

**POTOMAC AND RAPPAHANNOCK  
TRANSPORTATION COMMISSION**

**RESOLUTION**

**MOTION:** \_\_\_\_\_

**RESOLUTION NO. 08-01-\_\_\_\_\_  
OFFICIAL COMMISSION MEETING  
JANUARY 3, 2008**

**SECOND:** \_\_\_\_\_

**RE: AUTHORIZATION TO AMEND THE LIABILITY INSURANCE PLAN  
MANAGEMENT AGREEMENT WITH THE DIVISION OF RISK  
MANAGEMENT**

**WHEREAS**, NVTC and PRTC established the Commuter Rail Liability Insurance Plan ("Insurance Plan") in 1989; and

**WHEREAS**, the Insurance Plan is administered by the Commonwealth of Virginia Division of Risk Management (DRM) and provides for the indemnification obligations accepted by the Commissions in agreements with railroads; and

**WHEREAS**, amendments to the Insurance Fund Agreement and Liability Insurance Plan were recommended by the VRE Operations Board and approved by the Commissions last month; and

**WHEREAS**, changes to the Management Agreement for administration of the Liability Insurance Plan have also been agreed upon by the Division of Risk Management; and

**WHEREAS**, the VRE Operations Board recommends the following action.

**NOW, THEREFORE, BE IT RESOLVED** that the Potomac and Rappahannock Transportation Commission does hereby approve the Amended and Restated Management Agreement for administration of the Liability Insurance Plan for Commuter Rail Services.

**BE IT FURTHER RESOLVED** that the Commission authorizes the Commission Chairmen to execute the agreement on behalf of the Commissions.



# Virginia Railway Express Operations Board

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Web Site: <http://www.vre.org> • E-Mail: [gotrains@vre.org](mailto:gotrains@vre.org)

## AGENDA ITEM 9-G ACTION ITEM

**TO: CHAIRMAN KAUFFMAN AND THE VRE OPERATIONS BOARD**

**FROM: DALE ZEHNER**

**DATE: DECEMBER 21, 2007**

**RE: AUTHORIZATION TO AMEND THE LIABILITY INSURANCE  
PLAN MANAGEMENT AGREEMENT WITH THE DIVISION OF  
RISK MANAGEMENT**

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### RECOMMENDATION:

The VRE Operations Board is being asked to recommend that the Commissions authorize the Chairman of the Commissions to execute an Amended and Restated Management Agreement with the Division of Risk Management for administration of the Liability Insurance Plan.

### BACKGROUND:

NVTC and PRTC established the Commuter Rail Liability Insurance Plan ("Insurance Plan") in 1989. The Insurance Plan, which is administered by the Commonwealth of Virginia Division of Risk Management (DRM), provides for the indemnification obligations accepted by the Commissions in each of their agreements with the railroads as a condition of gaining access to the railroads' rights of way.

At the time the Insurance Plan was established, the Commissions entered into an Insurance Fund Agreement and a Management Agreement with DRM. These agreements, as well as the Plan, have not been modified since their original execution and it is appropriate to update them.

Last month, amendments to the Insurance Fund Agreement and the Liability Insurance Plan were recommended by the Operations Board and approved by the Commissions. This month, following discussions with DRM, changes to the Management Agreement are also being recommended, as reflected in the attached draft. These changes include the following:

- Corrections to state entity names to reflect organizational changes
- Updates to dates of agreements and names of parties
- Updates to State Code references
- Clarification of responsibilities of Commissions and of DRM, as well as Amtrak, with regard to purchase of insurance and administration of claims
- Addition of language to reflect minimum funding level of Insurance Fund
- Addition of language clarifying how additional parties and events are included in the Insurance Plan

**FISCAL IMPACT:**

There is no fiscal impact associated with this action.

December 10, 2007 draft

AMENDED AND RESTATED AGREEMENT

BETWEEN THE COMMONWEALTH OF VIRGINIA, DEPARTMENT OF THE TREASURY, DIVISION OF RISK MANAGEMENT AND THE NORTHERN VIRGINIA AND POTOMAC AND RAPPAHANNOCK TRANSPORTATION COMMISSIONS FOR ADMINISTRATION OF THE LIABILITY INSURANCE PLAN FOR COMMUTER RAIL SERVICES

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This Amended and Restated Agreement ("Agreement") is made this \_\_\_\_\_ day of

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\_\_\_\_\_, 2007, between the DIVISION OF RISK MANAGEMENT of the

