



COMMONWEALTH of VIRGINIA

Commonwealth Transportation Board

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Agenda Item # 16

RESOLUTION OF THE COMMONWEALTH TRANSPORTATION BOARD

December 6, 2017

MOTION

Made By: Ms. Hynes, Seconded By: Mr. Garczynski

Action: Motion Carried, Unanimously

**Title: Approval of a 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, on July 31, 2012, VDOT and 95 Express Lanes, LLC (Concessionaire) entered into a comprehensive agreement under which the Concessionaire developed and now operates approximately 29 miles of high-occupancy toll lanes in the median of Interstate 95 between the Route 610 interchange (Garrisonville Road) and Turkeycock Run (the 95 HOT Lanes); and

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

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

WHEREAS, after the Concessionaire has designed and built the 395 HOT Lanes, the 95 HOT Lanes and the 395 HOT Lanes will be operated and maintained by the Concessionaire under the ARCA as a continuous and unified 37-mile HOT Lane facility; and

WHEREAS, beginning upon service commencement of the 395 HOT Lanes, the Comprehensive Agreement requires the Concessionaire to pay to VDOT an annual transit investment (ATI) from toll revenue attributable to the 395 HOT Lanes; and

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

WHEREAS, the goals of the I-95/I-395 Project are to: (1) move more people, (2) enhance transportation connectivity, (3) improve transit service, (4) reduce roadway congestion, and (5) increase travel options, each of which will benefit the users of the I-95/I-395 Project; and

WHEREAS, to fund projects designed to accomplish these goals, the CTB desires to have VDOT transfer periodically to DRPT the ATI funds received by VDOT under the ARCA; and

WHEREAS, the CTB desires to delegate to the Northern Virginia Transportation Commission (NVTC) and Potomac Rappahannock Transportation Commission (PRTC) the authority to select and administer the implementation of Components designed specifically to attain the Improvement Goals to be financed with the Annual Transit Investment pursuant to a Memorandum of Agreement (MOA) between DRPT, VDOT, the CTB, the PRTC, and the NVTC; and

WHEREAS, the PRTC, the NVTC and the Commonwealth have negotiated the terms of a MOA outlining the duties of the CTB, DRPT, VDOT, the PRTC and the NVTC relating to the I-395 Annual Transit Investment, which is attached hereto as Exhibit A; and

NOW THEREFORE, BE IT RESOLVED, by the Commonwealth Transportation Board that the MOA among the CTB, DRPT, VDOT, the PRTC and the NVTC relating to the I-395 Annual Transit Investment attached hereto as Exhibit A is hereby approved and the Secretary, Director, and Commissioner are authorized to execute the MOA on behalf of the Board, DRPT, and VDOT, respectively, and further, that the Secretary is authorized to make such changes to the MOA as are necessary, provided such changes do not change the overall substance of the terms of the MOA.

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CTB Decision Brief

Approval of Memorandum of Agreement Regarding the Annual Transit Investment from the 395 HOT Lanes

Issue:

The Commonwealth of Virginia has committed that at least \$15 million will be provided annually through toll revenues as an Annual Transit Investment for multimodal improvements in the I-95/I-395 corridor. The Commonwealth has designated the Northern Virginia Transportation Commission (NVTC) and the Potomac and Rappahannock Transportation Commission (PRTC) the authority to select and administer projects funded by the Annual Transit Investment. The Department of Rail and Public Transportation (DRPT) requests approval of a Memorandum of Agreement (MOA) that defines the roles and responsibilities of the parties to the MOA, which include the Commonwealth Transportation Board (CTB), Virginia Department of Transportation (VDOT), DRPT, NVTC and PRTC.

