

EXECUTION VERSION – DECEMBER 5, 2011

COMPREHENSIVE AGREEMENT

**RELATING TO THE DOWNTOWN TUNNEL/MIDTOWN TUNNEL/MARTIN
LUTHER KING FREEWAY EXTENSION PROJECT**

DATED AS OF DECEMBER 5, 2011

BY AND AMONG

**VIRGINIA DEPARTMENT OF TRANSPORTATION,
an Agency of the Commonwealth of Virginia**

AND

**ELIZABETH RIVER CROSSINGS OPCO LLC,
a Delaware limited liability company**

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This **COMPREHENSIVE AGREEMENT RELATING TO THE DOWNTOWN TUNNEL/MIDTOWN TUNNEL/MARTIN LUTHER KING FREEWAY EXTENSION PROJECT** (this “Agreement”) is made and entered into as of December 5, 2011 by and between the VIRGINIA DEPARTMENT OF TRANSPORTATION (the “Department”), an agency of the Commonwealth of Virginia (the “State”), the address of which Department is 1401 East Broad Street, Richmond, Virginia 23219; and ELIZABETH RIVER CROSSINGS OPCO LLC, a Delaware limited liability company (the “Concessionaire”), the address of which is 99 Canal Center Plaza, Suite 125, Alexandria, Virginia 22314.

ARTICLE 1

RECITALS

WHEREAS, on March 25, 1995, the Governor of the State signed into law, effective July 1, 1995, the Public-Private Transportation Act, which was amended and re-enacted by Chapters 504 and 562 of the 2005 Acts of Assembly and signed into law by the Governor, effective July 1, 2005 (as amended, the “Act”).

WHEREAS, the Act grants the Department the authority to allow private entities to develop and/or operate qualifying transportation facilities if the Department determines there is a need for the facilities and private involvement would provide the facilities to the public in a timely and cost-effective fashion.

WHEREAS, on July 1, 1995, the Department adopted guidelines for the selection of solicited and unsolicited proposals for negotiation under the Act, which were revised in April 2001 and October 31, 2005, with an addendum issued on December 5, 2008, and updated on December 8, 2010 (as revised and updated, the “Implementation Guidelines”).

WHEREAS, pursuant to the Act, on April 5, 2005, the Commissioner recommended that the Department pursue the procurement for (a) the development and operation of a new two-lane tunnel under the Elizabeth River between the cities of Portsmouth and Norfolk in the Commonwealth of Virginia; and (b) the maintenance, safety, and operational improvements to the Existing Midtown Tunnel, the Existing Downtown Tunnels, and the extension of the Martin Luther King Freeway from London Boulevard to Interstate 264.

WHEREAS, pursuant to the Act, on May 30, 2008, the Department issued a Solicitation for Conceptual Proposals (“SFP”) to request receipt of conceptual proposals to enable the Department to identify and shortlist offerors qualified to submit detailed proposals to finance, design, construct, operate, and maintain the Project.

WHEREAS, in accordance with the Implementation Guidelines, the Department duly posted and published notice of the SFP.

WHEREAS, during the posting period ending September 29, 2008, the Department received a conceptual proposal (the “Conceptual Proposal”) submitted by ERC to form a public-private partnership to develop and operate the Project.

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WHEREAS, following a quality control review of the Conceptual Proposal to ensure its compliance with the Implementation Guidelines and the solicitation criteria, on October 29, 2008, the Commissioner accepted the Conceptual Proposal for further consideration.

WHEREAS, on February 19, 2009, the Secretary of Transportation designated an Independent Review Panel (“IRP”) to review and evaluate the Conceptual Proposal, based upon criteria set forth in the SFP, and for the purpose of developing recommendations to the Commonwealth Transportation Board (“CTB”) and the Department.

WHEREAS, following five public meetings wherein the IRP considered public comments, recommendations and comments from impacted jurisdictions, presentations provided by ERC and the Department staff, considering the Conceptual Proposal and using the selection and evaluation criteria pursuant to the SFP, the IRP determined that ERC was qualified and capable to undertake the development and operation of the Project.

WHEREAS, based on such evaluation, on July 16, 2009, the IRP recommended to the CTB that the Conceptual Proposal be further developed pursuant to the Act, and among other recommendations, recommended accelerating the procurement process to further determine the Project’s feasibility.

WHEREAS, on July 16, 2009, the CTB adopted a resolution consistent with the IRP’s findings.

WHEREAS, thereafter, the Commissioner directed the Department to negotiate an interim agreement with respect to the Project, with ERC based on the SFP, the Conceptual Proposal, and recommendations of the CTB.

WHEREAS, on January 7, 2010, the Department and ERC entered into an Interim Agreement to Develop and/or Operate the Downtown Tunnel/Midtown Tunnel/Martin Luther King Freeway Extension Project in Virginia (“Interim Agreement”).

WHEREAS, pursuant to the Interim Agreement, ERC was granted the exclusive right to negotiate with the Department for the development and operation of the Project, subject to the parties’ right to terminate the negotiations pursuant to the Interim Agreement.

WHEREAS, ERC and Concessionaire entered into an Assignment and Assumption Agreement with Respect to Interim Agreement dated as of December 5, 2011, pursuant to which ERC assigned, and the Concessionaire assumed, certain rights and obligations under the Interim Agreement.

WHEREAS, the Department and Concessionaire entered into a Termination of Interim Agreement and Release of Guaranty dated as of December 5, 2011, terminating the Interim Agreement and releasing all guarantees thereunder.

WHEREAS, the Department and Concessionaire desire to herein set forth the terms to develop and operate the Project pursuant to a long-term concession arrangement granted to the Concessionaire by the Department by this Agreement.

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NOW, THEREFORE, in consideration of the covenants contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto agree as follows:

ARTICLE 2

DEFINITIONS

All capitalized terms used in this Agreement, but not expressly defined in this Agreement, have the respective meanings set forth in Exhibit A attached to this Agreement.

ARTICLE 3

BASIC ROLES AND RESPONSIBILITIES

Section 3.01 Basic Agreement

(a) The parties hereto agree that the Project will be developed, designed, financed, constructed, operated, and maintained in accordance with this Agreement.

(b) The Concessionaire will perform, in accordance with (i) the Project Agreements; (ii) Law (including, to the extent applicable, with all federal requirements and Laws applicable to a transportation project that has received or receives federal-aid funds); (iii) Governmental Approvals; (iv) Good Industry Practice; and (v) the requirements of insurance policies required to be maintained hereunder.

(c) The Concessionaire will provide appropriate oversight, management and reporting of all phases of the Project and its Contractors such that the Project is delivered, operated and maintained in accordance with this Agreement.

(d) The Concessionaire may retain Contractors to perform certain of its responsibilities pursuant to this Agreement, subject to the terms and conditions of this Agreement. In any such event, the Concessionaire will remain fully and primarily responsible for the performance of such Contractors.

(e) The Department will be entitled to exercise such oversight of the activities of the Concessionaire and its Contractors in accordance with this Agreement, but will also be entitled to rely upon the Concessionaire to directly manage, oversee and resolve disputes involving its Contractors, without the involvement of the Department (except as otherwise provided in this Agreement).

(f) The Department will use reasonable efforts in performing its rights and duties under this Agreement to minimize any disruption to or impairment of the performance of the Concessionaire's rights and obligations under this Agreement; *provided*, that nothing in this Section 3.01(f) will limit the Department's rights and obligations under this Agreement.

Section 3.02 Project Agreements

The following Project Agreements (all as more particularly described by this Agreement), will be executed on or before the Agreement Date, and the Concessionaire will promptly deliver to the Department executed copies of the same:

- (a) Escrow Agreement attached as Exhibit D;
- (b) Design-Build Contract attached as Exhibit E; and
- (c) Design-Build Work Guarantee attached as Exhibit F.

Section 3.03 Nature of Parties' Interests Pursuant to This Agreement

(a) This Agreement does not grant to the Concessionaire any fee title, leasehold estate, easement or other real property interest of any kind in or to the Project or the Project Right of Way. The Concessionaire's interests pursuant to this Agreement are limited to the Permit granted by this Agreement under Section 4.01.

(b) The Department and the Concessionaire acknowledge their mutual intent that, despite the Department's retention of fee title to (or other good and valid real property interest in) the Project Assets and the Project Right of Way, as a result of the Concessionaire's rights and interests therein pursuant to the Permit granted to the Concessionaire under this Agreement, to the maximum extent permitted by Law, for federal income tax purposes the Concessionaire will be treated as having acquired (i) an ownership interest in those Project Assets that have an expected economic useful life equal to or less than the Term, (ii) an interest in the Project Right of Way and those Project Assets that have an expected economic useful life greater than the Term and (iii) a franchise and license, permit, or other right within the meaning of section 197(d)1)(F) and 197(d)1)(D) of the Internal Revenue Code of 1986, as amended, and in that regard an amount equal to the Concessionaire's cost of development, design, construction and start-up of the Project represents acquisition cost of such assets (the "Cost"), and no payment by the Department to the Concessionaire pursuant to Section 7.02 shall be treated as part of the Cost. The Cost will be allocated for all income tax purposes in the manner determined by the Concessionaire, which allocation shall be consistent with Section 1060 of the Internal Revenue Code of 1986, as amended and the Concessionaire will execute and file all income tax returns with the Internal Revenue Service in a manner consistent with such allocation, including Form 8594. The Department and the Concessionaire do not contemplate that the Department will be required to file any return with the Internal Revenue Service with respect to such allocation, but that if required to do so the Department will file such return in a manner consistent with such allocation.

Section 3.04 Quiet Possession and Enjoyment

The Concessionaire will, at all times during the Term, be entitled to, and will have, the quiet possession and enjoyment of the Project and the Project Right of Way, subject to the exercise by the Department of its rights under the Project Agreements. The Department will, at

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all times during the Term, defend (a) the Department’s title or real property interest to the Project and Project Right of Way; and (b) the Permit and related rights the Department grants to the Concessionaire hereunder, or any portion thereof, in each case against any Person claiming any interest adverse to the Department, the State or the Concessionaire in the Project or the Project Right of Way, or any portion thereof, except where such adverse interest arises as a result of the act or omission by the Concessionaire or any other Concessionaire Party in breach of the provisions of this Agreement or the negligence, misconduct or violation of Law by the Concessionaire or any other Concessionaire Party.

ARTICLE 4

GRANT OF PERMIT; TERM

Section 4.01 Grant of Permit

(a) Pursuant to the Act and subject to the terms and conditions of this Agreement, the Department grants to the Concessionaire the exclusive right, and the Concessionaire accepts the obligation (i) to finance, develop, design, construct, manage, operate and maintain the Project and (ii) to establish, impose, charge, collect, use and enforce payment of tolls and related charges (the “Permit”).

(b) The Department’s grant of the Permit pursuant to Section 4.01(a), and the Concessionaire’s obligations with respect thereto pursuant to Section 4.01(a), are conditional upon Financial Close having occurred in accordance with Section 7.03; *provided*, however, that portions of the Work may be performed by the Concessionaire prior to Financial Close pursuant to Section 8.02.

(c) In consideration of the Permit granted to the Concessionaire by the Department pursuant to this Section 4.01, the Concessionaire will perform the Work at its own expense except as otherwise provided herein and pay (to the extent required) to the Department the Assigned Gross Revenue and Refinancing Gain Share in accordance with the Assigned Gross Revenue and Refinancing Gain Share Calculation attached as Exhibit H; *provided*, however, that Refinancing Gains attributable to Planned Refinancings will not be subject to sharing under the Assigned Gross Revenue and Refinancing Gain Share Calculation.

(d) The Department shall have the right to dispute the Concessionaire’s calculation of the Assigned Gross Revenue and Refinancing Gain Share or to request additional information, clarification or amendment of such calculation, at any time for a period of 60 days following the submission of any data furnished pursuant to the Assigned Gross Revenue and Refinancing Gain Share Calculation. The Concessionaire shall deliver to the Department such information, clarification or amendment within 30 Days following the delivery of the Department’s request. If the Department does not agree with the calculation of the Assigned Gross Revenue and Refinancing Gain Share, the Dispute shall be resolved according to the dispute resolution procedures described in Article 21.

(e) The Concessionaire’s obligations to pay the Assigned Gross Revenue and Refinancing Gain Share shall survive the expiration of the Term.

Section 4.02 Term

(a) Term. This Agreement will take effect on the Agreement Date and will remain in effect until the first to occur of (i) the 58th anniversary of the Financial Close Date or (ii) the effective date of termination of this Agreement pursuant to Article 20 (such period, the “Term”).

(b) Extension of the Term for Certain Delay Events.

(i) The Concessionaire will be entitled to an extension of the Term for the following Delay Events; *provided however*, that as a condition precedent to such extension, the Concessionaire complies with the notice and claims submission requirements in Article 13:

(A) a Delay Event that delays the Scheduled Tolling and O&M Commencement Date of the Existing Project Assets; or

(B) a Delay Event occurring prior to Substantial Completion of the New Project Assets that delays the Design-Build Work for the New Project Assets.

(ii) Any extension of the Term will be limited to the extra period of time reasonably required to recover from the impact of the loss of Toll Revenues attributable to such Delay Event, minus any cost-savings realized by the Concessionaire due to such Delay Event. Notwithstanding the foregoing, to the extent a Delay Event identified in Section 4.02(b)(i) is also a Compensation Event that entitles the Concessionaire to recover a Net Revenue Impact as part of Concessionaire Damages, the Concessionaire will not be entitled to an extension of the Term for such Delay Event.

ARTICLE 5

TOLLING

Section 5.01 Tolling of the Project

(a) Toll Revenues.

(i) From and after the Tolling and O&M Work Commencement Date for each Project Asset and continuing during the Term, the Concessionaire will have the exclusive right to impose, charge, collect, use and enforce the collection and payment of the Toll Revenues, in accordance with the terms of this Agreement. The Concessionaire will have no right to charge or collect the Toll Revenues, except as expressly authorized by this Agreement. Except as otherwise provided in this Agreement, beginning on the Tolling and O&M Work Commencement Date for each Project Asset and through the end of the Term, the Concessionaire will have the exclusive right, title, entitlement and interest in and to the Toll Revenues for such

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Project Asset, subject to the provisions of the Electronic Toll Collection Agreement, a form of which is attached as Exhibit I.

(ii) The Concessionaire acknowledges and agrees that it will not be entitled to receive from the Department any compensation, return on investment or other profit for providing the services contemplated by this Agreement and the other Project Agreements, other than the Public Funds Amount and other payments to the extent and in the manner specified in this Agreement.

(b) Concerning Tolls. The Concessionaire's rights under Section 5.01(a) are limited by, and conditioned on, compliance with Law and all other provisions in this Agreement, including the following provisions:

(i) subject to Section 33.1-252 of the Code of Virginia, vehicles exempted from tolls thereunder ("Exempt Vehicles");

(ii) vehicles (other than vehicles referred to in Section 5.01(b)(i)) will be entitled to use the Project subject to payment of the applicable tolls;

(iii) the toll rates will be set in accordance with the Toll Rate Schedule attached as Exhibit J; and

(iv) the Concessionaire may charge, debit and collect tolls through open road tolling facilities that comply with Section 5.04 or use remote sensing or other technologies (including global positioning system technology) which must be interoperable with E-ZPass (or any successor to E-ZPass utilized on State Highways at that time) to charge, debit, and collect tolls for actual vehicular use of the Project.

(c) Incidental Charges. Except with respect to Exempt Vehicles, the foregoing authorization to impose, charge, collect and enforce the payment of tolls includes the right, to the extent permitted by Law, and subject to the requirement to be interoperable with the E-ZPass network (and any successor to E-ZPass utilized on State Highways at that time) as set forth in Section 5.01(d), to impose, charge, collect and enforce, with respect to electronic tolling accounts managed by or on behalf of the Concessionaire, the following incidental charges:

(i) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable administrative fees for account maintenance, account statements and customer service;

(ii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable amounts for the purchase or rental of transponders or other electronic tolling devices;

(iii) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable, refundable security deposits for the distribution of transponders or other electronic toll devices;

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(iv) except to the extent that such services are provided by the Department pursuant to the Electronic Toll Collection Agreement, reasonable video surcharges for permitted travel on the Project by vehicles that are not equipped with a transponder or other available equipment allowing the processing of the applicable tolls through the E-ZPass network (or any successor to E-ZPass utilized on State Highways at that time);

(v) reasonable fees, penalties and interest for toll violations, including costs of collection in accordance with Law; and

(vi) other incidental fees and charges reasonable and customary in connection with the services being provided at that time by the Concessionaire; *provided*, that the amount of any such other incidental fees and charges will not exceed the amount reasonably necessary for the Concessionaire to recover its reasonable out-of-pocket and documented costs and expenses incurred with respect to the items, services and work for which they are levied.

(d) Interoperability. From and after the Tolling and O&M Work Commencement Date for each Project Asset and through the end of the Term, the Concessionaire will operate and maintain a toll collection system with respect to such Project Asset which will be interoperable with the E-ZPass network and any successor to E-ZPass utilized on State Highways at that time. If the Department (or its successor) intends to change any State interoperability or compatibility standards, requirements or protocols for toll collection systems, it will endeavor to coordinate with the Concessionaire prior to the implementation of such change so as to minimize the loss of Toll Revenues, disruption and cost to the Concessionaire, but the Department will not be liable in any event for any loss of Gross Revenues, disruption or cost attributable to such change. If the Concessionaire selects an ETTM System other than the system then utilized on other State Highways, it will coordinate with the Department prior to the implementation or any change of such system to ensure interoperability and compatibility with the system then utilized on other State Highways in accordance with the Technical Requirements.

(e) Toll Collection Administration. The Concessionaire will be responsible for all toll transaction account management services; *provided*, however, that the Concessionaire will engage and contract with the Department for the provision of toll transaction account management services in accordance with and for the initial term set forth in the Electronic Toll Collection Agreement in which the Department will perform back-office, customer service and related activities for the Project as it relates to transactions processed through the E-ZPass network (and any successor to E-ZPass utilized on State Highways at that time). In consideration of such services the Concessionaire will pay the Department its customary charges for such services in effect from time to time in accordance with the Electronic Toll Collection Agreement. The Electronic Toll Collection Agreement is subject to renewal pursuant to the terms thereof.

(f) Violations Processing Services.

(i) The Department has implemented and maintains a processing system for the enforcement of penalties for toll violations in Virginia for electronic toll collection

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systems on State Highways. The Concessionaire may, but is not obligated to, enter into an agreement with the Department to obtain the benefits of such enforcement system, in accordance with the Violations Processing Services Agreement, a form of which is attached as Exhibit K. In consideration of such services, the Concessionaire will pay the Department its customary charges for such services in effect from time to time. For purposes of identifying and apprehending toll violators of the Project, provided it is authorized under Law, and any applicable agreements or arrangements, the Department will make available to the Concessionaire the benefits of any agreements or arrangements which the Department has in place with other state authorities or agencies that provide access to records in their possession relating to vehicle and vehicle owner data, and will coordinate with the Virginia State Police in accordance with Section 9.06(a) with respect to the provision of policing services, emergency services, traffic patrol and traffic law enforcement services on the Project.

(ii) The Concessionaire understands and agrees that, notwithstanding anything to the contrary in this Agreement or any other Project Agreement, the risk of enforcement and collection of tolls and related charges (including user fees and civil penalties and administrative fees) remains with the Concessionaire, and that the Department does not, and will not be deemed to, guarantee collection or collectability of such tolls and related charges to the Concessionaire or any other Person; *provided*, however, that the foregoing will not limit the Department's obligations or duties under the Electronic Toll Collection Agreement or any other Project Agreement with the Concessionaire.

(iii) While the parties do not anticipate that the Virginia Department of Motor Vehicles will charge the Concessionaire a fee for license plate identification pursuant to the Concessionaire's violation processing services, in the event that the Virginia Department of Motor Vehicles does charge the Concessionaire a fee for license plate identification pursuant to the Concessionaire's violation processing services, the Department agrees to pay the Concessionaire the amount of such fees charged to the Concessionaire by the Department of Motor Vehicles related to the collection of tolls for the Project. Prior to the payment by the Department of such amounts, the Concessionaire will submit to the Department on a monthly basis an invoice to the Department for such fees paid by the Concessionaire, including supporting documentation.

(g) No Continuing Department Obligations. Nothing in this Agreement will obligate or be construed as obligating the Department, or any assignee thereof, to continue or cease collecting tolls after the end of the Term.

Section 5.02 Toll Rates

(a) The toll rates charged to each category of user will be set in accordance with the Toll Rate Schedule and any escalation thereof will comply with the provisions of the Toll Rate Schedule; *provided*, that the Concessionaire may adopt and implement discount programs and any other promotional incentives agreed upon in writing by the parties in advance of the

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implementation of such programs or incentives for different classes or groups of persons using the Project, subject to the provisions of Section 24.01.

(b) The Concessionaire will provide to the Department at least 60 Days prior notice of any planned toll rate adjustment (other than in connection with any temporary promotions, incentives or other discounts agreed by the parties pursuant to Section 5.02(a)). The Concessionaire will provide to the general public at least 45 Days prior notice of any planned toll rate adjustment, through website notice, notices published in newspapers of general circulation in the areas where the Project is located, and through other reasonable means; *provided*, however, that the expiration of any temporary promotions, incentives or other discounts will not constitute a planned rate adjustment subject to the foregoing 45-Day notice requirement. No increase in toll rates otherwise authorized hereunder may take effect unless the Concessionaire has complied with this Section 5.02(b).

Section 5.03 Changes in User Classifications

(a) The Concessionaire may not change, add to or delete any of the User Classifications without the Department's express prior written consent pursuant to this Section 5.03.

(b) If the Concessionaire desires to change, add to or delete any of the User Classifications, the Concessionaire will apply to the Department for permission to implement such change, addition or deletion at least 75 Days prior to the proposed effective date of such change. Such application will set forth:

- (i) each proposed change, addition or deletion;
- (ii) the date each change, addition or deletion will become effective;
- (iii) the length of time each change, addition or deletion will be in effect;
- (iv) the reason the Concessionaire requests each change, addition or deletion;
- (v) the effect each change, addition or deletion is likely to have upon users and traffic patterns;
- (vi) a proposed schedule of toll rates reflecting each change, addition or deletion;
- (vii) a comprehensive report and analysis of the effect each change, addition or deletion is anticipated to have on the Equity IRR, including the effects on the Base Case Financial Model and on the assumptions and data therein; and
- (viii) such other information and data as the Department may reasonably request.

(c) The Concessionaire's application will be deemed granted without conditions unless within 30 Days after receipt of a completed application the Department advises the

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Concessionaire in writing that it has granted the Concessionaire's application with conditions or denied the Concessionaire's application. The Department may deny an application or impose conditions in its reasonable discretion, including conditioning approval on adjustment of compensation for the Department pursuant to this Agreement. Without limiting the Department's discretion, the following matters will be grounds for rejection:

- (i) the proposals set forth in the application are not reasonable under the circumstances;
- (ii) the supporting documentation is erroneous, incomplete, inconsistent, inaccurate or deficient, or is insufficient to support the proposal; or
- (iii) the assumptions of projections set forth in the application are unrealistic.

If the Concessionaire resubmits an application after rejection or imposition of conditions, the above procedures will apply to the resubmitted application.

(d) If the Concessionaire's application is deemed granted without conditions or is granted subject to conditions acceptable to the Concessionaire, then:

- (i) the Concessionaire may implement such change in User Classifications on the effective date set forth in the application, subject to such conditions, if any, imposed by the Department, and subject to first giving notice to the public of the change, addition or deletion in the same manner as a planned toll rate adjustment pursuant to Section 5.02(b); and
- (ii) the parties will promptly amend (A) the Toll Rate Schedule to incorporate the change, addition or deletion and (B) this Agreement as necessary in accordance with the accepted conditions.

Section 5.04 User Confidentiality

The Concessionaire will comply with all Laws related to confidentiality and privacy of users of the Project.

Section 5.05 Suspension of Tolls

(a) In addition to its rights under Law, the Department will have the right, in its sole discretion, to order immediate suspension of tolling in the event that any of the Project Assets are designated for immediate use as follows:

- (i) as an emergency mass evacuation route based on a declared emergency issued pursuant to Law and tolling has been suspended on other tolled roadways operated by or on behalf of Department within the evacuation route that are being used as emergency mass evacuation routes; or
- (ii) as the alternate route for the diversion of traffic from another State Highway temporarily closed to all lanes in one or both directions due to: (A) a declared

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emergency issued pursuant to Law or (B) a significant incident involving one or more casualties requiring hospitalization or treatment by a medical professional or one or more fatalities on the affected State Highway from which such traffic is diverted; *provided*, that suspension of tolls will be limited to the lanes in the direction of the diversion.

(b) The Department will lift any such order given in accordance with Section 5.05(a) as soon as the need for such order ceases. The Department will have no liability to the Concessionaire for the loss of Toll Revenues or the increase in costs or expenses attributable to any such order, and any such increase will be the Concessionaire's sole financial risk; *provided*, that with respect to Section 5.05(a)(i), the Department lifts the suspension order over the Project concurrently with the lifting of suspension over all other tolled roadways operated by or on behalf of the Department within the evacuation route.

(c) Each party will provide reasonable assistance to the other party in seeking any available reimbursement from Federal sources for lost Toll Revenues and expenses incurred as a result of a suspension and in pursuing insurance coverage.

Section 5.06 Disposition of Gross Revenues

(a) Gross Revenues will be used first to pay all due and payable operations and maintenance costs, specifically including all amounts due to the Department pursuant to this Agreement (which amounts will be paid on a *pari passu* basis with all other operations and maintenance costs), before they may be used and applied for any other purpose.

(b) The Concessionaire will not use Gross Revenues to make any Distributions (or to pay any amount payable pursuant to an Affiliate Contract subject to approval but not approved by the Department pursuant to Section 24.02(k)), unless and until the Concessionaire first pays the following:

(i) any undisputed amounts due to the Department pursuant to the terms of this Agreement;

(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(k));

(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, the Handback Reserve Fund and any other reserve contemplated by this Agreement; and

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- (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

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.

Section 5.08 Value Pricing Pilot Program Compliance

(a) The Department will comply with its obligations to FHWA under Section 1012(b) of the Intermodal Surface Transportation Efficiency Act of 1991, as amended by Section 1216(a) of the Transportation Equity Act for the 21st Century, and Section 1604(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (collectively, "Value Pricing Pilot Program"), and has entered into the Cooperative Agreement with FHWA.

(b) The Concessionaire will maintain and operate the Project in compliance with the Value Pricing Pilot Program, successor provisions, regulations promulgated thereunder, and the Cooperative Agreement attached as Exhibit L. The Concessionaire will assist the Department with respect to the Department's auditing and monitoring obligations under the Value Pricing Pilot Program and the Cooperative Agreement by providing access to records and data relating to the Project.

ARTICLE 6

BASE CASE FINANCIAL MODEL

Section 6.01 Initial Base Case Financial Model and Base Case Financial Model

(a) The Concessionaire and the Department agree to the composition of the Initial Base Case Financial Model and the Initial Refinancing Case Model as of the Agreement Date, which are included in the Escrow Documents and which will be deposited with the Escrow Agent as described in Section 18.05.

(b) The Initial Base Case Financial Model will be updated upon Financial Close to reflect the actual amounts of each type of Concessionaire Debt and Committed Investments issued or committed at Financial Close and any adjustment to the Public Funds Amount as of Financial Close and Projected Refinancings assumed in the Initial Refinancing Case Financial Model, and such update will become the Base Case Financial Model.

(c) The Concessionaire will not cause (or permit any other Person to cause) the Initial Base Case Financial Model or the Base Case Financial Model to contain any hidden data. The Concessionaire will furnish to the Department any password or other access rights for each of the Initial Base Case Financial Model and the Base Case Financial Model.

Section 6.02 Base Case Financial Model Updates

(a) Other than in accordance with the terms of this Agreement, in no event will the Base Case Financial Model or any Base Case Financial Model Update be changed, except with the prior written approval of both the Department and the Concessionaire. Further, the Concessionaire will not cause (or permit any other Person to cause) the Base Case Financial Model Update to contain any hidden data. The Concessionaire will furnish to the Department any password or other access rights for the Base Case Financial Model Update.

(b) Upon the occurrence of the following events, the Concessionaire will provide to the Department a proposed Base Case Financial Model Update, which will (except as otherwise agreed by the parties) include new projections and calculations, which will set forth the impact of the event:

- (i) upon submission of a notice of a Refinancing under Section 7.05(a);
- (ii) within 60 Days after the determination of a Delay Event that extends any Design-Build Work Deadline or extends the Term;
- (iii) within 60 Days after the determination of Concessionaire Damages due to occurrence of a Compensation Event; and
- (iv) within 60 Days after the parties agree that any amendments to this Agreement have had or will have a material effect on future costs or Gross Revenues.

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(c) Within 120 Days following the end of each calendar year, the most recent undisputed Base Case Financial Model Update (or, if there has been no undisputed Base Case Financial Model Update, the Base Case Financial Model) will be updated to reflect audited historical cash flows for the most recently audited calendar year; *provided*, however, such Base Case Financial Model Update will not: (i) include changes in Financial Model Formulas, (ii) include changes in forecast cash flows or (iii) allow such historical information to flow through the Financial Model Formulas.

Section 6.03 Financial Model Disputes

(a) The Department will have the right to dispute any proposed Base Case Financial Model or Base Case Financial Model Update. Within 21 Days after receipt, the Department will accept or dispute a proposed Base Case Financial Model or Base Case Financial Model Update (as applicable) and, if it disputes a proposed Base Case Financial Model or Base Case Financial Model Update (as applicable), specifying its reasons for such dispute in sufficient detail to enable the Concessionaire to correct the errors or deficiencies. To the extent that the Concessionaire and the Department cannot agree on the changes within 45 Days of the Concessionaire delivering the proposed Base Case Financial Model or Base Case Financial Model Update (as applicable) to the Department, the Dispute will be resolved in accordance with the dispute resolution procedures described in Article 21.

(b) In the event of a Dispute, the Initial Base Case Financial Model or the immediately preceding Base Case Financial Model Update (as applicable) that is not being disputed (or, if there has been no undisputed Base Case Financial Model Update, the Base Case Financial Model) will remain in effect until such Dispute is resolved or a new Base Case Financial Model Update is issued and not disputed. If a proposed Base Case Financial Model or Base Case Financial Model Update (as applicable) has not been disputed, or if any such Dispute has been so resolved, the proposed Base Case Financial Model or Base Case Financial Model Update (as applicable) will serve as the Base Case Financial Model or the current Base Case Financial Model Update (as applicable) and will be submitted to the Escrow Agent in accordance with Section 18.05(d).

Section 6.04 Auditor of Financial Model

(a) Within ten Days after any change to the Financial Model Formulas as a result of a proposed Base Case Financial Model Update pursuant to Section 6.02(b)(ii) through (iv), the Concessionaire will deliver to the Department an audit report and opinion of the Financial Model Auditor to the effect that the Financial Model Formulas reflect the terms of this Agreement and are suitable for use herein in connection with Compensation Events, Delay Events and early termination procedures, and covering such other matters as may be reasonably requested by the Department, all in form and substance acceptable to the Department. With respect to any change to Financial Model Formulas as a result of a proposed Base Case Financial Model Update due to a proposed Refinancing, such audit report and opinion will be delivered to the Department no later than seven Days prior to the proposed date of a Refinancing,

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(b) Copies of the audit reports and opinions delivered by the Financial Model Auditor will be addressed to the Department, and the Department will be expressly identified therein as an entity entitled to rely upon such audit.

(c) The Concessionaire will pay the fees and expenses of the Financial Model Auditor.

ARTICLE 7

**PROJECT FINANCING; FINANCIAL CLOSE; LENDER RIGHTS AND REMEDIES;
REFINANCING**

**Section 7.01 Concessionaire Responsibility for Project Financing; No
Department Liability for Concessionaire Debt**

(a) The Concessionaire is solely responsible for obtaining and repaying all financing, at its own cost and risk and without recourse to any State Party, necessary to develop, design, construct, maintain and operate the Project and any Concessionaire Project Enhancement.

(b) Each bond or promissory note evidencing Concessionaire Debt must include a conspicuous recital on its face to the effect that payment of the principal thereof and interest thereon does not constitute a claim against the Department's fee simple title to or other good and valid real property interest in the Project, the Project Right of Way, the Department's interest hereunder or its interest and estate in and to the Project or any part thereof, is not an obligation of any State Party, moral or otherwise, and neither the full faith and credit nor the taxing power of any State Party is pledged to the payment of the principal thereof and interest thereon.

(c) No State Party will have any liability whatsoever for payment of the principal sum of any Concessionaire Debt, any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project, or any interest accrued thereon or any other sum secured by or accruing under any Financing Assignment. The Department's review of any Financing Assignments or other project financing documents is not:

(i) a guarantee or endorsement of the Concessionaire Debt, any other obligations issued or incurred by the Concessionaire in connection with this Agreement, the Project, the Base Case Financial Model or any traffic and revenue study; nor

(ii) a representation, warranty or other assurance as to (A) the ability of the Concessionaire to perform its obligations with respect to the Concessionaire Debt or any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project or (B) the adequacy of the Gross Revenues to provide for payment of the Concessionaire Debt or any other obligations issued or incurred by the Concessionaire in connection with this Agreement or the Project.

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Section 7.02 Public Funds

The Department will make payments of the Public Funds Amount to the Concessionaire in accordance with the terms set forth in the Public Funds Amount Payment Terms attached as Exhibit M. The Public Funds Amount will be (a) decreased by any amounts paid by the Department to the Concessionaire prior to the Financial Close Date for Early Work and (b) adjusted pursuant Section 7.03(b).

Section 7.03 Financial Close

(a) Conditions for Financial Close. Except to the extent permitted in writing by the Department, Financial Close will only be achieved once all of the following conditions precedent are satisfied:

(i) the Concessionaire has provided the Department: (A) a list of and proposed initial drafts of the Initial Project Financing Agreements and Financing Assignments and (B) a proposed initial draft of the Base Case Financial Model reflecting any changes in financing from the Initial Base Case Financial Model, contemporaneously with the distribution of such drafts to the Lenders and other parties to Financial Close for the Department's review and comment, and has included the Department on all subsequent distributions of such drafts to the Lenders and other parties to Financial Close up and until the Concessionaire has furnished the proposed final drafts pursuant to Section 7.03(a)(ii);

(ii) the Concessionaire has provided the Department: (A) proposed final drafts of the Initial Project Financing Agreements and Financing Assignments and (B) a proposed final draft of the Base Case Financial Model reflecting any changes in financing from the Initial Base Case Financial Model, contemporaneously with the distribution of such final drafts to the Lenders and other parties to Financial Close at least 10 Days prior to the scheduled Financial Close Date for the Department's review and comment, and has included the Department on all subsequent distributions of such final drafts to the Lenders and other parties to Financial Close up and until Financial Close;

(iii) the Concessionaire has provided the Department the Base Case Financial Model and an update of the audit report and opinion delivered pursuant to Section 23.02(m) for such Base Case Financial Model;

(iv) the Concessionaire has provided the Department true and complete copies of the executed Initial Project Financing Agreements and Financing Assignments;

(v) the Concessionaire has provided the Department true and complete copies of the agreements executed by each Equity Member reflecting the commitment of such Equity Member to provide the equity funds reflected in the Base Case Financial Model which are required for meeting its obligations related to the Project;

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(vi) the Concessionaire has provided the Department evidence, satisfactory to the Department, that all conditions precedent required for Financial Close to the availability and utilization of Concessionaire Debt have been satisfied in full;

(vii) if utilized, the Concessionaire has caused the PABs Issuer to issue the PABs as provided by and in accordance with the Initial Project Financing Agreements and has made a Financing Assignment with respect to the PABs as described in the Initial Project Financing Agreements;

(viii) the Concessionaire has delivered to the Department certificates, as may be reasonably requested by the Department, certifying as to the Concessionaire's compliance with the terms and conditions of this Agreement, the satisfaction of the conditions precedent to Financial Close, and the validity of the Concessionaire's representations and warranties set forth in Section 23.02;

(ix) the Concessionaire has delivered executed copies of the Equity Funding Agreements and Equity Letters of Credit;

(x) the Department has received the following documents executed by the Concessionaire and/or the Collateral Agent, as applicable:

(A) Electronic Toll Collection Agreement, substantially in the form of Exhibit I;

(B) Violations Processing Services Agreement, substantially in the form attached as Exhibit K; and

(C) Direct Agreement, substantially in the form attached as Exhibit N;
and

(xi) the Department has received copies of the following executed documents:

(A) Design-Build Contract;

(B) Design-Build Work Guarantee; and

(C) Design-Build Letter of Credit, substantially in the form attached as Exhibit G.

Provided that the Concessionaire has satisfied all conditions precedent (or the Department, in its sole discretion, has waived any such conditions) identified in this Section 7.03(a), the Department will issue a certificate on the Financial Close Date confirming that all conditions precedent have been satisfied.

(b) Interest Rate and TIFIA Credit Assistance Protection. If the Concessionaire has not entered into the Initial Project Financing Agreement as of the Agreement Date, the following provisions will apply:

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(i) Subject to the Department’s right to terminate pursuant to Section 20.04(b)(i), for each type and corresponding amount of Concessionaire Debt and the amount of TIFIA credit assistance included in the Initial Base Case Financial Model, the Department will bear the risk and have the benefit of changes in the Benchmark Interest Rates and the Benchmark TIFIA Credit Assistance Amount (either positive or negative) for the period beginning on the Agreement Date and ending at 10:00 a.m. on the Financial Close Date;

(ii) the adjustment to the Public Funds Amount will be based on the movement, if any, in the Benchmark Interest Rates between the Agreement Date and the Financial Close Date, the change in the Benchmark TIFIA Credit Assistance Amount between the Agreement Date and the Financial Close Date, and the all in cost of borrowing of funds to replace a decrease in the Benchmark TIFIA Credit Assistance Amount or a reduction in the all in cost of borrowing of funds projected to be borrowed in the Initial Base Case Financial Model, but replaced by funds available as a result of an increase in the Benchmark TIFIA Credit Assistance Amount;

(iii) based on a reading taken from the sources identified in the definition of Benchmark Interest Rates as of the date determined in Section 7.03(b)(i) for each type and corresponding amount of Concessionaire Debt included in the Initial Base Case Financial Model and on the amount of TIFIA credit assistance in the Initial Project Financing Agreements, the Concessionaire and the Department will adjust the Initial Base Case Financial Model on the Financial Close Date to reflect the changes (if any) in the Benchmark Interest Rates and the Benchmark TIFIA Credit Assistance Amount;

(iv) in the event the amount of TIFIA credit assistance as of the Financial Close Date is lower than the Benchmark TIFIA Credit Assistance Amount (“TIFIA Shortfall Amount”), the Concessionaire will use its commercially reasonable efforts to fund the TIFIA Shortfall Amount by raising additional Concessionaire Debt and Committed Investments pursuant to the Initial Base Case Financial Model; *provided*, that to the extent the Concessionaire is unable to raise additional Concessionaire Debt and Committed Investments to fund the entire amount of TIFIA Shortfall Amount, the Public Funds Amount will be increased to fund the TIFIA Shortfall Amount; and

(v) the Department and the Concessionaire will use the Initial Base Case Financial Model, as so adjusted, to calculate the change, positive or negative, in the Public Funds Amount, and will apply such change using the following protocol: (1) adjust the Initial Base Case Financial Model by updating the Benchmark Interest Rates as of the Financial Close Date and calculating the adjustment to the Public Funds Amount such that the Equity IRR is equal to the Initial Equity IRR; and (2) thereafter, if the amount of TIFIA credit assistance is different compared to the Benchmark TIFIA Credit Assistance Amount, further adjust the Initial Base Case Financial Model by (A) updating for the amount of Concessionaire Debt that was expected to be issued if TIFIA credit assistance equal to the Benchmark TIFIA Credit Assistance Amount had been made available and observing the resulting Equity IRR (“Adjusted Initial Equity IRR”) and (B) further updating for the actual amounts of each type of Concessionaire

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Debt and Committed Investments issued or committed at Financial Close and calculating the adjustment to the Public Funds Amount such that the Equity IRR is equal to the Adjusted Initial Equity IRR; *provided*, however, that in no event will a change in the Public Funds Amount result in an adjusted Public Funds Amount that is less than the Minimum Adjusted Public Funds Amount. For the avoidance of doubt, the Initial Base Case Financial Model used to calculate the adjustment in the Public Funds Amount will be adjusted solely as set forth in this Section 7.03(b) and will not be adjusted for other revised projections and calculations or the terms and conditions included in the Initial Project Financing Agreements.

