



METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

RECOMMENDATION PAPER FOR THE FINANCE AND DULLES CORRIDOR COMMITTEES

Funding Agreement Between the Airports Authority and the
Commonwealth of Virginia Providing for a Grant of \$300 Million
for the Dulles Corridor Metrorail Project

APRIL 2014



Background

During its 2013 session, the Virginia General Assembly authorized a grant of \$300 million for the Dulles Corridor Metrorail Project, contingent upon the Airports Authority and Virginia executing a funding agreement governing the grant.

Negotiations related to this funding agreement have occurred over the past several months and a consensus agreement has been reached, subject to approval of the Board of Directors.

This \$300 million grant, along with the TIFIA loan for which the Authority has applied, are expected to allow the current toll rates on the Dulles Toll Road to remain in place through 2018.

This grant is in addition to the \$150 million grant the Commonwealth provided for the Metrorail Project (Project) in April 2013, and which was the subject of a separate funding agreement.



Summary of Agreement

Five provisions of the agreement are of note.

1. Timing and Condition to Delivery of Funds. Virginia will provide this grant in three equal annual installments, to be delivered on or before June 30 in 2014, 2015, and 2016.

As a condition to these installments, the General Assembly required a statement from the Airports Authority's accountability officer that the Authority has addressed the recommendations of the OIG in its November 2012 report on Airports Authority Governance. The legislature also authorized the Governor to waive this requirement in the event one or more recommendations have not been fully addressed.

This condition and the Governor's waiver authority are reflected in the agreement.

2. Use of Grant Funds. The Authority may use these grant funds *solely* to fund the design and construction of Phase 2 of the rail project and to reduce the portion of Phase 2 costs to be funded by revenues of the Dulles Toll Road (DTR).



Summary of Agreement

3. Continuing Effort to Minimize DTR Toll Rates. The Airports Authority agrees that it will continue to take reasonable actions, consistent with its rights and obligations under its agreements with the Commonwealth to operate and maintain the DTR, to minimize toll rates on the Toll Road.
4. Labor Agreements. The Airports Authority agrees, as it did in the 2013 agreement for the \$150 million Commonwealth grant, that it will not, in any Phase 2 construction solicitation or contract, require offerors or contractors to enter a project or workplace labor agreement, and will not offer any incentives or preferences favoring offerors with such an agreement.
5. Virginia Right-to-Work Law. The Airports Authority agrees, as it did in the 2013 funding agreement, to comply, and to require its Phase 2 construction contractors to comply, with Virginia's right-to-work law.



Conclusion

Staff recommends that the Committees recommend to the Board of Directors that it approve this \$300 million funding agreement with the Commonwealth of Virginia, and that it authorize the President and CEO to execute the agreement on behalf of the Airports Authority.



Ronald Reagan Washington National Airport



Dulles Corridor Metrorail Project



Dulles Toll Road



Washington Dulles International Airport



METROPOLITAN WASHINGTON
AIRPORTS AUTHORITY

Proposed Resolution

Approving a Funding Agreement between the Airports Authority
and the Commonwealth of Virginia
Providing for a Grant of \$300,000,000 for the
Dulles Corridor Metrorail Project

WHEREAS, During its 2013 session, the General Assembly of Virginia authorized a grant of \$300,000,000 to the Airports Authority for the Dulles Corridor Metrorail Project, contingent upon the Airports Authority and the Commonwealth executing a funding agreement defining the terms and conditions that would apply to the grant;

WHEREAS, Negotiations related to this funding agreement between staff from the Airports Authority and the Commonwealth have taken place, and a final proposed agreement has been reached, subject to the approval of the Board of Directors;

WHEREAS, This proposed funding agreement was presented to the Finance and Dulles Corridor Committees at a joint meeting on April 16, 2014, and the Committees recommended its approval to the Board of Directors; now, therefore, be it

RESOLVED, That the funding agreement between the Airports Authority and the Commonwealth of Virginia providing for a grant of \$300,000,000 to the Airports Authority for the Dulles Corridor Metrorail Project, as presented to the Finance and Dulles Corridor Committees on April 16, 2014, is approved, and the President and Chief Executive Officer is authorized to execute the agreement on behalf of the Airports Authority.

