

(c) If for any reason the Concessionaire fails to deliver its written notice of objection within the time period specified in Section 11.06(a), the Concessionaire shall 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 the Service Commencement Date, 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 the Service Commencement Date, 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 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)

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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 pay 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(b).

(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.

(d) The Department will have the right at any time (and without liability to the Concessionaire for any damages it may suffer, except as otherwise expressly provided in this Agreement) 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; *provided that*

(i) the Department shall use reasonable commercial efforts to keep the Concessionaire informed of planned maintenance, renewal and replacement and repair activities which can reasonably be foreseen to impact activities on the Project;

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

(iii) to the extent it relates to Department Project Enhancements, the provisions of Section 12.02 shall govern the Department's liability to the Concessionaire therefor.

Section 12.03 Safety Compliance Orders

(a) The Department may, but is not obligated to, issue Safety Compliance Orders to the Concessionaire at any time after the Substantial Completion Date; *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 VDOT 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. The Department may, in its discretion, monitor and inspect the Project Assets at any time and from time to time for the purposes of determining whether any circumstances exist that warrant issuance of a Safety Compliance Order and giving the Department and the Concessionaire reports and recommendations related to such matters.

(c) If the Department issues a Safety Compliance Order, the Concessionaire will proceed, at its sole cost and expense, with the 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 12.02, Section 12.04(d) (with respect to disruptions to the construction of the Project) Section 12.05 and Section 12.06(e) (with respect to disruptions to the construction of the Project), 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 (including, without limitation, free roads, connecting roads, service roads, frontage roads, turnpikes, managed lanes, HOT/HOV lanes,

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light rail, heavy rail, high-speed rail, freight rail and bus lanes) and exercise all of its authority to advise and recommend on transportation planning, development and funding, and to otherwise improve the GP Lanes and other roadways and structures within or adjacent to the I-95 Corridor (collectively, the “Department Projects”) outside the HOT Lanes, and whether 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 or traffic on the HOT Lanes; 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 of 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 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) 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 other relief, 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; *provided* however, that if the construction activities associated with a Department Project directly cause a material disruption to the construction of the Project, then such construction activities may entitle the Concessionaire to Concessionaire Damages or other relief as provided in this Agreement; *provided further* however, that the Concessionaire will not be entitled to Concessionaire Damages or other relief if such material disruption is caused by a Concessionaire Party.

Section 12.05 Alternative Facilities.

(a) Additional Lanes.

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

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

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

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

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

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

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

(e) Procedures.

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

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

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

Section 12.06 Northern HOT Lanes

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

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

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

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

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

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

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

ARTICLE 13.

DELAY EVENTS

Section 13.01 Delay Event Notice and Determination

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

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

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