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DEPARTMENT OF THE TREASURY for the COMMONWEALTH OF VIRGINIA, ("Risk

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Management"), and the NORTHERN VIRGINIA TRANSPORTATION DISTRICT

COMMISSION and the POTOMAC AND RAPPAHANNOCK TRANSPORTATION

DISTRICT COMMISSION (collectively the "Commissions"),

The Commissions have entered into a Master Agreement, dated as of October 3, 1989

("Master Agreement") and amended April 2, 1992, and July, 2007, for the Provision of

Commuter Rail Services in Northern Virginia – The Establishment of the Virginia Railway

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Express, which serves as the framework for a regional rail transit project providing service from

terminals located in the Fredericksburg and Manassas areas to Union Station in the District of

Columbia ("Rail Service"). In addition to the Commissions, the parties to the Master Agreement

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include Fairfax County, Prince William County, Stafford County, the City of Manassas, the City

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of Manassas Park, and the City of Fredericksburg ("Participating Jurisdictions") and Arlington

County and the City of Alexandria ("Contributing Jurisdictions").

The Rail Service has and will continue to use existing railroad tracks owned by the

Norfolk Southern Railway Company ("Norfolk Southern"), and CSX Transportation, Inc.

Deleted: the Richmond, Fredericksburg and Potomac Railroad Company ("RF&P"), and the Consolidated Rail Corporation ("Conrail")

(collectively "Railroads"), pursuant to Operating Access Agreements, dated

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May 5, 2000, as amended and extended, and February 10, 1995, as amended and extended, respectively, ("Access Agreements") with each of the Railroads. The Rail Service has been and will continue to be operated by the National Railroad Passenger Corporation ("Amtrak"), under a Purchase of Service Agreement, dated March 1, 1998, as amended ("Operating Agreement"), between the Commissions and Amtrak;

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The terms of the Access Agreements and the Operating Agreement require the indemnification of the Railroads and Amtrak by the Commissions in the annual aggregate amount of \$250,000,000, through a plan of insurance described in Exhibit A, originally dated December 20, 1989, and thereafter amended \_\_\_\_\_, 2007 ("Insurance Plan").

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The Commissions are authorized pursuant to §15.2-4518(13) of the Code of Virginia, as amended ("Code"), to provide third party indemnification through such an Insurance Plan administered by Risk Management. In accordance with the Insurance Plan, the Commissions have established and funded certain insurance reserves pursuant to an Insurance Fund

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Agreement, dated as of December 1, 1989 ("Insurance Fund"), as such has been amended and restated effective \_\_\_\_\_, 2007, between Risk Management and the Department of Treasury of the Commonwealth of Virginia, as trustee ("Trustee").

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The Insurance Plan is acceptable to Risk Management, and Risk Management, pursuant to its authority under §2.2-1839 of the Code, has agreed to administer the Commissions' insurance program which includes the Insurance Plan and the Insurance Fund.

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The parties desire to amend and restate the terms of this Agreement.

NOW, THEREFORE, the parties agree as follows:

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1. The term of this Agreement, as amended and restated, shall commence on \_\_\_\_\_, 2007 and will continue in force until terminated by agreement of the parties.

2. Risk Management agrees to act as the third party administrator for the Insurance Plan, and for other Commission related insurance needs, in accordance with its terms and this Agreement.

3. The Commissions agree to maintain, subject to the approval of Risk Management, an actuarially and financially sound Insurance Plan to satisfy the indemnity requirements of the Master Agreement, the Access Agreements, and the Operating Agreement. No material change to the Insurance Plan will become effective until it has been submitted to and approved by Risk Management.

4. (a) The Commissions' Insurance Plan will consist of a combination of actuarially sound self-insurance reserves for retained risks and purchased insurance to meet the indemnification obligations of the Commissions as set forth in this and the following documents:

- (1) The Insurance Plan attached as Exhibit A;
- (2) the Master Agreement;
- (3) the Operating Agreement; (4) the Access Agreements; and
- (5) the Insurance Fund Agreement.

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(b) The scope of indemnification provided by the Commissions through the Insurance Plan will be defined and conditioned by the limitations and exclusions, other than the monetary limits, contained in the Insurance Plan.

(c) The funding and insurance policies underlying the Commissions'

Insurance Plan shall consist of the insurance reserves and purchased insurance approved by Risk Management hereunder from time to time.