*For Consideration by the Finance and Dulles Corridor Committees,
and Board of Directors on April 16, 2014*

FUNDING AGREEMENT

BY AND BETWEEN

THE COMMONWEALTH OF VIRGINIA,
ACTING BY AND THROUGH THE VIRGINIA DEPARTMENT OF
TRANSPORTATION,

AND

THE METROPOLITAN WASHINGTON AIRPORTS AUTHORITY
CONCERNING
THE PROVISION AND USE OF \$300,000,000 OF COMMONWEALTH
FUNDING FOR THE DULLES METRORAIL PROJECT

**FUNDING AGREEMENT BY AND BETWEEN THE COMMONWEALTH
OF VIRGINIA, ACTING BY AND THROUGH THE VIRGINIA
DEPARTMENT OF TRANSPORTATION, AND THE METROPOLITAN
WASHINGTON AIRPORTS AUTHORITY CONCERNING THE
PROVISION AND USE OF \$300,000,000 IN COMMONWEALTH FUNDING
FOR THE DULLES METRORAIL PROJECT**

THIS FUNDING AGREEMENT (“**Agreement**”) is made and executed in duplicate as of the ___ day of _____ 2014, between the Commonwealth of Virginia (“**Commonwealth**”), acting by and through the Virginia Department of Transportation (“**VDOT**”), and the Metropolitan Washington Airports Authority (“**MWAA**”) (collectively, the “**Parties**”) and sets out the terms and conditions for the provision and use of \$300,000,000 in Commonwealth funding for the Dulles Metrorail Project (“**Project**”).

RECITALS

WHEREAS, the Project is a 23-mile extension of the Washington, D.C., Metrorail system from the system's West Falls Church station, through the Tyson's Corner area of Fairfax County and Dulles International Airport, into Loudoun County, Virginia, and is divided into two phases, with Phase 1 generally described as that portion of the Project running from the Metrorail Orange Line near the West Falls Church Station to the Wiehle Avenue Station, in Reston, Virginia, and Phase 2 generally described as that portion of the Project running from the Wiehle Avenue Station to the terminus of the Project at the Route 772 Station in Loudon County; and

WHEREAS, 2013 Va. Acts ch. 766, § 6 conditionally dedicates to Phase 2 of the Project in each of Fiscal Years 2014, 2015 and 2016 \$100 million of revenues otherwise provided to the VDOT Highway Maintenance and Operating Fund, provided that the MWAA Board of Directors first addresses (i) all recommendations cited in the November 2012 report of the Office of the

Inspector General of the U. S. Department of Transportation on MWAA Governance, and (ii) the accountability officer appointed by the U. S. Secretary of Transportation determines that such recommendations have been addressed; and

WHEREAS, this same legislation further provides that in the event that all the conditions in the legislation for dedication of funds are satisfied, the Commonwealth Transportation Board may provide funding from other available revenue sources to satisfy the requirements of the legislation in order to maximize the use of increased revenues provided under the act; and

WHEREAS, in the 2013 Appropriation Act, Section 430(N), the General Assembly of Virginia provided “[n]otwithstanding any provision of law, any agreement to transfer money from the Commonwealth Transportation Funds to the [MWAA] in connection with Phase II (sic) of the Dulles Corridor Metrorail Project beyond Wiehle Avenue in Fairfax County to Washington Dulles International Airport and on to Virginia Route 772 in Loudoun County shall include provisions stating that the MWAA has addressed all of the recommendations included in the November 2012 report of the Inspector General of the U.S. Department of Transportation as a condition of transferring such money.” and

WHEREAS the 2013 Appropriation Act, Section 430(N) further provided “[t]he Governor may waive this requirement for one or more specific recommendations that have not been implemented by notifying the Chairmen of the House Appropriations and Senate Finance Committees of his reason for granting the waiver or waivers”; and

WHEREAS, the Parties have worked in the past and will work together in the future to ensure that the use of the Commonwealth funding results in the lowest possible toll rates for users of the Dulles Toll Road (“DTR”); and

WHEREAS, the Parties desire to set out the terms under which the \$300,000,000 in Commonwealth funding will be made available to MWAA by VDOT on behalf of the

Commonwealth of Virginia.

