



COMMONWEALTH of VIRGINIA

Commonwealth Transportation Board

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Chairperson

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Agenda item # 17

RESOLUTION OF THE COMMONWEALTH TRANSPORTATION BOARD

January 12, 2022

MOTION

Made By: Ms. Hynes Seconded By: Mr. Yates

Action: Motion carried, unanimously

Title: Approval of Second Amended and Restated Memorandum of Agreement with the Northern Virginia Transportation Commission and Potomac Rappahannock Transportation Commission Relating to the I-395 Express Lanes Annual Transit Investment

WHEREAS, the Commonwealth and the Northern Virginia Transportation Commission (NVTC) and Potomac Rappahannock Transportation Commission (PRTC) previously negotiated the terms of a Memorandum of Agreement (MOA) between the Virginia Department of Transportation (VDOT), the Commonwealth Transportation Board (CTB), the Virginia Department of Rail and Public Transportation (DRPT), the PRTC, and the NVTC relating to the I-395 Express Lanes Annual Transit Investment (Project), and

WHEREAS, the original MOA, which was approved by the CTB on December 7, 2017, set forth the responsibilities of the Parties relating to the Project and provided for, among other things, the transfer to and use by NVTC and PRTC of specified funds collected from the tolling of the I-395 Express Lanes for certain Project Components; and

WHEREAS, there is a need to amend the MOA to include technical amendments to the provisions to modify and conform language to make the agreement more similar to the 2021 Third Amended and Restated Memorandum of Agreement, Transform 66: Inside the Beltway Project for the calculation of funding eligible to support transit operations;

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Northern Virginia Transportation Commission Relating to the I-395 Express Lanes Annual
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WHEREAS, the Commonwealth, NVTC, and PRTC have negotiated amendments to the MOA addressing this matter, which are reflected in the *Second Amended and Restated Memorandum of Agreement, I-395 Express Lanes*, attached hereto as Exhibit A, and approved by the Northern Virginia Transportation Commission on January 6, 2022, and pending approval by the Potomac Rappahannock Transportation Commission on January 13, 2022.

NOW THEREFORE, BE IT RESOLVED by the Commonwealth Transportation Board, that the *Second Amended and Restated Memorandum of Agreement, I-395 Express Lanes*, attached hereto as Exhibit A, is hereby approved and the Secretary, Commissioner of Highways and the Director of the Department of Rail and Public Transportation are authorized to execute the Amended and Restated MOA on behalf of the Board, VDOT and DRPT, respectively.

BE IT FURTHER RESOLVED that the Secretary is authorized to make and/or approve such changes to the Second Amended and Restated MOA as she deems necessary, provided such changes do not change the overall substance of the terms of the Second Amended and Restated MOA.

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CTB Decision Brief

Approval of Second Amended and Restated Memorandum of Agreement with the Northern Virginia Transportation Commission Relating to the I-395 Express Lanes Annual Transit Investment January 12, 2022

Issue: The Commonwealth has negotiated a second amendment to the “Memorandum of Agreement (MOA) with the Northern Virginia Transportation Commission (NVTC) and the Potomac Rappahannock Transportation Commission (PRTC) relating to the I-395 Annual Transit Investment. The Second Amended and Restated MOA requires approval by the CTB.

Facts: The original MOA, which was approved by the CTB on December 6, 2017, set forth the responsibilities of the Parties relating to the Project and provided for, among other things, the transfer to and use by NVTC and PRTC of specified funds collected from the I-395 Express Lanes (Facility) for certain Project Components.

The Parties now desire to make a technical amendment to the provisions of the MOA to conform the MOA to the 2021 Third Amended and Restated Memorandum of Agreement, Transform 66: Inside the Beltway Project for the calculation of funding eligible to support transit operations. The proposed Second Amended and Restated MOA (attached as Exhibit A to the accompanying resolution) addresses this matter. The MOA was approved by the Northern Virginia Transportation Commission on January 6, 2022, and is scheduled to be approved by the Potomac Rappahannock Transportation Commission on January 13, 2022.

Recommendation: DRPT recommends approval of the attached resolution.

Action Required by CTB: Approval of the attached resolution.

Options: Approve, Deny or Defer.

1 **AMENDED AND RESTATED**
2 **MEMORANDUM OF AGREEMENT REGARDING THE**
3 **ANNUAL TRANSIT INVESTMENT FROM THE 395 HOT LANES**
4

5 This Amended and Restated Memorandum of Agreement (“MOA”) is dated ~~December~~
6 ~~20, 2017~~[insert execution date], 2022 and is among: (i) the Commonwealth Transportation
7 Board (“CTB”), (ii) the Virginia Department of Transportation (“VDOT”), (iii) the Northern
8 Virginia Transportation Commission (“NVTC”), (iv) the Potomac and Rappahannock
9 Transportation Commission (“PRTC”), and (v) the Virginia Department of Rail and Public
10 Transportation (“DRPT”) ((i), (ii), (iii), (iv), and (v) collectively, the “Parties”).

