



## DULLES CORRIDOR COMMITTEE

Approval Of Phase 2 Cooperative Agreements  
With The Airports Authority And The Washington  
Metropolitan Area Transit Authority, Loudoun County And  
Toll Road Investors Limited Partnership II, L.P.

July 2013



## BACKGROUND

The Dulles Corridor Metrorail Project affects and involves several entities in addition to the Airports Authority – WMATA, VDOT, Fairfax and Loudoun Counties, and TRIP II, owner of the Dulles Greenway (the final 2.5+/- miles of Phase 2 lies in the median of the Greenway). This involvement has required in Phase 1, and will require in Phase 2, a close and cooperative working relationship between the Authority and these partner entities.

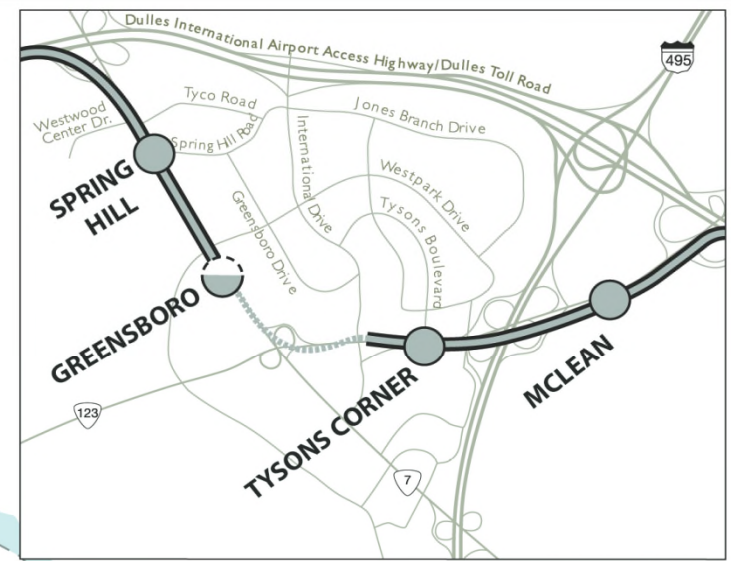
In 2007, at the start of Phase 1, agreements with three partners, WMATA, Fairfax, and VDOT, were executed which established a framework for cooperation in Project execution.

Now, with Phase 2 soon to start, cooperative agreements are needed for this stage of the Project, including with two entities lacking an agreement in Phase 1: Loudoun County and TRIP II.

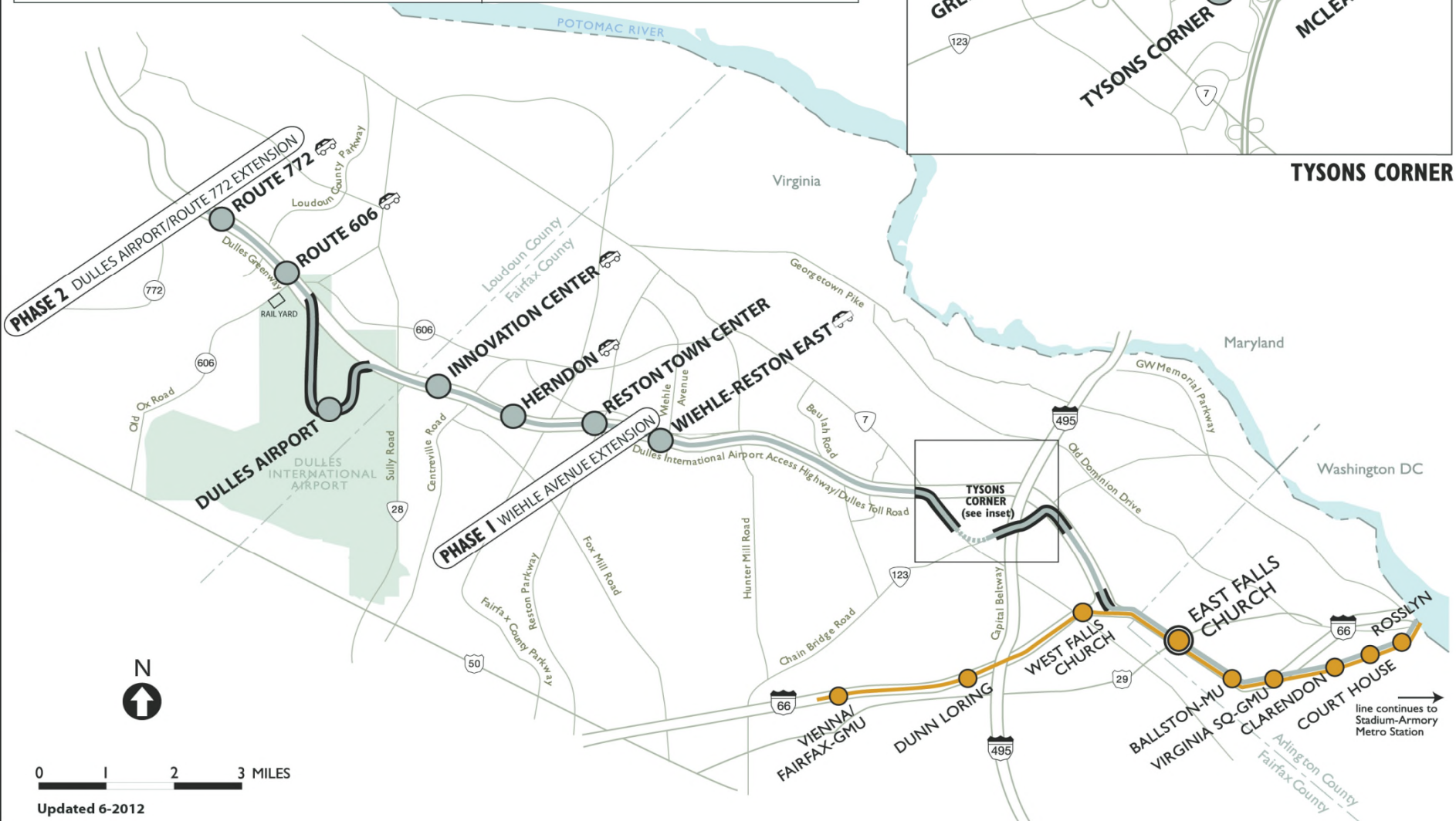
For Phase 2, the 2007 agreements with Fairfax and VDOT will remain, with minor updates. New agreements have been prepared with WMATA, Loudoun County and TRIP II, and are attached to this paper for approval.

# LEGEND

- Existing Orange Line Track and Station
- Transfer Station
- Parking
- New Station
- Partially Below Surface Station
- Surface Track
- Elevated Track
- Underground Track



TYSONS CORNER





## DISCUSSION

The WMATA agreement addresses the roles WMATA will play in Phase 2 and the various activities it will perform within each role.

WMATA's *roles* are threefold – it will serve as: (1) a technical advisor to the Authority during the design and construction of Phase 2; (2) the procurer of certain Phase 2 capital equipment (e.g., railcars and fare collection equipment); and (3) the future owner of Phase 2. The numerous WMATA *activities* within each of these roles are summarized in the Committee paper.

The agreement provides that WMATA's actual costs in performing its Phase 2 roles and activities will be reimbursed by the Authority. The agreement includes a budget that estimates these costs over the five-year Phase 2 period (2013-2018) to be \$305.3 million. Of this sum, roughly 75%, \$231.9 million, relates to capital items (e.g., 64 railcars, fare collection equipment, signage, non-revenue vehicles and equipment).



## DISCUSSION (cont)

Loudoun's agreement primarily addresses the county's role in issuing permits for Phase 2 facilities located in its jurisdiction, in reviewing the design of these facilities, and assisting in the acquisition of property within the county.

Finally, the TRIP II agreement provides for its cooperation in the construction that will occur in the median of the Greenway. The agreement addresses, among other things, TRIP II's role in the design and construction process, in the control of Greenway traffic during construction, and in obtaining permits for construction activities.

Under an agreement with Virginia, TRIP II is required to allow the Project to occupy the Greenway median at no cost to the Project, and with no cost to TRIP II. As a result, the cooperative agreement provides for the reimbursement of the costs TRIP II incurs in performing its roles under the agreement. These costs are estimated to be approximately \$2 million over the life of Phase 2.

## CONCLUSION

It is requested that the Committee approve and recommend to the Board that it authorize the President and Chief Executive Officer to execute the proposed Phase 2 cooperative agreements with WMATA, Loudoun and TRIPP II, in substantially the form of the documents attached to the Committee paper.

**RECOMMENDATION PAPER TO THE  
DULLES CORRIDOR COMMITTEE**

**APPROVAL OF PHASE 2 COOPERATIVE AGREEMENTS  
WITH THE AIRPORTS AUTHORITY AND THE WASHINGTON  
METROPOLITAN AREA TRANSIT AUTHORITY, LOUDOUN COUNTY AND  
TOLL ROAD INVESTORS LIMITED PARTNERSHIP II, L.P.**

**JULY 2013**

**ACTION REQUESTED**

That the Dulles Corridor Committee approve and recommend to the Board of Directors that it authorize the President and Chief Executive Officer to execute three agreements to provide for cooperation in the development of Phase 2 of the Dulles Corridor Metrorail Project (Project). These agreements are with the Washington Metropolitan Area Transit Authority (WMATA), Loudoun County, and Toll Road Investors Partnership II, L.P. (TRIP II), the private company that owns the Dulles Greenway.

**BACKGROUND**

In 2007, the Airports Authority entered into cooperative agreements related to the Project with WMATA, Fairfax County, and the Virginia Department of Transportation (VDOT). These agreements established a framework for cooperation between the Airports Authority and these project partners in Project-related design reviews, property acquisition, facility permitting, construction inspections, audits, insurance and other matters. The Fairfax and VDOT agreements addressed the entire Project, both Phase 1 and Phase 2; the WMATA agreement largely addressed only Phase 1. Agreements were not made in 2007 with other Project partners – Loudoun County or the owner of the Dulles Greenway, TRIP II – since these two entities lacked any involvement in the Project's Phase 1 which was the subject of the 2007 agreements.

As you know, the Airports Authority is about to commence construction on Phase 2 of the Project. The Phase 2 rail line begins in Fairfax County, at the eastern terminus of Phase 1, runs in the median of the Dulles International Airport Access Highway to and through Dulles Airport, and then along the median of the Dulles Greenway to its western terminus at Virginia Route 772.

For the past eight months, the Airports Authority and its partners have been addressing the subject of cooperative agreements for Phase 2. Initially, the parties discussed whether

the existing 2007 agreements, with minor amendments, would be sufficient for Phase 2 or whether new agreements were required. Those discussions led to the following conclusions: (i) that the Airports Authority's 2007 agreements with Fairfax and VDOT needed only minor amendments to serve for Phase 2, and new agreements with those partners were not needed; (ii) that the Airports Authority's 2007 agreement with WMATA was not sufficient for Phase 2 purposes, and a new agreement for Phase 2 was required; and (iii) that since no agreements had been reached in 2007 with Loudoun or TRIP II, new agreements with these partners for Phase 2 were required.

Since early January, therefore, the Airports Authority has been negotiating Phase 2 cooperative agreements with WMATA, Loudoun and TRIP II. The products of these negotiations are the three agreements attached to this paper as Attachments A (WMATA), B (Loudoun) and C (TRIP II). With the exception of one exhibit to the WMATA agreement, which shows a budget for the activities that WMATA will perform under the agreement, the exhibits to the agreements, which are quite voluminous, have not been included in the attachments to this paper, but are available for review in the Board office.

## **DISCUSSION**

**WMATA Agreement.** The agreement with WMATA provides for it to perform a wide range of activities in connection with the design and construction of Phase 2. These activities include, among others, the following: to provide the Airports Authority with technical advice regarding the design of Phase 2; to review, comment upon and eventually approve contractor design submittals; to review and decide requests for deviations from WMATA's design criteria and standards; to assist in the development of a plan for right-of-way acquisitions; to review and comment on construction schedules; to review and comment on contractor safety and security submittals; to participate with the Airports Authority in overseeing actual construction work; to comment on the procedures to be used in inspecting and testing the acceptability of the Phase 2 construction work; to participate in and comment upon such construction inspections and the results of such testing; to perform near the conclusion of the Phase 2 construction the multiple tasks necessary for the WMATA Board of Directors to formally accept Phase 2 into the regional Metrorail system; and to procure and deliver 64 railcars and other capital equipment.

The agreement provides for the Airports Authority to reimburse WMATA for the costs it incurs in performing the activities outlined in the agreement, and includes a budget that runs from 2013 into 2018. (The budget is the one exhibit to the WMATA agreement that *is* included in Attachment A.) The budget is for \$305.3 million in "year of expenditure" dollars, which includes \$205.9 million for railcars, \$25.7 million relating to other capital items (e.g., automated fare collection system, signage for stations, non-revenue vehicles and equipment), and \$59.8 million for technical support during the five-year Phase 2



period (e.g., design reviews and approvals, construction inspections, safety and security inspections, planning for real property acquisitions, performing final “WMATA acceptance” tasks).

**Loudoun Agreement.** The cooperative agreement with Loudoun is based on the 2007 Fairfax cooperative agreement. It addresses Loudoun’s “cooperative” activities relating to the permitting of Phase 2 construction, property acquisition, construction of parking garages at the two westernmost stations in Loudoun, and design review. Like the Airports Authority and Fairfax, Loudoun is a Phase 2 funding partner and must approve any major change to the Phase 2 preliminary engineering design that the partners previously approved.

**TRIP II Agreement.** The cooperative agreement with TRIP II provides for its cooperation primarily in the Phase 2 construction taking place in the median of the Dulles Greenway, along with traffic control and permitting. It also requires TRIP II, toward the conclusion of Phase 2, to grant property rights within the Greenway to WMATA, as needed to obtain WMATA’s ultimate acceptance of Phase 2.

TRIP II operates the Dulles Greenway pursuant to a “Comprehensive Agreement” with VDOT. That agreement requires TRIP II to allow the Phase 2 rail line to be constructed in the Greenway’s median, but provides that this construction will be without any cost to TRIP II. The attached cooperative agreement with TRIP II, therefore, provides that the costs incurred by TRIP II in facilitating the construction of Phase 2 in the Greenway’s median will be reimbursed as a Phase 2 cost. These costs are estimated to be approximately \$2 million over the five-year period of Phase 2 construction.

## **CONCLUSION**

Staff requests that the Committee approve and recommend to the Board that it authorize the President and Chief Executive Officer to execute the attached cooperative agreements with WMATA, Loudoun County, and TRIP II.

Prepared by:

Office of General Counsel  
July 2013

Attachments

ATTACHMENT A

COOPERATIVE AGREEMENT WITH WMATA

**Dated: June XX, 2013**

**Cooperative Agreement**

**For Phase 2 of the**

**Dulles Corridor Metrorail Project (Silver Line)**

**Between**

**The WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY**

**and**

**The METROPOLITAN WASHINGTON AIRPORTS AUTHORITY**

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**THIS COOPERATIVE AGREEMENT** is made and entered into this XXth day of June, 2013 by and between the METROPOLITAN WASHINGTON AIRPORTS AUTHORITY ("**MWAA**"), an interstate compact entity created by the Commonwealth of Virginia and the District of Columbia with the consent of the Congress, and the WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY ("**WMATA**"), an interstate compact agency and a common agency and instrumentality of the District of Columbia, the Commonwealth of Virginia and the State of Maryland. MWAA and WMATA are the "**Parties**".

## **RECITALS**

- A. The Department of Rail and Public Transportation ("**DRPT**"), an agency of the Commonwealth of Virginia, and WMATA entered into an Agreement dated April 28, 2000, under which WMATA assisted DRPT in the preparation of a National Environmental Policy Act ("**NEPA**") Environmental Impact Statement (EIS) for transit improvements in the Dulles Corridor.
- B. DRPT and WMATA entered into a Second Agreement (the "**Second Agreement**") dated April 22, 2004, to define the manner in which WMATA was to support DRPT through preliminary engineering for Phase 1 and Phase 2 of the Dulles Corridor Metrorail Project (as further defined on page 5, the "**Project**") and to provide for reimbursement of WMATA for its costs associated with the technical management work for preliminary engineering and related support activities by DRPT.
- C. The WMATA Board of Directors ("**WMATA Board**"), as a part of the WMATA Compact Hearing and General Plans process, by Resolutions 2000-15, 2004-45, 2002-54, 2006-01, 2006-62, 2007-04, and 2012-24 ("**WMATA Resolutions**"), amended WMATA's Adopted Regional System ("**ARS**") so as to incorporate the proposed 23.1 mile Dulles Metrorail Extension ("**Silver Line**"), subject to the fulfillment of certain conditions precedent. WMATA Board Resolution 2012-24 is attached hereto as **Exhibit 1**. Such conditions, as set forth in Article 6 below, are sometimes referred to herein as the "**ARS Incorporation Conditions**".
- D. On December 29, 2006, MWAA and the Commonwealth of Virginia executed two agreements relating to the transfer of the Dulles Toll Road ("**DTR**") to MWAA and construction of the Project. The first agreement established conditions for the transfer of the DTR and associated facilities and funds to MWAA. That transfer occurred on November 2, 2008. The second agreement was in the form of a permit with a specific term that authorizes MWAA to operate and manage the DTR, and to receive and own the revenue of the DTR. That agreement was executed and became effective at the time of the DTR transfer. Under that agreement, MWAA is obligated, *inter alia*, to use the DTR revenue to fund and to oversee construction of the Project. In addition, MWAA assumed responsibility of the Sponsor of the Project for purposes of implementing the Project and for purposes of satisfying the requirements of the Federal Transit Administration. As part of interrelated agreements, MWAA agreed to assume a major financing responsibility and to use the revenue from the DTR as security for the debt financing necessary to design and construct the Project. The assumption by MWAA of broad Project responsibility in the two agreements with the Commonwealth of Virginia resulted from

MWAA's unique role in the Dulles Corridor and MWAA's experience with the management of large projects, including the financing and engineering for large projects. MWAA's overall Project responsibility necessitates that it have managerial control over the contracts for the design and construction of Phase 2 of the Project.

E. With responsibility for the Project residing with MWAA, it is appropriate for MWAA and WMATA to specify WMATA's role, as intended owner and operator of the Silver Line, during the final design and construction of Phase 2 of the Project.

F. By Resolution 2007-04, the WMATA Board adopted, as a policy of WMATA, that in order to successfully meet the ARS Incorporation Conditions, WMATA, as the ultimate owner and operator of the Silver Line, must have a role in reviewing and concurring in significant project-related decisions and in the form of the agreements before the agreements are finalized.

G. WMATA and MWAA entered into that certain Cooperative Agreement dated September 14, 2007 to provide for such role. That Cooperative Agreement shall remain in effect as to Phase 1. The Parties intend in this Agreement to specify the roles and responsibilities of WMATA with respect to the Phase 2.

H. MWAA will provide the day-to-day management of the contracts for the design and construction of Phase 2 to which it is a party and will represent to the contractors under those contracts that WMATA, as the intended owner and operator of the Silver Line, will provide technical assistance and serve as Technical Advisor to MWAA, as set forth herein, during the work covered by the contracts. Phase 2 will be designed and constructed under the following contracts:

(i) a design-build contract for the design and construction of all of Phase 2 except the WMATA maintenance and storage yard at Dulles Airport ("**Phase 2 Design-Build Contract**"); and

(ii) a design-build contract for the maintenance and storage yard ("**Phase 2 Yard Contract**").

MWAA will be a party to the Phase 2 Design-Build Contract and the Phase 2 Yard Contract. Work to be performed under the Phase 2 Design-Build and Phase 2 Yard Contracts is referred to herein as the "**Phase 2 Work**". WMATA, as a Technical Advisor, will provide assistance to MWAA during Phase 2. WMATA is not a party to the Phase 2 Contracts but is expressly made a third party beneficiary under those contracts following Substantial Completion.

I. Pursuant to Resolution #99-63 adopted by the WMATA Board on October 28, 1999, WMATA is able to participate in reimbursable projects ("**Reimbursable Projects Policy**") at the request of a WMATA Compact jurisdiction, here the Commonwealth of Virginia, provided that the funding for WMATA's services shall be established in advance based upon a budget submitted and approved for each quarter and that payments shall be made based upon invoices that reflect actual or projected levels of effort subject to adjustment to reflect actual

costs expended.

J. MWAA and WMATA desire to enter into this Agreement under which WMATA will serve as a Technical Advisor to MWAA for design, construction, and related support activities for the Phase 2 Work as more specifically described herein, and to provide for MWAA's reimbursement to WMATA of WMATA's reasonable and allocable costs incurred in performing this function.

K. In its role as Technical Advisor (see Section 2.7.B), WMATA will advise MWAA as necessary to ensure that the Phase 2 Work is performed in accordance with the WMATA Design Criteria and Requirements, and that the work, when completed, is fit for revenue service and acceptance into the ARS. In addition, in its role as Technical Advisor and as intended owner and operator of the Silver Line, WMATA will review and approve the design of the work performed under the Phase 2 Design-Build Contract and the Phase 2 Yard Contract and perform other activities described in this Agreement (see Section 2.7.B).

L. WMATA will also perform the ARS Acceptance Tasks described in the Agreement (see Section 2.7.C). MWAA will reimburse WMATA as provided herein for all reasonable and allocable costs incurred in performing the ARS Acceptance Tasks. This Agreement identifies the actions and activities that must occur before the WMATA Board will accept the Phase 2 of Project into the ARS.

M. WMATA will also provide, in support of the Contractors' work, access to WMATA facilities, qualified personnel, equipment, and services, as described in Section 2.7.B of this Agreement.

N. Additionally, this Agreement addresses WMATA's responsibilities for the design, procurement, installation and commissioning of certain capital equipment for Phase 2. (See Section 2.7.A).

O. Finally, this Agreement addresses the conditions under which work may be performed on the portions of the Silver Line that are, at the time of the work, part of WMATA's existing system ("**WES**"). MWAA and its contractor under the Phase 2 Design-Build Contract will be permitted to perform work on the WES after executing a Right of Entry Permit, the form of which attached hereto as **Exhibit 2**.

P. In December 2011, a Memorandum of Agreement relating to Phase 2 of the Project ("**MOA**") was executed by various parties, including WMATA and MWAA. The MOA is attached hereto as **Exhibit 3**.

**NOW, THEREFORE**, in consideration of the preceding and the agreements, terms, covenants and conditions set forth herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

## **Article 1. DEFINITIONS AND INTERPRETATIONS**

### **Section 1.1 Definitions**

The definitions set forth in the above recitals are incorporated by reference to the same extent and with the same force and effect as if fully hereinafter set forth in this Section 1.1. The following are definitions of additional terms used in this Agreement:

- A. **"Adopted Regional System Acceptance Tasks" or "ARS Acceptance Tasks"** means those tasks to be performed by WMATA to meet the terms of the WMATA Board Resolutions and enable the WMATA Board to accept Phase 2 of the Project into the ARS, as identified in Section 2.7.C.
- B. **"Agreement"** means this Cooperative Agreement for Phase 2 of the Silver Line project between MWAA and WMATA.
- C. **"Approved Deviations"** means the deviations from WMATA Design Criteria and Requirements for Phase 2 (i) that have been approved by WMATA as of the date of this Agreement (listed on **Exhibit 4**), (ii) that are requested by MWAA or Contractors and are approved by WMATA during the term of this Agreement in accordance with the provisions of Section 3.2, or (iii) are initiated by WMATA and agreed to by MWAA or the Coordinating Committee during the term of this Agreement pursuant to the provisions of Section 3.2.
- D. **"Approved PE Design"** means the preliminary engineering design for Phase 2, as set forth in the Statement of Work including Appendices 1, 3, 5, 6, 7 (including agreed-upon resolutions) and 10 thereto issued in MWAA's Final Request for Proposals No. 8-13-C001 for the award of the Phase 2 Design-Build Contract.
- E. **"Authorized Representative"** means the occupant of the named position(s) for each party who has the delegated authority to act for that party in certain sections of this Agreement, and who is to receive official notices for that party under this Agreement. Either party may name a new Authorized Representative by a written letter to the other party.
- F. **"Business Day" or "business day"** means any day other than a Saturday, Sunday or other day on which The New York Stock Exchange or banks are closed in New York, New York or Richmond, Virginia.
- G. **"CIL"** means Certifiable Items List which includes the SCIL "Safety Critical Items List".
- H. **"Days" or "days"** means calendar days unless otherwise stated.

- I. **“Contracts”** means the Phase 2 Design-Build Contract and the Phase 2 Yard Contract.
- J. **“Contractor”** and **“Contractors”** means the contractors under the Phase 2 Design-Build Contract and/or the Phase 2 Yard Contract.
- K. **“Coordinating Committee”** means the Coordinating Committee established under Section 3.7 of the MOA.
- L. **“Dynamic Testing Readiness”** and **“Certificate of Dynamic Testing Readiness”** shall have the same meaning as in the Phase 2 Design-Build Contract.
- M. **“Eligible Costs”** means those costs allowed for reimbursement under federal grants as specified in OMB Circular A-87 (as amended), including WMATA start-up costs. Such start-up costs shall include start-up utility costs to the extent allowed by such OMB Circular.
- N. **“Financial Records”** means any and all original documents that are used under OMB Circulars A-87 and A-133, as those documents may be amended from time to time, to support federal grant costs or to generate the invoices submitted by WMATA to MWAA under this Agreement. Financial Records includes all documents submitted, or relied upon, by WMATA staff, consultants, sub-consultants, vendors, and suppliers working on the Project, to the extent those documents support federal grant costs or submitted invoices.
- O. **“OCIP”** means the Owner-Controlled Insurance Program to be maintained by MWAA pursuant to the Contracts.
- P. **“Operational Readiness Date”** or **“ORD”** means the date on which WMATA determines that the Project is sufficiently complete for WMATA to commence simulated rail service and prepare for revenue operation.
- Q. **“Phase 1”** means the segment of the Project from its junction with the Orange Line near the West Falls Church Station to the Wiehle Avenue pocket track in Reston, Virginia.
- R. **“Phase 2”** means the segment of the Project from the Wiehle Avenue pocket track in Reston to Route 772 in Ashburn, Virginia.
- S. **“Project”** means the Dulles Corridor Metrorail Project as approved by the Federal Transit Administration in its Record of Decision dated March 2005, as supplemented on November 17, 2006, and such approval is further amended from time to time. Notwithstanding the foregoing, as used in the Agreement, “Project” does not include the parking structures that are intended under the MOA to be built at the Phase 2 rail stations by or through Fairfax County and Loudoun County.

- T. **“Project Schedule”** means the Critical Path Method schedule to be developed and maintained by MWAA representing the plan for the execution of the Phase 2 Work, and integrating Project tasks for the Contractor, MWAA, WMATA, Fairfax County, Loudoun County, and other Project participants.
- U. **“Record Deliverables”** means the final, clean, and comprehensive version of the as-built drawings, technical reports, technical specifications, calculations, shop drawings, system software, and other records created during the course of the Phase 2 Work. Record Deliverables must be complete in every detail in accordance with industry standards and correctly depict the as-constructed or as-installed condition of the completed Phase 2 Work. The Record Deliverables for the Phase 2 Design-Build Contract are described in Division 1, Specification 01 78 39. MWAA and WMATA shall agree upon the Record Deliverables to be required in the Contract for the Yard.
- V. **“Substantial Completion”** has the same meaning as in the Phase 2 Design-Build Contract.
- W. **“Transit-Related Facility”** means any facility, structure, or other physical element of the Project including work constructed or delivered under Phase 2 Design-Build Contract and Yard Contract that WMATA, as the eventual owner and operator of Phase 2, will own, operate or maintain.
- X. **“WMATA Acceptance”** means the decision by the WMATA Board to accept Phase 2 of the Project into the ARS which is estimated to occur approximately 90 days after ORD.
- Y. **“WMATA Acceptance Determination”** means the determination by WMATA that, with respect to Phase 2 of the Project, all conditions in Article 6 of this Agreement have been satisfied and all ARS Acceptance Tasks have been completed, and that Phase 2 is therefore eligible and ready for WMATA Acceptance.
- Z. **“WMATA Design Criteria and Requirements”** means the design criteria, requirements and standards in the WMATA Manual of Design Criteria (Release 9, dated May 2008), WMATA Standard Drawings (Release 9, as set forth on **Exhibit 5**), Summary of WMATA Technological Enhancements Supplement to Design Criteria (Release 9, dated March 2013), and the safety design criteria specified in **Exhibit 6**, all as modified by Approved Deviations including changes approved under this Agreement including without limitation Section 3.2 below; provided, that for the performance of the Phase 2 traction power system, WMATA Design Criteria and Requirements means the criteria and performance requirements applied to the traction power substations in Phase 1 of the Project.
- AA. **“Yard”** means the WMATA railcar maintenance and storage yard as described in the

## **Section 1.2 Interpretations**

For the purposes of this Agreement, except as otherwise expressly provided or unless the context otherwise requires:

### **1.2.A References.**

All references in this Agreement to designated Articles, Sections, and other subdivisions are to the designated Articles, Sections and other subdivisions of this Agreement as originally executed. The words "herein," "hereof," "hereunder," "herewith," and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section or other subdivision hereof.