Facts:

On July 31, 2012, VDOT and 95 Express Lanes, LLC entered into a comprehensive agreement under which 95 Express Lanes, LLC developed and now operates approximately 29 miles of high-occupancy toll (HOT) lanes in the median of Interstate 95 between the Route 610 interchange (Garrisonville Road) and Turkeycock Run. The original 95 HOT Lanes have been in operation since December 2014. On June 8, 2017, VDOT and 95 Express Lanes, LLC amended and restated the Comprehensive Agreement to add in the median of Interstate 395, approximately eight miles of HOT Lanes between Turkeycock Run and the Washington D.C. Line. After 95 Express Lanes, LLC has designed and built the 395 HOT Lanes, the original 95 HOT Lanes and the 395 HOT Lanes will be operated and maintained by 95 Express Lanes, LLC under the Comprehensive Agreement as a continuous and unified 37-mile HOT Lane facility.

Beginning upon service commencement of the 395 HOT Lanes, the Comprehensive Agreement requires 95 Express Lanes, LLC to pay to VDOT an Annual Transit Investment (ATI) from toll revenue attributable to the 395 HOT Lanes. The Commonwealth desires to use the ATI funds for multimodal improvements along the corridor. The first-scheduled ATI payment is \$15,000,000 and each subsequent scheduled ATI payment escalates at 2.5%, as reflected in Exhibit A to the MOA. To fund multimodal projects with ATI funds, VDOT desires to transfer periodically to DRPT, and DRPT desires to transfer periodically to NVTC and PRTC, the ATI funds received by VDOT under the Comprehensive Agreement. Such multimodal projects would be funded in whole or in part from the ATI funds transferred from VDOT to DRPT, and the CTB desires to delegate to NVTC and PRTC the authority to select and administer the ATI-Funded Projects.

The Commonwealth has negotiated the attached MOA regarding the Annual Transit Investment from the 395 HOT Lanes with NVTC and PRTC. The Governing Boards of NVTC and PRTC will approve the MOA at their meetings on December 7, 2017.

Recommendation: DRPT recommends that the CTB approve the MOA regarding the Annual Transit Investment from the 395 HOT Lanes.

Action Required by CTB: Approve the MOA regarding the Annual Transit Investment from the 395 HOT Lanes

Options: Approve, Deny, or Defer.

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

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

10 **RECITALS**

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

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

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

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

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

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

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

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

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

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

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AGREEMENT

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NOW THEREFORE, the Parties agree as follows:

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I. Purpose of this MOA

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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.

54

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.

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II. Basic Agreement

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

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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.

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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 IV.

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

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

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

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

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

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

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

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

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

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

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

125 C. Limits on the Use of ATI Funds:

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

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

138 fund ATI-Funded Projects. ATI funds transferred to PRTC must first be used to
139 pay any PRTC ATI-Related Debt Service and thereafter may be used to fund ATI-
140 Funded Projects.

141 **"NVTC ATI-Related Debt"** means (i) any bonds, promissory notes, loan,
142 financing or credit agreements under which NVTC is obligated to repay money
143 borrowed to finance an ATI-Funded Project, and (ii) all installment sales,
144 conditional sales, and capital lease obligations incurred or assumed by NVTC to
145 finance an ATI-Funded Project. The term "incurred" as used in the MOA with
146 respect to NVTC ATI-Related Debt shall also mean issued or assumed.

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

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

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

161 **3. NVTC ATI-Related Debt Limits.** The annual amount of NVTC ATI-Related
162 Debt Service payments shall not exceed 60% of the ATI funds expected to be
163 transferred from DRPT to NVTC in the year such debt service payments will be
164 paid. In addition, no NVTC ATI-Related Debt may be incurred unless the ATI
165 funds expected to be transferred from DRPT to NVTC in the fiscal year prior to
166 the fiscal year the NVTC ATI-Related Debt would be incurred is at least two
167 times the maximum annual scheduled NVTC ATI-Related Debt Service (in the
168 then-current or any future fiscal year) on: (i) all outstanding NVTC ATI-Related
169 Debt, plus (ii) the proposed new NVTC ATI-Related Debt.