11 **RECITALS**

12 WHEREAS, on July 31, 2012, VDOT and 95 Express Lanes, LLC (the
13 “Concessionaire”) entered into a comprehensive agreement (the “Comprehensive Agreement”)
14 under which the Concessionaire developed and now operates approximately 29 miles of high-
15 occupancy toll lanes (“HOT Lanes”) in the median of Interstate 95 between the Route 610
16 interchange (Garrisonville Road) and Turkeycock Run (the “Original 95 HOT Lanes”);

17 WHEREAS, the Original 95 HOT Lanes have been in operation since December 2014;

18 WHEREAS, on June 8, 2017, VDOT and the Concessionaire amended and restated the
19 Comprehensive Agreement (the “ARCA”) to add in the median of Interstate 395 approximately
20 eight miles of HOT Lanes between Turkeycock Run and the Washington D.C. Line (the “395
21 HOT Lanes”);

22 WHEREAS, after the Concessionaire has designed and built the 395 HOT Lanes, the
23 Original 95 HOT Lanes and the 395 HOT Lanes will be operated and maintained by the
24 Concessionaire under the ARCA as a continuous and unified 37-mile HOT Lane facility (the
25 “I-95/I-395 Project”);

26 WHEREAS, beginning upon service commencement of the 395 HOT Lanes, the ARCA
27 requires the Concessionaire to pay to VDOT an annual transit investment (the “ATI”) from toll
28 revenue attributable to the addition of the 395 HOT Lanes (the “395 Revenues”);

29 WHEREAS, the parties desire to use the ATI funds for improvements along the
30 “Corridor” (herein defined as the stretch of Interstates 95 and 395 along which the
31 Concessionaire operates and maintains HOT Lanes, including Route 1, Virginia Railway
32 Express (“VRE”), and other adjacent and nearby routes);

33 WHEREAS, the first-scheduled ATI payment is \$15,000,000 and each subsequent
34 scheduled ATI payment escalates at 2.5%, as reflected in **EXHIBIT A**;

35 WHEREAS, the goals of the ATI-Funded Projects (defined below) are to: (1) maximize
36 person throughput in the Corridor; and (2) implement multimodal improvements to: (i) improve
37 mobility along the Corridor, (ii) support new, diverse travel choices, and, (iii) enhance
38 transportation safety and travel reliability ((1) and (2) collectively the “Improvement Goals”),
39 each of which will benefit the users of the I-95/I-395 Project;

40 WHEREAS, to fund projects designed to accomplish the Improvement Goals, VDOT
41 desires to transfer periodically to DRPT, and DRPT desires to transfer periodically to NVTC
42 and PRTC, the ATI funds received by VDOT under the ARCA; ~~and~~

43 WHEREAS, such projects (“ATI-Funded Projects”) would be funded in whole or in
44 part from the ATI funds transferred from VDOT to DRPT, and the CTB desires to delegate to
45 NVTC and PRTC the authority to select and administer the ATI-Funded Projects; ~~and~~

46 WHEREAS, the Parties entered into a Memorandum of Agreement Regarding the
47 Annual Transit Investment from the 395 HOT Lanes, dated December 20, 2017, and now wish

48 to amend and restate that agreement for the purpose of amending provisions relating to payment
49 of operating expenses as an ATI-Funded Project.

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AGREEMENT

NOW THEREFORE, the Parties agree as follows:

I. Purpose of this MOA

This MOA provides for the transfer of the ATI funds received by VDOT under the ARCA to DRPT. It also provides for the transfer of the ATI funds received by DRPT under this MOA to NVTC and PRTC. NVTC and PRTC will select and administer ATI-Funded Projects, which must be approved by the CTB.

This MOA does not grant DRPT, NVTC, or PRTC any authority over: (i) Interstate 95 or Interstate 395, (ii) the tolling of Interstate 95 or Interstate 395, or (iii) any other roadways. It also does not obligate VDOT or the CTB to transfer any funds to DRPT other than the ATI funds. It obligates VDOT to transfer the ATI funds to DRPT only to the extent VDOT actually receives such ATI funds from the Concessionaire (or its successor) under the ARCA.

II. Basic Agreement

A. VDOT and the CTB shall have the following rights and duties:

1. Annual Transfers by VDOT. VDOT shall transfer the ATI funds it receives, if any, to DRPT once per year, within 30 days of VDOT’s receipt of the ATI funds from the Concessionaire under the ARCA. A schedule of the expected ATI funds for each year of this MOA is attached hereto as **EXHIBIT A**. VDOT will not deduct any administrative fee or other charges from the ATI funds it receives.

2. Duration of Tolling: Nothing in this MOA shall obligate or be construed as obligating VDOT to continue or cease tolls after this MOA terminates, except as provided in Section IV.

75 **3. CTB Annual Budget Process.** In preparation for the CTB’s annual budget process,
 76 VDOT will ensure the Six Year Financial Plan reflects ATI funds due to VDOT from
 77 the Concessionaire under the ARCA.

78 The CTB, working through VDOT and DRPT, agrees to do the following:

79 (a) Each year and in accordance with the schedule of the Department of
 80 Planning and Budget of the Commonwealth, the CTB, working through
 81 VDOT and DRPT, or the CTB's designee shall request the Governor to
 82 include in the budget to be delivered to the General Assembly during its
 83 next session a provision that the anticipated ATI funds be appropriated
 84 to fund the ATI-Funded Projects during the next succeeding fiscal year
 85 or biennial period, as applicable.

86 (b) The CTB, working through VDOT and DRPT, shall use its best
 87 efforts to have (i) the Governor include, in each biennial or any
 88 supplemental budget that is presented to the General Assembly, the
 89 amounts described in (a) above and (ii) the General Assembly deposit,
 90 appropriate, and re-appropriate, as applicable, such amounts.

91 (c) The CTB, working through VDOT and DRPT, shall take all actions
 92 necessary to have payments which are made pursuant to (b) above
 93 charged against the proper appropriation made by the General Assembly.

94 (d) The CTB, working through VDOT and DRPT, shall notify NVTC
 95 and PRTC promptly upon becoming aware of any failure by the General
 96 Assembly to appropriate for the next succeeding fiscal year or biennial
 97 period, as applicable, amounts described in (a).

98 B. DRPT shall have the following rights and duties:

99 **1. DRPT Annual Budget.** DRPT shall include in its annual budget presented
100 to the CTB for approval in June of each year the ATI funds expected to be
101 transferred to it from VDOT in the upcoming year, and the proposed allocation
102 of all such ATI funds, including to pay any NVTC ATI-Related Debt Service
103 and/or PRTC ATI-Related Debt Service (each as defined below) in the
104 upcoming year.