### **1.2.B Terms.**

The terms defined in this Article have the meanings assigned to them in this Article and include the plural as well as the singular.

### **1.2.C Headings.**

The headings and captions used in this Agreement are for convenience of reference only, shall not be deemed to be part of this Agreement for any other purpose, and shall not define or affect the meaning, scope or intent of the provisions hereof.

## **Article 2. ROLES & RESPONSIBILITIES DURING DESIGN, CONSTRUCTION, TESTING, AND START-UP ACTIVITIES UNDER THE CONTRACTS**

### **Section 2.1 Basic Roles.**

MWAA is the overall manager of Phase 2 of the Project. WMATA, as the intended owner and entity responsible for operating and maintaining the completed facilities at such time as the Phase 2 may be accepted into the ARS, will serve as a Technical Advisor to MWAA to assist with review and where specified herein to approve work under the Contracts as more specifically set forth herein. MWAA will utilize WMATA to provide assistance on specialized technical matters relating to the integration of Phase 2 of the Project into the existing WMATA system and relating to the compliance of the Phase 2 Work with (i) the WMATA Design Criteria and Requirements and (ii) WMATA's Safety-Security Program Plan dated March 2012. WMATA will also provide access to its facilities, qualified personnel, equipment, and services in support of work by the Contractors.

### **Section 2.2 Technical Communication Protocols and Contractual Authority.**

MWAA shall have sole managing and contractual authority for the Phase 2 Work to ensure the Contractors' compliance with the Contracts. MWAA shall give consideration to WMATA's advice because WMATA, as the intended owner and operator, will ultimately determine whether Phase 2 is accepted into the ARS. The Contractors will interface with MWAA on a contractual basis and technical basis. MWAA may establish technical communication protocols that will

involve direct technical interface and communication between the Contractors and WMATA, other authorized technical representatives of MWAA and WMATA, and directly between MWAA and WMATA. WMATA will provide advice on technical matters, including but not limited to WMATA's Design Criteria and Requirements and whether the final design is consistent with the WMATA approved Phase 2 Preliminary Engineering 100% Design Submittals with agreed upon resolution of all WMATA review comments.

### **Section 2.3    MWAA's Roles and Responsibilities.**

#### **2.3.A    *Contractor Oversight.***

**2.3.A(1)**        Because WMATA will be a third party beneficiary to the Contracts after substantial completion, MWAA shall ensure that the final Contracts terms conform to the following terms reflected in the proposed draft "Phase 2 Design-Build Contract – Dulles Corridor Metrorail Project – Phase 2 – Package A" provided to offerors with the Draft Request for Proposals for the Phase 2 Design-Build Contract, Solicitation No. 8-13-C001 dated October 19, 2012 (the "**Draft RFP**"): (i) the proposed provision for maximum Contractor liability reflected in section 26.2.2 of such draft contract, adjusted in the case of the Yard Contract in proportion to the relative values of the Contracts, and (ii) the proposed provisions regarding the respective Contractor's obligations to correct latent defects or to timely perform warranty work.

**2.3.A(2)**        MWAA will ensure that the Contractors perform all of the design, construction management, quality assurance, analysis, scheduling, construction, installation, start-up, commissioning, testing and all other obligations set forth herein and in the Contracts in order to deliver a safe, reliable, complete, compatible, and fully operational rail transit system which meets or exceeds the performance standards established in this Agreement and in the Contracts. MWAA, with the assistance of WMATA as provided in this Agreement, shall further ensure that the ARS Incorporation Conditions are fulfilled.

#### **2.3.B    *Compliance Requirements.***

*Compliance with WMATA Criteria.* MWAA shall ensure that all design and construction work performed by the Contractors and their subcontractors under the Contracts or by any contractors under MWAA's control meets or exceeds all of the WMATA Design Criteria and Requirements (which are defined herein to include Approved Deviations), as well as any applicable state or federal regulatory requirements.

*Compliance with Approved Design.* MWAA shall obtain WMATA's approval for any material change in the final design of any Transit-Related Facility, compared to the Approved PE Design for such facility, if WMATA reasonably determines that the change materially and adversely affects the appearance, functionality, or durability of such facility. In addition, after a 100% design submittal for a Transit-Related Facility has been approved by WMATA as described in Section 2.7.B(2)(a) below, MWAA shall not



approve a change to such approved design, if WMATA reasonably determines that the change materially and adversely affects the appearance, functionality, or durability of such facility.

*Compliance with the MOA.* MWAA acknowledges that completion of operational readiness testing, ORD, and simulated train service for Phase 2 is dependent on the Phase 2 Yard Contract reaching completion at the same time or before the Phase 2 Design-Build Contract reaches completion. MWAA shall ensure that the Yard is designed and constructed as described in the MOA, with any modifications approved by WMATA.

### **2.3.C Access to Site and Testing.**

MWAA shall ensure reasonable access to the sites where all phases of work under the Contracts is performed, to allow WMATA to perform its oversight activities. MWAA will inform WMATA of any testing activity to be performed under the Contracts at least 14 days in advance of the activity, to the extent the testing is relevant to compliance with WMATA's requirements for Transit-Related Facilities. Twenty-one (21) days' advance notice shall be provided for off-site testing to be conducted at remote locations that would necessitate arrangements for travel and lodging. MWAA shall ensure that the Contractors provide WMATA with a detailed schedule for all required testing and maintain a thirty (30) day look ahead update of all planned testing dates.

### **Section 2.4 Access to WMATA's Right-of-Way.**

Prior to entry on to WMATA property to perform work on the WES, MWAA or the Contractor shall execute a Right of Entry Agreement in the form attached hereto as **Exhibit 2**. Consistent with the terms of (i) the Right of Entry Agreement, and (ii) the limitations inherent in working on an operating system, WMATA will provide access to MWAA, the Contractors, and their subcontractors, as well as the employees and consultants of each, to those portions of the WES or other WMATA property necessary to implement work under the Contracts. As more fully set forth in the Right of Entry Agreement, the Contractors shall provide insurance coverage naming WMATA an additional named insured as specified therein prior to entry onto WMATA property. MWAA shall exercise its oversight responsibility in close coordination with WMATA to achieve consistency with WMATA operating, safety and security standards that are referenced in the Contracts and to avoid contract delays and changes. However, MWAA agrees and acknowledges that access to the WES is subject to WMATA's on-going safety, security, and operational needs and that WMATA may limit or deny access to MWAA or the Contractors where WMATA, in its sole but reasonable discretion, determines that access to the WES will impair revenue operation or interfere with WMATA's on-going safety, security, operational, and maintenance needs. WMATA will take reasonable measures to coordinate with MWAA and the Contractors to anticipate where and when access to the WES will impair WMATA's operations, operational safety or planned maintenance activities and, where possible, to mitigate that impairment without denying or unduly limiting access. Notwithstanding anything herein, WMATA shall have no liability to MWAA or the Contractors for failing to provide access to the

WES.

## **Section 2.5    Project Office.**

### ***2.5.A    Description of Office.***

MWAA shall establish and maintain, or cause to be established and maintained, a Project office at a location in Northern Virginia and provide adequate office space for WMATA Project personnel necessary to perform the tasks provide in this Agreement. For space planning purposes, the Parties estimate that WMATA will have at the maximum up to \_\_\_\_XX people at the Project office, principally in design, and up to a total of \_\_\_\_XX people working at any time on the Project. Space will be made available in field offices and trailers as appropriate. MWAA and WMATA recognize that WMATA staffing may fluctuate with the needs of the Project. All costs and expenses associated with leasing, buying, equipping, and maintaining the Project office, and providing for utilities hook-ups and utilities will be a Project cost and a responsibility of MWAA in accordance with Project funding agreements.

### ***2.5.B    Specific Office Requirements.***

The Project office will also be used to conduct Project team meetings, technical committee meetings, and any other meetings supporting the Project. The Project office will be established, equipped, and maintained by MWAA for all Project staff, including, but not limited to, T-1 Line, computer communication network cabling (internal and external), required building security items, telephones, printers, facsimile machines, and office supplies necessary to fully support WMATA core Project personnel in performing its technical advisory services. However, MWAA shall not be responsible for the provision of computers and specialty software, cell phones, personal or PDA devices, or motor vehicles to WMATA personnel but shall reimburse WMATA for the actual reasonable Project-related cost incurred for these resources. MWAA shall provide a secured and conditioned space to support WMATA computer network equipment at the Project office, with connectivity to data cabling at WMATA offices and cubicles, as required to support installation by WMATA of secure access to WMATA's network for all WMATA employees in the Project office. Space in the field construction trailers will be provided by the Contractor for use by at least two WMATA staff at each office trailer to use during construction to write reports, make phone calls, and seek shelter from the weather.

## **Section 2.6    Phase 2 Project Records.**

### ***2.6.A    Access to Documents.***

MWAA shall ensure WMATA's access to the most current issued version of all Project documents in order to support its activities on the Project, including, but not limited to the most current project management plans (e.g., Quality Plan, System Acceptance Plan, Integration Plan, etc.), current design and issued for construction (IFC) drawings, specifications, design change documents, requests for information, construction submittals, shop drawings, field changes, and nonconformance or deficiency reports. The documents shall be made accessible in an indexed manner which allows locating documents relevant to a facility, element, system, or subsystem. MWAA shall also provide WMATA access to all information in

MWAA's possession or control information on key Contractor personnel, qualification of specialty design subcontractors, and approved vendors.

**2.6.B Shared Project Management Software.**

MWAA shall provide that the final Request for Proposals, issued in connection with the Phase 2 Design-Build Contract, requires the awarded Contractor to deliver a project management software system to be shared by MWAA, WMATA and the Contractors, and a requirements-based database system to be maintained by MWAA that will facilitate verification and acceptance of the Phase 2 Work performed under the Phase 2 Design-Build Contract. The purpose of this system is to provide an effective tool to WMATA and MWAA to determine with confidence that work under the Phase 2 Design-Build Contract has been designed, built, and tested in full conformance with contract requirements.

**2.6.C Confidential Information.**

Information of a proprietary or confidential nature that is provided to WMATA by MWAA or any of the Contractors shall be retained in confidence and not released without the agreement of MWAA, except for disclosures that WMATA is required to make under its Public Access to Records Policy. Prior to disclosing any documents containing such information, WMATA shall give MWAA seven (7) days' written notice of its intended disclosure. Upon WMATA Acceptance, WMATA shall have the right to use, reproduce, and distribute all Project documents and records as WMATA determines appropriate in connection with the ownership and operation of the entire ARS, free of any restrictions by MWAA or any of the Contractors on such use, reproduction, or distribution.

**2.6.D Warranty Information.**

Upon the transfer of any warranty to WMATA, MWAA shall provide all relevant documents and supporting data to WMATA for warranty administration.

**Section 2.7 WMATA's Roles and Responsibilities.**

WMATA, as the intended owner and operator, will ultimately determine whether Phase 2 of the Project is accepted into the ARS. To that end, WMATA will perform a multiple-part role, as described below in Sections 2.7.B, 2.7.C, and 2.7.D to support MWAA's goal of delivering a safe and reliable transit system which complies with WMATA Design Criteria and Requirements and the Contracts. WMATA will also provide certain capital equipment necessary for the operation of Phase 2, as provided below in Section 2.7.A.

**2.7.A Capital Equipment Design, Procurement, Installation, and Commissioning.**

**2.7.A(1)** Subject to timely funding by MWAA, WMATA shall design, procure, install and commission the following equipment, systems and hardware/software:

**2.7.A(1)(a) Railcars.** Prior to the date hereof, WMATA entered a contract for the purchase of 128 railcars for the Project, including 64 railcars for Phase 2. WMATA shall continue to manage this procurement and purchase, shall be responsible for

the design, testing and commissioning of these railcars, and shall ensure that a Fleet Management Plan which includes these railcars is approved by the FTA.

**2.7.A(1)(b) Automatic Fare Collection (“AFC”).** WMATA shall complete the following tasks associated with the AFC equipment at the Phase 2 passenger stations. This Agreement and Capital Equipment Budget assume that the parking garages provided at the Phase 2 station sites will not be operated or maintained by WMATA, and therefore do not address or include parking revenue control equipment. However, WMATA will cooperate with Fairfax and Loudoun Counties, and the contractors they engage to construct the Phase 2 parking garages, in defining the garages’ parking revenue control equipment.

(1) Provide MWAA with the technical information required for this AFC equipment. Technical information includes dimensions, weights, environmental requirements, power requirements, control wiring requirements, and any other information necessary to coordinate the interface of the WMATA supplied equipment with the designs for the Project’s passenger stations.

(2) Procure the AFC equipment for the passenger stations, and complete the installation of the equipment. MWAA will provide for the design and installation of the cable ducts and conduits identified by WMATA for the connection of the AFC equipment to the station operator’s kiosk.

(3) Complete all commissioning and acceptance testing of the AFC.

**2.7.A(1)(c) Tie-in Activities to the WES.** WMATA shall procure and install all database updates and all other hardware, firmware, software, computer equipment, required to tie-in the addition of Phase 2 into the existing WMATA System. MWAA and WMATA will work jointly to provide the software interface data required by WMATA and the Contractor under the Phase 2 Design-Build Contract to update the Rail Operations Computer System (“**ROCS**”) or its successor system and other computer-based control systems on a timely basis. To assist in the coordination of these interfaces, design data deliverables from the Contractor to WMATA and from WMATA to the Contractor shall be established, and applicable milestone dates identified in the Project Schedule.

**2.7.A(1)(d) Signage and Graphics.** WMATA shall design, fabricate and install in existing stations and railcars new signage, wayside graphics and maps to reflect the Phase 2 stations.

**2.7.A(1)(e) Arts-in-Transit.** As provided in Section 2.8, WMATA shall manage and coordinate the Arts-in-Transit program for Phase 2.

**2.7.A(1)(f) Non-Revenue Vehicles, Equipment and Furniture.** WMATA shall manage the procurements for all non-revenue vehicles, equipment and furniture required for Phase 2 of the Project, and schedule the delivery of the equipment prior to the Acceptance Date, or if needed for operational readiness testing, by the Operational Readiness Date.

**2.7.A(2)** Funding for the acquisition and installation of the equipment, systems and hardware/software described above in Section 2.7.A(1) shall be provided by MWAA in advance and in a timely manner and in accordance with the approved Capital Equipment Budget to ensure that the provision of the equipment, systems and hardware/software is coordinated with and accomplished in accordance with the Project Schedule and that the design interface information, equipment supply, equipment installation, hardware and software modifications at the Rail Operations Control Center and the commissioning of the WMATA-supplied capital equipment are coordinated with the Project Schedule and the Contractor's work.

**2.7.B Technical Advisor to MWAA.**

WMATA shall provide technical services and support to MWAA during Phase 2 of the Project as described below:

**2.7.B(1)** Provide timely notification to MWAA of any issue that, if not resolved, could affect the acceptance of Phase 2 into the ARS. WMATA staff shall conduct periodic visits to the Phase 2 Work to verify that design, construction and testing activities are being executed in conformance with the requirements of the Contracts and this Agreement. WMATA shall use its best efforts to participate in witnessing the testing activities of the Transit-Related Facilities and related equipment under the Phase 2 Contracts. Any such visit or participation by WMATA shall not relieve the Contractor of the responsibility of providing quality measures to assure that the work strictly complies with the Contract requirements. No such visit or participation by WMATA shall be construed as constituting or implying acceptance.

**2.7.B(2)** During the period prior to the award of any of the Contract(s), WMATA shall:

**2.7.B(2)(a)** Review and provide comments to MWAA regarding proposed Contract terms and conditions and technical requirements. WMATA will provide MWAA with a baseline list of system testing that WMATA believes must be completed to enable ORD to occur.

**2.7.B(2)(b)** Participate as an advisory member of the MWAA evaluation committee in the evaluation of technical proposals submitted by potential contractors in response to the solicitation documents and advise MWAA regarding deficiencies in the proposals.

**2.7.B(2)(c)** Participate in meetings, if any, with potential contractors following issuance of the solicitation document in which the technical requirements of the document is discussed, and make technical comments and recommendations regarding any technical issues arising and any informal suggestions or proposals made during the meetings.

**2.7.B(2)(d)** Provide comments on the technical qualifications of subcontractors proposed for train control, communications, traction power, and other vital systems by offerors seeking the Phase 2 Design-Build Contract and Phase 2 Yard Contract.

**2.7.B(3)** In connection with the design work performed under the Contracts, WMATA shall:

**2.7.B(3)(a)** Review and provide comments on all Transit-Related Facility design submittals made by the Contractors under the Contracts, as follows:

- (i) Transit-Related Facility submittals made under the Phase 2 Design-Build Contract exclude documents pertaining to permits, schedules, maintenance of traffic plans and project controls/contract compliance submittals.
- (ii) Transit-Related Facility submittals (including, where applicable, construction submittals and shop drawings approved by the Contractor/Designer of Record) will be made available to WMATA by MWAA, or the Contractor at MWAA's direction, simultaneously with receipt by MWAA.
- (iii) WMATA's review response shall be provided to MWAA within 21 days after WMATA's receipt of compliant submittal documents and will conform to the procedure for completing such reviews as defined in the then most current revision of the Dulles Corridor Metrorail Project Management Procedure agreed upon by MWAA and WMATA.
- (iv) Prior to advising the applicable Contractor that MWAA accepts any Transit-Related Facility design submittal, MWAA will obtain WMATA's acceptance of the submittal.
- (v) WMATA's response to submittals shall indicate acceptance, acceptance with comments, or non-acceptance, based upon WMATA's determination whether the submittals:

(A) comply with WMATA Design Criteria and Requirements (which are defined to include Approved Deviations), and

(B) conform to the Approved PE Design, and if the response indicates any non-conformity, whether the non-conformity materially and adversely

affects the appearance, functionality, or durability of the Transit-Related Facility.

- (vi) In the case of all Transit-Related Facility design submittals which constitute a 100% submittal, if WMATA responds that it accepts the submittal (or responds that it accepts the submittal with comments that are later resolved as required by WMATA), then WMATA shall have “approved” such submittal. The effect of approval of a 100% submittal shall be that WMATA will not object to Contract work in conformance with the approved submittal, except to the extent (A) the objection relies on new or additional information, or (B) WMATA reasonably determines that changes have been made to a previously “approved” 100% design submittal that materially and adversely affect the appearance, functionality, or durability of the Transit-Related Facility.

No approval of a submittal shall constitute a waiver of any of the ARS Incorporation Conditions or of the requirements of the WMATA Design Criteria and Requirements. A waiver of WMATA Design Criteria and Requirements requires an Approved Deviation as described in this Agreement.

- (vii) In the event of a design dispute (*e.g.*, a disagreement between WMATA and MWAA as to a submittal’s compliance with WMATA Design Criteria and Requirements), MWAA will obtain a resolution of the dispute through the Expedited Disputes Procedures in Article 11. If MWAA proceeds with construction of disputed work prior to resolution of this dispute, MWAA assumes the risk of having to remove the disputed work and other related work as necessary and replacing that work in accordance with the dispute resolution.

**2.7.B(3)(b)** Review and provide comments on the Contractor’s Baseline Schedule to ensure coordination with system acceptance and testing, WMATA-performed activities, and delivery of WMATA-supplied equipment, such as fare collection, railcars, and ROCS upgrade.

**2.7.B(3)(c)** Participate in Transit-Related Facility design review meetings, coordination meetings, and workshops. MWAA will distribute minutes of meetings to WMATA contemporaneously with the distribution to other participants for review and comment. WMATA will timely respond to those action items assigned in the minutes to WMATA by MWAA.

**2.7.B(3)(d)** Review and timely resolve requests for deviations from WMATA Design Criteria and Requirements. MWAA acknowledges that requests for deviations from WMATA Design Criteria and Requirements must be accepted by WMATA’s Design Control Board (DCB) which meets monthly, and a prerequisite of action by the DCB is

development of recommendations by the constituent WMATA Offices and Departments. WMATA acknowledges that deviations are an expected part of the design-build process for the Project, and that time is of the essence in WMATA's response to requests for deviations. MWAA and WMATA shall use diligent efforts to resolve all requests for deviations within ninety (90) days.

**2.7.B(3)(e)** Coordinate, through MWAA, the provision of all technical interface information for the WMATA-provided equipment, systems and hardware/software that the Contractor requires to perform its design responsibilities and to provide this information by the dates identified in the applicable Project Schedule. MWAA shall cause the Contractor to promptly respond to requests by WMATA for information needed by WMATA to develop technical interface information.

**2.7.B(3)(f)** Pursuant to the spare parts provisions in Division 1 of the Phase 2 Design-Build Contract, review the Contractor's proposed listing for spare parts, special tools, test equipment, consumables and personnel training, and provide MWAA with WMATA's selections for parts, tools and training not more than 21 days after WMATA's receipt of the proposed listing.

**2.7.B(3)(g)** Review CIL and SCIL and support MWAA in verification of design checklist sign-offs.

**2.7.B(3)(h)** Perform a Threat and Vulnerability Assessment ("TVA") of the Phase 2 Work based on the WMATA-approved 100% design submittals for Phase 2.

**2.7.B(3)(i)** Sign off on a Design Conformance Check List prior to WMATA approval of any 100% Transit-Related Facility design submittal.

**2.7.B(3)(j)** Participate as a member of Safety Certification Working Group with MWAA to review and approve resolutions of hazards and vulnerabilities.

**2.7.B(3)(k)** Participate with MWAA in development of requirements for documenting the acquisition, by permit, license, easement, and/or deed, of the necessary right of way for the Project to enable transit operation and maintenance (the "**Right-of-Way Plan**").

**2.7.B(4)** In connection with the applicable Contractor's construction work under the Contracts, WMATA shall:

**2.7.B(4)(a)** Participate in coordination, pre-activity and progress and schedule update meetings and receive meeting minutes of all such meetings contemporaneously with the distribution to other participants. Respond to those items of action assigned to WMATA by MWAA.

**2.7.B(4)(b)** Review and respond as described Section 2.7.B(3) to design issues arising in the course of construction.



**2.7.B(4)(c)** Participate with MWAA in its oversight of the Contractor's Quality Control/Assurance Program. WMATA may participate in quality audits of the Contractor that are performed by MWAA, subject to prior notification to WMATA to allow for proper scheduling and coordination. The tracking and management of non-conformance audit matters shall be undertaken by MWAA. WMATA shall have access to all deficiency and non-conformance reports prepared by or for MWAA and shall, if requested by MWAA, assist MWAA in reaching a final disposition of items raised in the report. WMATA shall approve the final disposition of any item in such a report that describes the non-conformance of a Transit-Related Facility, or a part of such facility, with either (i) the WMATA Design Criteria and Requirements (which are defined to include Approved Deviations) or (ii) a 100% design submittal approved by WMATA.

**2.7.B(4)(d)** Review, provide comments on and, where applicable, approve test and inspection procedures submitted by the Contractor under the Contracts for acceptance testing of all Transit-Related Facilities. Review comments on such procedures shall be provided to MWAA within 21 days after receipt and will conform to the MWAA procedure for completing such reviews as defined in the then most current revision of the Dulles Corridor Metrorail Project Management Procedure, No. PM-5.06.

**2.7.B(4)(e)** Participate in witnessing the qualification and acceptance testing of the Transit-Related Facilities and related equipment, including qualification testing, factory acceptance testing, PICO inspections and tests, integration tests, and system performance tests. Review and approve the test results submitted by the Contractor under the Contracts for all tests of the Transit-Related Facilities and related equipment, to the extent the test results may affect acceptance of Phase 2. MWAA will obtain WMATA's concurrence that the approved acceptance test results demonstrate satisfactory performance of the tested facilities for ultimate acceptance into the ARS. In the event of a dispute between WMATA and MWAA over the validity of the test results or the conclusions to be drawn from them, MWAA will obtain a resolution of the dispute through the Expedited Disputes Procedures in Article 11. If MWAA proceeds with construction of disputed work prior to resolution of the dispute, MWAA assumes the risk of having to remove/retest the disputed work and other related work as necessary and replacing that work in accordance with the dispute resolution.

**2.7.B(4)(f)** Participate in field inspections conducted jointly by MWAA and WMATA to audit Safety Certifiable items as described in **Exhibit 7** hereto.

**2.7.B(4)(g)** Approve the applicable Construction Conformance Checklist prior to commencement of any testing of a Transit-Related Facility. In addition, before testing a Transit-Related Facility, the Contractor and WMATA must have confirmed completion of the items on the Safety Critical Items List applicable to such facility.

**2.7.B(4)(h)** Review and approve the Site Specific Work Plans (SSWPs) submitted by the Contractor under the Phase 2 Design-Build Contract for all work on WMATA right-of-way in the WES. If the SSP is deficient as initially submitted, identify specific problems and required remedies so that a revised SSP will comply with WMATA's requirements. WMATA's approval shall be subject to the SSP's conformance to WMATA's Safety & Security Certification Program Plan dated March 2012. (see Exhibit 6)

**2.7.B(5)** In connection with the Contractor's testing activities under the Phase 2 Design-Build Contract (e.g., Dynamic Testing and System Performance Testing) and in preparation for Substantial Completion, WMATA shall:

**2.7.B(5)(a)** At least nine months prior to the projected date of Substantial Completion, develop and provide to MWAA a Rail Activation Plan for Phase 2 that is substantially similar to the Rail Activation Plan for Phase 1 attached hereto as Exhibit 8. The Phase 2 Rail Activation Plan shall identify all operational readiness testing and other operational readiness activities that WMATA requires prior to ORD. The Work under the Phase 2 Design-Build Contract includes certain testing that MWAA and WMATA have thus far identified as needed to achieve ORD. MWAA and WMATA recognize, however, that additional operational readiness testing ("**Additional OR Testing**"), not included in such Work, may be identified by WMATA, and listed in the Phase 2 Rail Activation Plan, as necessary prior to ORD. In addition, WMATA may revise the list of Additional OR Testing at any time prior to ORD based upon information obtained while undertaking its operational readiness activities under the Rail Activation Plan. Because the Additional OR Testing is not part of the Work under the Phase 2 Design-Build Contract, the completion of the Additional OR Testing will not be a condition to Substantial Completion. Nevertheless, MWAA and WMATA desire to enable ORD to occur at the same time as Substantial Completion, or as soon as practical thereafter. Therefore, WMATA will make a good faith effort (i) to work with the Contractor and MWAA to develop a schedule for completing, and (ii) to actually complete, all Additional OR Testing prior to the date of Substantial Completion, without impeding the work of the Contractor or delaying Substantial Completion. WMATA acknowledges that both prior to Substantial Completion and during the period, if any, after Substantial Completion and before ORD, WMATA will need to conduct its Additional OR Testing and other operational readiness activities in coordination with and subject to the rules and procedures of the Contractor or other party then responsible for the care, custody and control of Phase 2.

**2.7.B(5)(b)** Participate in coordination, progress and schedule update meetings. MWAA will distribute meeting minutes of all such meetings to WMATA contemporaneously with the distribution to other participants for review and comment. WMATA will respond to those items of action assigned to WMATA by MWAA.