(c) Financial Close Deadline. In the event Financial Close is not achieved by the Financial Close Deadline, either party may terminate this Agreement pursuant to Section 20.04.

(d) Reimbursements at Financial Close. On the Financial Close Date, the Concessionaire will receive amounts agreed to by the parties, from sources identified in the Base Case Financial Model, for the costs related to Project development that remain un-reimbursed as of the Financial Close Date and any amounts for Project development other than the Project Deliverables. Such costs will be specifically itemized and identified in the proposed draft Base Case Financial Model submitted to the Department in accordance with Section 7.03(a)(ii), and such costs will be updated for approval as a condition precedent to financial close.

(e) Closing Transcript. The Concessionaire agrees to provide the Department a complete transcript of all documents executed and delivered in connection with the execution of this Agreement and the Financial Close promptly following the Financial Close Date.

(f) Financial Closing Status Updates.

(i) During the period between the Agreement Date and Financial Close Date, the Concessionaire agrees to provide the Department with updates as may be reasonably requested by the Department, including supporting documentation on an Open Book Basis, regarding the status of the financing of the Project.

(ii) The Concessionaire agrees to provide the Department (A) complete and transparent information regarding the marketing and pricing of PABs, including, but not limited to, the provision to the Department of the PABs offering documentation as it is developed and (B) the ability to participate in the PABs marketing and pricing process, each in advance of the financial close of the PABs. Before proceeding to pricing and financial close of the PABs, the Concessionaire agrees to consult with the Department and take into account any reasonable opinion of the Department in respect of the commercial reasonableness of the expected final terms of the PABs, including, but not limited to, the expected price of the PABs and the projected change in the Public Funds Amount.

Section 7.04 Project Financing Agreements; Department's Rights and Protections

(a) From time to time during the Term, the Concessionaire has the right, at its sole cost and expense, to pledge, hypothecate or assign the Gross Revenues and the Concessionaire's Interest as security for any Concessionaire Debt, such debt to be issued on such terms and conditions as may be acceptable to any Lender and the Concessionaire, subject to the following terms and conditions (such pledge, hypothecation, assignment, or other security instrument, including the Initial Project Financing Agreements, being referred to in this Agreement as a "Financing Assignment"):

(i) no Person other than an Institutional Lender is entitled to the benefits and protections afforded by a Financing Assignment, except that lenders of Concessionaire Debt may be Persons other than Institutional Lenders so long as any Financing Assignment securing such Concessionaire Debt made by such Person is held by an Institutional Lender acting as Collateral Agent, and PABs may be issued, acquired and held by parties other than Institutional Lenders so long as an Institutional Lender acts as indenture trustee for the PABs;

(ii) no Financing Assignment will encumber less than the entire Concessionaire's Interest; *provided*, that the foregoing does not preclude subordinate Financing Assignments;

(iii) the Concessionaire is strictly prohibited from pledging or encumbering the Concessionaire's Interest, or any portion thereof, to secure any indebtedness, and no Financing Assignment will secure any indebtedness, (A) that is issued by any Person other than the Concessionaire, any special purpose company that directly or indirectly owns the Concessionaire and has no assets except as are directly related to the Project, or any special purpose subsidiary wholly owned by such company, or the PABs Issuer, or (B) the proceeds of which are used in whole or in part for any purpose other than the Project Purposes or any other purpose permitted in Section 7.04(a)(xiv);

(iv) no Financing Assignment or other instrument purporting to mortgage, pledge, encumber, or create a Lien on or against the Concessionaire's Interest will extend to or affect the Department's fee simple title to or other property interest and estate in and to the Project, the Project Right of Way or any interest of the Department hereunder or any part thereof;

(v) any number of permitted Financing Assignments may be outstanding at any one time, and any Financing Assignment permitted hereunder may secure two or more separate loans from two or more separate Lenders; *provided*, that each such loan and the Financing Assignment securing the same complies with the provisions of this Article 7;

(vi) the Department will not have any obligation to any Lender or Collateral Agent pursuant hereto, except as expressly set forth in this Article 7 or in any other instrument or agreement signed by the Department in favor of such Lender or

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Collateral Agent and unless the Concessionaire and/or the Collateral Agent have notified the Department of the existence of such Financing Assignment;

(vii) each Financing Assignment will require that if the Concessionaire is in default under the Concessionaire Debt secured by the Financing Assignment or under the Financing Assignment and the Lender or Collateral Agent gives notice of such default to the Concessionaire, then the Collateral Agent will also give concurrent notice of such default to the Department. Each Financing Assignment also will require that the Collateral Agent deliver to the Department, concurrently with delivery to the Concessionaire or any other Person, every notice of election to sell, notice of sale or other notice required by Law or by the Financing Assignment in connection with the exercise of remedies under the Financing Assignment;

(viii) no Financing Assignment will grant to a Lender any right to apply funds in the Handback Reserve Fund or deposited with the Depository in accordance with Section 17.07, except for the express purposes for which the reserve or deposit is established;

(ix) each Financing Assignment will provide that the Concessionaire may, without condition or qualification, issue additional Concessionaire Debt, secured by the Concessionaire's Interest, for the limited purpose of funding Safety Compliance Orders; *provided*, that (1) the Lenders may limit such additional Concessionaire Debt if other funds are then available to the Concessionaire for the purpose of funding any such Safety Compliance Orders, and (2) the Lenders may impose reasonable, customary requirements as to performance and supervision of the work related to such Safety Compliance Order;

(x) each Financing Assignment will expressly state that the Collateral Agent and the Lenders will not name or join any State Party or any officer thereof in any legal proceeding seeking collection of the related debt or other obligations secured thereby or the foreclosure or other enforcement of the Financing Assignment except to the extent (A) joining the Department as a necessary party is required to give the court jurisdiction over the dispute with the Concessionaire and to enforce any Lender's remedies against the Concessionaire and (B) the complaint against the Department states no Claim against the Department for a Lien or security interest on, or to foreclose against, the Department's fee simple title to or other property interest and estate in and to the Project, the Project Right of Way or any interest of the Department hereunder, or any part thereof, or for any liability of the Department;

(xi) each Financing Assignment will expressly state that neither the Lenders nor the Collateral Agent will seek any damages or other amounts from the Department due to the Department's breach of this Agreement, whether for Concessionaire Debt or any other amount, except damages for a violation by the Department of its express obligations to Lenders set forth in this Article 7; *provided*, that the foregoing will not affect any rights or claims of a Lender as a successor to the Concessionaire's Interest by foreclosure or transfer in lieu of foreclosure;

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(xii) each Financing Assignment will expressly state that the Lenders and the Collateral Agent will respond to any request from the Department or the Concessionaire for consent to a modification or amendment of this Agreement within a reasonable period of time;

(xiii) no Financing Assignment may secure Concessionaire Debt that prohibits prepayment or defeasance; *provided*, that the foregoing does not preclude imposition of Breakage Costs in order to prepay or defease; and

(xiv) each Financing Assignment may only secure Concessionaire Debt that satisfies the requirements set forth in Section 7.01 and the proceeds of which are used exclusively for the purpose of (A) developing, designing, permitting, constructing, financing, maintaining, repairing, rehabilitating, renewing or operating the Project or any Project Enhancements or establishing or maintaining reserves in connection therewith, (B) paying reasonable fees, development costs and expenses incurred by the Concessionaire in connection with the execution of this Agreement and the Initial Project Financing Agreements and not otherwise reimbursed, (C) making Distributions, but only from the proceeds of any Refinancing permitted pursuant to Section 7.05, and (D) any Refinancing of pre-existing Concessionaire Debt that conforms to the provisions of this Section 7.04(a), including use of proceeds to pay the reasonable costs of closing the Refinancing (including Lender's fees, but excluding any amounts paid to Affiliates).

(b) The Department will have no obligation to join in, execute or guarantee any Financing Assignment.

(c) Notwithstanding the enforcement of any security interest created by a Financing Assignment, the Concessionaire will remain liable to the Department for the payment of all sums owing to the Department pursuant to this Agreement and the performance and observance of all of the Concessionaire's covenants and obligations pursuant to this Agreement.

(d) No Lender or Collateral Agent will, by virtue of its Financing Assignment, acquire any greater rights to or interest in the Project or Gross Revenues than the Concessionaire has at any applicable time pursuant to this Agreement, other than the provisions set forth in this Article 7 for the specific protection of the Lenders and the Collateral Agent.

(e) All rights acquired by the Lenders or the Collateral Agent under any Financing Assignment will be subject to the provisions of this Agreement and any Development Contract and to the rights of the Department hereunder and thereunder.

(f) No Financing Assignment will be binding upon the Department in the enforcement of its rights and remedies as provided herein and by Law, unless and until the Department has received a copy (certified as true and correct by the Collateral Agent or by the administrative agent identified in the Initial Project Financing Agreements) of the original thereof and a copy of a specimen bond, promissory note or other evidence of indebtedness (certified as true and correct by the Collateral Agent or by the administrative agent identified in the Initial Project Financing Agreements) secured by such Financing Assignment, together with

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written notice of the address of the Collateral Agent to which notices may be sent. If applicable, after the recordation or filing thereof, the Collateral Agent will provide to the Department a copy of the Financing Assignment bearing the date and instrument number or book and page of such recordation or filing. In the event of an assignment of any such Financing Assignment by the Collateral Agent, such assignment will not be binding upon the Department unless and until the Department has received a certified copy thereof, together with written notice of the assignee thereof to which notices may be sent (and the assignee will, if such assignment is required to be recorded, after such recordation deliver to the Department a copy thereof bearing the date and instrument number or book and page of such recordation).

(g) No Financing Assignment, including relating to any Refinancing, will be valid or effective, and no Lender will be entitled to the rights, benefits and protections of this Article 7, unless the Financing Assignment complies with this Section 7.04. If the Department has actual knowledge that any Financing Assignment or amendment thereto has been entered into and does not comply with this Section 7.04, then the Department will deliver a notice to the Collateral Agent, with a copy to the Concessionaire. Unless and until such non-compliance is remedied, the Financing Assignment will be neither valid nor effective, and the Lenders thereunder will be entitled to none of the rights, benefits, and protections of this Article 7.

(h) Each Financing Assignment will make the Department a third-party beneficiary to any provision thereof that creates or protects the rights and priorities of the Department to receive payments thereunder as provided for in this Agreement, including Section 5.06.

Section 7.05 Refinancing Requirements

(a) Notice of Refinancing. The Concessionaire will provide the Department written notice of a Refinancing 75 Days before the date of such Refinancing (or, if such advance notice is not reasonably possible under the circumstances, such notice as is possible and in any event with reasonable time for the Department to review and, if applicable, provide its consent for such Refinancing as contemplated below) and such notice will include a calculation of any anticipated Refinancing Gain (if any) and supporting documentation. At the Department's request, the Concessionaire will provide to the Department details of the proposed Refinancing, including (i) details of the changes, if any, proposed to the Financial Model Formulas, (ii) the proposed Base Case Financial Model Update, (iii) any material changes in the Concessionaire's obligations (including contingent obligations) to the Project Lenders, (iv) an outline detailing the changes and/or replacements, as the case may be, to the Project Financing Agreements then in effect and the Financing Assignments contemplated by the Refinancing, (v) a calculation of the anticipated Refinancing Gain and any Assigned Gross Revenue and Refinancing Gain Share generated from such Refinancing, in each case together with any supporting documentation, and (vi) any other details concerning the Refinancing that the Department may reasonably require to determine whether the Refinancing would, or could reasonably be expected to, have a material adverse effect on the Department, the Project or the ability of the Concessionaire to perform its obligations pursuant to this Agreement or any other Project Agreement, including details of any material changes in the Concessionaire's obligations (including, for the avoidance of doubt, contingent obligations) to the Lenders, and outline details of the changes and/or replacements, as

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the case may be, to the Initial Project Financing Agreements and Financing Assignments contemplated by the Refinancing.

(b) Project Financing Agreements Related to Refinancings.

(i) The Concessionaire will deliver to the Department for access and review, initial and subsequent drafts of all proposed Project Financing Agreements contemporaneously with the distribution of such drafts by and between the Concessionaire and the Lenders. The Department's consent, when applicable, will be given not less than five Days prior to the proposed date of the Refinancing; *provided*, however, that there are no material changes in the terms of the relevant Project Financing Agreements and that the Department has been given reasonable time to provide its review and/or approval in the event that written notice was not provided to Department 75 Days before the date of the Refinancing.

(ii) The Concessionaire will deliver, not later than 15 Days after close of the Refinancing, to the Department executed copies of all Project Financing Agreements in connection with the Refinancing.

(c) Department's Right to Approve Refinancing. Any Refinancing will require the Department's prior written approval; *provided*, however, that no such approval will be required if the Concessionaire demonstrates to the Department that the Refinancing will not increase the Department's liability upon a termination of this Agreement at any point in the Term above the level defined in the most recent Base Case Financial Model Update other than by the amount of reasonable costs and fees, as applicable, and one of the following applies:

(i) the proceeds of the Refinancing will be used exclusively to pay the costs of a Safety Compliance Order, a Department Change or a Department Project Enhancement;

(ii) the Refinancing constitutes a Rescue Refinancing;

(iii) the Refinancing constitutes a Planned Refinancing;

(iv) no proceeds of the Refinancing will be used to make distributions to equity or to pay non-capital costs and expenses (other than related costs of issuance and reserves);

(v) the Refinancing consists only of a change in taxation or a change in accounting treatment; or

(vi) the Refinancing consists of the exercise of rights, waivers, consents and similar actions in respect of the financing documents relating to day-to-day administrative and supervisory matters (including amendments to the financing documents, delays in providing information under the financing documents, restrictions imposed by Lenders in drawdown of funds, voting by the Lenders, a re-set of interest rates pursuant to the terms of the financing documents, any sale of equity

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interests in the Concessionaire, and the syndication or grant of participation by a Lender of its rights in the financing documents).

(d) Reimbursement of Department Expenses.

(i) In any Refinancing, the Concessionaire will reimburse the Department for the Department's reasonable documented expenses incurred related to the Refinancing at the time of the closing of the Refinancing. For any Refinancings that do not close, the Department will be reimbursed for its documented expenses for such Refinancings from and at the time of any subsequent successful Refinancings, and will be entitled to payment of interest on such expenses based on the Bank Rate calculated from the date that the Department first invoiced the Concessionaire for such expenses until paid by the Concessionaire.

(ii) The Department will provide the Concessionaire with an estimate of the expenses to be incurred by the Department related to the Refinancing not less than ten Days prior to the proposed date of the Refinancing.

(e) Other Requirements.

(i) Every Refinancing will be subject to the provisions of Section 7.01 and Section 7.03 and the other provisions of this Agreement pertaining to Concessionaire Debt and Financing Assignments.

(ii) Any reimbursement agreement and related documents that the Concessionaire enters into in connection with obtaining a letter of credit will, if they encumber the Concessionaire's Interest, constitute a Financing Assignment and be treated as a Refinancing for all purposes pursuant to this Agreement. No such reimbursement agreement and related documents will encumber less than the entire Concessionaire's Interest.

(iii) In connection with the consummation of any proposed Refinancing, the Department will, promptly upon the reasonable request of the Concessionaire or the Collateral Agent or any Lender and such requesting party's agreement to cover any costs incurred by the Department in connection with the requested action, review the Concessionaire's written analysis of whether the Department is required to approve such Refinancing pursuant to Section 7.05(c) and confirm whether the Department believes its approval is required for such Refinancing.

(iv) In connection with the Initial Project Financing or any Refinancing, the Department will, promptly upon the request of the Concessionaire or the Collateral Agent, execute, acknowledge and deliver to the Concessionaire, or any of the parties specified by the Concessionaire, standard consents or certificates with respect to the Agreement, which may be qualified by materiality and/or to the best of the knowledge and belief of a designated representative of the Department; *provided*, however, that such consents or certificates do not limit, restrict or prejudice the Department's rights under this Agreement or any other Project Agreement.

Section 7.06 Collateral Agent’s Rights

The Collateral Agent’s rights are set forth in the Direct Agreement.

ARTICLE 8

DESIGN AND CONSTRUCTION OF THE PROJECT

Section 8.01 General Obligations of the Concessionaire

(a) The Concessionaire will furnish all design, construction and other services, provide all materials, equipment and labor to perform the Work reasonably inferable from this Agreement and perform the Work in accordance with this Agreement.

(b) Except as otherwise expressly provided in this Agreement, the Department makes no warranties or representations as to any surveys, data, reports or other information provided by the Department or other Persons, including the data and other information set forth in the Baseline Asset Condition Report attached as Exhibit O, the Known Site Conditions Baseline Report attached as Exhibit P and the Known Pre-Existing Hazardous Substances Report attached as Exhibit Q concerning surface or subsurface conditions, the existing condition of the roadway and other Assets, drainage, the presence of Utilities, Hazardous Substances, contaminated ground water, archeological, paleontological and cultural resources, and endangered and threatened species, affecting the Project Right of Way or surrounding locations. The Concessionaire acknowledges that such information is for the Concessionaire’s reference only and has not been verified by the Department, and that the Concessionaire will be responsible for conducting all surveys, studies and assessments as it deems appropriate for the Project; *provided*, that the foregoing will not limit the Concessionaire’s rights with respect to Compensation Events and Delay Events.

(c) Except as otherwise expressly provided in this Agreement, the Concessionaire will bear the risk of all conditions occurring on, under or about the Project Right of Way on which the Work is performed, including:

- (i) physical conditions of an unusual nature that differ materially from those ordinarily encountered in the area;
- (ii) changes in surface topography;
- (iii) variations in subsurface moisture content;
- (iv) Utility facilities;
- (v) Hazardous Substances, including contaminated groundwater;
- (vi) any archeological, paleontological or cultural resources; and
- (vii) any species listed as threatened or endangered under Federal or State endangered species Law;

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provided, that the foregoing will not limit the Concessionaire’s rights with respect to Compensation Events and Delay Events.

(d) The Concessionaire will be responsible for coordinating and scheduling the Work with other separate contractors working in the Project Right of Way.

(e) The Concessionaire Representative and the Department Representative will be reasonably available to each other and will have the necessary authority, expertise and experience required to oversee and communicate with respect to the Work.

(f) Prior to and during the construction, the Concessionaire will provide information to the public concerning the Project, any Project Enhancements or any other construction activities in accordance with the Technical Requirements.

(g) The Concessionaire will prepare and submit to the Department for its review and approval the Project Development Plans in accordance with the requirements and times set forth in the Technical Requirements.

(h) The Concessionaire will not enter into any agreement with any Governmental Authority with jurisdiction over any Governmental Approval, Utility Owner, railroad, property owner or other third party having regulatory jurisdiction over any aspect of the Project or the Work or having any property interest affected by the Project or the Work that in any way purports to obligate the Department, or states or implies that the Department has an obligation, to the third party to carry out any activity during or after the end of the Term, unless the Department otherwise approves the same in writing in its sole discretion. Except in the case of an agreement approved by the Department pursuant to the preceding sentence, the Concessionaire has no power or authority to enter into any such agreement with a third party in the name or on behalf of the Department and the parties agree that any purported agreement to that effect will be null and void.

(i) The Concessionaire will be responsible for performing and completing all work that the Concessionaire is obligated to perform for or on behalf of third parties relating to the Project.

Section 8.02 Limited Notices to Proceed to Perform Certain Work and Completion of Early Work

(a) The Concessionaire may request that the Department issue one or more Limited Notices to Proceed authorizing the Concessionaire to commence certain portions of the Work as set forth in this Section 8.02. Prior to issuance of a LNTP, the parties will agree upon the conditions to the issuance of such LNTP, as well as the scope, schedule and payment terms (if applicable) for such portion of the Work. By way of illustration and not limitation, the Concessionaire may request that the Department issue one or more LNTPs to enable the Concessionaire to proceed with certain design and construction activities necessary for the design, construction, commissioning and operation of the tolling equipment and support facilities required for the Concessionaire to seek the Tolling and O&M Work Notice to Proceed.

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(b) The Concessionaire will deliver notice to the Department upon the satisfaction of the agreed conditions to the issuance of any LNTP and request that the Department issue such LNTP for the applicable portion of the Work. The Department will endeavor to respond to such request, within 21 Days following receipt of such request by the Department, by delivery to the Concessionaire of the applicable LNTP or notice of the conditions that the Department believes, in its reasonable discretion, to have not been satisfied; *provided*, that the Department’s review period for Developer’s re-submission of a previously submitted submittal will be ten Days. The Concessionaire will have a reasonable opportunity to address those deficiencies and re-submit a notice to the Department or, if the Concessionaire does not agree with the Department’s assessment, to refer the matter to the dispute resolution procedures pursuant to Article 21. If the Concessionaire has not received a response within such 21-Day period or ten-Day period, as applicable, such failure by the Department to respond will be deemed issuance of the applicable LNTP, but will not be deemed a waiver of the Department’s other rights or the Concessionaire’s other obligations, including compliance with Good Industry Practice, the Technical Requirements, Governmental Approvals and Law.

(c) To the extent any elements of the Early Work or payment therefor have not been completed or paid in full by the Department prior to the Agreement Date, the Concessionaire is authorized to complete such Early Work in accordance with this Agreement and payment therefor will be made under this Agreement (including for any such Early Work performed by the Concessionaire but not paid by the Department prior to the Agreement Date). Any Early Work performed prior to the Agreement Date shall, upon execution of this Agreement, be deemed to have been performed pursuant to, and subject to the terms and conditions of, this Agreement.

Section 8.03 Conditions Precedent for Notices to Proceed

(a) Notice to Proceed with Design Work. The Concessionaire will not commence any design Work except as authorized under an LNTP unless and until the Department determines that the following conditions have been satisfied (or that the Department will waive such conditions) and the Department has delivered notice to that effect to the Concessionaire (such notice being referred to as the “Design Work Notice to Proceed”):

(i) the Concessionaire will have delivered to the Department and obtained its approval of the schedule of submissions described in Section 8.04(b);

(ii) the Department has approved the following Project Development Plans: (A) Concessionaire Management Plan; (B) Document Management Plan; (C) Design Quality Management Plan; (D) Public Information and Communications Plan; and (E) DBE/SWaM Plan;

(iii) there exists no court order which restrains, enjoins, challenges or delays performance of the Work;

(iv) the Concessionaire certifies to the Department that all representations and warranties of the Concessionaire set forth in Section 23.02 remain true in all material respects;

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(v) the Concessionaire certifies to the Department that all insurance policies required under Section 17.01(a) for the Work, except with respect to the builder's risk insurance, have been obtained and will be in full force and effect, and in the case of Project-specific policies, the Concessionaire has delivered to the Department duplicate originals or copies thereof certified by the Concessionaire's insurance broker to be true and correct copies of the originals; and

(vi) there exists no Concessionaire Default for which the Concessionaire has received notice from the Department, and the Concessionaire certifies to the Department that there exists no condition, which with the lapse of time or delivery of notice to the Concessionaire, or both, would constitute a Concessionaire Default.

The delivery of the Design Work Notice to Proceed will not constitute authorization to commence construction activities.

(b) Notice to Proceed for Construction. In addition to the conditions set forth in Section 8.03(a), the Concessionaire will not commence construction of any Construction Segment unless and until the Department determines that the following conditions have been satisfied (or the Department, in its discretion, waives such conditions) for the applicable Construction Segment and has delivered notice to that effect to the Concessionaire (such notice being referred to as the "Construction Segment Notice to Proceed"):

(i) the Concessionaire has delivered to the Department correct and complete copies of all Design Public Hearing Documentation, ETM System Design Documentation, and Construction Documentation relating to the applicable Construction Segment pursuant to this Agreement and the Technical Requirements, and the Concessionaire has received from the Department any prior written approvals thereof required by this Agreement and Federal Requirements;

(ii) all Governmental Approvals (including any applicable Department approvals and Federal approvals and agreements) necessary for the construction of the applicable Construction Segment have been acquired (and copies provided to the Department), and the Concessionaire has satisfied all applicable pre-construction requirements of the Governmental Approvals;

(iii) all rights of access or other property rights necessary for the commencement of construction within the applicable portion of a Construction Segment have been obtained;

(iv) the Department has approved the following: (A) Baseline Schedule; (B) Construction Quality Management Plan; (C) Maintenance of Traffic Plan; (D) Environmental Management Plan; (E) ROW Acquisition and Relocation Plan; (F) Health, Safety and Security Plan; and (G) Utilities Plan;

(v) the builder's risk insurance policy required under Section 17.01(a) has been obtained and will be in full force and effect, and the Concessionaire has delivered

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to the Department a duplicate original or copy thereof certified by the Concessionaire's insurance broker to be a true and correct copy of the original; and

(vi) with respect to commencement of construction for the Existing Project Assets, the Department has approved the Rehabilitation Plan attached hereto as Exhibit R.

(c) The Concessionaire will deliver notice to the Department upon the satisfaction of the applicable conditions set forth in this Section 8.03 and request that the Department issue a Design Work Notice to Proceed or a Construction Segment Notice to Proceed. The Department will endeavor to respond to such request, within 21 Days following delivery of such request to the Department, by delivery to the Concessionaire of either the requested Design Work Notice to Proceed or Construction Segment Notice to Proceed, or notice of the conditions that the Department believes, in its reasonable discretion, to have not been satisfied. The Concessionaire will have a reasonable opportunity to address those deficiencies and re-submit a notice to the Department (*provided* that, upon any such resubmission in response to the Department's comments, the Department's review period will be ten Days) or, if the Concessionaire does not agree with the Department's assessment, to refer the matter to the dispute resolution procedures pursuant to Article 21. If the Concessionaire has not received a response within such 21-Day or ten-Day period, as applicable, such failure by the Department to respond will be deemed issuance of the Design Work Notice to Proceed or Construction Segment Notice to Proceed (as applicable), but will not be deemed a waiver of the Department's other rights or the Concessionaire's other obligations, including compliance with the Technical Requirements, Governmental Approvals and Law.

(d) The Department may waive any condition precedent set forth in Section 8.03(a) and Section 8.03(b); *provided*, that no person or entity will be entitled to assume that the Department will waive or refuse to waive any condition precedent in the absence of strict compliance therewith. Unless the Department waives in writing (as distinguished from a deemed waiver) a condition precedent that requires action by the Concessionaire to be satisfied, the Concessionaire will remain bound to use diligent efforts to satisfy the condition precedent.

Section 8.04 Design Work

(a) The Concessionaire will submit to the Department accurate and complete copies of all Design Documentation and Construction Documentation relating to the Work within three Days after such documentation is delivered by the Design-Build Contractor to the Concessionaire under the Design-Build Contract. If the Department determines that any submittal is not in compliance in any respect, the Department will be entitled to cease all further review of such submittal and will notify the Concessionaire with a description of such noncompliance together with its review comments. The Concessionaire will respond to all of the Department's comments and objections and make all modifications to the submittal necessary to bring such submittal into compliance with this Agreement and resubmit such documentation to the Department in accordance with the foregoing procedures. Such re-submittal will identify all changes to the prior submittal.

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(b) The Concessionaire will provide the Department with a schedule of its proposed submittals of Design Documentation and Construction Documentation (which schedule will be updated periodically as necessary) so as to facilitate the Department's coordination and review of such documents, and will complete quality control and quality assurance reviews of all Design Documentation and Construction Documentation to ensure that they are accurate and complete and comply with the requirements of this Agreement and the Technical Requirements prior to any submission to the Department.

(c) Whenever the Department is entitled to review and comment on, or to affirmatively approve the Design Documentation and Construction Documentation and other items submitted in accordance with this Agreement or the Technical Requirements, the Department will respond within 21 Days after the Department's acknowledgement of receipt. In the event that the Department fails to respond in 21 Days, such failure by the Department to respond will be deemed to be the Department's approval thereof, except to the extent that submittals deviate from the Technical Requirements, Governmental Approvals, or Law. Subject to Section 10.02(c), if the Department has responded, the Concessionaire will respond to all of the Department's comments and objections and, to the extent Department approval is required pursuant hereto, make modifications to the Design Documentation and Construction Documentation necessary to fully reflect and resolve all such comments and objections, and resubmit such documentation to the Department for its review and approval in accordance with the foregoing procedures (except that in the case of a resubmittal, the Department will have ten Days to respond, unless the Department notifies the Concessionaire within such ten Days that the Department has determined in its sole discretion that the resubmittal is of significant substance and requires the full 21-Day response period). The Concessionaire will give due consideration to the Department's suggested amendments and comments, but the Concessionaire will not be obligated to incorporate the Department's suggested amendments or comments unless they are necessary for such submittal to comply with the applicable requirements of this Agreement. Whenever the Department is required to respond to the Concessionaire's request for the Department's approval or consent pursuant to this Section 8.04 (whether or not failure to respond is deemed approval or consent), the Department will be deemed to have responded if it has notified the Concessionaire, within the applicable time period, that the Department requires additional time to obtain information or to perform reviews necessary or appropriate for a complete response.

(d) Failure to respond within the 21-Day time period will not constitute a deemed approval by the Department pursuant to Section 8.04(c) with respect to the Concessionaire's Right of Way Acquisition and Relocation Plan, Deviations pursuant to Section 14.03, or any other matter where the Department has sole discretion to approve or disapprove pursuant to this Agreement. Any failure of the Department to respond to the Concessionaire regarding the Department's approval of such documents or matters within 21 Days after delivery of the Concessionaire's request to the Department will be deemed disapproval by the Department. If the Department fails to respond within such 21 Days, the Department will notify the Concessionaire of the status of the review of such submittals upon the request of the Concessionaire.

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(e) On or about the time of the scheduled submissions that require the Department's review, comment or approval, the Concessionaire will meet with the Department and will identify during such meetings, among other things, the evolution of the design and any Deviations or other changes from any of the Technical Requirements, or, if applicable, previous design submissions. Minutes of the meetings will be maintained by the Concessionaire and provided to all attendees for review.

(f) Construction Documentation will set forth in detail drawings and specifications describing the requirements for construction of the Work, in full compliance with the Technical Requirements, Law and Governmental Approvals. The Construction Documentation will be consistent with the latest set of interim design submissions; as such submissions may have been modified in writing in a design review meeting or as otherwise agreed upon in writing, and will be submitted after Concessionaire has obtained all requisite Governmental Approvals associated with the Work contained in such documents.

(g) The Department's review, comment and/or approval of interim design submissions and the Construction Documentation are for the purpose of evaluating the Concessionaire's compliance with the requirements of this Agreement and will be performed in accordance with the terms of this Agreement.

(h) Following the Department's initial approval pursuant to this Section 8.04, the Concessionaire will have the right to amend, supplement or otherwise modify the Design Public Hearing Documentation, Design Documentation or the Construction Documentation or any part thereof, without the further approval of the Department; *provided*, that the Department's approval will be required with respect to amendments, supplements or modifications that (i) constitute a material change in the scope of the Work or Deviations from any of the Technical Requirements, (ii) result in increases in the time to complete the Work beyond the Guaranteed Substantial Completion Date, or (iii) except to the extent directly attributable to a Compensation Event, impose on the Department any new or increased costs, liabilities or obligations; *provided*, further, that the Concessionaire will provide the Department notice of all such proposed amendments, supplements and modifications regardless of whether the Department's consent is required and will reimburse the Department, upon demand, for all the Allocable Costs it incurs to review and consider such proposed amendments, supplements or modifications that are subject to the Department's approval.

(i) In the event the Concessionaire's design differs from the schematic upon which the NEPA Documents were based, as between the Department and the Concessionaire, the Concessionaire will be fully responsible for all necessary actions, and will bear all risk of delay (except to the extent resulting from Delay Events) and all risk of increased cost, resulting from or arising out of any associated change in the Project location and design, including (i) conducting all necessary environmental studies and preparing all necessary environmental documents in compliance with applicable Environmental Laws, (ii) obtaining and complying with all necessary new Governmental Approvals (including any modifications, renewals and extensions of the NEPA Documents and other existing Governmental Approvals) or third party approvals or agreements, and (iii) bearing all risk and cost of litigation. The foregoing provisions will not apply, however, in the case of a Department Change or Department Project Enhancement. The

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Department and FHWA will independently evaluate all environmental studies and documents and fulfill the other responsibilities assigned to them by 23 CFR Part 771; *provided*, that except in the case of a Compensation Event that results in a change in the Project location and design, the Concessionaire will fully reimburse the Department for the Allocable Costs it incurs to conduct further or supplemental environmental studies and to fulfill any other responsibilities assigned to it pursuant to 23 CFR Part 771.

Section 8.05 Acquisition of Project Right of Way; Utility Relocations; Railroad Easements; Virginia Ports Authority Lease

(a) Right of Way Acquisition Obligations. The Concessionaire will perform all Work related to the acquisition of Project Right of Way necessary for the construction of the Project including but not limited to all appraisals, appraisal reviews, negotiations with landowners and Utility Owners, relocation assistance and advisory services, and legal services. The Concessionaire will carry out such Work as follows:

(i) the Concessionaire will carry out the Work specified herein, in each case in accordance with the Technical Requirements and all applicable Federal and State Laws;

(ii) the Concessionaire will acquire all Project Right of Way in accordance with the Technical Requirements and Law, including but not limited to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (the “Uniform Act”) and Titles 25.1 and 33.1 of the Code of Virginia;

(iii) the Concessionaire will submit a Right of Way Acquisition Plan (as defined in the Technical Requirements) for the Department’s approval. The Right of Way Acquisition Plan will identify a schedule of right of way activities including the specific parcels to be acquired and all relocations. The Right of Way Acquisition Plan will allow for the orderly relocation of displaced persons based on time frames not less than those provided by the Uniform Act. In the event the Department fails to respond in 21 Days, such failure by the Department will not be deemed approval of the Right of Way Acquisition Plan. The Right of Way Acquisition Plan will be updated as necessary during the Term;

(iv) the Concessionaire will exercise due diligence and use reasonable care in determining whether property to be acquired may contain wastes or other materials or hazards requiring remedial action or treatment to the extent the Concessionaire has access to such property and will otherwise comply with the Technical Requirements, including the undertaking of studies, assessments and tests required by the Technical Requirements;

(v) the Concessionaire will make direct payments of benefits to property owners for negotiated settlements, relocation benefits, and payments to be deposited with the court; and

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(vi) the Concessionaire will prepare, obtain execution of, and record documents conveying title of the Project Right of Way to the State and deliver all executed and recorded general warranty deeds to the Department. For all property purchased in conjunction with the Project, title will be acquired in fee simple except as may be specifically agreed to by the Department.

(b) Condemnation. The Concessionaire will use its best efforts (i) to acquire the Project Right of Way by making *bona fide* efforts to purchase the Project Right of Way from the owners of the property for amounts not to exceed just compensation therefore and (ii) to settle claims with landowners amicably, each in accordance with Law. If, despite the Concessionaire's best efforts, it is unable to reach agreement with landowners within 45 Days of its initial offer, the Department will undertake any necessary condemnation proceedings. Prior to the Department filing a condemnation proceeding, the Concessionaire will prepare all necessary paperwork and supporting documentation required for the proceeding and it will deliver that documentation to the Department. The Department then will file the condemnation proceeding(s) and handle such proceeding(s) in accordance with the Technical Requirements.

(c) Property Outside the Project Right of Way. Except as provided in Section 8.05(f) or Section 8.05(g), the Concessionaire will be responsible, at its own cost and expense, for the acquisition of, or for causing the acquisition of, any property, temporary easements or other property rights outside of the Project Right of Way which may be necessary for any permanent or temporary works outside of the Project Right of Way, including those necessary to accommodate laydown, staging, drainage and other construction methods in connection with the construction of the Project, and for all facilities and improvements required for the opening and operation of the Project.

(d) ROW Acquisition Costs.

(i) Except as provided in this Section 8.05(d), Section 8.05(f), and Section 8.05(g), the Concessionaire will be responsible for performing all activities and services necessary for the acquisition of all Project Right of Way at its sole cost and expense.

(ii) Responsibility for ROW Acquisition Costs will be allocated between the parties as follows:

(A) ROW Acquisition Costs Overage.

(1) the Concessionaire will pay 100% of the ROW Acquisition Costs up to 110% of the ROW Baseline Cost;

(2) the Concessionaire and the Department each will pay 50% of the ROW Acquisition Costs in excess of 110% but less than or equal to 120% of the ROW Baseline Cost; and

(3) the Department will pay 100% of the ROW Costs in excess of 120% of the ROW Baseline Cost.

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(B) ROW Acquisition Costs Savings. To the extent that the ROW Acquisition Costs are less than the ROW Baseline Cost, the savings will be allocated between the parties as follows:

(1) the Concessionaire will retain 100% of the savings equal to or less than 10% of the ROW Baseline Cost;

(2) the Concessionaire will pay the Department 50% of the savings in excess of 10% but less than or equal to 20% of the ROW Baseline Cost; and

(3) the Concessionaire will pay the Department 100% of the savings that exceeds 20% of the ROW Baseline Cost.

(iii) The ROW Acquisition Costs for which the Department bears responsibility pursuant to Section 8.05(d)(ii)(A) will be paid by the Department to the Concessionaire, and savings to which the Department is entitled pursuant to Section 8.05(d)(ii)(B) will be paid by the Concessionaire to the Department, in each case no more than 30 Days after the date of determination thereof.

(e) Utility Relocations.

(i) The Concessionaire will perform all activities and services necessary for all Utility Relocations necessary to accommodate construction of the Project.

(ii) The Concessionaire will perform Utility Relocations in accordance with the Technical Requirements. Subject to Law, the Department will provide to the Concessionaire the benefit of any provisions in recorded Utility or other easements affecting the Project which require the easement holders to relocate at their expense and the Department will reasonably assist Concessionaire in obtaining the benefit of all rights the Department has under any Utility easement, permit, or other right in real property relating to Utility Relocations, it being understood that such assistance will not entail the initiation of or participation in legal actions or proceedings.

(f) Acquisition of Railroad Easements.

The Department will obtain, at the Department's sole cost and expense, any easements and other property rights necessary for the Work located on property owned by CSX Corporation and the Norfolk-Portsmouth Railroad Company, and facilitate the negotiation of a construction agreement between Concessionaire and CSX Corporation and the Norfolk-Portsmouth Railroad Company, respectively ("Railroad Easements"). Notwithstanding the foregoing, the Concessionaire will reimburse the Department for actual costs incurred by the Department in the Department's efforts to obtain such Railroad Easements, to the extent such costs are incurred by the Department as a result of any Concessionaire Party's misconduct, negligence or other culpable act, error or omission.

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(g) Lease of Virginia Port Authority Property. The Parties acknowledge that the Design-Build Contractor will be responsible for entering into the Virginia Port Authority Lease with the Virginia Port Authority in order to perform certain portions of the Work. In the event that the Concessionaire or the Design-Build Contractor is required to make payments to the Virginia Port Authority pursuant to the Virginia Port Authority Lease, the Department agrees to pay the Concessionaire the amount of such lease payments the Concessionaire or the Design-Build Contractor pays to the Virginia Port Authority pursuant to the Virginia Port Authority Lease. Prior to the payment by the Department of such amounts, the Concessionaire will submit to the Department on a monthly basis an invoice to the Department for such lease payments paid by the Concessionaire or the Design-Build Contractor, including supporting documentation. Notwithstanding the foregoing, the Department will not be liable for any lessee obligations pursuant to the Virginia Port Authority Lease, including, but not limited to, the cost of any improvements required to be performed by the Concessionaire or the Design-Build Contractor.