105 **2. Proportion of ATI Funds Available; Annual Transfers by DRPT.** Each
106 year DRPT shall transfer the ATI funds it receives from VDOT to NVTC and
107 PRTC within 30 days of its receipt of the ATI funds from VDOT. DRPT will
108 divide and transfer the ATI funds between NVTC and PRTC *pro rata*, based on
109 each commission's population as determined by the most recent population
110 figures of the Weldon Cooper Center. The populations of all member
111 jurisdictions of each commission will be included in determining the availability
112 of ATI funds as between NVTC and PRTC under this MOA except the
113 populations of the following jurisdictions will not be counted: (i) the County of
114 Loudoun, (ii) the City of Falls Church, (iii) the City of Fairfax, (iv) the City of
115 Manassas, and (v) the City of Manassas Park. For any year during the life of
116 this MOA, during the project approval process established in II.D.1. and II.D.2.,
117 NVTC and PRTC may agree on an alternate mechanism of designating the
118 proportion of ATI funds available to either NVTC or PRTC under this MOA
119 and use this mechanism in the selecting the projects they recommend for CTB
120 approval. DRPT will not deduct any administrative fee or other charges from
121 the ATI funds it receives. Subject to the other requirements of this MOA, no

122 geographic restrictions apply to either NVTC's or PRTC's use of the ATI funds;
123 each of NVTC and PRTC is free to spend its share of the ATI funds on ATI-
124 Funded Projects that are beyond the geographic bounds (in whole or in part) of
125 its respective member jurisdictions.

126 **3. DRPT Assistance; Presentation to CTB.** DRPT may provide technical
127 assistance to NVTC and PRTC during the selection and implementation of ATI-
128 Funded Projects. DRPT will provide the CTB with an analysis of whether the
129 proposed ATI-Funded Projects meet the requirements of this MOA, and will
130 provide a copy of the analysis to NVTC and PRTC for review and input at least
131 fifteen working days prior to DRPT sending it to the CTB.

132 C. Limits on the Use of ATI Funds:

133 **1. Limits on Use of Toll Revenues.** Because the ATI funds are paid out of 395
134 Revenues, this MOA is governed by applicable state and federal laws restricting
135 the use of toll revenues, including (without limitation) Va. Code § 33.2-309, 23
136 U.S.C. §§ 129 and 166, and the terms of any agreement between the Federal
137 Highway Administration ("FHWA") and VDOT required to toll the I-95/I-395
138 Project. The Parties agree that the ATI funds may be used for programs and
139 projects reasonably related to or benefiting the toll paying users of the entire I-
140 95/I-395 Project since the 395 Revenues, as defined under the ARCA, are
141 inclusive of the incremental increase in toll revenue generated on the Original
142 95 HOT Lanes, which incremental increase is attributable to the addition of the
143 395 HOT Lanes.

144 **2. Priority of Use of ATI Funds.** ATI funds transferred to NVTC must first
145 be used to pay any NVTC ATI-Related Debt Service and thereafter may be used

146 to fund ATI-Funded Projects. ATI funds transferred to PRTC must first be used
147 to pay any PRTC ATI-Related Debt Service and thereafter may be used to fund
148 ATI-Funded Projects.

149 **"NVTC ATI-Related Debt"** means (i) any bonds, promissory notes,
150 loan, financing or credit agreements under which NVTC is obligated to repay
151 money borrowed and secured primarily by ATI Funds to finance an ATI-Funded
152 Project, and (ii) all installment sales, conditional sales, and capital lease
153 obligations incurred or assumed by NVTC and secured primarily by ATI Funds
154 to finance an ATI-Funded Project. The term "incurred" as used in the MOA
155 with respect to NVTC ATI-Related Debt shall also mean issued or assumed.

156 **"NVTC ATI-Related Debt Service"** means for a fiscal year or other
157 measurement period the aggregate of the payments to be made in respect of the
158 principal of and interest on NVTC ATI-Related Debt and the associated
159 financing or trustee's fees or charges and required deposits to any reserve funds.

160 **"PRTC ATI-Related Debt"** means (i) any bonds, promissory notes,
161 loan, financing or credit agreements under which PRTC is obligated to repay
162 money borrowed and secured primarily by ATI Funds to finance an ATI-Funded
163 Project, and (ii) all installment sales, conditional sales, and capital lease
164 obligations incurred or assumed by PRTC and secured primarily by ATI Funds
165 to finance an ATI-Funded Project. The term "incurred" as used in the MOA
166 with respect to PRTC ATI-Related Debt shall also mean issued or assumed.

167 **"PRTC ATI-Related Debt Service"** means for a fiscal year or other
168 measurement period the aggregate of the payments to be made in respect of the

169 principal of and interest on PRTC ATI-Related Debt and the associated
 170 financing or trustee's fees or charges and required deposits to any reserve funds.

171 **3. NVTC ATI-Related Debt Limits.** No NVTC ATI-Related Debt may be
 172 incurred unless the annual amount of NVTC ATI-Related Debt Service
 173 payments will be less than 60% of the ATI funds expected to be transferred from
 174 DRPT to NVTC in each year such debt service payments will be paid. In
 175 addition, no NVTC ATI-Related Debt may be incurred unless the ATI funds
 176 expected to be transferred from DRPT to NVTC in the fiscal year prior to the
 177 fiscal year the NVTC ATI-Related Debt would be incurred is at least two times
 178 the maximum annual scheduled NVTC ATI-Related Debt Service (in the then-
 179 current or any future fiscal year) on: (i) all outstanding NVTC ATI-Related
 180 Debt, plus (ii) the proposed new NVTC ATI-Related Debt.