**2.7.B(5)(c)** Prior to the release of any “issued for construction drawings” for Transit-Related Facilities, or any specifications, test plans or procedures, or testing reports, review and comment on the Contractor’s System Integration Program Plan, including all test procedures submitted by the Contractor for Integration and System Performance Demonstration Testing. Such comments shall be provided to MWAA within 21 days after receipt by WMATA and will conform to the MWAA procedure for completing such reviews as defined in the most current revision of the Dulles Corridor Metrorail Project Management Procedure, No. PM-5.06. Before accepting the Contractor’s System Integration Program Plan, MWAA will obtain WMATA’s concurrence that the Plan adequately addresses applicable WMATA requirements. In the event of a dispute over the System Integration Program Plan, MWAA will obtain a resolution of the dispute through the Expedited Disputes Procedures in Article 11. If MWAA proceeds with the construction of work affected by the dispute prior to its resolution, MWAA assumes the risk of having to remove the disputed work and other related work as necessary and replacing that work in accordance with the dispute resolution.

**2.7.B(5)(d)** Witness all integration and system performance demonstration testing relating to Transit-Related Facilities and related equipment.

**2.7.B(5)(e)** Review and provide comments on the results of integration and system performance demonstration testing conducted by the Contractor for the Transit-Related Facilities and related equipment. Promptly notify MWAA of any discrepancies within the test results that should be resolved prior to acceptance of the results. Prior to accepting any performance test result submittals, MWAA will obtain WMATA’s concurrence that the test results reported in the submittals demonstrate satisfactory performance for ultimate acceptance of the Transit Related Facilities into the ARS. In the event of a dispute over any test result submittal, MWAA will obtain a resolution of the dispute through the Expedited Disputes Procedures in Article 11. If MWAA proceeds prior to resolution of the dispute, MWAA assumes the risk of having either to retest the disputed work or to remove the work and replace it in accordance with the dispute resolution.

**2.7.B(5)(f)** Review and resolve requests for deviations from the WMATA Design Criteria and Requirements arising during the testing phase of the Project.

**2.7.B(5)(g)** When all pre-requisites for Dynamic Testing are completed and accepted, review and provide comments on the Contractor’s request for Dynamic Testing Readiness Certification.

**2.7.B(5)(h)** Manage the transport to the Project and the on-site utilization of WMATA railcars for Dynamic Testing and the Performance Demonstration Test by providing vehicles, operators, Operations Control Center (“OCC”) staff, and all other required support staff. WMATA will perform a Daily Safety Test (“DST”) of each railcar prior to transporting the vehicle to the site for the Contractor’s Dynamic

Testing. Within 72 hours of notification by MWAA of the need for safe braking tests, WMATA will modify the requested number of married pair vehicles to meet the Dynamic Test requirements in accordance with the approved safe brake test procedure. WMATA will not be responsible for the daily vehicles calibration, power inverters for test equipment, test fixtures or circuit board modifications to extract vehicle data for Contractor test equipment or similar needs to support dynamic testing and data gathering. WMATA agrees to provide the vehicles, operators and other necessary personnel, but only to the extent budgeted in the Technical Advisory Budget. In the event that MWAA or the Contractor require additional hours of testing not budgeted in the Technical Advisory Budget, MWAA will be required to reimburse WMATA for those additional hours of railcar and personnel time and such additional hours shall not be subject to the overrun provisions in Article 4 below. MWAA shall provide 72 hours of advance notice to WMATA and comply with established WMATA procedures when requesting this support for the Project. WMATA shall make reasonable efforts to timely provide the railcars, other equipment and personnel for the tests. MWAA agrees that the operation of WMATA's system shall take priority over providing railcars and operations personnel, and, in the event of a conflict between the tests and WMATA's operational requirements, if WMATA, in its reasonable discretion, determines that such railcars or personnel are required to support operation of the WMATA system, WMATA shall have the right to cancel, postpone, or reschedule the tests without incurring liability

**2.7.B(5)(i)** Review and, within 21 days, provide comments on the Contractor's System Safety and Security submittals.

**2.7.B(5)(j)** Participate in inspections performed by MWAA or the Contractor to determine whether Safety Certifiable items are functioning properly.

**2.7.B(5)(k)** In cooperation with MWAA, review and provide comments on the Contractor's substantial completion certificate under the Phase 2 Design-Build or Phase 2 Yard Contract. Conduct joint inspection with the Contractor, MWAA, and others as necessary to document punch list work that does not conform to the contract documents.

**2.7.B(5)(l)** Complete the designs, procurements, installations and commissioning of the OCC updates to support the Project Schedule under the Phase 2 Design-Build Contract; provided that MWAA and the Contractor have timely provided any information in their possession, not otherwise available to WMATA, that is necessary to support this WMATA work.

**2.7.B(5)(m)** Manage the design, fabrication, installation and commissioning of AFC equipment.

**2.7.B(6)** During the period following Substantial Completion until WMATA Acceptance, WMATA shall:

**2.7.B(6)(a)** Conduct the operational tests, simulated service, and other activities needed to prepare for revenue service on Phase 2 portion of the Silver Line (the “**Operational Readiness Activities**”). MWAA will provide support to WMATA for the Operational Readiness Activities.

**2.7.B(6)(b)** If not completed prior to Substantial Completion, complete all testing and commissioning tasks for Project equipment that is provided by WMATA.

**2.7.B(6)(c)** In conformance with WMATA’s policies and procedures and the attached Right of Entry Agreement, provide access to the Contractor for the purpose of completing punch list items, warranty work, and conducting joint inspections with the Contractor, MWAA, and others as necessary to document the completion of final punch list work and warranty work. MWAA agrees that the operation of WMATA’s system shall take priority over the access by the Contractor for punch list and warranty work, and in the event of a conflict between the warranty work and punch list work and WMATA’s operational requirements, WMATA, in its reasonable discretion, shall have the right to complete the warranty work or punch list work at the expense of MWAA.

**2.7.B(6)(d)** Assist MWAA with the administration of applicable warranties. Upon WMATA's Acceptance, MWAA will assign all warranties to WMATA, together with the relevant documentation and records, and, once accepted into the ARS, WMATA will be responsible for administration of the warranties. MWAA will provide reasonable assistance, without charge to WMATA, when WMATA requests such assistance in enforcing warranties and providing documentation.

**2.7.B(6)(e)** For the period between ORD and WMATA Acceptance, WMATA will, in its capacity as technical advisor to MWAA, assume provisional responsibility for the care, custody and control of the Transit-Related Facilities, provided that during such period (i) WMATA will not assume any risk of loss for property for which it does not already then bear the risk of loss, (ii) MWAA must provide WMATA with liability insurance coverage for such period, at no expense to WMATA, in such amounts and on such terms as WMATA shall require in its sole discretion, and (iii) such provisional responsibility does not constitute waiver of any of the ARS Incorporation Conditions.

### **2.7.C *Intended Future Owner and Operator***

WMATA must perform certain tasks in order for the WMATA Board to accept Phase 2 of the Project into the ARS (“**ARS Acceptance Tasks**”).

#### **2.7.C(1) Design Approval.**

WMATA must have approved all design submittals for all Transit-Related Facilities pursuant to Section 2.7.B(3)(a) (i) through (vi) and determined that they comply with

the WMATA Design Criteria and Requirements (including through the issuance of Approved Deviations). For design submittals as to which there was a dispute over compliance with such standards, the dispute must be resolved through the Expedited Disputes Procedures in Article 11. WMATA has, prior to the date hereof, approved the 100% Preliminary Engineering design for Phase 2.

**2.7.C(2) Dynamic Readiness Certificate.**

WMATA must review and, in its reasonable discretion, approve and sign the Dynamic Testing Readiness Certificate. MWAA shall not issue a Certificate of Dynamic Testing Readiness pursuant to Section 17.3 of the Phase 2 Design-Build Contract until after WMATA has approved and signed the Dynamic Testing Readiness Certificate.

**2.7.C(3) Conditions to Operational Readiness Date.**

WMATA must determine when the Operational Readiness Date has occurred under the definition provided in this Agreement, must conduct its Operational Readiness Activities, and must advise MWAA if WMATA determines, during such testing, that the Transit Related Facilities do not to meet the standards required in Article 3 or otherwise do not comply with the Contracts.

**2.7.C(3)(a) Punch list.** WMATA must have, jointly with MWAA, developed a punch list prior to MWAA issuing the Certificate of Substantial Completion pursuant to Section 17.4 of the Phase 2 Design-Build Contract and the corresponding provision of the Yard Contract, and to the extent necessary, approved all Site Specific Work Plans (“SSWPs”) for all punch list-related work to be performed on WMATA right-of-way or within the WES, as required by the Right of Entry Agreement.

**2.7.C(3)(b) Right-of-Way Plans.** WMATA must have approved the Right-of-Way Plans, based on its reasonable determination whether such Plans provide for the minimum right-of-way necessary for transit operation and maintenance.

**2.7.C(3)(c) Deviations to WMATA Design Criteria and Requirements.** WMATA must have approved all deviations from WMATA Design Criteria and Requirements, except for deviations that were resolved pursuant to the applicable dispute resolution provisions of Article 11. To the extent WMATA determines that MWAA has allowed an unapproved deviation as described in this Section 2.7.C(3)(c), WMATA must determine whether to accept such deviation or require that MWAA comply with the WMATA Design Criteria and Requirements.

**2.7.C(3)(d) Safety Certification.** WMATA must prepare and provide to MWAA and the Contractor a Safety Certification consistent with WMATA's System Security and Safety Certification process described in **Exhibit 7.**

**2.7.C(3)(e) ATC Room Certification.** (i) Prior to Substantial Completion, WMATA's Automatic Train Control engineers and technicians shall have witnessed all necessary tests performed by the Contractor regarding the Automatic Train Control

(“ATC”) system. MWAA shall instruct the Contractor to ensure that WMATA has at least five (5) days notice of all such testing. (ii) After Substantial Completion, WMATA's automatic train control certification team shall have the right, if WMATA so elects, to independently validate and certify all vital train control logic as part of WMATA's final acceptance and safety certification. (iii) This certification team shall promptly notify MWAA of any nonconforming work or punch list items the team found, which were unrelated to its certification, that required corrective action. WMATA shall promptly advise MWAA whether such nonconforming work or punch list item must be completed prior to WMATA Acceptance.

**2.7.C(3)(f) Rail Activation Plan Testing.** WMATA shall have completed the testing described in the Rail Activation Plan, identified pursuant to Section 2.7.B(5)(a), except for the activities listed in Section 5 of the Rail Activation Plan, and any problems noted have been resolved to WMATA's reasonable satisfaction.

**2.7.C(4) WMATA Acceptance Determination.** WMATA shall determine when all the conditions necessary for WMATA Acceptance as set out below in Article 6 have been satisfied, and Phase 2 of the Project is ready for WMATA Acceptance. This determination is to be made regardless of whether MWAA has issued a Certificate of Final Acceptance under either or both Contracts.

**2.7.D *Contractor Support.***

In connection with the activities of the Contractors, and avoiding or minimizing, in a manner satisfactory to WMATA in its discretion, any adverse impact to WMATA's ongoing operations, WMATA will provide support in the form of access to WMATA existing facilities, escort personnel, bus bridging, rail cars, operators, and equipment as necessary to allow the Contractors to perform work and complete testing requirements.

**2.7.D(1)** WMATA will provide (i) reasonable access to the WES sites for the Contractor to perform the Work and (ii) all necessary escort and work zone protection in support of the Work per existing WMATA policies and procedures. WMATA shall review and approve work and equipment proposed by the Contractor for use on WES right-of-way to assure that the equipment meets WMATA's safety standards and will not foul or damage existing facilities or equipment belonging to WMATA. If the Contractor is unable to supply equipment complying with WMATA safety standards, is using equipment that WMATA determines is not suitable for use within the WES right-of-way, or otherwise needs to use a specialized piece of equipment which WMATA owns, WMATA will undertake to make its equipment available to MWAA on a reimbursable basis for the Contractor's use. WMATA may charge the Contractor a fee for use of such equipment, provided that such fee shall be determined by WMATA, acting reasonably, based on WMATA's estimate of the actual cost, including wear and tear, to WMATA of providing the equipment.

**2.7.D(2)** When all prerequisites necessary to safely complete clearance tests are satisfied under the test plan and test procedure agreed to by WMATA and MWAA, WMATA will provide the Clearance Train and witness the Clearance Test required prior to Dynamic Testing. WMATA shall participate with MWAA in the inspection and resolution of any conflicts resulting from this test.

**2.7.E WMATA Proposed CPM Schedule.**

With respect to its responsibilities described above in Sections 2.7.A through 2.7.C, within thirty (30) days of the submission of the Contractor's schedule, WMATA will prepare and submit for MWAA review and approval a construction project management schedule denoting the tasks to be undertaken by WMATA, the durations of those tasks, and the inter-relationship of the tasks. The approved schedule will be integrated into the Project Schedule by MWAA. WMATA and MWAA will cooperate to keep the CPM schedule up to date.

**2.7.F Spare Parts List**

At least eighteen (18) months prior to the projected date for Substantial Completion, WMATA shall provide MWAA a list of spare parts and special tools which are required by WMATA for Phase 2, and which WMATA and MWAA, acting reasonably, agree can be obtained within the anticipated budget of \$10,000,000 (the "**Spare Parts**")

**Section 2.8 Arts In Transit**

Phase 2 of the Project will include, in each rail station, one art installation under WMATA's Arts-In-Transit program. MWAA shall provide in the Design-Build Contract for Phase 2 that the Contractor will be responsible for installation of supporting structures (for example, a base to which a sculpture will be attached) and supplying electrical and/or communications connections needed for the installation (for example, electric power for lighting of or within an art work). WMATA will require the artist to be responsible for the design, engineering, and construction of all other aspects, including internal aspects, of the applicable piece. For example, the artist must design, supply, and install the control system for any piece that includes mechanical or electrical components. The artwork will be selected by WMATA pursuant to the WMATA Arts-In-Transit Program. Final selection will be made after consultation with MWAA. WMATA will manage the Arts-In-Transit Program as part of its Technical Advisor responsibilities under Section 2.7.A(1)(e). WMATA will ensure that sufficient information about the size, location, and nature of each piece is timely communicated to MWAA and the Contractor to avoid any delay in the Design-Build process. Supporting WMATA's efforts (i) MWAA shall ensure that the contractor adheres to milestones in the Project Schedule for provision of information that is needed by the artists to advance their work and define the size location and nature of each piece, and (ii) to include, if the necessary information is timely provided by WMATA on behalf of the artists, the artwork in applicable building permit submittals.



### **Article 3. APPLICABLE STANDARDS**

#### **Section 3.1 Design Criteria and Requirements.**

WMATA Design Criteria and Requirements shall be used for the design of Phase 2 of the Project.

#### **Section 3.2 Deviations from WMATA Design Criteria and Requirement.**

Deviations from the WMATA Design Criteria and Requirements may be requested by the Contractors, MWAA, or WMATA.

##### ***3.2.A MWAA/Contractor Proposed Deviations.***

Where the deviation is requested by MWAA or a Contractor, WMATA shall determine, in its reasonable discretion, whether such deviation is to be approved. WMATA will evaluate requested deviations from the WMATA Design Criteria and Requirements against the following conditions:

1. Will the requested deviation be equivalent in safety with the relevant standards or plans and specifications?
2. Is the requested deviation recognized as good industry practice for comparable facilities?
3. Will the requested deviation cause a material increase in operating and life cycle costs for the completed Project?
4. Is the requested deviation reasonably likely to achieve the estimated capital cost savings?

As part of any request for a deviation, MWAA or the Contractors must address the four conditions listed above. If a requested deviation is approved by WMATA, MWAA shall determine how such deviation is implemented contractually (*e.g.*, whether a change order is needed).

##### ***3.2.B WMATA-Proposed Deviations.***

**3.2.B(1)** When deviations are initiated by WMATA from WMATA Design Criteria and Requirements, and such deviations are required by a change in law or a change in one or more governmental safety standards applicable to WMATA, or are required because necessary components are no longer obtainable, the deviations shall be incorporated into the design of the Phase 2 project and any associated cost will be a Project cost.

**3.2.B(2)** When such deviations are initiated by WMATA for any other reason, the deviation shall be incorporated into the design of the Phase 2 only by mutual agreement of WMATA and MWAA. MWAA may condition its agreement on WMATA's payment, from its own funds outside the Project Budget, any increased design and construction costs caused by the deviation, as reasonably calculated by MWAA. MWAA may

disapprove any such proposed deviation that it believes would delay Substantial Completion or WMATA Acceptance. If MWAA rejects a request for a deviation under this paragraph, WMATA may take the request to the Coordinating Committee, and the Committee shall decide whether to approve the deviation into the Phase 2 project, and, if it determines that it will be incorporated, shall review the reasonableness of MWAA's calculation of the additional cost, if any, that must be paid by WMATA.

### **Section 3.3    Order of Precedence.**

In the event of any ambiguity or conflicting interpretation of the applicable standards the following order of precedence shall determine the interpretation of this Agreement:

**1.1.A(1)(a)** Applicable law or code/standard prescribed by law.

**1.1.A(1)(b)** WMATA-approved designs, which include Approved Deviations from the WMATA Design Criteria and Requirements. A design may be approved by WMATA either by express approval or by documented resolution of any WMATA comments on a design submittal.

**1.1.A(1)(c)** WMATA Manual of Design Criteria (Release 9, dated May 2008) as modified by Approved Deviations and WMATA requested changes that are approved by MWAA or the Coordinating Committee.

**1.1.A(1)(d)** Applicable WMATA Standard Drawings (Release 9, as shown on **Exhibit 5**), as modified by Approved Deviations and WMATA requested changes that are approved by MWAA.

**1.1.A(1)(e)** Applicable WMATA Standard Specifications (Release 8, various dates).

**1.1.A(1)(f)** The 100% preliminary engineering design approved by WMATA, including technical specifications, reports, and recorded resolutions of WMATA comments.

## **Article 4. FUNDING**

### **Section 4.1    Responsibilities for Costs Arising under this Agreement.**

#### ***4.1.A    MWAA's Obligation to Reimburse Costs.***

MWAA shall be responsible for reimbursing WMATA on a cost reimbursable basis for Eligible Costs, and only Eligible Costs, actually incurred by WMATA to:

**4.1.A(1)**        procure and install the capital equipment listed in Section 2.7.A,

**4.1.A(2)**        perform the technical advisory services described in Section 2.7.B,

**4.1.A(3)**        perform the ARS Acceptance Tasks identified in Section 2.7.C, and

**4.1.A(4)** provide access and support as provided in Section 2.7.D.

**4.1.B Costs for Capital Equipment.**

WMATA and MWAA have jointly prepared an overall budget that includes budgets (collectively, the “**Capital Equipment Budget**”) for the procurement and installation of the capital equipment described in Section 2.7.A(1). WMATA shall advise MWAA of any overruns in the capital equipment budget, but MWAA shall reimburse WMATA for all Eligible Costs incurred by WMATA to procure and (where applicable) install such capital equipment. The provisions of Section 4.1.F(2) below shall not apply to WMATA’s purchase of capital equipment.

**4.1.C Costs for Technical Advisory Services and ARS Acceptance Services.**

WMATA shall be responsible for adhering to a budget (“**WMATA Support Budget**”), which has been approved by MWAA as part of the overall budget, for costs reimbursable under Section 4.1.A(2) (“**Technical Advisory Costs**”) and costs reimbursable under Section 4.1.A(3) (“**Acceptance Review Costs**”). MWAA shall reimburse WMATA’s actual Eligible Costs, and only Eligible Costs, expended by WMATA to perform the technical advisory services as described in Section 2.7.B, and to perform the ARS Acceptance Tasks as described in Section 2.7.C, for the line items and within the limits of the WMATA Support Budget. The WMATA Support Budget may provide for a phased mobilization of WMATA staff. The WMATA Support Budget is agreed to be preliminary, and will be revised by mutual agreement prior to the first anniversary of the date of this Agreement to reflect information about Acceptance Review Costs learned through Phase 1 acceptance.

**4.1.D Costs for Force Account / Startup Support.**

WMATA and MWAA have jointly prepared an overall budget that includes a budget (“**Force Account/Startup Budget**”) for providing access to WMATA existing facilities, escort personnel, bus bridging, rail cars, operators, and equipment as necessary to allow the Contractors to perform work and complete testing requirements as described in Section 2.7.D. MWAA shall reimburse WMATA for all Eligible Costs incurred by WMATA to provide the support requested by the Contractors as directed by MWAA. . In the event that WMATA support costs exceed or are forecast to exceed the Force Account/Startup Budget, WMATA will assist MWAA in indentifying ways to minimize or reduce the additional costs; however, WMATA shall have no obligation to provide support services until funds are available to pay for the WMATA support services. Current Budgets.

The Capital Equipment Budget, the WMATA Support Budget, and Force Account/Startup Budget (the “**Budgets**”) are attached hereto as **Exhibit 9** and include:

- i. The Capital Equipment, WMATA Support, and Force Account/Startup Budgets, based on Year of Expenditure (YOE); and
- ii. The Capital Equipment, WMATA Support, and Force Account/Startup Budgets based on 2013 dollars.

The WMATA Support Budget shall include an estimate of WMATA Staffing Levels for

the Project.

**4.1.E Timing of Payments.**

It is the intent of the Parties (see Section 4.2 below) that MWAA will provide quarterly payments to WMATA in advance of the start of the quarter that represent the Eligible Costs projected to be incurred by WMATA in that upcoming quarter, so long as such costs are consistent with then-current Budgets; provided, that in the case of the Capital Equipment Budget, MWAA will fund overruns in projected actual Eligible Costs.

**4.1.F Budget Tracking.**

**4.1.F(1)** In each Budget, WMATA will provide MWAA with an estimate of the total WMATA costs in each of the three Budgets (in YOE dollars and current dollars) for each calendar year and calendar quarter beginning with the first quarter of 2013 and ending upon WMATA Acceptance. MWAA, however, shall only be responsible for payment of Eligible Costs actually incurred.

**4.1.F(2)** WMATA will monitor and document its costs and expenditures covered by each Budget. No later than July 1 of each year during the term of this Agreement, WMATA will provide MWAA an updated "Funding and Expenditure Projection Schedule" for each of the three Budgets. Each schedule will be based upon the level of effort that WMATA anticipates will be required for it to perform activities within the applicable Budget during the 12-month period beginning on the first full month following the date referenced above, and it will project the costs and funding obligations WMATA will actually incur in performing these activities during this upcoming 12-month period. If the costs projected for a 12-month period in a Funding and Expenditure Projection Schedule covering the Technical Advisory Budget or Acceptance Review Budget are exceeded by 5% or more, WMATA shall provide an explanation of the overrun and propose a recovery plan to bring future overall expenditures in the area in line with the applicable Budget, or explain why that is not feasible. WMATA need not propose a recovery plan with respect to costs incurred to support a Contractor. MWAA shall, not more than thirty (30) days following its receipt of an overrun explanation, approve the payment of the overrun, with or without a plan to bring future expenditures into conformity with the Budget.

**4.1.F(3)** WMATA shall also provide to MWAA on the fifteenth (15) business day of every month, a statement of actual costs incurred through the end of the previous month compared to expected costs and/or budgeted costs. If staff and/or consultant/contractor costs being incurred by WMATA are such as to cause either WMATA or MWAA to project that WMATA'S Technical Advisory Budget or Acceptance Review Budget will be exceeded for the budgetary period, then WMATA and MWAA shall meet and confer as soon as practicable. In addition, WMATA shall notify MWAA of

any use of any applicable Budget contingency. After the projection of an overrun and after the meeting, MWAA shall, in not more than thirty (30) Days, either: I) approve an increased Budget, with or without a plan for recovering the overrun amount, or ii) request WMATA to develop a mutually satisfactory revised Budget and scope.

**4.1.G Final Accounting.**

In any final accounting by the Parties, actual Eligible Costs shall be utilized. If there is a balance of MWAA funds on deposit at WMATA after the final accounting of actual costs properly charged to the Project, WMATA shall promptly return those funds to MWAA without demand. If actual costs properly charged to the Technical Advisory or Acceptance Review Budget exceed any balance of MWAA funds on deposit at WMATA, MWAA shall promptly reimburse WMATA for these costs. Any moneys to be reimbursed or paid, in accordance with this subsection, shall be forwarded by the responsible party within thirty (30) days after the issuance of the joint final reconciliation.

**Section 4.2 Funds Advancement.**

**4.2.A(1)** MWAA agrees to advance funds in accordance with the schedule set out in the approved Budgets. WMATA will not incur costs or obligations for any work enumerated hereunder, unless adequate funds are available, and MWAA has obligated or will timely obligate the necessary funds. MWAA shall not be required to make available or timely obligate funds until WMATA has complied with all conditions contained in this Agreement relating to funding, including a satisfactory accounting for its expenditures under each of the Budgets. Upon compliance with such conditions and the advancement of sufficient funds by MWAA, WMATA may incur costs or obligate funds in accordance with an approved Budget. It is the intent of the Parties that these funds are to be used to cover WMATA staff costs and other expenses. Each Budget and revisions to the Budget, if any, will include a schedule of periodic progress payments sufficient to fund the anticipated costs for the subsequent period.

**4.2.A(2)** WMATA shall submit periodic invoices to MWAA to support the next progress payments thirty (30) days in advance of the due dates set out in each Budget. The schedule of progress payments may be revised from time to time by WMATA with written agreement from MWAA to reflect changes in costs and/or the rate of spending.

**4.2.A(3)** WMATA shall draw against those amounts advanced, and submit a monthly statement of actual costs to MWAA pursuant to Section 4.1.F(2).

**4.2.A(4)** Suspension or termination of any part of this Agreement will not invalidate obligations properly incurred by WMATA prior to the date of suspension or termination to the extent the obligations are non-cancelable. Therefore, MWAA will remain responsible for properly incurred Eligible Costs that have been incurred by WMATA as Technical Advisor, including, but not limited to, consultant/contractor

contract close-out costs, and costs reasonably and properly incurred to finish or close out WMATA's work in accordance with this Agreement, in each case to the extent the cost is an Eligible Cost. The obligation to reimburse WMATA for its Eligible Costs will survive the suspension or termination of the Project or of this Agreement.

**4.2.A(5)** WMATA will place the funds advanced under this Agreement by MWAA into an interest-earning account. Interest earnings will be credited to the Budget to be used for authorized Project purposes. WMATA will provide an accounting of these earnings to MWAA along with the statement specified in Section 4.1.F(2).

### **Section 4.3 Financial Records and Audits.**

WMATA shall retain Financial Records pertaining to its performance of this Agreement for three (3) years after completion or termination of this Agreement, and will have the right to recycle and destroy these records at that time after securing approval from MWAA. MWAA has the right to conduct an audit and WMATA shall permit MWAA, or its authorized agent(s), at MWAA's expense to conduct independent audits, make copies of pertinent records, documentation, invoices, and receipts relating to the performance of this Agreement during or at the conclusion of the Technical Advisory services. WMATA agrees, following the completion of any MWAA audit report performed in compliance with OMB Circulars A-87 and A-133 (collectively "federal guidelines"), as those circulars are amended from time to time, and which audit is acceptable to the FTA and WMATA, that it will promptly credit or refund to MWAA any costs actually paid to WMATA and determined to be disallowed under those federal guidelines, from the WMATA Reimbursable Project Reserve Funds, as approved by the WMATA Board of Directors.

## **Article 5. TIME IS OF THE ESSENCE**

### **Section 5.1 WMATA Commitment.**

WMATA agrees that time of performance related to its role is essential for timely completion of Phase 2 of the Project and that a failure to timely perform its Technical Advisor duties that is not otherwise excusable and results in a material delay to the Critical Path established under the Contracts may have serious financial repercussions upon MWAA and the Project. Therefore, WMATA is committed to provide timely reviews and responses on design submittals, test results, and other documentation.

### **Section 5.2 Exceptions.**

Section 5.1 notwithstanding, WMATA shall have no obligation to (1) approve the Dynamic Readiness Certificate, (2) undertake Operational Readiness activities before satisfaction of the conditions set forth herein for such activities, or (3) provide railcars or operation personnel for testing if WMATA determines, in its reasonable discretion, that (A) the work performed under the Contracts fails, in any material respect, to comply with WMATA's Design Criteria and Requirements as provided in this Agreement, or with WMATA's operations security, and safety requirements as provided in this Agreement, or (B) that the date and/or time proposed for testing cannot reasonably be accommodated with operation of WMATA's existing system.