NOW, THEREFORE, in consideration of the mutual promises herein contained and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

ARTICLE 1. PROVISION OF COMMONWEALTH FUNDS

Section 1.1 Subject to appropriation by the General Assembly and allocation by the Commonwealth Transportation Board, MWAA's full satisfaction of the conditions imposed for the dedication of funds by the General Assembly and the provisions of this Agreement, VDOT, on behalf of the Commonwealth, hereby agrees to provide \$100,000,000 in Fiscal Year 2014, \$100,000,00 in Fiscal Year 2015 and \$100,000,000 in Fiscal Year 2016, for a total of \$300,000,000, in funding for the Dulles Metrorail Project as described below.

Section 1.2 VDOT will provide \$100,000,000 in Commonwealth funding to MWAA on or before June 30 in each of Fiscal Years 2014, 2015 and 2016 (the "**Fiscal Years**"), the precise date of which provision will be solely determined by VDOT, on the condition that before the release of any funding in any of the Fiscal Years, MWAA shall submit to the Chief Financial Officer of VDOT a writing from the accountability officer appointed by the Secretary of the U.S Secretary of Transportation that contains the accountability officer's determination that MWAA has addressed all of the recommendations included in the November 2012 report of the Inspector General of the U.S. Department of Transportation on MWAA Governance ("**Report of the Transportation OIG**"), hereto attached, marked as Attachment A and made a part of this Agreement (the "**OIG Condition**"). If MWAA, in any of the Fiscal Years, produces a writing from the accountability officer which indicates that one or more specific recommendations have not been addressed, the Governor of Virginia, in his sole discretion, may elect to waive (but is not required to waive) the requirement that all recommendations of the Report of the Transportation OIG have been implemented for that Fiscal

Year and shall thereafter notify the Chairmen of the House Appropriations and Senate Finance Committees of his reason or reasons for granting the waiver or waivers. If the Governor grants a waiver, the funding for that Fiscal Year will be provided by VDOT; however, if all recommendations of the Report of the Transportation OIG have not been implemented, and the Governor does not elect to grant a waiver or waivers as described above, the Commonwealth funding will not be provided for that Fiscal Year.

ARTICLE 2. REQUIREMENTS APPLICABLE TO THE USE OF COMMONWEALTH FUNDING

Section 2.1 In consideration of the Commonwealth funding provided under this Agreement, MWAA agrees to comply with the requirements of this Agreement, and acknowledges that its failure to comply with any of the requirements shall be a material breach that will trigger the cancellation provisions of Article 3.

Section 2.2 MWAA shall use all Commonwealth funding provided to it under this Agreement solely to fund the design and construction of Phase 2 of the Project and to reduce the portion of the Phase 2 design and construction costs that, under the Agreement to Fund the Capital Cost of Construction of Metrorail in the Dulles Corridor, dated July 19, 2007, by and between Fairfax County, Loudoun County and MWAA, is to be funded by a contribution from revenues of the DTR.

Section 2.3 MWAA shall take all reasonable actions available to it, consistent with its rights and obligations under the Dulles Toll Road Permit and Operating Agreement, dated December 29, 2006, by and between VDOT and MWAA (“**POA**”), to minimize the toll rates charged users of the DTR. Consistent with these rights and obligations, MWAA shall use its best efforts to maximize contributions under Section 4.01(d) of the POA to the Toll Rate Stabilization Fund and use funds in the Toll Rate Stabilization Fund in a manner that will reduce debt and minimize toll rate increases.

