT OF TRANSPORTATION,**  
**an Agency of the Commonwealth of Virginia**  
**AND**  
**95 EXPRESS LANES LLC,**  
**a Delaware limited liability company**

**\*\*THE VIRGINIA DEPARTMENT OF TRANSPORTATION RESERVES THE RIGHT TO MODIFY ANY OF THE TERMS PRESENTED IN THIS DRAFT COMPREHENSIVE AGREEMENT\*\***

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- (ii) current and delinquent operating and maintenance costs (including any payments to Affiliates made solely in accordance with the applicable Affiliate Contracts entered into in accordance with Section 24.02(1));
- (iii) current and delinquent debt service and other current and delinquent amounts, due under any Concessionaire Debt;
- (iv) all Taxes affecting the Project that are currently due and payable or delinquent;
- (v) all current and delinquent deposits to any Major Maintenance Reserve Fund and any other reserve contemplated by this Agreement; and
- (vi) all current and delinquent costs and expenses for Major Maintenance.

In the event there are any disputed amounts due to the Department pursuant to the terms of this Agreement, the Concessionaire will maintain a cash reserve for such disputed amounts in accordance with GAAP or any other generally accepted accounting principles which are acceptable to the Department as a condition precedent to making any Distribution or payment to an Affiliate. If the Concessionaire makes any Distribution or payment to an Affiliate in violation of this Section 5.06(b), the same will be deemed to be held in trust by such Person for the benefit of the Department and the Collateral Agent, and will be payable to the Department or the Collateral Agent on demand. If the Department collects any such amounts held in trust, it will make them available for any of the purposes set forth above and, at the request of the Collateral Agent, deliver them to the Collateral Agent.

(c) The Concessionaire will have no right to use Gross Revenues to pay any debt, obligation or liability unrelated to this Agreement, the Project, or the Concessionaire's services pursuant to this Agreement, *provided*, that this Section 5.06(c) does not apply to or otherwise affect the Concessionaire's right to make Distributions in accordance with the Concessionaire's governing instruments and this Agreement and the ability of the recipients thereof to apply the same in their sole discretion, subject to compliance with Section 5.06(b).

**Section 5.07 Revenue Risk Related to Traffic Volume**

(a) Except for its specific obligations to the Concessionaire under the terms and conditions of this Agreement, the Department will not have any risk or liability related to actual traffic volume and revenue, including but not limited to the risk that actual traffic volume is less than the traffic volume projected in the Base Case Financial Model.

(b) (i) From the period beginning on the second anniversary of the Service Commencement Date to December 31, 2030 (the "First Measurement Period"), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of 35% of the total flow of all Permitted Vehicles in two consecutive Toll Sections that are then using such Toll Sections going in the same direction

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for any period of 15 consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “First Threshold HOV Percentage and Rate”) of 1,450 vehicles per hour per traffic lane; *provided*, however, that the Department will not be required to make any payment, in question pursuant to this Section 5.07(b)(i) unless the 15 minute period in question and any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeds the First Threshold HOV Percentage and Rate.

(ii) From January 1, 2031 to December 31, 2040 (the “Second Measurement Period”), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of 37% of the total flow of all Permitted Vehicles in two consecutive Toll Sections that are then using such Toll Sections going in the same direction for any period of 15 consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “Second Threshold HOV Percentage and Rate”) of 1,550 vehicles per hour per traffic lane; *provided*, however, that the Department will not be required to make any payment, in question pursuant to this Section 5.07(b)(ii) unless the 15 minute period in question and any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeds the Second Threshold HOV Percentage and Rate.

(iii) From January 1, 2041 to the 40<sup>th</sup> anniversary of the Financial Close Date (the “Third Measurement Period”), the Department will pay to the Concessionaire amounts equal to 70% of the Average Toll for the number of High Occupancy Vehicles exceeding a threshold of 38% of the total flow of all Permitted Vehicles in two consecutive Toll Sections that are then using such Toll Sections going in the same direction for any period of 15 consecutive minutes during a day during which the total flow of all Permitted Vehicles not including Permitted Vehicles violating the High Occupancy Requirement on such two consecutive Toll Sections going in the same direction exceeds a rate (the “Third Threshold HOV Percentage and Rate”) of 1,550 vehicles per hour per traffic lane; *provided*, however, that the Department will not be required to make any payments pursuant to this Section 5.07(b)(iii) unless the 15 minute period in question and any subsequent consecutive 15 minute periods immediately follows a period of at least 30 consecutive minutes during which the total flow of all Permitted Vehicles for such two consecutive Toll Sections going in the same direction exceeded the Third Threshold HOV Percentage and Rate.

(iv) For purposes of determining the High Occupancy Vehicles as a percentage of flow, (A) HOV-2 or below vehicles and (B) Permitted Vehicles violating the High

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Occupancy Requirement will not be counted as High Occupancy Vehicle usage but will be counted as part of total flow.