Deleted: to be set forth in Exhibit B as may be amended

5. The Commissions shall be responsible to:

(a) Provide, using funds from the Insurance Fund, for the procurement, implementation and maintenance of all excess insurance or alternative insurance mechanisms needed to fulfill the required limits of liability under the Insurance Plan and will designate Risk Management, with such excess insurance carrier(s), as the representative of the Commissions for purposes of claims defense, administration, coordination and settlement. The Commissions may further provide, using funds from the Insurance Fund, with the approval of Risk Management, for other coverage and services which may either protect the property used in the Rail Service or reduce the risk of loss generated by the Rail Services; and

(b) Provide funding, through the mechanisms provided in the Master Agreement, for the commercial insurance, alternative insurance mechanisms and self-insurance reserves provided for in the Insurance Plan.

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6. The Commissions will contract for the services of an

actuary, as needed, but in no event less than annually, to determine the adequacy of the amounts in the Insurance Fund to fund the risks retained by the Commissions under the Insurance Plan at a 90% confidence level. Risk Management may, at its option, retain a second actuary to review the work of the Commissions' actuary, to consult with the Commissions' actuary regarding possible needed revisions to its study, and to provide such advice to Risk Management as may be needed to enable Risk Management to perform its duties under this Agreement and §2.2-1839 of

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the Code. The reasonable cost and fees of the actuary retained by the Commissions and, if applicable, Risk Management will be paid from the Insurance Fund.

7. The Commissions will deposit or cause to be deposited annually with, into the State Treasury such amounts to be held as part of the Insurance Fund as Risk Management deems necessary to ensure the financial stability of the Insurance Plan, it being agreed that the sum of \$10 million is the minimum level of funding the Commissions have agreed to achieve and maintain for the Insurance Fund. The Commissions also agree to acquire, purchased insurance sufficient to fulfill the requirements of Section 4, and to pay the applicable premiums from the Insurance Fund. The Commissions will deliver to Risk Management evidence that such insurance is in effect on or before July 1 of each year. The Commissions agree to provide to Risk Management within 30 days of receiving written notice from Risk Management additional funds with Risk Management to be held in the Insurance Fund to ensure the financial stability of the Insurance Plan, as determined by Risk Management under §2.2-1839 of the Code ("Required Level"). With the approval of Risk Management, the Commissions may purchase additional insurance in lieu of making additional deposits to the Insurance Fund. It is understood that the determination of what constitutes the Required Level of funds to ensure the financial stability of the Insurance Plan is to be made in the sole discretion of Risk Management. Risk Management may in its sole discretion authorize payments from Insurance Fund as authorized by the Insurance Fund Agreement and the Insurance Plan.

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8. In addition to the provisions of Section 5, the Commissions will be responsible for the following:

- (a) Requiring all insurers to provide certificates of insurance and copies of all contracts and terms of coverage to Risk Management;

(b) Requiring that copies of all legal notices affecting any aspect of coverage be sent by the insurers to the Commissions, which will thereafter distribute said notices to Risk Management and to each Insured and Indemnitee under the Insurance Plan; and

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(c) Establishing procedures, in conjunction with the excess broker, for the proper and timely "notice of loss" and coordination of claims management with excess insurers, and informing Risk Management of those procedures.

9. Risk Management will be responsible for administration of the Insurance Plan, which may include but not be limited to the following:

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(a) Providing advice, guidance, and assistance to the Commissions with the purchase of insurance;

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(b) Establishing procedures related to claims and litigation management; and

(c) Upon receipt of notice of a claim or the institution of a suit, reviewing the

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claim for the applicability of coverage within the self insured limits of the Insurance Plan,

providing for the assignment of counsel, if needed, or providing for the declination of

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coverage, in whole or in part, to each affected Insured or Indemnitee.

(d) Providing written confirmation of coverage within the self-insured limits,

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including a certificate of coverage as needed in response to the Commissions' request to

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add a party or an activity to the Insurance Plan provided the request, as determined by

Risk Management, does not affect the stability of the Insurance Fund.

(e) Assist the Commissions in obtaining written confirmation of coverage from brokers,

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agents and insurers, including certificates of insurance and the inclusion of additional insureds

and activities on purchased commercial insurance policies, 10. Risk Management will,

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review outstanding claims and advise the Commissions regarding the sufficiency of the

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Insurance Fund to meet anticipated liabilities set forth in the Insurance Plan in accordance with generally accepted industry standards and practices. 11. Subject to the provisions of Part B, Sections 1 and 2(b) of the Insurance Plan, Risk Management agrees with the Commissions as follows:

(a) Original notice of a claim related to the Rail Service will be transmitted to and received, for all Insureds and Indemnitees, by Amtrak.