Section 2.4 When undertaking its obligation under the POA to construct Phase 2 of the Project, MWAA shall at all times comply, and shall contractually require all of its contractors to comply, and

contractually require their subcontractors to comply, with Virginia's Right to Work Law, Title 40.1, Chapter 4, Article 3 (§§ 40.1-58 through 40.1-69, as amended) of the *Code of Virginia*; and MWAA, its contractors and subcontractors shall be subject to all remedies enunciated therein. In addition, except as required by federal law, MWAA shall ensure that bid specifications, requests for proposals and other procurement documents for Phase 2 construction services do not contain any incentive in scoring that favors entities entering into a project labor agreement (“**PLA**”), and do not contain any other form of PLA bonus or preference or any PLA requirement of any kind.

MWAA agrees that provisions reflecting the following principles will be incorporated into all of the Phase 2 construction contracts:

- (A) neither the prime contractor nor any subcontractor, at any tier, nor any agent of the prime contractor or a subcontractor empowered to recruit employees on their behalf through a hiring hall or otherwise shall require any individual, as a condition to becoming an employee of the prime contractor or subcontractor, (i) to be or become a member of a labor union or labor organization, or (ii) not to be or become a member of a labor union or labor organization;
- (B) the prime contractor shall not discriminate against any person or entity that is working or seeking to work under a subcontract with the prime contractor based upon the affiliation of the person or entity with one or more labor unions or labor organizations or its lack thereof;
- (C) the prime contractor shall not be required, in order to maintain the contract, to become a party to any agreement with one or more labor unions or labor organizations; and
- (D) the prime contractor shall not require any person or entity, in order to secure or maintain a subcontract with the prime contractor, to become a party to, or

otherwise adhere to, any agreement with one or more labor unions or labor organizations.

MWAA acknowledges that it, as well as the contractors and subcontractors working under a Phase 2 construction contract to which MWAA is a party, are subject to the requirements set forth in Virginia's Right to Work Law and are subject to all remedies for non-compliance set forth therein, in addition to any other remedies that may be available under Virginia law. MWAA agrees to include in any and all solicitation documents and in any contract awarded for Phase 2 (i) the language contained in this Agreement, and (ii) language requiring any entity awarded a contract for Phase 2 to include such language contained in this Agreement in its agreements with subcontractors. MWAA agrees to maintain all relevant executed contract documents concerning Phase 2 of the Project and make such documents available to the Commonwealth pursuant to the provisions of Section 2.4 so that the Commonwealth may monitor compliance with commitments made by MWAA herein.

Section 2.5 MWAA shall maintain all books, documents, papers, and other records necessary to show how the Commonwealth funding has been used and that MWAA has complied with all requirements and conditions of this Agreement applicable to it and/or imposed upon MWAA. MWAA shall make such records available to the Commonwealth for audit and inspection at MWAA's office at all reasonable times during the term of this Agreement plus five years. Copies of such records shall be furnished by MWAA to VDOT upon request.

Section 2.6 MWAA shall disclose and provide to VDOT any audit report related to the Dulles Metrorail Project prepared by federal authorities or state entities, other than VDOT or any other project related audit report accessible under standards allowing public disclosure, within 30 days of receipt of such report. MWAA shall address the recommendations made in any such audit report of its administration of the Dulles Metrorail Project, and shall provide quarterly updates to VDOT that demonstrate its progress in addressing the recommendations. MWAA shall also advise VDOT's Chief Financial Officer of any MWAA internal audit related to or indirectly related to the administration of

the Dulles Metrorail Project, the nature of the audit, and any related findings and recommendations of the audit, as well as MWAA's plan to address the recommendations, within 30 days of the audit's completion. MWAA shall thereafter provide quarterly updates to the VDOT Chief Financial Officer on MWAA's implementation of the plan. MWAA shall also provide VDOT with copies of MWAA's publicly available management response and corrective action plan within 30 days of the audit's completion.