(v) If the Annual Budget submitted to the Department for any Agreement Year pursuant to Section 9.08 contemplates that the Highest Revenue Share IRR will be achieved during such Agreement Year, any amounts otherwise payable to the Concessionaire under this Section 5.07(b) for any month occurring during or after the month which the Highest Revenue Share IRR estimated to be achieved will be deposited by the Department into an escrow account. Within 90 Days following the end of the Agreement Year in which such deposits were made, the Concessionaire and the Department will direct the escrow agent to transfer the moneys in such escrow fund to the Concessionaire to the extent that, upon receipt of the moneys, the Highest Revenue Share IRR has not been exceeded, and, upon confirmation that such amount has been duly paid and received by the Concessionaire, the Concessionaire and the Department shall direct the escrow agent to transfer any excess remaining after the foregoing transfer to the Department.

(vi) Failure by the Concessionaire to notify the Department in writing of its claim for a payment pursuant to this Section 5.07(b) within 30 Days after the end of each calendar month with respect to which this provision applies will constitute a permanent waiver of any such claim with respect to such month. If the Department disagrees with a claim filed by the Concessionaire, the Department may direct the Concessionaire to provide audited or otherwise independently verified information relevant to its claim for a payment. The Department will have 30 Days upon receipt of this information to review the information and calculations provided and if the Department agrees with the calculation, make the calculated payment, together with interest on such amount, which interest shall commence accruing 30 Days after the month to which the payment relates. To the extent there are amounts on deposit in the Project Enhancement Account, such payments shall be made first from the Project Enhancement Account and the interest due shall be calculated based on the average earnings rate on the Project Enhancement Account, during such period. If there are no amounts on deposit therein then interest shall be based on the average earnings rate on the State's Transportation Trust Fund or any successor thereto, during such period.

(vii) Notwithstanding the foregoing, this Section 5.07(b) will cease to apply on the first to occur of: (A) the date on which the Highest Revenue Share IRR has been reached and (B) the 40<sup>th</sup> anniversary of the Financial Close Date.

**Section 5.08 Failure to Meet OSPS**

(a) At any time after the second full month following the Service Commencement Date, the Concessionaire will notify the Department if the Concessionaire's scheduled monthly report identifies an instance of the Project's failure to meet the OSPS (as provided in the Technical Requirements). The notice will describe such failure in reasonable detail. The Department will notify the Concessionaire within 30 Days of its receipt of the Concessionaire's report whether or not it requires an OSPS Improvement Plan (the "OSPS Improvement Plan").

**Section 12.05 Alternative Facilities.**

(a) Additional Lanes.

(i) If the Department determines that Additional Lanes are in the State's best interests, the Department will consult with the Concessionaire as to an appropriate strategy to implement such Additional Lanes. Prior to undertaking construction of Additional Lanes, the Department will give the Concessionaire the first right to submit a proposal to construct such Additional Lanes as new HOT Lanes and HOV Lanes at the Concessionaire's sole cost as a Concessionaire Project Enhancement, so long as the Concessionaire demonstrates that (A) it has or can obtain sufficient funding (whether debt, equity, other sources of funds or combination thereof) for such Concessionaire Project Enhancement, and (B) it has or can obtain (with appropriate assistance from the Department) all required Governmental Approvals for such Concessionaire Project Enhancement.

(ii) The Concessionaire's proposal to construct Additional Lanes as new HOT Lanes pursuant to a Concessionaire Project Enhancement will contain the information specified by the Department in writing and delivered to the Concessionaire. The Concessionaire's failure to submit such a proposal within 120 Days of its receipt of the Department's specifications as to the contents of the Concessionaire's proposal will constitute a waiver of the Concessionaire's right to submit a proposal pursuant to this Section 12.05. If a valid proposal is submitted by the Concessionaire, the Department will evaluate the Concessionaire's proposal in accordance with the Department's specifications within 90 Days of its submission. If the Concessionaire determines not to pursue the construction of such Additional Lanes as a Concessionaire Project Enhancement or the Department does not approve such Concessionaire Project Enhancement after review in accordance with the Department's specifications, the Department may add Additional Lanes as a Department Project; and except as provided in clause (iv), such Additional Lanes will constitute a Compensation Event.

(iii) The Department will coordinate the activities described in Section 12.05(a) with the Concessionaire so as to minimize to the extent reasonably feasible the disruption to the Concessionaire's construction, operation and maintenance of the Project and the generation of Toll Revenues.

(iv) Without limiting the applicability of clause (ii) above, the construction of Additional Lanes by or on behalf of the Department will not constitute a Compensation Event if the Highest Revenue Share IRR has been reached as of the date on which Commencement of Use of the Additional Lanes begins.

(b) Route One Improvements. The Route One Improvements will be treated as a Compensation Event unless the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Route One Improvements.