(b) The Commissions will establish a \$50,000 revolving fund for the payment of claims within the authority delegated to Amtrak. Amounts paid to the revolving fund will be paid from the Insurance Fund. The Commissions will advise Risk Management of any and all payments made from this revolving fund and Risk Management will provide funds from the Insurance Fund to enable the Commissions to maintain the \$50,000 level in the revolving fund.

(c) Amtrak will handle the administration of all claims up to \$10,000. Amtrak will notify the Commissions and Risk Management of claims it receives which are outside its delegated authority. Risk Management will provide for the administration of all claims over \$10,000, and for all suits instituted against any Insured or Indemnitee under the Insurance Plan. Risk Management may, at the expense of the Insurance Fund, contract for investigative and related services.

(d) On an annual or semi-annual basis, the Commissions will provide to Risk Management and to all Insureds and Indemnitees under the Insurance Plan summaries of payments made by Amtrak related to claims under the Insurance Plan within Amtrak's delegated authority.

**Deleted:** To the extent the amount of a claim or claims exceed the limits of the Commissions' retained insurance under the Insurance Plan, Risk Management will notify the appropriate commercial insurance carriers, coordinating claims activity as needed.¶

**Deleted:** (a) Except for the provisions for the settlement of claims by Amtrak provided for under the Operating Agreement and for claims covered by purchased insurance or alternative insurance mechanisms, Risk Management has the sole authority to negotiate, compromise and settle all claims covered by the Insurance Plan.¶

(b) When practicable, Risk Management will provide notice of settlement of a claim to each party covered by the Insurance Plan whose liability would be affected by the settlement, but Risk Management shall have no obligation to notify any party covered by the Insurance Plan who is not a party to the particular claim.¶

(c) All payments for claims settlement, defense costs, or investigative services shall be made from the Insurance Fund and shall be properly recorded by Risk Management. Summaries of such transactions will be provided by Risk Management to all Insureds or Indemnitees under the Insurance Plan on an annual and semi-annual basis.¶

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(e) Risk Management will provide notice of settlement of a claim to the Commissions and, to the extent practicable, to each Insured or Indemnitee under the Insurance Plan who is a subject of the claim being settled; however, Risk Management shall have no obligation to notify any Insured or Indemnitee under the Insurance Plan who is not the subject of a settled claim. (f) Risk Management will provide to the Commissions on an annual or semi-annual basis summaries of all payments made by Risk Management from the Insurance Fund for claims under the Insurance Plan administered by Risk Management, as well as.

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12. Subject to any limitations in the Insurance Plan, in the event that, in any calendar year, the commercial insurance policies purchased by the Commissions expire, lapse, or otherwise become subject to cancellation, the Commissions agree, with approval of Risk Management, to purchase other insurance or to retain such risk by establishing and maintaining additional, actuarially sound reserves for the risks previously insured through commercial insurance. The Commissions will notify Risk Management, the Railroads, and Amtrak of the action taken to provide such other insurance coverage or retained risk. Thereafter, Exhibit A will be amended with the approval of Risk Management to reflect such changes to the Insurance Plan.

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13. Risk Management agrees to perform at least the following services as part of its responsibilities:

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(a) Assist the Commissions and Amtrak in the establishment of procedures for the prompt review and processing of all claims for which the Commissions or any party covered by the Insurance Plan are or may become liable.

(b) Maintain current estimates for each claim of the anticipated cost to the Insurance Plan based on information and data provided by the Commissions, the Railroads, and Amtrak.

(c) Maintain historical data of claims brought against the Commissions, the Railroads, and Amtrak based on information and data provided by the Commissions, the Railroads, and Amtrak.

(d) Oversee generally and review, as necessary, the investigation and settlement of claims administered by Amtrak and contract, as needed, for the necessary services for the investigation of claims or suits not administered by Amtrak.

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(e) Review the Commissions' development of an appropriate payment system for claims and expenses of claims administration for those claims within Amtrak's delegated authority.

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(f) Make available to the Commissions, financial and other information relating to claims and the Insurance Fund based on information available to Risk Management, including that provided by the Commissions, the Railroads, and Amtrak provided, however, Risk Management shall be under no duty to provide information in any particular format, nor shall Risk Management be obligated to provide information which may impair a claim, the Insurance Plan or the Insurance Fund.