181 **4. PRTC ATI-Related Debt Limits.** No PRTC ATI-Related Debt may be
 182 incurred unless the annual amount of PRTC ATI-Related Debt Service payments
 183 will be less than 60% of the ATI funds expected to be transferred from DRPT to
 184 PRTC in each year such debt service payments will be paid. In addition, no
 185 PRTC ATI-Related Debt may be incurred unless the ATI funds expected to be
 186 transferred from DRPT to PRTC in the fiscal year prior to the fiscal year the
 187 PRTC ATI-Related Debt would be incurred is at least two times the maximum
 188 annual scheduled Debt Service (in the then-current or any future fiscal year) on:
 189 (i) all outstanding PRTC ATI-Related Debt, plus (ii) the proposed new PRTC
 190 ATI-Related Debt.

191 **5. Use of ATI Funds Limited to ATI-Funded Projects.** The Commonwealth,
 192 NVTC, and PRTC shall have no right to use the ATI funds to pay any debt,

193 obligation, or liability unrelated to a CTB-approved ATI-Funded Project, or for
 194 any purposes other than those specified in this MOA. Interest earned on ATI
 195 funds held by NVTC and PRTC shall be considered ATI funds and may only be
 196 used for the purposes specified in this MOA.

197 **6. Limit on Operating Costs.** Neither NVTC nor PRTC may expend more
 198 than 50% of the ATI funds (as a percentage of the overall ATI funds transferred
 199 to either NVTC or PRTC, as applicable, during the preceding ~~five~~nine-fiscal-
 200 year period) for operating costs. In addition, with respect to operating costs,
 201 NVTC and PRTC may only use the ATI funds:

202 (a) to pay operating costs for individual ATI-Funded Projects that are
 203 transit operations and are regional in nature because: (i) the service crosses
 204 jurisdictional boundaries and/or (ii) the service provides a direct connection to
 205 Metrorail or VRE commuter rail stations; and

206 (b) to pay operating costs for all other individual ATI-Funded Projects
 207 only in the following maximum amounts: (i) up to 100% of operating costs for
 208 the first five years, (ii) up to 75% of operating costs for year six, (iii) up to 50%
 209 of operating costs for year seven, (iv) up to 25% of operating costs for year eight,
 210 and (v) 0% of operating costs after year eight.

211 D. NVTC and PRTC shall have the following rights and duties:

212 **1. Project Criteria and CTB Approval of ATI-Funded Projects.** Each year,
 213 NVTC and PRTC shall submit to DRPT a list of proposed ATI-Funded Projects
 214 for presentation by DRPT, NVTC and PRTC at a regularly-scheduled CTB
 215 workshop. Such proposed ATI-Funded Projects shall be selected by NVTC and
 216 PRTC in accordance with a process established by written agreement between

217 NVTC and PRTC consistent with the terms of this MOA. In addition, NVTC
218 and PRTC must provide to DRPT for DRPT's review and input any draft written
219 materials, presentations, or recommendations that NVTC and PRTC intend to
220 provide to the CTB for any workshop relating to proposed ATI-Funded projects
221 at least fifteen working days before NVTC and PRTC finalize any such written
222 materials, presentations, or recommendations. Each proposed ATI-Funded
223 Project presented to the CTB for approval shall be identified separately with
224 supporting documentation, including a description of the benefits that were the
225 basis for evaluation and selection of each such proposed ATI-Funded Project.
226 If the proposed ATI-Funded Projects are selected in accordance with NVTC and
227 PRTC's selection process described in II.D.2, and the proposed ATI-Funded
228 Projects meet the Project Criteria (defined below), then the CTB will consider
229 and approve the proposed ATI-Funded Projects by an affirmative vote and,
230 subject to appropriation by the General Assembly, allocate ATI funds for such
231 ATI-Funded Projects. To be approved by the CTB, each proposed ATI-Funded
232 Project must meet each of the following four criteria (the "Project Criteria"):

- 233 (a) Must reasonably relate to or benefit the toll-paying users of the
234 I-95/I-395 Project;
- 235 (b) Must have the capacity to attain one or more of the Improvement
236 Goals;
- 237 (c) Must be one of the following types of multimodal transportation
238 improvements serving the Corridor (which term, for the avoidance of
239 doubt, includes adjacent and nearby routes):

- 240 i. New or enhanced local and commuter bus service, including
241 capital and operating expenses (*e.g.*, fuel, tires, maintenance,
242 labor, and insurance), and transit priority improvements,
- 243 ii. Expansion or enhancement of transportation demand
244 management strategies, including without limitation, vanpool,
245 and formal and informal carpooling programs and assistance,
- 246 iii. Capital improvements for expansion or enhancement of
247 Washington Metropolitan Area Transit Authority rail and bus
248 service, including capital and operating expenses, and improved
249 access to Metrorail stations and Metrobus stops,
- 250 iv. New or enhanced park and ride lot(s) and access or improved
251 access thereto,
- 252 v. New or enhanced VRE improvements or services, including
253 capital and operating expenses,
- 254 vi. Roadway improvements in the Corridor (which term, for the
255 avoidance of doubt, includes adjacent and nearby routes),
- 256 vii. Transportation Systems Management and Operations as
257 defined in 23 U.S.C. § 101(a)(30) on September 30, 2017, or
- 258 viii. Projects identified in Commonwealth studies and plans or
259 projects in the region's constrained long range plan (including
260 without limitation the I-95/395 Transit and TDM Study) or
261 regional transportation plans approved by the Northern Virginia

262 Transportation Authority, as any such plan may be updated from
263 time to time; and,

264 (d) Must demonstrate that the ATI-Funded Projects will be in
265 compliance with all applicable laws, rules, and regulations and have
266 received or will receive all required regulatory approvals.