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(c) Occoquan Bridge Improvements. The Occoquan Bridge Improvements will be treated as a Compensation Event unless the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Occoquan Bridge Improvements.

(d) Southern HOT Lanes. The Southern HOT Lanes will be treated as a Compensation Event unless (i) the Highest Revenue Share IRR has been reached as of the Commencement of Use of the Southern HOT Lanes or (ii) the Concessionaire develops and constructs the Southern HOT Lanes as a Concessionaire Project Enhancement.

(e) Procedures.

(i) This Section 12.05(e) sets forth the Concessionaire's sole and exclusive rights and remedies with respect to Alternative Facilities, and supersedes any provisions of this Agreement to the contrary; *provided* however, that if the construction activities associated with an Alternative Facility directly cause a material disruption to the construction of the Project Assets, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement. Such rights and remedies are subject to Section 12.05(e)(iii).

(ii) The Concessionaire Damages owing from the Department to the Concessionaire on account of an Alternative Facility will be equal to the Concessionaire Damages, if any, attributable to the Alternative Facility, but only to the extent that any such amount of any such reduction has not been previously recognized under Section 14.04. The foregoing Concessionaire Damages will be determined in the same manner, and subject to the same conditions and limitations, as for a Compensation Event under Section 14.01.

(iii) The Concessionaire acknowledges that each of CTB and the Department has a paramount public interest and duty to develop and operate whatever Department Projects it deems to be in the best interests of the State, and that the compensation to which the Concessionaire is entitled on account of Alternative Facilities is a fair and equitable remedy. Accordingly, the Concessionaire will not have, and irrevocably waives and relinquishes, any and all rights to institute, seek or obtain any injunctive relief or pursue any action, order or decree to restrain, preclude, prohibit or interfere with CTB's or the Department's rights to plan, finance, develop, operate, maintain, toll or not toll, repair, improve, modify, upgrade, reconstruct, rehabilitate, restore, renew or replace Alternative Facilities; *provided*, that the foregoing will not preclude the Concessionaire from enforcing its right to submit proposals for Additional Lanes and the Northern HOT Lanes pursuant to Section 12.05(a) and Section 12.06(a), respectively, its rights to compensation under this Section 12.05, or claiming any relief in respect of Compensation Events or Delay Events, if appropriate. The filing of any such action by the Concessionaire seeking to restrain, preclude, prohibit or interfere with CTB's or the Department's rights will automatically entitle CTB or the Department, as applicable, to recover all costs and expenses, including attorneys fees, of defending such action and any appeals.

**Section 12.06 Northern HOT Lanes**

(a) **Concessionaire Project Enhancement - Concessionaire's Sole Cost.**

(i) If the Department determines to develop the Northern HOT Lanes or if the Concessionaire proposes to develop, construct, operate and maintain Northern HOT Lanes, the Department and the Concessionaire will consult as to an appropriate strategy to implement the Northern HOT Lanes. The Concessionaire will have the first right to submit a proposal to the Department to develop, construct, operate and maintain the Northern HOT Lanes at the Concessionaire's sole cost as a Concessionaire Project Enhancement, so long as the Concessionaire demonstrates that (i) it has or can obtain sufficient funding (whether debt, equity, or combination thereof) for the development, construction, operation and maintenance of the Northern HOT Lanes, (ii) it has or can obtain (with appropriate assistance from the Department) all required Governmental Approvals for the development, construction, operation and maintenance of the Northern HOT Lanes and (iii) neither the Department nor any other agency of instrumentality of the State will be required to make a contribution of public funds or provide any other sort of financial support or credit in connection with the development, construction, operation and maintenance of the Northern HOT Lanes, other than customary approvals and non-financial support from an issuer of bonds that will be used to finance the Northern HOT Lanes.

(ii) The Concessionaire's proposal to develop, construct, operate and maintain the Northern HOT Lanes as a Concessionaire Project Enhancement will contain the information specified by the Department in writing and delivered to the Concessionaire. The Concessionaire's failure to submit such a proposal within 120 Days of its receipt of the Department's specifications of the contents of the Concessionaire's proposal will constitute a waiver of the Concessionaire's first right to submit a proposal pursuant to this Section 12.06. If the Concessionaire submits a valid proposal, the Department will evaluate the Concessionaire's proposal in accordance with the Department's specifications within 90 Days of its submission.

(b) Concessionaire Project Enhancement - Department Contribution. If the Concessionaire or the Department determine that the Department (or any other agency or instrumentality of the State) would be required to make a contribution of public funds or provide any other sort of financial support or credit in connection with the development and construction of the Northern HOT Lanes, the Concessionaire shall have the first right to submit a proposal to operate and maintain the Northern HOT Lanes as a Concessionaire Project Enhancement. In such event, the Concessionaire and the Department shall cooperate in the solicitation of proposals to develop and construct the Northern HOT Lanes through competitive processes in accordance with Law. The acceptance of any proposal to develop, construct, operate and maintain the Northern HOT Lanes shall be at the Department's sole discretion.