170 **4. PRTC ATI-Related Debt Limits.** The annual amount of PRTC ATI-Related
171 Debt Service payments shall not exceed 60% of the ATI funds expected to be
172 transferred from DRPT to PRTC in the year such Debt Service payments will be
173 paid. In addition, no PRTC ATI-Related Debt may be incurred unless the ATI
174 funds expected to be transferred from DRPT to PRTC in the fiscal year prior to
175 the fiscal year the PRTC ATI-Related Debt would be incurred is at least two times
176 the maximum annual scheduled Debt Service (in the then-current or any future
177 fiscal year) on: (i) all outstanding PRTC ATI-Related Debt, plus (ii) the proposed
178 new PRTC ATI-Related Debt.

179 **5. Use of ATI Funds Limited to ATI-Funded Projects.** The Commonwealth,
180 NVTC, and PRTC shall have no right to use the ATI funds to pay any debt,
181 obligation, or liability unrelated to a CTB-approved ATI-Funded Project, or for
182 any purposes other than those specified in this MOA. Interest earned on ATI

183 funds held by NVTC and PRTC shall be considered ATI funds and may only be
184 used for the purposes specified in this MOA.

185 **6. Limit on Operating Costs.** Neither NVTC nor PRTC may expend more than
186 50% of the ATI funds (as a percentage of the overall ATI funds transferred to
187 either NVTC or PRTC, as applicable, during the preceding five-fiscal-year
188 period) for operating costs. In addition, with respect to operating costs, NVTC
189 and PRTC may only use the ATI funds:

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

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

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

200 **1. Project Criteria and CTB Approval of ATI-Funded Projects.** Each year,
201 NVTC and PRTC shall submit to DRPT a list of proposed ATI-Funded Projects
202 for presentation by DRPT, NVTC, and PRTC at a regularly-scheduled CTB
203 workshop. Such proposed ATI-Funded Projects shall be selected by NVTC and
204 PRTC in accordance with a process established by written agreement between
205 NVTC and PRTC consistent with the terms of this MOA. In addition, NVTC and

206 PRTC must provide to DRPT for DRPT’s review and input any draft written
207 materials, presentations, or recommendations that NVTC and PRTC intend to
208 provide to the CTB for any workshop relating to proposed ATI-Funded projects at
209 least fifteen working days before NVTC and PRTC finalize any such written
210 materials, presentations, or recommendations. Each proposed ATI-Funded
211 Project presented to the CTB for approval shall be identified separately with
212 supporting documentation, including a description of the benefits that were the
213 basis for evaluation and selection of each such proposed ATI-Funded Project. If
214 the proposed ATI-Funded Projects are selected in accordance with NVTC and
215 PRTC’s selection process described in II.D.2, the proposed ATI-Funded Projects
216 meet the Project Criteria (defined below), then the CTB will consider and approve
217 the proposed ATI-Funded Projects by an affirmative vote and, subject to
218 appropriation by the General Assembly, allocate ATI funds for such ATI-Funded
219 Projects. To be approved by the CTB, each proposed ATI-Funded Project must
220 meet each of the following four criteria (the “Project Criteria”):

- 221 (a) Must reasonably relate to or benefit the toll-paying users of the I-
222 95/I-395 Project;
- 223 (b) Must have the capacity to attain one or more of the Improvement
224 Goals;
- 225 (c) Must be one of the following types of multimodal transportation
226 improvements serving the Corridor (which term, for the avoidance of
227 doubt, includes adjacent and nearby routes):

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

250 Transportation Authority, as any such plan may be updated from
251 time to time; and,

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

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

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

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

263 (i) all jurisdictions that are members of either NVTC or PRTC, and
264 (ii) other public transportation providers providing services in
265 those jurisdictions;

266 (b) The evaluation, prioritization, and selection of proposed ATI-Funded
267 Projects by NVTC and PRTC, the development of a funding strategy for
268 each proposed ATI-Funded Project, and the submission of proposed ATI-
269 Funded Projects (including a funding strategy for each) by NVTC and
270 PRTC to the CTB, through DRPT; and,

271 (c) A public hearing held by NVTC and PRTC prior to NVTC and
272 PRTC's selection of proposed ATI-Funded Projects for submission to the
273 CTB.