267 Under no circumstances shall the Project Criteria be modified except by
268 written amendment to this MOA.

269 **2. Proposed ATI-Funded Project Selection Process.** Any ATI-Funded Project
270 to be proposed for CTB approval shall be selected by NVTC and PRTC through
271 a process established by written agreement between NVTC and PRTC. Such
272 process shall include at least the following three elements:

273 (a) A request to the following entities to submit a list of their preferred
274 proposed ATI-Funded Projects to NVTC and PRTC:

275 (i) all jurisdictions that are members of either NVTC or PRTC,
276 and

277 (ii) other public transportation providers providing services in
278 those jurisdictions;

279 (b) The evaluation, prioritization, and selection of proposed ATI-Funded
280 Projects by NVTC and PRTC, the development of a funding strategy for
281 each proposed ATI-Funded Project, and the submission of proposed
282 ATI-Funded Projects (including a funding strategy for each) by NVTC
283 and PRTC to the CTB, through DRPT; and,

284 (c) A public hearing held by NVTC and PRTC prior to NVTC and
 285 PRTC’s selection of proposed ATI-Funded Projects for submission to
 286 the CTB.

287 **3. Financing of ATI-Funded Projects; No Recourse against**
 288 **Commonwealth.** NVTC and PRTC may use ATI funds appropriated by the
 289 General Assembly and allocated by the CTB to NVTC and PRTC to support the
 290 financing of approved ATI-Funded Projects.

291 NVTC and PRTC, respectively, are solely responsible for obtaining and
 292 repaying all NVTC ATI-Related Debt and PRTC ATI-Related Debt at their own
 293 respective cost and risk, and without recourse to the Commonwealth of Virginia,
 294 the CTB, VDOT, and/or DRPT, for any ATI-Funded Project.

295 The Commonwealth of Virginia, the CTB, VDOT, and DRPT shall have
 296 no liability for any (i) NVTC ATI-Related Debt or NVTC ATI-Related Debt
 297 Service, (ii) PRTC ATI-Related Debt or PRTC ATI-Related Debt Service, or
 298 (iii) any other sum secured by or accruing under any financing document entered
 299 into by NVTC or PRTC as a result of this MOA. No document evidencing or
 300 associated with any NVTC ATI-Related Debt or PRTC ATI-Related Debt shall
 301 contain any provisions whereby a trustee would be entitled to seek any damages
 302 or other amounts from the Commonwealth of Virginia, CTB, VDOT, or DRPT
 303 due to any breach of this MOA.

304 Each bond, promissory note, or other document evidencing NVTC ATI-
 305 Related Debt or PRTC ATI-Related Debt must include a conspicuous recital on
 306 its face stating: (a) payment of the principal and interest does not constitute a
 307 claim against VDOT’s interest in I-95, I-395, or any part thereof; (b) payment is

308 not an obligation of the Commonwealth of Virginia, VDOT, DRPT, the CTB,
 309 or any other agency, instrumentality, or political subdivision of the
 310 Commonwealth of Virginia (including NVTC’s or PRTC’s member
 311 jurisdictions, as applicable), moral or otherwise; and (c) neither the full faith and
 312 credit nor the taxing power of the Commonwealth of Virginia, VDOT, DRPT,
 313 the CTB, or any other agency, instrumentality, or political subdivision of the
 314 Commonwealth of Virginia, (including NVTC’s or PRTC’s member
 315 jurisdictions, as applicable) is pledged to the payment of the principal and
 316 interest on such NVTC ATI-Related Debt or PRTC ATI-Related Debt.

317 NVTC and PRTC shall not enter into agreements with holders of any
 318 NVTC ATI-Related Debt or PRTC ATI-Related Debt incurred by NVTC,
 319 PRTC, or their member jurisdictions that contain a pledge or claim on the ATI
 320 funds or NVTC or PRTC’s interest in the ATI funds under this MOA except
 321 such debt issued for ATI-Funded Projects. If, despite such efforts, ATI funds
 322 are applied to satisfy any debt of NVTC or PRTC that is not properly payable
 323 out of ATI funds in accordance with this MOA and state and federal law, NVTC
 324 or PRTC as applicable shall reimburse DRPT (which in turn shall reimburse
 325 VDOT an equal amount) in full any such ATI funds or accounts from any other
 326 available revenues other than the ATI funds.

327 **4. Monitoring.** NVTC and PRTC shall provide jointly an annual report to the
 328 CTB within 120 days of the end of NVTC’s and PRTC’s fiscal year. The report
 329 shall contain at a minimum the following four items:

- 330 (a) A description of the ATI-Funded Projects selected for funding in the
 331 past fiscal year and the benefits that were the basis for evaluation and
 332 selection of each such ATI-Funded Projects;
- 333 (b) Starting five years after the effective date of this MOA, a review of
 334 the ATI-Funded Projects funded in past fiscal years describing the
 335 degree to which the expected benefits were realized or are being realized;
- 336 (c) In the event that an ATI-Funded Project is not providing substantially
 337 similar benefits to those that were the basis for evaluation and selection
 338 of the ATI-Funded Project, the report shall evaluate the viability of a
 339 plan to either (i) modify such ATI-Funded Project, or (ii) redeploy assets
 340 in such ATI-Funded Project to other eligible ATI-Funded Projects that
 341 are expected to provide greater benefits; and,
- 342 (d) The proposed uses of: (i) residual, unobligated balances of ATI funds
 343 carried over from prior years, and (ii) interest earned on such ATI funds.