(c) Department Project. If the Concessionaire determines not to pursue the development, construction, operation and maintenance of the Northern HOT Lanes as a Concessionaire Project Enhancement or the Department does not approve such Concessionaire

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Project Enhancement after review in accordance with the Department's specifications, the Department may develop, construct, operate and maintain the Northern HOT Lanes as a Department Project.

(d) The development, construction, operation and maintenance of the Northern HOT Lanes will not be a Delay Event or a Compensation Event, and the Concessionaire acknowledges and agrees that the Department may, in its sole discretion, develop additional general purpose lanes or HOV lanes in the area between the intersection of Eads Street and Interstate 395 and the current northern terminus of the I-95 Corridor, which is approximately one mile north of Route 648 (Edsall Road); *provided* however, that if the construction activities associated with the Northern HOT Lanes directly cause a material disruption to the construction of the Project, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement; *provided further* however, that the Concessionaire will not be entitled to Concessionaire Damages or other relief if such material disruption is caused by a Concessionaire Party.

**ARTICLE 13.**

**DELAY EVENTS**

**Section 13.01 Delay Event Notice and Determination**

(a) If the Concessionaire is affected by a Delay Event, it will give written notice to the Department within 30 Days following the date on which the Concessionaire first became aware (or should have become aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Delay Event, (*provided*, that in the case of the same Delay Event being a continuing cause of delay, only one notice will be necessary) (a "Delay Event Notice"). Such Delay Event Notice will include (i) a detailed description of the Delay Event, (ii) details of the circumstances from which the Delay Event arises and (iii) an estimate of the duration of the delay in the performance of obligations pursuant to this Agreement attributable to such Delay Event and information in support thereof, if known at that time. The Concessionaire will also provide such further information relating to the Delay Event as the Department may reasonably require. The Concessionaire will bear the burden of proving the occurrence of a Delay Event and the resulting impacts.

(b) If for any reason the Concessionaire fails to deliver a Delay Event Notice within such 30-Day period, the Concessionaire will be deemed to have irrevocably and forever waived and released any Claim or right to time extensions or any other relief with respect to such Delay Event pursuant to this Agreement or any Project Agreement.

(c) Upon the occurrence of a Delay Event, the Concessionaire will promptly undertake efforts to mitigate the effects of such Delay Event, including all steps that would generally be taken in accordance with Good Industry Practice. The Concessionaire will promptly deliver to the Department an explanation of the measures being undertaken to mitigate the delay and other consequences of the Delay Event. The Concessionaire will notify the



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Department within 30 Days following the date on which it first became aware (or should have become aware, using all reasonable due diligence) that such a Delay Event has ceased.

(d) Notwithstanding the occurrence of a Delay Event, the Concessionaire will continue its performance and observance pursuant to this Agreement of all of its obligations and covenants to be performed to the extent that it is reasonably able to do so and will use its reasonable efforts to minimize the effect and duration of the Delay Event. Without limiting the foregoing, the occurrence of a Delay Event will not excuse the Concessionaire from timely payment of monetary obligations pursuant to this Agreement, from compliance with Law, or from compliance with the Technical Requirements, except temporary inability to comply with the Technical Requirements as a direct result of the Delay Event.

(e) Subject to the Concessionaire giving the notice required in Section 13.01(a), a Delay Event will excuse the Concessionaire from whatever performance is prevented or delayed by the Delay Event referred to in such notice to the extent set forth in Section 13.02 and Section 13.03.

**Section 13.02 Delay Events During the Construction Period**

A Delay Event occurring during the Construction Period will excuse the Concessionaire from performance of its obligations to perform the Work pursuant to this Agreement but only to the extent that such obligations are directly affected by such Delay Event. In addition, during the Construction Period, extensions of milestones and/or activities identified on the Baseline Schedule for Delay Events affecting the Work will be made based on Time Impact Analysis, using the then current Baseline Schedule and taking into account impacts of the Delay Events on Critical Path items, in accordance with the Technical Requirements, and will extend the Guaranteed Substantial Completion Date, the Final Acceptance Deadline and the Long Stop Date. For avoidance of doubt, the Long Stop Date may be extended in accordance with this Agreement by reason of a Delay Event that occurs during the period after the Guaranteed Substantial Completion Date. If the Department and the Concessionaire cannot agree upon the extension, then either party will be entitled to refer the matter to the dispute resolution procedures in Article 21.

**Section 13.03 Delay Events After Service Commencement**

A Delay Event occurring after Service Commencement will only excuse the Concessionaire from performance of its obligations to perform O&M Work pursuant to this Agreement directly affected by such Delay Event.

ARTICLE 14.

**COMPENSATION EVENTS; DEPARTMENT CHANGES;  
DEVIATIONS; NET COST SAVINGS**

**Section 14.01 Compensation Events**

(a) Compensation Event Notice.