274 **3. Financing of ATI-Funded Projects; No Recourse against Commonwealth.**

275 NVTC and PRTC may use ATI funds appropriated by the General Assembly and
276 allocated by the CTB to NVTC and PRTC to support the financing of approved
277 ATI-Funded Projects.

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

282 The Commonwealth of Virginia, the CTB, VDOT, and DRPT shall have
283 no liability for any (i) NVTC ATI-Related Debt or NVTC ATI-Related Debt
284 Service, (ii) PRTC ATI-Related Debt or PRTC ATI-Related Debt Service, or (iii)
285 any other sum secured by or accruing under any financing document entered into
286 by NVTC or PRTC as a result of this MOA. No document evidencing or
287 associated with any NVTC ATI-Related Debt or PRTC ATI-Related Debt shall
288 contain any provisions whereby a trustee would be entitled to seek any damages
289 or other amounts from the Commonwealth of Virginia, CTB, VDOT, or DRPT
290 due to any breach of this MOA.

291 Each bond, promissory note, or other document evidencing NVTC ATI-
292 Related Debt or PRTC ATI-Related Debt must include a conspicuous recital on
293 its face stating: (a) payment of the principal and interest does not constitute a

294 claim against VDOT's interest in I-95, I-395, or any part thereof; (b) payment is
295 not an obligation of the Commonwealth of Virginia, VDOT, DRPT, the CTB, or
296 any other agency, instrumentality, or political subdivision of the Commonwealth
297 of Virginia (including NVTC's or PRTC's member jurisdictions, as applicable),
298 moral or otherwise; and (c) neither the full faith and credit nor the taxing power of
299 the Commonwealth of Virginia, VDOT, DRPT, the CTB, or any other agency,
300 instrumentality, or political subdivision of the Commonwealth of Virginia,
301 (including NVTC's or PRTC's member jurisdictions, as applicable) is pledged to
302 the payment of the principal and interest on such NVTC ATI-Related Debt or
303 PRTC ATI-Related Debt.

304 NVTC and PRTC shall not enter into agreements with holders of any
305 NVTC ATI-Related Debt or PRTC ATI-Related Debt incurred by NVTC, PRTC,
306 or their member jurisdictions that contain a pledge or claim on the ATI funds or
307 NVTC or PRTC's interest in the ATI funds under this MOA except such debt
308 issued for ATI-Funded Projects. If, despite such efforts, ATI funds are applied to
309 satisfy any debt of NVTC or PRTC that is not properly payable out of ATI funds
310 in accordance with this MOA and state and federal law, NVTC or PRTC as
311 applicable shall reimburse DRPT (which in turn shall reimburse VDOT an equal
312 amount) in full any such ATI funds or accounts from any other available revenues
313 other than the ATI funds.

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

317 (a) A description of the ATI-Funded Projects selected for funding in the
318 past fiscal year and the benefits that were the basis for evaluation and
319 selection of each such ATI-Funded Projects;

320 (b) Starting five years after the effective date of this MOA, a review of the
321 ATI-Funded Projects funded in past fiscal years describing the degree to
322 which the expected benefits were realized or are being realized;

323 (c) In the event that an ATI-Funded Project is not providing substantially
324 similar benefits to those that were the basis for evaluation and selection of
325 the ATI-Funded Project, the report shall evaluate the viability of a plan to
326 either (i) modify such ATI-Funded Project, or (ii) redeploy assets in such
327 ATI-Funded Project to other eligible ATI-Funded Projects that are
328 expected to provide greater benefits; and,

329 (d) The proposed uses of: (i) residual, unobligated balances of ATI funds
330 carried over from prior years, and (ii) interest earned on such ATI-funds.