MWAA acknowledges that WMATA is not responsible for delays and claims associated with designs reflecting deviations from WMATA's Design Criteria and Requirements (which are defined to include Approved Deviations), or for claims by the Contractor associated with Dynamic Readiness Testing where WMATA determines, in its reasonable discretion, that the Contractor has not achieved Dynamic Readiness.

### **Section 5.3    Procedure.**

WMATA shall provide reasonable documentation in support of any determination under Section 5.2 that work under the Contract does not comply with WMATA's Design Criteria and Requirements, in order for MWAA to correct the deficiency in the work. In an effort to mitigate costs associated with delays associated with approval of deviations to WMATA's Design Criteria and Requirements, or relating to Operational Readiness testing, MWAA and WMATA shall establish a request for resolution (RFR) mechanism to assure that the subject matter of the RFR is identified early and resolved expeditiously. The mechanism shall include, but not be limited to, a log that identifies the date of receipt of such a request, the projected time for completion, and the specific information that is needed for completion by the projected date. If the MWAA considers the response time by WMATA or request for supporting information is unreasonable in light of the potential delay costs of added project administration and management costs, MWAA and WMATA shall develop a mitigation plan to resolve the matter. If the parties are unable to develop a mitigation plan, the parties shall declare the matter to be in dispute and proceed under the Expedited Procedures of Article 11. If the Parties disagree on such a determination, the dispute will be governed by Article 11.

## **Article 6. CONDITIONS FOR WMATA ACCEPTANCE**

Unless waived in writing by WMATA, the following are the conditions precedent for acceptance by the WMATA Board of Phase 2 of the Project into the ARS:

### **Section 6.1    Condition 1. Punch list**

All punch list work shall have been completed to WMATA's satisfaction within the limits of the Transit-Related Facilities, including the Yard, unless completion of the punch list work for an item prior to WMATA Acceptance has been waived by WMATA. MWAA shall have ninety (90) days after WMATA's Acceptance to complete all punch list items receiving a waiver under the prior sentence. If not completed within that time, WMATA has the right to complete punch list items at the Project's expense.

### **Section 6.2    Condition 2. Property Transfers**

MWAA shall have transferred, or caused to have been transferred, to WMATA the appropriate property interests in the Right-of-Way Plans approved by WMATA pursuant to Section 2.7.C(3)(b) of this Agreement.

### **Section 6.3    Condition 3. Spare Parts and Training**

MWAA shall have provided, or made satisfactory arrangements to provide, to WMATA all Spare Parts, O&M Manuals (in a format acceptable to WMATA), and training necessary to accept the

Project into the ARS.

**Section 6.4     Condition 4. Record Deliverables**

MWAA shall have provided WMATA with all Record Deliverables.

**Section 6.5     Condition 5. Assignment of Warranties**

MWAA shall have obtained warranties from the Contractor and its subcontractors that comply with the technical specifications as approved as part of the Phase 2 design submittals approved by WMATA, including any subcontractor warranties described in Section 11.3.2 of the Contract. MWAA shall have assigned all continuing warranties to WMATA and provided all documentation necessary to enforce the warranties. At the time of assignment, WMATA will have all rights that MWAA had under Article 11 of the Contract.

**Section 6.6     Condition 6. Permits**

MWAA shall have obtained for WMATA all land use and permitting approvals from any federal, state or local regulatory agency necessary for WMATA's operation and maintenance of Phase 2 of the Project.

**Section 6.7     Condition 7. Payments**

MWAA shall have paid to WMATA all sums due and owing under this Agreement.

**Section 6.8     Condition 8. Safety and Security**

The WMATA Chief Safety officer shall have completed its independent examination of the Contractor's Safety Critical Items List documentation and be ready to certify to the WMATA General Manager that Phase 2 of the Project is ready for revenue service.

**Section 6.9     Condition 9. Insurance**

WMATA shall have received the certificates of insurance in accordance with Article 7.

**Section 6.10    Condition 10. Storm Water Management.**

If Phase 2 includes any Storm Water Management Ponds located on property to be maintained by WMATA, and those ponds serve property other than WMATA property, MWAA shall have obtained a maintenance agreement with each property owner discharging stormwater into the pond, including real property covenants to ensure payment of the maintenance costs. The responsibility for maintenance costs of any pond serving both Transit-Related Facilities and other facilities shall be assessed based on the relative shares of water running into the pond. WMATA will not be responsible for maintaining Storm Water Management Ponds not located on WMATA property.

**Article 7. INDEMNITY AND INSURANCE**

For periods prior to WMATA Acceptance, the cost of additional insurance obtained by WMATA as described below as a result of Phase 2 of the Project shall be an Eligible Cost included in the Technical Advisory Budget.



## **Section 7.1 Property Insurance.**

### **7.1.A *WMATA Premises.***

WMATA shall be responsible for maintaining property insurance for WMATA-owned premises and other property that is affected by construction of Phase 2. For example, WMATA will be responsible for insuring the section of the Phase 1 railway to which the Phase 2 railway will attach. The cost of this insurance will not be an Eligible Cost, and claims by WMATA for damage to Phase 1 arising out of Phase 2 work will not be excluded under the OCIP general liability policy. WMATA and its insurer will not be required to waive subrogation for claims for such damage covered by WMATA's property insurance or self-insurance.

### **7.1.B *Railcars.***

WMATA is purchasing 64 new railcars as a part of Phase 2 of the Dulles Corridor Metrorail Project. It is anticipated that these railcars will arrive before completion of Phase 2. These railcars will not be used on Phase 2 prior to WMATA acceptance. MWAA expressly authorizes the use of these 64 railcars by WMATA elsewhere on the WMATA system. At all times, both prior to and after WMATA Acceptance of Phase 2, WMATA shall bear the risk of loss of or damage to these 64 railcars by including the same in WMATA's Master Property insurance program. WMATA and its insurer will not be required to waive subrogation for claims for such damage to such railcars covered by WMATA's property insurance or self-insurance.

### **7.1.C *Equipment.***

WMATA is supplying certain equipment, identified in Section 2.7.A.1, as part of Phase 2. WMATA will instruct its vendor to deliver equipment directly to the project site and the equipment shall be insured from delivery of such project-specific equipment to the Contractor until WMATA Acceptance, under the Contractor's Builder's Risk insurance policy. WMATA's supplier will bear the risk of loss while the equipment is in transit to its delivery point. WMATA shall not deliver, cause to be delivered or install such equipment earlier than contemplated by the Phase 2 project schedule.

### **7.1.D *Testing in Support of Phase 2.***

WMATA will insure its railcars and rail equipment used for testing in support of the Project under Force Account insurance which shall carry limits not less than the limits established in 7.3 below. Force Account insurance shall be carried beginning with the first use of WMATA railcars or rail equipment for testing and continuing continuously until WMATA Acceptance. The premiums associated with the purchase of the insurance described in this Section 7.1.D will be included in the Project Budget and will be reimbursed by MWAA as an Eligible Cost. WMATA will use best efforts to cause the Force Account carrier to include a Waiver of Subrogation endorsement for all Enrolled Parties. Provided, however, nothing herein shall waive WMATA employees' rights to seek recovery from any negligent party.

### **7.1.E *Auto Liability.***

The Parties agree and acknowledge that WMATA will self-insure its Auto Liability risks for both

on-site and off-site exposures. WMATA's self insurance of this risk shall be deemed to meet the requirements for Enrolled Parties under the OCIP.

**7.1.F Phase 2 Work.**

MWAA shall maintain or cause the Contractors to maintain builder's risk policies to insure against all risks of direct physical loss, damage or destruction occurring during the policy period, except as excluded, to the respective Contract work as more specifically described and insured in the policy. Each builder's risk policy shall be in the amount of the initial applicable Contract sum, plus the value of subsequent Contract modifications and cost of materials supplied or installed by others, to cover the total value for the entire Contract work. WMATA and the Owner shall each be a named insured on each Contractor's builder's risk insurance policy. Builder's Risk insurance shall be on an "all-risk" or equivalent policy form, as "all-risk" is defined and interpreted according to applicable law.

**Section 7.2 Worker's Compensation and Employer's Liability.**

A. For the period beginning with project inception and ending with Final Acceptance, WMATA shall procure and maintain, a project-specific Workers' Compensation Liability Policy. Such insurance shall be written on a guaranteed cost basis, include Workers' Compensation Insurance with statutory limits as required by law, including Federal Employers Liability Act, United States Longshoremen and Harbor Workers' Act & Maritime coverage, if appropriate, and Employers' Liability coverage with limits of not less than \$1,000,000 each accident/\$1,000,000 each employee/\$1,000,000 each disease. MWAA shall reimburse WMATA the premiums included in the Project Budget and paid under this Section 7.2 as Eligible Costs. WMATA will use best efforts to cause the Workers' Compensation carrier to include a Waiver of Subrogation endorsement for all Enrolled Parties. Provided, however, nothing herein shall waive WMATA employees' rights to seek recovery from any negligent party.

B. WMATA's compliance with the requirements of this Section 7.2 shall be deemed to comply with any requirements related to Workers' Compensation and Employer's Liability insurance imposed on Owner Indemnities as part of the OCIP. For the period that the project specific policy of this section 7.2 is in place, WMATA will not charge a Workers' Compensation additive to the labor costs billed and included in the Project Budget.

**Section 7.3 General Liability**

A. MWAA shall arrange for the OCIP as described in **Exhibit 10** for the Phase 2 Design-Build Contract, and for a similar OCIP for the Yard Contract. Any contractors engaged by WMATA to perform work in connection with Project shall be enrolled in the OCIP, provided that enrollment of contractors shall be subject to the OCIP eligibility requirements. To the extent any WMATA contractor that performs work related to the Project is not included in the OCIP, WMATA shall ensure that such contractor complies with terms outlined in **Exhibit 10**, Section 1.8. WMATA shall procure project specific Force Account insurance with limits of \$5 million per occurrence and \$10 million in the project aggregate to cover its liability from its Rail Activation Work.

B. WMATA shall be enrolled as an Owner Indemnitee under the OCIP. To the extent that the OCIP requires enrolled parties to carry on-site or off-site insurance of any kind, WMATA will be deemed to have complied with those requirements by carrying the insurance established in this Article 7, or by self-insuring the risk. Notwithstanding WMATA's agreement to self-insure the required on-site and off-site coverages, the OCIP will respond on a primary basis to on-site general liability claims. Provided, however, nothing herein shall waive WMATA employees' rights to seek recovery from any negligent party.

#### **Section 7.4 Indemnity, Additional Insurance.**

Neither MWAA nor the Contractor are providing any indemnity to WMATA and nothing herein is to be construed to create such an indemnity *except* (i) to the extent that a specific indemnity may be provided in the Right of Entry, and (ii) WMATA shall be an Owner Indemnitee as that term is used in the Phase 2 Design-Build Contract, and subject to all of the terms and conditions of that contract. Further, WMATA shall be enrolled as an Owner Indemnitee under the OCIP. WMATA shall receive certificates of insurance and appropriate endorsements certifying that the required coverage has been provided. . The insurance policies required hereunder, or comparable replacements therefor, shall be in place for the benefit of WMATA as an Owner Indemnitee from the Notice to Proceed under the Phase 2 Design-Build Contract through WMATA Acceptance. These provisions may not be amended or altered in any way that affects the coverage of WMATA required herein without the express written approval of WMATA.

### **Article 8. REPRESENTATIONS**

Each Party hereby represents to the other that it possesses full power and authority to execute, deliver and perform this Agreement and to carry out the transactions contemplated hereby. The execution, delivery, and performance of this Agreement and the transactions contemplated hereby have been duly and validly authorized by all necessary action of MWAA and WMATA and constitutes valid and binding obligation of each. Each Party also represents that the execution and performance by of this Agreement by the party does not and will not (a) violate any requirement of law or court order applicable to the party or its ability to perform under this Agreement, (b) require consent, approval or authorization of, or notice to, or declaration, filing or registration with, any person or entity not already obtained or accomplished as of the effective date hereof, or (c) conflict with or will result in a default under or violation of the governing instruments of the party or any other instrument or agreement to which it is a party.

### **Article 9. CANCELLATION**

#### **Section 9.1 Right to Cancel.**

In the event that the Contract does not proceed as contemplated herein, either because such contract is terminated, materially modified or otherwise not performed so that Phase II will not be adopted into the ARS, then MWAA may cancel this Agreement by providing express notice in

writing to WMATA (a “**Notice of Cancellation**”).

**Section 9.2 Cancellation Procedures.**

This Agreement will be considered cancelled on the date that is seven days after delivery by courier or overnight express of a Notice of Cancellation. Upon receipt, the Parties will institute measures to minimize and eliminate the incurring of additional costs. Eligible Costs, including any and all costs incurred after the receipt of notice, associated with cancelling the work hereunder shall be paid to WMATA. The amount outstanding, if any, shall be determined jointly by the Parties in a final accounting. The final accounting shall be concluded within twelve (12) months of cancellation, unless that time is extended by joint written agreement of the Parties. If the result of the joint final accounting for actual costs expended, including allowable and allocable cancellation costs, identifies a balance on hand, WMATA shall promptly return those funds to MWAA.

**Article 10. DEFAULT**

**Section 10.1 Default by WMATA.**

The following shall constitute an event of default by WMATA: The failure of WMATA to timely and satisfactorily perform the Technical Advisor tasks as set forth herein or any other material covenant, term or condition, not otherwise left to the reasonable discretion of WMATA, and the continued failure of WMATA to remedy such nonperformance within ten (10) days after receipt of written notice from MWAA. However, in the event of a Level 2, 3 or 4 Dispute over the alleged nonperformance, WMATA shall not be in default unless and until the dispute process is finally resolved in favor of MWAA with regard to the performance.

**Section 10.2 Default by MWAA.**

The following shall constitute an event of default by MWAA: (i) The failure of MWAA to pay to WMATA the sums due to WMATA for the timely performance of its obligation herein when said sums are due and owing and the continued failure of MWAA to remedy such nonpayment within ten (10) days after receipt of written notice from MWAA, (ii) MWAA's approval of a deviation from the WMATA Design Criteria and Requirements, issuance of a Dynamic Readiness Certificate, or approval of a punch list prior to Substantial Completion, in each case without WMATA's prior written approval and MWAA's failure to correct its action within 30 days, or, for actions that cannot be corrected within 30 days, commence to correct within 30 days, after notice from WMATA that the design deviation, issuance of the certificate or approval of the punch list was not approved. In the event of a Level 2, 3 or 4 Dispute over a payment, MWAA shall not be in default unless and until the dispute process is finally resolved in favor of WMATA with regard to the payment. In that event MWAA shall make the payment due to WMATA within thirty days or within the time specified in the dispute resolution, whichever is later. Upon payment, the default will be deemed cured. In the event of a Level 2, 3 or 4 Dispute over any other alleged default by MWAA, MWAA shall not be in default unless and until the dispute process is finally resolved in favor of WMATA with regard to the default.

### **Section 10.3 MWAA's Remedies.**

MWAA's sole and exclusive remedy against WMATA for an event of default, whether arising in contract, tort (including negligence) or other legal theory shall be the right to terminate this Agreement for default.

### **Section 10.4 WMATA's Remedies.**

In the event of a MWAA event of default for other than non-payment, WMATA's sole remedy, whether arising in contract, tort (including negligence) or other legal theory shall be to decline to accept the Phase II into the ARS until such time as MWAA cures the breach.

## **Article 11. DISPUTES**

### **Section 11.1 Dispute Resolution -- Level 1**

Resolution of disputes arising in design reviews.

The respective MWAA and WMATA staffs shall make every effort to resolve design review comments that are in dispute at the conclusion of each design review conference. If the dispute is not resolved between the WMATA Dulles Director and the MWAA Project Director within three (3) work days, both parties shall immediately notify their respective Organizational level Managers, i.e., the WMATA Assistant General Manager for Transit Infrastructure & Engineering Services and MWAA Executive Project Director, and provide them a written synopsis of the issue, including all pertinent data and references, applicable drawings and documents within two (2) business days of the notification. The Organizational Managers shall make every effort to resolve the dispute within three (3) business days following receipt of the written information from their respective staffs. Upon resolution, the MWAA Executive Project Director will issue a jointly signed letter outlining their resolution and direction to the respective Project staffs. Should the Organizational Managers be unable to resolve the issue within the time specified above, both parties shall immediately notify their respective Organizational level Executives i.e., the WMATA Deputy General Manager for Operations and MWAA Vice President of Engineering. The Organizational Executives shall make every effort to resolve the dispute within three (3) business days following receipt of the written information from their respective staffs. Upon resolution, the MWAA Vice President of Engineering will issue a jointly signed letter outlining their resolution and direction to the respective Project staffs. Should the Organizational Executives be unable to resolve the issue within the time specified, the matter shall be immediately referred to the WMATA General Manager and CEO and MWAA CEO for resolution in accordance with Section 11.2.

#### ***11.1.A Disputes subject to expedited procedure:.***

For all disputes arising under Section 2.7.B(3)(a) (i) through (vi) regarding final design submittals, under Section 2.7.B(3)(c) regarding Transit Related Facilities submittals, Section 2.7.B(4)(e) regarding acceptance tests of Transit Related Facilities and related equipment, Section 2.7.B(5)(c) regarding the System Integration Program Plan, Section 2.7.B(5)(e) regarding acceptance test results, and Section 5.3, Time is of Essence, these procedures shall apply unless

the Parties agree otherwise. The respective MWAA and WMATA staffs shall make every effort to resolve the dispute. If the dispute is not resolved between the WMATA Project Director and MWAA Project Director within two (2) business days, both parties shall immediately notify their respective Organizational level Executives i.e., the WMATA Deputy General Manager for Operations and MWAA Vice President of Engineering, and, and simultaneously provide them a synopsis of the issue, including pertinent data and references, applicable drawings and documents. The Organizational Level Executives shall make every effort to resolve the dispute within two (2) business days following receipt of the notice of the dispute from their respective staffs. Upon resolution, the MWAA Vice President of Engineering will issue a jointly signed letter outlining their resolution and direction to the respective Project staffs. Should the Organization Level Executives be unable to resolve the issue within the time specified above, the matter shall be immediately referred to the WMATA General Manager and CEO and MWAA CEO for resolution. In the event a dispute is not resolved between the Parties within seven (7) calendar days after submission to the WMATA General Manager and CEO, and the President and CEO of MWAA, either party may proceed under Level 3 or 4.

***11.1.B Resolution of Other Disputes:***

For all other disputes between MWAA and WMATA arising out of this Agreement, either party to this Agreement shall, through its Project Director, provide the other party written notice of any dispute and/or default under this Agreement by identifying the Section in dispute, and/or the necessary corrective action whenever it reasonably deems that the other party is in default. The notice shall specifically state the nature of the dispute and or default and shall provide the other party a reasonable period of time within which to respond or to correct the default, but in no event less than ten (10) calendar days. Should the matter in dispute or any alleged default not be corrected to the satisfaction of the party giving notice thereof within ten (10) calendar days, either party may further, thereafter, invoke the dispute procedures.

***11.1.C Exception for certain technical disputes.***

Notwithstanding the foregoing, technical disputes over application of WMATA Design Criteria and Requirements that were not identified in preliminary engineering or were not discoverable by the exercise of reasonable engineering judgment during preliminary engineering, shall be resolved by WMATA's Design Control Board. If the application of WMATA Design Criteria and Requirements are not possible or are commercially impracticable, such disputes are not subject to this Article.

**Section 11.2 Dispute Resolution or Default Resolution -- Level 2.**

A dispute that is not resolved at Level 1 may be brought by either party within five (5) business days to Level 2 where the President and CEO of MWAA and the General Manager and CEO of WMATA, or their designees, will be responsible for reviewing and resolving disputes and/or alleged defaults between MWAA and WMATA, related to this Agreement, that are not resolved in Level 1. Resolution will be signified by a decision agreed to by both the President and CEO of MWAA and the General Manager and CEO of WMATA. In the event a dispute cannot be resolved between the Parties pursuant to Levels 1 or 2, or twenty (20) calendar days after submission to the General Manager and CEO of WMATA and the President and CEO of MWAA

have passed and there is not a decision, either party may proceed under Level 3 or 4.

**Section 11.3 Principals -- Level 3.**

Either party may give written notice to the other that it is bringing the matter before next Principals Meeting. Each party shall provide the Principals with a summary of the issues. The Principals shall review the dispute and provide their recommendation for resolutions as soon as practicable, but not later than the next regularly scheduled Principals meeting. The recommendation of the Principals is advisory, and is a tool for further guidance to assist in resolution by the Parties. The recommendation of the Principals is not a binding resolution upon the Parties to this Agreement.

**Section 11.4 Court Jurisdiction -- Level 4.**

The Parties are not obligated to pursue or to complete the Level 3 dispute. In the event that the parties are not able to resolve the default or dispute after using the procedure set forth in Level 1 and 2, either party may commence a civil action to resolve the dispute in a court of competent jurisdiction in the Commonwealth of Virginia.

**Article 12. NOTICES**

**Section 12.1 Written Notice.**

All notices hereunder shall be in writing and shall be deemed to have been sufficiently given or served for all purposes when presented personally, or sent by a courier service or a national overnight delivery service, such as the U.S. Postal Service Overnight Express Mail, to any party hereunder as follows:

If to MWAA:

Project Director  
Silver Line Project Office  
1593 Spring Hill Road  
Suite 300  
Fairfax, VA 22182

And its Authorized Representative, if applicable in connection with the notice,

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

With a copy to the General Counsel:

Metropolitan Washington Airports Authority  
General Counsel's Office  
1 Aviation Circle  
Washington, D.C. 20001-6000

If to WMATA:

General Manager  
Washington Metropolitan Area Transit Authority  
600 Fifth Street, N.W.  
Washington, D.C. 20001

And its Authorized Representative, if applicable in connection with the notice,

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

With a copy to:

General Counsel  
Washington Metropolitan Area Transit Authority  
Jackson Graham Building, Second Floor  
600 Fifth Street, N.W.  
Washington, D.C. 20001

### **Article 13. AMENDMENT AND ASSIGNMENT**

#### **Section 13.1 Amendment(s).**

This Agreement may be amended in writing by agreement of the Parties.

#### **Section 13.2 Assignment.**

This Agreement is binding upon both MWAA and WMATA. The rights, duties, and obligations of either party with respect to the Project may not be assigned without the written consent of the other party. It is understood that WMATA may retain consultant/contractors to perform review and administrative work consistent with the approved Budget and this shall not constitute an assignment.



#### **Article 14. RIGHTS NON-EXCLUSIVE**

Nothing herein shall be construed to grant an exclusive right to WMATA to provide Technical Advisory Services. MWAA reserves the right to obtain technical advice and services from third parties even if such advice or services pertains to the same or similar matter about which WMATA is advising MWAA or providing services. MWAA shall not be in default or liable to WMATA in any way for seeking or using such advice or services provided that such advice is consistent with the contract requirements.

#### **Article 15. ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement between the Parties hereto with respect to the transactions contemplated herein related to Phase 2, and, to the extent that any prior oral or written agreements, letters of intent, commitments or understandings between the parties with respect to the matters provided herein conflict with this Agreement such conflict shall be resolved in favor of both the express language and the intent of this Agreement.

#### **Article 16. CONSTRUCTION**

##### **Section 16.1 Liberal Construed.**

This agreement is to be liberally construed to accomplish its intended purpose.

##### **Section 16.2 Drafting Responsibility.**

Each Party acknowledges that they participated equally in the negotiation and drafting of this Agreement and that, accordingly, a court construing this Agreement shall not construe it more strictly against one party or the other.

#### **Article 17. GOVERNING LAW**

This Agreement and the rights and obligations of the Parties hereto, shall be governed by and construed under the laws of the Commonwealth of Virginia.

#### **Article 18. WAIVER**

Neither the waiver by either of the Parties hereto of a breach or default of under any of the provisions of this Agreement, nor the failure of the parties, on one or more occasions, to enforce any of the provisions of this Agreement or to exercise any right or privilege hereunder shall thereafter be construed as a waiver of any subsequent breach of default of a similar nature.

#### **Article 19. SEVERABILITY**

If any provision or clause contained in this Agreement operates or would prospectively operate to invalidate this Agreement in whole or in part, then such provision or clause only shall be held ineffective, as though not contained herein, and the remainder of this Agreement shall remain operative and in full force and effect.

#### **Article 20. COUNTERPARTS**

This Agreement may be executed in two identical counterparts, and it shall not be necessary that the signatures of, or on behalf of, each party appear on each counterpart, but it shall be sufficient for the signature of, or on behalf of, each party to appear on one of the counterparts. The counterparts shall collectively constitute a single agreement.

#### **FOR THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY:**

---

Richard Sarles

General Manager and CEO

DATE: \_\_\_\_\_

#### **FOR THE METROPOLITAN WASHINGTON AIRPORTS AUTHORITY:**

---

John E. Potter

President and CEO

DATE: \_\_\_\_\_



## Exhibit 9



Revised 5/28/2013

**WMATA Silver Line Phase 2 Program Budget**

**WMATA Program Budget Summary**

Description	Agreement Ref.	WMATA DRAFT Budget (April 2013 \$ except Railcars @ YOE \$)	WMATA DRAFT Budget (YOE \$)	Components
Railcars	2.7.A(1)(a)	\$205,868,200	\$205,868,200	Continue to manage procurement and purchase. Design, testing, and commissioning. Fleet Management Plan.
Automatic Fare Collection (AFC)	2.7.A(1)(b)	\$11,668,227	\$13,233,791	Provide Technical support to MWAA. Procure and install AFC equipment. Commissioning and testing.
Tie-in Activities to the WES	2.7.A(1)(c.)	\$9,139,809	\$10,389,393	Procure and install database updates, hardware, firmware, software, computer equipment and coordinate with MWAA.
Signage and Graphics	2.7.A(1)(d)	\$2,909,916	\$3,334,384	Design, Fabricate, and install new signage, wayside graphics and maps.
Arts-in-Transit	2.7.A(1)(e)	\$1,665,888	\$1,838,415	Manage and coordinate the Arts-in-Transit Program.
Non-Revenue Vehicles, Equipment and Furniture	2.7.A(1)(f)	\$8,050,889	\$9,250,751	Manage procurement of all non-revenue vehicles, equipment and furniture. Schedule delivery of equipment by Acceptance /Operational Readiness Dates as required.
WMATA Support	2.7.B and 2.7.C	\$46,724,079	\$50,929,428	Provide technical services and support to MWAA. Perform design approval, Dynamic Readiness Cert., determine ORD, perform ARS Acceptance Tasks.
Force Account/Startup	2.7.D	\$7,708,409	\$8,958,487	Provide support to MWAA as it relates to the physical tie-in of Phase 1 and Phase 2 (at Wiehle Ave.) and support of Dynamic Testing.
PA Expenses @4.0% (Railcars, WMATA Oversight, and WMATA Force Account 0.0%)		\$1,337,389	\$1,521,869	WMATA Adopted FY2014 Cost Allocation Rate
<b>Total</b>		<b>\$295,072,806</b>	<b>\$305,324,718</b>	

## EXHIBITS

1. WMATA Board Resolution 2012-24
2. WMATA's Standard Right of Entry Permit
3. December 2011 Memorandum of Agreement among affected jurisdictions
4. Approved Deviations [*this exhibit will consist of the list included as Appendix 3 to the Statement of Work in the Phase 2 Design-Build Contract*]
5. List of WMATA Standard Drawings that are part of WMATA Design Criteria and Requirements (see section 1.1.Z)
6. List of any safety requirements that are part of WMATA Design Criteria and Requirements (see section 1.1.Z)
7. Safety Certification Requirements, including list of Safety Certifiable Items
8. Rail Activation Plan for Phase 1
9. Budget
10. OCIP Description [*this exhibit will consist of the OCIP description from Phase 2 Design-Build Contract*]

**ATTACHMENT B**

**COOPERATIVE AGREEMENT WITH LOUDOUN COUNTY**

**COOPERATIVE AGREEMENT**  
**BETWEEN**  
**THE METROPOLITAN WASHINGTON AIRPORTS AUTHORITY**  
**AND**  
**THE COUNTY OF LOUDOUN, VIRGINIA**  
**June \_\_, 2013**



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THIS COOPERATIVE AGREEMENT RELATING TO THE CONSTRUCTION OF METRORAIL IN THE DULLES AIRPORT CORRIDOR ("**Agreement**") is hereby entered into as of June \_\_, 2013 by and

between the Metropolitan Washington Airports Authority ("**Airports Authority**") and the County of Loudoun, Virginia ("**Loudoun**").