(i) If the Concessionaire is affected by a Compensation Event, it will give written notice to the Department within 30 Days following the date on which the Concessionaire first became aware (or should have become aware, using all reasonable due diligence) that an event has occurred and that it is or will become a Compensation Event ( a “Compensation Event Notice”); *provided*, that, in the case of a Department Project Enhancement, a Compensation Event Notice must be given within 30 days following the Commencement of Use of such Department Project Enhancement. The Compensation Event Notice will set forth (A) the Compensation Event and its date of occurrence in reasonable detail, (B) the amount claimed as Concessionaire Damages and (C) details of the calculation thereof including a written analysis and calculation of the estimated Net Cost Impact, if any, and estimated Net Revenue Impact, if known at that time; *provided* that, if the amount of Concessionaire Damages and details of the calculation thereof are not available within the 30-Day notice period required herein, the Concessionaire may submit an estimate of the amount, or if known, the actual amount claimed as Concessionaire Damages and details of the calculation thereof no later than 60 Days from submission of the Compensation Event Notice; *provided* however, the Concessionaire may update the amount of claimed Concessionaire Damages and details thereof every 30 Days.

(ii) If, for any reason, the Concessionaire fails to deliver such written Compensation Event Notice within the foregoing time period, the Concessionaire will be deemed to have irrevocably and forever waived and released any Claim or right to Concessionaire Damages or other adverse effects on Gross Revenues or on costs, expenses and liabilities attributable to such Compensation Event.

(iii) After the Concessionaire submits a Compensation Event Notice, the Department may, but is not required to, obtain, at its sole cost, (A) a comprehensive report as to the Concessionaire’s estimate of the Net Cost Impact attributable to the Compensation Event and (B) from a traffic and revenue consultant a traffic and revenue study, prepared in accordance with Good Industry Practice, analyzing and calculating the estimated Net Revenue Impact attributable to the Compensation Event. Within 90 Days after receiving a Compensation Event Notice and the supporting documentation required by Section 14.01(a)(i), the Department will provide to the Concessionaire a copy of such reports as it has elected to obtain. If the Department disagrees with the entitlement to or amount of Concessionaire Damages claimed by the Concessionaire, the Concessionaire and Department will commence good faith negotiations to resolve the Dispute within 120 Days after the delivery of the Compensation Event Notice. If the Dispute cannot be

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resolved within such 120 Days, either party may submit the Dispute for resolution pursuant to Article 21.

(b) Concessionaire Damages Determination.

(i) Concessionaire Damages with respect to any Compensation Event will be calculated based on the sum of (A) any adverse Net Cost Impact and (B) any adverse Net Revenue Impact for each year that there is an impact attributable to such Compensation Event; *provided*, that, subject to Section 14.01(c), any Net Cost Savings and positive Net Revenue Impact attributable to such Compensation Event will be used to decrease the amount of Concessionaire Damages. The calculation of Concessionaire Damages will be based on the difference in the projected cost and revenue related to the Project immediately prior to the occurrence of the Compensation Event and the projected cost and revenue related to the Project after taking into account the impact of the Compensation Event.

(ii) Following the calculations pursuant to Section 14.01(b)(i), the Concessionaire will incorporate such calculations into the proposed Base Case Financial Model Update and will provide such proposed Base Case Financial Model Update to the Department pursuant to Article 6.

(iii) The Concessionaire Damages will be net of all applicable insurance proceeds payable to the Concessionaire or its Contractors associated with the Compensation Event (or that would have been payable to the Concessionaire or its Contractors but for the failure by the Concessionaire or its Contractors to comply with the insurance requirements set forth in Section 14.01(b)(v) and Article 17), except as any payment of such insurance proceeds is affected by the bankruptcy or insolvency of the provider of such insurance, and will include all costs of asserting a Claim for such insurance proceeds and any increased insurance premium resulting from any such Claim; *provided*, that any increased insurance premium resulting from such Claim is certified in writing by the insurance provider of the Concessionaire or its Contractor, as applicable, prior to payment by the Department.

(iv) The Concessionaire will conduct all discussions and negotiations with the Department to determine any Concessionaire Damages and will share with the Department all data, documents and information pertaining thereto, on an Open Book Basis. As part of such negotiations, the parties will continue to refine and exchange, on an Open Book Basis, plans, drawings, configurations and other information related to the Compensation Event, traffic and revenue data, information, analyses and studies and financial modeling and quantifications of projected Net Cost Impacts, Net Revenue Impacts or Net Cost Savings, if any.

(v) The Concessionaire will take all steps reasonably necessary to mitigate the amount of the Concessionaire Damages attributable to, and other consequences of, any Compensation Event, including all steps that would generally be taken in accordance

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with Good Industry Practice, including filing a timely claim for insurance and pursuing such claims.