ARTICLE 3. CANCELLATION AND TERMINATION

Section 3.1 Any failure by VDOT to provide Commonwealth funding in a manner not in compliance with this Agreement shall constitute a material breach, unless such failure is due in whole or in part to compliance with a court order or action by the Virginia General Assembly. In the event that MWAA believes there has been a material breach by VDOT, MWAA shall provide written notice to VDOT of the alleged breach. VDOT shall have 60 working days after receipt of the notice to cure the breach to the satisfaction of MWAA. If VDOT fails to cure such breach within this 60 working day period, the chief executive officers of MWAA and VDOT will meet to attempt to resolve the dispute. If the dispute is not resolved, MWAA may cancel this Agreement at any time after such meeting. In the event it elects to cancel the Agreement, MWAA shall notify VDOT of the effective date of the cancellation.

Section 3.2 Any failure by MWAA to comply with the requirements of this Agreement shall constitute a material breach. In the event that VDOT believes there has been a material breach by MWAA, VDOT shall give written notice to MWAA of the alleged breach. MWAA shall have 60 working days to cure the breach to the satisfaction of VDOT. If MWAA fails to cure such breach within the 60 working day period, the chief executive officers of MWAA and VDOT will meet to attempt to resolve the dispute. If the dispute is not resolved, VDOT may cancel this Agreement at any time after such meeting of the chief executive officers following the expiration of the 60-day cure

period, unless otherwise agreed by the parties. In the event it elects to cancel the Agreement, VDOT shall notify MWAA of the effective date of the cancellation. Within 60 working days of the effective date of the cancellation, MWAA shall return to VDOT any Commonwealth funding previously released to it under this Agreement which, as of the cancellation's effective date, has not been expended on Project costs.

Section 3.3 Upon 30 working days notice to the MWAA, VDOT may terminate, in whole or in part, any of the Commonwealth's funding obligations under this Agreement if (i) MWAA becomes insolvent or (ii) statutory changes concerning or affecting the Commonwealth funding render the funding or the use of the funding to be provided under this Agreement impossible as a matter of law or (iii) MWAA fails to complete the Project on the date agreed upon by MWAA and the Commonwealth pursuant to Section 6.06 of the Dulles Toll Road Permit and Operating Agreement dated December 29, 2006. VDOT shall notify MWAA promptly in writing of its determination to terminate one or more Commonwealth funding obligations under this Agreement and the effective date of the termination.

Section 3.4 In all reimbursements from MWAA to VDOT, VDOT may require MWAA to include a payment of interest, using the prevailing statutory legal rate of interest established by the Virginia General Assembly, calculated from the date the VDOT payment was made to the date MWAA makes repayment to VDOT.

ARTICLE 4. EFFECTIVE DATE AND TERM, ENTIRE AGREEMENT, NOTICES AND AMENDMENT

Section 4.1 This Agreement shall be effective upon its execution by both Parties. The term of the Agreement shall be from its effective date until the earlier of (i) five years after the transfer of Phase 2 of the Project to WMATA or (ii) the date on which the Agreement is cancelled, or all of the Commonwealth's funding obligations under the Agreement are terminated, pursuant to Article 3.

Section 4.2 This Agreement and the requirements referenced herein constitute the entire and exclusive agreement between the Parties relating to the specific conditions under which the Commonwealth funding addressed by the Agreement is to be provided and used.

Section 4.3 All notices or communications with respect to this Agreement shall be in writing and shall be deemed delivered upon delivery by hand, upon the next business day if sent prepaid overnight delivery service, or on the third business day following mailing by U.S. Mail, certified, postage prepaid, return receipt requested, to the addresses set forth below or such other addresses as may be specified by delivery of prior notice by a Party to the other Parties.