### **Recitals**

- A. Loudoun and Airports Authority desire to enhance transportation service in Loudoun County and the Dulles Airport Corridor.
- B. Loudoun, the Commonwealth of Virginia, and the County of Fairfax, Virginia ("**Fairfax**") have approved an approximately 23-mile extension of Metrorail, including a segment in Loudoun County from the Washington Dulles International Airport, along the Dulles Greenway, and terminating at Route 772. This extension is known as the Silver Line, and is described more fully in the Agreement to Fund the Capital Cost of Construction of Metrorail in the Dulles Corridor dated July 19, 2007 ("**Funding Agreement**") among Fairfax, Loudoun, and Airports Authority.
- C. The Commonwealth, Loudoun, Fairfax, and Airports Authority assessed transportation alternatives in accordance with the process recommended by the FTA, which included feasibility studies, alternatives analysis, and environmental analysis in accordance with the National Environmental Policy Act ("**NEPA**").
- D. The public was involved throughout the alternatives analysis and NEPA processes and in the selection of a locally preferred alternative ("**LPA**") developed as part of the Dulles Corridor Rapid Transit Project's Environmental Impact Statement process, to build the Silver Line.
- E. For purposes of obtaining one or more federal grants, construction of the Project has been divided into two phases, with Phase 1 of the Project ("**Phase 1**") generally consisting of that portion of the Project extending from the Metrorail Orange Line near the West Falls Church Station to and including the proposed Wiehle-Reston East Station, and Phase 2 of the Project ("**Phase 2**") described generally as that portion of the Project west of the proposed Wiehle-Reston East Station to and including the Dulles Airport Station and continuing thereafter to the terminus of the Project at Route 772 in Loudoun.
- F. In accordance with NEPA, an Environmental Impact Statement for both phases of the Project and an Environmental Assessment for Phase 1 design refinements has been completed and the Federal Transit Administration ("**FTA**") issued a Record of Decision in March 2005 and an Amended Record of Decision in November 2006, and the Federal Aviation Administration ("**FAA**") issued a Record of Decision in July 2005.
- G. In accordance with NEPA, an Environmental Assessment for Phase 2 design refinements has been completed and the **FTA** issued a Finding of No Significant Impact on December 17, 2012, and the **FAA** issued an Amended Record of Decision on December xx, 2012.

- H. As described in that certain Memorandum of Agreement dated December, 2011 among The United States Department of Transportation, WMATA, the Airports Authority, Loudoun, Fairfax, and the Commonwealth of Virginia (the “**MOA**”), Loudoun agreed to use its best efforts to build parking structures at the rail stations planned at Route 606 and Route 772 in Loudoun County (the “**Loudoun Parking Structures**”) and the parties agreed that if Loudoun is unable to secure the funding to build the Loudoun Parking Structures, then funding will be governed by the Funding Agreement.
- I. Airports Authority plans to award a design-build contract for Phase 2 as described in that certain Request for Proposals, Solicitation No. 8-13-C001 dated February 6, 2013 issued by Airports Authority (as amended, the “**Phase 2 RFP**”) and will separately award contracts for (i) the rail and related facilities in Phase 2 of the Silver Line, (ii) the WMATA Maintenance Facility and (iii) if necessary, the Loudoun Parking Structures and/or Fairfax Parking Structures..
- J. Airports Authority provides day to-day management of both phases of the construction of the Silver Line. That management includes, but is not limited to, financial planning and financing; right-of-way acquisition; environmental mitigation; intergovernmental agreements; permitting and utility coordination; public involvement; management of design and construction until completion, inspection, and acceptance of the Project by the Washington Metropolitan Area Transit Authority; and warranty implementation support.
- K. Airports Authority applied to the FTA as the Project sponsor to receive an FTA grant to implement Phase 1, and received such a grant pursuant to that certain Full Funding Grant Agreement (FTA FFGA-15) dated October 8, 2008.
- L. The Commonwealth will assist Airports Authority with right-of-way acquisition, site plan review and inspections, issuance of building permits, storm water management, and the regulation of Project activity in floodplain areas.
- M. Loudoun, Fairfax, the Commonwealth, and Airports Authority are committed to design and construct the Project to meet the cost-effectiveness criteria established by the FTA while complying with all federal, state, and local laws, ordinances, and regulations.
- N. Loudoun has participated in the preparation of the Project’s Phase 2 Preliminary Engineering by reviewing and providing comments on the 100% Preliminary Engineering design for Phase 2 (the “**Phase 2 PE Design**”) as described in the Phase 2 RFP. Certain comments have been resolved as set forth in the letter from Airports Authority to Loudoun dated April 29, 2013, a copy of which is attached hereto as **Attachment A**.
- O. Loudoun and the Airports Authority wish to cooperate if Loudoun is able to separately fund the construction the Loudoun Parking Structures, including the timely conveyance of property interests from the Airports Authority and the coordination of the construction activities of the respective parties .

- P. Recognizing that the funding for the Project has been addressed in a separate Funding Agreement, Loudoun and Airports Authority desire to enter into this Agreement to memorialize their understandings concerning other issues relating to the Project, including project coordination, property acquisition, project compliance with existing regulatory processes, insurance coverage, indemnity, and certain other issues not directly related to funding.

NOW THEREFORE, Airports Authority and Loudoun agree as follows:

## **Article I.      Recitals and Definitions**

### **Section 1.01   Recitals.**

The definitions set forth in the above recitals are a part of this Agreement.

### **Section 1.02   Definitions.**

In addition to the definitions provided in the recitals and elsewhere in this Agreement, the following are definitions of additional terms used in this Agreement:

**"Agreement"** means this Agreement including any appendices, exhibits, and amendments.

**"AHJ"** means the authority having jurisdiction for administrative permitting purposes.

**"Airports Authority"** means the Metropolitan Washington Airports Authority, its various departments and agencies, and its officials and agents.

**"Airports Authority Property"** means the real property that is owned by Airports Authority or by the United States of America and leased to Airports Authority, which is used for the Washington Dulles International Airport, the Washington Dulles International Airport Access Highway, and the Dulles Toll Road, excluding any real property that is acquired by Airports Authority for purposes of constructing the Project.

**"ARS"** means the adopted regional system for Metrorail in the Metropolitan Washington area, which (excluding the Project) is currently composed of 106 miles of Metrorail track and operated by the Washington Metropolitan Area Transit Authority, and any additions made to the system by the WMATA Board of Directors.

**"Contractor"** means any firm(s) engaged by Airports Authority to perform design, development, preliminary and final engineering, design-build, or construction work for the benefit of the Project, and shall include any and all subcontractors, agents, and successors-in-interest.

**"Days"** means (unless otherwise expressly provided) business days, excluding all holidays recognized by Airports Authority and/or Loudoun.

**"DCR"** means the Department of Conservation and Recreation for the Commonwealth of

Virginia.

"**DGS**" means the Department of General Services for the Commonwealth of Virginia.

"**DRPT**" means the Department of Rail and Public Transportation for the Commonwealth of Virginia.

"**Fairfax**" means the County of Fairfax, a political subdivision of the Commonwealth of Virginia, its various departments and agencies and its officials and agents.

"**FHWA**" means the Federal Highway Administration.

"**Funding Partners**" means, solely for purposes of this Agreement, the Commonwealth, Loudoun, Fairfax, and Airports Authority.

"**Loudoun**" means the County of Loudoun, a political subdivision of the Commonwealth of Virginia, its various departments and agencies and its officials and agents.

"**Loudoun County Code**" means the Codified Ordinances of the County of Loudoun, Virginia, as amended from time to time.

"**Loudoun County Zoning Ordinance**" means the Revised 1993 Zoning Ordinance of the County of Loudoun, Virginia, as amended from time to time.

"**Loudoun Facilities**" means existing Loudoun-owned facilities and infrastructure as well as those facilities designed for and constructed as part of the Project to be owned and/or maintained by Loudoun. The term "**Loudoun Facilities**" shall not include Loudoun-owned vacant real property.

"**Metropolitan Washington Airports Authority Dulles Corridor Enterprise Fund**" means the fund bearing this name that is more fully described in Resolution No. 07- 16 entitled "Financial Administration of the Dulles Toll Road and Dulles Corridor Metrorail Project," as adopted by the Metropolitan Washington Airports Authority Board on June 6, 2007. A copy of such resolution is attached hereto and incorporated herein by reference as **Attachment B**.

"**Project**" means the following: (i) Phase 2 of the Silver Line, including all the work described in "Package A" in Design Build Contract awarded pursuant to the process described in the Phase 2 RFP, (ii) the WMATA Maintenance Facility, and (iii) to the extent Loudoun does not elect to build them, the Loudoun Parking Structures.

"**Project Facilities**" means all rail transit and associated transit facilities designed for and constructed as part of the Project, including without limitation rail lines, rail guideways, and rail stations and supporting facilities.

"**VDOT**" means the Virginia Department of Transportation, its various departments and

agencies, and its officials and agents.

**"VDOT Facilities"** means existing VDOT-owned facilities and infrastructure including, but not limited to, roadways, pavement markings, rights-of-way, traffic signals and associated equipment, highway signs, toll facilities, structures, drainage facilities, and related facilities, pedestrian and bicycling facilities, as well as those facilities designed for and constructed as part of the Project to be owned and/or maintained by VDOT.

**"WMATA"** means the Washington Metropolitan Area Transit Authority, its various departments and agencies, and its officials and agents.

**"WMATA Maintenance Facility"** means the rail yard and maintenance and storage facilities to be built for WMATA on Airports Authority's property near Dulles Airport.

## Article II. **Project Coordination and Design Review**

### **Section 2.01 Airports Authority's Role.**

Airports Authority shall serve as the federal grant recipient and is responsible for the day-to-day management of the Project. Airports Authority shall be responsible for the completion of preliminary and final engineering for the Project, design-build activities, and associated project development activities, including financial planning, right-of-way acquisition, environmental mitigation, utility coordination and relocation, and permitting. Airports Authority also is responsible for coordinating the engineering, design, and construction of the Project with the Funding Partners, including Loudoun, as set forth more fully below. Separately, Airports Authority will act as the AHJ with respect to building code and permitting issues on Airports Authority Property. Airports Authority will assign one or more project coordinators to work with and provide support to Loudoun for the implementation of the Project until final acceptance of the Project Facilities by WMATA. Airports Authority's project coordinator(s) will facilitate the participation of Loudoun staff in Project-related reviews and meetings and shall facilitate the timely transmission of information to Loudoun to allow Loudoun sufficient time to exercise its rights and responsibilities under Section 2.02.

### **Section 2.02 Loudoun's Role.**

Loudoun will coordinate with Airports Authority and the other Funding Partners in the implementation of the Project, and will act as the AHJ for any portion of Project in Loudoun, off Airports Authority property, as to which DGS, DCR (or successor state agency) does not agree to act as AHJ. Loudoun will assign a project coordinator to support Airports Authority. Loudoun's project coordinator shall (a) serve as Airports Authority's first point of contact for Loudoun in coordinating issues relating to the Project, (b) assist in managing coordination with all Loudoun offices, (c) facilitate the participation of Loudoun staff in Project-related reviews and meetings, (d) represent and advocate Loudoun's interests in Project-related reviews, meetings or discussions and (e) facilitate the timely transmission of information to the Airports Authority from Loudoun staff to assist the Airports Authority in completing the Project within Project schedule.

## **Section 2.03 Project Design Review.**

### **(a) Review Process.**

The parties acknowledge that the Airports and Loudoun have mutually agreed upon the Phase 2 PE Design. The Phase 2 PE Design includes, without limitation, drawings depicting the Project alignment, line, track, and systems, and the location and general appearance of stations and facilities including traction power substations and storm water facilities. Using a design review software package that allows shared access to design documents, Airports Authority will provide Loudoun with access to copies of all design submittals during the design-build process. In addition, the Airports Authority shall provide hard copies of all documents as requested by Loudoun. Loudoun will have the right to review and provide comments to Airports Authority on all design submittals through completion of final design. The Airports Authority shall obtain the advance written approval of Loudoun prior to making any changes that are not in substantial conformance with the Phase 2 PE Design. In the absence of Loudoun's advance written approval of such proposed changes, the Airports Authority shall construct the Project Facilities substantially as shown in the Phase 2 PE Design. Loudoun will provide comments within the Applicable Review Time after the applicable review materials are made available to Loudoun as described above. Airports Authority shall meet with Loudoun to discuss, and otherwise coordinate with Loudoun about, the supplemental engineering design packages (if any), the final engineering drawings, and final site plans for all portions of the Project in Loudoun County or outside Loudoun County to the extent Loudoun desires to comment. As part of this collaborative process, Airports Authority shall respond in writing to each of the comments made by Loudoun. Such response will indicate whether such comments were incorporated into the drawings or plans, and if not shall give a detailed explanation. To the extent that this collaborative process does not resolve Loudoun's comments, such issues shall be resolved by the Funding Partners. Notwithstanding the foregoing, the Airports Authority must obtain the advance written approval of Loudoun for all supplemental design packages, final engineering drawings, and final site plans that in each case affect Loudoun Facilities and/or Loudoun-owned land.

### **(b) Accommodating Adjoining Development.**

From time to time upon request by Loudoun, Airports Authority will consider proposed changes to Project Facilities to accommodate adjacent development by Loudoun, or by private owners pursuant to Loudoun's approval process, subject in all cases to the following conditions:

(i) Loudoun, and not Airports Authority, will conduct such discussions with private owners as Loudoun may deem appropriate in order to determine what changes Loudoun wishes to propose. Airports Authority shall not be responsible for screening, evaluating, or negotiating changes proposed by private owners, but shall instead consider and respond to changes that Loudoun, after its own screening, evaluation, and negotiation, has elected to propose to Airports Authority. (ii) Airports Authority will not be required to delay any part of the Project schedule, as established and modified from time to time by Airports Authority in its reasonable discretion, to accommodate any such changes. (iii) Loudoun or the applicable owner will pay all costs to review the proposed changes. (iv) Loudoun or the applicable owner will pay all increases in Project actual costs attributable, in the Funding Partners' reasonable estimation, to implementing any changes agreed to by Airports Authority under this paragraph. (v) Prior to

reviewing any proposed changes and again prior to implementing any approved changes under this paragraph, Airports Authority may require the applicable owner to provide security, reasonably acceptable to Airports Authority, for payment of the review costs and change costs described in this paragraph.

**(c) Phase 2 Parking Structure Responsibility.**

As more particularly set out in § 3.2 of the MOA, Loudoun has agreed to use its best efforts to secure Additional Funding Sources for the Loudoun Parking Structures. If Loudoun elects to construct any Loudoun Parking Structure, that facility will be completed by December 31, 2018. If the project schedule is extended for the completion of Phase 2 of the Project, the deadline for completion of any Loudoun Parking Structure will be extended accordingly. On or before June 30, 2014, Loudoun will provide a status report to the Airports Authority on its efforts to secure the Additional Funding Sources and whether it anticipates that it will be constructing any or all of the Loudoun Parking Structures. This status report is for informational purposes and is not binding on Loudoun. On or before December 31, 2014, Loudoun will notify Airports Authority in writing to identify which, if any, of the Loudoun Parking Structures Loudoun will be responsible for constructing. Airports Authority will be responsible for construction of each Loudoun Parking Structure that Loudoun has not unconditionally agreed in writing on or before December 31, 2014 to construct at Loudoun's expense and within Airports Authority's Phase 2 project schedule.

As more particularly set out in § 3.3 of the MOA, the Airports Authority has agreed:

“to the extent permitted by law, provide to Loudoun, at no cost, such real property rights to land that is leased by [Airports Authority] from the federal government as are reasonably necessary for the construction, location, and operation of, and vehicular access to and from, the parking facility that is to be constructed to serve the Route 606 Station.”

Loudoun anticipates that it will require a long term easement over the Airport Authority's federal leasehold, sufficient to allow the construction and operation of the Loudoun Parking Structures at the Route 606 station, including ingress and egress, stormwater management, installation of utilities, and temporary construction activity. The Airports Authority agrees to respond in writing within 30 days of a request from Loudoun for any such property interests, confirming whether it will provide the requested lease, easement or other property interest on the schedule requested by Loudoun.

Loudoun has solicited proposals for a private-public partnership to construct the Loudoun Parking Structures. The Airports Authority will cooperate with Loudoun on such proposals by promptly responding to requests by Loudoun related to these efforts. Such requests may include modification of the location or configuration of the Loudoun Parking Structures or accommodating private commercial development within or adjacent to the Loudoun Parking Structure on Airports Authority property. Nothing herein shall require the Airports Authority to approve such requests.

If Loudoun constructs any Loudoun Parking Structure, the Airports Authority and Loudoun will



consult closely to coordinate construction activity undertaken by their respective contractors or agents.

**(d) Applicable Review Time.**

(i) The time for Loudoun to review and respond to design submittals is referred to herein as the "**Applicable Review Time.**"

(ii) Loudoun acknowledges that Airports Authority will generally have a contractual obligation to respond to design submittals by the Phase 2 Contractor within twenty-eight (28) calendar days after Airports Authority's receipt. Therefore, the Applicable Review Time for all design submittals shall be twenty-one (21) days.

(iii) Loudoun and Airports Authority will cooperate to minimize unnecessary delays in the design review process. Loudoun will endeavor, when and if it disapproves a submittal based on minor omissions or needed corrections, to specify in its disapproval an Applicable Review Time of such period, less than 21 days, that Loudoun in its discretion determines will be needed for its review of the re-submittal. Airports Authority shall, however, endeavor to cause the Contractor to avoid the need for re-submittals by providing complete and accurate initial submittals.

(iv) Loudoun will commit sufficient resources to enable Loudoun to meet its review deadlines under this Agreement, to enable Airports Authority in turn to meet its deadlines under the design-build contract for Phase 2.

**Section 2.04 Loudoun Coordination.**

At all stages of Project construction and establishment, Airports Authority shall give notice of its construction activities for the Project to Loudoun's project coordinator, who will assist in coordinating with each Loudoun agency affected by the Project's activities. Such coordination shall include, without limitation, efforts to minimize the effects of nighttime construction and construction noise, as well as the development of traffic managements plans during Project construction as set forth more fully in Article 5, below.

**Section 2.05 Drawings to be Made Available.**

Airports Authority shall maintain a set of up to-date "final design" drawings (including contractor modifications) which shall be available for review by Loudoun during the progress of construction of the Project. Upon completion of each phase of the Project, Airports Authority shall furnish Loudoun with electronic copies of reproducible "as built" drawings showing all Project Facilities in Loudoun County, including but not limited to Loudoun Facilities. For all Loudoun Facilities, such "as built" drawings shall be signed by a representative of the Contractor for the Project, certifying that the "as-built" conditions for the Loudoun Facilities are accurately reflected on the "as built" drawings.

**Section 2.06 Schedules.**

Airports Authority will provide Loudoun with updated Project schedules on a monthly basis. Similarly, Loudoun will provide Airports Authority with updates regarding its Project activities, as applicable, on a monthly basis.

## **Section 2.07 Adjoining Development.**

### **(a) Coordination by Contractors.**

The parties recognize that Loudoun intends to perform or permit other or additional work, and to contract with other persons to perform, adjacent to the Route 772 Station (“**Adjoining County Development**”). Subject to Section 2.03(b), Airports Authority shall require the Contractor to make commercially reasonable efforts to cooperate with Loudoun to the extent necessary for the performance by Loudoun of the Adjoining County Development, and shall direct all parties related to the Contractor to so cooperate. Similarly, Loudoun shall require its contractors undertaking Adjoining County Development to make commercially reasonable efforts to cooperate with Airports Authority and the Contractor to the extent necessary for the construction of the Project and Loudoun shall direct all parties related to Loudoun’s contractors to so cooperate. Airports Authority and Loudoun shall instruct their respective contractors to make commercially reasonable efforts to conduct their work without interfering or hindering the progress of the work being performed by other such contractors. This section does not require Loudoun to require coordination of development performed by private parties who are not under the direct contractual control of Loudoun. Any public-private partnership constructing a parking structure for Loudoun shall be considered under Loudoun’s direct contractual control for this purpose.

### **(b) Coordination Agreements.**

Promptly after the execution of the contract for construction of Phase 2, Airports Authority and the Contractor shall use commercially reasonable efforts to enter into coordination agreements with the other persons or entities, including Loudoun, undertaking the Adjoining County Development. The purpose of these coordination agreements is to coordinate the Project's construction schedule, as well as the construction schedules of the Adjoining County Development, so as to minimize potential interference with access to work sites and delays to the Project and to the other projects. Airports Authority agrees to require the Contractor to attend and participate in coordination meetings as necessary to facilitate the negotiation and execution of such coordination agreements in an effort to avoid cost and time impacts to the Project.

## **Section 2.08 Applicable Standards.**

The Phase 2 Project Facilities shall conform to the May 2008 WMATA Manual of Design Criteria for Maintaining and Continued Operations of Facilities and Systems (WMATA Design Criteria, Release 9), with deviations to the extent permitted by WMATA under separate agreements with Airports Authority. For any and all Project Facilities located on Airports Authority Property that qualify as "buildings," the relevant standards of Airports Authority shall apply. The relevant standards of the Virginia Uniform Statewide Building Code, as well as any and all other applicable Loudoun ordinances and regulations, shall apply to the portions of the Project located in Loudoun County that are not on Airports Authority Property. Design and construction of all Project Facilities on VDOT's rights-of-way shall comply with the Virginia Uniform Statewide Building Code and any and all other applicable regulations and requirements of VDOT, other departments of the Commonwealth, and FHWA. Design and construction of all Project Facilities located on the Greenway, which is owned by Toll Road Investors Partnership II, L.P., a Virginia

limited partnership (“TRIP II”), shall be governed by the same requirements applicable to VDOT rights-of-way or as otherwise provided in controlling agreements between VDOT and TRIP II.

**Section 2.09 Dulles Greenway.**

The area of the Project in Loudoun County, with the exception of the Airports Authority Property, is subject to Loudoun permitting and regulatory requirements. This includes the Phase 2 Project Facilities within the Dulles Greenway, outside of the Airports Authority property, unless DGS or other state agency agrees in writing to act as the permitting authority as described in Section 3.05 below.

**Section 2.10 Role of TRIP II.**

The Airports Authority will be responsible for obtaining any necessary permissions or agreements from TRIP II, or its successor, to apply on its behalf for permits or approvals or otherwise to comply with regulatory requirements on the Dulles Greenway property. To the extent TRIP II, as the title holder of parts of the land on which Phase 2 is to be built, must be treated by Loudoun as the owner for purpose of construction of any Phase 2 Project Facilities, this Agreement will nevertheless apply to the applicable construction.

**Section 2.11 WMATA Approval.**

Airports Authority shall be responsible for obtaining the approval of WMATA and VDOT of all of the Project's design and construction plans that affect WMATA's property or operations and/or VDOT Facilities, including obtaining WMATA's approval of all Project Facilities intended for acceptance by WMATA into the ARS.

Article III. **Government Approvals**

**Section 3.01 Regulatory Approvals.**

Airports Authority shall be responsible for obtaining all necessary regulatory approvals for the Project in order to expedite WMATA's acceptance of the completed Project Facilities into the ARS and to ensure that the Project complies with all federal, state, and local laws, ordinances, regulations, and other applicable requirements.

**Section 3.02 Section 2232 Compliance.**

DRPT, acting on behalf of WMATA, has obtained a determination from Loudoun that the general or approximate location, character, and extent of the Metrorail tracks and ancillary facilities (including stations areas) are substantially in accordance with the adopted Comprehensive Plan of Loudoun County as required by Va. Code Ann. §15.2-2232 (2003) (“**Section 2232**”). Airports Authority shall be responsible for obtaining, on behalf of WMATA, any additional Loudoun County approvals that may be required for Phase 2.

**Section 3.03 Loudoun Legislative Approvals.**

Loudoun acknowledges the following legislative approvals: (i) the special exception for the Dulles Greenway which provided for the extension of rail in the median; (ii) the proffered rezonings for Loudoun Station and Moorefield that included connections and related facilities associated with the Route 772 station; and (iii) the comprehensive plan for Loudoun County

that includes the proposed rail line in the Dulles Greenway and the Route 772 and Route 606 stations. There are no additional special exceptions, rezonings, § 15.2-2232 approvals, required to construct the Project Facilities as shown on the Phase 2 PE Design in Loudoun County. To the extent any changes or additions to the Project require any special exception, rezoning or § 15.2-2232 approval, the Airport Authority will apply on a schedule that will allow sufficient time for Loudoun to process, and the Loudoun County Board of Supervisors to act on, such application prior to the construction of the Project Facilities that are the subject of the application. The Airports Authority will incorporate design changes required as part of development conditions governing any such special exception approval for any such changes or additions to the Project into the Project and shall direct the Contractor to fully implement the development conditions during the construction of the Project. If Airports Authority is responsible for any Loudoun Parking Structure, Loudoun will establish, to the extent it may legally do so, an expedited process for final action on such applications consistent with the overall Phase 2 project schedule.

**Section 3.04 Permitting on Airport Property.**

Airports Authority shall be responsible for reviewing and approving all site plans and issuing all building permits for Project Facilities located on Airports Authority Property.

**Section 3.05 Permitting off Airport Property.**

With respect to those portions of the Project that are located on property within Loudoun County that is not Airports Authority Property, Airports Authority shall secure DGS's approval of all site plans and building permits that are required for the Project. Airports Authority shall also secure DCR's (or successor agency's) approval of all storm water management and erosion and sediment control plans associated with the Project to ensure that they fully comply with all applicable federal, state, and local laws, ordinances, regulations, and other requirements. The parties acknowledge that Loudoun has not elected to cause land-disturbing and construction activity on property in Loudoun County to be subject to the Chesapeake Bay Preservation Act. Airports Authority will provide to Loudoun written confirmation from DGS or DCR (or successor agency) that each of those agencies agrees to undertake its respective responsibilities as set out in this section.

If the Airports Authority is unable to obtain the agreement of DGS and/or DCR to perform these regulatory roles with respect to the portions of the Project that are located on property in Loudoun County that is not Airports Authority Property, then Airports Authority shall obtain Loudoun's advance written approval of all required plans and permits that are needed to conduct land disturbing and construction activities on such property.

Airports Authority shall not engage in and/or allow the Contractor to engage in any land-disturbing or construction activity on property in Loudoun County that is not Airports Authority Property unless Airports Authority has first obtained all required permits from DGS, DCR, and/or Loudoun, as set forth herein.

**Section 3.06 Access for Inspections.**

Airports Authority shall require the Contractor to provide full and complete access to the

Project Facilities at all times during construction so that Loudoun, DGS, and/or DCR may conduct inspections. Inspections initiated by Loudoun shall be coordinated through Airports Authority.

**Section 3.07 Certificate of Occupancy.**

Prior to occupancy of those Project Facilities in Loudoun County that are not on Airports Authority Property, Airports Authority, acting on behalf of WMATA, will apply for and obtain a certificate of occupancy from the AHJ. It is anticipated that DGS will be the AHJ; however, to the extent the AHJ is Loudoun, Loudoun agrees to expedite inspections and permit issuance to the extent allowable and practical. The Airports Authority will apply for and obtain the Loudoun County Zoning Administrator's approval of any required Zoning Permits associated with the Project Facilities in Loudoun County that are not on Airports Authority property.

Article IV. **Property Acquisition And Use**

**Section 4.01 Acquisitions.**

**(a) Acquisition Responsibility.**

Airports Authority will be responsible for acquiring all rights-of-way and property rights within Loudoun County necessary for the construction and operation of the Project Facilities.

**(b) Property for Staging and Utility Relocation.**

Airports Authority will require the Contractor to acquire the property (or property rights such as easements or licenses) needed, outside the property acquired for the location of Project Facilities, for utility relocation, and/or construction staging and storage areas, in connection with Project construction.