Section 8.06 Governmental Approvals

(a) The Concessionaire, at its sole cost and expense (except as otherwise provided herein), will obtain and maintain in full force and effect and comply with all Governmental Approvals necessary for the Work. Responsibility for and cost of obtaining Governmental Approvals necessitated by a Department Change or a Department Project Enhancement will be as specified in the accompanying Change Order.

(b) The Department will provide reasonable assistance and cooperation to the Concessionaire, as requested by the Concessionaire, in obtaining Governmental Approvals relating to the Project and any revisions, modifications, amendments, supplements, renewals, reevaluations and extensions of Governmental Approvals.

(c) Except as otherwise provided in this Agreement, the Department will not unreasonably withhold or delay any Governmental Approval for which it is the issuing Governmental Authority with respect to the design, construction, operation or maintenance of the Project or any Project Enhancement. For the avoidance of doubt, the provisions of this Section 8.06(c) are not intended to supersede any provision of this Agreement or any other Project Agreement providing for the conditions to or time of approval of any such Governmental Approval, or any express right of the Department to withhold consent in its sole discretion.

(d) The Concessionaire will at all times and at its sole cost and expense (except as set forth in this Section 8.06(d)) comply with the NEPA Documents, including, without limitation, compliance necessitated by a change in the base design of the Project. If supplements to the NEPA Documents or additional NEPA Documents are needed following the Agreement Date, the Department will prepare the necessary documentation using data and other information provided by the Concessionaire, and the Concessionaire will reimburse the Department for its reasonable, documented costs incurred in the preparation of such documentation; *provided*, that the Department will pay for supplements to the existing NEPA Documents or additional NEPA Documents necessitated by a Department Change or Department Project Enhancement and for the Allocable Costs incurred by the Concessionaire in providing data and information relating to such supplements.

Section 8.07 Construction Work and Project Schedule

(a) The Initial Baseline Schedule will be the basis for monitoring the Concessionaire's performance of the Work until such time as a Baseline Schedule has been approved by the Department in accordance with the Technical Requirements.

(b) The Concessionaire and the Department will conduct monthly progress meetings in accordance with the Technical Requirements. As part of, and in conjunction with, such meetings, the Concessionaire will provide the Department with any proposed update of the Project Schedule in accordance with the Technical Requirements. The parties further agree to abide by the terms and procedures set forth in the Technical Requirements pertaining to project management and coordination matters.

(c) Except as provided otherwise in this Agreement, the Concessionaire will be financially responsible for all damage to the Project resulting from the Work. The Department will not be responsible for any construction means and methods of the Concessionaire or liability ensuing therefrom, unless such means and methods were directed by the Department pursuant to a Department Change or a Department Project Enhancement; *provided*, that the foregoing will not limit the Concessionaire's right to a Department Change with respect to the Existing Project Assets pursuant to Section 8.11(c) or Section 9.04(e), unless the Excess Rehabilitation Work or Structural Assets Excess Costs, as applicable, are attributable to the Concessionaire's failure to perform the Work in accordance with this Agreement.

(d) Whenever required by the Department, the Concessionaire will provide in writing a general description of the arrangements and methods that the Concessionaire proposes to adopt for the execution of the Work. The Concessionaire will not significantly alter the Baseline Schedule, or such arrangements and methods, without informing the Department, and the Concessionaire will coordinate any such alterations to take into account the Department's resources and the work to be carried out by the Department's separate contractors, if any.

(e) If any alteration affects the Critical Path, adversely or materially affects the Department's oversight resources or the Department's separate contractors, or deviates from the Technical Requirements, the Concessionaire will not make such alteration without the prior approval of the Department.

(f) If the progress of the Work does not conform to the Baseline Schedule, as updated herein, the Concessionaire will submit a recovery schedule as required by the Technical Requirements, and will reasonably consider revisions to the Baseline Schedule proposed by the Department to achieve completion within the timeframe set forth in this Agreement.

Section 8.08 Substantial Completion

(a) The Concessionaire will achieve Substantial Completion on or before the Scheduled Substantial Completion Date for the applicable Project Asset, subject to adjustment in accordance with this Agreement and subject to the assessment of liquidated damages pursuant to Section 8.10(a).

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(b) The Department will issue a written certificate of Substantial Completion at such time as Substantial Completion occurs for each Project Asset.

(c) Substantial Completion of each Project Asset will have been achieved when each of the following conditions have occurred for the applicable Project Asset:

(i) all lanes of traffic (including ramps, interchanges, overpasses, underpasses, and other crossings) set forth in the Construction Documentation are in their final configuration and available for normal and safe use and operation;

(ii) all major safety features are installed and functional, including, as required, shoulders, guard rails, striping and delineations, concrete traffic barriers, bridge railings, cable safety systems, metal beam guard fences, safety end treatments, terminal anchor sections and crash attenuators;

(iii) all required illumination for normal and safe use and operation is installed and functional in accordance with the Technical Requirements;

(iv) all required signs and signals for normal and safe use and operation are installed and functional in accordance with the Technical Requirements;

(v) the need for temporary traffic controls or for lane closures at any time has ceased (except for any then required for routine maintenance, and except for temporary lane closures in accordance with and as permitted by a Department-approved traffic management plan solely in order to complete Punch List items);

(vi) the Concessionaire has completed the toll commissioning process described in the Technical Requirements, and the components of the ETTM System (other than the TMS) are complete, have passed all demonstration testing in accordance with the Construction Documentation and the Technical Requirements (other than the Integration Acceptance Test), including demonstration of interoperability with the E-ZPass network or any successor to E-ZPass then utilized on State Highways, and are ready for normal operation; *provided*, however, with respect to any Project Asset for which (A) a Tolling and O&M Notice to Proceed has been issued or (B) the Department has agreed in writing pursuant to Section 9.02(a)(viii) that the conditions in Section 9.02(a)(viii) have been satisfied, then the conditions of this Section 8.08(c)(vi) will be deemed satisfied;

(vii) the TMS (if any) and safety features for TMS components are installed and functional; and

(viii) the Concessionaire has otherwise completed the construction Work in accordance with this Agreement, including the Technical Requirements, and with the Construction Documentation, such that the Project is in a physical condition that it can be used for normal and safe vehicular travel in all lanes and at all points of entry and exit, subject only to Punch List items.

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(d) The parties will disregard the status of the landscaping and aesthetic features included in the Construction Documentation in determining whether Substantial Completion has occurred, except to the extent that its later completion will affect public safety or satisfaction of the criterion in Section 8.08(c).

(e) The Concessionaire will provide the Department with written notice of anticipated Substantial Completion of the applicable Project Asset at least 21 Days prior to such anticipated Substantial Completion Date. During such 21-Day period, the Concessionaire and the Department will meet, confer and exchange information on a regular basis with the goal being the Department's orderly, timely inspection of the applicable Project Asset and review of the final Construction Documentation for the applicable Project Asset and the Department's issuance of a Substantial Completion Certificate for the applicable Project Asset. In addition, the Department will conduct an inspection of the applicable Project Asset and review of the final Construction Documentation for the applicable Project Asset, and such other matters as may be necessary to determine whether Substantial Completion for the applicable Project Asset is achieved within such 21-Day period.

(f) If the Department disapproves the issuance of a Substantial Completion Certificate, then the Department will provide a written notice to the Concessionaire specifying in reasonable detail its reasons for such disapproval within ten Days of receipt of the final Construction Documentation and completion of the inspection for the applicable Project Asset, and the Concessionaire will satisfy the conditions to Substantial Completion that were not met for the applicable Project Asset to which the Department's disapproval relates. The Department will inspect, review and investigate the applicable Project Asset and the corrective work and, if it does so, will complete such inspection, review and investigation within five Days after (i) the Concessionaire provides written notice that such work has been completed and (ii) the Department is provided access to such corrective work. If the Department and the Concessionaire cannot, despite good faith efforts, agree as to Substantial Completion for the applicable Project Asset, such Dispute will be resolved in accordance with the dispute resolution procedures set forth in Article 21.

(g) The Concessionaire will provide notice to the Department if the Department has not approved or disapproved the issuance of a Substantial Completion Certificate within 21 Days after delivery of the notice by the Concessionaire pursuant to Section 8.08(e). If the Department has not notified the Concessionaire of such approval or disapproval within 15 Days after such Concessionaire notice, and if the delay is not a result of a Concessionaire Party action or inaction, then such delay will constitute a Compensation Event, and the Concessionaire will be entitled to Concessionaire Damages, if any, pursuant to Section 14.01.

(h) If the Department approves the issuance of a Substantial Completion Certificate, the Department will provide with its Substantial Completion Certificate a Punch List of items to be completed to achieve Final Acceptance of the applicable Project Asset.

Section 8.09 Final Acceptance

(a) The Concessionaire will achieve Final Acceptance on or before the Scheduled Final Acceptance Date for the applicable Project Asset, subject to adjustment in accordance with this Agreement and subject to the assessment of liquidated damages pursuant to Section 8.10(b).

(b) The Concessionaire will provide the Department with written notification when it has determined that the following conditions to Final Acceptance for the applicable Project Asset have been satisfied:

(i) Substantial Completion has occurred;

(ii) the components of the ETTM System have passed the Integration Acceptance Test;

(iii) other than the Permitted Encumbrances (not including clause (c) of the definition thereof), the Project is free and clear of all Liens, claims, security interests or encumbrances arising out of or in connection with the performance of the Work during the Construction Period;

(iv) all Punch List items will have been completed and delivered to the reasonable satisfaction of the Department;

(v) all Project Documentation, including as-built drawings, will have been delivered to the Department;

(vi) the Concessionaire will have paid for all Design-Build Work and other Work required to achieve Final Acceptance by third parties that the Concessionaire is obligated to pay (other than disputed amounts and amounts that are not yet due and payable);

(vii) the Concessionaire will have delivered all required certifications from the engineer of record and architect of record to all necessary Governmental Authorities and to the Department; and

(viii) the Concessionaire will have made all deliveries of Work Product to the Department that are required to be made pursuant to this Agreement.

(c) During the 21-Day period following delivery of the Concessionaire's written notification, the Concessionaire and the Department will meet, confer and exchange information with the goal being the Department's orderly, timely inspection of the applicable Project Asset and the Department's issuance of a Final Acceptance Certificate, and the Department will conduct an inspection of the Punch List items, a review of the final drawings and such other investigation as may be necessary to evaluate whether the conditions to Final Acceptance have been satisfied.

(d) Within such 21-Day period, the Department will issue a Final Acceptance Certificate or will notify the Concessionaire why Final Acceptance has not been achieved;

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provided, that if the Department has failed to issue a Final Acceptance Certificate or to notify the Concessionaire why Final Acceptance had not been achieved within 21 Days after the expiration of the 21-Day period described in Section 8.09(c) (or, in the case of any re-submittal in response to the Department’s comments, within ten Days after such resubmittal), a Final Acceptance Certificate will be deemed to be issued. Deemed issuance will not, however, excuse the Concessionaire from satisfying all the conditions set forth in Section 8.09(b).

Section 8.10 Liquidated Damages for Delayed Completion

(a) Liquidated Damages Related to Substantial Completion. If the Concessionaire does not achieve Substantial Completion of each of the Project Assets by the applicable Scheduled Substantial Completion Date, the Department will be entitled to assess liquidated damages against the Concessionaire in the following amounts:

(i) \$7,000 as liquidated damages for each Day that Substantial Completion of the Existing Midtown Tunnel extends beyond the Existing Midtown Tunnel Scheduled Substantial Completion Date.

(ii) \$7,000 as liquidated damages for each Day that Substantial Completion of the Existing Downtown Tunnels extends beyond the Existing Downtown Tunnels Scheduled Substantial Completion Date.

(iii) \$21,000 as liquidated damages for each Day that Substantial Completion of the New Midtown Tunnel extends beyond the New Midtown Tunnel Scheduled Substantial Completion Date.

(iv) \$11,500 as liquidated damages for each Day that Substantial Completion of the New MLK Extension extends beyond the New MLK Extension Scheduled Substantial Completion Date.

(b) Liquidated Damages Related to Final Acceptance. If the Concessionaire does not achieve Final Acceptance of each of the Project Assets by the applicable Scheduled Final Acceptance Date, the Department will be entitled to assess liquidated damages against the Concessionaire in the following amounts:

(i) \$3,000 as liquidated damages for each Day that Final Acceptance of the Existing Midtown Tunnel remains to be achieved following the expiration of the Scheduled Final Acceptance Date of the Existing Midtown Tunnel.

(ii) \$3,000 as liquidated damages for each Day that Final Acceptance of the Existing Downtown Tunnel remains to be achieved following the expiration of the Scheduled Final Acceptance Date of the Existing Downtown Tunnels.

(iii) \$8,500 as liquidated damages for each Day that Final Acceptance of the New Midtown Tunnel remains to be achieved following the expiration of the Scheduled Final Acceptance Date of the New Midtown Tunnel.

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(iv) \$5,000 as liquidated damages for each Day that Final Acceptance of the New MLK Extension remains to be achieved following the expiration of the Scheduled Final Acceptance Date of the New MLK Extension.

(c) Additional Provisions. The parties acknowledge, recognize and agree on the following:

(i) that because of the unique nature of the Project, it is difficult or impossible to determine with precision the amount of damages that would or might be incurred by the Department as a result of the Concessionaire's failure to timely complete the Work;

(ii) that any sums assessed under this Section 8.10 are in the nature of liquidated damages, and not a penalty, and are fair and reasonable and such payment represents a reasonable estimate of fair compensation for the additional Oversight Services that may reasonably be anticipated from such failure;

(iii) that any sums assessed under this Section 8.10 will be in lieu of all liability of the Concessionaire and its Contractors for any and all Losses, whether direct, special or consequential, and of any nature whatsoever incurred by the Department, which are caused solely by the Concessionaire's failure to achieve Substantial Completion and Final Acceptance by the applicable deadlines;

(iv) that any sums assessed under this Section 8.10 will be due and owing to the Department upon assessment of such damages, subject to the dispute resolution procedures of Article 21; and

(v) notwithstanding the above, liquidated damages are not intended to excuse Concessionaire or any of its Contractors from liability for any other breach of its obligations under the Project Agreements, or limit the Department's recourse to other remedies hereunder such as termination pursuant to Article 19 and Article 20; *provided*, that no Concessionaire Default will occur solely as a result of a delay in achieving Substantial Completion by the applicable Scheduled Substantial Completion Date, except as set forth in Section 19.01(e).

(d) Payment of Liquidated Damages. The Concessionaire will pay all undisputed liquidated damages under this Section 8.10 monthly in arrears not later than 30 Days after the end of each calendar month, and in accordance with the requirements set forth in Section 5.06(b).

**Section 8.11 Warranties; Defective Design and Construction;
Financial Responsibility for Rehabilitation Work**

(a) Warranties.

(i) The Concessionaire will require the Design-Build Contractor to warrant that (A) the Design-Build Work is complete and conforms to Good Industry Practice; and (B) the Design-Build Work, including all materials and equipment furnished as part of the Design-Build Work, is new unless otherwise specified in the Technical

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Requirements or elsewhere in this Agreement, of good quality, free of defects in materials and workmanship.

(ii) The warranties in Section 8.11(a)(i) are exclusive and are in lieu of all other warranties by contract. No implied or statutory warranties will apply. Subject to Section 8.11(a)(iii) below, the foregoing warranties for Work relating to any Project Asset will be effective for a period of one year beginning on the date on which the applicable Project Asset achieves Substantial Completion (the “Warranty Period”). Such warranties will survive termination of this Agreement for Work that was in place prior to termination.

(iii) With respect to the warranty furnished by the Design-Build Contractor pursuant to Section 8.11(a)(i) and if and to the extent the Concessionaire obtains general or limited warranties from any other Contractor in favor of the Concessionaire with respect to design, materials, workmanship, construction, equipment, tools, supplies, software or services, the Concessionaire will cause such warranties to be expressly extended to the Department and any third parties for whom Work is being performed or equipment, tools, supplies or software is being supplied by such Contractor; *provided*, that the foregoing requirement will not apply to standard, pre-specified manufacturer warranties of mass-marketed materials, products (including software products), equipment or supplies where the warranty cannot be extended to the Department using commercially reasonable efforts. The Department will only have the right to exercise remedies under any such warranty so long as the Concessionaire or a Lender is not pursuing remedies thereunder. To the extent that any Contractor warranty would be voided by reason of the Concessionaire’s negligence or failure to properly incorporate material or equipment into the Work, the Concessionaire will be responsible for correcting such defect.

(iv) Contractor warranties are in addition to all rights and remedies available pursuant to this Agreement or Law or in equity, including Claims against the Performance Security, and will not limit the Concessionaire’s liability or responsibility imposed by this Agreement or Law or in equity with respect to the Work, including liability for Non-Conforming Work, design defects, patent and latent construction defects, strict liability, breach, negligence, willful misconduct or fraud.

(b) Non-Conforming Work. In the event of the occurrence of a Defect in the design or construction Work, including in any materials and equipment furnished as part of the construction, and including any Non-Conforming Work, the Department will be entitled, in addition to any other remedies:

(i) to demand that the Concessionaire rectify such Defect at its sole expense, it being understood that, in such event, the Department will be permitted to draw on the Performance Security provided by the Concessionaire or any Contractor liable for such Work, to the extent of the cost of any work performed by the Concessionaire;

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(ii) to suspend any affected portion of the Work of design and construction, by delivery of a written order to the Concessionaire, which order the Department will lift after the Concessionaire fully cures or corrects such Defects;

(iii) to rectify such Defects itself and to obtain reimbursement of its Allocable Costs from the Concessionaire or, where the Contractor providing such Performance Security is liable for such Work from a draw on any Performance Security furnished pursuant to this Agreement; *provided*, that (A) the Department will not rectify such Defects itself or seek reimbursement from the Concessionaire or such Performance Security unless it has requested rectification of, and the Concessionaire and the Contractor have failed to promptly rectify, the Defects and (B) the Concessionaire will be permitted to draw on the Performance Security provided by any Contractor liable for such Work to the extent of any amounts reimbursed by the Concessionaire; or

(iv) to seek performance or reimbursement pursuant to any applicable guaranty.

The Concessionaire will have the right to dispute the Department's determination that the design or construction Work constitutes Non-Conforming Work by written notice to the Department, which notice will provide supporting information for the Concessionaire's position. Unless directed otherwise by the Department after receipt of such notice, the Concessionaire will carry out the Work required by the Department. If it is determined in accordance with the dispute resolution procedures in Article 21 that the Work in question conformed to the Technical Requirements, then the additional Work required by the Department will be treated as a Department Change pursuant to Section 14.02.

(c) Financial Responsibility for Rehabilitation Work.

(i) Except for Compensation Events and as provided in Section 8.11(c)(ii) and Section 9.01(c)(ii), the Concessionaire has full financial responsibility for the Rehabilitation Work as identified in the Rehabilitation Plan for the Existing Project Assets.

(ii) Except as provided in Section 8.11(c)(iii), to the extent the Concessionaire is required to perform Rehabilitation Work on the Existing Project Assets that materially differs from the Rehabilitation Work identified in the Rehabilitation Plan for Existing Project Assets ("Excess Rehabilitation Work"), the Concessionaire will be entitled to seek a Department Change with respect to the Excess Rehabilitation Work and, subject to the Concessionaire complying with all notice and claims submissions requirements set forth in this Agreement, the Department will issue a Department Change; *provided*, however, that:

(A) the Concessionaire will be solely responsible for the Net Cost Impact for performing Excess Rehabilitation Work up to \$5 million in the aggregate ("Excess Rehabilitation Work Deductible"); and

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(B) the Department will be solely responsible for the Net Cost Impact for performing Excess Rehabilitation Work in excess of the Excess Rehabilitation Work Deductible but less than or equal to \$20 million.

(iii) If the Net Cost Impact for performing the Excess Rehabilitation Work is in excess of \$20 million (“Excess Rehabilitation Work Outer Band”), the parties will comply with the provisions of this Section 8.11(c)(iii).

(A) The Department and the Concessionaire agree to collaborate to determine the scope, timing and potential Net Cost Impact for the Concessionaire to secure funding for the Excess Rehabilitation Work Outer Band; *provided*, however, that the 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. Thereafter, if requested by the Department in writing, the Concessionaire will use commercially reasonable efforts to secure funding for the Excess Rehabilitation Work Outer Band. If the Concessionaire is able to secure funding for all or part of the Excess Rehabilitation Work Outer Band, 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 Excess Rehabilitation Work Outer Band, including any proposed adjustments to the Toll Rate Schedule, proposed extensions of the Term and/or proposed payments by the Department. The Department will reject, accept or initiate a negotiation of the funding proposal within 30 Days of receipt of the funding proposal; *provided*, however, that if the Department initiates a negotiation of the funding proposal within such 30-Day period and the Department and the Concessionaire cannot reach mutual agreement regarding the funding proposal within 60 Days of the Department’s initial receipt of the funding proposal, then such funding proposal will be deemed rejected by the Department.

(B) If the Department accepts the funding proposal furnished pursuant to Section 8.11(c)(iii)(A), 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 Excess Rehabilitation Work Outer Band, the Change Order will provide funding for the remainder thereof on terms and conditions mutually agreed by the parties.

(C) If the Department rejects the funding proposal furnished pursuant to Section 8.11(c)(iii)(A), or the Concessionaire is unable to secure funding for the Excess Rehabilitation Work Outer Band pursuant to Section 8.11(c)(iii)(A), the Department will issue a Change Order to implement changes to the performance requirements set forth in Attachment 4A of the Technical Requirements so that the Concessionaire will not be in breach of its obligations under this Agreement due to a failure to perform Excess Rehabilitation Work associated with the Excess Rehabilitation Work Outer Band.

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(D) Notwithstanding the provisions of this Section 8.11(c)(iii), the Concessionaire will be entitled to seek a Department Change with respect to Excess Rehabilitation Work in excess of the Excess Rehabilitation Work Outer Band, subject to the Concessionaire complying with all notice and claims submissions requirements set forth in this Agreement (but excluding the notice and claims submission requirements contained in clauses (A), (B) and (C) of this Section 8.11(c)(iii), if such Excess Rehabilitation Work is required in order for the Concessionaire to comply with Law, this Agreement or Government Approvals or if failure to perform such Excess Rehabilitation Work would case an insured risk to become uninsurable.

(E) If the Department requests the Concessionaire to use commercially reasonable efforts to secure funding for the Excess Rehabilitation Work Outer Band pursuant to Section 8.11(c)(iii)(A), the Department will be responsible for the Net Cost Impact of the parties complying with this Section 8.11(c)(iii).

Section 8.12 Fuel Price Adjustments

Each of the Department and the Concessionaire will be responsible for price adjustments for fuel used during the performance of the Design-Build Work as set forth in the Fuel Adjustment Provisions in Exhibit S.

ARTICLE 9

PROJECT MANAGEMENT; OPERATIONS AND MAINTENANCE

Section 9.01 Transition of Operations and Maintenance to Concessionaire

(a) Care, Custody and Control of Existing Project Assets. The Department will be responsible, at its sole cost and expense, for the operation and maintenance of the Existing Project Assets until the Existing Project Assets Tolling and O&M Work Commencement Date.

(b) Turnover Process. The Concessionaire will implement and comply with the Turnover Plan attached as Exhibit T to ensure the timely and orderly transition of operations and maintenance of the Existing Project Assets from the Department to the Concessionaire. The parties will cooperate and coordinate with each other with respect to activities undertaken pursuant to the Turnover Plan.

(c) Inspection of Existing Project Assets.

(i) As a condition to issuing a notice to proceed pursuant to Section 9.02(a), the Concessionaire will conduct an inspection of the Existing Project Assets to determine whether the Existing Project Assets are in accordance with the Baseline Asset Condition Report within 30 Days prior to the Scheduled Existing Project Assets Tolling and O&M Work Commencement Date. The Concessionaire will provide an inspection report to the Department within 30 Days of conducting the inspection.

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(ii) If the inspection report reveals that any component of the Existing Project Assets is not in the condition set forth in the Baseline Asset Condition Report, the Concessionaire will notify the Department of the condition of such component through the inspection report produced pursuant to Section 9.01(c)(i) and the parties will meet to discuss a mutually agreeable plan to address such condition. If such condition materially differs from those identified in the Baseline Asset Condition Report and affects Concessionaire's cost or time in performing the Design-Build Work, the Concessionaire will be entitled to seek a Department Change, subject to the Concessionaire complying with the notice and claims submission requirements set forth in this Agreement.

Section 9.02 Conditions Precedent to Tolling and O&M Work Commencement Date

(a) The Concessionaire will not initiate tolling or O&M Work on a Project Asset unless and until the Department determines that the following conditions have been satisfied (or the Department, in its sole discretion, waives such conditions) for such Project Asset and the Department has delivered notice to that effect to the Concessionaire (the "Tolling and O&M Work Notice to Proceed"):

(i) the Cooperative Agreement is in full force and effect;

(ii) the Department has approved the Tolling Strategy and Marketing Plan, the Public Information and Communications Plan, the Life Cycle Maintenance Plan, and the O&M Plan, which approval will be subject to Section 8.04(c);

(iii) the Concessionaire has received and delivered to the Department copies of all Governmental Approvals necessary to operate the Project Asset and has satisfied all conditions and requirements thereof which must be satisfied before the Project Asset can be lawfully opened for regular public use, all such Governmental Approvals remain in full force and effect, and there exists no uncured material violation of the terms and conditions of any such Governmental Approval;

(iv) all insurance policies required under Section 17.01(b) have been obtained and will be in full force and effect, and the Concessionaire has delivered to the Department duplicate originals or copies thereof certified by the Concessionaire's insurance broker to be true and correct copies of the originals;

(v) there exists no Concessionaire Default for which the Concessionaire received notice from the Department, except as to any such Concessionaire Default that has been cured or for which initiation of tolling or O&M Work will effect its cure, and there exists no event or condition that, with notice or lapse of time, would constitute a Concessionaire Default;

(vi) all Operations and Maintenance Agreements and agreements relating to toll collection and violation enforcement are in full force and effect;

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(vii) the Concessionaire has implemented the Maintenance Management System in accordance with the Technical Requirements;

(viii) the Concessionaire has completed the toll commissioning process described in the Technical Requirements, and the components of the ETTM System (other than the TMS) are complete, have passed all demonstration and performance testing in accordance with the Construction Documentation and the Technical Requirements (other than the Integration Acceptance Test), including demonstration of interoperability with the E-ZPass network or any successor to E-ZPass then utilized on State Highways, and are ready for normal operation; *provided*, however, that the Concessionaire may, at any time when the Concessionaire believes that the ETTM System (other than the TMS) for the New Midtown Tunnel is complete and has passed the necessary demonstration and performance testing, notify the Department that the Concessionaire believes that the conditions set forth in this Section 9.02(a)(viii) have been satisfied, and the Department will promptly notify the Concessionaire in writing if the Department concurs that such conditions have been satisfied (and in such case, the conditions of this Section 9.02(a)(viii) will be deemed satisfied) or will notify the Concessionaire pursuant to Section 9.02(b) that such conditions have not been met;

(ix) the TMS (if any) and safety features for TMS components are installed and functional;

(x) the Concessionaire has deposited the Source Code and Source Code Documentation with the Escrow Agent in accordance with Section 18.06;

(xi) with respect to the Existing Project Assets, the Department has approved the Turnover Plan;

(xii) with respect to the New Midtown Tunnel and New MLK Extension, the Department has issued a Substantial Completion Certificate for such Project Asset;

(xiii) with respect to the New Midtown Tunnel and New MLK Extension, the Concessionaire and the Department have agreed in writing to a Punch List;

(xiv) the Concessionaire has paid or caused to be paid to the Department all amounts due and payable from the Concessionaire to the Department in connection with this Agreement, including any applicable interest thereon; and

(xv) the Concessionaire has certified to the Department in writing that the conditions set forth in this Section 9.02(a) have been satisfied as of the date of such certification.

(b) If the Department determines that any of the conditions set forth in Section 9.02(a) has not been satisfied for the applicable Project Asset, it will notify the Concessionaire in writing setting forth, as applicable, why the conditions have not been satisfied. If the Concessionaire and the Department, despite good faith efforts, cannot reach agreement as to such matters, such dispute will be resolved in accordance with the dispute resolution procedures set

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forth in Article 21. In the event that the Department has not notified the Concessionaire of a determination that any such condition has not been satisfied, or has not issued the Tolling and O&M Notice to Proceed for the applicable Project Asset, within 21 Days after the date on which the conditions set forth in Section 9.02(a) are satisfied and the Department receives the certificate from the Concessionaire pursuant to Section 9.02(a)(xv), the Concessionaire will give notice of such delay to the Department. If the Department has not either notified the Concessionaire of such non-satisfaction or issued the Tolling and O&M Notice to Proceed for the applicable Project Asset within 15 Days after such Concessionaire notice, and if the delay is not a result of a Concessionaire Party action or inaction, then such Tolling and O&M Notice to Proceed will be deemed to have been issued upon expiration of such 15-Day period, but will not be deemed a waiver of the other conditions set forth in Section 9.02(a).

(c) The Department's issuance (or deemed issuance) of the Tolling and O&M Notice to Proceed for the applicable Project Asset will not constitute a waiver by the Department of any then-existing breach of this Agreement by the Concessionaire.

Section 9.03 Concessionaire Obligation to Manage and Operate

At all times following the Tolling and O&M Work Commencement Date for each of the Project Assets, the Concessionaire, at its sole cost and expense (except as otherwise provided herein), will cause the applicable Project Asset to be managed, maintained, and operated within the O&M Boundaries in accordance with Law, all Governmental Approvals, the terms, conditions and standards set forth in this Agreement, including the requirements set forth in the Technical Requirements, and in accordance with Good Industry Practice. Without limiting the foregoing, the Concessionaire agrees to be responsible for the following, at its sole cost and expense at all times following the Tolling and O&M Work Commencement Date for each of the Project Assets:

(a) the management and control of traffic on the Project Asset, including, but not limited to, incident response services and temporary partial or full closures of the Project Asset, subject to the Department's rights to assume control as expressly provided in this Agreement;

(b) the maintenance and repair of the Project Asset and all systems and components thereof, including the ETTM System, which the Concessionaire may upgrade, modify, change and replace, as applicable, in accordance with this Agreement and the requirements set forth in the Technical Requirements;

(c) the operation of the Project Asset and the ETTM System, and otherwise carrying out the collection and enforcement of tolls and other incidental charges in accordance with Article 5 respecting the Project Asset;

(d) the maintenance, compliance with and renewal of Governmental Approvals necessary and incidental to the foregoing activities;

(e) traffic management, and maintenance and repair responsibilities under Section 9.04(a) in accordance with the Technical Requirements; and

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(f) except as otherwise specifically provided herein and including the right of the Concessionaire to close a Project Asset to traffic in connection with a Permitted Closure, causing the Project to be continuously open and operational for use by all members of the public 24 hours a day, 365 days a year.

Section 9.04 Procedures Relating to Maintenance Work

(a) General. The Concessionaire will perform all maintenance obligations with respect to the Project in accordance with this Agreement and the Technical Requirements.

(b) Life Cycle Maintenance Plan.

(i) No later than 90 Days before the beginning of the first year after the date that a Project Asset has achieved Substantial Completion, and thereafter no later than 90 Days before the expiration of every following one-year period, the Concessionaire will annually prepare and deliver to the Department a full five-year period maintenance plan on a rolling basis that describes life cycle asset maintenance for such Project Asset (each a “Life Cycle Maintenance Plan”). The Life Cycle Maintenance Plan will include a description of all Major Maintenance to be undertaken during such five-year period, by component, item or discrete project (each, a “Task”), the estimated costs and timing relating to each Task, the underlying assumptions used to develop such plan, including assumptions arising from the re-evaluations of the physical condition of the Assets conducted pursuant to Section 9.04(d)(i); and such other information as may be reasonably requested by the Department. The Life Cycle Maintenance Plan will reasonably demonstrate and incorporate a schedule of Ordinary Maintenance and Major Maintenance necessary to meet the Performance Requirements set forth in the Technical Requirements and other standards and requirements set forth in this Agreement for the Project Assets.

(ii) The Life Cycle Maintenance Plan will include a Structural Assets Major Maintenance Plan and a Structural Assets Monitoring Plan. The Base Case Structural Assets Major Maintenance Plan attached as Exhibit U and any subsequent Structural Assets Major Maintenance Plans furnished with the Life Cycle Maintenance Plan will provide a description of all Major Maintenance to be undertaken for each Structural Asset of the Existing Project Assets, the estimated costs and timing for performing Major Maintenance of each Structural Asset, and such other information as may be reasonably requested by the Department. The Base Case Structural Assets Monitoring Plan attached as Exhibit V and any subsequent Structural Assets Monitoring Plans furnished with the Life Cycle Maintenance Plans will provide a description of the Concessionaire’s inspection and monitoring routine for each Structural Asset of the Existing Project Assets to assess the current condition of such Structural Assets and ensure that such Structural Assets are maintained in the condition required by this Agreement, a budget for implementing the inspection and monitoring routine, and such other information as may be reasonably requested by the Department.

(c) Review and Approval of Life Cycle Maintenance Plan.

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(i) The Department will review and approve the Life Cycle Maintenance Plan and components thereof, including, but not limited to, the proposed scope of work, timing and estimated costs for the Major Maintenance for each Structural Asset of the Existing Project Assets. The Department will deliver its comments, approval or disapproval to the Concessionaire within 45 Days after the Concessionaire has delivered each proposed Life Cycle Maintenance Plan to the Department in accordance with Section 9.04(b)(i).

(ii) The Concessionaire will reasonably consider any changes or additions proposed by the Department to the proposed Life Cycle Maintenance Plan and will modify the Life Cycle Maintenance Plan to reflect those changes and additions which are consistent with the standards and requirements of this Agreement.

(iii) In the event of any Dispute relating to a Life Cycle Maintenance Plan, the Department and the Concessionaire will endeavor in good faith to resolve any such Dispute within 60 Days after it is provided to the Department. Any Disputes raised by the Department with respect to the Life Cycle Maintenance Plan must be based on whether it and the underlying assumptions are reasonable, realistic and consistent with Good Industry Practice, the Technical Requirements and Law. If no agreement is reached within such 60-Day period as to any such matter, either party may submit the Dispute to the dispute resolution procedures set forth in Article 21. Until resolution of any Dispute relating to a Life Cycle Maintenance Plan, the treatment of the disputed Tasks in the most recently-approved Life Cycle Maintenance Plan will remain in effect and govern the requirements relating to such Tasks. If there is no approved Life Cycle Maintenance Plan then in effect, the Concessionaire will proceed as directed by the Department until resolution of such Dispute.

(d) Inspection and Implementation.

(i) Commencing two years after the date that a Project Asset has achieved Substantial Completion, the Concessionaire will conduct a biennial assessment of the physical condition of such Project Asset (except as otherwise provided in the Technical Requirements), and prepare a comparative analysis of such conditions to the conditions as previously reported (or, with respect to any Project Enhancements, their condition upon completion thereof), such analysis to take into account any changes in Federal requirements and changes to safety standards. With respect to the Existing Project Assets, such biennial assessment will also be performed in accordance with the Structural Assets Monitoring Plan. The condition of each Asset will be assessed using the Department's Maintenance Rating Program in accordance with the Technical Requirements. If any Asset is determined by the Concessionaire or the Department to fall below the rating specified in the Technical Requirements for such Asset, the Concessionaire will, within 90 Days of such assessment, develop and submit to the Department a plan to restore such Asset to a condition that will enable the Asset to meet all applicable Performance Requirements, and such plan will also include a budget, timeline and identification of the funding sources that will be utilized to restore such Asset.

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(ii) If the Concessionaire fails to complete any of the Tasks in accordance with this Agreement and the applicable Life Cycle Maintenance Plan, the Department may demand in writing that such Tasks be completed by the Concessionaire. If the Concessionaire has failed to commence and diligently continue to perform such Tasks within 30 Days after the Department delivers such notice, the Department may, at its option, but is not obligated to, either (A) carry out such Task or correct such defective work using Department personnel, materials and equipment or (B) procure the services for such Task or corrective work by one or more contractors. Upon such notice, the Department (except as otherwise provided in Section 9.04(e)) will be entitled to demand that the Concessionaire pay to the Department an amount equal to the Department's good faith estimate of the Allocable Costs it will incur to complete such Task or corrective work, plus an additional 10% contingency, and its third-party costs to procure such contract(s) (if applicable). The Concessionaire will make such payment to the Department not later than 30 Days after demand by the Department for such payment. Upon completion of such work, the Department will promptly provide to the Concessionaire its calculation of the Allocable Costs to complete such Tasks and any third-party costs to procure any contract(s) for such work, together with supporting documentation. If the total amount of such costs is greater or less than the amount the Concessionaire previously paid to the Department under this Section 9.04, the Concessionaire will pay to the Department an amount equal to such excess or the Department will reimburse the excess funds paid by the Concessionaire, as applicable, not later than 30 Days after the Department has provided its calculation.

(iii) The Concessionaire may, by written notice delivered to the Department within 30 Days, object to any demand by the Department in accordance with Section 9.04(d)(ii) on the basis that the Concessionaire has completed the Task(s) specified in the Department's demand in accordance with this Agreement and the applicable Life Cycle Maintenance Plan or that such Task(s) are not then required in accordance with this Agreement or the applicable Life Cycle Maintenance Plan, which notice will give details of the grounds for such objection. Upon the giving of any such notice, the parties will endeavor to reach agreement as to any matters referred to in the notice. If no agreement is reached as to any such matter within 30 Days after the giving of such notice, either party may refer the Dispute to the dispute resolution procedures set forth in Article 21. Notwithstanding the foregoing, the Concessionaire will perform the Task as directed by the Department and the Department will be entitled to exercise its remedies for the Concessionaire's failure to comply with such directive in accordance with this Agreement. If it is determined in accordance with the dispute resolution procedures in Article 21 that the Concessionaire was in compliance with its obligations under this Agreement, then such directive and any additional Work required by the Department will be treated as a Department Change pursuant to Section 14.02.

(e) Conditions of Structural Assets.

(i) To the extent the Concessionaire is required to perform Major Maintenance on the Structural Assets of the Existing Project Assets involving expenditures in excess of the Major Maintenance costs identified in the Base Case

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Structural Assets Major Maintenance Plan (“Structural Assets Excess Costs”), the Concessionaire will be entitled to seek a Department Change with respect to the Structural Assets Excess Costs and, subject to all notice and claims submissions requirements set forth in this Agreement, the Department will issue a Department Change; *provided*, however, that (1) the Net Cost Impact for performing such Major Maintenance is in excess of the Structural Assets Deductible, and (2) such additional Major Maintenance was not due to any act or omission by the Concessionaire or its Contractors in breach of the provisions of this Agreement.

(ii) If requested by the Department, the Concessionaire will use commercially reasonable efforts to secure funding for the Structural Assets Excess Costs. If the Concessionaire is able to secure funding for all or part of the Structural Assets Excess Costs, 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 Structural Assets Excess Costs, including any proposed adjustments to the Toll Rate Schedule, proposed extensions of the Term and/or 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.

(f) Exception for Force Majeure Event. The provisions of Section 9.04(e) will not apply if a Force Majeure Event requires the Concessionaire to perform any work or take any actions on or related to the Structural Assets of the Existing Project Assets, and in such event the Concessionaire’s remedy, if any, will be through Section 20.03.

Section 9.05 Major Maintenance Reserve Fund

The Concessionaire will fund the Major Maintenance Reserve Fund in such amounts and in accordance with the terms as may be required by the Lenders.

Section 9.06 Police and Enforcement Services

(a) The Department will coordinate with the Virginia State Police to provide policing services, and to provide emergency services (fire and rescue), including traffic patrol and traffic law enforcement services, to be provided on the Project at a level of service equivalent to that provided on comparable State Highways from time to time. All such foregoing services will be provided without any charge to the Concessionaire or the Project. In addition, if reasonably requested by the Concessionaire, the Department will assist the Concessionaire in obtaining enhanced levels of police services for the control of traffic for construction or maintenance activities or as otherwise needed (and in each case, at the Concessionaire’s sole cost and expense). Notwithstanding such assistance, the Concessionaire will be solely responsible for obtaining such enhanced services and the Department does not guarantee that such services can be obtained.