VDOT: Chief Financial Officer
1401 East Broad Street
Richmond, VA 23219

Commissioner of Highways
1401 East Broad Street
Richmond, VA 23219

MWAA: Chief Financial Officer
Metropolitan Washington Airports Authority
1 Aviation Circle
Washington, DC 20001-6000

General Counsel
Metropolitan Washington Airports Authority
1 Aviation Circle
Washington, DC 20001-6000

Section 4.4 This Agreement may be amended only by a writing signed by the Parties.

ARTICLE 5. ASSIGNMENT

Section 5.1 This Agreement and any obligations hereunder may not be assigned by either Party without the prior written approval of the other Party.

ARTICLE 6. MISCELLANEOUS PROVISIONS

Section 6.1 This Agreement shall be governed by the laws of the Commonwealth of Virginia.

Section 6.2 If any term or provision of this Agreement is determined to be invalid, illegal or

unenforceable, that determination shall not affect the validity, legality or enforceability of any other parts of this Agreement, and the remaining parts of the Agreement shall be binding upon the Parties.

Section 6.3 All provisions of this Agreement shall be binding upon the Parties and their respective successors and assigns.

Section 6.4 Any legal action concerning this Agreement shall be brought in the Circuit Court of the City of Richmond, and the Parties hereby waive any objection which they may have to such venue and irrevocably submit to the jurisdiction of such Court in any suit, action or proceeding. MWAA hereby consents to suit and service of process in the Commonwealth of Virginia, and hereby appoints the Secretary of the Commonwealth as its agent for receipt of service of process.

Section 6.5 The provision of Commonwealth funding under this Agreement is conditioned upon and is subject to appropriation by the General Assembly and allocation by the Commonwealth Transportation Board.

Section 6.6 To the maximum extent allowable by law, MWAA agrees to indemnify and hold harmless the Commonwealth, VDOT, and their officers, employees or agents against all damages, claims, suits, judgments, expenses, actions and costs of every kind, name and description arising out of any act or omission taken by MWAA, its agents, contractors or subcontractors which involves this Agreement.

Section 6.7 The Parties agree that the individuals acting on behalf of the Parties are acting within the scope of their official authority and the Parties agree that neither Party will bring a suit or assert a claim against any official, director, officer, employee or agent of either Party or of any agency of the Commonwealth in their individual or personal capacity, for a breach or violation of the terms of this Agreement or to otherwise enforce the terms and conditions of this Agreement. Nothing in this paragraph shall prevent the enforcement of the terms and conditions of this Agreement by or against any a Party in a competent court of law; provided however, that in any such action no Party shall be entitled to assert a claim related to the validity of this Agreement or the authority of any other Party to

enter into this Agreement.

Section 6.8 Any monetary liability of MWAA to VDOT arising under this Agreement shall be payable solely from MWAA's Dulles Corridor Enterprise Fund, and when enforcing its rights under Article 3 of this Agreement, VDOT shall have recourse solely against MWAA's Dulles Corridor Enterprise Fund, and shall have no recourse against the MWAA Aviation Enterprise Fund. MWAA agrees that it will place all Commonwealth funding it receives under this Agreement in its Dulles Corridor Enterprise Fund and will retain all such funding in that fund until the funding is expended for Project costs in compliance with the terms of this Agreement. .

Section 6.9 Nothing in this Agreement shall be construed as preventing MWAA from using the Agreement as part of a transaction to borrow funds for the Project in anticipation of, and secured by, the Commonwealth funding to be made available under the Agreement, so long as the transaction does not impose any obligations upon the Commonwealth and does not affect any of the terms of this Agreement.

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IN TESTIMONY THEREOF, the Parties have caused this Agreement to be executed,
each by its duly authorized officers.

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION**

By: _____

CHARLES A. KILPATRICK
COMMISSIONER OF HIGHWAYS

WITNESS: _____

DATE: _____

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

By: _____

JOHN E. POTTER
PRESIDENT AND CHIEF EXECUTIVE OFFICER

WITNESS: _____

DATE: _____