(vi) If the Concessionaire and the Department are unable to agree upon the amount of the Concessionaire Damages within 120 Days after the delivery of the Compensation Event Notice, then either party, by written notice to the other party, may terminate the negotiations and request the Dispute be resolved in accordance with Article 21; *provided*, that the Department will proceed to make payment to the Concessionaire of the undisputed portion of the Concessionaire Damages in accordance with Section 14.01(b) without regard to the dispute resolution procedures.

(vii) The Concessionaire will not be entitled to Concessionaire Damages which are *de minimis*.

(c) Compensation Event Payment. Following a determination of the Concessionaire Damages pursuant to Section 14.01(b), the Department will compensate the Concessionaire for such Concessionaire Damages in such manner as agreed upon by the parties in writing or as may be determined through the dispute resolution procedures set forth in Article 21; *provided*, that:

(i) in the case of any lump sum payment of the Concessionaire Damages or any other payment schedule that differs from the projected timing of the Concessionaire Damages, the net present value of the Concessionaire Damages will be determined using the then appropriate risk adjusted discount rate(s), as agreed between the Department and the Concessionaire;

(ii) in the case of any payment method chosen other than an up-front lump sum payment or a payment that is based on the projected timing and amounts of the Concessionaire Damages, the payment method will yield an amount that will be equal to the present value of a lump sum payment, using appropriate risk adjusted discount rate(s) as agreed by the parties;

(iii) the amount and timing of payment of Concessionaire Damages related to a Compensation Event will take into account the ability of the Concessionaire, *first*, to obtain funding in relation to such Concessionaire Damages in accordance with Section 14.01(d) and, *second*, to have funds available in such time and in such amounts as are required to make current payments to third parties in respect of any portion of Net Cost Impact related to such Compensation Event; and

(iv) any Net Cost Savings or positive Net Revenue Impact attributable to such Compensation Event not included in the determination of Concessionaire Damages under the provisions of this Section 14.01 will be included in the Permit Fee calculated pursuant to the Permit Fee calculation, as agreed between the Department and the Concessionaire.

(d) Concessionaire Funding of Concessionaire Damages. If requested by the Department, the Concessionaire will use commercially reasonable efforts to obtain funding for a portion or the full amount of Concessionaire Damages; *provided*, however, that the

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Concessionaire will not be obligated to obtain such funding if the Concessionaire, in its reasonable discretion, determines that obtaining such funding will diminish the Project Value, or to the extent such funding, combined with any payments from the Department, will not make funds available in such time and in such amounts as are required to make current payments to third parties as they are due or will become due in respect of any portion of Net Cost Impact included as part of such Concessionaire Damages. If the Concessionaire is able to obtain funding for all or part of the Concessionaire Damages, the Concessionaire will submit a funding proposal for the Department's review and approval. Such funding proposal will identify the terms and conditions required to secure funding for such Concessionaire Damages, including any proposed payments by the Department. The Department will reject or accept the funding proposal within 30 Days of receipt of the funding proposal. If the funding proposal is accepted by the Department, the Department will issue a Change Order to implement the funding proposal and, to the extent such funding proposal secures financing for less than 100% of the Concessionaire Damages, the Change Order will provide funding for the remainder thereof on terms and conditions mutually agreed by the parties.

(e) Sole Remedy and Release of Claims.

(i) Without limiting the Concessionaire's rights with respect to non-monetary relief for Delay Events, the Concessionaire Damages as determined according to this Section 14.01 will represent the sole right to compensation and damages for the adverse effects of a Compensation Event.

(ii) As a condition precedent to the Department's obligation to compensate any portion of the Concessionaire Damages, following a determination of the Concessionaire Damages, the Concessionaire will execute a full, unconditional, irrevocable release, in form reasonably acceptable to the Department, of any Claims, Losses or other rights to compensation or other monetary relief associated with such Compensation Event, except for (A) the Claim and right to the subject Concessionaire Damages, (B) the Concessionaire's right to non-monetary relief for a Delay Event and (C) the right to terminate this Agreement in accordance with Article 20 and to receive any applicable termination compensation.

(f) Additional Provisions for Certain Compensation Events.

(i) For the Compensation Event described in clause (k) of the definition thereof, the Concessionaire will be entitled to recover the Net Cost Impact for such Compensation Event; *provided*, however, that:

(A) in no event will the Concessionaire be entitled to submit a Claim if the Net Cost Impact of such Compensation Event does not equal or exceed \$10 million per occurrence ("Claim Threshold");

(B) if such Compensation Event meets the Claim Threshold, the Department will be solely responsible for the Net Cost Impact in excess of \$10 million for such Compensation Event; *provided*, however, that the Concessionaire will be solely

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responsible for the Net Cost Impact up to \$10 million per occurrence for the first two Compensation Events that meet the Claim Threshold; and

(C) the Department will be responsible for the Net Cost Impact for such Compensation Events after the first two such Compensation Events occur that meet the Claim Threshold.