344 **5. Accounting.** NVTC and PRTC shall each receive and manage, as a fiduciary,
 345 the ATI funds appropriated by the General Assembly, allocated by the CTB, and
 346 transferred to them by DRPT. NVTC and PRTC shall each create and maintain
 347 all funds and accounts containing the ATI funds separate and apart from all other
 348 funds and accounts of NVTC and PRTC. Said funds shall constitute a “special
 349 revenue fund” as defined by the Governmental Accounting Standards Board.
 350 The revenues and expenses relating to the use of the ATI funds and the ATI-
 351 Funded Projects undertaken shall not be commingled with any other funds,
 352 accounts, venues, or expenses of NVTC or PRTC. NVTC and PRTC shall each
 353 report for the ATI-Funded Projects financed by ATI funds provided by this

354 MOA and reported as an applicable special revenue fund within their financial
355 statements. Expenditures will be recorded and reported for each ATI-Funded
356 Project.

357 All ATI funds transferred to NVTC and PRTC pursuant to the terms of
358 this MOA shall be held by NVTC and PRTC in accounts with a financial
359 institution under an arrangement that, to the extent reasonably practicable,
360 preclude such funds from being an asset subject to the claims of creditors of
361 NVTC and PRTC, other than (i) a holder of NVTC ATI-Related Debt or PRTC
362 ATI-Related Debt, or (ii) other claims related to the ATI-Funded Projects
363 undertaken in accordance with this MOA.

364 **6. Quality Management.** NVTC and PRTC shall be responsible for all quality
365 assurance and quality control activities necessary to properly manage the
366 funding of the development, design, construction, purchases, acquisition,
367 operation, and maintenance of any ATI-Funded Project they have undertaken
368 pursuant to this MOA, and will develop and provide to VDOT and DRPT for
369 information purposes NVTC's and PRTC's manuals, policies, and procedures.

370 **7. Public Information.** During the term of this MOA, NVTC and PRTC shall
371 provide information to the public concerning the ATI-Funded Projects they have
372 undertaken, including any public meetings and public hearing that may be
373 required by law or regulation.

374 **8. Regulatory Approvals.** NVTC and PRTC shall obtain, keep in effect,
375 maintain, and comply with all regulatory approvals necessary to fund the
376 development, design, construction, purchases, acquisition, operation, and
377 maintenance of any ATI-Funded Projects.

378 **9. Contracting Practices.** During the term of this MOA, NVTC and PRTC
379 covenant and agree that, with respect to the ATI-Funded Projects they have
380 undertaken, they will comply with all requirements of state and federal laws
381 relating to anti-discrimination, including (without limitation) Titles VI and VII
382 of the Civil Rights Act of 1964, as amended, and the Americans with Disabilities
383 Act, and shall contractually require the same of all contractors, subcontractors,
384 vendors, and recipients of any ATI funds. NVTC and PRTC recognize the
385 importance of the participation of minority, women-owned and small businesses
386 through the federal and local Disadvantaged Business Enterprise programs and
387 will abide by such programs in implementing ATI-Funded Projects.

388 NVTC and PRTC shall comply with all applicable federal requirements,
389 including those applicable to highways that are part of the National Highway
390 System.

391 **10. Losses.** "Losses" are losses actually suffered or incurred arising from: (a)
392 any failure by NVTC or PRTC to comply with, to observe or to perform in any
393 material respect any of the covenants, obligations, agreements, terms or
394 conditions in this MOA, or any breach by NVTC or PRTC of its representations
395 or warranties in this MOA; (b) any actual or willful misconduct or negligence
396 of NVTC or PRTC, their employees or agents in direct connection with the I-
397 95/I-395 Project or any related ATI-Funded Projects; (c) any actual or alleged
398 patent or copyright infringement or other actual or alleged improper
399 appropriation or use of trade secrets, patents, proprietary information, know-
400 how, trademarked, or service-marked materials, equipment devices or processes,
401 copyright rights or inventions by NVTC or PRTC in direct connection with the

402 I-95/I-395 Project or any related ATI-Funded Projects; (d) any inverse
 403 condemnation, trespass, nuisance, or similar taking of or harm to real property
 404 committed or caused by NVTC or PRTC, their employees, or agents in direct
 405 connection with the I-95/I-395 Project; or (e) any assumed liabilities.

406 NVTC and PRTC shall each include the Commonwealth of Virginia, the
 407 CTB, VDOT, DRPT, and their officers, employees, and agents, (collectively
 408 “State Indemnites”) as additional insureds on NVTC and PRTC’s insurance
 409 policies so the State Indemnites are protected from and against any Losses.

410 In addition, NVTC and PRTC shall contractually require their
 411 contractors, subcontractors, vendors, and others providing goods or performing
 412 services related to any ATI-Funded Project to indemnify the State Indemnites
 413 against any Losses.

414 All insurance purchased by NVTC and PRTC or their contractors
 415 pursuant to this section shall name each of the State Indemnites as additional
 416 insureds. This provision shall survive the expiration or earlier termination of
 417 this MOA.

418 In the event any third-party claim to which this section II.D.10 applies is
 419 asserted in writing against a State Indemnitee, VDOT and/or DRPT will as
 420 promptly as practicable notify NVTC and PRTC in writing of such claim, which
 421 shall include a copy and any related correspondence or documentation from the
 422 third party asserting the claim. However, any failure to give such prompt notice
 423 shall not constitute a waiver of any rights of any State Indemnitee unless such
 424 failure limits or precludes the availability of those rights.

425 **11. Records.** NVTC and PRTC agree to provide DRPT and VDOT
426 access to all records relating to ATI-Funded Projects. Further, NVTC and PRTC
427 will provide all such records for inspection and audit by VDOT, DRPT, and
428 federal agencies including (without limitation) the United States Department of
429 Transportation, the FHWA, and the Federal Transit Administration, or their
430 designees, upon reasonable notice at all times during the term of this MOA.
431 NVTC and PRTC agree promptly to furnish to VDOT and DRPT copies of all
432 reports and notices they deliver to bondholders or other credit providers or any
433 trustee relating to the use of the ATI funds.