(b) The Concessionaire may, at its sole cost and expense, engage the Virginia State Police to provide toll enforcement services (including the identification and apprehension of toll

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violators), and the Department will assist the Concessionaire in obtaining such services if so requested by the Concessionaire. The Concessionaire will not engage or permit the engagement of private security services to provide traffic patrol or traffic law enforcement services on the Project; *provided*, that the foregoing does not preclude the Concessionaire from engaging private security firms or employing other appropriate security devices, vehicle occupancy detection equipment or other automated technology to protect, collect and enforce the payment of Toll Revenues or to identify toll violators, subject to compliance with Law, nor does it limit the Concessionaire's right to enforce any private rights and civil remedies available to it respecting toll violations. Notwithstanding the foregoing, the Concessionaire will not permit any private security firm to stop vehicles, apprehend road users, or engage in any other direct enforcement activity on the Project Right of Way.

(c) The Department will not have any responsibility or liability to the Concessionaire resulting from or otherwise relating to the failure of the Virginia State Police or any other public agencies to provide policing services contemplated by this Section 9.06 or any of the acts or omissions of the Virginia State Police or such agencies with respect to such services.

(d) The parties further understand and agree that, as the Project will constitute part of the State Highway system, the Virginia State Police and other public agencies will have access to the Project and jurisdiction to enforce the laws and regulations of the State as they apply to the Project.

Section 9.07 Maintenance by the Department

(a) Except as otherwise provided herein, the Department will maintain, repair and, subject to and in accordance with the Department's normal course of operations and activities as in effect from time to time, cause to be open and operational, in a manner consistent with access to State Highways, the ramps, bridges and roadways directly connecting to the Project Assets, over which the Department has sole control. The foregoing does not restrict the Department's right to operate existing or new facilities, to modify existing facilities, to construct new facilities, including Project Enhancements, and to perform planned and emergency maintenance, renewal and replacement, safety and repair activities on existing and new facilities adjacent to or near the Project regardless of the impact of such activities on the Project.

(b) Activities undertaken by the Department pursuant to this Section 9.07 will not constitute a Compensation Event, except as otherwise provided in this Agreement.

Section 9.08 Annual Budget

(a) For each Agreement Year and partial Agreement Year from and after the Existing Project Assets Tolling and O&M Work Commencement Date, the Concessionaire will file with the Department an annual budget for the Project for such full or partial Agreement Year at least 90 Days prior to the start thereof (an "Annual Budget"). Each Annual Budget will be in a form reasonably acceptable to the Department and show in reasonable detail in respect of such full or partial Agreement Year:

- (i) projected Gross Revenues;

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(ii) projected operating costs, including all amounts payable to the Department or required to be deposited to the Handback Reserve Fund hereunder;

(iii) projected maintenance expenses, including the costs of Major Maintenance activities to be performed pursuant to the Life Cycle Maintenance Plan;

(iv) projected debt service and other amounts payable with respect to Concessionaire Debt, including deposits to reserve funds held for benefit of the Project Lenders; and

(v) projected Distributions.

(b) The Concessionaire will provide such other information as the Department may reasonably require in connection with its review of the budget.

ARTICLE 10

**CONCESSIONAIRE PROJECT AND QUALITY MANAGEMENT; DEPARTMENT
OVERSIGHT AND OTHER SERVICES**

Section 10.01 Project and Quality Management

The Concessionaire will provide oversight and management of the Project to control the scope, quality, cost, and on-time delivery of the Work. If the Concessionaire is required to rectify any Non-Conforming Work in accordance with Section 8.11(b), the parties will review the Quality Management System Plan to assess and determine whether changes to such plan are necessary to prevent such further Non-Conforming Work.

Section 10.02 Right to Oversee Work

(a) The Department will have the right at all times during the Term to carry out Oversight Services with respect to all aspects of the design, permitting, financing, acquisition, construction, installation, equipping, maintenance, repair, preservation, modification, operation, management and administration of the Project. The Department's Oversight Services will not impact its right to rely on the Concessionaire to perform its obligations pursuant to this Agreement.

(b) The Concessionaire will fully cooperate with the Department to facilitate its conduct of Oversight Services. In the course of performing Oversight Services, the Department will use reasonable efforts to minimize the effect and duration of any disruption to or impairment of the Work or the Project.

(c) The Department will submit to the Concessionaire in accordance with Section 8.04(c) all Department comments related to the Concessionaire's submittals certified in accordance with this Agreement and the Technical Requirements. If after the process for reviewing the Concessionaire's submittals, the Department reasonably determines that a submittal fails to comply with the applicable Technical Requirements, the Department will have

the right, in accordance with this Agreement, to direct the Concessionaire to perform the Work in accordance with the Department's instructions. In such event, the Concessionaire will be obligated to diligently proceed with the Work in accordance with such directive, and will have the right to (i) dispute the Department's directive in accordance with this Agreement and, if it chooses, (ii) proceed with the expedited dispute resolution process set forth in Article 21. If it is finally determined in accordance with the dispute resolution procedures in Article 21 that the Concessionaire's submittal complied with the applicable Technical Requirements, the additional Work required by the Department's directive will be treated as a Department Change pursuant to Section 14.02.

Section 10.03 Department Access and Inspection

The Department and the FHWA, and their respective authorized agents, will have unrestricted access at all times to enter upon, inspect, sample, measure and physically test any part of the Project or the Project Right of Way, as well as any materials, supplies, machinery and equipment to be incorporated into or used in construction, operation or maintenance of the Project. The Department will also have the right, upon reasonable advance written notice (except as provided in Section 18.07(a)) to the Concessionaire, to inspect financial or other records relating to the Project. The Department will provide the Concessionaire with a notice describing results of any such test or inspection, subject to any protections from disclosure under Applicable Law. If at any time the Concessionaire has failed to perform any of its construction, operating or maintenance obligations in any material respect then, in addition to other remedies available pursuant to this Agreement and the other Project Agreements, the Department is entitled to increase the level of its monitoring of the Project and the Concessionaire's compliance with its construction, operation and maintenance obligations pursuant to this Agreement, until such time as the Concessionaire has demonstrated to the Department's reasonable satisfaction that it will perform and is capable of performing its construction, operation and maintenance obligations pursuant to this Agreement. The Concessionaire will compensate the Department for all Allocable Costs incurred by the Department as a result of such increased level of monitoring; *provided*, that if the increased monitoring is due to a delay in achieving Substantial Completion or Final Acceptance, the Concessionaire will compensate the Department for such increased monitoring solely pursuant to Section 8.10.

Section 10.04 Compensation for Oversight Services

Except as otherwise expressly provided in this Agreement, including, without limitation, Section 10.05(c), the Department will not be compensated for its Oversight Services, whether in respect of the design, inspection or permitting for the Project, any Project Enhancement or any Safety Compliance Orders.

Section 10.05 Department Approvals

(a) Except as otherwise expressly provided in this Agreement, in any case in which the Department's response to a request for its approval is required by the terms hereof within a specified time period (or such extended period of time as will have been mutually agreed by the Department and the Concessionaire, and *provided*, that any such time period will be extended for the duration of the results of a Force Majeure Event that prevents such performance), the failure

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by the Department to respond to a written request for such approval within such specified time period (as may be so extended) will be deemed to be the Department's approval of such request.

(b) In all cases where approvals, consents or determinations are required to be provided hereunder, such approvals or consents will not be withheld or delayed unreasonably and such determinations will be made reasonably except in cases where a different standard (such as, by way of example only, sole discretion) is specified. In cases where sole discretion is specified for an approval, consent, determination or other decision, the decision will not be subject to the dispute resolution procedures set forth in Article 21.

(c) If the Concessionaire must submit a submittal to the Department for review and approval more than twice due to the Concessionaire's failure to comply with the requirements of this Agreement, the Concessionaire will reimburse the Department for the Department's Allocable Costs incurred thereafter in reviewing any portions of such submittal. If the Concessionaire must submit a submittal more than twice due to the Department's failure to comply with the requirements of this Agreement, the Department will reimburse the Concessionaire for the Concessionaire's Allocable Costs incurred thereafter in preparing or submitting any portions of such submittal and the Concessionaire will be entitled to any other remedies afforded to the Concessionaire under this Agreement.

Section 10.06 Limitations on the Concessionaire's Right to Rely

(a) The Concessionaire expressly acknowledges and agrees that the Department's rights, if any, under the Project Agreements:

(i) to review, comment on, approve, disapprove and/or accept designs, plans, specifications, work plans, construction, equipment, installation, plans for maintenance, traffic management, policing and/or Project management, books, records, reports or statements, or documents pertaining to Concessionaire Debt and Financing Assignments;

(ii) to review, comment on and approve or disapprove qualifications and performance of, and to communicate with, Contractors; and

(iii) to perform Oversight Services;

exist solely for the benefit and protection of the Department, do not create or impose upon the Department any standard or duty of care toward any Concessionaire Party, all of which are hereby disclaimed, may not be relied upon, nor may the Department's exercise or failure to exercise any such rights be relied upon, by the Concessionaire in determining whether the Concessionaire has satisfied the standards and requirements set forth in this Agreement and may not be asserted, nor may the Department's exercise or failure to exercise any such rights be asserted, against the Department by the Concessionaire as a defense, legal or equitable, to the Concessionaire's obligation to fulfill such standards and requirements; *provided*, that the foregoing will not limit the Department's liabilities or obligations pursuant to this Agreement.

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(b) To the maximum extent permitted by Law, and subject to the provisions of this Agreement, the Concessionaire hereby releases and discharges the Department from any and all duty and obligation to cause permitting, Project Right of Way acquisition, Utility Relocation, construction, equipping, operations, maintenance, policing, renewal, replacement, traffic management or other management of or for the Project or the Project Right of Way, by the Department, to satisfy the standards and requirements set forth in the Project Agreements; *provided*, that the foregoing will not limit the Department's liability or obligations under this Agreement. The Department will be entitled to remedies for Non-Conforming Work and to identify additional Work which must be done to bring the Work and Project into compliance with requirements of this Agreement, regardless of whether previous review, comment, objection, rejection, approval, disapproval, acceptance, certification, concurrence, monitoring, testing, inspection, spot checking, auditing or other oversight were conducted or given by the Department.

(c) No rights of the Department described in Section 10.06(a), no exercise or failure to exercise such rights, no failure of the Department to meet any particular standard of care in the exercise of such rights, no issuance of permits or certificates of completion or acceptance and no Final Acceptance of any Project Assets or any Project Enhancement will:

(i) relieve the Concessionaire from performance of the Work or of its responsibility for the selection and the competent performance of its Contractors;

(ii) relieve the Concessionaire of any of its obligations or liabilities under the Project Agreements;

(iii) be deemed or construed to waive any of the Department's rights and remedies under the Project Agreements; or

(iv) be deemed or construed as any kind of representation or warranty, express or implied, by the Department.

(d) Notwithstanding Section 10.06(a), (b) and (c) above, (i) the Concessionaire will be entitled to rely on specific approved Deviations and interpretative engineering decisions the Department gives pursuant to this Agreement in accordance with the Technical Requirements, the Design-Build Contract or any Development Contract, and any Law, (ii) the Department is not relieved from any liability arising out of a knowing, intentional material misrepresentation under any written statement the Department delivers and (iii) the Department is not relieved from its obligations under any Development Contract.

Section 10.07 Suspension of the Work

(a) The Department will have the right and authority, without liability to the Concessionaire, to suspend any affected portion of the Work by written order to the Concessionaire to comply with any court order or judgment, to protect against a risk to the public health, safety or welfare (as more particularly set forth in Section 24.04(b)) including to workers, other personnel or the general public from unsafe or dangerous conditions, or upon the occurrence of any of the following by the Concessionaire:

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- (i) with respect to Non-Conforming Work, as provided in Section 8.11(b)(ii);
 - (ii) failure to comply with any Law or Governmental Approval (including failure to handle, preserve and protect archeological, paleontological or cultural resources, or failure to handle Hazardous Substances, in accordance with applicable Laws and Governmental Approvals);
 - (iii) failure to provide proof of required insurance coverage or to provide or maintain the required Performance Security;
 - (iv) failure to carry out and comply with Directive Letters; and
 - (v) failure to satisfy any conditions to commencing performance of the applicable portion of the Work set forth in Section 8.03 or Section 9.02.
- (b) The Department will lift the suspension order promptly after it is permitted by the terms of the court order or judgment, after the dangerous or unsafe condition is rectified, or after the Concessionaire fully cures and corrects the applicable breach or failure to perform.
- (c) The Concessionaire will have the right to dispute the Department’s suspension order by written notice to the Department, which notice will provide supporting information for the Concessionaire’s position. Unless directed otherwise by the Department after receipt of such notice, the Concessionaire will carry out the Work required by the Department. If it is determined in accordance with the dispute resolution procedures in Article 21 that the Concessionaire was in compliance with its obligations under this Agreement, then the suspension order and any additional Work required by the Department will be treated as a Department Change pursuant to Section 14.02.
- (d) The issuance of a suspension order will not affect the Concessionaire’s rights to cure or correct any such incidents giving rise to the issuance of the suspension order in accordance with this Agreement.

ARTICLE 11

NON-COMPLIANCE POINTS SYSTEM

Section 11.01 Non-Compliance Points System

- (a) The Non-Compliance Points Table attached as Exhibit W sets forth a table for the identification of certain Concessionaire acts, omissions, breaches or failures to perform its obligations under this Agreement (each such omission, breach or failure, a “Performance Shortfall”) that may result in the assessment by the Department of Non-Compliance Points. The Non-Compliance Points system is used by the Department to measure the Concessionaire’s performance levels. The accumulation of Non-Compliance Points by the Concessionaire may trigger the remedies set forth or referenced in this Article 11 and in Article 19.

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(b) The inclusion in the Non-Compliance Points Table of a Performance Shortfall will not determine whether such breach or failure is material.

(c) The Department may exercise any of its remedies under this Article 11 without prejudice to any other rights or remedies it has pursuant to this Agreement, including the right of the Department to declare a Concessionaire Default.

(d) The Non-Compliance Points Table contains a representational, but not exhaustive, list of Performance Shortfalls possible under this Agreement. Accordingly, subject to Section 11.01(e), the Department may from time to time add any entry to such table describing a Performance Shortfall under this Agreement that was not previously included in such table, establishing the Non-Compliance Points applicable to such Performance Shortfall and setting a cure period after consultation with the Concessionaire. The Department will notify the Concessionaire in writing whenever the Department proposes to make such additions to the Non-Compliance Points Table. The Concessionaire will have 15 Days after receipt of such additions or adjustments to deliver written comments. Thereafter, the Department will render its decision regarding whether and on what terms to incorporate the proposed additions to the Non-Compliance Points Table by written notice to the Concessionaire. Any Disputes with respect to the Department's decision will be subject to dispute resolution pursuant to Article 21. The Department's right to make additions or adjustments to the Non-Compliance Points Table is not intended to expand the Concessionaire's existing contractual obligations as set forth in this Agreement, but rather to add existing contractual obligations as set forth in this Agreement to the list of Performance Shortfalls for which Non-Compliance Points may be assessed.

(e) The Department's right to add existing contractual obligations to the Non-Compliance Points Table will be subject to the following limitations and requirements:

(i) the Department will be limited to adding only those contractual obligations which the Concessionaire has previously failed to comply with at least three times within a three-year period beginning upon notice of the first failure to comply; *provided*, that the Department has furnished the Concessionaire with prior written notice of such failures and the Concessionaire has subsequently violated such contractual obligations after receipt of such notice;

(ii) the Department will have no right to assess Non-Compliance Points on account of a Performance Shortfall that occurs prior to the date it is added to the Non-Compliance Points Table;

(iii) the categories assigned to Performance Shortfalls will be limited to "Category A" or "Category B"; and

(iv) the Non-Compliance Points assigned to a "Category A" Performance Shortfall and a "Category B" Performance Shortfall will not exceed the maximum number of Non-Compliance Points for a "Category A" Performance Shortfall and "Category B" Performance Shortfall identified in the Non-Compliance Points Table, respectively, and it is intended that the number of Non-Compliance Points assigned to new Performance Shortfalls will be consistent with the number of Non-Compliance

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Points assigned to comparable contractual obligations listed as Performance Shortfalls in the Non-Compliance Points Table as of the Agreement Date.

Section 11.02 Assessment of Non-Compliance Points

(a) The Department may only assess the number of Non-Compliance Points set forth in the Non-Compliance Points Table for each Performance Shortfall. The Department may, in its sole discretion, assess fewer or no Non-Compliance Points for a particular Performance Shortfall.

(b) The assessment of Non-Compliance Points will begin two years following the Final Completion Date (the “Non-Compliance Points Start Date”), and commencing on the Non-Compliance Points Start Date, the Department and the Concessionaire will notify one another of any Performance Shortfall as provided in this Section 11.02.

(c) Beginning on the Non-Compliance Points Start Date, the Concessionaire will notify the Department in writing of the occurrence of Performance Shortfall within five Days after the Concessionaire first obtains knowledge of a Performance Shortfall. The notice will describe the breach or failure in reasonable detail. On and after the Non-Compliance Points Start Date, within ten Days of the receipt of such notice, the Department will deliver to the Concessionaire a written determination setting forth the number of Non-Compliance Points, if any, the Department, in its sole discretion, has assessed to the Concessionaire. This Section 11.02(c) will not apply if the Concessionaire first obtains knowledge of a Performance Shortfall through a notice from the Department under Section 11.02(d).

(d) If the Department determines that a Performance Shortfall has occurred, the Department will, within five Days of its determination, deliver to the Concessionaire notice thereof. Such notice will describe the Performance Shortfall in reasonable detail, the number of Non-Compliance Points, if any, the Department, in its sole discretion, has assessed to the Concessionaire, and the basis for the Department’s assessment of Non-Compliance Points.

(e) Non-Compliance Points will not be assessed for any Performance Shortfall that results from a Delay Event, including any failure by the Concessionaire to take corrective actions within the timeliness requirements set forth in the Technical Requirements to the extent such failure is directly attributable to a Delay Event. Further, the cure periods specified in the Non-Compliance Points Table for each Performance Shortfall will be extended to the extent that the Concessionaire is delayed in the performance of Work to cure such Performance Shortfall due to a Delay Event.

(f) Non-Performance Compliance Points will not be assessed to the Concessionaire for Performance Shortfalls directly caused by issuance of a Safety Compliance Order unless such Safety Compliance Order has resulted from a breach by the Concessionaire of its obligations under the Project Agreements.

Section 11.03 General Terms

The Department may assess Non-Compliance Points subject to the following terms and conditions:

(a) The Non-Compliance Points Table sets forth the number of Non-Compliance Points that the Department may assess for each type of Performance Shortfall.

(b) Where a single act or omission gives rise to more than one Performance Shortfall, the Department may assess Non-Compliance Points for only one Performance Shortfall. In such circumstances, the Department may, in its sole discretion, assess Non-Compliance Points for the Performance Shortfall with the highest maximum number of Non-Compliance Points.

(c) Categories of Performance Shortfalls

(i) For Performance Shortfalls classified as “Category A” in the Non-Compliance Points Table, Non-Compliance Points will be assessed only at the end of the applicable cure period set forth in the Non-Compliance Points Table and only if the Concessionaire has failed to cure such Performance Shortfall within such cure period. Additional Non-Compliance Points may be assessed again at the end of each subsequent cure period (and each such assessment of Non-Compliance Points will constitute a separate and distinct Performance Shortfall) until the Performance Shortfall is cured.

(ii) For Performance Shortfalls classified as “Category B” in the Non-Compliance Points Table, Non-Compliance Points will be assessed on the date of the initial notice described in Section 11.02. If the Performance Shortfall is not then cured within the applicable cure period, additional uncured Non-Compliance Points will be assessed at the end of the first and each subsequent cure period (and each such assessment of Non-Compliance Points will constitute a separate and distinct Performance Shortfall), until the Performance Shortfall is cured.

(iii) For Performance Shortfalls classified as “Category C” in the Non-Compliance Points Table, Non-Compliance Points will be assessed on the date of the initial notice described in Section 11.02. Each act, omission, breach or failure that gives rise to a Performance Shortfall classified as “Category C” in the Non-Compliance Points Table will be assessed Non-Compliance Points separately.

Section 11.04 Notification of Cure

(a) When the Concessionaire determines it has cured a Performance Shortfall classified as “Category A” or “Category B” in the Non-Compliance Points Table for which the Department has assessed Non-Compliance Points, the Concessionaire will deliver written notice of cure to the Department within five Days of its determination. The Concessionaire’s written notice of cure will identify the Performance Shortfall at issue and describe what steps were undertaken to cure it.

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(b) The Department will then promptly verify the cure through inspection or other means and provide to the Concessionaire a written certification of cure. If, following such inspection or other process, the Department determines that the Concessionaire has not adequately cured the notice of the continued Performance Shortfall and Non-Compliance Points will continue to accumulate in respect of such Performance Shortfall. If applicable, the Department's written certification of cure will set forth the total number of cured Non-Compliance Points assessed to the Concessionaire for each Performance Shortfall.

Section 11.05 Monitoring of Non-Compliance Points

(a) The Department will monitor the total number of cured and uncured Non-Compliance Points assessed by it on an ongoing basis for the duration of the Term.

(b) The date of assessment of Non-Compliance Points for a Performance Shortfall will be deemed to be the date of the initial notice of such Performance Shortfall under Section 11.02. On the anniversary of the date of assessment of Non-Compliance Points for a Performance Shortfall, such Non-Compliance Points for the specific Performance Shortfall will be subtracted from the cumulative total number of Non-Compliance Points the Concessionaire has been assessed.

Section 11.06 Monitoring Period

If the Concessionaire is assessed an amount of Non-Compliance Points equal to or greater than 40% of the total number of Non-Compliance Points in the Non-Compliance Points Table in any consecutive 365-Day period or maintains an amount of Non-Compliance Points in respect of uncured Performance Shortfalls equal to or greater than 20% of the total number of Non-Compliance Points in the Non-Compliance Points Table at any time, the Department may increase the level of monitoring of the Project pursuant to Section 10.03 for a period of not less than 90 Days (the "Monitoring Period"). The Concessionaire will compensate the Department for its Allocable Costs incurred in performing its increased oversight during the Monitoring Period.

Section 11.07 Performance Improvement Plan

(a) If the Concessionaire accumulates an amount of Non-Compliance Points equal to or greater than 60% of the total number of Non-Compliance Points in the Non-Compliance Points Table in any consecutive 365-Day period or allows to continue an amount of Non-Compliance Points in respect of uncured Performance Shortfalls equal to or greater than 30% of the total number of Non-Compliance Points in the Non-Compliance Points Table at any time, the Department may require the Concessionaire to prepare and submit (at the Concessionaire's sole cost and expense) a proposed Performance Improvement Plan (the "Performance Improvement Plan") for the Department's approval, which will not be unreasonably withheld; *provided*, that the Performance Improvement Plan addresses the correction of the underlying Performance Shortfalls and is consistent with the requirements of this Agreement. The Concessionaire will deliver the Performance Improvement Plan to the Department within 30 Days of its request. The Performance Improvement Plan will set forth a schedule and describe specific actions the Concessionaire will undertake to improve its performance as demonstrated by reducing the

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frequency with which it is assessed Non-Compliance Points and by its incurring no new uncured Performance Shortfalls following implementation of the Performance Improvement Plan. Such actions may include:

- (i) improvements to the Concessionaire’s quality management practices, plans and procedures;
- (ii) changes in its organizational and management structures;
- (iii) increased monitoring and inspections;
- (iv) changes in key personnel; and
- (v) the replacement of Contractors.

The Concessionaire will diligently implement the approved Performance Improvement Plan in accordance with the schedule set forth therein.

(b) If, after 180 Days following the implementation of the approved Performance Improvement Plan, the Concessionaire can demonstrate that:

- (i) the Performance Improvement Plan has reduced the number of Non-Compliance Points accumulated and the number of continuing Performance Shortfalls classified as “Category A” or “Category B” in the Non-Compliance Points Table as compared to the period prior to the implementation of the approved Performance Improvement Plan;
- (ii) the Concessionaire is complying in all material respects with the course of action described in the approved Performance Improvement Plan; and
- (iii) the Concessionaire has been assessed no Non-Compliance Points for Performance Shortfalls classified as “Category C” in the Non-Compliance Points Table since the implementation of the approved Performance Improvement Plan;

then the total number of outstanding Non-Compliance Points assessed to the Concessionaire over the course of the prior 180-Day period will be reduced by 50%.

(c) The Concessionaire acknowledges that its failure to comply with this Section 11.07 may constitute a Concessionaire Default pursuant to Section 19.01.

Section 11.08 Disputes Regarding the Assessment of Non-Compliance Points

(a) The Concessionaire may object to the assessment of Non-Compliance Points by delivering to the Department notice of its objection within ten Days of receipt of the Department’s determination assessing the Non-Compliance Points at issue. Such notice will set forth with specificity the grounds for the Concessionaire’s objection.

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(b) The Department will consider the Concessionaire's objections and Representatives of the Department and the Concessionaire will meet to discuss the matter within ten Days after the Concessionaire has provided its objection. If, at the conclusion of this ten-Day period, the Concessionaire still objects to the Department's decision, it may pursue dispute resolution pursuant to Article 21.

(c) If for any reason the Concessionaire fails to deliver its written notice of objection within the time period specified in Section 11.08(a), the Concessionaire will have waived its right to challenge the Department's assessment of Non-Compliance Points.

ARTICLE 12

PROJECT ENHANCEMENTS AND SAFETY COMPLIANCE ORDERS

Section 12.01 Project Enhancements by the Concessionaire

The Concessionaire will have the right, at its sole cost and expense, at any time after Substantial Completion of all of the Project Assets, to design, develop, construct, operate and maintain Concessionaire Project Enhancements within the Project Right of Way, including any fundamental change in the dimensions, character, quality, location or position of all or any part of the Project; *provided*, that the Concessionaire will not undertake any such Project Enhancements unless all aspects thereof are approved in writing by the Department in its sole discretion, and the Concessionaire has entered into a Development Contract with the Department with respect to such Concessionaire Project Enhancement.

Section 12.02 Project Enhancements by the Department

(a) The Department will have the right from time to time after Final Completion, at its sole cost and expense, to design, develop, construct, operate and maintain Department Project Enhancements. The Department will have the right to design, develop, construct, operate and maintain Department Project Enhancements through one or more of the following mechanisms, as the Department selects from time to time in its sole discretion:

- (i) use by the Department of its own personnel, materials and equipment;
- (ii) contracting with third parties through requests for proposals, competitive bids, negotiations or any other lawful procurement process; and
- (iii) authorizing and directing the Concessionaire, at the Department's sole cost and expense, to undertake the Department Project Enhancements, through contracting for necessary traffic and revenue studies and all necessary planning, design, engineering, permitting, financial, right-of-way acquisition services, Utility Relocation, construction, installation, project management, operation, maintenance, repair and other work and services;

provided, that the Department will give the Concessionaire at least 60 Days written notice prior to initiating any procurement process referred to in clause (ii) above, during which time the

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Concessionaire will have the right, but not the obligation, to agree in writing to undertake the Department Project Enhancement on such terms and conditions as the Department and the Concessionaire will mutually agree upon; *provided further*, that if the Department and the Concessionaire fail to agree upon such terms and conditions within such 60-Day period, the Department will be entitled to proceed with any of the mechanisms set forth in clauses (i), (ii) and (iii) of this Section 12.02(a) and will have no further liability or obligation to the Concessionaire except as otherwise expressly provided in this Agreement.

(b) If the Department authorizes and directs the Concessionaire to undertake a Department Project Enhancement pursuant to Section 12.02(a)(iii), then, in cooperation with the Department, as applicable, and subject to (i) the review and written approval by the Department in its sole discretion and (ii) without limiting the Concessionaire's right to claim additional Concessionaire Damages, the Department making available to the Concessionaire sufficient funds, through monthly progress payments for work performed and costs incurred (plus an amount not to exceed 10% of such costs to reimburse the Concessionaire for reasonable and documented costs actually incurred to administer the work), including without limitation the costs of obtaining any Governmental Approvals necessitated by such Department Project Enhancement, in order to perform the work required to design, construct, operate and maintain such Department Project Enhancement, the Concessionaire will implement such Project Enhancement in accordance with the terms and provisions of this Agreement, and the Project Enhancement will be deemed a part of the Project and will become subject to all the terms and provisions of this Agreement as of the date the Concessionaire is required to assume such responsibility pursuant to this Section 12.02.

(c) The Department will have the right to enter upon the Project and the relevant rights of way for any purpose relating to Department Project Enhancements under this Section 12.02 to the extent reasonably necessary.

Section 12.03 Safety Compliance Orders

(a) The Department may, but is not obligated to, issue Safety Compliance Orders to the Concessionaire; *provided*, that no Safety Compliance Order may in any event order or direct the Concessionaire to do any act in violation of any Law. Compliance with a Safety Compliance Order by the Concessionaire will not be deemed a default by the Concessionaire under the provisions of this Agreement or any other Project Agreement.

(b) The Department will use good faith efforts to inform the Concessionaire at the earliest practicable time of any circumstance or information relating to the Project which in the Department's reasonable judgment is likely to result in a Safety Compliance Order. Except in the case of an Emergency, the Department will consult with the Concessionaire prior to issuing a Safety Compliance Order concerning the risk to public or worker safety, alternative compliance measures, cost impacts and the availability of Concessionaire resources to fund the Safety Compliance Work.

(c) If the Department issues a Safety Compliance Order, the Concessionaire will proceed, at its sole cost and expense (except as otherwise provided in Section 9.04), with the

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necessary environmental, design and construction Work to carry out the Safety Compliance Order as follows:

(i) if the Safety Compliance Order is of the type described in clause (a) of the definition of that term, the Concessionaire will proceed expeditiously; and

(ii) if the Safety Compliance Order is of the type described in clause (b) of the definition of that term, the Concessionaire will carry it out in accordance with the procedures adopted by the Department for carrying out similar work on similar portions of the State Highways.

(d) The Concessionaire will have the right to dispute a Safety Compliance Order by providing written notice to the Department within 21 Days of the issuance of the Safety Compliance Order setting forth the Concessionaire's Claim that no condition exists to justify the disputed Safety Compliance Order and the Concessionaire's estimate of impact costs, Gross Revenues and the construction schedule, if applicable. The Concessionaire will nevertheless implement the Safety Compliance Order, but if it is finally determined in accordance with the dispute resolution procedures in Article 21 that conditions warranting the Safety Compliance Order did not exist, then the Safety Compliance Order will be treated as a Department Change pursuant to Section 14.02.

Section 12.04 Development of Other Facilities

(a) Except for the right of the Concessionaire to receive compensation set forth in Section 12.05 with respect to Alternative Facilities, the State Parties will have the unlimited right, each in its sole discretion, at any time and without liability, to finance, develop, approve, construct, expand, improve, modify, upgrade, add capacity to, reconstruct, rehabilitate, restore, renew and replace any existing and new transportation or other facilities other than the Project outside of the Project Right of Way (including, without limitation, free roads, connecting roads, service roads, frontage roads, turnpikes, managed lanes, HOT/HOV lanes, light rail, heavy rail, high-speed rail, freight rail and bus lanes) (collectively, the "Department Projects"), and whether adjacent to, nearby or otherwise located as to affect the Project, its operation and maintenance (including the costs and expenses thereof), its vehicular traffic and/or its revenues; provided, that

(i) the Department will use diligent efforts to keep the Concessionaire informed of planned maintenance, renewal and replacement and repair activities of the Department Projects which can reasonably be foreseen to impact the Work; and

(ii) the Department will provide to the Concessionaire copies of and other information concerning the Department's then current maintenance, renewal and replacement and repair program for the Department Projects, upon the Concessionaire's reasonable request.

(b) The Department Projects include those facilities (i) owned or operated by the State Parties, including those owned or operated by a private entity pursuant to a contract with a State Party; (ii) owned or operated by a joint powers authority or similar entity to which a State Party is a member; (iii) owned or operated by any other Governmental Authority pursuant to a

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contract with a State Party, including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities and (iv) owned or operated by any other Governmental Authority (including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities) with respect to which a State Party has contributed funds, in-kind contributions or other financial or administrative support. The foregoing rights include the ability to institute, increase or decrease tolls or other fees and charges on such facilities or modify, change or institute new or different operation and maintenance procedures.

(c) The State Parties will have the right, without liability, to make discretionary and non-discretionary distributions of Federal and other funds for any transportation projects, programs and planning, and to exercise all of its authority to advise and recommend on transportation planning, development and funding on any project of its choosing.

(d) At the request of the Concessionaire, the Department will facilitate and assist the Concessionaire in interacting with applicable Governmental Authorities with respect to intersection control plans setting forth the management of the intersections and other junctions connecting the Project at the O&M Boundaries to the surrounding roadway system.

(e) In no event will the taking of any action described in this Section 12.04 by a State Party (i) constitute a default by the Department pursuant to this Agreement or (ii) entitle the Concessionaire to Concessionaire Damages or compensation, except to the extent provided in (A) Section 12.02 with respect to any such existing and new transportation or other facilities that constitute Department Project Enhancements and (B) Section 12.05 with respect to Alternative Facilities.

Section 12.05 Alternative Facilities

(a) This Section 12.05 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. Such rights and remedies are subject to Section 12.05(k).

(b) The Concessionaire Damages owing from the Department to the Concessionaire on account of an Alternative Facility will be determined pursuant to Section 14.01(b). The foregoing Concessionaire Damages will be determined in the same manner, and subject to the same conditions and limitations set forth under Section 14.01(c) and Section 14.01(d).

(c) The Department may, but is not obligated to, deliver to the Concessionaire a notice of a potential Alternative Facility no later than 90 Days prior to the opening of the potential Alternative Facility to traffic. The Department will include in such notice (i) a reasonable description of the potential Alternative Facility, including the expected date of opening, any right of way alignments, number of lanes, location and other pertinent features, (ii) a statement whether the potential Alternative Facility will be tolled, and if so the intended toll rate schedule by vehicle classification, *provided*, that such schedule is available at the time of such notice and (iii) subject to any confidentiality obligations binding upon the Department, any traffic and revenue studies and analyses available to the Department for the potential Alternative Facility.

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(d) If the Department has delivered a notice of a potential Alternative Facility pursuant to Section 12.05(c), within 180 Days after the Department delivers such notice to the Concessionaire, the Concessionaire will deliver to the Department a written notice of Claim stating whether the Concessionaire believes the potential Alternative Facility will have a Net Cost Impact or Net Revenue Impact and, if so, a true and complete copy of a preliminary traffic and revenue study and analysis showing the projected effects and a reasonably detailed statement quantifying such effects. Such analysis and quantification will include data on past Toll Revenues and projected future Toll Revenues with and without the potential Alternative Facility, together with any projected Net Cost Impact or Net Revenue Impact. At the Concessionaire's request within such 180-Day period, the Department will grant reasonable extensions of time for the Concessionaire to deliver the written notice of Claim, so long as the Concessionaire is making good faith, diligent progress in completing its traffic and revenue analysis and Net Cost Impact or Net Revenue Impact analysis, *provided*, that in no event will the Department be obligated to grant extensions aggregating more than 90 Days. The Department will reimburse the Concessionaire its Allocable Costs in preparing such preliminary traffic and revenue study.

(e) If for any reason the Concessionaire fails to deliver such written notice of Claim and related information within the foregoing time period (as may be extended) pursuant to Section 12.05(d), the Concessionaire will be deemed to have irrevocably and forever waived and released any Claim or right to compensation for Concessionaire Damages attributable to the construction, operation and use of the potential Alternative Facility, or any other Alternative Facility that is not substantially different from the potential Alternative Facility. For purposes of this Section 12.05(e), an Alternative Facility ultimately constructed and operated will be considered substantially different from the potential Alternative Facility if (i) the route is substantially different, (ii) the number of lanes is different, (iii) the number of HOV, HOT, truck or other special purpose or restricted use lanes is different or their length is substantially different, (iv) the total length is substantially different, (v) highways, roads and facilities having interchange, entrance or exit ramp access to and from such Alternative Facility are different, or the design capacity of an interchange, entrance or exit ramp is substantially different, (vi) the Department stated in its written notice that the potential Alternative Facility would be tolled and the actual Alternative Facility is not tolled or is tolled at materially lower toll rates for the predominant classifications of vehicles than the rates described in the Department's notice, (vii) the means for collecting tolls is substantially different (e.g. barrier only vs. barrier-free or open lane tolling) or (viii) there are other differences similar in scale or effect to the foregoing differences.

(f) If the Concessionaire delivers its written notice of Claim and related information, then, if the Department disagrees with the amount of Concessionaire Damages claimed by the Concessionaire, at the Department's request the Concessionaire will engage in good faith, diligent negotiations with the Department to settle the Dispute as to the Concessionaire Damages, if any, owing from the Department to the Concessionaire on account of the potential Alternative Facility. As part of such negotiations, the parties will continue to refine and exchange, on an Open Book Basis, plans, drawings, configurations and other information on the potential Alternative Facility, traffic and revenue data, information, analyses and studies and financial modeling and quantifications of projected Net Cost Impacts or Net Revenue Impacts, if

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any. At the request of either party, the parties will engage a neutral facilitator to assist with the negotiations.

(g) If the parties are successful in the negotiations, they will execute and deliver written agreements and, if necessary, amendments to this Agreement, setting forth all terms and conditions of the settlement, which will thereafter be final and binding and constitute a full settlement and release of any and all Claims, causes of action, suits, demands and Losses of the Concessionaire arising out of the Alternative Facility, or any similar Alternative Facility, to the extent not taken into account in any prior determination of Concessionaire Damages, and any Delay Events related to an Alternative Facility. Neither party will thereafter have the right to rescind or cancel the settlement for any reason, including differences between the amounts of actual future Net Cost Impacts or Net Revenue Impacts and the amounts that were previously projected.

(h) If, despite such good faith, diligent negotiations (including exchange of information on an Open Book Basis), the parties are unable to agree upon the Concessionaire Damages within 90 Days after commencement of such negotiations, then either party may, by written notice to the other party, terminate the negotiations and request that the Dispute be resolved in accordance with Article 21.

(i) If the Department has not delivered a notice of a potential Alternative Facility pursuant to Section 12.05(c) and the Alternative Facility is opened for traffic operations, or if any Alternative Facility is opened and upon opening is substantially different from the Alternative Facility that is the subject of a compensation settlement or is not the subject of a compensation settlement under Section 12.05(g), then the Concessionaire will be entitled to pursue its Claim for Concessionaire Damages on and subject to the following terms and conditions:

(i) the Concessionaire will have a period of up to four years following the opening for traffic operations of the Alternative Facility to make a Claim for Concessionaire Damages (which may include both past and future Net Cost Impacts or Net Revenue Impacts). The Concessionaire will make a Claim by delivering to the Department written notice of such Claim, together with the same related information and materials described in Section 12.05(d). The written notice will state the claimed Concessionaire Damages and the Concessionaire's proposed Base Case Financial Model Update. If for any reason the Concessionaire fails to deliver such written notice of Claim and related information within the foregoing time period, the Concessionaire will be deemed to have irrevocably and forever waived and released any Claim or other right to compensation for any Net Cost Impact or Net Revenue Impact, past or future, attributable to the Alternative Facility;

(ii) if the Concessionaire timely delivers its written notice of Claim and related information, then at the Department's request the Concessionaire will deliver to the Department, on an Open Book Basis, any other information, studies, analyses and documentation used by or available to the Concessionaire in support of its Claim or otherwise relevant to the determination of the Concessionaire Damages (if any), and the parties will seek to settle the Claim in good faith. Any unresolved Dispute regarding

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whether the Concessionaire is entitled to any compensation and the amount thereof will be resolved according to Article 21 of this Agreement; and

(iii) the Concessionaire will bear the burden of proving its Claim.