331 **5. Accounting.** NVTC and PRTC shall each receive and manage, as a fiduciary,
332 the ATI funds appropriated by the General Assembly, allocated by the CTB, and
333 transferred to them by DRPT. NVTC and PRTC shall each create and maintain
334 all funds and accounts containing the ATI funds separate and apart from all other
335 funds and accounts of NVTC and PRTC. Said funds shall constitute a “special
336 revenue fund” as defined by the Governmental Accounting Standards Board.
337 The revenues and expenses relating to the use of the ATI funds and the ATI-
338 Funded Projects undertaken shall not be commingled with any other funds,
339 accounts, venues, or expenses of NVTC or PRTC. NVTC and PRTC shall each

340 report for the ATI-Funded Projects financed by ATI funds provided by this MOA
341 and reported as an applicable special revenue fund within their financial
342 statements. Expenditures will be recorded and reported for each ATI-Funded
343 Project.

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

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

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

361 **8. Regulatory Approvals.** NVTC and PRTC shall obtain, keep in effect,
362 maintain, and comply with all regulatory approvals necessary to fund the

363 development, design, construction, purchases, acquisition, operation, and
364 maintenance of any ATI-Funded Projects.

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

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

378 **10. Losses.** “Losses” are losses actually suffered or incurred arising from: (a)
379 any failure by NVTC or PRTC to comply with, to observe or to perform in any
380 material respect any of the covenants, obligations, agreements, terms or
381 conditions in this MOA, or any breach by NVTC or PRTC of its representations
382 or warranties in this MOA; (b) any actual or willful misconduct or negligence of
383 NVTC or PRTC, their employees or agents in direct connection with the I-95/I-
384 395 Project or any related ATI-Funded Projects; (c) any actual or alleged patent
385 or copyright infringement or other actual or alleged improper appropriation or use

386 of trade secrets, patents, proprietary information, know-how, trademarked, or
387 service-marked materials, equipment devices or processes, copyright rights or
388 inventions by NVTC or PRTC in direct connection with the I-95/I-395 Project or
389 any related ATI-Funded Projects; (d) any inverse condemnation, trespass,
390 nuisance, or similar taking of or harm to real property committed or caused by
391 NVTC or PRTC, their employees, or agents in direct connection with the I-95/I-
392 395 Project; or (e) any assumed liabilities.

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

397 In addition, NVTC and PRTC shall contractually require their contractors,
398 subcontractors, vendors, and others providing goods or performing services
399 related to any ATI-Funded Project to indemnify the State Indemnitees against any
400 Losses.

401 All insurance purchased by NVTC and PRTC or their contractors pursuant
402 to this section shall name each of the State Indemnitees as additional insureds.
403 This provision shall survive the expiration or earlier termination of this MOA.

404 In the event any third-party claim to which this section II.D.10 applies is
405 asserted in writing against a State Indemnitee, VDOT and/or DRPT will as
406 promptly as practicable notify NVTC and PRTC in writing of such claim, which
407 shall include a copy and any related correspondence or documentation from the
408 third party asserting the claim. However, any failure to give such prompt notice

409 shall not constitute a waiver of any rights of any State Indemnitee unless such
410 failure limits or precludes the availability of those rights.

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

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

424 **IV. Temporal Limit on Debt and Pay-As-You-Go Financing.** NVTC and PRTC shall not
425 incur any NVTC ATI-Related Debt or PRTC ATI-Related Debt that is dependent on ATI funds
426 and which matures or extends beyond the term of this MOA. If this MOA is terminated in
427 accordance with Section VII, or expires due to the termination of the ARCA, and there is
428 outstanding NVTC ATI-Related Debt or PRTC ATI-Related Debt for which ATI funds have
429 been pledged to pay NVTC ATI-Related Debt Service or PRTC ATI-Related Debt Service, or
430 there are pay-as-you-go ATI-Funded Projects that are not complete (and provided the use of ATI
431 funds to pay NVTC ATI-Related Debt Service or PRTC ATI-Related Debt Service or the costs

432 of the pay-as-you-go ATI-Funded Projects is not a misuse of ATI funds under this MOA and the
433 cause or basis of the termination), then tolls shall continue to be imposed on the I-95/I-395
434 Project (in the case of expiration of this MOA due to the termination of the ARCA, the
435 continuation of such tolls being subject to CTB approval) and the CTB will allocate 395
436 Revenues in an amount sufficient to pay NVTC ATI-Related Debt Service or PRTC ATI-Related
437 Debt Service, as applicable, or to complete the pay-as-you-go ATI-Funded Projects. The CTB
438 will not approve funding for pay-as-you-go ATI-Funded Projects for more than two fiscal years
439 past the termination of the MOA in accordance with Section VII.