For the avoidance of doubt, the Concessionaire will be solely responsible for such Compensation Events with a Net Cost Impact under \$10 million per occurrence.

(ii) For the Compensation Event described in clause (l) of the definition thereof, the Concessionaire will be entitled to recover the Net Cost Impact for such Compensation Event, *provided*, however, that:

(A) the Concessionaire will be solely responsible for the Net Cost Impact up to \$5 million in the aggregate for such Compensation Event;

(B) the Department will be solely responsible for the Net Cost Impact in excess of \$5 million but less than or equal to \$10 million for such Compensation Event; and

(C) the parties will share evenly the Net Cost Impact in excess of \$10 million for such Compensation Event

The provisions of this Section 14.01(f)(ii) apply to each event and not in the aggregate.

**Section 14.02 Department Changes**

(a) Department's Right to Issue Change Orders. The Department may, at any time and from time to time during the Term, authorize and/or require changes in the Work pursuant to a Change Order or in the terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work); *provided*, that the Department has no right to require any change that:

(i) is not in compliance with Law;

(ii) would contravene an existing Governmental Approval and such contravention cannot be corrected by the issuance of a further or revised Governmental Approval;

(iii) would cause an insured risk to become uninsurable; or

(iv) would give rise to a material and adverse health or safety issue.

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(b) Request for Change Proposal.

(i) If the Department desires to initiate a Department Change, then the Department will issue a Request for Change Proposal. The Request for Change Proposal will set forth the nature, extent and details of the proposed Department Change.

(ii) Within 21 Days following Concessionaire's receipt of the Request for Change Proposal, the Concessionaire will provide the Department with a preliminary written response, and within a reasonable time thereafter (not to exceed 30 Days or such other timeframe agreed upon between the Concessionaire and the Department), with a definitive written response (a "Change Proposal"), as to whether, in the Concessionaire's opinion, the Department Change constitutes a Compensation Event, and if so, (A) a detailed assessment of the Net Revenue Impacts and Net Cost Impacts, to the extent known at that time, (B) the effect of the proposed Department Change on the Concessionaire's performance of its obligations pursuant to this Agreement, to the extent known at the time, (C) the proposed Base Case Financial Model Update and (D) a TIA if applicable.

(iii) Within 30 Days following the delivery of the Change Proposal, the Concessionaire and the Department will exercise good faith efforts to negotiate a mutually acceptable Change Order.

(iv) The Department will pay the Concessionaire's Allocable Costs for preparing a Change Proposal and conducting preliminary work to respond to a Request for Change Proposal at the Department's request. Upon payment of such Allocable Costs, the Department will own all Work Product included in the Change Proposal.

(c) Concessionaire Performance of Department Change. The Concessionaire will perform the work required to implement the Department Change in a timely manner; *provided, that:*

(i) a Change Order setting forth, among other things, the adjusted scope of the Work and adjustments to the Baseline Schedule and the Technical Requirements, if applicable, will have been mutually agreed upon between the Department and the Concessionaire and issued by the Department;

(ii) the Department and the Concessionaire (if applicable) will have identified sufficient funds that may be made available to the Concessionaire to perform the work required to implement the Department Change; and

(iii) all necessary Governmental Approvals to commence the Work required to implement the Department Change have been obtained.

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(d) Disputed Work.

(i) If the Department and the Concessionaire agree that the Work in question constitutes a Department Change and are unable to reach an agreement on a Change Order, the Department may deliver to the Concessionaire a Directive Letter, directing the Concessionaire to proceed with the performance of the Work in question, notwithstanding such disagreement. Such Directive Letter will include any changes to the Technical Requirements, if applicable, necessary to proceed with the Work covered by the Directive Letter.

(ii) If the parties disagree whether the Work in question constitutes a Department Change, the Department will have the right to issue a Directive Letter, directing the Concessionaire to proceed with the performance of the Work in question, and the Concessionaire will proceed with such work. Such Directive Letter will include any changes to the Technical Requirements necessary to proceed with the Work covered by the Directive Letter.

(iii) Upon receipt of a Directive Letter under (i) or (ii) above, the Concessionaire will implement and perform the Work in question as directed by the Department and the Department will make payments to the Concessionaire for such Work performed pursuant to Section 14.02(e).

(iv) To the extent there are any Disputes related to any Directive Letter issued under Section 14.02(d), such Disputes will be subject to the dispute resolution procedures set forth in Article 21.

(e) Payments for Directive Letter Work. If the Department issues a Directive Letter to the Concessionaire pursuant to Section 14.02(d), the Department will make payments to the Concessionaire on a monthly basis for the Work in question for the reasonable Allocable Costs of the Work in question, subject to subsequent adjustment through the dispute resolution procedures set forth in Article 21.