(j) If any Alternative Facility for which compensation is paid pursuant to Section 12.05(g) or Section 12.05(i) is modified physically or operationally after opening for traffic operations so that it is substantially different (as described in Section 12.05(e)) from the original Alternative Facility and a result thereof the Concessionaire experiences a further Net Cost Impact or Net Revenue Impact, then the Concessionaire will be entitled to further Concessionaire Damages for such additional impact. The foregoing right to further compensation will be subject to the same terms and conditions set forth in Section 12.05(g), with the deadline for making a Claim in relation thereto running from the date the changes in the original Alternative Facility are substantially completed.

(k) 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 rights to compensation under this Section 12.05, or claiming any relief in respect of 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.

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

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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 Department within 15 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 Delays Affecting Performance of the Design-Build Work

During the performance of the Design-Build Work, extensions of key milestone and/or activities identified on the most recent Project Schedule Update for Delay Events affecting the Work will be made based on Time Impact Analysis, in accordance with the Technical Requirements, and will extend each of the Design-Build Work Deadlines affected thereby. 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 Affecting Performance of the O&M Work

A Delay Event will excuse the Concessionaire from performance of its O&M Work obligations only to the extent such Delay Event directly affects such obligations.

ARTICLE 14

COMPENSATION EVENTS; DEPARTMENT CHANGES; AND DEVIATIONS

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*, however, that for an Alternative Facility, notice will be provided in accordance with Section 12.05. 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 such amount claimed as Concessionaire Damages and details of the calculation thereof no later than 60 Days from submission of the Compensation Event Notice.

(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) from an independent engineering consultant 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 resolved within such 120 Days, either party may submit the Dispute for resolution pursuant to Article 21.

(b) Concessionaire Damages Determination.

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(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 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 Article 17), 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 with Good Industry Practice.

(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.

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(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 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) the amount and timing of payment of Concessionaire Damages related to a Compensation Event will take into account the ability of the Concessionaire to obtain funding in relation to such Concessionaire Damages in accordance with Section 14.01(d) and will take into account the ability of the Concessionaire to have available funds at such times as the Concessionaire is required to make payments to third parties in respect of any Concessionaire Damages; and

(iii) 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 Assigned Gross Revenue and Refinancing Gain Share calculated pursuant to the Assigned Gross Revenue and Refinancing Gain Share 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 Concessionaire Damages; *provided*, however, that the 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. 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 adjustments to the Toll Rate Schedule, proposed extensions of the Term and/or 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.

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(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 Related to Certain Compensation Events.

(i) For Compensation Events described in clauses (i) through (l) of the definition thereof, the Concessionaire will be entitled to recover 50% of the Net Cost Impact for Critical Path delays attributable to such Compensation Events.

(ii) For the Compensation Event described in clause (m) 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 \$10 million in the aggregate for such Compensation Event;

(B) the Department will be solely responsible for the Net Cost Impact in excess of \$10 million but less than or equal to \$15 million for such Compensation Event; and

(C) the Concessionaire will be solely responsible for the Net Cost Impact in excess of \$15 million for such Compensation Event.

(iii) For the Compensation Event described in clause (n) 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 responsible for the Net Cost Impact up to \$10 million per

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occurrence for the first two Compensation Events that meet the Claim Threshold;
and

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

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

(g) If the Concessionaire makes a Claim for a Compensation Event prior to Final Completion and the representation set forth in Section 23.02(n) was inaccurate on the Agreement Date, the Department will not be liable for Concessionaire Damages with respect to such Claim if such Claim would not have been brought had such representation been accurate and, to the extent that such Claim would have been brought for a reduced amount had such representation been accurate, the Department will only be liable for Concessionaire Damages equal to such reduced amount, subject to the Concessionaire complying with the requirements of this Article 14.

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.

(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

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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, (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 most recent Project Schedule Update will have been mutually agreed upon between the Department and the Concessionaire and issued by the Department; and

(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.

(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. Upon receipt of the Directive Letter, 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 on a force account basis pursuant to Section 14.02(e).

(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.

(iii) 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.

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(e) Force Account. If the Department issues a Directive Letter to the Concessionaire pursuant to Section 14.02(d)(i), the Department will make interim payments to the Concessionaire on a monthly basis for the Work in question in accordance with the Force Account Provisions set forth in Exhibit X, 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 performance of the Design-Build Work, a change in the terms and conditions of the Technical Requirements affecting the Design-Build Work (including changes in the standards applicable to the Design-Build 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 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);
- (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.

(c) 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 that has been approved by the Department.

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;

(c) any actual or alleged patent or copyright infringement or other actual or alleged improper appropriation or use by a Concessionaire Party of trade secrets, patents, proprietary information, know-how, trade marked or service marked materials, equipment, devices or processes, copyright rights or inventions in connection with the Project;

(d) any actual or alleged inverse condemnation, trespass, nuisance or similar taking of or harm to real property committed or caused by a Concessionaire Party in connection with the Project arising from any actual or alleged (i) failure by the Concessionaire to comply with, observe or perform any of the covenants, obligations, agreements, terms or conditions in this Agreement; (ii) breach by Concessionaire of its representations or warranties set forth in this Agreement or (iii) misconduct, negligence or other culpable act, error or omission of a Concessionaire Party; *provided*, however, that the Concessionaire will not be required to indemnify, defend or hold harmless a State Indemnitee from and against any Losses actually suffered or incurred by such State Indemnitee due to Third-Party Claims that are based upon any actual inverse condemnation arising from the establishment of the Project Right of Way as identified in the NEPA Documents;

(e) any actual or alleged violation of any Federal or state securities or similar law by any Concessionaire Party, or the Concessionaire's failure to comply with any requirement necessary to preserve the tax exempt status of interest paid on the PABs;

(f) any actual or alleged Tax attributable to any Transfer of the Concessionaire's Interest or any part thereof; or

(g) any actual or alleged claim for brokerage commissions, fees or other compensation by any Person who acted on behalf of the Concessionaire, its Affiliates or their

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respective Representatives in connection with this Agreement or a Project Agreement, any Transfer of the Concessionaire's Interest or any part thereof.

Section 15.02 Defense and Indemnification Procedures

(a) In the event that any Third-Party Claim for which the Concessionaire may be required to indemnify a State Indemnitee hereunder is asserted in writing against the Department, it will as promptly as practicable notify the Concessionaire in writing of such Claim, and such notice will include a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim; *provided*, that any failure to give such prompt notice will not constitute a waiver of any rights of the Department, except to the extent that the rights of the Concessionaire are actually and materially prejudiced thereby. If any Third-Party Claim for which the Concessionaire may be required to indemnify a State Indemnitee hereunder is asserted in writing against a State Indemnitee other than the Department, a failure by such State Indemnitee to give the Concessionaire prompt notice in writing of such Claim together with a copy of the Claim and any related correspondence or documentation from the third party asserting the Claim, will constitute a waiver of any rights of such State Indemnitee to indemnification to the extent, and only to the extent, that the rights of the Concessionaire are actually and materially prejudiced thereby.

(b) The Concessionaire will be entitled and obligated to appoint counsel of its choice at the expense of the Concessionaire to represent a State Indemnitee in any action for which indemnification is sought (in which case the Concessionaire will not thereafter be responsible for the fees and expenses of any separate counsel retained by that State Indemnitee except as set forth below); *provided*, that such counsel will be satisfactory to such State Indemnitee. Notwithstanding the Concessionaire's appointment of counsel to represent a State Indemnitee in any action, such State Indemnitee will have the right to employ separate counsel, and the Concessionaire will bear the reasonable fees, costs and expenses of such separate counsel, if:

(i) the use of counsel chosen by the Concessionaire to represent the State Indemnitee would present such counsel with a conflict of interest;

(ii) the actual or potential defendants in, or targets of, any such action include both the State Indemnitee and the Concessionaire and the State Indemnitee will have reasonably concluded that there may be legal defenses available to it and/or other State Indemnitees which are different from or additional to those available to the Concessionaire;

(iii) the Concessionaire will not have employed counsel to represent the State Indemnitee within a reasonable time after notice of the institution of such action; or

(iv) the Concessionaire authorizes the State Indemnitee to employ separate counsel at the Concessionaire's expense.

(c) The Concessionaire will not be liable for any settlement or compromise by an affected State Indemnitee of a Third Party Claim except with the Concessionaire's prior written consent, which consent will not be unreasonably withheld or delayed, or except where the

settlement or compromise is approved by the court after the Concessionaire receives reasonable notice and the opportunity to be heard and such court approval has become final and non-appealable.

ARTICLE 16

HAZARDOUS SUBSTANCES

Section 16.01 General Obligations

(a) The Concessionaire will be responsible for the management, treatment, handling, storage, monitoring, remediation, removal, transport and/or disposal of any Hazardous Substances the presence of which constitutes a Hazardous Environmental Condition that are discovered on, in or under the Project Right of Way on which the Work is performed, after the earlier to occur, with respect to each Project Asset, of (i) the issuance of an LNTP (but limited to the Project Right of Way on which the Work is performed pursuant to such LNTP), (ii) issuance of the Construction Segment Notice to Proceed, or (iii) the Tolling and O&M Work Commencement Date for such Project Asset, in each case in accordance with this Agreement.

(b) After the earlier to occur, with respect to each Project Asset, of (i) the issuance of an LNTP (but limited to the Project Right of Way on which the Work is performed pursuant to such LNTP), (ii) the issuance of the Construction Segment Notice to Proceed, or (iii) the Tolling and O&M Work Commencement Date for such Project Asset, if the Concessionaire encounters any Hazardous Environmental Condition, then the Concessionaire will promptly notify the Department. In the case of Hazardous Environmental Conditions that are attributable to Known Pre-Existing Hazardous Substances, the Concessionaire will thereafter proceed with Remedial Actions in accordance with the Concessionaire's Environmental Management Plan. In the case of all other Hazardous Environmental Conditions and to the extent not covered by the Environmental Management Plan, the Concessionaire will develop a Remedial Action Plan setting out the scope of the Remedial Actions that the Concessionaire proposes to take in relation to the relevant Hazardous Environmental Condition, such actions to include, but not be limited to: (i) conducting such further investigations as may be necessary or appropriate to determine the nature and extent of the Hazardous Substances and submitting copies of such data and reports to the Department for its review and approval, (ii) taking reasonable steps, including in the case of excavation, construction, reconstruction or rehabilitation, modifications and/or construction techniques, to avoid or minimize excavation or dewatering in areas with Hazardous Substances, (iii) preparing and obtaining Governmental Approvals for remedial action plans, including Department approval, (iv) carrying out the Remedial Action Plan, including, as necessary, disposal of the Hazardous Substances and (v) timely informing the Department of all such actions.

(c) Before any Remedial Actions are taken that would inhibit the Department's ability to ascertain the nature and extent of the Hazardous Environmental Condition, the Concessionaire will afford the Department the opportunity to inspect areas and locations that require Remedial Actions; *provided*, that in the case of a sudden release of any Hazardous Substances, the Concessionaire may take all reasonable actions necessary to stabilize and contain

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the release without prior notice or inspection, but will promptly notify the Department of the sudden release and its location.

(d) The Concessionaire will obtain all Governmental Approvals relating to Remedial Actions. The Concessionaire will be solely responsible for compliance with such Governmental Approvals and applicable Environmental Laws concerning or relating to Hazardous Substances. In carrying out Remedial Actions that are compensable by the Department pursuant to this Agreement, the Concessionaire will not take any steps or actions which impair the Department's potential Claims for indemnity and contribution, statutory or otherwise.

(e) Unless directed otherwise by the Department, the Concessionaire will seek to recover costs from any available reimbursement program or from any third party responsible for generating or otherwise creating or contributing to conditions that lead to the need for Remedial Action. Without limiting the preceding sentence, the Concessionaire will seek pre-approval and pursue reimbursement from the Virginia Petroleum Storage Tank Fund (“VPSTF”) for qualifying expenses incurred during the course of investigation, containment, management, mitigation or remediation activities on petroleum storage tank releases. The parties will cooperate with and notify each other with respect to activities undertaken pursuant to this Section 16.01(e).

(f) Except as provided in Section 16.02, the Concessionaire will bear all costs and expenses of preparing and complying with any Remedial Action Plan, of complying with Law and obtaining and complying with Governmental Approvals pertaining to Hazardous Substances, and otherwise of carrying out Remedial Actions.

Section 16.02 Pre-Existing Hazardous Substances

(a) The Department will reimburse, to the extent permitted by Law, the Concessionaire for the Concessionaire's Allocable Costs for Remedial Actions with respect to any Unknown Pre-Existing Hazardous Substances, the presence of which constitutes a Hazardous Environmental Condition,. To the extent the Concessionaire recovers costs from any available reimbursement program or third parties with respect to Unknown Pre-Existing Hazardous Substances, the Concessionaire will pay such costs to the Department, less the Allocable Costs incurred by the Concessionaire in seeking recovery in accordance with Section 16.01(e). The Concessionaire will furnish to the Department documentation supporting the amount recovered from any reimbursement program or third parties and the Allocable Costs incurred by the Concessionaire in pursuing such recovery.

(b) The Department will assume, to the extent permitted by Law, responsibility for third-party claims against the Concessionaire for personal injury, damages or harm to property or business due to any Pre-Existing Hazardous Substances, the presence of which constitutes a Hazardous Environmental Condition, and all related penalties, fines and administrative or civil sanctions arising out of or related to such Pre-Existing Hazardous Substances; except to the extent such claims are due to the negligence, recklessness, or willful misconduct of a Concessionaire Party.

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(c) At all times during the Term, the Concessionaire will provide cost estimates with respect to such Remedial Actions which may be reimbursed by the Department, for the Department's review and approval prior to proceeding with any such Remedial Actions, subject to Section 16.01(c). If the Department has not responded to a request for such approval pursuant to this Section 16.02(c) within 21 Days after the Department's acknowledgement of receipt (or in the case of an emergency a reasonably appropriate shorter period), the request will be deemed to be approved, except to the extent matters deviate from applicable Technical Requirements or Law.

Section 16.03 Concessionaire Indemnifications Regarding Hazardous Substances

(a) The Concessionaire will indemnify, protect, defend and hold harmless and release each State Indemnitee from and against any and all Third-Party Claims, including attorney's fees, expert witness fees and court costs suffered or incurred by such State Indemnitee, to the extent caused by:

(i) Hazardous Substances introduced to or brought onto the Project Right of Way by a Concessionaire Party;

(ii) failure of any Concessionaire Party to comply with any requirement of this Agreement or any other Project Agreement relating to Hazardous Substances (including any failure to perform any Remedial Action required in accordance with Section 16.01) or to otherwise comply with applicable Environmental Laws and Governmental Approvals; or

(iii) the exacerbation, release, spreading, migration, or toxicity of Hazardous Substances due to the negligence, recklessness, or willful misconduct of a Concessionaire Party.

(b) The Concessionaire will defend such Third-Party Claims in accordance with Section 15.02.

(c) The Concessionaire's obligations under this Section 16.03 will not apply to Third-Party Claims to the extent caused by the negligence, recklessness, or willful misconduct of any State Indemnitee.

Section 16.04 Generator Status

(a) The Department will be deemed the generator of Pre-Existing Hazardous Substances, the presence of which constitutes a Hazardous Environmental Condition, within the Project Right of Way. The Department agrees to be identified as the generator of such Pre-Existing Hazardous Substances in waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Authority.

(b) The Concessionaire will be deemed the generator of Hazardous Substances introduced to the Project Right of Way by a Concessionaire Party, the presence of which

constitutes a Hazardous Environmental Condition within the Project Right of Way. The Concessionaire agrees to be identified, or cause the applicable Concessionaire Party to be identified, as the generator of such Hazardous Substances in waste manifests and any other documentation submitted to transporters, disposal facilities and any Governmental Authority.

ARTICLE 17

INSURANCE; PERFORMANCE SECURITY

Section 17.01 Insurance Coverage Required

(a) Required Insurance for the Design-Build Work. The Concessionaire will provide and maintain at its own expense, or cause the Design-Build Contractor to provide and maintain, during performance of the Design-Build Work the insurance coverages specified in Part 1 of the Insurance Requirements attached as Exhibit Y.

(b) Required Insurance for the O&M Work. The Concessionaire will provide and maintain at its own expense, or cause the O&M Contractor to provide and maintain, during performance of the O&M Work and during any time period following the Term's expiration if the Concessionaire is required to return and perform any additional work, the insurance coverages specified in Part 2 of the Insurance Requirements.

(c) Railroad Protective Liability Insurance. The Concessionaire will provide and maintain at its own expense, or cause to be provided and maintained, during the Term, railroad protective liability insurance as specified in the Insurance Requirements, or as may be required by any railroad in connection with Work across, under or adjacent to the railroad's tracks or railroad right-of-way.

Section 17.02 General Requirements Applicable to Insurance

The insurances which the Concessionaire is required to maintain under Section 17.01:

(a) will delete any design-build or similar exclusions that could compromise coverages because of the Concessionaire's use of the design-build delivery method;

(b) except for professional liability insurance, worker's compensation insurance and employer's insurance, the Department will be named as an additional insured on a primary, non-contributory basis;

(c) will not limit the Concessionaire's liabilities and obligations pursuant to this Agreement, including the Concessionaire's indemnification obligations;

(d) will be maintained with insurers that at the time coverage commences are authorized to do business in the State and have a current policyholder's management and financial size category rating of not less than "A-: VIII" according to A.M. Best's Financial Strength Rating and Financial Size Category, except as otherwise approved by the Department;

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(e) will be on terms approved by the Department (such approval not to be unreasonably withheld);

(f) will contain coverage terms and conditions that reflect the industry standard that the commercial market will provide and support as of the date of such insurance procurement and any subsequent renewals;

(g) without inferring a right of cancellation that would not exist in the absence of these endorsements, will contain a term which requires the insurer to give not less than 30 Days prior notice to the Department whenever the insurer gives the Concessionaire a notice of cancellation or any other notice with respect to the policy (except in the case of any non-premium payment, not less than ten Days prior notice, which the insurer will be obligated to give to the Department simultaneously with providing such notice to the Concessionaire);

(h) with regard to workers compensation insurance, automobile liability insurance and contractor pollution liability insurance, will be effected on a severability of interest basis for the purposes of which the insurer accepts the term “insured” as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall policy limit not being increased as a result);

(i) other than for professional liability insurance, worker’s compensation insurance, employer’s liability insurance and property and business interruption insurance, will include cross-liability clauses allowing one insured to bring a claim against another insured party;

(j) will be endorsed so that the insurer agrees to waive all rights of subrogation or action that it may have or acquire against all or any of the Persons comprising the insured;

(k) other than for workers compensation insurance, automobile liability insurance and contractor pollution liability insurance, will contain a provision under which the insurer agrees that the failure of one insured to observe and fulfill the terms of the policy will not prejudice the coverage of the other insureds;

(l) other than for workers compensation insurance and automobile liability insurance, have each policy endorsed to contain a standard mortgagee clause to the effect that the Department and the other insureds will not be prejudiced by an unintended and/or inadvertent error, omission or misdescription of the risk interest in property insured under the policies, incorrect declaration of values, failure to advise insurers of any change of risk interest or property insured or failure to comply with a statutory requirement;

(m) will not include defense costs within the limits of coverage or permit erosion of coverage limits by defense costs, except that defense costs may be included within the limits of coverage of professional and contractor pollution liability policies; and

(n) will provide that the coverage thereof is primary and noncontributory coverage with respect to all named or additional insureds, except for coverage that by its nature cannot be written as primary.

Section 17.03 Proof of Coverage

The Concessionaire will deliver to the Department policies, material forms, endorsements and premium indications of each insurance policy certified by the Concessionaire's insurance broker to be true and correct copies of such policies, forms, endorsements and premium indications, as a condition to receiving the applicable notices to proceed set forth in this Agreement, and annually thereafter no later than ten Days prior to policy renewal or replacement. The Concessionaire will also deliver to the Department duplicate originals or copies of each Project-specific insurance policy and endorsements for the Project coverage of each other insurance policy certified by the Concessionaire's insurance broker to be true and correct copies of the originals no later than 60 Days after receiving the applicable notices to proceed set forth in this Agreement and annually thereafter no later than 60 Days after policy renewal or replacement, and also whenever reasonably requested by the Department.

Section 17.04 Adjustments in Coverage Amounts

(a) All insurance coverage limits stipulated in Section 17.01(b), as well as deductibles and self-insured retentions, will be reviewed every three years and adjusted as appropriate, in line with such amounts that would be insured by a prudent business similar to, and undertaking similar activities to, the Concessionaire; *provided*, that no such review or adjustments will be required with respect to insurance coverage required for the Design-Build Work.

(b) In determining increases in limits and adjustments to deductibles or self-insured retentions, the parties will take into account (A) Claims and Loss experience for the Project, *provided*, that premium increases due to adverse Claims experience will not be a basis for justifying increased deductibles or self-insured retentions; (B) the condition of the Project, (C) the safety compliance and performance record for the Project; (D) then-prevailing Good Industry Practice for insuring comparable transportation projects; and (E) the provisions regarding unavailability of increased coverage set forth in Section 17.05.

(c) In connection with such review, the Concessionaire will deliver to the Department evidence that such insurance is in effect, together with the Concessionaire's certification that such insurance is in line with amounts that would be insured by such a prudent business.

(d) Any Dispute regarding increases in limits or adjustments to deductibles or self-insured retentions will be resolved according to the dispute resolution procedures under Article 21.

Section 17.05 Unavailability of Insurance

(a) If any insurance required to be maintained pursuant to this Article 17 (including the limits, deductibles or any other terms under policies for such insurance) ceases to be available on a commercially reasonable basis, the Concessionaire will provide written notice to the Department accompanied by a letter from the Concessionaire's insurance advisor stating that such insurance is unavailable anywhere in the global market on a commercially reasonable basis. Such notice will be given not later than 30 Days prior to the scheduled date for renewal of any

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such policy. Except to the extent attributable to the Concessionaire, or any Concessionaire Party upon receipt of such notice by the Department, the Concessionaire and the Department will immediately enter into good faith negotiations regarding the matters set forth in Section 17.05(c) and (d) below.

(b) The Concessionaire will not be excused from satisfying the insurance requirements of this Article 17 merely because premiums for such insurance are higher than anticipated. To establish that the required coverages (or required terms of such coverages, including insurance policy limits) are not available on commercially reasonable terms, the Concessionaire will bear the burden of proving either that (i) the same is not available at all in the global insurance and reinsurance markets or (ii) the premiums for the same have so materially increased over those previously paid for the same coverage that a reasonable and prudent risk manager for a Person seeking to insure comparable risks would conclude that such increased premiums are not justified by the risk protection afforded. For the purpose of clause (ii), the only increases in premiums that may be considered are those caused by changes in general market conditions in the insurance industry.

(c) In the event that the Concessionaire and the Department cannot reach a resolution acceptable to both parties within ten Days, the Concessionaire and the Department will make arrangements for the formation of an insurance panel consisting of the Concessionaire's insurance advisor (or broker), the Department or its insurance advisor (or broker) and an independent insurance expert from a nationally recognized insurance brokerage firm, chosen by the Concessionaire and reasonably acceptable to the Department. Such independent expert will conduct a separate review of the relevant insurance requirements of this Article 17 and the market for such insurance at the time, giving due consideration to the representations of both insurance advisors, and upon conclusion of such review will issue a written report stating whether such insurance is available or unavailable on a commercially reasonable basis.

(d) If the insurance expert concludes that such insurance is not available on a commercially reasonable basis, the insurance expert will provide a written recommendation (which will include the amount and type of insurance which is available upon a commercially reasonable basis) not less than 15 Days before the date for renewal of such insurance. The Concessionaire will, prior to the expiration of the insurance then in effect, obtain the insurance required by this Article 17 as adjusted in accordance with such recommendation.

(e) The Department makes no representation that the limits of liability specified for any insurance policy to be carried pursuant to this Agreement are adequate to protect the Concessionaire against its undertakings pursuant to this Agreement, to the Department, or any third party. No such limits of liability will preclude the Department from taking any actions as are available to it under the Project Agreements or Law.

Section 17.06 Failure to Obtain Insurance Coverage

(a) If in any instance the Concessionaire has not performed its obligations respecting insurance coverage set forth in this Agreement (as may be adjusted in accordance with Section 17.05) or is unable to enforce and collect any such insurance for failure to assert Claims in accordance with the terms of the insurance policies, then for purposes of determining the

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Concessionaire's liability and the limits thereon or determining reductions in compensation due from the Department to the Concessionaire on account of available insurance, the Concessionaire will be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had the Concessionaire performed such obligations and not committed such failure.

(b) Nothing in this Section 17.06 or elsewhere in this Article 17 will be construed to treat the Concessionaire as electing to self-insure where the Concessionaire is unable to collect due to the bankruptcy or insolvency of any insurer which at the time the insurance policy is written meets the rating qualifications approved by the Department.

Section 17.07 Restoration; Insurance Proceeds

(a) If all or any part of any of the Project will be destroyed or damaged during the Term in whole or in part by fire or other casualty of any kind or nature (including any casualty for which insurance was not obtained or obtainable), ordinary or extraordinary, foreseen or unforeseen, the Concessionaire will:

(i) give the Department notice thereof promptly after the Concessionaire receives actual notice of such casualty;

(ii) except (A) in the case of destruction or damage caused by a Compensation Event (in which case the provisions of Section 14.01 will apply), or (B) as otherwise provided in Section 20.03, at its sole cost and expense (whether or not insurance proceeds, if any, are equal to the estimated cost of repairs, alterations, restorations, replacement and rebuilding (the "Casualty Cost")), proceed diligently to restore the Project to its pre-casualty condition;

(iii) deposit all insurance proceeds received by the Concessionaire in connection with any restoration with a Depository (together with any interest earned thereon, the "Restoration Funds"); *provided*, that the procedures of this Section 17.07(a)(iii) will only apply to casualty events for which the cost of restoration exceeds \$5,000,000, adjusted annually by the percentage increase in CPI.

(b) Subject to Section 17.07(a)(ii), if the Concessionaire (i) fails or neglects to commence the diligent restoration of the Project or the portion thereof so damaged or destroyed, (ii) having so commenced such restoration, fails to diligently complete the same in accordance with the terms of this Agreement or (iii) prior to the completion of any such restoration, this Agreement expires or terminates in accordance with the terms of this Agreement, the Department may, but will not be required to, complete such restoration at the Concessionaire's expense and will be entitled to be paid out of the Restoration Funds for the relevant restoration costs incurred by the Department. Subject to Section 17.07(a)(ii), in any case where this Agreement will expire or be terminated prior to the completion of the restoration, the Concessionaire will (A) account to the Department for all amounts spent in connection with any restoration which was undertaken, (B) immediately pay over or cause the Depository to pay over to the Department the remainder, if any, of the Restoration Funds received by the Concessionaire prior to such termination or cancellation and (C) pay over or cause the Depository to pay over to the Department, within five

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Business Days after receipt thereof, any Restoration Funds received by the Concessionaire or the Depositary subsequent to such termination or cancellation. The Concessionaire's obligations under this Section 17.07(b) will survive the expiration or termination of this Agreement.

(c) Subject to the satisfaction by the Concessionaire of all of the terms and conditions of this Section 17.07, the Concessionaire will cause the Depositary, with prior written notice to the Department, to pay to the Concessionaire from time to time, any Restoration Funds, but not more than the amount actually collected by the Depositary upon the loss, together with any interest earned thereon, to be utilized by the Concessionaire solely for the restoration, such payments to be made as follows:

(i) prior to commencing any restoration, the Concessionaire will furnish to the Department for its approval the estimated cost, estimated schedule and detailed plan for the completion of the restoration, each prepared by an architect or engineer;

(ii) the Restoration Funds will be paid to the Concessionaire in installments as the restoration progresses, subject to Section 17.07(c)(iii), based upon requisitions to be submitted by the Concessionaire to the Depositary, with a copy to the Department, in compliance with Section 17.07(d), showing the cost of labor and materials purchased for incorporation in the restoration, or incorporated therein since the previous requisition, or the amounts payable or paid to the Contractor, as the case may be, and due and payable or paid by the Concessionaire; *provided*, that if any Lien is filed against the Project or any part thereof in connection with the restoration (other than a Permitted Encumbrances (but not including clause (c) of the definition thereof)), the Concessionaire will not be entitled to receive any further installment until such Lien is satisfied or discharged (by bonding or otherwise); *provided further*, that notwithstanding the foregoing, but subject to the provisions of Section 17.07(c)(iii), the existence of any such Lien will not preclude the Concessionaire from receiving any installment of Restoration Funds so long as such Lien will be discharged with funds from such installment and at the time the Concessionaire receives such installment the Concessionaire delivers to the Department and the Depositary a release of such Lien executed by the holder of such Lien and in recordable form;

(iii) the amount of each installment to be paid to the Concessionaire will be the aggregate amount of Casualty Costs theretofor incurred by the Concessionaire minus the aggregate amount of Restoration Funds theretofor paid to the Concessionaire in connection therewith; *provided*, that all disbursements to the Concessionaire will be made based upon an architect's or engineer's certificate for payment in accordance with industry standards, and disbursements may be made for advance deposits for materials and Contractors to the extent that such disbursements are customary in the industry and that the unapplied portion of the funds held by the Depositary are sufficient to complete the restoration; and

(iv) except as provided in Section 17.07(b), upon completion of and payment for the restoration by the Concessionaire, subject to the rights of any Collateral Agent, the Depositary will pay the balance of the Restoration Funds, if any, to the Concessionaire; *provided*, that if the insurance proceeds are insufficient to pay for the

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restoration (or if there will be no insurance proceeds), the Concessionaire will nevertheless be required to make the restoration and provide the deficiency in funds necessary to complete the restoration as provided in Section 17.07(a)(iii).

(d) The following will be conditions precedent to each payment made to the Concessionaire as provided in Section 17.07(c):

(i) the Concessionaire will have furnished the Department with estimates of costs and schedule and a detailed plan for the completion of the restoration, as provided for in Section 17.07(c)(i);

(ii) the Concessionaire will have furnished the Department a certificate stating that the materials and other items which are the subject of the requisition have been delivered to the Project (except with respect to requisitions for advance deposits permitted under Section 17.07(c)(iii)), free and clear of all Liens, and no unsatisfied or unbonded mechanic's or other Liens have been claimed, except for any Lien that will be discharged, by bonding or otherwise, with funds to be received pursuant to such requisition (*provided*, that a release of such Lien is delivered to the Depository in accordance with Section 17.07(c)(ii));

(iii) the restoration will be carried out under the supervision of the relevant architect or engineer (which has been approved by the Department), and there will be submitted to the Depository and the Department the certificate of such architect or engineer stating that:

(A) the sum then requested to be withdrawn either has been paid by the Concessionaire or is due and payable to Contractors, engineers, architects or other Persons (whose names and addresses will be stated), who have rendered or furnished services or materials for the work and giving a brief description of such services and materials and the principal subdivisions or categories thereof and the several amounts so paid or due to each of such Persons in respect thereof, and stating in reasonable detail the progress of the work up to the date of such certificate;

(B) no part of such expenditures has been made the basis, in any previous requisition (whether paid or pending), for the withdrawal of Restoration Funds or has been made out of the Restoration Funds received by the Concessionaire;

(C) the sum then requested does not exceed the value of the services and materials described in the certificate;

(D) other than amounts for disbursements for advance deposits for materials and Contractors, the work relating to such requisition has been performed in accordance with this Agreement;

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(E) the balance of the Restoration Funds held by the Depositary or available from other sources will be sufficient upon completion of the restoration to pay for the same in full, and stating in reasonable detail an estimate of the cost of such completion; and

(F) in the case of the final payment to the Concessionaire, the restoration has been completed in accordance with this Agreement.

(e) If the Concessionaire obtains performance bonds or performance letters of credit related to a restoration (which the Concessionaire may or may not obtain in its discretion), the Concessionaire will name the Department and the Concessionaire and the Collateral Agent, as their interests may appear, as additional obligees or transferee beneficiaries (as applicable), and will deliver copies of any such bonds or letters of credit to the Department promptly upon obtaining them. The Department will only have the right to exercise remedies under any such bonds or letters of credit so long as the Concessionaire or a Lender is not pursuing remedies thereunder.

(f) The requirements of this Section 17.07 are for the benefit only of the Department, and no Contractor or other Person will have or acquire any claim against the Department as a result of any failure of the Department actually to undertake or complete any restoration as provided in this Section 17.07 or to obtain the evidence, certifications and other documentation provided for herein.

(g) Restoration Funds deposited with a Depositary will be invested and reinvested in direct obligations of and obligations fully guaranteed by, the United States of America or any agency or instrumentality of the United States of America, the obligations of which are backed by the full faith and credit of the United States of America, or in other “permitted investments” under the Project Financing Documents, and all interest earned on such investments will be added to the Restoration Funds.

(h) The Department acknowledges and agrees that any Restoration Funds not applied to a restoration as provided in this Section 17.07 will be subject to the Lien or Liens of any Collateral Agent.

Section 17.08 Performance Security

(a) Performance Security – Equity Letter of Credit. Each Equity Member will provide an Equity Letter of Credit. Subject to the provisions of the Direct Agreement, the Project Financing Agreements will include a provision granting the Department the right to direct the Collateral Agent to draw upon the applicable Equity Letter of Credit with respect to any amounts that the relevant Equity Member has failed to fund when due and payable (whether at the scheduled date or upon acceleration upon an event of default under the Project Financing Agreements), and that the proceeds of such draw will be deposited in a project account as designated by the Collateral Agent in accordance with the Project Financing Agreements.

(b) Performance Security – Design Build Work. The Concessionaire will require the Design-Build Contractor to furnish both the Design-Build Letter of Credit and the Design-Build

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Work Guarantee (collectively “Design-Build Performance Security”). The Design-Build Performance Security will name the Department a permitted assignee or transferee beneficiary (as applicable), with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under the Design-Build Contract.

(c) Performance Security – Project Enhancements and Major Maintenance. The Concessionaire will require its separate O&M Contractors to furnish performance security with respect to Project Enhancements and Major Maintenance during the Term (“O&M Performance Security”) if and to the extent required by the Project Financing Agreements. The O&M Performance Security will name the Department a permitted assignee or transferee beneficiary (as applicable), with rights to draw upon or exercise other remedies thereunder if the Department succeeds to the position of the Concessionaire under the applicable O&M Contract.

(d) Additional Requirements.

(i) Unless otherwise specified in this Agreement or in the Direct Agreement, a draw on the Performance Security or exercise of any rights thereunder will not be conditioned on prior resort to any other security of, or provided for the benefit of, any Concessionaire Party. If the Department receives proceeds of a draw on the Performance Security in excess of the relevant obligation, the Department will promptly refund the excess to the Concessionaire (or to its designee) after all relevant obligations are satisfied in full.

(ii) The Concessionaire will obtain and furnish, or cause to be obtained and furnished, all Performance Security and replacements thereof at no cost to the Department, and will pay all charges imposed in connection with the Department’s presentment of sight drafts and drawing against any performance security or replacements thereof.

(iii) In the event the Department makes a permitted assignment of its rights and interests under this Agreement, the Concessionaire will cooperate so that concurrently with the effectiveness of such assignment, either replacement performance security for, or appropriate amendments to, the outstanding Performance Security will be delivered to the assignee naming the assignee as transferee beneficiary, at no cost to the Concessionaire.

(iv) The Department’s rights to draw on the Performance Security will not include any monetary Claims or obligations that the Concessionaire may have against the Design-Build Contractor or any separate O&M Contractor that existed prior to the Department’s transfer or vesting of the rights to draw on the Performance Security.

ARTICLE 18

OWNERSHIP AND ACCESS TO RECORDS

Section 18.01 Maintenance and Retention of Records

The Concessionaire will maintain and retain, or cause to be maintained and retained, proper books of records and accounts in which complete and correct entries will be made of its transactions in accordance with GAAP or any other generally accepted accounting standards which are acceptable to the Department. Such books and records will be maintained and retained at a location situated within the contiguous United States of America as designated by the Concessionaire by delivery of notice of such location to the Department. Further, the Concessionaire will maintain and retain, or cause to be maintained and retained, such books and records in accordance with applicable Law, including those Laws applicable to projects receiving federal-aid funds and State bond proceeds.

Section 18.02 Public Records

(a) The Concessionaire acknowledges that any Work Product the Department owns and any document of which the Department obtains a copy that relates to the Project may be considered public records under the Virginia Public Records Act, Sections 42.1-76 through 42.1-91 of the Code of Virginia or official records under the Virginia Freedom of Information Act, Sections 2.2-3700 through 2.2-3714 of the Code of Virginia, and as such may be subject to public disclosure. In the event of a request for disclosure of any such information, the Department will comply with Law. The Department recognizes that certain Work Product the Department owns, and certain documents of which the Department obtains a copy that relate to the Project, including Escrow Documents obtained under Section 18.05, may contain information exempt from disclosure under Section 2.2-3705.6(11) of the Code of Virginia, may constitute trade secrets as defined in the Uniform Trade Secrets Act, Sections 59.1-336 through 59.1-343 of the Code of Virginia, and may include confidential information which is otherwise subject to protection from misappropriation or disclosure, and the Department will keep such information confidential unless disclosure is required by Law. Should such records become the subject of a request for public disclosure, the Department will promptly notify the Concessionaire of such request and the date by which the Department anticipates responding and will consider the objections received from the Concessionaire in advance of such date.

(b) If the Concessionaire believes that any Work Product or any document subject to transmittal to or review by the Department under the terms of this Agreement or a Project Agreement contains proprietary or confidential information or trade secrets that are exempt or protected from disclosure pursuant to Law, the Concessionaire will use its reasonable efforts to identify such information prior to such transmittal or review and the Concessionaire and the Department will confer on appropriate means of ensuring compliance with such Law prior to transmittal or review. Upon the written request of either party, the Concessionaire and the Department will mutually develop a protocol for the transmittal, review and disclosure of Work Product or other documents produced or obtained by the Concessionaire so as to avoid violations of any Law and to protect, consistent with the requirements of Law, appropriate information from disclosure.

Section 18.03 Ownership of Work Product

(a) All Work Product (including records thereof in software form), including reports, studies, data, information, logs, records and similar terms, which is prepared or procured by or on behalf of the Department or its other contractors, whether before or after the Agreement Date, will be and remain the exclusive property of the Department; *provided*, that the Department will make available to the Concessionaire, without charge, and without representation or warranty of any kind, any documents in the possession of the Department relating to the planning, design, engineering and permitting of the Project and any Project Enhancement that the Concessionaire elects to or is directed to carry out.

(b) Prior to the expiration or earlier termination of this Agreement, all Work Product prepared by or on behalf of the Concessionaire will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of this Agreement for any reason, including termination by the Concessionaire for a Department Default, (i) the Concessionaire will promptly turn over to the Department a copy of all Work Product the Concessionaire owns and (ii) subject to Section 18.04, all such Work Product will be considered the sole and exclusive property of the Department (other than Proprietary Work Product, with respect to which the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license in connection with the Project), without compensation due the Concessionaire or any other party. The Department will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any Proprietary Work Product, subject to Section 18.02. The Concessionaire will continue to have a full and complete right to use any and all duplicates or other originals of such Proprietary Work Product in any manner it chooses.

Section 18.04 Ownership of Proprietary Intellectual Property

(a) All Proprietary Intellectual Property of the Concessionaire will remain exclusively the property of the Concessionaire, notwithstanding any delivery of copies thereof to the Department. Upon the expiration or earlier termination of, or any assignment by the Concessionaire of its rights under, this Agreement for any reason whatsoever, the Department will have a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire solely in connection with the Project. The Department will not at any time sell any such Proprietary Intellectual Property or use or allow any party to use any such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the Project (except as permitted on other State Highways in accordance with Section 18.04(b)). Subject to Section 18.02, the Department will not disclose any Proprietary Intellectual Property of the Concessionaire (other than to its concessionaires, Contractors, employees, attorneys and agents in connection with the development and operation of the Project who agree to be bound by any confidentiality obligations of the Department relating thereto), and the Department will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such Proprietary Intellectual Property.