**(c) Loudoun County Requirements.**

All easements on Loudoun-owned property, if any, shall be obtained using uniform language approved by Loudoun that allows for construction and operation of Project Facilities and/or VDOT Facilities.

**(d) Use of Density Credits.**

Density/intensity credit may be utilized to acquire property to the extent permitted by the Loudoun County Zoning Ordinance.

**Section 4.02 Loudoun Property.**

**(a) Proffers.**

Loudoun does not currently own any property required for the Project. At properties adjacent to the Route 772 Station, Loudoun has accepted and approved zoning conditions pursuant to Va. Code § 15.2-2303 that address future dedications to Loudoun related to the Project, as follows:

1. Proffer I.F.2.b for Loudoun Station (ZMAP-2002-0005) provides for the dedication of 2.5 acres for transit purposes in the second phase of that development. This

- property is located on the north side of the Route 772 Station.
2. Proffer I.F.3.f for Loudoun Station (ZMAP-2002-0005) provides for the acquisition of the Ryan Park Parking Lot Reservation Area in the third phase of that development. This property is located on the north side of the Route 772 Station adjacent to the Loudoun Station property.
  3. Proffer IV.A for Moorefield Station (ZMAP-2001-0003) provides for the dedication of two sites to Loudoun: a 12 acre Transit Station Site and a 3.6 acre Commuter Parking Site. These properties are located on the south side of the Route 772 Station.

The properties that are to be dedicated to Loudoun under the Loudoun Station and Moorefield Station zoning approvals are collectively referred to as the “Proffered Dedications,” and the referenced proffers are included as **Attachment C**. Loudoun will undertake best efforts to secure the Proffered Dedications. In the event that Loudoun is able to secure the Proffered Dedications by the dates required to meet the Project schedule, it will:

1. Provide the Airports Authority a right-of-entry on the property, at no cost, to allow entry, construction, maintenance, and operation of Project Facilities prior to WMATA's acceptance of the Project Facilities into the ARS; and
2. Transfer an ownership interest to WMATA, at no cost, but only for the portion of the proffered property where Project Facilities that are transit facilities or supporting facilities are located and will be operated and maintained by WMATA.
3. Provide easements or rights-of-entry for access to facilities operated and maintained by WMATA that, in Loudoun’s reasonable discretion, will not interfere with the use and development of property retained by Loudoun for other purposes.
- 4.

Loudoun expressly retains the following rights or interests in the Proffered Dedications:

1. Any property required for any Loudoun Parking Structure, if constructed by Loudoun pursuant to § 3.2 of the MOA and the terms of this Cooperative Agreement;
2. All land or interests in land that, in Loudoun’s reasonable discretion, are in excess of the area actually necessary for the facilities shown on Phase 2 PE Design .
3. Air rights on property transferred to WMATA; and
4. Any property interest that is to be retained by Loudoun, or any restriction that is to be enforced by Loudoun, under the terms of the Proffered Dedications.

In the event Loudoun is unable to acquire the Proffered Dedications, the Airports Authority will be responsible for acquisition, as provided in Section 4.01; provided, however, that if Loudoun funds one or both of the parking structures at Route 772, it will be responsible for the acquisition costs of the respective site(s).

#### **(b) Additional Acquisitions**

In the event that Loudoun acquires any other property that may be required by the Airports Authority for the Project, Loudoun will cooperate in providing a right-of-entry to the Airports Authority to accommodate the construction of the Project and transferring an ownership

interest, easement or right-of-way to WMATA for facilities to be operated and maintained by WMATA. Loudoun is not required to acquire any property for the Project by purchase or the exercise of eminent domain.

Any instrument granting a right-of-entry or conveying an ownership interest shall be in a form reasonably acceptable to the Airports Authority and Loudoun, must be approved by the Loudoun County Attorney, and shall be subject to the provisions for conveyance of county property in Va. Code § 15.2-1800.

## Article V. Construction on Loudoun-Owned Property

### **Section 5.01 Design Affecting Future Loudoun Improvements.**

The Airports Authority shall notify Loudoun in a timely manner of any current or future plan for construction by the Airports Authority on Loudoun-owned property that may be affected by the design or construction of the Project. The Airports Authority shall make arrangements with the Loudoun project coordinator to have appropriate Loudoun staff meet with the Airports Authority to discuss the possible effects on Loudoun-owned property. Where Project Facilities are to be built on property to which Loudoun plans to retain title as described in **Error! Reference source not found.**, all designs for such Project Facilities must be approved by Loudoun in writing prior to implementation. To the extent that Loudoun has already approved in writing design drawings depicting the construction of Project Facilities on Loudoun-owned vacant land, further refinements of those plans (which include the Phase 2 PE Design) shall not require additional written approval as long as all construction activity remains within the footprint of the approved design.

### **Section 5.02 Right of Entry Permit.**

A right-of-entry permit in the form attached hereto as **Attachment D** must be issued by Loudoun before any Project activities on Loudoun-owned property, including relocation, modification, or construction of Loudoun Facilities. Said relocation, modification or construction shall comply with the right-of-entry permit and this Agreement. The right of entry permit shall remain in place for the duration of the Project and shall not be revoked by Loudoun without cause.

### **Section 5.03 Loudoun Facilities.**

Airports Authority or the Contractor shall perform such relocation, modification, or construction of currently-existing Loudoun Facilities as may be required to accommodate Project Facilities. Such Loudoun Facilities may include county-owned utilities such as sanitary sewer and storm sewer lines. In connection with such work, (i) trees and landscaped areas located on property owned by Loudoun shall be preserved to the extent reasonably practicable, and (ii) trees in the construction area, to the extent they are to remain, shall be protected in accordance with the County's requirements and standards. When trees must be removed from such property, the affected property shall be re-landscaped as required by the Phase 2 Design-Build Contract. .

## Article VI. Traffic Maintenance

### **Section 6.01 MOT Plans.**

Airports Authority shall prepare Maintenance of Traffic ("MOT") plans for roads that are affected by the construction of the Project. Such plans will show, among other things, the construction phasing, roads to be closed, detour routes, pedestrian walk areas, parcel access, signs, traffic signal modifications, and other pertinent information relating to traffic maintenance during the construction of the Project. The MOT plans shall be coordinated with and approved by Loudoun and VDOT prior to the commencement of construction. All MOT plans shall comply with all applicable federal regulations.

### **Section 6.02 Closures of State Roads.**

Airports Authority shall consult with and obtain VDOT approval prior to partial or complete closure of any Commonwealth-maintained roadways to vehicular and pedestrian traffic during the construction of the Project. Airports Authority shall provide adequate detour routes as part of any such plans, to be coordinated with and approved by VDOT. Airports Authority shall notify Loudoun, Loudoun Fire and Rescue Department, Loudoun Sheriff's Office, Loudoun Public Schools, Loudoun elected officials, VDOT, and the media at least ten business days in advance of the need to fully close a Commonwealth-maintained roadway.

### **Section 6.03 Closures of County Roads.**

Airports Authority shall consult with and obtain Loudoun approval prior to partial or complete closure of Loudoun-maintained roadways to vehicular and pedestrian traffic during the construction period as needed to construct the Project Facilities. Airports Authority, with the assistance and approval of Loudoun, shall plan for and provide adequate detour routes. Airports Authority shall give Loudoun, Loudoun Fire and Rescue Department, Loudoun Sheriff's Office, Loudoun Public Schools, Loudoun elected officials, VDOT, and the media at least ten business days in advance of the need to fully close a Loudoun-maintained roadway.

### **Section 6.04 General Road Closure Rules.**

#### **(a) County Policies.**

All road closures required by the Project on property in Loudoun County that is not Airports Authority Property shall comply with the requirements of Loudoun's road closure policies that have been adopted by the Loudoun County Board of Supervisors.

#### **(b) Hours of Closures.**

To the extent reasonably possible, construction on roadways shall not occur during peak traffic hours to avoid any unreasonable disruption of the movement of pedestrian and vehicular traffic, except on portions of roadways closed by VDOT permit. Airports Authority shall require its Contractor during construction of the Project to allow operating businesses sufficient access to their properties for pedestrians, vehicles, deliveries, and fire fighting and rescue equipment.

#### **(c) Signs.**

Any and all signs, pavement markings, and barricades installed and maintained by the Contractor shall be in accordance with the applicable MOT plan, the 2009 edition (with



Revisions 1 and 2 dated May 2012) of the Manual on Uniform Traffic Control Devices, and the Virginia Work Area Protection Manual, as applicable.

**Section 6.05 Transportation Management Plan Update.**

Separately from the MOT plans, Airports Authority assisted in developing a Transportation Management Plan ("TMP") (also known as a Congestion Management Plan) for all areas affected by the construction of the Silver Line project. Airports Authority and Loudoun will discuss and agree upon any updates to the TMP that may be necessary for Phase 2.

Article VII. **Insurance Requirements**

**Section 7.01 Responsibility for Damage.**

Airports Authority shall require its Contractor to be responsible for its work and every part thereof, and for all materials, tools, equipment, appliances, and property of any and all description used in connection therewith. Airports Authority shall require its Contractor to assume all risk of direct and indirect damage or injury to the property or persons used or employed on or in connection with the work contracted for, and of all damage or injury to any person or property wherever located, resulting from any action, omission, commission, or operation under the contract.

**Section 7.02 Insurance.**

Airports Authority shall (itself or through the Contractor) during the continuance of all work under the contracts for the Project shall maintain the insurance called for by the Design-Build Contract, the form of which contract is included in the Phase 2 RFP and has been made available to Loudoun. Airports Authority shall consult with Loudoun before materially modifying any insurance requirement benefitting Loudoun.

**Section 7.03 Specific Insurance Requirements.**

- a. No change, cancellation, or non-renewal shall be made in any insurance coverage without a 60-day written notice to Loudoun. Airports Authority or the Contractor shall furnish a new certificate to Airports Authority prior to any change or cancellation date.
- b. Contractual and other liability insurance provided under any contracts for this Project shall not contain a supervision, inspection, or engineering services exclusion that would preclude Loudoun from supervising and/or inspecting the project as to the end result. Airports Authority shall require its Contractor to assume all on-the-job responsibilities as to the control of persons directly employed by it and/or by the subcontractors.
- c. Nothing contained in the specifications shall be construed as creating any contractual relationship between the Contractor or any subcontractor and Loudoun. The Contractor shall be as fully responsible to Loudoun for the acts and omissions of the subcontractors and of persons employed by subcontractors as it Contractor is for acts and omissions of person directly employed by it.

d. If an "ACORD" Insurance Certificate form is used by the insurance agent(s) for the Project, Airports Authority shall endeavor to obtain the deletion of the words, "endeavor to" and "... but failure to mail such notice shall impose no obligation or liability of any kind upon the company" in the "Cancellation" paragraph of the form.

e. Loudoun shall be entitled to be an Enrolled Party in the Owner-Controlled Insurance Program under the Phase 2 Design-Build Contract.

**Section 7.04 OSHA Compliance; Safety.**

Airports Authority shall require its Contractor and all subcontractors to comply with the Occupational Safety and Health Act of 1970, Public Law 91-596, as it may apply to this Project. Precaution shall be exercised at all times for the protection of persons (including employees) and property.

**Section 7.05 Pre-Completion Occupancy by Loudoun.**

When Loudoun finds it necessary to occupy or use a portion or portions of the land area on which the Project is constructed prior to substantial completion of the Project, such occupancy shall commence only after a mutual agreement between Loudoun and Airports Authority. In that event, the insurance company or companies providing the property insurance shall be request to provide an endorsement prior to the commencement of work. Consent of Airports Authority and of the insurance company or companies to such occupancy or use shall not be unreasonably withheld.

**Article VIII. Indemnification**

**Section 8.01 General Indemnity.**

To the extent permitted by law, Airports Authority shall indemnify and hold harmless Loudoun, its officials, employees and agents from all liabilities, obligations, damages, penalties, claims, costs, charges, and expenses (including reasonable attorney's fees), of whatsoever kind and nature for injury, including personal injury or death of any person or persons (including without limitation employees of Loudoun), and for loss or damage to any property occurring in connection with or in any way arising out of the construction of the Project, including without limitation those liabilities, obligations, damages, penalties, claims, costs, charges, and expenses occurring in connection with or in any way arising from the use and occupancy of Loudoun-owned land for, and the performance of work associated with, the construction of the Project on Loudoun-owned land and/or any acts in connection with activities to be performed as part of the construction of the Project on Loudoun-owned land, to the extent the injury or property damage results in whole or in part from the acts, errors, or omissions of Airports Authority and/or the Contractor, or any employee, agent, or representative of Airports Authority and/or the Contractor.

**Section 8.02 Indemnity For Hazardous Materials.**

Airports Authority shall indemnify, defend, and hold harmless Loudoun, its agencies, directors, officers, employees, and agents against any and all claims, liabilities, losses, demands, damages, penalties, costs, charges, remedial costs, environmental claims, fees, or other expenses (including reasonable attorneys fees) related to, arising from or attributable to any effluent or

other hazardous waste, residue, contaminated soil, or other similar material discharged from, removed from, or introduced on, about, or under Loudoun-owned property as a result of activities in connection with the construction of the Project on Loudoun-owned land.

**Section 8.03 Procedures for Indemnity.**

If any action or proceeding is brought against Loudoun that is covered by the terms of the indemnification set forth in this Article VII, then upon written notice from Loudoun to Airports Authority, Airports Authority shall, at its expense, resist or defend such action or proceeding by counsel approved by Loudoun in writing, such approval not to be unreasonably withheld, but no approval of counsel shall be required where the cause of action is resisted or defended by counsel of any insurance carrier obligated to resist or defend the same.

**Section 8.04 Limitation.**

Airports Authority's obligations under this Article are limited:

- a.** to the extent of insurance under Article VII of this Agreement, and
- b.** for a claim or a loss that is not insured under Article VII of this Agreement, to funds of the Metropolitan Washington Airports Authority Dulles Corridor Enterprise Fund as defined above and/or revenues from the Dulles Toll Road.

**Article IX. Notices**

Unless otherwise expressly provided, in this Agreement, notices pursuant to this Agreement shall be in writing and delivered by independent commercial overnight courier or by facsimile transmission with a cover sheet and date and time stamp (provided an original is also sent by United States mail on the same or the following business day as the facsimile), addressed as follows:

If to AIRPORTS AUTHORITY:

President and CEO  
Metropolitan Washington Airports Authority  
1 Aviation Circle  
Washington, D.C. 20001-6000  
Fax: 703.417.3917  
With a copy to:

General Counsel  
Metropolitan Washington Airports Authority  
1 Aviation Circle  
Washington, D.C. 20001-6000  
Fax: 703.417.3917

And an additional copy to:

Project Chief Executive

MWAA / Dulles Corridor Metrorail Project  
1593 Spring Hill Road, Suite 300  
Vienna, Virginia 22182  
Fax: 703.\_\_\_\_.\_\_\_\_\_

If to LOUDOUN:  
Loudoun County Administrator  
1 Harrison St. SE  
Mail Stop #02  
Leesburg, VA 20175

Fax: 703-777-0325

With a copy to:  
Loudoun County Attorney  
1 Harrison St. SE  
Mail Stop #06  
Leesburg, VA 20175  
Fax: 703-771-5025

Article X. **Miscellaneous Provisions**

**Section 10.01**

This Agreement shall be binding on the parties, their respective agencies, employees, agents, and any successors-in-interest. No other party, including without limitation WMATA or the Contractor, has any rights under this Agreement as a third-party beneficiary.

**Section 10.02**

This Agreement may not be assigned by either party unless the parties mutually agree to such an assignment in writing. Airports Authority may delegate its rights and responsibilities hereunder to the Contractor, without relieving Airports Authority of its obligations.

**Section 10.03**

This Agreement shall become effective upon its execution by the parties, and shall remain in effect as long as Airports Authority is the Project sponsor until WMATA accepts all Project Facilities in Loudoun County into the ARS; provided, however, that the provisions of Article VII and Article VIII of this Agreement shall survive any termination or cessation of this Agreement.

**Section 10.04**

This agreement may be altered, amended, or revoked only by an instrument in writing signed by each party hereto. No waiver of any term, covenant, or condition of this Agreement shall be valid unless in writing and signed by the parties.

**Section 10.05**

Nothing in this Agreement limits the authority of Airports Authority, the Commonwealth, or

Loudoun to exercise its regulatory and police powers granted by law, including but not limited to their powers of condemnation with respect to all or any part of Project.

**Section 10.06**

This Agreement is intended by the parties to be construed as whole and indivisible and its meaning is to be ascertained from the entire instrument. All parts of the Agreement are to be given effect with equal dignity, including but not limited to the recitals at the beginning of this Agreement, and all such parts, including the recitals, are to be given full force and effect in construing this Agreement. No provision of any recital shall be construed as being controlled by or having less force than any other part of this Agreement because the provision is set forth in a recital.

**Section 10.07**

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one in the same Agreement.

**Section 10.08**

This Agreement shall be governed by the laws of the Commonwealth of Virginia. Any and all litigation relating to this Agreement may be brought and/or maintained only in a Virginia court of competent jurisdiction.

**Section 10.09**

This Agreement is not intended to amend the Funding Agreement or MOA.

**Section 10.10**

Nothing in this Agreement is intended to establish any duty or obligation from Loudoun to any contractor of the Airports Authority or any right of claim by such contractor against Loudoun.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first provided above.

**Metropolitan Washington Airports Authority**

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Print Title: \_\_\_\_\_

Date: \_\_\_\_\_

**County of Loudoun, Virginia**

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Print Title: \_\_\_\_\_

Date: \_\_\_\_\_

**Attachment A**

[Attach letter re resolution of outstanding PE Design comments]

**Attachment B**

[Attach copy of MWAA Board Dulles Corridor Enterprise Fund establishing resolution]



**Attachment C**

[Attach copy of proffers described in Section 4.02]

**Attachment D**

[Attach copy of standard right of entry form]



ATTACHMENT C

COOPERATIVE AGREEMENT WITH TRIP II

**COOPERATIVE AGREEMENT  
BETWEEN  
THE METROPOLITAN WASHINGTON AIRPORTS AUTHORITY  
AND  
TOLL ROAD INVESTORS PARTNERSHIP II, L.P.**

**Silver Line Phase 2**

**July \_\_, 2013**

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**Silver Line Phase 2**

**THIS COOPERATIVE AGREEMENT** (this “**Agreement**”) is made and entered into as of \_\_\_\_\_, 2013, by and between the METROPOLITAN WASHINGTON AIRPORTS AUTHORITY (“**MWAA**”) and TOLL ROAD INVESTORS PARTNERSHIP II, L.P., a Virginia limited partnership (“**TRIP II**”), with reference to the following recitals of fact.

RECITALS

A. TRIP II is the owner and operator of the privately-held limited-access toll highway known as the Dulles Greenway, a 14.1-mile extension of Virginia Route 267 from Virginia Route 28 to Leesburg, Virginia, under a Certificate of Authority issued by the Virginia State Corporation Commission and the Comprehensive Agreement dated September 27, 1993 between TRIP II and the Virginia Department of Transportation (as amended, the “**Comprehensive Agreement**”).

B. MWAA owns or leases certain properties in Fairfax and Loudoun County, Virginia, known as the Dulles Airport Access Road right-of-way and the Washington Dulles International Airport (the “**Airport**”).

C. The Dulles Greenway is located (i) on land owned in fee simple by TRIP II, (ii) on the Airport, by easement from MWAA, and (iii) across certain secondary roadway rights-of-way, by easements from the Virginia Department of Transportation (as hereinafter more particularly defined, the “**Dulles Greenway Right-of-Way**”).

D. MWAA is the developer of Phase 2 of the Silver Line Metrorail extension (as hereinafter more particularly defined, the “**Project**”) from the Phase 1 Silver Line terminus near Wiehle Avenue in Reston, Fairfax County, Virginia, to the planned Phase 2 terminus in Ashburn, Loudoun County, Virginia.

E. Consistent with the terms of the Comprehensive Agreement and other agreements governing the Dulles Greenway, a certain portion of the Project will be constructed within the Dulles Greenway Right-of-Way, within and outside of the Dulles Greenway median, and implementation of the Project will require certain temporary or permanent modifications to existing Dulles Greenway facilities.

F. Upon completion of the Project, MWAA intends to transfer the Silver Line property, facilities and systems to the Washington Metropolitan Area Transit Authority (“**WMATA**”) for operation and maintenance, upon acceptance by WMATA, as an integrated element of the adopted regional system for Metrorail in the Metropolitan Washington area.

G. In order to provide for cost-effective, timely implementation of the Project, and for the safety and convenience of the travelling public, MWAA and TRIP II desire to set forth their respective rights and obligations to one another with respect to Project coordination, design, construction and other components of Project implementation.

NOW THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, MWAA and TRIP II hereby agree as follows:

## **Article I. DEFINITIONS**

In addition to the terms defined in the foregoing recitals, the following capitalized terms have the following meanings:

**“Construction Plans”** has the meaning given in Section 4.04.

**“Contractor”** means, individually and collectively, any firm or firms engaged by MWAA to perform design, development, preliminary and final engineering, design-build, or construction work for the benefit of the Project, and includes any and all of their subcontractors, agents, and successors-in-interest.

**“Design-Build Contract”** means, individually and collectively, one or more design-build contracts for construction of the Project.

**“Dulles Greenway Right-of-Way”** means, collectively, the TRIP II Right-of-Way and the MWAA Easement Area.

**“Existing TRIP II Facilities”** means TRIP II-owned facilities and infrastructure that constitute the Dulles Greenway prior to commencement of Project implementation, including roadways, pavement markings, rights-of-way, traffic signals and associated equipment, highway signs, toll facilities, structures, drainage facilities and related facilities and improvement.

**“FHWA”** means the Federal Highway Administration.

**“FTA”** means the Federal Transit Administration.

**“Future Expansion”** has the meaning given in Section 4.02.

**“Legal Requirements”** means all requirements imposed by law, regulation, or ordinance, including without limitation all VDOT and FHWA regulations, the Code of the County of Loudoun, Virginia, as amended from time to time, the Zoning Ordinance of the County of Loudoun, Virginia, as amended from time to time, and including the highway design criteria and standards applicable to a National Highway Systems Route and building standards of Virginia Department of General Services.

**“Loudoun Facilities”** means all road and associated facilities such as guardrails, storm drains, and utility lines, that are part of the Project and are either owned by Loudoun County or planned to be conveyed to Loudoun County.

**“Maintenance Agreement”** has the meaning given in Section 7.12.

**“Median Reservation Area”** means the land area of the Dulles Greenway median, as delineated by the interior left-side westbound and eastbound shoulders of the Dulles Greenway in its configuration existing as of the date of this Agreement.

**“MOT Plan”** has the meaning given in Section 7.03.

**“MWAA Easement”** means the Deed of Easement to Toll Road Investors Partnership II, L.P., by and between MWAA and TRIP II, dated September 29, 1993, and recorded in Deed Book 1256 at Page 0386 among the land records of Loudoun County, as amended by that certain Amendment to Deed of Easement to Toll Road Investors Partnership II, L.P., dated September



16, 2004, and recorded among the land records of Loudoun County as Instrument No. 20050302-0022167.

**“MWAA Easement Area”** means the portion of the MWAA Property encumbered by the MWAA Easement.

**“MWAA Property”** means the real property that is owned by MWAA or by the United States of America and leased to MWAA, including the sites of the Washington Dulles International Airport, the Washington Dulles International Airport Access Highway, and the Dulles Toll Road.

**“MWAA TRCV Agreement”** means the “Agreement Between the Metropolitan Washington Airports Authority and the Toll Road Corporation of Virginia,” by and between MWAA and the Toll Road Corporation of Virginia, Inc., predecessor in interest to TRIP II, dated July 2, 1992, as modified by a certain Amendment by and between MWAA and TRIP II dated September 3, 2004.

**“New TRIP II Facilities”** means all facilities and infrastructure to be constructed or reconstructed as part of the Project that will be owned TRIP II and incorporated in the Dulles Greenway, including roadways, pavement markings, rights-of-way, traffic signals and associated equipment, highway signs, toll facilities, structures, drainage facilities, and related facilities and improvements. For example, a section of roadway shoulder that is rebuilt as part of the Project is a New TRIP II Facility.

**“Permit Fee”** has the meaning given in Section 5.03.

**“Preliminary Engineering Design”** means the 100% preliminary engineering design for the Project described in MWAA’s Final Request for Proposals No. 8-13-C001 for the award of the Design-Build Contract for the rail, stations, and related components of the Project.

**“Project”** means Phase 2 of the “Project” as defined in the Agreement to Fund the Capital Cost of Construction of Metrorail in the Dulles Corridor (including all Concurrent Non-Project Activities set forth in Exhibit A thereto entitled “Definition of the Dulles Corridor Metrorail Project”) dated July 19, 2007, entered into by Loudoun County, Fairfax County and MWAA.

**“Project Facilities”** means all road, rail transit and associated facilities, as well as ancillary facilities such as utility lines, substations, and storm water management facilities, designed for and constructed as part of the Project. The Project Facilities include the Loudoun Facilities, the VDOT Facilities, the Transit-Related Facilities, and the New TRIP II Facilities.

**“Rail Service Easement”** has the meaning given in Section 5.04.

**“Remediable Hazardous Substances”** has the meaning given in Section 2.08

**“Reimbursable Cost Budget”** has the meaning given in Section 8.03.

**“Transit Development Permit”** has the meaning given in Section 5.01.

**“Transit Permit Area”** means the area covered by the Rail Services Permit, as more particularly described on Exhibit E.

**“Transit-Related Facility”** means any facility, structure, or other physical element of the Project that will form a part of the Silver Line and be operated and maintained by WMATA,

including without limitation a dual carriage railway with an eastbound and a westbound track, six passenger stations, as well as ancillary facilities such as supporting structures, fences, duct banks, utility lines, traction power substations, pedestrian bridges, maintenance access points, WMATA communications and control lines and devices, and drainage and storm water facilities.

**“TRIP II Deed of Trust”** has the meaning given in Section 6.04.

**“TRIP II Lender”** has the meaning given in Section 6.04.

**“TRIP II Right-of-Way”** means, collectively, all real property owned in fee simple by TRIP II, excluding off-site wetlands mitigation parcels located in western Loudoun County, together with the VDOT Easement Property.

**“VDOT Easements”** means the permanent easements from VDOT, as grantor, to TRIP II, as grantee, providing for the construction, operation and maintenance of the Dulles Greenway across certain VDOT-owned secondary roadway rights-of-way crossing the Dulles Greenway.

**“VDOT Easement Property”** means the VDOT-owned land encumbered by the VDOT Easements.

**“VDOT Facilities”** means all secondary roads providing access to or crossing the Dulles Greenway, and associated facilities such as guardrails, storm drains, and utility lines, that are part of the Project and either owned by VDOT or planned to be conveyed to VDOT on completion.

#### **TABLE OF EXHIBITS**

<b>EXHIBIT A</b>	<b>TRIP II Preliminary Engineering Design Exceptions</b>
<b>EXHIBIT B</b>	<b>Storm Water Management Facilities</b>
<b>EXHIBIT C</b>	<b>Form of Transit Development Permit</b>
<b>EXHIBIT D</b>	<b>Form of Utility Permit</b>
<b>EXHIBIT E</b>	<b>Transit Permit Area</b>
<b>EXHIBIT F</b>	<b>Reimbursable Cost Budget</b>

## **Article II. PROJECT IMPLEMENTATION**

### **Section 2.01 MWAA Role in Project Implementation**

MWAA is responsible for the financing and construction of the Project. Construction of the Project to completion and acceptance by WMATA will be pursuant to and in accordance with the Design-Build Contract. Upon completion of the Project, MWAA intends to transfer the Transit-Related Facilities, the Loudoun Facilities, the VDOT Facilities and the New TRIP II Facilities to WMATA, Loudoun County, VDOT and TRIP II, respectively.