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

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

446 **VII. Termination.** This MOA may be terminated (a) by a non-breaching Party for material non-
447 compliance with this MOA that has not either been remedied, or a remedy commenced and
448 diligently pursued thereafter, within 120 days after written notice to the breaching Party from a
449 non-breaching Party, or (b) by written agreement of the Parties. However, prior to any
450 termination, the Parties shall meet and confer to make a good faith attempt to resolve any non-
451 compliance issues as follows. Within 30 days of the notice, the Commissioner of Highways, the
452 Director of DRPT, the NVTC Executive Director, and the PRTC Executive Director shall meet
453 to discuss resolution of the non-compliance issues. If a resolution cannot be reached within 30
454 days, the Secretary of Transportation and the Chairman of NVTC and the Chairman of PRTC

455 shall meet within 30 days to discuss resolution of the non-compliance issues. If a resolution
456 cannot be agreed within 30 days, the termination shall be effective as set forth in the written
457 notice and in accordance with this MOA.

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

459 **If to NVTC:**

460 Executive Director
461 Northern Virginia Transportation Commission
462 2300 Wilson Boulevard, Suite 620
463 Arlington, VA 22201
464 Fax: (703) 524-1756
465

466 **If to PRTC:**

467 Executive Director
468 Potomac and Rappahannock Transportation Commission
469 14700 Potomac Mills Road
470 Woodbridge, VA 22192
471 Fax: (703) 583-1377
472

473 **If to VDOT:**

474 Virginia Department of Transportation
475 1401 East Broad Street
476 Richmond, Virginia 23219
477 Attn: Commissioner of Highways
478 Fax: (804) 786-2940
479

480 *With a copy to:*

481 Office of the Attorney General
482 Chief, Transportation Section
483 202 North Ninth Street
484 Richmond, Virginia 23219
485 Fax: (804) 692-1647
486

487 **If to DRPT:**

488
489 Department of Rail & Public Transportation
490 600 East Main Street
491 Richmond, VA 23219
492

493 Attn: Director
494 Fax: 804 225 3752
495

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

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

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

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

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

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

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

515 **XV. Construction of Agreement.** This MOA is intended by the Parties to be construed as a
516 whole, and indivisible, and its meaning is to be ascertained from the entire instrument. All parts
517 of the MOA are to be given effect with equal dignity, including but not limited to the recitals at

518 the beginning of this MOA, and all such parts, including the recitals, are to be given full force
519 and effect in construing this MOA. No provision of any recital shall be construed as being
520 controlled by, or having less force and effect, than any other part of this MOA because the
521 provision is set forth in a recital.

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

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

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

528 *[SIGNATURE PAGES TO FOLLOW]*

529

530 COMMONWEALTH TRANSPORTATION BOARD

531

532

533 The Honorable Aubrey L. Layne, Jr
534 Secretary of Transportation

535

536 Date: _____

537

538

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

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540

541 VIRGINIA DEPARTMENT OF TRANSPORTATION

542

543

544 Charles A. Kilpatrick, P.E.
545 Commissioner of Highways

546

547 Date: _____

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

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551

552 NORTHERN VIRGINIA TRANSPORTATION COMMISSION

553

554

555 Katherine A. Mattice
556 Executive Director

557

558 Date: _____

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

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POTOMAC AND RAPPAHANNOCK TRANSPORTATION COMMISSION

565

566
567
568

Robert Schneider
Executive Director

569

Date: _____

570
571

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

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573

574 VIRGINIA DEPARTMENT OF RAIL AND PUBLIC TRANSPORTATION

575

576 _____

577 Jennifer Mitchell

578 Director

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580 Date: _____

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

583

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