434 **III. Term.** Unless this MOA is otherwise terminated in accordance with Section VII below,
435 the term of this MOA shall commence on the date last signed by the Parties (“the Effective
436 Date”) and shall expire concurrent with the expiration or termination of the ARCA (as may be
437 amended and restated from time to time).

438 **IV. Temporal Limit on Debt and Pay-As-You_Go Financing.** NVTC and PRTC shall not
439 incur any NVTC ATI-Related Debt or PRTC ATI-Related Debt that is dependent on ATI funds
440 and which matures or extends beyond the term of this MOA. If this MOA is terminated in
441 accordance with Section VII, or expires due to the termination of the ARCA, and there is
442 outstanding NVTC ATI-Related Debt or PRTC ATI-Related Debt for which ATI funds have
443 been pledged to pay NVTC ATI-Related Debt Service or PRTC ATI-Related Debt Service, or
444 there are pay-as-you-go ATI-Funded Projects that are not complete (and provided the use of
445 ATI funds to pay NVTC ATI-Related Debt Service or PRTC ATI-Related Debt Service or the
446 costs of the pay-as-you-go ATI-Funded Projects is not a misuse of ATI funds under this MOA
447 and the cause or basis of the termination), then tolls shall continue to be imposed on the I-95/I-
448 395 Project (in the case of expiration of this MOA due to the termination of the ARCA, the

449 continuation of such tolls being subject to CTB approval) and the CTB will allocate 395
450 Revenues in an amount sufficient, if available, to pay NVTC ATI-Related Debt Service or
451 PRTC ATI-Related Debt Service, as applicable, or to complete the pay-as-you-go ATI-Funded
452 Projects. However, for pay-as-you-go ATI-Funded Projects the CTB will not approve funding
453 for more a two-year period after termination of the MOA. For pay-as-you-go ATI-Funded
454 Projects that are capital improvement projects with completion dates more than two years past
455 the termination of the MOA, NVTC and/or PRTC, as applicable, shall use best efforts to obtain
456 additional funding necessary to complete the project. If NVTC and/or PRTC knows it will not
457 be able to obtain additional funding to complete such a project, it shall terminate the project as
458 soon as practicable after gaining such knowledge. No new projects may be funded with the ATI
459 funds after any delivery of a written notice of termination under Section VII.

460 **V. Entire Agreement.** This MOA constitutes the entire and exclusive agreement among the
461 Parties relating to the specific matters covered. All prior written, and prior or contemporaneous
462 verbal agreements, understandings, and representations are superseded, revoked, and rendered
463 ineffective for any purpose.

464 **VI. Amendment.** This MOA may be modified only in writing signed by all Parties or their
465 permitted successor(s) or assignee(s).

466 **VII. Termination.** This MOA may be terminated (a) by a non-breaching Party for material
467 non-compliance with this MOA that has not either been remedied, or a remedy commenced and
468 diligently pursued thereafter, within 120 days after written notice to the breaching Party from a
469 non-breaching Party, or (b) by written agreement of the Parties. However, prior to any
470 termination, the Parties shall meet and confer to make a good faith attempt to resolve any non-
471 compliance issues as follows. Within 30 days of the notice, the Commissioner of Highways,

472 the Director of DRPT, the NVTC Executive Director, and the PRTC Executive Director shall
473 meet to discuss resolution of the non-compliance issues. If a resolution cannot be reached
474 within 30 days, the Secretary of Transportation and the Chairman of NVTC and the Chairman
475 of PRTC shall meet within 30 days to discuss resolution of the non-compliance issues. If a
476 resolution cannot be agreed within 30 days, the termination shall be effective as set forth in the
477 written notice and in accordance with this MOA.

478 **VIII. Notices.** Notices shall be in writing and addressed as follows:

479 **If to NVTC:**

480 Executive Director
481 Northern Virginia Transportation Commission
482 2300 Wilson Boulevard, Suite ~~230620~~
483 Arlington, VA 22201
484 Fax: (703) 524-1756

485
486 **If to PRTC:**

487 Executive Director
488 Potomac and Rappahannock Transportation Commission
489 14700 Potomac Mills Road
490 Woodbridge, VA 22192
491 Fax: (703) 583-1377

492
493 **If to VDOT:**

494 Virginia Department of Transportation
495 1401 East Broad Street
496 Richmond, Virginia 23219
497 Attn: Commissioner of Highways
498 Fax: (804) 786-2940

499
500 *With a copy to:*

501 Office of the Attorney General
502 Chief, Transportation Section
503 202 North Ninth Street
504 Richmond, Virginia 23219
505 Fax: (804) 692-1647

506
507 **If to DRPT:**

508

509 Department of Rail & Public Transportation
510 600 East Main Street
511 Richmond, VA 23219
512 Attn: Director
513 Fax: 804 225 3752
514

515 Any Party may, by notice as specified above, in writing designate an additional or a
516 different entity or mailing address to which all such notices should be sent.

517 **IX. Relationship of the Parties.** The relationship of each Party to each other Party shall be
518 one of an independent contractor, not an agent, partner, lessee, joint venturer, or employee.

519 **X. No Third Party Beneficiaries.** Nothing contained in this MOA is intended or shall be
520 construed as creating or conferring any rights benefits or remedies upon or creating any
521 obligations of the Parties toward any person or entity not a party to this MOA.

522 **XI. Governing Law.** This MOA shall be governed and construed in accordance with the laws
523 of the Commonwealth of Virginia, without regard for conflict of laws principles.

524 **XII. Assignment.** This MOA may be assigned only with the written approval of the other
525 Parties. In the event of an agreed assignment, there will be an amendment to this MOA to
526 reflect the change in Parties.