### **Section 2.02 Use of Dulles Greenway Right-of-Way**

Use of the Dulles Greenway Right-of-Way and construction within its limits is controlled by TRIP II, subject, however, to certain rights reserved to MWAA, VDOT or their respective designees under the MWAA Easement, the MWAA TRCV Agreement and the Comprehensive Agreement, including, among others, rights pertaining to the development and operation of

rail transit within the Dulles Greenway median.

**Section 2.03 TRIP II Cooperation**

TRIP II hereby reaffirms its obligations to MWAA under the MWAA TRCV Agreement with respect to cooperating in and generally facilitating the construction and operation of rail services within the Dulles Greenway Right-of-Way.

**Section 2.04 TRIP II Role in Project Implementation**

TRIP II will grant rights of ingress to and egress from, over, under and across the Dulles Greenway Right-of-Way, to the extent reasonably required for implementation of the Project and operation of the Transit-Related Facilities, on and subject to the terms and provisions of the Transit Development Permits, Utility Permits, Rail Service Permits, Maintenance Agreement and other instruments or agreements to be issued or entered into by TRIP II in implementation of this Agreement. In addition, TRIP II will participate in the design-build activities of the Project as they relate to TRIP II Facilities, including, among others, fulfilling TRIP II's responsibilities under this Agreement with respect to project coordination, review and approval of design and construction plans, and inspection of TRIP II Facilities, all as more particularly described in this Agreement below.

**Section 2.05 TRIP II Reserved Access Rights**

Rights of ingress, egress, or access within the Transit Permit Area to be reserved to or by TRIP II for operation, maintenance, repair and Future Expansion of the Dulles Greenway, from and after commencement of Project construction, will be confirmed by TRIP II and MWAA during the review and approval of design and construction plans under this Agreement and will be memorialized in the relevant Transit Development Permit, Rail Service Easement, or Maintenance Agreement, as applicable. Upon final acceptance of the Transit-Related Facilities by WMATA, the exercise by TRIP II of its reserved rights of ingress, egress and access within the Transit Permit Area will thereafter be subject to applicable policies and procedures established by WMATA from time to time.

**Section 2.06 TRIP II Financing Requirements**

Without limiting the generality of the provision for further assurances set forth in Article XI, promptly following the execution of this Agreement, TRIP II will use commercially reasonable efforts to obtain from the TRIP II Lender written confirmation, in form and substance satisfactory to MWAA in its reasonable discretion, that (i) TRIP II has authority to issue the Transit Development Permit and the Rail Service Easement under the instruments and agreements evidencing or securing the bond financing secured by the Dulles Greenway Right-of-Way and (ii) such Permit and Easement when issued will not be subordinate to the lien of the TRIP II Deed of Trust.

**Section 2.07 Legal Compliance**

MWAA is responsible for compliance with all Legal Requirements applicable to the Project from the start of work until final acceptance of all Project Facilities by WMATA, VDOT, TRIP II or Loudoun County, as applicable. For all purposes under this Agreement, TRIP II acceptance of any given New TRIP II Facility is subject to, and will not be deemed to have occurred prior to,

TRIP II's receipt of a notice of acceptance from VDOT with respect to such New TRIP II Facility.

#### **Section 2.08 Hazardous Materials**

- (a) MWAA is responsible for and shall direct all activities associated with the containment, management, mitigation and remediation ("**CMMR**") of any and all hazardous substances discovered within or adjacent to the Transit Permit Area in the course of Project implementation ("**Remediable Hazardous Substances**"). MWAA shall contract directly with a VDOT-approved firm for CMMR services and shall ensure that such services are provided in compliance with all applicable VDOT policies and procedures. Subject to the limitation set forth in Section 2.08(b), the costs and expenses of CMMR for Remediable Hazardous Substances are Project costs to be borne by MWAA or its Contractor, as applicable.
- (b) Notwithstanding anything foregoing to the contrary, for Remediable Hazardous Substances discovered within the TRIP II Right-of-Way, MWAA is responsible only for CMMR of those Remediable Hazardous Substances introduced to or discharged within the TRIP II Right-of-Way by MWAA or its Contractor or any of their respective agents, employees or contractors in the course of Project implementation.

#### **Section 2.09 Project Costs**

- (a) MWAA is responsible for payment of all Project costs including, among others, payment to TRIP II of costs and expenses incurred by TRIP II in fulfillment of its obligations hereunder, as and to the extent expressly provided under this Agreement, subject to and in accordance with the provisions of Section 8.03 for the Reimbursable Cost Budget.
- (b) TRIP II acknowledges that pursuant to the Design-Build Contract, the Contractor will assume responsibility, as between MWAA and the Contractor, for certain Project costs, including certain payments to TRIP II. MWAA hereby expressly confirms that, notwithstanding any allocation of responsibility for Project costs established under the Design-Build Contract, MWAA retains primary liability for payment of amounts due to TRIP II under this Agreement or due from MWAA under any other agreement or instrument executed by TRIP II and MWAA in fulfillment of this Agreement.

### **Article III. PROJECT COORDINATION**

#### **Section 3.01 Dulles Greenway As-Built Plans**

On or before the date of this Agreement, TRIP II has provided MWAA with copies of certain as-built plans for the Dulles Greenway as requested from time to time by or on behalf of MWAA. Upon reasonable prior request, TRIP II will promptly provide copies of as-built plans to MWAA or its designee. The reasonable costs and expenses of reproduction and delivery of as-built plans are Project cost reimbursable to TRIP II, subject to and in accordance with the provisions of Section 8.03 for the Reimbursable Cost Budget.

### **Section 3.02 TRIP II Project Coordinator**

- (a) Upon 30 days' prior written notice from MWAA, TRIP II will assign a project coordinator to serve as the point of contact for and otherwise represent TRIP II in implementation of the Project and fulfillment of TRIP II's obligations under this Agreement. The TRIP II project coordinator will attend Project meetings, manage TRIP II's Project-related communications with VDOT, MWAA and its Contractor, and have day-to-day responsibility for TRIP II activities with respect to the Project. TRIP II will maintain the project coordinator position until final inspection and acceptance of the New TRIP II Facilities.
- (b) The costs and expenses incurred by TRIP II in establishing and maintaining the TRIP II project coordinator position, including allocable salary and benefits, are Project costs reimbursable to TRIP II. For purposes of this paragraph, "allocable salary and benefits" means an amount equal to (i) the TRIP II project coordinator's fully burdened hourly rate, including overhead and fringe benefits, multiplied by (ii) the actual number of hours the project coordinator performs his or her services under this Agreement.

### **Section 3.03 Regulatory Permits and Legal Requirements**

- (a) Where regulatory permits or other Legal Requirements require the consent of TRIP II in its capacity as owner or operator of the Dulles Greenway, including by way of example any approval required by VDOT or the FHWA, TRIP II will timely review and execute all regulatory permit applications and provide any other assistance reasonably required to obtain such regulatory permits or satisfy such Legal Requirements.
- (b) TRIP II's obligation to execute regulatory permit applications or to take other actions binding on TRIP II or the Dulles Greenway in satisfaction of Legal Requirements applicable to the Project is expressly subject to the condition that the undertaking or activity made or authorized by TRIP II under the regulatory permit is (i) acceptable to VDOT, in form and substance, (ii) in conformance with Construction Plans approved by TRIP II, where such approval is required under this Agreement, and (iii) consistent with and does not impose on TRIP II, directly or indirectly, obligations greater than or beyond the scope of obligations undertaken by TRIP II in the applicable Transit Development Permit, Utility Permit, Rail Service Easement or other instrument or agreement contemplated by this Agreement.
- (c) MWAA is responsible for the preparation of all regulatory permit applications and related documentation. The reasonable costs and expenses incurred by TRIP II in the review and execution of such permit applications and otherwise in providing other assistance contemplated by this Section 3.03 are Project costs reimbursable to TRIP II, subject to and in accordance with the provisions of Section 8.03 for the Reimbursable Cost Budget.

#### **Section 3.04 Dulles Greenway Construction-Period Operations, Maintenance and Improvements**

- (a) During Project construction, TRIP II will use commercially reasonable efforts to conduct Dulles Greenway operation, maintenance and repair activities within the Dulles Greenway Right-of-Way on a schedule and in a manner that avoids interference with or delay of any Project-related activity authorized under a Transit Development Permit or Utility Permit.
- (b) In circumstances where a Dulles Greenway maintenance or repair project would be reasonably anticipated to materially affect the cost or schedule of Project implementation, including, by way of example, resurfacing of Dulles Greenway travel lanes, TRIP II will notify MWAA and its Contractor in writing no later than 90 days prior to the proposed commencement of work setting forth in reasonable detail the nature, purpose and timing of the proposed project. MWAA and TRIP II will cooperate in good faith to coordinate the respective Project and Dulles Greenway activities so as to avoid material delay or material increases in the cost of the Project or of the Dulles Greenway maintenance or repair activity.

#### **Section 3.05 Deferral of TRIP II Capital Projects**

Except for those capital improvements contemplated by the Project, TRIP II does not anticipate undertaking any roadway, bridge or interchange expansion or other major Dulles Greenway capital project prior to the Project's estimated completion date in 2018. If due to Project delay or for any other reason TRIP II wishes to initiate construction of a major Dulles Greenway capital project prior to Project completion, TRIP II will notify MWAA accordingly. MWAA and TRIP II will cooperate in good faith to determine the potential impact of the Dulles Greenway capital project on Project costs and schedule. Where MWAA determines in its reasonable judgment that the capital project proposed by TRIP II cannot reasonably be accommodated without material delay in the Project schedule or a material increase in Project costs, TRIP II will defer such work for the period reasonably determined by MWAA as necessary to avoid such cost or delay.

### **Article IV. PROJECT DESIGN AND PLAN DEVELOPMENT**

#### **Section 4.01 Preliminary Engineering Design**

TRIP II hereby approves the Preliminary Engineering Design, subject only to those matters addressed in correspondence attached hereto at Exhibit A.

#### **Section 4.02 Future Dulles Greenway Expansion**

- (a) The location and configuration of Project Facilities shown in the Preliminary Engineering Design, including, among other things, all Transit-Related Facilities within or adjacent to the Dulles Greenway Right-of-Way, anticipate future expansion of the Dulles Greenway to up to a ten-lane configuration (*i.e.*, five westbound travel lanes and five eastbound travel lanes) without material modification of any such Transit-Related Facilities. Unless expressly provided otherwise, all references in this Agreement to the Dulles Greenway's "**Future Expansion**" refer to the addition of travel lanes up to but not more than a ten-lane

configuration.

- (b) For purposes of clarity, TRIP II hereby confirms that MWAA has no obligation, in its design and implementation of the Project, to accommodate an expansion of the Dulles Greenway beyond a ten-lane configuration, whether through design, right-of-way acquisition or otherwise. Notwithstanding that the Preliminary Engineering Design accommodates Future Expansion of the Dulles Greenway, (i) except as provided in Section 4.03 with respect to shared-use storm water management facilities, MWAA has no obligation to extend utility casings, construct retaining walls or construct or install any other improvements on TRIP II's behalf in anticipation of an expansion of the Dulles Greenway beyond the existing six-lane configuration reflected in the Preliminary Engineering Design and (ii) TRIP II acknowledges that minor modifications to Transit-Related Facilities such as, by way of example, minor modifications required for extension of utility casings, will be undertaken by TRIP II, at TRIP II's expense in the event of any future expansion.

#### **Section 4.03 Shared-Use Storm Water Management Facilities**

Anything foregoing to the contrary notwithstanding, MWAA will design and construct, as a cost of the Project, certain storm water management facilities, as identified on Exhibit B, that are required for development and operation of the Project but intended to serve both the Transit-Related Facilities and the Dulles Greenway, to a capacity and other specifications sufficient to accommodate an expansion of the portions of the Dulles Greenway served by such stormwater management facilities to eight lanes. In consideration of MWAA's (i) construction of expanded storm water management facilities, which are deemed New TRIP II Facilities for all purposes under this Agreement and, (ii) to the extent such facilities are not located on land held by TRIP II in fee simple or by easement, obtaining customary storm drainage easements for the benefit of TRIP II sufficient for TRIP II's intended use and maintenance of the facilities in accordance with Section 6.01(b) below, TRIP II will assume perpetual maintenance of such facilities, at TRIP II's sole cost and expense, upon completion of construction, final inspection and acceptance of such facilities for maintenance. The foregoing maintenance covenant will be memorialized in the Maintenance Agreement, on customary terms otherwise reasonably acceptable to TRIP II and WMATA.

#### **Section 4.04 Development of Construction Plans**

MWAA is responsible for the development of detailed construction plans based on the Preliminary Engineering Design, including associated MOT Plans, for construction of the Project within or adjacent to the Dulles Greenway Right-of-Way or any Existing TRIP II Facilities (the "**Construction Plans**"). Development of Construction Plans will be undertaken by the Contractor pursuant to the Design-Build Contract. Upon reasonable prior notice from MWAA or its Contractor, TRIP II will participate in meetings and work sessions involving the development of the Construction Plans and any modifications thereof. Neither MWAA's election to notify or not notify TRIP II of such meetings or work sessions, nor TRIP II's participation or non-participation in such meetings or work sessions, will be construed as expanding, limiting, waiving or otherwise affecting the express rights and responsibilities of TRIP II under this Agreement with respect to review and approval of Construction Plans.

#### **Section 4.05 Status Update; Notice of Proposed Changes**

MWAA or its Contractor will keep TRIP II informed no less frequently than bi-weekly, by written notice or by electronic access to a shared database to be developed for review, comment and approval of Project plans by applicable stakeholders, of the schedule and status of Construction Plans in development. Without limiting the generality of the foregoing, MWAA or its Contractor shall notify TRIP II in writing or by e-mail , with receipt confirmed, of (i) proposed modifications to plans for any TRIP II Facilities or (ii) proposed deviations from the Preliminary Engineering Design for Project Facilities or other Construction Plan components subject to TRIP II review and approval under this Agreement, if and to the extent such proposed modifications or deviations are not reasonably apparent in the document update and notification protocol established for the shared database.

#### **Section 4.06 Project Phasing**

To the extent practical without delaying completion of the Project, the Construction Plans will provide for construction of realigned or relocated Dulles Greenway travel lanes sufficiently in advance of other Project Facilities in the vicinity in order to avoid, with respect to any three-lane roadway section, the simultaneous elimination or material reduction of left and right shoulder areas or any other construction-related activity or condition that would materially and adversely impact traffic flow or capacity.

#### **Section 4.07 Design Compliance with Legal Requirements**

The Construction Plans and the Project Facilities and other Project components shown thereon must meet all Legal Requirements. In addition, for the specific purpose of TRIP II compliance with the Comprehensive Agreement, VDOT approval must be obtained for all plans and other engineering for New TRIP II Facilities or any modification of Existing TRIP II Facilities. Updates or other material changes in Legal Requirements or other standards or requirements applicable to the Project that are adopted after completion of a significant portion of final design or the commencement of construction of a facility will be evaluated for appropriate application to the Project by TRIP II, VDOT and MWAA.

#### **Section 4.08 Design Standards for TRIP II Facilities**

Design and construction for all New TRIP II Facilities will comply with all applicable VDOT and FHWA standards and requirements. In particular, any signage, lighting, structures, pavement marking and barricades installed as part of the New TRIP II Facilities or any modification of Existing TRIP II Facilities, whether on a temporary or permanent basis, or in implementation of any MOT Plan, will comply with, among other among other applicable standards and requirements, (i) the Manual on Uniform Traffic Control Devices (MUTCD), (ii) Virginia Work Area Protection Manual, (iii) VDOT Northern Virginia District Traffic Engineering Design Guidelines for Traffic Control Devices, (iv) VDOT Road and Bridge Specifications and (v) VDOT Road and Bridge Standards.

#### **Section 4.09 TRIP II Review and Approval of Construction Plans**

- (a) MWAA will submit to TRIP II and VDOT concurrently Construction Plans for (i) all TRIP II Facilities and (ii) any Project Facilities, including Transit-Related Facilities,



within or immediately adjacent to the Dulles Greenway Right-of-Way.

- (b) All Construction Plans for New TRIP II Facilities or for modification of Existing TRIP II Facilities, whether conforming to or deviating from the Preliminary Engineering Design, are subject to review and approval by TRIP II, which approval will not be unreasonably withheld.
- (c) Subject to the qualification set forth in Section 4.09(d), Construction Plans for Project Facilities, other than TRIP II Facilities, within or immediately adjacent to the Dulles Greenway Right-of-Way will be submitted to TRIP II for informational purposes only, and are not subject to TRIP II approval, provided that such Construction Plans and the Facilities addressed thereon (i) are not subject to VDOT approval, (ii) do not materially deviate from the Preliminary Engineering Design or from any subsequent plan, specification or drawing duly approved by TRIP II and (iii) comply with all Legal Requirements.
- (d) Notwithstanding anything set forth in this Agreement to the contrary, TRIP II is entitled to review, and is under no obligation to approve, any Project Facility or other Construction Plan component that materially differs from that shown on the Preliminary Engineering Design and that:
  - (i) unless authorized under an MOT Plan, as described in Section 7.03, incorporated in a Transit Development Permit approved by TRIP II, reduces or impairs Dulles Greenway traffic flow or capacity, or accessibility to or from secondary roadways, on a temporary or permanent basis, whether through lane closure, reduction of sight-distance, elimination of shoulder areas, erection of barriers immediately adjacent to travel lanes or otherwise; or
  - (ii) subject to the provisions of Section 4.02(b) for minor modifications to Transit-Related Facilities, requires the future relocation or reconstruction of Transit-Related Facilities in order to accommodate Future Expansion of the Dulles Greenway.
- (e) Further notwithstanding anything set forth in this Agreement to the contrary, TRIP II is entitled to review, is under no obligation to approve, and will in no event be deemed to have approved under Section 4.10, any Project Facility or other Construction Plan component that materially differs from that shown on the Preliminary Engineering Design and that materially and adversely impacts the function, operation and maintenance of the Dulles Greenway in its existing configuration or following any Future Expansion.

#### **Section 4.10 Deadline for TRIP II Approval**

Within 21 days after receipt of any Construction Plan or component thereof subject to TRIP II approval under this Agreement, TRIP II will notify MWAA, by written notice or by notification properly given via the electronic shared database, of (i) TRIP II's approval of the submission or (ii) any TRIP II objections to the submission stating the basis for the objections in reasonable

detail. If TRIP II fails to timely approve any submission or to otherwise respond in writing stating the basis for disapproval, such submission will be deemed approved, provided that the submission prominently set forth the relevant deadline for response and stated that, in accordance with this Agreement, failure to timely respond would constitute approval.

#### **Section 4.11 VDOT Approval Required**

Notwithstanding anything set forth in this Agreement to the contrary, approval by TRIP II of any Construction Plan or component thereof under this Agreement is conditioned on and subject to VDOT approval of the same. The foregoing condition will not be construed as affecting TRIP II's obligations with respect to review, comment submission or approval of Construction Plans under Section 4.10, provided that MWAA will make reasonable accommodation for any revision of TRIP II approval terms proposed by TRIP II to accommodate or conform with the applicable VDOT comments or requirements.

### **Article V. PROJECT DEVELOPMENT AND TRANSIT PERMITS**

#### **Section 5.01 Transit Development Permits**

- (a) TRIP II will issue to MWAA one or more land use permits in the form of "Application and Agreement" attached to this Agreement as Exhibit C (a "**Transit Development Permit**") for implementation of the Project within the Dulles Greenway Right-of-Way. Each Transit Development Permit will terminate upon (i) acceptance of the applicable Project Facilities for maintenance by WMATA, VDOT, Loudoun County or TRIP II, as the case may be, (ii) conveyance of the Transit-Related Facilities to WMATA and (iii) execution of the Maintenance Agreement. Transit Development Permits will be issued to MWAA as "Applicant," with Contractor named as "Agent," within 60 days after (x) TRIP II receipt of a completed Application and Agreement accompanied by all Construction Plans and other documentation identified in such Application and Agreement and (y) payment of the requisite Permit Fee.
- (b) The issuance by TRIP II of a Transit Development Permit or any modification thereof is conditioned upon TRIP II's review and approval of any Construction Plans identified in such Permit, as and to the extent of TRIP II's approval rights described in Section 4.09 of this Agreement. MWAA or its Contractor will deliver to TRIP II, or provide electronic access to TRIP II via the shared Project database, to review sets of Construction Plans for TRIP II Facilities and other relevant Project Facilities from time to time in advance of the application for the relevant Transit Development Permit.

#### **Section 5.02 Utility Permits**

As and to the extent relocation of existing utilities or installation of new utility facilities are required within the Dulles Greenway Right-of-Way in connection with the Project, TRIP II will issue to public utilities and governmental or quasi-governmental utilities land use permits, of temporary or permanent duration, as applicable, in the forms of "Application and Agreement" attached to this Agreement as Exhibit D (a "**Utility Permit**") providing for the installation,

maintenance and operation of lines, conduits and other facilities for the transmission of electricity, natural gas, water, sanitary sewer and the like within the Dulles Greenway Right-of-Way. Utility Permits will be issued to the respective public service company or governmental authority as “Applicant,” with Contractor named as “Agent,” within 30 days after (i) TRIP II receipt of a completed Application and Agreement accompanied by all plans, specifications and other documentation identified in such Application and Agreement and (ii) payment of the requisite Permit Fee.

### **Section 5.03 Transit Development and Utility Permit Fees**

Issuance of any Transit Development Permit or Utility Permit is subject to payment of an administrative fee (a “**Permit Fee**”), as determined by TRIP II from time to time in its reasonable discretion prior to issuance of the relevant Permit, in an amount equal to the estimated costs and expenses incurred by TRIP II, and not otherwise reimbursed by MWAA, in the review, approval and processing of the Permits including (i) allocable TRIP II personnel and overhead expenses, (ii) legal, engineering and other consultants’ fees paid by TRIP II and (iii) out-of-pocket expenses actually incurred. TRIP II is not otherwise entitled to compensation for the initial issuance of a Transit Development Permit or Utility Permit, it being understood and acknowledged that all costs otherwise reimbursable to TRIP II as Project costs with respect to any given Permit are reflected in the respective Permit Fee. Subsequent to initial issuance of a given Transit Development or Utility Permit, the reasonable costs and expenses incurred by TRIP II in modification or enforcement of a Permit are Project costs reimbursable to TRIP II by the Permit applicant, subject to and in accordance with the provisions of Section 8.03 for the Reimbursable Cost Budget.

### **Section 5.04 Rail Service Easement within TRIP II Right-of-Way**

Concurrently with the transfer of the Transit-Related Facilities to WMATA, TRIP II will grant to WMATA permanent occupancy rights or easements over the portion of the Transit Permit Area located within the TRIP II Right-of-Way (the “**Rail Service Easement**”) providing for the operation, maintenance and repair of the Transit-Related Facilities, in substantially the same form, and on substantially the same terms, as occupancy rights or easements to be granted by VDOT to WMATA for transit facilities operating in the median of State Route 7 and State Route 123 in Tysons Corner, Virginia, and otherwise in form and substance satisfactory to TRIP II, VDOT and WMATA. The costs and expenses incurred by TRIP II in consummating the issuing the Rail Service Easement, including, among others the fees and expenses of obtaining the approval by the TRIP II Lender as to the form and substance of the applicable conveyance instruments and making requisite modifications to the TRIP II Deed of Trust and title insurance policies, are Project costs reimbursable to TRIP II, subject to and in accordance with the provisions of Section 8.03 for the Reimbursable Cost Budget.

### **Section 5.05 Rail Service Easement on MWAA Property**

MWAA has primary responsibility for issuance of a Rail Service Easement over the portion of the Transit Permit Area located within the MWAA Easement Area; provided, however, that TRIP II will execute such instruments and agreements reasonably required by MWAA, at no expense to TRIP II, to establish permanent occupancy rights for Transit-Related Facilities, to

the extent not in derogation of TRIP II's remaining rights under the MWAA Easement.

**Article VI. PROPERTY AND RIGHT-OF-WAY MODIFICATION**

**Section 6.01 Right-of-Way Additions Outside of MWAA Property**

- (a) Where implementation of the Project outside of the MWAA Property requires (i) the location of New TRIP II Facilities outside of the TRIP II Right-of-Way or (ii) the temporary use by TRIP II of areas outside of the TRIP II Right-of-Way for purposes of Dulles Greenway operation and maintenance, MWAA or its Contractor will obtain, on behalf of and in the name of TRIP II except as otherwise provided in Section 6.01(b), in fee simple by Special Warranty Deed or by easement, as the case may be, such additional right-of-way or easement interests as are sufficient to meet TRIP II right-of-way obligations under the Comprehensive Agreement. Each such conveyance will be made subject to the approval of VDOT's Right-of-Way Division, at no expense to TRIP II and on substantially the same terms and deed forms previously agreed upon by TRIP II and VDOT for the original acquisition of and subsequent modifications to the TRIP II Right-of-Way.
- (b) If MWAA reasonably determines that the acquisition of right-of-way in fee simple or by easement, for New TRIP II Facilities or for temporary use by TRIP II in fulfillment of Section 6.01(a), is more cost-effective or timely if such property interest is acquired by or in the name of VDOT, including, by way of example, for the shared-use storm water management facilities described in Section 4.03 or any right-of-way expansion required for relocation of Dulles Greenway travel lanes proximate to transit station locations, MWAA is entitled to do so, provided that in a concurrent transaction TRIP II obtains permanent transportation, storm drainage or other easements for the benefit of TRIP II on substantially the same terms and deed forms previously agreed upon by TRIP II and VDOT for the original acquisition of and subsequent modifications to the TRIP II Right-of-Way.

**Section 6.02 Right-of-Way and Easement Conveyance to VDOT**

Where the Project requires relocation or expansion within the TRIP II Right-of-Way of a VDOT secondary roadway or other VDOT-owned facility, TRIP II will convey such right-of-way to VDOT in fee simple or by easement, subject where applicable to a permanent transportation easement for the benefit of TRIP II for purposes of construction, operation and maintenance of the Dulles Greenway in its existing and future configuration. Each such conveyance will be made subject to the approval of VDOT's Right-of-Way Division, at no expense to TRIP II and on substantially the same terms and deed forms previously agreed upon by TRIP II and VDOT for the relocation or expansion of VDOT secondary roadways crossing the Dulles Greenway.

**Section 6.03 Additions to MWAA Easement**

- (a) Where implementation of the Project within the MWAA Property requires the permanent location of New TRIP II Facilities within the MWAA Property but outside of the MWAA Easement Area, MWAA and TRIP II will execute an amendment to the MWAA Easement providing for such additional easement interests as are sufficient to meet TRIP II right-of-

way obligations under the Comprehensive Agreement. Such amendment will be made subject to the approval of VDOT's Right-of-Way Division, at no expense to TRIP II and on substantially the same terms and deed forms previously agreed upon by MWAA, TRIP II and VDOT in connection with TRIP II's original acquisition of and subsequent modifications to the MWAA Easement.

- (b) Where implementation of the Project within the MWAA Property requires the temporary use by TRIP II of areas within the MWAA Property but outside of the MWAA Easement Area, for purposes of Dulles Greenway operation and maintenance during Project implementation, MWAA will permit such use by license, temporary easement or other instrument sufficient to meet TRIP II operational obligations under the Comprehensive Agreement, at no expense to TRIP II and otherwise in form and substance satisfactory to MWAA, TRIP II and VDOT.

#### **Section 6.04 Compliance with TRIP II Bond Financing Requirements**

TRIP II hereby confirms that all additions to, transfers from, permanent encumbrances of or other modifications to the Dulles Greenway Right-of-Way, including any conveyance or acquisition in fee simple or by easement, any modification of the MWAA Easement or any grant of permanent occupancy rights over land held by TRIP II in fee simple (collectively, the **"Collateral Modifications"**) are subject to approval of the Indenture Trustee and the Bond Insurer (collectively, the **"TRIP II Lender"**) pursuant to the instruments and agreements evidencing or securing the bond financing secured by the Dulles Greenway Right-of-Way, and require (i) amendment of the deed of trust encumbering the Dulles Greenway (the **"TRIP II Deed of Trust"**), for purposes of subjecting the additional property to the lien of the TRIP II Deed of Trust or, alternatively, releasing property transferred from the lien of the TRIP II Deed of Trust and (ii) an endorsement to the lender's and owner's policies of title insurance to reflect such addition, transfer or other modification. The reasonable costs and expenses incurred by TRIP II to satisfy these TRIP II Lender requirements as to Collateral Modifications are Project costs reimbursable to TRIP II, subject to and in accordance with the provisions of Section 8.03 for the Reimbursable Cost Budget.