(b) The Department will have the right to purchase from the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use the Proprietary Intellectual Property of the Concessionaire on any other tolled State Highway owned and

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operated by the Department or other State agency on commercially reasonable terms. The Concessionaire will continue to have the full and complete right to use, sell or license to other Persons any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

(c) With respect to any Proprietary Intellectual Property owned by a Person other than the Concessionaire or the Department, the Concessionaire will obtain from such owner, concurrently with execution of any Contract or purchase order with such owner, both for the Concessionaire and the Department, nonexclusive, nontransferable, irrevocable, fully paid up (other than with respect to ongoing maintenance and support fees) licenses to use such Proprietary Intellectual Property solely in connection with the Project, of at least identical scope, purpose, duration and applicability as the licenses granted by Section 18.04(a); *provided*, that the foregoing requirement will not apply to standard, pre-specified manufacturer licenses of mass-marketed products (including software products) or equipment where the license cannot be extended to the Department using commercially reasonable efforts or to other licenses of products or equipment where the products or equipment are not reasonably necessary for the operation or maintenance of the Project. The Concessionaire will use commercially reasonable efforts to obtain from such owner a right in favor of the Department to purchase from such owner a nonexclusive, nontransferable, irrevocable, fully paid up license to use such owner's Proprietary Intellectual Property on any other tolled State Highway owned and operated by the Department or other State agency on commercially reasonable terms. The limitations on sale and disclosure by the Department set forth in Section 18.04(a) will also apply to the Department's licenses in such Proprietary Intellectual Property.

(d) The Concessionaire Marks may appear on some of the Project assets, including supplies, materials, stationery and similar consumable items at the Project on the last Day of the Term. The parties agree that the Concessionaire will remain the owner or licensee, as applicable, of the Concessionaire Marks at the end of the Term, and the Concessionaire may remove, at its expense, the Concessionaire Marks prior to the end of the Term. If the Concessionaire fails to do so, the Department will be entitled to remove the Concessionaire Marks and, in such case, the Department will be entitled to reimbursement of its Allocable Costs in so doing from the Concessionaire or the Handback Reserve Fund. The Department acknowledges and agrees that it will have no right, title, interest or license in the Concessionaire Marks.

(e) On or before the Agreement Date, the Department will grant to the Concessionaire a nonexclusive, nontransferable, irrevocable, fully paid up license to use any Proprietary Intellectual Property of the Department that has been developed for the Project, solely in connection with the development, construction, operation, maintenance and other incidental activities of the Project. The Concessionaire will not at any time sell such Proprietary Intellectual Property or use or allow any party to use such Proprietary Intellectual Property for any purpose whatsoever other than in connection with the Project. On or before the Agreement Date, the Department will also assign in favor of the Concessionaire the Department's rights with respect to any license by the Department's software suppliers (to the extent permitted by, and subject to the terms of, such license) for the use of any Proprietary Intellectual Property for the Project, together with an assignment of the Department's rights under any escrow for the Source Code and Source Code Documentation relating to such Proprietary Intellectual Property,

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which assignments will be reasonably satisfactory to the Concessionaire. The Concessionaire will not disclose any such Proprietary Intellectual Property (other than to its Contractors, employees, attorneys, agents and Affiliates in connection with the Project who agree to be bound by any confidentiality obligations of the Concessionaire relating thereto), and the Concessionaire will enter into a confidentiality agreement reasonably requested by the Department with respect to any such Proprietary Intellectual Property. The Department will continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

Section 18.05 Escrow Documents

(a) General. On or before the Agreement Date, the Concessionaire, the Department and the Escrow Agent will have executed and delivered the Escrow Agreement to implement the provisions of this Section 18.05. Within the time period required in this Section 18.05, the Concessionaire will submit to the Department for its review and approval the following materials (collectively, the “Escrow Documents”): one copy of all documentary information generated with respect to (i) the expected costs of the Work available to the Concessionaire under the Design-Build Contract (the “D-B Escrow Documents”) no later than 14 Days from the Agreement Date and (ii) the components of, and formulae for, the Initial Base Case Financial Model and Initial Refinancing Case Financial Model, including, without limitation, forecast revenue and expected non-financial costs of the Project during the Term included in the Initial Base Case Financial Model and Initial Refinancing Case Financial Model (the “Financing Escrow Documents”) no later than the Agreement Date.

(b) Format and Contents.

(i) The Concessionaire may submit Escrow Documents in their usual cost estimating format; *provided*, that all information is clearly presented and ascertainable and submitted in accordance with the requirements of this Section 18.05. It is not the intention of this Section 18.05 to cause the Concessionaire extra work, but to ensure that the Escrow Documents will be adequate to enable complete understanding and proper interpretation for their intended use.

(ii) The Escrow Documents will be submitted in English and clearly itemize the estimated costs of performing each item of the Project, including financing, administrative and related costs. Cost items will be separated into sub-items as required to present a detailed cost estimate and allow a detailed cost review.

(iii) The D-B Escrow Documents will include: estimates for costs of the design professionals and consultants itemized by discipline both for development of the design, all quantity take-offs, crew size and shifts, equipment, calculations of rates of production and progress, copies of quotes from Contractors and suppliers, and memoranda, narratives, drawings and sketches showing site or work area layouts and equipment, add/deduct sheets, geotechnical reviews and consultant reports, all other information used by the Concessionaire to arrive at the estimated prices for the Project, and all information and formulae used by the Concessionaire in developing the initial Base Case Financial Model. Estimated costs will be broken down into estimate

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categories for items such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials and subcontract costs as appropriate. Plant and equipment, indirect costs, bond rates and calculations, insurance costs and financing should be detailed. The Concessionaire's allocation of indirect costs, contingencies, and mark-up will be identified.

(iv) The D-B Escrow Documents will identify all costs. Estimated unit costs are acceptable without a detailed cost estimate, *provided*, that labor, equipment, materials and subcontracts, as applicable, are specified, and *provided further*, that indirect costs, contingencies, and mark-up, as applicable, are allocated.

(c) Submittal.

(i) The Concessionaire will submit the Escrow Documents in sealed containers, the D-B Escrow Documents in one and the Financing Escrow Documents in another, to the Department, which containers have been clearly marked on the outside with the Concessionaire's name, reference to the Project, and the words "Downtown Tunnel/Midtown Tunnel/MLK Extension Project D-B Escrow Documents" or "Downtown Tunnel/Midtown Tunnel/MLK Extension Project Financing Escrow Documents" as applicable.

(ii) On or before the Agreement Date, representatives of the Department, assisted by members of the Concessionaire's staff who are knowledgeable in how the Escrow Documents were prepared, will have examined, organized and inventoried the Escrow Documents. This examination was to ensure that the Escrow Documents are legible and complete. It did not include review of, and does not constitute approval of proposed construction methods, estimating assumptions, or interpretations of any Project Agreements, including the Design-Build Contract. Such examination will not alter any condition or term of any Project Agreement.

(iii) Timely submission of complete Escrow Documents as of the Agreement Date is an essential element of the Concessionaire's responsibility and a prerequisite to the execution and delivery of this Agreement by the Department.

(iv) To the extent the Concessionaire plans to contract out any part of the Work as of the Agreement Date, the Concessionaire will cause each Contractor whose total Contract price exceeds 5% of the Project costs as set forth in the Design-Build Contract to provide separate similar documentation to be included with those of the Concessionaire. Such documents will be opened and examined in the same manner and at the same time as the examination described above for the Concessionaire to the extent that they are relevant to the issue at hand.

(d) Updating of the Escrow Documents. Upon each update of the Initial Base Case Financial Model, Base Case Financial Model and Base Case Financial Model Update in accordance with this Agreement, such update will be submitted by the Concessionaire to the Escrow Agent promptly and in any event within seven Days after an update has not been disputed or any such dispute has been resolved for inclusion as part of the Financing Escrow

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Documents. For the avoidance of doubt, previous undisputed versions of the Escrow Documents will remain in escrow with the Escrow Agent.

- (e) Storage. The Escrow Documents will be stored at the following address:

SunTrust Bank
919 East Main Street, Floor 7
Richmond, Virginia 23219
Attention: Corporate Agency Services
Telephone: 804-782-5400
Facsimile: 804-782-785

The Concessionaire will bear the cost for storing the Escrow Documents.

- (f) Examination.

(i) Subject to the terms of the Escrow Agreement, the Escrow Documents may be examined by the Department and the Concessionaire at any time deemed necessary by the Department or the Concessionaire and the Department may delegate review of the Escrow Documents to members of its staff or to Consultants; *provided*, that, unless a Consultant is bound by a confidentiality agreement or other obligations to keep the Escrow Documents confidential, each such Consultant will enter into a confidentiality agreement reasonably requested by the Concessionaire with respect to any such examination. No other person will have access to the Escrow Documents. The Design-Build Contractor will have the right to be present during an examination of the D-B Escrow Documents; *provided*, however, that such right will not in any way limit the Department's right to review the D-B Escrow Documents if the D-B Contractor does not attend such examination. Notwithstanding the foregoing, the Escrow Documents and information contained therein may be used:

(A) to assist in the negotiation of Concessionaire Damages, Net Cost Savings and Change Orders;

(B) in the resolution of any claim or dispute before any entity selected to resolve disputes; and

(C) in any dispute resolution procedure commenced hereunder.

(ii) Access to the documents will take place in the presence of duly designated representatives of both the Department and the Concessionaire, except that, if the Concessionaire refuses to be present or to cooperate in any other way in the review of the documents, the Department may upon notice to the Concessionaire, review such documents without the Concessionaire being present.

(g) Ownership. The Escrow Documents are, and will always remain, the property of the Concessionaire, subject to joint review by the Department and the Concessionaire, as provided herein. The Department stipulates and expressly acknowledges that the Escrow

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Documents constitute trade secrets. This acknowledgement is based on the Department's express understanding that the information contained in the Escrow Documents is not known outside the Concessionaire's business, is known only to a limited extent and only by a limited number of employees of the Concessionaire, is safeguarded while in the Concessionaire's possession, is extremely valuable to the Concessionaire and could be extremely valuable to the Concessionaire's competitors by virtue of its reflecting Concessionaire's contemplated techniques of design and construction. The Department further acknowledges that the Concessionaire expended substantial sums of money in developing the information included in the Escrow Documents and further acknowledges that it would be difficult for a competitor to replicate the information contained therein. The Department further acknowledges that the Escrow Documents and the information contained therein are made available to the Department only because such action is an express prerequisite to the execution and delivery of this Agreement. The Department further acknowledges that the Escrow Documents include a compilation of the information used in the Concessionaire's business, intended to give the Concessionaire an opportunity to obtain an advantage over competitors who do not know of or use the contents of the documentation.

(h) Final Disposition and Return of Escrow Documents. The D-B Escrow Documents will be returned to the Concessionaire upon the earlier to occur of (i) completion of the Design-Build Work, including tender of final payment and resolution of all claims or disputes arising under the Design-Build Contract or (ii) termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement. The remaining Escrow Documents will be returned upon termination of this Agreement and resolution of all claims or disputes arising pursuant to this Agreement.

Section 18.06 Source Code Escrow

(a) The Department and the Concessionaire acknowledge that the Concessionaire and/or the Concessionaire's Software suppliers may not wish to disclose directly to the Department at the time of installation the Source Code and Source Code Documentation which is Proprietary Intellectual Property of the Concessionaire and/or the Concessionaire's software suppliers, as public disclosure could deprive the Concessionaire and/or the Concessionaire's software suppliers of commercial value, but that the Department must be ensured access to such Source Code and Source Code Documentation in either of the following circumstances:

(i) in the case of Source Code and Source Code Documentation that is a Contractor's Proprietary Intellectual Property, if this Agreement is terminated for Concessionaire Default or upon assignment by Concessionaire of its rights pursuant to this Agreement, the Department assumes the contract or subcontract with such Software supplier, and either (A) a business failure (including voluntary or involuntary bankruptcy, and insolvency) of the Software supplier occurs or (B) the Software supplier fails or ceases to provide services as necessary to permit continued use of the software by the Department as contemplated by this Agreement; or

(ii) in the case of Source Code and Source Code Documentation that is the Concessionaire's Proprietary Intellectual Property, (A) this Agreement is terminated for Concessionaire Default, (B) a business failure (including voluntary or involuntary

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bankruptcy, and insolvency) of the Concessionaire occurs or (C) the Concessionaire fails or ceases to provide services as necessary to permit continued use of the software by the Department as contemplated by this Agreement.

(b) By no later than the Tolling and O&M Work Commencement Date of the Existing Project Assets, the Department and the Concessionaire will establish one or more escrows (the “Source Code Escrows”) with the Escrow Agent on terms and conditions reasonably acceptable to the Department and to the Concessionaire into which such Source Code and Source Code Documentation will be escrowed, including all relevant commentary, explanations and other documentation, as well as instructions to compile such Source Code and Source Code Documentation, and all modifications, additions or substitutions made to such Source Code and Source Code Documentation.

(c) The escrow provided for herein will survive any termination of this Agreement regardless of the reason.

(d) The Concessionaire will pay the reasonable costs and expenses of the Escrow Agent related to the Source Code Escrows.

Section 18.07 Inspection and Audit Rights

(a) Subject to Section 18.07(c), the Concessionaire will make available to the Department and the FHWA (including their employees, contractors, consultants, agents or designees), and allow each of them access to, such books, records and documents as they may reasonably request in connection with the Project for any purpose related to the Project, this Agreement, including but not limited to monitoring compliance with the terms and conditions of this Agreement. The Department will provide the Concessionaire 48 hours prior written notice prior to exercising its rights to access and audit the Concessionaire’s books, records and documents pursuant to this Section 18.07(a) and Section 18.07(b); *provided*, however, that the Department may exercise such rights unannounced and without prior notice during a Concessionaire Default or where there is good faith suspicion of fraud.

(b) Subject to Section 18.07(c), the Department and the State, at the Department’s own expense, will have the right to carry out an audit of information relating to (i) the design, construction, operation, maintenance and repair of the Project or (ii) other information required to be maintained or delivered by the Concessionaire pursuant to this Agreement or any other Project Agreement. Such audit may extend, without limitation, to calculations undertaken, and financial or business reports provided, by or on behalf of the Concessionaire pursuant to this Agreement. The Department or its employees, agents, auditors, attorneys and consultants, at the Department’s own expense may examine, copy, take extracts from and audit all the books and records of the Concessionaire related to the Project, including all subcontracts entered into under Section 24.02. In addition, the Department or its agents, auditors, attorneys and consultants, at the Department’s own expense, may conduct a re-audit and observe the business operations of the Concessionaire to confirm the accuracy of books and records. In addition, at FHWA’s request, the Concessionaire will make all its records relating to the Project available to the FHWA for inspection and audit.

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(c) The Concessionaire reserves the right to assert exemptions from Persons other than the Department from disclosure for information that would be exempt under Law from discovery or introduction into evidence in legal actions. Unless otherwise required by Law or this Agreement, the Concessionaire may make available copies of books, records and documents containing trade secrets or confidential proprietary information with such information redacted.

(d) In addition, the Concessionaire, at its expense, will cause a reputable independent auditor to annually audit its books and records relating to the Project, according to GAAP or any other generally accepted accounting standards which are acceptable to the Department. The Concessionaire will cause the independent auditor to deliver the audit report to the FHWA and the Department promptly after it is completed, but in any event within 120 Days of the end of each of the Concessionaire’s fiscal years.

(e) Nothing contained in this Agreement will in any way limit the constitutional and statutory powers, duties and rights of elected State officials, including the independent rights of the State Auditor of Public Accounts, in carrying out his or her legal authority.

(f) No audit rights will extend to the make-up of any lump sum amount or unit price or rate under the Design-Build Contract once such amount, price or rate has been agreed.

(g) The Concessionaire will cooperate with the Department, the FHWA and the other persons mentioned in this Section 18.07 in the exercise of their rights hereunder. At the request of the Department, the Concessionaire will furnish or cause to be furnished to the Department such information relating to the operation, maintenance and repair of the Project as the Department may reasonably request for any purpose related to the Project or this Agreement and as will be in the possession and control of the Concessionaire, any Concessionaire Party, or any of their Representatives. Subject to Section 18.02, the Department will keep confidential any information obtained from the Concessionaire, any Concessionaire Party or their Representatives that (i) constitutes trade secrets or commercial or financial information (A) where the trade secrets or commercial or financial information are proprietary, privileged or confidential or (B) where disclosure of the trade secrets or commercial or financial information may cause competitive harm and (ii) is designated as such by the Concessionaire, a Concessionaire Party or their Representatives in writing to the Department, and the Department has determined that such information qualifies for exemption from disclosure under Law.

ARTICLE 19

DEFAULTS AND REMEDIES

Section 19.01 Concessionaire Defaults

The occurrence of any one or more of the following events during the Term will constitute a “Concessionaire Default” pursuant to this Agreement:

(a) any representation or warranty made by the Concessionaire herein or in any other Project Agreement is false or misleading in any respect on the date made and a material adverse effect upon the Project or the Department’s rights or obligations under the Project Agreements

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results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof, with cure regarded as complete only when the adverse effects are remedied; *provided*, however, that any breach of the representation and warranty set forth in Section 23.02(n) will not constitute a Concessionaire Default;

(b) the Concessionaire fails to comply with, perform or observe any material obligation, covenant, agreement, term or condition in this Agreement or any other Project Agreement to which the Department and the Concessionaire are parties (provided, that the failure to achieve any goals or Good Faith Efforts relating to DBE or SWaM participation in Section 24.03 will not constitute a Concessionaire Default), which failure materially adversely affects the Department's rights or obligations under the Project Agreements results therefrom, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; *provided*, that in the latter case, (i) the Concessionaire is proceeding with all due diligence to cure or cause to be cured such failure, (ii) the failure is capable of being cured within a reasonable period of time, and (iii) such failure is in fact cured within such period of time; *provided*, further that this Section 19.01(b) will not apply to events covered by other provisions of this Section 19.01;

(c) the Concessionaire fails (i) to pay to the Department when due any undisputed sum payable to the Department pursuant to this Agreement or any other Project Agreement, which failure materially and adversely affects the Department's interest in the Project, or (ii) to deposit funds to any reserve or account in the amount and within the time period required by this Agreement, and such failures, including any failure to pay interest at the Bank Rate from the date due, continues without cure for a period of 30 Days following the date the Department delivers to the Concessionaire written notice thereof;

(d) the Concessionaire closes all or part of a Project Asset to traffic, at any time following Tolling and O&M Work Commencement for such Project Asset, other than in connection with any Permitted Closure, and such closure continues without cure for a period of ten Days following the date the Department delivers to the Concessionaire written notice thereof;

(e) the Concessionaire fails to achieve Substantial Completion of all of the Project Assets by the Long Stop Date, as such date may be extended pursuant to this Agreement;

(f) the Concessionaire fails to commence the O&M Work for the Project Asset within 30 Days following the date the Department issues the Tolling and O&M Work Notice to Proceed for such Project Asset, and such failure continues without cure for a period of 30 Days following the date the Department delivers to the Concessionaire written notice thereof;

(g) the Concessionaire fails to maintain, or to cause to be maintained, in effect the insurance, guarantees, letters of credit or other performance security as and when required pursuant to this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, terms or coverage of the same and such

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failure continues without cure for a period of ten Business Days following the date the Department delivers to the Concessionaire written notice thereof;

(h) the Concessionaire (A) fails to deliver to the Department within the deadline for submission set forth in Section 11.07(a) a Performance Improvement Plan meeting the requirements for approval set forth in Section 11.07(a) and such failure continues without cure for a period of 30 Days following the date the Department delivers to the Concessionaire written notice of such failure or (B) fails to reduce the number of accumulated Non-Compliance Points below the level in effect prior to the implementation of the approved Performance Improvement Plan (after taking into account the subtraction of Non-Compliance Points provided for in Section 11.05(b) and any reduction of Non-Compliance Points provided for in Section 11.07(b) within the 180-Day period described in Section 11.07(b);

(i) this Agreement or all or any portion of the Concessionaire's Interest is Transferred, or there occurs a Change in Control, in contravention of Section 25.01;

(j) after exhaustion of all rights of appeal, (i) there occurs any suspension or debarment (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, of the Concessionaire, any affiliate of the Concessionaire (as "affiliate" is defined in 29 CFR 98.905 or successor regulation of similar import), or Key Members whose work is not completed, from bidding, proposing or contracting with any Federal or State department or agency or (ii) the Concessionaire, its Key Members who have ongoing Work, or any of their respective officers, directors, or Administering Employees have been convicted of, or plead guilty or *nolo contendere* to, a violation of Law for fraud, conspiracy, collusion, bribery, perjury, or material misrepresentation, as a result in whole or in part of activities relating to any project in the State, and such failure continues without cure for a period of 90 Days following the date the Department delivers to the Concessionaire written notice thereof (giving particulars of the failure in reasonable detail). If the offending Person is an officer, director or Administering Employee, cure will be regarded as complete when the Concessionaire proves that such Person has been removed from any position or ability to manage, direct or control the decisions of the Concessionaire or such Key Member (as applicable) or to perform Work; and if the Person debarred or suspended or subject to an agreement for voluntary exclusion is an affiliate of the Concessionaire (as "affiliate" is defined in 29 CFR 98.905 or successor regulation of similar import) or a Key Member, cure will be regarded as complete when the Concessionaire replaces such Person in accordance with this Agreement;

(k) the Concessionaire or any Concessionaire Financial Party (i) admits, in writing, that it is unable to pay its debts as they become due, (ii) makes an assignment for the benefit of its creditors, (iii) files a voluntary petition under Title 11 of the U.S. Code, or files any other petition or answer seeking, consenting to or acquiescing in any reorganization, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar Law, or (iv) seeks or consents to or acquiesces in the appointment of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of such Concessionaire or Concessionaire Financial Party, or of all or any substantial part of its properties or of the Project or any interest therein;

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(l) within 90 Days after the commencement of any proceeding against the Concessionaire or any Concessionaire Financial Party seeking any reorganization, liquidation, dissolution or similar relief under the present or any future U.S. bankruptcy code or any similar Law, such proceeding has not been dismissed, or, within 90 Days after the appointment, without the consent or acquiescence of such Concessionaire or Concessionaire Financial Party, of any trustee, receiver, custodian, assignee, sequestrator, liquidator or other similar official of such Concessionaire, or Concessionaire Financial Party or of all or any substantial part of its properties or of the Project or any interest therein, such appointment has not been vacated or stayed on appeal or otherwise, or, within 90 Days after the expiration of any such stay, such appointment has not been vacated; and

(m) a levy under execution or attachment has been made against all or any part of the Project or any interest therein (including the Concessionaire's Interest) as a result of any Lien (other than a Lien relating to permitted Concessionaire Debt) created, incurred, assumed or suffered to exist by the Concessionaire or any Person claiming through it, and such execution or attachment has not been vacated, removed or stayed by court order, bonding or otherwise within a period of 60 Days, unless such levy resulted from actions or omissions of the Department or its Representatives.

Section 19.02 Department Remedies upon Concessionaire Default

Upon the occurrence of a Concessionaire Default, the Department may, subject to the provisions of the Direct Agreement, do any or all of the following as the Department, in its sole discretion, will determine:

(a) the Department may terminate this Agreement and any other Project Agreements to which the Department and the Concessionaire are both parties, to the extent provided in Section 20.05;

(b) if the Concessionaire Default is by reason of the failure to pay any undisputed monies to a third party, the Department may (but will have no obligation to) make payment on behalf of the Concessionaire of such monies, and any amount so paid by the Department will be payable by the Concessionaire to the Department within five Days after demand, including accrued interest at the Bank Rate from the date such payment is made by the Department to the repayment date; *provided*, that (i) the Department will not incur any liability to the Concessionaire for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default and (ii) the Department's cure of any Concessionaire Default will not waive or affect the Department's rights against the Concessionaire by reason of the Concessionaire Default;

(c) the Department may cure the Concessionaire Default (but this will not obligate the Department to cure or attempt to cure a Concessionaire Default or, after having commenced to cure or attempted to cure a Concessionaire Default, to continue to do so), and all costs and expenses reasonably incurred by the Department in curing or attempting to cure the Concessionaire Default, including the Department's Allocable Costs, will be payable by the Concessionaire to the Department within five Days of demand, including accrued interest at the Bank Rate from the date such costs or expenses were incurred to the repayment date; *provided*,

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that (i) the Department will not incur any liability to the Concessionaire, and the Concessionaire hereby irrevocably waives and releases any liability of the Department to the Concessionaire, for any act or omission of the Department or any other Person in the course of remedying or attempting to remedy any Concessionaire Default, and (ii) the Department's cure of any Concessionaire Default will not waive or affect the Department's rights against the Concessionaire by reason of the Concessionaire Default;

(d) if the Concessionaire Default consists of imposing tolls in excess of that permitted pursuant to this Agreement, such Concessionaire Default will be curable only by (i) reinstating the tolls in effect immediately prior to the impermissible raise in tolls, unless waived by the Department and (ii) disgorging to the Department any and all increases in Toll Revenues that would not have been realized in the absence of such Concessionaire Default, together with interest thereon at the Bank Rate from the date of collection until the date disgorged;

(e) without notice and without awaiting lapse of the period to cure, in the event of a Concessionaire Default under Section 19.01(d) (closure of all or any part of the Project or any lane in violation of this Agreement), or any failure to perform a Safety Compliance Order and the Concessionaire Default or failure to perform the Safety Compliance Order results in or prolongs an Emergency or danger to persons or property, the Department may enter and take control of the Project or applicable portion thereof to the extent the Department finds it necessary to rectify the closure, Emergency or danger, and may suspend construction Work and/or close or cause to be closed the portion of the Project affected by the Emergency or danger, until such time as such breach or failure is cured, or the Department terminates this Agreement. In the event of such action by the Department, the Department may, subject to Law, distraint against any of the materials and equipment purchased exclusively for the Project that are situated on the Project and the Concessionaire waives any statutory protections and exemptions in connection therewith. Further, the Concessionaire will pay to the Department on demand the Department's Allocable Costs in connection with the exercise of the Department's rights pursuant to this Section 19.02(e). So long as the Department undertakes such action in good faith, even if under a mistaken belief in the occurrence of such a breach or failure, such action will not be deemed unlawful or a breach of this Agreement, will not expose the Department to any liability to the Concessionaire and will not entitle the Concessionaire to any other remedy, it being acknowledged that the Department has a high priority, paramount public interest in providing and maintaining continuous public access to the Project and in protecting public and worker safety. The foregoing will not, however, protect the Department from the Concessionaire's lawful Claims for recovery for third party bodily injury or property damage arising out of any such Department action, if and to the extent (i) (A) the Department was mistaken in believing such a breach or failure occurred, or (B) such injury or property damage was caused by the Department's gross negligence, recklessness or willful misconduct, and (ii) the third party liability is not insured and not required to be insured pursuant to this Agreement. Immediately following rectification of such breach or failure, as determined by the Department, acting reasonably, the Department will relinquish control and possession of the Project or applicable portion thereof back to the Concessionaire; and

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(f) the Department may exercise any of its other rights and remedies provided for under this Agreement or at law or in equity, subject to any limitations thereon set forth in this Agreement, including Section 25.09.

Section 19.03 Financial Close Liquidated Damages

No liquidated damages will be assessed for failure to achieve Financial Close by the Financial Close Deadline.

Section 19.04 Department Defaults

The occurrence of any one or more of the following events during the Term will constitute a “Department Default” pursuant to this Agreement:

(a) any representation or warranty made by the Department herein or in any other Project Agreement is false or misleading in any respect on the date made and a material adverse effect upon the Project or the Concessionaire’s rights or obligations under the Project Agreements results therefrom, and such circumstance continues without cure for a period of 90 Days following the date the Concessionaire delivers to the Department written notice thereof, with cure regarded as complete only when the adverse effects are remedied; or

(b) the Department fails to comply with, perform or observe any material obligation, covenant, agreement, term or condition in this Agreement or any other Project Agreement to which it is a party, including any failure to pay undisputed amounts when due and payable and in accordance with this Agreement, which failure materially adversely affects the Concessionaire’s Interest, and such failure continues without cure for a period of 90 Days following the date the Concessionaire delivers to the Department written notice thereof (giving particulars of the failure in reasonable detail) or for such longer period as may be reasonably necessary to cure such failure up to a maximum cure period of 180 Days; *provided*, that in the latter case, (i) the Department is proceeding with all due diligence to cure or cause to be cured such failure, (ii) the failure is capable of being cured within a reasonable period of time and (iii) such failure is in fact cured within such period of time.

Section 19.05 Concessionaire Remedies upon Department Default

(a) Upon the occurrence of a Department Default pursuant to this Agreement, the Concessionaire may by notice to the Department declare the Department to be in default and may, subject to the provisions of Section 19.04(b), do any or all of the following as the Concessionaire, in its discretion, will determine:

(i) the Concessionaire may terminate this Agreement and any Project Agreements to which the Concessionaire and the Department are both parties, to the extent provided in Section 20.06; and

(ii) the Concessionaire may exercise any of its other rights and remedies provided for under this Agreement or at law or in equity, subject to any limitations thereon set forth in this Agreement, including Section 25.09 and Section 25.19.

(b) If the Department’s failure constitutes a Delay Event or Compensation Event, the Concessionaire’s sole recourse will be to seek remedies pursuant to Article 13 and Article 14.

ARTICLE 20

TERMINATION; HANDBACK

Section 20.01 Termination Upon Expiration of Term

Unless earlier terminated in accordance with the terms of this Article 20, all the rights and obligations of the parties hereunder will cease and terminate, without notice or demand, on the last Day of the Term. Not later than 180 Days preceding the end of the Term, the Concessionaire and the Department will develop a plan (the “Transition Plan”) to assure the orderly transition of the Project to the Department or its designee (which Transition Plan is in addition to the adjustments and changes to the Life Cycle Maintenance Plan under Section 20.02). The parties will then diligently implement the Transition Plan in accordance with the Technical Requirements.

Section 20.02 Handback Obligations and Reserve

(a) Upon the end of the Term, the Concessionaire will hand back the Project to the Department, at no charge to the Department, with asset conditions as specified in the Technical Requirements.

(b) Beginning five years prior to the projected expiration of the Term and every year thereafter, the Concessionaire will conduct annual inspections of the Project and provide reports of such inspections to the Department pursuant to the Technical Requirements.

(c) The Concessionaire will diligently perform and complete all work contained in the Life Cycle Maintenance Plan prior to the handback of the Project to the Department, based on the approved adjustments and changes to the Life Cycle Maintenance Plan resulting from the inspections and analysis under Section 20.02(b).

(d) No later than the first Day of the year that is seven years prior to the expiration of the Term, and no later than the first Day of each subsequent year, the Department and the Concessionaire will cause an independent consultant to set forth an amount that it reasonably determines is equal to an amount sufficient to cover all costs necessary to cause the Assets to meet the Handback Requirements at the end of the Term. The amount determined in the preceding sentence is the “Handback Amount.” Notwithstanding the provisions in this Section 20.02(d), the Handback Amount will not take into account any Structural Assets Excess Costs to meet the Handback Requirement over the amount set forth in the Base Case Structural Assets Major Maintenance Plan.

(e) Handback Reserve Fund. Five years prior to the expiration of the Term, the Concessionaire will establish the Handback Reserve Fund for the sole and exclusive benefit of the Department.

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(i) Concurrently with the establishment of the Handback Reserve Fund, the Concessionaire will deposit therein cash, a Handback Performance Security or a combination of the two in an aggregate amount equal to at least 100% of all costs necessary to cause the Assets to meet the Handback Requirements at the end of the Term as reasonably determined by the independent consultant pursuant to Section 20.02(d). Within 15 Days of the date of each annual determination of the Handback Amount, the Concessionaire will cause the amount on deposit in the Handback Reserve Fund to be equal to at least 100% of the Handback Amount so determined. If the sum of the amount available under the Handback Performance Security and the amount of cash on deposit in the Handback Reserve Fund exceeds 100% of the new Handback Amount, the Concessionaire will be permitted (A) to cause the stated amount of the Handback Performance Security to be reduced by an amount equal to such excess, or (B) to direct that the excess cash then on deposit in the Handback Reserve Fund be transferred to the Concessionaire.

(ii) At its sole cost, the Concessionaire will be permitted to deposit a Performance Security (the “Handback Performance Security”) to the credit of the Handback Reserve Fund, which will have a scheduled expiration date no earlier than the first anniversary of the scheduled end of the Term (or, if it expires earlier than such date, permits a drawing of the full amount of the Handback Performance Security if the Handback Performance Security is not renewed or extended at least 30 Days prior to its stated expiration date). The Handback Performance Security will be considered a part of the Handback Reserve Fund and the amount available thereunder will be included in any calculations of the amount required to be on deposit in the Handback Reserve Fund. The Handback Performance Security will provide that, if its term is scheduled to expire prior to the termination of the Handback Reserve Fund, then the Department may draw thereon in an amount equal to the full amount available to be drawn thereunder. The Department will deposit the proceeds of any drawing on the Handback Performance Security pursuant to this Section 20.02(e) into the Handback Reserve Fund.

(iii) The Department may withdraw moneys on deposit in the Handback Reserve Fund starting upon the termination or expiration of the Term and until one year after such termination or expiration if any Asset does not meet the Handback Requirements. The Department’s right to withdraw funds from the Handback Reserve Fund includes the right to draw upon the Handback Performance Security. Any moneys withdrawn from the Handback Reserve Fund pursuant to this Section 20.02(e) will be used by the Department to pay its Allocable Costs of causing the Assets to meet the Handback Requirements.

(iv) Upon the occurrence of a Concessionaire Default, the Department will have the right (in addition to all other rights and remedies provided in this Agreement, but with the understanding that any other monetary damages that the Department may recover will be reduced by the amount so drawn, and without the Department’s exercise of such right being deemed a waiver or a cure of the Concessionaire’s failure to perform and whether or not this Agreement is thereby terminated), with three

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Business Days prior notice to the Concessionaire, to withdraw moneys from the Handback Reserve Fund and to draw upon the Handback Performance Security in accordance with its terms up to the amount due to the Department with respect to such Concessionaire Default.

(v) If this Agreement is terminated by the Department prior to the expiration of the Term as a result of a Concessionaire Default in accordance with the terms hereof, the Department will have the right (in addition to all other rights and remedies provided in this Agreement and without the Department's exercise of such right being deemed a waiver or a cure of the Concessionaire's failure to perform), with three Business Days prior notice to the Concessionaire, to withdraw moneys from the Handback Reserve Fund and to draw against any Handback Performance Security in accordance with its terms up to the amount due to the Department pursuant to the terms of this Agreement.

(vi) Upon the expiration of this Agreement at the end of the Term, the Handback Reserve Fund will remain in effect until the earliest of: (A) a determination by the Department that the Concessionaire's obligations under this Section 20.02 have been satisfied, (B) the Concessionaire's obligations are determined to have been satisfied hereunder pursuant to the dispute resolution procedures set forth in this Section 20.02, or (C) the first anniversary of the end of the Term.

(vii) Upon the termination of the Handback Reserve Fund, all monies on deposit therein will be paid over to the Concessionaire and the Department will surrender the Handback Performance Security marked cancelled to the Concessionaire.

Section 20.03 Termination for a Significant Force Majeure Event

(a) If a Significant Force Majeure Event occurs, then

(i) the Concessionaire may elect to terminate this Agreement unless the Department elects, within 14 Days following receipt of the Concessionaire's written notice of election to terminate, to treat the Significant Force Majeure Event as a Compensation Event; and

(ii) the Department may elect to terminate this Agreement unless the Concessionaire elects, within 60 Days following the Significant Force Majeure Event, to restore any resulting damage or destruction at the Concessionaire's sole cost and expense and furnishes a restoration plan acceptable to the Department with respect to such damage or destruction;

provided, that a party will exercise its right to terminate this Agreement pursuant to this Section 20.03(a) by delivering to the other party written notice of its election to terminate this Agreement ("Significant Force Majeure Termination Notice").

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(b) If the Concessionaire has elected to restore the Project in accordance with Section 20.03(a)(ii), it will promptly carry out the restoration of the Project in accordance with the terms of this Agreement and the restoration plan approved by the Department.

(c) If this Agreement is terminated pursuant to Section 20.03(a), the Department will pay to the Concessionaire the Significant Force Majeure Termination Amount.

**Section 20.04 Termination for Failure to Achieve Financial Close;
Termination Based on Excess Interest Rate Fluctuation
and TIFIA Credit Assistance**

(a) Failure to Achieve Financial Close by Financial Close Deadline. If the Concessionaire fails to achieve Financial Close by the Financial Close Deadline, either party may, at its sole discretion, elect to terminate this Agreement and any other Project Agreement to which it is a party. If a party elects to terminate pursuant to this Section 20.04(a), such party will provide written notice of termination to the other party, and such termination will be effective immediately upon delivery of such notice. In the event of such termination, the Department will pay the Concessionaire the Non-Financial Close Termination Amount.

(b) Excess Interest Rate and TIFIA Credit Assistance Fluctuation.

(i) Subject to Section 20.04(b)(ii), if as a result of the provisions of Section 7.03(b), the aggregate adjustment in the Benchmark Interest Rates and adjustment in the amount of TIFIA credit assistance results in an adjusted Public Funds Amount greater than the Maximum Adjusted Public Funds Amount, the Department may, at its sole discretion, elect to terminate this Agreement and the other Project Agreements to which it is a party. If the Department elects to terminate pursuant to this Section 20.04(b)(i), the Department will provide written notice of termination to the Concessionaire, and such termination will be effective immediately upon delivery of such notice. In the event of such termination, the Department will pay the Concessionaire the Non-Financial Close Termination Amount.

(ii) If the adjustment in the Benchmark Interest Rates and adjustment in the amount of TIFIA credit assistance pursuant to Section 7.03(b) results in an adjusted Public Funds Amount greater than the Maximum Adjusted Public Funds Amount, the Concessionaire may, by written notice to the Department, elect to assume the cost and expense of the portion of such increase in excess of the Maximum Adjusted Public Funds Amount. In such event, the Department will not have the election to terminate this Agreement pursuant to Section 20.04(b)(i).

(c) Liability Upon Termination. In the event of any termination under this Section 20.04, the Department will have no liability to the Concessionaire under this Agreement or any other Project Agreement other than the Non-Financial Close Termination Amount, and the Concessionaire will not be entitled to any Concessionaire Damages.

Section 20.05 Termination for Concessionaire Default

(a) Subject to the provisions of the Direct Agreement, at any time after the occurrence and during the continuance of a Concessionaire Default, the Department is entitled to terminate this Agreement and any other Project Agreement to which the Department and the Concessionaire are both parties.

(b) If the Department elects to terminate pursuant to this Section 20.05, the Department will deliver to the Concessionaire and the Collateral Agent written notice of its election to terminate, which termination will take effect not less than 60 Days after the delivery of such notice.

(c) In the event of termination pursuant to this Section 20.05, the Department will pay to the Concessionaire the Concessionaire Default Termination Amount.

(d) A termination by the Department for Concessionaire Default or any other termination of this Agreement by the Department which is later determined by a court of proper jurisdiction to be wrongful or in violation of this Agreement will be deemed to have been a termination for convenience by the Department pursuant to Section 20.07 for the sole purpose of calculating the compensation owed to the Concessionaire by the Department.

Section 20.06 Termination for Department Default

(a) Subject to the provisions of this Section 20.06, the Concessionaire is entitled to terminate this Agreement and any other Project Agreement to which the Concessionaire and the Department are both parties in the event of a Department Default.

(b) If the Concessionaire elects to terminate pursuant to this Section 20.06, the Concessionaire will deliver to the Department a written notice of intent to terminate this Agreement. Upon receipt of such notice of intent to terminate, the Department will be entitled to cure such Department Default by providing the Concessionaire with a written work plan within 60 Days after the Department receives the written notice of intent to terminate. The work plan will outline the actions by which the Department will ensure future compliance with the obligation, covenant, agreement, term or condition in this Agreement that the Department failed to perform or observe. The work plan will be subject to the Concessionaire's written approval (which approval will not be unreasonably withheld, delayed or conditioned).

(c) If (i) the Department fails to provide the Concessionaire with the work plan required pursuant to Section 20.06(b) or (ii) the Department fails to comply in any material respect with the work plan approved by the Concessionaire pursuant to Section 20.06(b) and in the case of this clause (ii), such failure continues without cure for 60 Days following the date the Concessionaire delivers to the Department written notice thereof, the Concessionaire may terminate this Agreement by delivering to the Department written notice of its election to terminate, which termination will take effect not less than 30 Days after the delivery of such notice.