(f) Technical Requirements Revisions. Notwithstanding anything to the contrary contained in this Agreement, during the Construction Period, a change in the terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work) required or authorized by the Department will constitute a Department Change.

**Section 14.03 Concessionaire Requests for Deviations**

(a) The Concessionaire may request the Department to approve, in the Department's sole discretion, Deviations by submitting to the Department a written change request in a form approved by the Department. At a minimum, the following information will be submitted with each such change request:

(i) a statement that the request is submitted pursuant to this Section 14.03(a);



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(ii) a statement concerning the basis for the request, benefits to the Department or the Project and an itemization of the contract items and requirements affected by the request;

(iii) a detailed estimate of the time and/or cost savings and impacts on Gross Revenues;

(iv) proposed specifications and recommendations as to the manner in which the requested changes are to be accomplished; and

(v) the time by which the request must be approved so as to obtain the maximum cost-effectiveness.

(b) The Department may consider and approve or disapprove, in its sole discretion, any such request, and the Concessionaire will bear the burden of persuading the Department that the Deviation sought constitutes sound and safe engineering consistent with Good Industry Practice and achieves the Department's applicable safety standards and criteria. No Deviation will exist or be effective unless and until approval thereof is expressly provided in writing by the Department. Approval of a submission containing a Deviation will not constitute approval of the Deviation unless and until the Department expressly and specifically approves the Deviation in writing pursuant to the terms of this Section 14.03(b). The Department's decision will not be subject to the dispute resolution procedures of Article 21. If not previously communicated, the Department will provide within 10 Days after a request by the Concessionaire its rationale, in reasonable detail, for any disapproval of a Deviation proposed by the Concessionaire.

(c) Unless otherwise agreed, the Concessionaire will be solely responsible for payment of any increased costs, for any losses of Gross Revenues, for all Allocable Costs and for any schedule delays or other impacts resulting from the implementation of a Deviation requested by the Concessionaire that has been approved by the Department.

**Section 14.04 Net Cost Savings or Positive Net Revenue Impact**

(a) Whenever it believes a Net Cost Saving or positive Net Revenue Impact exists or will arise from a Compensation Event, a Deviation, or a Department waiver of Non-Conforming Work, the Department at its election may, and the Concessionaire will, deliver to the other party written notice thereof. The notice will set forth (i) the Compensation Event and its date of occurrence in reasonable detail, the proposed or approved Deviation, or the Non-Conforming Work, as the case may be, (ii) a preliminary estimate, if then known, of the amount of the Net Cost Saving or positive Net Revenue Impact and (iii) a brief, preliminary written analysis and calculation thereof. Such notice will be brought within 30 Days after a claim for Concessionaire Damages or, if no claim is brought by the Concessionaire for Concessionaire Damages, within 30 Days after the occurrence of the Compensation Event or, in the case of a Project Enhancement, within 30 Days after the Commencement of Use of the Project Enhancement.

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(b) If the Concessionaire gives such a notice to the Department, the parties will follow the terms and procedures set forth in Section 14.01 as if they applied to the determination of the Net Cost Saving or positive Net Revenue Impact.

(c) Following a determination of the Net Cost Saving or positive Net Revenue Impact by mutual agreement or the dispute resolution procedures set forth in Article 21, the Department will decide on the percentage share of each that it desires as compensation, in any event not to exceed 50% of the applicable Net Cost Savings and/or positive Net Revenue Impact. The Concessionaire will compensate the Department in an amount equal to the selected percentage in the manner provided for in Section 14.01(c); *provided* that when Concessionaire Damages and Net Cost Saving or positive Net Revenue Impact are payable in the same time period, such amounts shall be netted to the extent possible. The parties will select one or any combination of the following methods of compensation:

(i) through monthly payments of the selected percentage of the Net Cost Saving or positive Net Revenue Impact in accordance with a written payment schedule determined by mutual agreement or through the dispute resolution procedures set forth in Article 21;

(ii) by a lump sum payment of the selected percentage, payable as determined by mutual agreement or through the dispute resolution procedures set forth in Article 21;  
or

(iii) in such other manner as agreed upon by the parties in writing.

**ARTICLE 15.**

**INDEMNIFICATION**

**Section 15.01 Indemnities of the Concessionaire**

In addition to the Concessionaire's indemnity obligations as set forth elsewhere in this Agreement, the Concessionaire will indemnify, defend, and hold harmless a State Indemnitee from and against any Losses actually suffered or incurred by such State Indemnitee (except to the extent such Losses are solely caused by the misconduct, negligence or other culpable act, error or omission of a State Indemnitee), due to Third-Party Claims that are based upon:

(a) any actual or alleged failure by the Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement or a Project Agreement or, any actual or alleged breach by the Concessionaire of its representations or warranties set forth herein or therein;

(b) any actual or alleged misconduct, negligence or other culpable act, error or omission of a Concessionaire Party in connection with the Project;