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**Deleted:** Issue periodic incurred/reserved progress reports on pending claims to the Commissions.¶  
... (h) . Maintain a detailed statistical record of all claims and payments.¶  
... (i) . Provide quarterly claims and other computerized reports so that claim trends and problem areas can be readily identified by the Commissions.  
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(g) Employ loss control consultants and other professionals, as needed, to advise the Commissions on matters involving the Insurance Plan.

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(h) Review all cases for potential subrogation recoveries, make recommendations to the Commissions concerning cases where recovery should be attempted,

and, for cases where the Commissions have approved subrogation recovery efforts, retain and assist legal counsel when litigation is required to effect recovery.

(i) Provide such funds from the Insurance Fund as may be necessary to enable the Commissions, in consultation with Risk Management, to pursue legal remedies against any insurer providing insurance coverage under the Insurance Plan denying coverage.

(j) Perform such other related services as may be reasonably necessary for administration of the Insurance Plan and the Insurance Fund in a manner that best benefits the Insureds and Indemnitees under the Insurance Plan.

14. Risk Management agrees to grant access to the Commissions upon reasonable written notice to all records it maintains in the management of the Insurance Plan and to respond to inquiries by the Commissions on the status of particular claims and other issues, provided, however, that Risk Management is under no duty to provide information in any particular format and may charge the Commissions as an administrative cost, for time and materials incurred in granting such access, nor shall Risk Management be obligated to provide information which may impair administration of the Insurance Plan or the Insurance Fund.

15. Risk Management is entitled to be reimbursed or paid for all expenses associated with claims administration and management of the Insurance Plan and for its actual personnel and administrative costs related to its services under this Agreement, in accordance with procedures established under the Insurance Fund Agreement.

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(m) . Procure, recommend, direct, and monitor the work and charges of specialized and professional investigation services when such service is needed.

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16. In the event that either Rail Service is terminated or suspended, sufficient funds, as determined by Risk Management with the assistance of actuarial services, shall be maintained by Risk Management to provide for all current and future liabilities.

In the event that funds are deemed inadequate to assure the discharge of such liabilities, Risk Management will notify the Commissions who shall take the appropriate action as provided in Section III.D. of the Master Agreement and Section 7 of the Management Agreement. Risk Management shall, periodically, reassess the nature and extent of such liabilities and in its sole discretion may release to the Commissions a portion of any funds, if any, which Risk Management deems as unnecessary to discharge such current and future liabilities.

Risk Management, with the concurrence of the Commissions, may contract for the administration of all subsequent claims. The Commissions, subject to the approval of Risk Management, may purchase separate "run off" insurance either as an extension of existing coverage or as a new policy or combination thereof and Risk Management shall consider the nature and adequacy of such "run off" insurance in determining whether and, to what extent, it may release funds to the Commissions as provided in the paragraph above.

At such time as all known claims have been resolved and the actuary has determined that the reasonable likelihood of further claims has approached zero, Risk Management shall dissolve the Insurance Plan and Management Agreement.

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17. The Commonwealth of Virginia shall incur no financial obligation for any and all liabilities created under any portion of the Insurance Plan by virtue of this Agreement, as a result of the activities of Risk Management as the third party administrator of the Insurance Plan, or any other reason.

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18. Notice. All demands, notices, approvals, consents, requests, opinions and other communications under this Agreement will be in writing and will be deemed to have been given when delivered in person or mailed by registered or certified mail, postage prepaid, addressed (i) if to the Commissions, to Virginia Railway Express, 1500 King Street, Suite 202, Alexandria, Virginia 22314. Attention: Chief Executive Officer, (ii) if to Risk Management, at 101 North 14<sup>th</sup> Street, 3rd Floor, Richmond, Virginia 23219, Attention: Director. The Commissions and Risk Management may, by notice given under this Section, designate and further or different addresses to which subsequent demands, notices, approvals, consents, requests, opinions or other communications are to be sent or persons to whose attention they are to be directed.

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IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officials this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

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APPROVED BY THE GOVERNOR:

APPROVED:

\_\_\_\_\_  
Northern Virginia  
Transportation Commission  
Chairman  
Jody M. Wagner  
Secretary of Finance

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APPROVED:

Potomac and Rappahannock  
Transportation Commission

J. Braxton Powell, Treasurer  
Department of the Treasury

Chairman

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Services

APPROVED:

Don W. LeMond, Director  
Division of Risk Management