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(d) In the event of a termination pursuant to this Section 20.06, the Department will pay to the Concessionaire the Department Default Termination Amount.

Section 20.07 Termination for Convenience

(a) The Department may terminate this Agreement and any other Project Agreement to which the Department and the Concessionaire are both parties, at any time after the Agreement Date, if it determines that, in its sole discretion, a termination is in the best interests of the Department. Termination pursuant to this Section 20.07 will not relieve the Concessionaire or the Department of their respective obligations for any Claims arising prior to termination.

(b) If the Department elects to terminate pursuant to this Section 20.07, the Department will deliver to the Concessionaire and the Collateral Agent written notice of its election to terminate, which termination will take effect no less than 90 Days after delivery of such notice.

(c) In the event of termination pursuant to this Section 20.07, the Department will pay to the Concessionaire the Department Convenience Termination Amount.

Section 20.08 Concessionaire Actions Upon Termination

(a) On delivery of notice of termination of this Agreement or the Concessionaire's rights hereunder for any reason prior to the expiration of the Term, the provisions of this Section 20.08 will apply. The Concessionaire will timely comply with such provisions independently of, and without regard to, the timing for determining, adjusting, settling and paying any amounts due to the Concessionaire or the Department on account of termination. In connection with the expiration of the Term, certain provisions of this Section 20.08, as specified, will apply.

(b) The Concessionaire will conduct all discussions and negotiations to determine the amount of any termination compensation, and will share with the Department all data, documents and information pertaining thereto, on an Open Book Basis.

(c) Except as otherwise specified in this Agreement, within 30 Days after receipt of a notice of termination, or, if applicable, not later than 120 Days before expiration of the Term, the Concessionaire will meet and confer with the Department for the purpose of developing an interim transition plan for the orderly transition of Work, demobilization and transfer to the Department of control of the Project and Project Right of Way. The parties will use diligent efforts to complete preparation of the interim transition plan within 15 Days after the date the Concessionaire receives the notice of termination or, if applicable, not later than 15 Days before expiration of the Term. The parties will use diligent efforts to complete a final transition plan within 30 Days after such date. The transition plan will be in form and substance acceptable to the Department in its good faith discretion and will include and be consistent with the other provisions and procedures set forth in this Section 20.08, all of which procedures the Concessionaire will promptly follow, regardless of any delay in preparation or acceptance of the transition plan.

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(d) Upon receipt of a notice of termination, or, if applicable, before expiration of the Term, the Concessionaire will take all action that may be necessary, or that the Department may reasonably direct, for the protection and preservation of the Project, the Work and such materials, goods, machinery, equipment, parts, supplies and other property. For the avoidance of doubt, during the period from its receipt of a notice of termination until the expiration of the Term, the Concessionaire will continue to perform its obligations and be entitled to receive Toll Revenues pursuant to this Agreement.

(e) The Concessionaire will deliver to the Department on the date of expiration of the Term or on the effective date of any earlier termination:

(i) all tangible personal property, reports, books, and records necessary or useful for the design, construction, operation or maintenance of the Project, and, to the extent provided in Article 18, Work Product and Intellectual Property used or owned by the Concessionaire or any Contractor relating to the Project or the Work; excluding, however, all machinery, equipment and tools owned or leased by any Contractor and not incorporated or intended to be incorporated into the Project;

(ii) possession and control of the Project and Project Right of Way, free and clear of any and all Liens created, incurred or suffered by the Concessionaire, any Concessionaire Party or any Affiliate or anyone claiming under any of them; *provided*, that release of the Liens of the Lenders will be subject to payment of termination compensation owing by the Department;

(iii) all other intangible personal property used or owned by the Concessionaire and relating to or derived from the Project, the Work and the Handback Reserve Fund; and

(iv) a notice of termination of this Agreement and the Concessionaire's Interest, in the form reasonably required by the Department, executed and acknowledged by the Concessionaire.

(f) If, as of the date on which the notice of termination is delivered, the Concessionaire has not completed construction of all or part of the Project, the Department may, subject to the provisions of the Direct Agreement, elect, by written notice to the Concessionaire and the Design-Build Contractor delivered within 90 Days after the date on which the notice of termination is delivered, to continue in effect the Design-Build Contract or to require its termination. If the Department does not deliver written notice of election within such time period, the Department will be deemed to elect to require termination of the Design-Build Contract. If the Department elects to continue the Design-Build Contract in effect, then the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire's right, title and interest in and to the Design-Build Contract, and the Department will assume in writing the Concessionaire's obligations thereunder that arise from and after the end of the Term. If the Department elects (or is deemed to elect) to require termination of the Design-Build Contract, then the Concessionaire will:

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(i) unless the Department has granted Replacement Agreements to a Lender or its Substituted Concessionaire, take such steps as are necessary to terminate the Design-Build Contract, including notifying the Design-Build Contractor that the Design-Build Contract is being terminated and that the Design-Build Contractor is to immediately stop work and stop and cancel orders for materials, services or facilities unless otherwise authorized in writing by the Department;

(ii) immediately and safely demobilize and secure construction, staging, lay down and storage areas for the Project and Utility Relocations included in the construction Work in a manner satisfactory to the Department, and remove all debris and waste materials except as otherwise approved by the Department in writing;

(iii) take such other actions as are necessary or appropriate to mitigate further cost;

(iv) subject to the prior written approval of the Department, settle all outstanding liabilities and all Claims arising out of the Design-Build Contract;

(v) cause the Design-Build Contractor to execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Design-Build Contractor's right, title and interest in and to (A) all third party agreements and permits, except Contracts for performance of the Design-Build Contractor's Work; *provided*, that the Department assumes in writing all of the Design-Build Contractor's obligations thereunder that arise after the effective date of termination and (B) all assignable warranties and Claims held by the Design-Build Contractor against other Contractors and other third parties in connection with the Project or the Work; and

(vi) carry out such other directions as the Department may give for suspension or termination of Work performed under the Design-Build Contract.

(g) If, as of the date notice of termination is delivered, the Concessionaire has entered into any other Contract for the design, construction, permitting, installation and equipping of the Project, the Department will elect, by written notice to the Concessionaire, to continue in effect such Contract or to require its termination. If the Department elects to continue the Contract in effect, then the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire's right, title and interest in and to the Contract, and the Department will assume in writing the Concessionaire's obligations thereunder that arise from and after the effective date of termination. If the Department elects to require termination of the Contract, then the Concessionaire will take actions comparable to those set forth in Section 20.08(f) with respect to the Contract.

(h) If, as of the date notice of termination is delivered, the Concessionaire has entered into any operations or maintenance Contract, the Department will elect, by written notice to the Concessionaire, to continue it in effect or require its termination; *provided*, that if a Lender is entitled to Replacement Agreements following termination, the Department will not elect to

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terminate any such Contract until the Lender's right to Replacement Agreements expires without exercise. If the Department elects to continue any such Contract in effect, then on or about the effective date of termination (or promptly after any later election to terminate) the Concessionaire will execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all the Concessionaire's right, title and interest in and to the Contract, and the Department will assume in writing the Concessionaire's obligations thereunder that arise from and after the effective date of termination.

Section 20.09 Liability After Termination; Consequences of Termination

(a) If this Agreement is terminated by reason of a Concessionaire Default or a Department Default or any other Project Agreement is terminated for default thereunder, such termination will not excuse the defaulting party from any liability arising out of such default as provided in the Project Agreements. If any outstanding Claim of the Concessionaire against the Department that is independent of the event of termination and determination of the termination compensation is resolved prior to payment of the termination compensation (if any), the parties will adjust the termination compensation by the amount of the unpaid award, if any, on the Claim. Notwithstanding the foregoing, any termination of this Agreement will automatically extinguish any Claim of the Concessionaire to payment of Concessionaire Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing after the effective date of termination from Compensation Events that occurred prior to termination; *provided*, however, that (i) Claims for any such Net Cost Impacts that cannot reasonably be avoided by the Concessionaire will not be extinguished, and (ii) the foregoing will not limit any Claim of the Concessionaire for interest on unpaid amounts owing or to become owing by the Department as provided herein.

(b) If this Agreement is terminated by any reason other than a Concessionaire Default or a Department Default or any other Project Agreement is terminated other than a termination for default, no party will have any further obligation or liability except for performance of their respective obligations which are either expressly stated in this Agreement or any other Project Agreement to survive termination or by their sense and context are intended to survive termination.

(c) The Department will, as of the effective date of termination of this Agreement or the Concessionaire's rights hereunder, whether due to expiration or earlier termination of the Term, assume full responsibility for the Project or, if Substantial Completion has not been achieved or other Work has otherwise not been completed as of such date, be permitted to assume full responsibility for such outstanding Work, and as of such date, the Concessionaire will have no liability or responsibility for such Work, as the case may be, occurring after such date; *provided*, that the Department and the Concessionaire will remain fully responsible for all of their respective obligations or liabilities pursuant to this Agreement or any other Project Agreement arising before the effective date of termination and those obligations pursuant to this Agreement or other Project Agreements which survive termination.

(d) Each of the Concessionaire and the Department will be liable for all costs, expenses and other amounts for which it is liable or responsible hereunder incurred up to the

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effective date of termination of this Agreement or the Concessionaire's rights hereunder, whether due to expiration or earlier termination of the Term, and the Concessionaire will not be liable for any costs, expenses and amounts incurred in connection with the Project or the Work on and after such date, except to the extent such costs, expenses and amounts are properly included in the measure of any damages due to the Department arising from a default by the Concessionaire pursuant to this Agreement. The amount of any termination compensation is subject to reduction and offset for such damages.

(e) Regardless of the Department's prior actual or constructive knowledge thereof, no contract or agreement to which the Concessionaire is a party (unless the Department is also a party thereto) as of the effective date of termination will bind the Department, unless the Department elects to assume such contract or agreement in writing. Except in the case of the Department's express written assumption, no such contract or agreement will entitle the contracting party to continue performance of work or services respecting the Project following the effective date of termination, or to any Claim, legal or equitable, against the Department.

(f) As of the effective date of termination of this Agreement, whether due to expiration or earlier termination of the Term, the Permit and all of the Concessionaire's Interest will automatically terminate and expire, and all Liens created, permitted or suffered by the Concessionaire will be automatically extinguished.

Section 20.10 Exclusive Termination Remedies

(a) Each of the Department and the Concessionaire hereby acknowledges and agrees that it may only terminate this Agreement in accordance with the express terms hereof.

(b) Article 19 and this Article 20 set forth the entire and exclusive provisions and rights of the Department and the Concessionaire regarding termination of this Agreement, and any and all other rights at law or in equity to terminate or to payment of compensation upon termination are hereby waived to the maximum extent permitted by Law. The parties hereto agree that, upon any termination of this Agreement, the payments provided herein will constitute the Concessionaire's sole compensation pursuant to this Agreement and in the event the Department or any designee or licensee of the Department imposes tolls for travel on the Project after termination of this Agreement, neither the Concessionaire nor any beneficiary or Lender as a result of a Financing Assignment will be entitled to any further compensation in respect thereof. In furtherance of the foregoing, the parties hereto agree that the provisions of Section 56-568B of the Code of Virginia will not apply to the Project after the termination of this Agreement.

Section 20.11 Determination of Project Value

(a) In the event the Department owes the Concessionaire an amount calculated by reference to the Project Value, Project Value will be determined according to the following procedures:

(i) within 30 Days after a party requests the appointment of an appraiser, the Department and the Concessionaire will confer in good faith to mutually appoint an

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independent third-party appraiser to determine the Project Value by written appraisal. This appraiser must be nationally recognized and experienced in appraising similar assets;

(ii) if the parties are unable to agree upon such a single appraiser within such 30-Day period, then within ten Days thereafter the Department and the Concessionaire will each appoint an independent third-party appraiser and both such appraisers will be instructed jointly to select, within 15 Days after they are appointed, a third independent third-party appraiser who is nationally recognized and experienced in appraising similar assets to make the appraisal referred to above;

(iii) if the appraisers appointed by the parties are unable to appoint an independent third-party appraiser under Section 20.11(a)(ii) within 60 Days after a party has requested the appointment of an appraiser under Section 20.11(a)(i), then either party may petition the Circuit Court for the City of Richmond to appoint an independent third-party appraiser having such reputation and experience;

(iv) each party will pay the costs of its own appraiser. The Department and the Concessionaire will pay in equal shares the reasonable costs and expenses of the third independent appraiser;

(v) each party will diligently cooperate with the appraiser, including promptly providing the appraiser with data and information regarding the Project, Project Right of Way, asset condition, historical cost and revenue data, and other information the appraiser may request that is in the possession of or reasonably available to the party. Each party will provide the appraiser with access to the party's books and records regarding the Project on an Open Book Basis; and

(vi) once appointed, the independent third-party appraiser will conduct an appraisal of the Project Value and deliver to both parties a draft appraisal report and draft valuation. The appraisal will determine Project Value as of the effective date of termination of the Agreement, based on the then condition of the Project (but without regard to any damage or loss resulting from a Department Default). The appraiser will appraise Project Value by taking into account the terms and conditions of this Agreement, projected cash flows and projected costs of the Project for the remainder of the projected Term had this Agreement not been terminated, as determined by the appraiser. For the avoidance of doubt, the calculation of Project Value is the sum of the fair market value of the projected Distributions for the remainder of the Term without taking into consideration any terminations pursuant to Article 20 and the fair market value of any Concessionaire Debt outstanding as of the date of the calculation, and will include Concessionaire Damages for adverse Net Cost Impacts and Net Revenue Impacts accruing after the effective date of termination from Compensation Events that occurred prior to termination. In conducting the appraisal, and before issuing a draft appraisal report, the independent appraiser will afford reasonable and comparable opportunity to each party to provide the appraiser with information, data, analysis and reasons supporting each party's view on the Project Value. The parties will have 15 Days after receipt of the draft appraisal report to comment thereon. After

the opportunity to comment has expired, the independent third-party appraiser will consider and evaluate all comments, prepare a final appraisal report stating the Project Value, and deliver the final appraisal report to both parties.

(b) If either party disagrees with the Project Value, either party may invoke the dispute resolution procedures set forth in Article 21, by delivery of notice to the other party within 60 Days following receipt of the appraiser's report. Failure to invoke the dispute resolution procedures within such time period will conclusively constitute acceptance of the Project Value.

ARTICLE 21

DISPUTE RESOLUTION

Section 21.01 General

(a) The parties will attempt to resolve any Disputes arising out of this Agreement at the Project level through good faith negotiations between designated representatives.

(b) If the Dispute cannot be resolved at the Project level in accordance with Section 21.01(a) above within ten Days of the initiation of good faith negotiations between designated representatives, then either party will have the right to submit the Dispute to the Steering Committee for resolution. The Steering Committee will convene a meeting within ten Days of notification by either party of any unresolved Dispute. After the meeting has convened, the Steering Committee will have seven Days to resolve the Dispute.

(c) If the Steering Committee has not resolved the Dispute pursuant to Section 21.01(b), then either party may request non-binding mediation of the Dispute in accordance with the Dispute Resolution Provisions attached as Exhibit Z. If the Dispute has not been resolved within 60 Days after the initiation of mediation proceedings, either party will have the right to proceed in accordance with Section 21.02 (in the case of TR Disputes) or Section 21.03. The first face-to-face meeting between the mediator and both parties will be deemed to be the initiation of mediation.

(d) Any of the time periods specified in this Section 21.01 may be extended by mutual agreement of the parties.

Section 21.02 Disputes Involving Technical Requirements

(a) If the Concessionaire disputes a Department directive issued in accordance with Section 10.02(c) (“TR Dispute”), and the parties have not been able to resolve such TR Dispute through good faith negotiations between designated representatives, then either party will have the right: (i) first, to initiate the Steering Committee process set forth in Section 21.01(b), and then, if applicable, (ii) the mediation process set forth in Section 21.01(c).

(b) If the TR Dispute remains unresolved after the parties have proceeded through the processes in Section 21.02(a), then either party will have the right to proceed with the TR Formal

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Dispute Panel (“TR Dispute Panel”) process set forth in the Dispute Resolution Provisions. Except for the interim relief set forth in Section 21.02(c) below, any TR Dispute Decision issued by the TR Dispute Panel will be non-binding. If the TR Dispute has not been resolved within 60 Days after the issuance of the TR Dispute Decision, or if the TR Dispute Panel fails to issue a TR Dispute Decision within 14 Days after the closing of the TR Dispute Panel hearing, either party will have the right to proceed in accordance with Section 21.03. The TR Dispute Decision will be admissible as evidence in subsequent legal proceedings, but will be given no greater weight than any other evidence submitted by the parties.

(c) In the event the TR Dispute Decision agrees with the Concessionaire’s position, then, subject to the Department’s reservation of rights pending any actions under Section 21.03 taken by the Department, the Department’s directive will be deemed a Department Change and the Concessionaire will be entitled, as interim relief, to be paid for 65% of the direct design and construction costs associated with such Department Change on a force account basis calculated in accordance with Section 14.02(e), subject to the Concessionaire’s right to seek to recover through an action under Section 21.03, the remaining 35% of the direct design and construction costs and Concessionaire Damages, if any, not paid by the Department pursuant to the interim relief described herein. For the avoidance of doubt, the Concessionaire will not be entitled, as interim relief, payment for any Net Revenue Impact or other Concessionaire Damages.

(d) Any of the time periods specified in this Section 21.02 may be extended by mutual agreement of the parties.

Section 21.03 Litigation; Venue

(a) All litigation between the parties arising out of or pertaining to this Agreement or its breach will be filed, heard and decided in the Circuit Court for the City of Richmond, Virginia, Division I, which will have exclusive jurisdiction and venue.

(b) As permitted by Section 56-569 of the Code of Virginia, the parties agree that any requirement that the State Corporation Commission issue a declaratory judgment regarding a material default (as defined in Section 56-568 of the Code of Virginia) pursuant to such Section 56-569, as a prerequisite to exercising any remedy set forth in this Agreement or such Section 56-569, will not apply to this Agreement.

(c) Satisfaction of the procedures set forth in Section 21.01 (and, for Disputes involving Technical Requirements, Section 21.02) will be a condition precedent to instituting a legal action in court; *provided*, that if the Department determines, in its sole discretion, that a Dispute involves an issue that poses an immediate and serious threat to the public health, safety and welfare, the Department will be entitled to take whatever steps it deems appropriate and to initiate litigation of the matter in court without first submitting the Dispute to the dispute resolution procedures of this Agreement.

Section 21.04 Conduct During Pendency of Dispute

(a) Notwithstanding anything to the contrary in this Agreement, neither party will be required to await the resolution of dispute proceedings regarding the reasons for terminating this Agreement before exercising such party's termination rights.

(b) Pending final resolution of any Dispute (except a Dispute regarding the cause for terminating this Agreement), the parties will continue to fulfill their respective obligations under this Agreement.

Section 21.05 Costs of Dispute Resolution

(a) Each party will bear its own attorneys' fees and costs in any Dispute or litigation arising out of or pertaining to this Agreement, and no party will seek or accept an award of attorneys' fees or costs, except as otherwise expressly provided herein.

(b) The fees and costs of any mediator and the TR Dispute Panel members will be borne equally by each party.

ARTICLE 22

RESERVED RIGHTS

Section 22.01 Exclusions from the Concessionaire's Interest

The Concessionaire's rights and interests in the Project have been granted to the Concessionaire under the Permit in order to enable it to accomplish the Project Purposes. Subject to Section 22.04, the Concessionaire's rights and interests consist only of those expressly granted by this Agreement and other Project Agreements, and specifically exclude all Reserved Rights.

Section 22.02 Department Reservation of Rights

(a) The Department may, at any time at its sole cost and expense, devote, use or take advantage of the Reserved Rights for any public purpose without any financial participation whatsoever by the Concessionaire. The Department hereby reserves to itself all ownership, development, maintenance, repair, replacement, operation, use and enjoyment of, and access to, the Reserved Rights.

(b) In addition to any rights it has, the Department reserves (for itself and its representatives, as well as others claiming by, through or under the Department) the right and will have the right to enter the Project and each and every part thereof at all reasonable times, in the following circumstances:

(i) in the event of an actual or reported emergency, danger, threat, circumstance or event that is reasonably believed by the Department or its designee (including relevant police, fire, emergency services, armed forces, and any other security or emergency personnel in accordance with Section 9.06) to have caused (or to

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present the imminent potential to cause) injury to individuals, damage to property, or threat to the Environment or to public safety, to take, at such times, as the Department determines necessary in its discretion and with notice to the Concessionaire if practicable under the circumstances, such actions as the Department or such designee determines necessary to respond to or to rectify such emergency, danger, threat, circumstance or event; and

(ii) in the event of any circumstance or event that is reasonably believed by the Department to have caused an impairment to the continuous operation of the Project as a public highway, and if the Department in its discretion determines that the Concessionaire is not then taking all necessary steps to respond to or to rectify such circumstance or event, to take, at such times as the Department determines necessary in its discretion and with notice to the Concessionaire if practicable under the circumstances, such actions as the Department determines may be necessary to respond to or to rectify such circumstance or event or to restore the operation of the Project, and all costs and expenses incurred by the Department in connection with or related to such actions will be paid by the Concessionaire.

(c) The Concessionaire acknowledges and agrees that all rights to own, lease, sell, assign, transfer, utilize, develop or take advantage of the Reserved Rights are hereby reserved to the Department, and the Concessionaire will not engage in any activity infringing upon the Reserved Rights, it being agreed that the development, construction and operation of the Project in accordance with this Agreement will not infringe upon the Reserved Rights.

Section 22.03 Disgorgement

If a Concessionaire Default concerns a breach of the provisions of Section 22.01 or Section 22.02, in addition to any other remedies pursuant to this Agreement, the Department will be entitled to disgorgement of all profits from the prohibited activity and to sole title to and ownership of the prohibited assets and improvements.

Section 22.04 Alternate Treatment of Reserved Rights

Notwithstanding Section 22.01 and Section 22.02, the Department may elect in its sole discretion to treat any development of improvements respecting Reserved Rights that it undertakes as Project Enhancements, in which case all the provisions of Section 12.02 will apply.

Section 22.05 Naming Rights

(a) The Department hereby grants the Concessionaire the naming rights for the Project, subject to (i) approval of any such name by the Department, which approval will not be unreasonably withheld, conditioned or delayed, and (ii) compliance with Law and Governmental Approvals. The Concessionaire will request the Department's approval of a name for the Project in writing and no such approval will be effective unless and until provided in writing by the Department; *provided*, that the failure of the Department to respond in writing to such request within 21 Days following receipt of the Concessionaire's request will be deemed the

Department's approval thereof. The Concessionaire may sub-license any such rights to its separate O&M Contractors.

(b) For purposes of the Assigned Gross Revenue and Refinancing Gain Share Calculation, any revenues received by the Concessionaire with respect to the naming rights granted to the Concessionaire under this Section 22.05 will be treated as Gross Revenues.

ARTICLE 23

REPRESENTATIONS; WARRANTIES AND FINDINGS

Section 23.01 Department Representations and Warranties

- (a) The Department hereby represents and warrants to the Concessionaire as follows:
- (i) the Department is an agency of the State and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with, and subject to the terms and conditions of this Agreement and other Project Agreements to which the Department is a party;
 - (ii) each person executing this Agreement or any other Project Agreement on behalf of the Department to which the Department is a party has been or at such time will be duly authorized to execute each such document on behalf of the Department;
 - (iii) neither the execution and delivery by the Department of this Agreement and the other Project Agreements executed concurrently herewith to which the Department is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or violation of any other agreements or instruments to which it is a party or by which it is bound;
 - (iv) there is no action, suit, proceeding, investigation or litigation pending and served on the Department which challenges the Department's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which the Department is a party, or which challenges the authority of the Department official executing this Agreement or the other Project Agreements, and the Department has disclosed to the Concessionaire any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Department is aware;
 - (v) as of the Agreement Date, no agreement, contract, option, commitment or other right exists which binds, or which in the future may become binding on, the Department to sell, transfer, convey, dispose of or encumber the Project. The Department has not granted or assigned any interest in Gross Revenues to any other party other than the Concessionaire pursuant to this Agreement;
 - (vi) this Agreement has been duly authorized, executed and delivered by the Department and constitutes a valid and legally binding obligation of the Department,

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enforceable against it in accordance with the terms hereof, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity;

(vii) the Department has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Department is a party;

(viii) the Department is in material compliance with all Laws and Governmental Approvals applicable to its obligations in connection with this Agreement; and

(ix) other than with respect to portions of the Project Right of Way not yet acquired as of the Agreement Date, the Department has good and sufficient title and interest to the Project Right of Way necessary for purposes of this Agreement free and clear of all Liens or other exceptions to title, except Permitted Encumbrances.

(b) The Department makes no representations or warranties with regard to data prepared by the Concessionaire as part of the Phase 2 Project Deliverables pursuant to the Interim Agreement.

Section 23.02 Concessionaire Representations and Warranties

The Concessionaire hereby represents and warrants to the Department as follows:

(a) the Concessionaire is a duly organized limited liability company created under the laws of the State of Delaware, is qualified to conduct business in the State, has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to execute and perform each and all of its obligations under the Project Agreements;

(b) as of the Agreement Date, (i) the membership interest in the Concessionaire is wholly owned by Elizabeth River Crossings HoldCo, LLC, and (ii) the membership interest in Elizabeth River Crossings Holdco, LLC is owned 50% by Macquarie Midtown Holdings, Inc and 50% by Skanska ID ERC Holdings LLC, and no other Person has a membership interest in the Concessionaire;

(c) the Concessionaire has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Project Agreements to which the Concessionaire is a party;

(d) each person executing this Agreement or any other Project Agreement on behalf of the Concessionaire has been or will at such time be duly authorized to execute each such document on behalf of the Concessionaire;

(e) this Agreement and each Project Agreement to which the Concessionaire or a Concessionaire Financial Party is a party have been duly authorized, executed and delivered by the Concessionaire or the Concessionaire Financial Party and constitutes a valid and legally

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binding obligation of the Concessionaire or the Concessionaire Financial Party (as the case may be), enforceable against it in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and to general principles of equity;

(f) neither the execution and delivery by the Concessionaire of this Agreement and the other Project Agreements to which the Concessionaire is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or a violation of the governing instruments of the Concessionaire or any other agreements or instruments to which it is a party or by which it is bound;

(g) there is no action, suit, proceeding, investigation or litigation pending and served on the Concessionaire which challenges the Concessionaire's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Project Agreements to which the Concessionaire is a party, or which challenges the authority of the Concessionaire official executing this Agreement or the other Project Agreements; and the Concessionaire has disclosed to the Department any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Concessionaire is aware;

(h) the Concessionaire is in material compliance with all Laws applicable to the Concessionaire or its activities in connection with this Agreement and the other Project Agreements;

(i) none of the Concessionaire, any affiliate of the Concessionaire (as "affiliate" is defined in 29 CFR 98.905), or the Design-Build Contractor or its affiliates (as so defined) is suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any Federal or State department or agency;

(j) no event which, with the passage of time or the giving of notice, would constitute a Concessionaire Default has occurred;

(k) except with respect to the Pond 16 Issue, no event which, with the passage of time or the giving of notice, would constitute a Delay Event or a Compensation Event under this Agreement has occurred;

(l) the Initial Base Case Financial Model (i) was prepared by or on the Concessionaire's behalf in good faith, (ii) fully discloses all Financial Model Formulas, all cost, revenue and other financial assumptions and projections that the Concessionaire used or is using in making its decision to enter into this Agreement, and in making disclosures to potential equity investors, (iii) fully discloses all Financial Model Formulas disclosed to the Lenders under the Project Financing Agreements, and (iv) as of the Agreement Date, represents the projections that the Concessionaire believes in good faith are realistic and reasonable for the Project; *provided*, that such projections are based upon a number of estimates and assumptions and are subject to significant business, economic and competitive uncertainties and contingencies and that, accordingly, no representation or warranty is made that any of the assumptions are correct, that

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such projections will be achieved or that the forward-looking statements expressed in such projections will correspond to actual results;

(m) on or before the Agreement Date, the Concessionaire has delivered to the Department an audit report and an opinion of the Financial Model Auditor addressed to the Department to the effect that the Initial Base Case Financial Model and the Financial Model Formulas reflect the terms of this Agreement and that the Financial Model Formulas and the Initial Base Case Financial Model are suitable for use herein in connection with Compensation Events, Delay Events and early termination procedures, and covering such other matters as may have been reasonably requested by the Department, all in form and substance acceptable to the Department; and

(n) ERC performed all work which forms the basis of the ROW Cost and Acquisition Baseline Schedule, the Baseline Asset Condition Report, the Known Site Conditions Baseline Report and the Known Pre-Existing Hazardous Substances Report in accordance with (i) Law; (ii) Governmental Approvals; and (iii) prudent industry practices, methods, techniques and standards (including the Applicable IA Standards) and using the degree of care that would be expected to be exercised by a prudent, skilled and experienced developer engaged in the same kinds of undertakings and under the same or similar circumstances, conditions, scope and limitations (including limitations on access to the Project Right of Way and the Existing Project Assets and limitations agreed with the Department as to the scope of the work to be undertaken prior to the Agreement Date) as those applying to such work.

Section 23.03 Department's Findings Under the Act

The Department, as the Responsible Public Entity with respect to the Project, makes the following findings:

(a) the actions taken by the Department pursuant to the Act facilitate the development, design, construction, management, operation and maintenance of the Project and the timely development of any Project Enhancements, and such public need may not be wholly satisfied by existing methods of procurement in which qualifying transportation facilities are developed and/or operated;

(b) there is a public need to construct and operate a qualifying transportation facility (as defined in Section 56-557 of the Code of Virginia) of the type of the Project;

(c) the Permit granted hereunder authorizing the Concessionaire to develop, design, construct, manage and operate and maintain the Project, including the development of any Project Enhancements, may result in their availability to the public in a more timely, more efficient and less costly fashion, thereby serving the public safety and welfare;

(d) the Project, its interconnections with existing transportation facilities, and the Concessionaire's plans for the development, design, construction, operation and maintenance of the Project are reasonable and compatible with the State transportation plan and with local comprehensive plans;

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- (e) the estimated cost of developing, designing, constructing, operating and maintaining the Project is reasonable in relation to similar transportation facilities;
- (f) the Concessionaire's plans will result in the timely construction and operation and maintenance of the Project and in the development of any Project Enhancements;
- (g) the Department will continue to have fee title or good and valid interest to the Project and the Project will remain open for use by members of the public as a public road upon payment of the applicable tolls;
- (h) through this Agreement the Department intends to encourage investment in the State by the Concessionaire to facilitate the development, construction, operation and maintenance of the Project and the development of any Project Enhancements; and
- (i) the terms and conditions of this Agreement serve the public purpose of the Act.

ARTICLE 24

CONTRACTING PRACTICES AND PUBLIC WELFARE CONSIDERATIONS

Section 24.01 Obligation to Refrain from Discrimination

The Concessionaire covenants and agrees that it will not discriminate and it will require all Contractors not to discriminate against any person, or group of persons, on account of age, sex, marital status, race, creed, color, national origin, religion or the presence of any sensory, mental or physical handicap in the permitting, design, acquisition, construction, maintenance, operation or management of the Project, nor will the Concessionaire establish or permit any such practice or practices of discrimination or segregation with reference to the selection, use, hiring, firing, promotion or termination of employees, Contractors, and vendors or with reference to the use, occupancy or enjoyment of or access to or toll rates charged for use of the Project; *provided*, that the prohibition against discrimination on the basis of sensory, mental or physical handicap will not apply if the particular disability prevents the proper performance of the particular person involved.

Section 24.02 Contracting

(a) General. The Concessionaire may perform the Work through use of its own personnel, materials and equipment, or by contracting to Persons with the expertise, qualifications, experience, competence, skills and know-how to perform the responsibilities being contracted in accordance with all Law, all Governmental Approvals, and the terms, conditions and standards set forth in this Agreement.

(b) Design-Build Contractor. The Concessionaire has entered into the Design-Build Contract. Notwithstanding its use of the Design-Build Contractor, the Concessionaire remains responsible for the Design-Build Work during the Term in accordance with this Agreement. The Concessionaire will immediately notify the Department upon the termination, replacement or removal of the Design-Build Contractor.

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(c) O&M Contractor.

(i) Subject to the Department's approval, which will not be unreasonably withheld, the Concessionaire may contract with one or more separate O&M Contractors with the expertise, qualifications, experience, competence, skills and know-how to perform the operations and maintenance obligations of the Concessionaire in accordance with this Agreement. Notwithstanding its use of an O&M Contractor, the Concessionaire remains ultimately responsible for the operation and maintenance of the Project during the Term in accordance with this Agreement. The O&M Contractor will be subject at all times to the direction and control of the Concessionaire, and any delegation to an O&M Contractor does not relieve the Concessionaire of any of its obligations, duties or liability pursuant to this Agreement. The Concessionaire will immediately notify the Department upon the termination, replacement, removal or resignation of an O&M Contractor. Any agreement between the Concessionaire and any O&M Contractor will by its terms terminate, without penalty, at the election of the Department upon five Days notice to such O&M Contractor upon the termination of this Agreement. The O&M Contractor will have no interest in or rights pursuant to this Agreement or the Project.

(ii) Each O&M Contractor and its Contract will comply with this Section 24.02. In addition, the material terms of the proposed Contract of the O&M Contractor must be consistent with the corresponding duties and obligations of the Concessionaire pursuant to this Agreement and the other Project Agreements.

(d) Replacement of Design-Build Contractor or O&M Contractor. Before entering into any Contract replacing the initial Design-Build Contractor or O&M Contractor, as applicable, the Concessionaire will submit a true and complete copy of the proposed Contract for the Department's review and approval, subject to the following:

(i) the Department may disapprove such proposed Contract if such Contract or the Work to be performed thereunder does not comply, or is inconsistent, in any material respect with the applicable requirements of this Agreement;

(ii) the Department may disapprove, in its sole discretion, of the replacement Contractor after taking into account the following factors:

(A) the financial strength and integrity of the proposed Contractor, each of its direct Contractors, and their respective direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates;

(B) the capitalization of the proposed Contractor or any parent guarantor, as applicable;

(C) the experience of the proposed Contractor and each of its direct Contractors in constructing or operating toll roads or highways and performing other projects;

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(D) the presence of any actions, suits or proceedings, at law or in equity, or before any Governmental Authority, pending or, to the best of such Contractor's knowledge, threatened against such Contractor, that would or could reasonably be expected to have a material adverse effect on its ability to perform its obligations under the Contract;

(E) the background of the proposed Contractor, each of its direct Contractors, and their respective direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees and each of their respective Affiliates (including the absence of criminal, civil or regulatory Claims or actions against any such Person and the quality of any such Person's past or present performance on other projects); and

(F) the Contractor's compliance with any of the other provisions of this Section 24.02.

(e) Each Contract for the performance of the Work that the Concessionaire executes at a minimum:

(i) will set forth a standard of professional responsibility or a standard for commercial practice equal to prudent industry standards for work of similar scope and scale and will set forth effective procedures for Claims and change orders;

(ii) will establish provisions for prompt payment by the Concessionaire in accordance with the provisions of Sections 2.2-4347 through 4355 of the Code of Virginia, which would apply if the Department was contracting with such Contractor;

(iii) will require the Contractor to carry out its scope of work in accordance with Law, the Technical Requirements, all Governmental Approvals, Good Industry Practice and the terms, conditions and standards set forth in this Agreement;

(iv) will set forth warranties, guaranties and liability provisions of the contracting party in accordance with Good Industry Practice for work of similar scope and scale;

(v) will be fully assignable to the Department upon termination of this Agreement, such assignability to include the benefit of all Contractor warranties, indemnities, guarantees and professional responsibility;

(vi) will include express requirements that, if the Department succeeds to the Concessionaire's rights under the subject Contract (by assignment or otherwise), then the relevant Contractor agrees that it will (A) maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment supplier, designer, service provider), (B) permit audit thereof by the Concessionaire, and provide progress reports to the Concessionaire appropriate for the type of Contract it is performing sufficient to enable the Concessionaire to

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provide the reports it is required to furnish the Department pursuant to this Agreement and (C) allow the Department, to assume the benefit of the Concessionaire's Contract rights and the work performed thereunder, with liability only for those remaining obligations accruing after the date of assumption, but excluding any monetary claims or obligations that the Concessionaire may have against such Contractor that existed prior to the Department's assumption of such Contract;

(vii) will not be assignable by the Contractor without the Concessionaire's prior written consent; *provided*, that the foregoing will not limit permitted subcontracting of the Work;

(viii) will expressly require the Contractor to participate in meetings between the Concessionaire and the Department, upon the Department's reasonable request, concerning matters pertaining to such Contractor or its work, *provided*, that all direction to such Contractor will be provided by the Concessionaire, and *provided further*, that nothing in this Section 24.02(e)(viii) will limit the authority of the Department to give such direction or take such action which in the opinion of the Department is necessary to remove an immediate and present threat to the safety of life or property;

(ix) will expressly provide that all Liens and claims of any Contractors at any time will not attach to any interest of the Department in the Project or the Project Right of Way; and

(x) will be consistent in all other respects with the terms and conditions of this Agreement to the extent such terms and conditions are applicable to the scope of work of such Contractor.

(f) The Concessionaire will not enter into any Contract at any level with any Person if that Person or any of its affiliates (as "affiliate" is defined in 29 CFR § 98.905), or any of their respective officers, directors and employees, (i) is then suspended or debarred, subject to a proceeding to suspend or debar it, or subject to an agreement for voluntary exclusion, from bidding, proposing or contracting with any Federal or State department or agency, (ii) has been convicted, pled guilty or *nolo contendere* to a violation of Law involving fraud, conspiracy, collusion, bribery, perjury, material misrepresentation, or any other violation that shows a similar lack of moral or ethical integrity or (iii) is then barred or restricted from owning, operating or providing services for the Project under Law, including the Foreign Investment and National Security Act of 2007, 50 USC App. 2170 (HR556).

(g) The Concessionaire will include a provision in each Contract for the performance of the Work requiring the Contractor to maintain all licenses required by Law and comply with the requirements of the eVA or its successor.

(h) The Concessionaire will include in each Contract for Design-Build Work of any amount and O&M Work in excess of \$50,000 to which the Concessionaire or an Affiliate of the Concessionaire is a party (including the Design-Build Contract) a provision naming the Department as a third-party beneficiary of all Contractor representations and warranties

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contained in the Contract; *provided*, that the Department will have the right to exercise its rights under such representations and warranties only so long as the Concessionaire or a Lender is not pursuing remedies thereunder.

(i) The Concessionaire will not contract any part of the Design-Build Work or the O&M Work to a Contractor who is not prequalified with the Department in accordance with the Department's Rules Governing Prequalification Privileges, unless otherwise indicated in this Agreement. This restriction does not apply to contract specialty items, consultants, manufacturers, suppliers, haulers, or snow removal service providers.

(j) The appointment of Contractors will not relieve the Concessionaire of its responsibility hereunder or for the quality of work, materials and services provided by it. The Concessionaire will at all times be held fully responsible to the Department for the acts and omissions of its Contractors and persons employed by them and no Contract entered into by the Concessionaire will impose any obligation or liability upon the Department to any such Contractor or any of its employees. Further, absent the Department's express written consent, no Contract or delegation of Work thereunder will affect the obligation of the Concessionaire to directly communicate with the Department and to oversee the Work of the Contractor. Nothing in this Agreement will create any contractual relationship between the Department and a Contractor.

(k) The Concessionaire will not enter into or materially amend an Affiliate Contract without notice to and consent of the Department, which consent will not be unreasonably withheld or delayed if the Contract is entered into in the ordinary course of business and the Concessionaire demonstrates to the Department's satisfaction that the Affiliate Contract is on overall terms no less favorable or unfavorable to the Concessionaire than terms the Concessionaire could obtain in an arm's-length transaction for comparable services with a Person that is not an Affiliate of the Concessionaire; *provided*, that no consent will be required for (i) reasonable overhead sharing fees and reimbursement of third-party costs payable to an Affiliate for legal, accounting, tax, computer and other centralized management services provided to the Concessionaire in lieu of the Concessionaire having its own employees for such functions; or (ii) the joint ownership of assets or property used for the operation or maintenance of the Project and other projects owned or operated by Affiliates of the Concessionaire so long as the cost of such assets and properties are reasonably shared and documented.