527 **XIII. Survival.** If any provisions in this MOA are rendered obsolete or ineffective, the Parties
528 agree to negotiate in good faith appropriate amendments to, or replacement of such provisions,
529 to restore and carry out the original purposes to the extent practicable. If any provision is
530 rendered void or invalid, all remaining provisions shall survive.

531 **XIV. Notice of Legal Proceedings.** The Parties agree promptly to notify each other if they
532 become aware of any claim or legal proceeding that could impact the program, projects, and
533 activities undertaken pursuant to this MOA.

534 **XV. Construction of Agreement.** This MOA is intended by the Parties to be construed as a
535 whole, and indivisible, and its meaning is to be ascertained from the entire instrument. All parts

536 of the MOA are to be given effect with equal dignity, including but not limited to the recitals at
537 the beginning of this MOA, and all such parts, including the recitals, are to be given full force
538 and effect in construing this MOA. No provision of any recital shall be construed as being
539 controlled by, or having less force and effect, than any other part of this MOA because the
540 provision is set forth in a recital.

541 **XVI. No Personal Liability.** This MOA shall not be construed as creating any personal
542 liability on the part of any officer, employee, or agent of the Parties.

543 **XVII. No Waiver of Sovereign Immunity.** Nothing in this MOA shall be deemed a waiver
544 of sovereign immunity by any Party.

545 **XVIII. Appropriations.** All obligations of the CTB to allocate ATI funds are subject to
546 appropriation by the Virginia General Assembly.

547 *[SIGNATURE PAGES TO FOLLOW]*

COMMONWEALTH TRANSPORTATION BOARD

The Honorable Shannon Valentine
Secretary of Transportation

Date: _____

[MEMORANDUM OF AGREEMENT REGARDING THE ANNUAL TRANSIT INVESTMENT FROM THE 395 HOT LANES
SIGNATURE PAGE]

VIRGINIA DEPARTMENT OF TRANSPORTATION

Stephen C. Brich, P.E.
Commissioner of Highways

Date: _____

[MEMORANDUM OF AGREEMENT REGARDING THE ANNUAL TRANSIT INVESTMENT FROM THE 395 HOT LANES
SIGNATURE PAGE]

NORTHERN VIRGINIA TRANSPORTATION COMMISSION

Katherine A. Mattice
Executive Director

Date: _____

[MEMORANDUM OF AGREEMENT REGARDING THE ANNUAL TRANSIT INVESTMENT FROM THE 395
HOT LANES SIGNATURE PAGE]

POTOMAC AND RAPPAHANNOCK TRANSPORTATION
COMMISSION

Robert Schneider
Executive Director

Date: _____

[MEMORANDUM OF AGREEMENT REGARDING THE ANNUAL TRANSIT INVESTMENT FROM THE 395 HOT
LANES SIGNATURE PAGE]

VIRGINIA DEPARTMENT OF RAIL AND PUBLIC TRANSPORTATION

Jennifer Mitchell

Director

Date: _____

[MEMORANDUM OF AGREEMENT REGARDING THE ANNUAL TRANSIT INVESTMENT FROM THE 395 HOT LANES SIGNATURE PAGE]

EXHIBIT A

PART A – ANNUAL TRANSIT INVESTMENT FORM			
Payment Due Date	Annual Transit Investment (\$ Nominal)	Payment Due Date	Annual Transit Investment (\$ Nominal)
395 Service Commencement Date	\$15,000,000	+ 35 year	\$35,598,078
+ 1 year	15,375,000	+ 36 year	36,488,030
+ 2 year	15,759,375	+ 37 year	37,400,230
+ 3 year	16,153,359	+ 38 year	38,335,236
+ 4 year	16,557,193	+ 39 year	39,293,617
+ 5 year	16,971,123	+ 40 year	40,275,958
+ 6 year	17,395,401	+ 41 year	41,282,857
+ 7 year	17,830,286	+ 42 year	42,314,928
+ 8 year	18,276,043	+ 43 year	43,372,801
+ 9 year	18,732,945	+ 44 year	44,457,121
+ 10 year	19,201,268	+ 45 year	45,568,549
+ 11 year	19,681,300	+ 46 year	46,707,763
+ 12 year	20,173,332	+ 47 year	47,875,457
+ 13 year	20,677,666	+ 48 year	49,072,343
+ 14 year	21,194,607	+ 49 year	50,299,152
+ 15 year	21,724,472	+ 50 year	51,556,631
+ 16 year	22,267,584	+ 51 year	52,845,547
+ 17 year	22,824,274	+ 52 year	54,166,685
+ 18 year	23,394,881	+ 53 year	55,520,852
+ 19 year	23,979,753	+ 54 year	56,908,874
+ 20 year	24,579,247	+ 55 year	58,331,596
+ 21 year	25,193,728	+ 56 year	59,789,885
+ 22 year	25,823,571	+ 57 year	61,284,633
+ 23 year	26,469,160	+ 58 year	62,816,748
+ 24 year	27,130,889	+ 59 year	64,387,167
+ 25 year	27,809,161	+ 60 year	65,996,846
+ 26 year	28,504,391	+ 61 year	67,646,767
+ 27 year	29,217,000	+ 62 year	69,337,937
+ 28 year	29,947,425	+ 63 year	71,071,385
+ 29 year	30,696,111	+ 64 year	72,848,170
+ 30 year	31,463,514	+ 65 year	74,669,374
+ 31 year	32,250,102	+ 66 year	76,536,108
+ 32 year	33,056,354	+ 67 year	78,449,511
+ 33 year	33,882,763	+ 68 year	80,410,749
+ 34 year	34,729,832		
		Term of ARCA	\$2,696,840,696