#### **Section 6.05 Conveyance Plats and Other Engineering for Conveyances**

Easement, subdivision or other plats and engineering work required to effect the right-of-way and easement conveyances contemplated by this Agreement will be prepared and processed for governmental approval by or on behalf of MWAA or its Contractor, at no cost or expense to TRIP II, and submitted to TRIP II for review and approval concurrently with and as a component of the applicable Construction Plan submission.

#### **Section 6.06 Fair-Market Compensation for TRIP II Right-of-Way**

TRIP II is entitled to compensation at fair-market value for any interest in the TRIP II Right-of-Way outside of the Median Reservation Area that TRIP II conveys to MWAA, WMATA or, at the request or with the express consent of MWAA, any other third party in fulfillment of TRIP II's obligations under this Agreement, whether in fee simple or by Rail Service Easement or other permanent easement, expressly including areas occupied by traction power stations located outside of the Median Reservation Area, but expressly excluding (i) areas encumbered by the

Rail Service Easement for purposes of overhead pedestrian bridges and passageways, or by Utility Permits for underground utility lines serving the Transit Facilities, that do not materially affect the operation, maintenance, repair or Future Expansion of the Dulles Greenway, and (ii) areas used for shared-use storm water management facilities to be maintained by TRIP II upon Project completion pursuant to Section 4.03. The foregoing notwithstanding, TRIP II is not entitled to compensation for conveyance to VDOT of fee-simple or easement interests in the TRIP II Right-of-Way required, in implementation of the Project, for relocation or expansion of a VDOT secondary roadway or other VDOT-owned facility, except for reimbursement by MWAA to TRIP II, as Project costs, of the costs and expenses incurred to complete such transaction, secure and document TRIP II Lender approval, and make requisite modifications to the TRIP II Deed of Trust and title insurance policies, subject to and in accordance with the provisions of Section 8.03 for the Reimbursable Cost Budget.

**Section 6.07 Compensation for TRIP II Personal Property**

As provided in Section 7.09 of this Agreement, guardrails, signage, lighting and other Dulles Greenway personal property dismantled or removed during Project construction remain the property of TRIP II. If any such property is removed and not timely returned to the custody of TRIP II, then MWAA will pay TRIP II the fair-market value of such property upon presentation of an invoice in accordance with this Agreement

**Section 6.08 MWAA Easement Area**

TRIP II is not entitled to compensation under this Agreement for use of any portion of the MWAA Easement Area in implementation of the Project and operation of the Transit-Related Facilities, subject to the replacement, restoration or relocation of TRIP II Facilities in accordance with approved Construction Plans and other provisions of this Agreement; provided, however, that all reasonable costs and expenses incurred by TRIP II in the review and execution of instruments and agreements reasonably required by MWAA to confirm or establish permanent occupancy rights for Transit-Related Facilities are Project costs reimbursable to TRIP II, subject to and in accordance with the provisions of Section 8.03 for the Reimbursable Cost Budget.

**Article VII. CONSTRUCTION AND FINAL ACCEPTANCE**

**Section 7.01 Contractor's Temporary Staging or Storage Area.**

TRIP II will consider, upon reasonable prior written notice, requests by MWAA or its Contractor for use, for construction staging or storage purposes, of areas within the TRIP II Right-of-Way outside of the Median Reservation Area, to be authorized by TRIP II, in its sole discretion, subject to execution of a license agreement on TRIP II's customary form and payment by MWAA or its Contractor, as applicable, of a license fee to be established by TRIP II in its sole discretion.

**Section 7.02 Quality Assurance Program**

- (a) With respect to the construction of the Project, MWAA's Contractor will implement a quality assurance program meeting all FTA and VDOT requirements. With respect to the construction of New TRIP II Facilities or modification of Existing

TRIP II Facilities, MWAA will require the Contractor to be responsible for the inspection and testing of the materials and methods used in construction to assure compliance with VDOT specifications and standards and applicable requirements of the Comprehensive Agreement.

- (b) MWAA's Contractor will engage (i) inspectors assigned to the Contractor's quality assurance organization and independent of the Contractor's construction organization, or inspectors from a third-party inspection firm that report to the Contractor's quality assurance organization, and (ii) an accredited third-party materials testing firm, also reporting to the Contractor's quality assurance organization, to conduct testing.
- (c) All personnel conducting inspections and tests on TRIP II Facilities will be VDOT-certified (or equivalent) in the required areas. In addition, MWAA will engage qualified personnel, independent of the Contractor's construction management team, with the expertise necessary to provide oversight of the inspection and testing program, including audits, surveillances, and representative samplings of materials necessary to insure the integrity of TRIP II Facilities. The MWAA-engaged personnel will conduct sufficient oversight and sample testing to ensure compliance with the provisions of this Section.
- (d) Promptly following completion of any inspection, test or other evaluation of or pertaining to any TRIP II Facility, MWAA will provide copies of all written results, reports and other documentation to TRIP II and to VDOT.

### **Section 7.03 Maintenance of Traffic**

- (a) Concurrently with development of the applicable Construction Plans, MWAA will prepare (or ensure that its Contractor prepares) a plan for the maintenance of traffic (each an "**MOT Plan**") in the vicinity of each Project work site. MOT Plans will be submitted with and constitute a part of the Transit Development Permits to be issued by TRIP II under this Agreement. Each MOT Plan will show how traffic will be controlled on affected roadway at relevant times during Project construction, as well as construction phasing, lane closings, detour routes and signs, traffic signal modifications and other pertinent information relating to traffic maintenance.
- (b) Without limiting the generality of the foregoing, lane closings will be governed by the terms of the relevant Transit Development Permit, including the "Special Provisions" attached to and incorporated in the form of Transit Development Permit attached to this Agreement at Exhibit C. Any special TRIP II requirements for lane closings (*i.e.*, in addition to the requirements set forth in the Transit Development Permit's Special Provisions) will be no more stringent than VDOT requirements applicable to comparable activities affecting VDOT-operated limited-access toll highways. TRIP II approval of MOT Plans developed in conformance with such Special Provisions and otherwise meeting the requirements of this Agreement will not be unreasonably withheld.

#### **Section 7.04 Supplemental Patrol Services**

By contract with TRIP II, the Virginia State Police provides public safety and patrol services for the Dulles Greenway. TRIP II is entitled to engage supplemental State Police services if at any time during Project construction TRIP II determines, in its reasonable discretion, that additional State Police personnel are required to maintain acceptable safety levels due to Project activities, whether under emergency circumstances directly attributable to the Project activities, in implementation of an approved MOT Plan or under any other circumstance where travel conditions attributable to Project activities present heightened risk of property damage or injury to the travelling public. The costs and expenses incurred by TRIP II for such supplemental State Police services are Project costs reimbursable to TRIP II.

#### **Section 7.05 Work-Hour Restrictions**

MWAA hereby acknowledges and reaffirms the work-hour restrictions established under the Special Provisions of the Transit Development Permit, including certain provisions for penalties which, if incurred as a result of a violation a work-hour restriction (*e.g.*, for any lane closure, work that restricts traffic flow, or other failure to restore all traffic lanes, beyond the time periods indicated), would be payable by MWAA as the permittee under the Transit Development Permit. Nothing set forth in the foregoing sentence is to be construed as affecting in any way the responsibility of the Contractor to MWAA under the Design-Build Contract for compliance with the Transit Development Permit or the Contractor's liability to MWAA for penalties incurred.

#### **Section 7.06 Complete Closure of Travel Lanes**

TRIP II will authorize complete closure of the Dulles Greenway under a proposed MOT Plan only during the hours of 12:00 AM and 5:00 AM, subject to compensation for lost toll revenues on the terms and in the amount set forth in this paragraph. For purposes of this paragraph, a **"complete closure"** means simultaneous closure of all eastbound travel lanes, of all westbound travel lanes, or of all eastbound and westbound travel lanes in implementation of an approved MOT Plan. Upon TRIP II's presentation of invoice following a complete closure of the Dulles Greenway, MWAA will pay TRIP II, as a Project cost, an amount equal to the following: (i) the duration in hours of the complete closure, rounded to the nearest 15 minutes, multiplied by (ii) the average hourly toll revenue for the 12:00 AM to 5:00 AM period over the preceding five weekdays (or for the 12:00 AM to 5:00 AM period over the five preceding Saturdays or Sundays, if the complete closure occurs on a Saturday, Sunday or holiday), multiplied by (iii) 150.0%. TRIP II and MWAA hereby confirm that, given the difficulty in ascertaining the actual toll revenue foregone by TRIP II as a result of any given complete closure, the foregoing payment is an equitable approximation of and compensation for the losses to be incurred by TRIP II during such closure.

#### **Section 7.07 Coordination with Dulles Greenway Operations**

- (a) In addition to other communications required under this Agreement or any Transit Development Permit issued hereunder, MWAA will provide TRIP II no less frequently than bi-weekly with the latest schedule of Project activities that affect Dulles Greenway operations.



- (b) MWAA will comply with any order by TRIP II to cease or modify specific activities that have a material and unanticipated adverse safety impact on Existing TRIP II Facilities during Project construction. Except in an emergency involving safety, TRIP II will coordinate with MWAA with respect to any order of cessation or modification of activities.
- (c) At all stages of Project development within the Dulles Greenway Right-of-Way, MWAA will notify Loudoun County of its activities and cooperate with Loudoun County in mitigating the impact of Project activities, including reasonable measures to minimize the effect of nighttime construction and construction noise, on residential communities adjacent to the Dulles Greenway.
- (d) Project-related use of the Dulles Greenway for vehicular passage, including trucking of excavated material, supplies and equipment, is subject to (i) payment of applicable Dulles Greenway tolls and (ii) compliance with applicable laws and regulations of the Commonwealth of Virginia, and will otherwise be unrestricted.

#### **Section 7.08 Maintenance of Project and TRIP II Facilities**

- (a) MWAA is responsible for maintaining all Project Facilities, including all New TRIP II Facilities, until completion and final acceptance for maintenance of such Facilities by WMATA, VDOT, Loudoun County or TRIP II, as applicable. All costs and expenses of such maintenance will be borne by MWAA as a Project cost.
- (b) Maintenance and restoration of Existing TRIP II Facilities are governed by the provisions of the applicable Transit Development Permit. Without limiting the generality of the foregoing, MWAA will install and regularly monitor any instrumentation reasonably required by TRIP II to verify the condition of Existing TRIP II Facilities from time to time during Project construction, and upon request provide TRIP II with written documentation of the results of such monitoring. The costs and expenses of such monitoring and reporting will be borne by MWAA as a Project cost.

#### **Section 7.09 Preservation of TRIP II Property**

All guardrails, signage, lighting and other Dulles Greenway personal property dismantled or uninstalled during Project construction remain the property of TRIP II, must not be removed from the Dulles Greenway Right-of-Way without the prior written consent of TRIP II and, promptly following dismantling, will be delivered at no expense to TRIP II to a storage site identified by TRIP II reasonably proximate to the Dulles Greenway. The costs and expenses of storing TRIP II personal property will be borne by TRIP II and not reimbursed as Project costs.

#### **Section 7.10 TRIP II Inspection Rights and Responsibilities**

- (a) MWAA will make all elements of Project construction within or immediately adjacent to the Dulles Greenway Right-of-Way available for review and inspection by TRIP II personnel at all times prior to completion, final inspection and acceptance for maintenance by WMATA, VDOT, MWAA or TRIP II, as the case may be.

- (b) TRIP II has an obligation to conduct inspections of New TRIP II Facilities or any maintenance, modification or repair of Existing TRIP II Facilities, in accordance with an agreed-upon construction-period inspection schedule established from time to time during Project construction or otherwise upon reasonable prior written request by MWAA or its Contractor.
- (c) In addition, at any time during Project construction, TRIP II is entitled to conduct inspections of New TRIP II Facilities or any maintenance, modification or repair of Existing TRIP II Facilities, and to review and audit any inspection test results with respect to such Facilities, all upon reasonable prior notice to MWAA. TRIP II's obligation to accept New TRIP II Facilities for maintenance upon completion is conditioned on completion of a final inspection satisfactory to TRIP II in its reasonable discretion and TRIP II's receipt of a notice of acceptance from VDOT.
- (d) The scope and subject matter of TRIP II inspections under this Section 7.10 are limited to confirming conformance of the work with the provisions of the relevant Transit Development Permit or Utility Permit, the Construction Plans identified in such Permit, and all other applicable terms, conditions and requirements of this Agreement.
- (e) From time to time during Project construction, TRIP II will designate qualified inspection personnel to conduct inspections, monitor Project activities and review and audit test results and other documentation. TRIP II, MWAA and its Contractor will coordinate to ensure sufficient staffing for timely performance of TRIP II inspection, monitoring and audit activities under this Agreement.
- (f) The reasonable costs and expenses incurred by TRIP II in undertaking the inspection, monitoring and audit activities required by or permitted under this Agreement, including TRIP II coordination with and confirmation of approval by VDOT, are Project costs reimbursable to TRIP II, subject to and in accordance with the provisions of Section 8.03 for the Reimbursable Cost Budget.

#### **Section 7.11 As-Built Plans for Project Facilities**

Upon completion of the Project, MWAA will provide TRIP II with as-built plans for all New TRIP II Facilities and any Existing TRIP II Facilities to the extent modified in construction of the Project.

#### **Section 7.12 Maintenance Agreement**

WMATA, TRIP II, VDOT and, in its capacity of owner or operator of the MWAA Property, MWAA, will enter into to a perpetual maintenance agreement (the "**Maintenance Agreement**") to allocate maintenance responsibilities among the parties and otherwise establish the right and obligations of the parties with respect to certain Project Facilities that are not owned, occupied and operated exclusively by WMATA. The Maintenance Agreement will be in substantially the same form as the Maintenance Agreement (Dulles International Airport Access Highway and Dulles Connector Road) dated

\_\_\_\_\_, 2013, between MWAA, WMATA and VDOT.<sup>1</sup>

### **Section 7.13 Project Suspension and Site Restoration**

If Project construction is terminated or indefinitely suspended prior to completion, the Dulles Greenway Right-of-Way will be restored to a safe, functional and attractive condition satisfactory to TRIP II in its reasonable discretion, at no expense to TRIP II. Without limiting the generality of the foregoing, (i) all barriers and other construction-related facilities and equipment will be removed, (ii) median and other open areas disturbed will be restored to the grade and vegetation existing prior to commencement of construction and, (iii) to the extent of Project construction at the time of work suspension, either travel lanes, drainage systems and related facilities existing prior to construction will be restored or new or relocated travel lanes, drainage systems and related facilities conforming to approved Construction Plans will be completed.

## **Article VIII. PAYMENTS**

### **Section 8.01 Invoicing and Payment Generally**

MWAA is responsible for making all payments to TRIP II required under this Agreement. TRIP II will provide monthly invoices with sufficient detail and supporting information for MWAA to confirm its obligation to pay the invoice pursuant to this Agreement. MWAA will reimburse TRIP II within 30 days after MWAA's approval of each TRIP II monthly invoice.

### **Section 8.02 FTA Documentation Requirements**

TRIP II hereby acknowledges that, due to certain Project funding by the Federal Transit Administration, certain FTA regulations govern Project accounting and, accordingly, reimbursement of Project costs to TRIP II. MWAA will provide TRIP II with requisite accounting and record-keeping guidelines pertinent to compliance with such regulations promptly following execution of this Agreement. For any amount paid or reimbursed to TRIP II by or on behalf of MWAA under this Agreement, TRIP II will maintain detailed records and supporting documentation consistent with such guidelines and will provide copies of such records and documents to MWAA promptly upon request.

### **Section 8.03 Reimbursable Cost Budget**

TRIP II and MWAA have developed a Project budget anticipating the costs and expenses to be incurred by TRIP II and reimbursed by MWAA in implementation of this Agreement, a copy of which is attached hereto as **Exhibit F** (the "**Reimbursable Cost Budget**"). TRIP II and MWAA will meet at least quarterly during implementation of the Project to review and confirm the accounting of costs reimbursed under the Reimbursable Cost Budget and, if applicable, reallocate funds between budget categories based on reasonable estimates of costs and expenses to be incurred by TRIP II in fulfillment of its unsatisfied obligations under this Agreement. Should unforeseen circumstances directly related to the Project and beyond the reasonable control of TRIP II warrant an increase in one or more budget category that cannot be reasonably satisfied by a reallocation of budget funds, then TRIP II and MWAA will

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<sup>1</sup> Review current status of Maintenance Agreement between MWAA, WMATA and VDOT.

negotiate in good-faith to establish an equitable increase in such category or of the Reimbursable Cost Budget in total.

**Section 8.04 MWAA Source-of-Funds Qualification**

TRIP II hereby acknowledges that MWAA's payment obligations under this Agreement are limited to and are to be paid solely from the Dulles Corridor Enterprise Fund, as established by Resolution No. 07-16 entitled "Financial Administration of the Dulles Toll Road and Dulles Corridor Metrorail Project" adopted by the MWAA Board on June 6, 2007, which will include Toll Revenues (as defined in the Master Transfer Agreement dated December 29, 2006 between VDOT and MWAA), proceeds of any obligations secured by Toll Revenues, any funds made available to MWAA by the Commonwealth of Virginia or any of its Departments or political subdivisions in respect of the Project, federal grants and loans that are extended in respect of the Project, and investment earnings on any such funds.

**Article IX. INSURANCE, WARRANTY AND LIEN WAIVER**

**Section 9.01 Project Insurance Policies**

MWAA will require TRIP II to be named as an additional insured or named insured on all insurance policies under any owner-controlled insurance program for the Project, or if applicable under any insurance the Contractor is required to maintain for the benefit of the project owner under the Design-Build Contract.

**Section 9.02 Construction Warranty for TRIP II Facilities**

MWAA will require its Contractor to warrant, for a period of two years following the Substantial Completion Date as defined in the Design-Build Contract, all New TRIP II Facilities and any improvements or modifications to Existing TRIP II Facilities.

**Section 9.03 Lien Waiver**

Pursuant to Section 2.3.8 of the Design-Build Contract, the Contractor has (i) waived any rights it may have to file or enforce any mechanics liens against the Project or any property related to the Work (as defined in the Design-Build Agreement) and owned by, among others, TRIP II and, further, (ii) agreed to require Contractor's subcontractors to execute substantially the same waiver. The terms of Section 2.3.8 of the Design-Build Contract are hereby incorporated in this Agreement by reference and will not be modified in a manner that materially affects TRIP II or its property without the consent of TRIP II, which consent will not be unreasonably withheld, conditioned or delayed. MWAA will use commercially reasonable efforts to enforce Section 2.3.8 of the Design-Build Contract and, further, will indemnify, hold harmless and defend TRIP II from and against liens or claims of liens related to Project activities within the Dulles Greenway Right-of-Way.

**Article X. DISPUTE RESOLUTION**

**Section 10.01 Dispute Resolution Procedures**

Any dispute between TRIP II and MWAA as to any design or construction issue, including any dispute over compliance of any aspect of the Project design or construction with VDOT

standards or Legal Requirements, that cannot be resolved by TRIP II and MWAA Project staff will be formally presented, in writing, to (i) an engineer selected by TRIP II, within ten (10) days after request by MWAA, who is expert in highway construction and (ii) MWAA's Vice President for Engineering, who shall promptly endeavor to resolve the dispute. Any resolution of the dispute will be reduced to writing signed by TRIP II's designated engineer and MWAA's Vice President for Engineering.

#### **Section 10.02 Other Remedies**

Any dispute not included under the preceding paragraph will be resolved as the parties may agree, and otherwise either party may exercise its remedies at law or equity.

#### **Article XI. GENERAL PROVISIONS**

**Construction.** Under this Agreement, the singular includes the plural and the plural includes the singular, and any gender includes all other genders, all as the meaning and the context requires. Unless otherwise specified, reference to section numbers mean the applicable section of this Agreement, and references to exhibits and schedules mean the applicable exhibits and schedules to this Agreement. Any reference to any federal, state, local statute or Legal Requirement is to be deemed also to refer to all rules and regulations promulgated thereunder and any successor statute or Legal Requirement thereto, unless the context requires otherwise. Unless otherwise expressly provided, the word "including" does not limit the preceding words or terms. This Agreement is the product of arm's-length negotiations between TRIP II and MWAA and should be liberally construed so that its intended purposes can be accomplished. Neither TRIP II nor MWAA will be deemed to have drafted this Agreement unilaterally. In the event a dispute arises regarding the meaning or application of any provision of this Agreement, such provision will not be construed by reference to any doctrine calling for ambiguities to be construed against the drafter of a document.

**Further Assurances.** MWAA and TRIP II will each use its commercially reasonable efforts to comply with all requirements imposed by this Agreement and to cause the transactions contemplated herein to be consummated as contemplated herein and each will, from time to time and without further consideration, either before or after the consummation of the transactions contemplated the Permits, execute such further instruments and take such other actions as the other party reasonably requests in order to fulfill its obligations under this Agreement and to effectuate the purposes of this Agreement and to provide for the orderly and efficient Project design, coordination, implementation and final acceptance of the Project. The obligations of MWAA and TRIP II under this paragraph will survive expiration or earlier termination of this Agreement and the issuance of any Permit or conveyance documentation.

**Notices.** Any notice, demand or request that is permitted, required or desired to be given under this Agreement must be in writing and directed to MWAA and TRIP II as follows:

***If to MWAA:***

President and CEO  
Metropolitan Washington Airports Authority  
1 Aviation Circle

Washington, D.C. 20001-6000

Fax: (703) 417-8949

***With a copy to:***

Phase 2 Project Director  
MWAA Rail Project  
1593 Spring Hill Road,  
Suite 300 Vienna, VA 22182  
Fax: (703) \_\_\_\_\_

***If to TRIP II:***

E. Thomas Sines  
Chief Executive Officer  
Toll Road Investors Partnership II, L.P.  
45305 Catalina Court, Suite 102  
Sterling, Virginia 20166

Fax (703) 707-8876

***With a copy to:***

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Fax: (\_\_\_\_) \_\_\_\_ - \_\_\_\_\_

Notices are deemed properly delivered and received (i) the same day when personally delivered, or (ii) one day after deposit with FedEx or another reputable commercial overnight courier, or (iii) the same day when sent by confirmed facsimile.

***Binding Effect; Assignment.*** The terms, conditions and covenants of this Agreement are binding upon and inure to the benefit of MWAA and TRIP II and their respective successors and permitted assigns. Neither party is entitled to assign all or any portion of this Agreement without the prior written consent of the other party, which consent will not be unreasonably withheld.

***No Third-Party Beneficiaries.*** This Agreement will not be construed as giving any person or entity, other than MWAA and TRIP II and their respective successors and permitted assigns, any legal or equitable right, remedy or claim under or in respect of this Agreement or any of the provisions herein contained, this Agreement and all provisions and conditions hereof being intended to be, and being, for the sole and exclusive benefit of such parties, and their respective successors and permitted assigns and for the benefit of no other person or entity.

***Amendment, Modification and Waiver.*** MWAA and TRIP II are entitled to amend or modify, or to waive any right or obligation under, this Agreement in any respect, provided that any such amendment, modification or waiver must be in writing and executed by duly authorized representatives of the parties. No waiver of any breach of any provision of this Agreement will constitute or operate as a waiver of any other breach of such provision or of any other provision of this Agreement, nor will any failure to enforce any provision of this Agreement

operate as a waiver of such provision or of any other provision of this Agreement.

**Counterparts.** This Agreement may be executed in two or more counterparts, each of which is deemed an original, and all of which together are deemed to constitute one and the same instrument.

**Governing Law.** This Agreement is made pursuant to, and will be construed and enforced in accordance with, the laws of the Commonwealth of Virginia, without giving effect to otherwise applicable principles of conflicts of law. Any legal action, suit or proceeding arising out of or relating to this Agreement will be instituted, heard and determined exclusively in a court of competent jurisdiction located in the Commonwealth of Virginia.

**Exhibits.** The Exhibits referenced in and attached to this Agreement are incorporated by reference and a part of this Agreement.

**Section Headings.** The section headings contained in this Agreement are for reference purposes only and do not in any way affect the meaning and interpretation of any of the provisions of this Agreement.

**Severability.** If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced by any rule of law, or public policy, all other conditions and provisions of this Agreement will nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated by this Agreement is not affected in any manner materially adverse to any party. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, MWAA and TRIP II will negotiate in good faith to modify this Agreement so as to effect their original intent as closely as possible in a mutually acceptable manner in order that the transactions contemplated by this Agreement be consummated as originally contemplated to the fullest extent possible.

**No Modification of Existing Agreements.** Nothing set forth in this Agreement is intended to expand, limit or otherwise modify in any way the respective rights and obligations of the parties under the MWAA-TRCV Agreement or the MWAA Easement, which instruments TRIP II and MWAA hereby confirm are in full force and effect in accordance with their terms. Without limiting the generality of the foregoing, nothing set forth in this Agreement will be construed as affecting in any way the respective rights and obligations of TRIP II and MWAA under the MWAA-TRCV Agreement or the MWAA Easement with respect to Future Expansion of the Dulles Greenway or future extension of rail service in the Dulles Greenway median beyond the scope of the Project.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, MWAA and TRIP II have caused this Agreement to be executed by their duly authorized representatives as of the date first written above.

**METROPOLITAN WASHINGTON AIRPORTS AUTHORITY**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**TOLL ROAD INVESTORS PARTNERSHIP II, L.P.**

By: Shenandoah Greenway Corporation,  
a Delaware corporation, its General Partner

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_



Exhibit A

[Attach letter from Karl Rohrer, MWAA, to Thomas Sines, TRIP II, dated July 3, 2012 (Letter No. MWAA-P2-00801)]

Exhibit B

**[Attach description of Storm Water Management Facilities]**

Exhibit C

**[Attach form of Transit Development Permit]**

Exhibit D

[Attach Form of Utility Permit; for both governmental and non-governmental permittees]

Exhibit E

[Attach description of Transit Permit Area]

Exhibit F

[Attach Reimbursable Cost Budget]

## Proposed Resolution

### Approving Dulles Corridor Metrorail Project Phase 2 Cooperative Agreements

WHEREAS, In 2007, the Airports Authority entered into cooperative agreements relating to the Dulles Corridor Metrorail Project (Project) with the Washington Metropolitan Area Transit Authority (WMATA), Fairfax County and the Virginia Department of Transportation (VDOT), which established a framework for cooperation between these Project partners and the Airports Authority in the design and construction of the Project;

WHEREAS, In 2007, cooperative agreements were not made with two other Project partners, Loudoun County and Toll Road Investors Partnership II, L.P., (TRIP II), because they would not become involved in the Project until the commencement of the Project's Phase 2 which, in 2007, was years away;

WHEREAS, The Airports Authority is now about to commence construction on Phase 2 of the Project, which runs from the eastern terminus of the Project's Phase 1 along the median of the Dulles International Airport Access Highway to and through Dulles Airport, and then along the median of the Dulles Greenway to a terminus at Virginia Route 772;

WHEREAS, To address their relationships during the construction of Phase 2, the Airports Authority, Loudoun County and TRIP II have negotiated cooperative agreements defining roles and activities relating to Phase 2 design reviews, permitting, property acquisition, and other matters;

WHEREAS, The Airports Authority and WMATA have determined that their 2007 cooperative agreement does not sufficiently address Phase 2 issues, and therefore have negotiated a new cooperative agreement for Phase 2;

WHEREAS, The Phase 2 cooperative agreements between the Airports Authority and Loudoun County, Trip II and WMATA have been reviewed and approved by the Dulles Corridor Committee and recommended to the Board of Directors for approval; now, therefore, be RESOLVED, That the President and Chief Executive Officer is authorized and directed to execute, on behalf of the Airports Authority, the Phase 2 cooperative agreements with Loudoun County, Toll Road Investors Partnership II, L.P., and WMATA in substantially the form as presented to the Dulles Corridor Committee on July 17, 2013.

*For Consideration by the Dulles Corridor Committee  
and the Board of Directors on July 17, 2013*