(l) From and after the Agreement Date, the Concessionaire will be solely responsible for paying each Contractor and any other Person to whom any amount is due from the Concessionaire for services, equipment, materials and supplies in connection with the Work. Pursuant to Section 2.2-4354 of the Code of Virginia, the Concessionaire will require the Design-Build Contractor and O&M Contractor, within seven Days following receipt of monies from the Concessionaire for work performed by any Contractor of the Design-Build Contractor or O&M Contractor, to either (i) pay such Contractor for the proportionate share of the total payment received from the Concessionaire attributable to the Work performed by such Contractor or (ii) notify the Concessionaire and such Contractor, in writing, of the Design-Build Contractor's or O&M Contractor's intention to withhold all or a part of the Contractor's payment, specifying the reason for the non-payment. The Concessionaire also agrees that it will

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require the Design-Build Contractor and O&M Contractor to include in all of its Contracts a provision that (A) obligates the Design-Build Contractor or O&M Contractor, as applicable, to pay interest to its Contractors on all amounts owed by the Design-Build Contractor or O&M Contractor, as applicable, that remain unpaid after seven Days following receipt of monies from the Concessionaire for work performed by its Contractor, except for amounts withheld as allowed in clause (ii) of this Section 24.02(l); (B) states, “Unless otherwise provided under the terms of this contract, interest will accrue at the rate of one percent per month.” and (C) obligates each Contractor to include or otherwise be subject to the same payment and interest requirements as specified in this Section 24.02(l) with respect to each lower-tier Contractor.

(m) Upon entering into Contract for the Design-Build Work or O&M Work in excess of \$100,000, the Concessionaire will provide the Department with a copy of such Contract and, if such Contract is with an Affiliate of the Concessionaire, a list of all Contracts in effect to which such Affiliate is a party and under which all or a substantial portion of the Affiliate’s responsibilities or obligations under its Contract are delegated to its Contractor. The Concessionaire will allow the Department ready access to all Contracts and records regarding Contracts, including amendments and supplements to Contracts and guarantees thereof.

(n) As soon as the Concessionaire identifies a potential Contractor for a potential Contract described in the first sentence of Section 24.02(m), but in no event later than five Days after Contract execution, the Concessionaire will notify the Department in writing of the name, address, phone number and authorized representative of such Contractor.

Section 24.03 Disadvantaged Business Enterprise (DBE) and Small, Women-Owned and Minority Business (SWaM) Requirements

(a) General.

(i) The parties recognize the importance of pursuing, inviting and developing the participation of minority, women-owned and small businesses through the DBE and SWaM programs, where applicable.

(ii) The Concessionaire shall not and will not permit its Contractors to discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Concessionaire will carry out applicable Federal Requirements, including but not limited to the requirements of 49 CFR part 26, in the administration of this Agreement and the award and administration to subcontracts pursuant to this Agreement. Failure by the Concessionaire to carry out the requirements in this Section 24.03 will subject the Concessionaire to the remedies set forth in this Section 24.03 and shall not result in a right to terminate this Agreement.

(b) Design-Build Work.

(i) During performance of the Design-Build Work, in an effort to comply with 49 CFR Part 26 and support Executive Order 33 (2006), the Department has established a goal of 12% for DBE participation and 23% for SWaM participation, such percentages totaling an aggregate goal of 35% of the DBE/SWaM Design-Build

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Contract Value. The Department and the Concessionaire agree to manage this goal as follows:

(A) the Concessionaire will submit an updated DBE/SWaM Plan on January 1 of each year of the Term that defines the Concessionaire's approach to meeting the DBE/SWaM participation goals set forth in this Section 24.03;

(B) the Concessionaire will have dedicated resources to the DBE/SWaM inclusion program to ensure compliance with 49 CFR Part 26, the DBE/SWaM Plan, nondiscrimination provisions, technical assistance activities, communication of subcontracting and generate reports specific to DBE/SWaM utilization;

(C) the Concessionaire will be responsible for achieving the overall goal of 35% by providing maximum contracting opportunities for DBE and SWaM businesses;

(D) the Concessionaire will provide to the Department each calendar quarter documentation of all executed Contracts and payments to DBE and SWaM businesses;

(E) the Concessionaire will have the opportunity to establish DBE-only and SWaM-only statement of work packages with an estimated contract value of \$250,000 or less; and

(F) the Concessionaire will provide Good Faith Efforts documentation using form C-49 and other supplemental information as appropriate for Contracts that do not include DBE and SWaM participation. The Concessionaire agrees that if the Department accepts the Good Faith Efforts documentation on a particular bid item group, the Concessionaire will make reasonable efforts to accomplish the overall goal using other bid item groups.

(ii) During the performance of the Design-Build Work, the parties will work cooperatively to accomplish the DBE and SWaM objectives. The Department will assist the Concessionaire in meeting the Design-Build Work goals by offering assistance to include the following items:

(A) the parties will jointly conduct outreach meetings for DBE and SWaM firms;

(B) the Department will identify to the Concessionaire DBE and SWaM firms that are eligible to bid on the specific bid item groups; and

(C) the Department will provide access to technical and managerial assistance to eligible DBE and SWaM firms through the Business Opportunity Workforce Development Center based upon available funds.

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(iii) The Concessionaire acknowledges that the Department's assistance and cooperation will not eliminate or reduce the Concessionaire's responsibility to achieve the Design-Build Work goals or demonstrate Good Faith Efforts. The Concessionaire is expected to utilize a variety of means and methods and creative strategies to do so. These strategies should be employed for all phases of the Project. The Concessionaire is expected to meet the goal or demonstrate that a Good Faith Efforts has been made. The Concessionaire will submit quarterly reports of Good Faith Efforts documentation, and, DBE and SWaM payments on form C-63 to the Department Representative.

(iv) When there is a contract goal for the Design-Build Work the Concessionaire and the Concessionaire Parties must make Good Faith Efforts to meet the goal either through obtaining enough DBE and SWaM participation or documenting the Good Faith Efforts it made to do so. 49 CFR Part 26 explicitly provides that the Department must not disregard showings of Good Faith Efforts, and it gives the Concessionaire and the Concessionaire Parties the right to have the Department reconsider a decision that their Good Faith Efforts were insufficient. The Department must seriously consider the Concessionaire's documentation of Good Faith Effort. The Department will issue a guidance memorandum on Good Faith Efforts, providing examples, procedures and reporting requirements for the Concessionaire.

(c) O&M Work. During performance of the O&M Work, when contracting for such work the Concessionaire will promote the participation of local small business as well as minority and women-owned businesses in the Project. The Concessionaire will set annual goals and make a Good Faith Efforts to achieve or exceed such goals in contracts for the O&M Work. The Concessionaire will provide its participation on such matters to the Department Representative, and the Department may include those participation rates, as appropriately adjusted, with its own towards the State's long-term goal established pursuant to the Office of the Governor's Executive Order 33 (2006). The annual and long-term participation SWaM goal for the Concessionaire in contracting for the O&M Work is 25% and the annual and long-term participating DBE goals for the Concessionaire in contracting for the O&M Work is 15%.

(d) DBE/SWaM Reporting and Assessment.

(i) The Concessionaire will report quarterly, within 15 Days after each calendar quarter ends, to the Chief of Administration on the Concessionaire's efforts to (A) satisfy the DBE and SWaM goals set forth in this Section 24.03 or (B) demonstrate Good Faith Efforts to accomplish the DBE and SWaM goals set forth in this Section 24.03.

(ii) The Chief of Administration will assess, confirm and communicate to the Concessionaire within 30 Days after receiving each quarterly report whether the Concessionaire has (A) satisfied the DBE and SWaM goals, (B) demonstrated Good Faith Efforts, or (C) failed to satisfy the requirements of clause (A) and (B) of this Section 24.03(d)(ii).

(e) Failure to Demonstrate DBE Good Faith Efforts Related to Design-Build Work.

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(i) If the Chief of Administration notifies the Concessionaire pursuant to Section 24.03(d) that the Concessionaire has failed to satisfy the requirements of clause (A) and (B) of with respect to the DBE goals for the Design-Build Work for a quarterly period, the Concessionaire will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (A) and (B) of Section 24.03(d)(ii) with respect to such DBE goals.

(ii) If the Concessionaire has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the DBE goals for the Design-Build Work for two consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(d), the Concessionaire will prepare and submit, at the Concessionaire's sole cost and expense, a DBE Performance Improvement Plan for the Department's review and approval. The DBE Performance Improvement Plan will describe the specific actions and measures that the Concessionaire will undertake to improve its performance with respect to satisfying the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the DBE goals for the Design-Build Work. The Concessionaire will submit the DBE Performance Improvement Plan within 15 days after receiving notice from the Chief of Administration pursuant to Section 24.03(d) that the Concessionaire has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii). The Concessionaire will reimburse the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire's compliance with the DBE Performance Improvement Plan until the Concessionaire satisfies the requirements of either clause (A) or (B) of Section 24.03(d)(ii) with respect to the DBE goals for the Design-Build Work.

(iii) If the Concessionaire has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the DBE goals for the Design-Build Work for three consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(d), the Department may debar or disqualify the Concessionaire and its Key Members from participating in State procurements through the Department until the earlier to occur of (i) the Concessionaire satisfies the requirements of either clause (A) or (B) of Section 24.03(d)(ii) with respect to the DBE goals for the Design-Build Work or (ii) twenty-four months after Final Completion. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.03(e)(iii).

(iv) If the Chief of Administration determines that the Concessionaire has satisfied the requirements of either clause (A) or (B) of Section 24.03(d)(ii) with respect to the DBE goals for the Design-Build Work performed to date, then any prior determinations by the Chief of Administration of the Concessionaire's failure to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to such DBE goals will be disregarded, the Concessionaire will be deemed to be in compliance with this Section 24.03, and any future determinations of a failure satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to such DBE goals will trigger the provisions set forth in Section 24.03(e).

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(v) Any decision or action taken by Chief of Administration or the Department pursuant to Section 24.03(d) is subject to the dispute resolution procedures set forth in Article 21.

(f) Failure to Demonstrate SWaM Good Faith Efforts Related to Design-Build Work.

(i) If the Chief of Administration notifies the Concessionaire pursuant to Section 24.03(d) that the Concessionaire has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the SWaM goals for the Design-Build Work for a quarterly period, the Concessionaire will have until the end of the next consecutive quarter to demonstrate that it has satisfied the requirements of either clause (A) and (B) of Section 24.03(d)(ii) with respect to such SWaM goals.

(ii) If the Concessionaire has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the SWaM goals for the Design-Build Work for two consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(d), the Concessionaire will prepare and submit, at the Concessionaire's sole cost and expense, a SWaM Performance Improvement Plan for the Department's review and approval. The SWaM Performance Improvement Plan will describe the specific actions and measures that the Concessionaire will undertake to improve its performance with respect to satisfying the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the SWaM goals for the Design-Build Work. The Concessionaire will submit the SWaM Performance Improvement Plan within 15 days after receiving notice from the Chief of Administration pursuant to Section 24.03(d) that the Concessionaire has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii). The Concessionaire will reimburse the Department for its Allocable Costs in reviewing, approving and monitoring the Concessionaire's compliance with the SWaM Performance Improvement Plan until the Concessionaire satisfies the requirements of either clause (A) or (B) of Section 24.03(d)(ii) with respect to the SWaM goals for the Design-Build Work.

(iii) If the Concessionaire has failed to satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to the SWaM goals for the Design-Build Work for three consecutive quarters based on the determinations by the Chief of Administration pursuant to Section 24.03(d), the Department may debar or disqualify the Concessionaire and its Key Members from participating in State procurements through the Department until the earlier to occur of (i) Concessionaire satisfies the requirements of either clause (A) or (B) of Section 24.03(d)(ii) with respect to the SWaM goals for the Design-Build Work or (ii) twenty-four months after Final Completion. Only the Commissioner of Highways for the Department may waive the provisions of this Section 24.03(f)(ii).

(iv) If the Chief of Administration determines that the Concessionaire has satisfied the requirements of either clause (A) or (B) of Section 24.03(d)(ii) with respect to the SWaM goals for the Design-Build Work performed to date, then any prior determinations by the Chief of Administration of the Concessionaire's failure to

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satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to such SWaM goals will be disregarded, the Concessionaire will be deemed to be in compliance with this Section 24.03, and any future determinations of a failure satisfy the requirements of clause (A) and (B) of Section 24.03(d)(ii) with respect to such SWaM goals will trigger the provisions set forth in Section 24.03(e)(i).

(v) Any decision or action taken by Chief of Administration or the Department pursuant to Section 24.03(d) is subject to the dispute resolution procedures set forth in Article 21.

Section 24.04 Public Safety and Welfare

The parties recognize and agree that protection of the health, safety and welfare of the public and all persons engaged in connection with the performance of the Concessionaire's obligations pursuant to this Agreement is a priority. Accordingly, the Concessionaire will comply with the following provisions, along with all other Laws and the Technical Requirements:

(a) the Concessionaire will comply, and will require all Contractors to comply, with all construction safety and health standards established by Law. Neither the Concessionaire nor any Contractor will require any worker to work in surroundings or under working conditions that are unsanitary, hazardous or dangerous to their health or safety, as determined under construction safety and health standards promulgated by the U.S. Secretary of Labor in accordance with Section 107 of the Contract Work Hours and Safety Standards Act; and

(b) the Department will be entitled to require the Concessionaire to suspend any Work or other activities related to the Project, which, in the sole discretion of the Department, presents a risk to the public health, safety or welfare, and to take such other actions as the Department may require to prevent such risk; *provided*, that if it is determined in accordance with the dispute resolution procedures in Article 21 that the Concessionaire was in compliance with its obligations under this Agreement, then the suspension order will be treated as a Department Change pursuant to Section 14.02.

Section 24.05 Labor, Employment and DBE/SWaM Related Matters

The Concessionaire will comply, and will cause its Contractors to comply, with the provisions set forth in the Labor, Employment and DBE/SWaM Related Matters attached as Exhibit AA.

Section 24.06 Federal Immigration Reform and Control Act

In accordance with Section 2.2-4311.1 of the Code of Virginia, the Concessionaire certifies that it does not and agrees that it will not, during the Term, knowingly employ an unauthorized alien as defined in the Federal Immigration Reform and Control Act of 1986. The Concessionaire further agrees that it will require all of its Contractors to certify that they do not and will not knowingly employ an unauthorized alien as defined by such Act.

ARTICLE 25

MISCELLANEOUS

Section 25.01 Transfers by the Concessionaire

(a) Lock-Up Period. During the Lock-up Period, the Concessionaire will not, without the Department's approval, Transfer, or otherwise permit the Transfer of, any or all of the Concessionaire's Interest to or in favor of any Person (a "Transferee") or permit any Person to:

(i) Transfer, or otherwise dispose of 50% or more of any direct or indirect ownership interest in the Concessionaire;

(ii) grant any security interest, Lien or other encumbrance over its direct or indirect ownership interest in the Concessionaire;

(iii) enter into any agreement in respect of any direct or indirect ownership interest in the Concessionaire or in respect of any votes attached to any such shares held by such Person in the Concessionaire, in each case (A) other than customary shareholder, partnership or organizational agreements among the Equity Members as of the Agreement Date solely with respect to the governance and management of the Concessionaire or (B) other than agreements for Transfers of less than 50% of any direct or indirect ownership interest in the Concessionaire; or

(iv) agree, whether or not subject to any condition precedent or subsequent, to do any of the foregoing.

Notwithstanding the foregoing, this Section 25.01(a) will not prohibit or restrict the following:

(A) a Transfer to the Collateral Agent or trustee or such Person's nominee or transferee, as permitted in connection with the exercise of rights and remedies under the Project Financing Agreements, or a Transferee permitted or approved under the Direct Agreement;

(B) any other Transfer identified in clauses 1 through 8 of the definition of Change in Control; or

(C) any agreement to do any of the Transfers described in the preceding clauses (A) and (B) of this Section 25.01(a).

(b) Post Lock-Up Period. Following the Lock-up Period, the Concessionaire will not Transfer any or all of the Concessionaire's Interest to or in favor of a Transferee, unless:

(i) the Department has approved such proposed Transferee based upon a determination in accordance with Section 25.01(c) (unless it is the Collateral Agent permitted under Article 7 or a Transferee that is permitted or has been approved under the Direct Agreement); and

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(ii) the proposed Transferee (unless it is the Collateral Agent permitted under Article 7 or a Transferee that is permitted or has been approved under the Direct Agreement) enters into an agreement with the Department in form and substance reasonably satisfactory to the Department wherein the Transferee acquires the rights and assumes the obligations of the Concessionaire and agrees to perform and observe all of the obligations and covenants of the Concessionaire pursuant to this Agreement.

(c) The Department's approval of a proposed Transferee may be withheld only if the Department determines that the proposed Transfer is prohibited by Law or such proposed Transferee is not capable of performing the obligations and covenants of the Concessionaire pursuant to this Agreement, which determination may be based upon, or take into account, one or more of the following factors:

(i) the financial strength and integrity of the proposed Transferee and its direct or indirect beneficial owners, any proposed managers or operating partners and each of their respective Affiliates;

(ii) the capitalization of the proposed Transferee;

(iii) the experience of the proposed Transferee and each of its direct Contractors in operating toll roads or highways and performing other projects; and

(iv) the background of the proposed Transferee, each of its direct Contractors and their direct or indirect beneficial owners, any proposed managers or operating partners, each of their respective officers, directors and employees and each of their respective Affiliates (including the absence of criminal, civil or regulatory Claims or actions against any such Person and the quality of any such Person's past or present performance on other projects).

If the Department is not satisfied that these conditions are met, it may condition its consent on provision of reasonable additional security or other reasonable arrangements.

(d) Except for a Transfer of all the Concessionaire's Interest to the Collateral Agent upon its exercise of remedies under the Financing Assignments or to a Transferee that is permitted or has been approved under the Direct Agreement, no Transfer of all or any of the Concessionaire's Interest will be made or have any force or effect if at the time of such Transfer there has occurred a Concessionaire Default that has not been remedied or an event that with the lapse of time, the giving of notice or otherwise would constitute a Concessionaire Default, unless the Transferee is prepared to cure such Concessionaire Default in accordance with the Direct Agreement.

(e) A Change in Control of the Concessionaire will be deemed to be a Transfer of the Concessionaire's Interest for purposes of this Section 25.01.

(f) Any Transfer or other sale, transfer, disposition or other transaction made in violation of this Section 25.01 will be null and void *ab initio* and of no force and effect.

Section 25.02 Ethical Standards

(a) The Concessionaire has adopted and provided copies to the Department of its written policies establishing ethical standards of conduct for all its directors, officers and supervisory or management personnel in dealing with the Department and employment relations. Such policies including any amendments or modifications will include standards of ethical conduct concerning the following:

(i) restrictions on gifts and contributions to, and lobbying of, any State Party and any of their respective commissioners, directors, officers and employees;

(ii) protection of employees from unethical practices in the selection, use, hiring, compensation or other terms and conditions of employment, or in firing, promotion and termination of employees;

(iii) protection of employees from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms and conditions of employment) in response to reporting of illegal (including the making of a false Claim), unethical or unsafe actions or failures to act by the Concessionaire or its personnel or any Contractors;

(iv) restrictions on directors, members, officers or supervisory or management personnel of the Concessionaire engaging in any transaction or activity, including receiving or offering a financial incentive, benefit, loan or other financial interest, that is, or to a reasonable person appears to be, in conflict with or incompatible with the proper discharge of duties or independence of judgment or action in the performance of duties, or adverse to the interests of the Project or employees;

(v) restrictions on use of an office or job position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of a director, member, officer or supervisory or management person, rather than primarily for the benefit of the Concessionaire or the Project, or primarily to achieve a private gain or an exemption from duty or responsibility for a director, member, officer or supervisory or management person; and

(vi) adherence to the Department's organizational conflict of interest rules and policies pertaining to the hiring of any consultant which has assisted the Department in connection with the negotiation of this Agreement or the conduct of Oversight Services for the Project.

(b) The Concessionaire will cause its directors, members, officers and supervisory and management personnel, and require those of its Contractors, to adhere to and enforce the adopted policy on ethical standards of conduct. The Concessionaire will establish reasonable systems and procedures to promote and monitor compliance with the policy.

(c) Without limiting the foregoing provisions of this Section 25.02, the Concessionaire further agrees: (i) no gifts, gratuities, or favors of any nature whatsoever will be

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given or offered by any Concessionaire Party to personnel of the Department; and (ii) no Concessionaire Party will employ any personnel of the Department for any services during the Term, without the prior written consent of the Department. If the Department determines, after investigation, that a Concessionaire Party or any of its employees, representatives, or agents of any person acting in its behalf have violated this provision, the Concessionaire Party may, at the discretion of the Department, be disqualified from bidding on future contracts with the Department for a period of six months from the date of the Department's determination of such a violation. Any implicated employees, agents, or representatives of the Contractor may be prohibited from working on any contract awarded by the Department for the period of disqualification.

Section 25.03 Assignment by the Department

The Department may, subject to giving the Concessionaire not less than 90 Days prior written notice or as required by Law, transfer and assign its interests, in whole or in part, in the Project, this Agreement and any other Project Agreements to any other public agency or public entity of the State as permitted by Law; *provided*, that the assignee (a) has assumed all of the Department's obligations, duties and liabilities pursuant to this Agreement and the Project Agreements then in effect and has provided the Concessionaire with reasonable assurance of its legal authority and sufficient financial resources to honor and perform same and (b) will not be required to have financial resources in excess of those then available to the Department.

Section 25.04 Authorized Representatives

(a) Each of the Concessionaire and the Department hereby designates the following individuals as its initial Concessionaire Representative(s) and Department Representative(s), respectively, to administer this Agreement on its respective behalf:

(i) For the Concessionaire:

Greg Woodsmall, Interim Chief Executive Officer
Elizabeth River Crossings Opco LLC
99 Canal Center Plaza
Suite 125
Alexandria, VA 22314

(ii) For the Department:

Chief Engineer
Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA 23219

and

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Hampton Roads District Administrator
Virginia Department of Transportation
1700 North Main Street
Suffolk, VA 23434

(b) The Concessionaire Representatives and the Department Representatives will be reasonably available to each other during the Term and will have the authority to issue instructions and other communications on behalf of the Concessionaire and Department, respectively, and will be the recipient of notices and other written communications from the other party pursuant to this Agreement (except any notice initiating or relating to the dispute resolution procedures of Article 21 will be given in accordance with Section 25.05). However, such Representatives will not have the authority to make decisions or give instructions binding upon the Concessionaire or the Department, except to the extent expressly authorized by the Concessionaire or the Department, as the case may be, in writing. In the event the Concessionaire or the Department designates different Representatives, it will give the other party written notice of the identity of and contact information for the new Concessionaire Representative(s) or Department Representative(s), as the case may be.

Section 25.05 Notices

(a) Whenever under the provisions of this Agreement it will be necessary or desirable for one party to serve any notice, request, demand, report or other communication on another party, the same will be in writing and will not be effective for any purpose unless and until actually received by the addressee or unless served (i) personally, (ii) by independent, reputable, overnight commercial courier, (iii) by facsimile transmission, where the transmitting party includes a cover sheet identifying the name, location and identity of the transmitting party, the phone number of the transmitting device, the date and time of transmission and the number of pages transmitted (including the cover page), where the transmitting device or receiving device records verification of receipt and the date and time of transmission receipt and the phone number of the other device, and where the facsimile transmission is immediately followed by service of the original of the subject item in another manner permitted herein or (iv) by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:

If to the Department:

Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA 23219
Attention: Commissioner of Highways
Facsimile: (804) 786-2940

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With copies to:

Office of the Attorney General
900 E. Main Street
Richmond, VA 23219
Attention: Chief Transportation Section
Facsimile: (804) 786-9136

If to the Concessionaire:

Elizabeth River Crossings Opco LLC
99 Canal Center Plaza
Suite 125
Alexandria, VA 22314
Attn: Greg Woodsmall, Interim Chief Executive Officer
Facsimile: (703) 340-1201

With copies to:

Orrick Herrington & Sutcliffe LLP
51 West 52nd Street
New York, New York 10019-6142
Attn: Daniel Mathews
Facsimile: 212-506-5151

(b) Any party may, from time to time, by notice in writing served upon the other party as aforesaid, designate an additional and/or a different mailing address or an additional and/or a different person to whom all such notices, requests, demands, reports and communications are thereafter to be addressed. Any notice, request, demand, report or other communication served personally will be deemed delivered upon receipt, if served by mail or independent courier will be deemed delivered on the date of receipt as shown by the addressee's registry or certification receipt or on the date receipt at the appropriate address is refused, as shown on the records or manifest of the United States Postal Service or independent courier, and if served by facsimile transmission will be deemed delivered on the date of receipt as shown on the received facsimile (*provided*, that the original is thereafter delivered as aforesaid).

Section 25.06 Binding Effect

Subject to the limitations of Section 25.01 and Section 25.03, this Agreement will be binding upon and will inure to the benefit of the parties hereto and their respective legal representatives, successors and permitted assigns, and wherever a reference in this Agreement is made to any of the parties hereto, such reference also will be deemed to include, wherever applicable, a reference to the legal representatives, successors and permitted assigns of such party, as if in every case so expressed.

Section 25.07 Relationship of Parties

(a) The relationship of the Concessionaire to the Department will be one of an independent contractor, not an agent, partner, lessee, joint or co-venturer or employee, and neither the Department nor the Concessionaire will have any rights to direct or control the activities of the other or their respective Affiliates, contractors or consultants, except as otherwise expressly provided in this Agreement.

(b) Officials, employees and agents of the Concessionaire or the Department will in no event be considered employees, agents, partners or representatives of the other.

Section 25.08 No Third-Party Beneficiaries

Nothing contained in this Agreement is intended or will be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement, except rights expressly contained herein for the benefit of the Lenders, the Collateral Agent and/or State Indemnitees.

Section 25.09 Limitation on Consequential Damages

Except as expressly provided in this Agreement to the contrary, neither party will be liable to the other for punitive damages or special, indirect, incidental or consequential damages of any nature, whether arising in contract, tort (including negligence) or other legal theory. The foregoing limitation will not, however, in any manner:

(a) prejudice the Department's right to recover liquidated damages from the Concessionaire as provided in this Agreement;

(b) limit the Concessionaire's liability for any type of damage arising out of the Concessionaire's obligation to indemnify, protect, defend and hold each State Indemnitee harmless from Third-Party Claims under Article 15 and elsewhere in this Agreement;

(c) limit the Concessionaire's liability for any type of damage to the extent covered by the proceeds of insurance required hereunder; or

(d) limit the amounts the Department or the Concessionaire may owe under the express provisions of this Agreement.

Section 25.10 Waiver

(a) No waiver by any party of any right or remedy pursuant to this Agreement or the other Project Agreements will be deemed to be a waiver of any other or subsequent right or remedy pursuant to this Agreement or the other Project Agreements. The consent by one party to any act by the other party requiring such consent will not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

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(b) No act, delay or omission done, suffered or permitted by one party or its agents will be deemed to waive, exhaust or impair any right, remedy or power of such party pursuant to this Agreement or any other Project Agreement, or to relieve the other party from the full performance of its obligations pursuant to this Agreement and the other Project Agreements.

(c) No waiver of any term, covenant or condition of this Agreement will be valid unless in writing and executed by the obligee party.

(d) The acceptance of any payment or reimbursement by a party will not (i) waive any preceding or then-existing breach or default by the other party of any term, covenant or condition of this Agreement, other than the other party's prior failure to pay the particular amount or part thereof so accepted, regardless of the paid party's knowledge of such preceding or then-existing breach or default at the time of acceptance of such payment or reimbursement or (ii) continue, extend or affect (A) the service of any notice, any suit, arbitration or other legal proceeding or final judgment, (B) any time within which the other party is required to perform any obligation or (C) any other notice or demand.

(e) No custom or practice between the parties in the administration of the terms of this Agreement will be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of this Agreement.

Section 25.11 No Brokers

Except for any financial adviser or investment banker whose fee will be paid by the party retaining such adviser or banker (or in the case of a Concessionaire Financial Party, by such party or the Concessionaire), each party represents and warrants that it has not dealt with any real estate or business opportunity broker or agent or any finder in connection with this Agreement. Each party agrees, to the extent permitted by Law, to indemnify, protect, defend with counsel acceptable to the other party and hold harmless the other party against any Claim for commission, finder's fee or like compensation asserted by any real estate or business opportunity broker, agent, finder or other Person claiming to have dealt with the indemnifying party in connection with this Agreement.

Section 25.12 Governing Law; Compliance with Law and Federal Requirements

(a) This Agreement will be governed by and construed in accordance with the Laws of the State applicable to contracts executed and to be performed within the State.

(b) The Concessionaire will keep fully informed of and comply and require its Contractors to comply with Law. The Concessionaire will execute and file the documents, statements, and affidavits required under any Law required by or affecting this Agreement or the execution of the Work. The Concessionaire will permit examination of any records made subject to such examination by such Law.

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(c) The Concessionaire will comply and require its Contractors to comply with all Laws applicable to a transportation project that receives Federal credit or funds, including the Federal Requirements attached as Exhibit BB.

(d) The Concessionaire acknowledges and agrees that the USDOT will have certain approval rights with respect to the Project, including the right to provide certain oversight and technical services with respect to the Work. The Concessionaire will cooperate with USDOT and provide such access to the Project and information as USDOT may request in the exercise of USDOT's duties, rights and responsibilities in connection with the Project.

Section 25.13 Use of Police Power

Nothing in this Agreement limits the authority of the Department to exercise its regulatory and police powers granted by Law.

Section 25.14 Survival

All representations and warranties, the dispute resolution procedures, the indemnifications, limitations, releases, obligations to pay termination compensation, and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the Work will survive the expiration or earlier termination of this Agreement and/or the completion of the Work.

Section 25.15 Subpoena

Except as provided for in Section 33.1-4 of the Code of Virginia, the Concessionaire may subpoena any Department personnel; *provided*, that the Concessionaire will pay for such personnel's time at its fully burdened rate (including overhead and fringe benefits), together with all out-of-pocket expenses incurred, no later than 30 Days after the Concessionaire's receipt of an invoice reasonably documenting the amount of such time provided.

Section 25.16 Construction and Interpretation of Agreement

(a) The language in all parts of this Agreement will in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any party. The parties hereto acknowledge and agree that this Agreement has been prepared jointly by the parties and has been the subject of arm's length and careful negotiation over a considerable period of time, that each party has been given the opportunity to independently review this Agreement with legal counsel, and that each party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions hereof. Accordingly, in the event of an ambiguity in or Dispute regarding the interpretation of this Agreement, this Agreement will not be interpreted or construed against the party preparing it, and instead other rules of interpretation and construction will be utilized.

(b) If any term or provision of this Agreement, the deletion of which would not adversely affect the receipt of any material benefit by either party hereunder, will be held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement

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will not be affected thereby and each other term and provision of this Agreement will be valid and enforceable to the fullest extent permitted by Law. It is the intention of the parties to this Agreement, and the parties hereto agree, that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, the parties in good faith will supply as a part of this Agreement an enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible.

(c) The captions of the articles and sections herein are inserted solely for convenience and under no circumstances are they or any of them to be treated or construed as part of this instrument.

(d) References in this instrument to this “Agreement” mean, refer to and include this instrument as well as any riders, exhibits, addenda and attachments hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation and/or undertaking “herein,” “hereunder” or “pursuant hereto” (or language of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument. All terms defined in this instrument will be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. All references to a subsection or clause “above” or “below” refer to the denoted subsection or clause within the section in which the reference appears. Unless expressly provided otherwise, all references to “Articles” and “Sections” refer to the Articles and Sections set forth in this Agreement. Unless otherwise stated in this Agreement or the Project Agreements, words which have well-known technical or construction industry meanings are used in this Agreement or the Project Agreements in accordance with such recognized meaning. Wherever the word “including,” “includes” or “include” is used in this Agreement or the Project Agreements, except where immediately preceded by the word “not”, it will be deemed to be followed by the words “without limitation”. Wherever reference is made in the Project Agreements to a particular Governmental Authority, it includes any public agency succeeding to the powers and authority of such Governmental Authority.

(e) As used in this Agreement and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

(f) The Project Agreements are intended to be complementary and consistent and to be read together as a complete agreement. In the event of any conflict or inconsistency between the Articles of this Agreement and the exhibits to this Agreement, the conflict or inconsistency will be resolved by applying the following order of document precedence, from highest to lowest:

- (i) Change Orders and amendments to the articles of this Agreement and Definitions;
- (ii) the Articles of this Agreement and Definitions;

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- (iii) the Technical Requirements, as amended; and
- (iv) the other exhibits to this Agreement, as amended.

(g) A Project Agreement to which the Department is not a party will have no effect upon the terms and conditions of this Agreement or the construction or interpretation thereof.

Section 25.17 Counterparts

This instrument may be executed in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

Section 25.18 Entire Agreement; Amendment

(a) THIS AGREEMENT AND THE PROJECT AGREEMENTS TO WHICH THE DEPARTMENT AND THE CONCESSIONAIRE ARE BOTH PARTIES CONSTITUTE THE ENTIRE AND EXCLUSIVE AGREEMENT BETWEEN THE PARTIES RELATING TO THE SPECIFIC MATTERS COVERED HEREIN AND THEREIN. ALL PRIOR WRITTEN AND PRIOR OR CONTEMPORANEOUS VERBAL AGREEMENTS, UNDERSTANDINGS, REPRESENTATIONS AND/OR PRACTICES RELATIVE TO THE FOREGOING, INCLUDING THE INTERIM AGREEMENT, ARE HEREBY SUPERSEDED, REVOKED AND RENDERED INEFFECTIVE FOR ANY PURPOSE. THIS AGREEMENT MAY BE ALTERED, AMENDED OR REVOKED ONLY BY AN INSTRUMENT IN WRITING SIGNED BY EACH PARTY HERETO, OR ITS PERMITTED SUCCESSOR OR ASSIGNEE, EXCEPT TO THE EXTENT THE DEPARTMENT HAS THE RIGHT TO AMEND BY DEPARTMENT CHANGE OR DIRECTIVE LETTER PURSUANT TO ARTICLE 14. NO VERBAL AGREEMENT OR IMPLIED COVENANT WILL BE HELD TO VARY THE TERMS HEREOF, ANY STATUTE, LAW OR CUSTOM TO THE CONTRARY NOTWITHSTANDING.

(b) This Agreement and the other Project Agreements attempt to set forth in full all requirements applicable under the Act as to the development, operation, maintenance, repair, management and financing of the Project and attempt to define in full the rights and responsibilities of each party in connection therewith. To the extent requirements and rights and responsibilities have not been addressed in this Agreement and the other Project Agreements, the parties agree to carry out their respective responsibilities in the spirit of cooperation contemplated by the Act, recognizing that they may not have defined in a sufficient detail or anticipated fully all activities necessary for the full implementation of the Project.

Section 25.19 Payment of Concessionaire Damages and Other Amounts by the Department

(a) THE DEPARTMENT'S PAYMENT OF ANY CONCESSIONAIRE DAMAGES, LOSSES OR ANY OTHER AMOUNTS DUE AND OWING BY THE DEPARTMENT PURSUANT TO THIS AGREEMENT WILL BE SUBJECT TO APPROPRIATION BY THE GENERAL ASSEMBLY AND ALLOCATION BY THE CTB. Upon determination of Concessionaire Damages or such other amounts due and owing by the

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Department, the Department will with all practical dispatch consistent in all respects with Law and its obligations pursuant to this Agreement:

(i) deliver to the Governor and the Director of the Department of Planning and Budget of the State, before December 1 with respect to any such payment requested to be appropriated by the next regular session of the General Assembly, a statement of the amount of any such payment due or expected to be due and a request that the Governor include in his budget to be delivered to the next session of the General Assembly a provision that there be appropriated such amounts for such purpose to the extent required, from any legally available funds;

(ii) use its diligent efforts to have (A) the Governor include, in each biennial or any supplemental budget the Governor presents to the General Assembly, the amounts set forth in any statement delivered pursuant to (i) above, (B) the General Assembly appropriate and reappropriate, as applicable, such amounts to or on behalf of the Department for the purpose of paying any Concessionaire Damages or other amounts due and owing by the Department to the Concessionaire pursuant to this Agreement, and (C) the CTB allocates such appropriated amounts as applicable for payment to the Concessionaire; and

(iii) notify the Concessionaire promptly upon becoming aware of any failure by (A) the Governor to include such amounts in his budget delivered to the next session of the General Assembly, (B) the General Assembly to appropriate such amounts during such next session of the General Assembly or (C) the CTB to so allocate such amounts for payment to the Concessionaire.

(b) The parties hereto agree and acknowledge that, subject to appropriation, such obligation of the Department to pay the Concessionaire Damages and other amounts was and is a material inducement and consideration for the execution and delivery of this Agreement by the Concessionaire.

(c) The Department will pay any sum due pursuant to Section 20.03, Section 20.04, Section 20.05, Section 20.06 or Section 20.07 on the date specified in writing by the Department in its termination notice or, if the termination notice is delivered by the Concessionaire, within 60 Days after receipt of the Concessionaire's termination notice ("Termination Compensation Payment Date"), but in no event will the Termination Compensation Payment Date exceed 300 Days from the date of determination of the applicable termination compensation amount; *provided*, that the Termination Compensation Payment Date for any sum due pursuant to Section 20.04 will be no later than 60 Days after delivery of the notice of termination. No later than 30 Days prior to the Termination Compensation Payment Date, the Concessionaire will furnish an invoice of the applicable termination compensation amount owed by the Department. The invoice will include an amount for any interest accruing on such termination compensation amount from the date of determination of the applicable termination compensation amount up to the Termination Compensation Payment Date at the Bank Rate (other than any portion of the termination compensation amount calculated by reference to Concessionaire Debt, Concessionaire's Equity Value or any Credit Balances, which will be re-calculated to take into account payment of such portions on the Termination Compensation Payment Date).

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(d) The Department will proceed to make payment to the Concessionaire of the undisputed amount of any sum due pursuant to Section 20.03, Section 20.05, Section 20.06 or Section 20.07 without regard to the dispute resolution procedures.

Section 25.20 Taxes

The Concessionaire is solely responsible for the payment of Taxes accrued or arising out of the performance of its obligations pursuant to this Agreement.

Section 25.21 Payments to Department or Concessionaire

(a) Except as otherwise expressly provided herein or in any Project Agreement, payments due to the Department or the Concessionaire hereunder, as applicable, will be due and payable within 30 Days of receipt by the Concessionaire or the Department, as applicable, of an invoice therefor, together with any supporting documentation.

(b) Each party will be entitled to deduct, offset or withhold from any amounts due from one party to the other party any amounts then due and owing from such other party.

Section 25.22 Interest on Overdue Amounts

Any amount not paid when due pursuant to this Agreement will bear interest from the date such payment is due until payment is made (after as well as before judgment) at a variable rate per annum at all times equal to the Bank Rate (except as provided otherwise in Section 25.19(c)), which interest will be payable on demand. Interest will be compounded annually and payable on the date on which the related overdue amount is paid.

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SIGNATURE PAGE FOLLOWS]

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IN WITNESS WHEREOF, the parties, intending to be legally bound, have executed this Comprehensive Agreement Relating to the Downtown Tunnel/Midtown Tunnel/Martin Luther King Freeway Extension Project as of the date first written above.

VIRGINIA DEPARTMENT OF TRANSPORTATION,
an agency of the Commonwealth of Virginia

By: _____
Gregory A. Whirley, Sr.
Commissioner of Highways

ELIZABETH RIVER CROSSINGS OPCO LLC,
a Delaware limited liability company

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____