County:
ROW CSJ No.:
Const. CSJ No.:
Highway:
Limits:
Fed. Proj. No.:

MASTER UTILITY ADJUSTMENT AGREEMENT
(Owner Managed)
Agreement No.: -U-_____

THIS AGREEMENT, by and between _____, hereinafter identified as the "**Developer**", and _____, hereinafter identified as the "**Owner**", is as follows:

WITNESSETH

WHEREAS, the STATE OF TEXAS, acting by and through the Texas Department of Transportation, hereinafter identified as "TxDOT" or the "Department", is authorized to design, construct, operate, maintain, and improve turnpike projects as part of the state highway system throughout the State of Texas, all in conformance with the provisions of Chapter 203, Texas Transportation Code, as amended; and

WHEREAS, the Department proposes to construct a turnpike project identified as *(insert project name)* and

WHEREAS, pursuant to that certain Comprehensive Development Agreement by and between the Department and the Developer with respect to the Facility (the "CDA"), the Developer has undertaken the obligation to design and construct the Facility; and

WHEREAS, the Developer's duties pursuant to the CDA include causing the removal, relocation, or other necessary adjustment of existing utilities impacted by the Facility (collectively, "Adjustment"), at the Developer's expense; and

WHEREAS, the Facility may receive Federal funding, financing and/or credit assistance; and

WHEREAS, the Developer has notified the Owner that certain of its facilities and appurtenances (the "Owner Utilities") are in locational conflict with the Facility (and/or with the "Ultimate Design", as hereinafter defined), and has requested that the Owner undertake the Adjustment of the Owner Utilities as necessary to accommodate the Facility (and the Ultimate Design); and

WHEREAS, the Owner Utilities and the proposed Adjustment of the Owner Utilities are described as follows *[insert below a description of the affected facilities (by type, size and location) as well as a brief description of the nature of the Adjustment work to be performed (e.g., "adjust 12" waterline from approximately Highway Station 100+00 to approximately Highway Station 200+00")]:*
_____; and

WHEREAS, the Owner recognizes that time is of the essence in completing the work contemplated herein; and

WHEREAS, the Developer and the Owner desire to implement the Adjustment of the Owner Utilities by entering into this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of these premises and of the mutual covenants and agreements of the parties hereto and other good and valuable consideration, the receipt and sufficiency of which being hereby acknowledged, the Developer and the Owner agree as follows:

1. **Preparation of Plans.** *[Check one box that applies:]*

☐ The Developer has hired engineering firm(s) acceptable to the Owner to perform all engineering services needed for the preparation of plans, required specifications, and cost estimates, attached hereto as Exhibit A (collectively, the "Plans"), for the proposed Adjustment of the Owner Utilities. The Developer represents and warrants that the Plans conform to the most recent Utility Accommodation Rules issued by the Texas Department of Transportation ("TxDOT"), set forth in 43 Tex. Admin. Code, Part 1, Chapter 21, Subchapter C, *et seq*. (the "UAR"). By its execution of this Agreement or by the signing of the Plans, Owner hereby approves and confirms that the Plans are in compliance with Owner's "standards" described in Paragraph 3(c).

☐ The Owner has provided plans, required specifications and cost estimates, attached hereto as Exhibit A (collectively, the "Plans"), for the proposed Adjustment of the Owner Utilities. The Owner represents and warrants that the Plans conform to the UAR. By its execution of this Agreement, Developer hereby approves the Plans. The Owner also has provided to the Developer a utility plan view map illustrating the location of existing and proposed utility facilities on the Developer's right of way map of the Facility. With regard to its preparation of the Plans, Owner represents as follows *[check one box that applies]*:

☐ The Owner's employees were utilized to prepare the Plans, and the charges therefore do not exceed the Owner's typical costs for such work.

☐ The Owner utilized consulting engineers to prepare the Plans, and the fees for such work are not based upon a percentage of construction costs. Further, such fees encompass only the work necessary to prepare the Plans for Adjustment of the Owner Utilities described herein, and do not include fees for work done on any other project. The fees of the consulting engineers are reasonable and are comparable to the fees typically charged by consulting engineers in the locale of the Facility for comparable work for the Owner.

2. **Review by the Department.** The parties hereto acknowledge and agree as follows:

(a) Upon execution of this Agreement by both the Developer and the Owner, pursuant to the CDA the Developer will submit this Agreement, together with the attached Plans, to the Department for its review and approval as part of a package referred to as a "Utility Assembly". The parties agree to cooperate in good faith to modify this Agreement and/or the Plans, as necessary and mutually acceptable to both parties, to respond to any comments made by the Department thereon. Without limiting the generality of the foregoing, (i) the Owner agrees to respond (with comment and/or acceptance) to any modified Plans and/or Agreement prepared by the Developer in response to Department comments within **fourteen (14) business days** after receipt of such modifications; and (ii) if the Owner originally prepared the Plans, the Owner agrees to modify the Plans in

response to Department comments and to submit such modified Plans to the Developer for its comment and/or approval (and re-submittal to the Department for its comment and/or approval) within **fourteen (14) business days** after receipt of the Department's comments. The Owner's failure to timely respond to any modified Plans submitted by the Developer pursuant to this paragraph shall be deemed the Owner's approval of same. If the Owner fails to timely prepare modified Plans which are its responsibility hereunder, then the Developer shall have the right to modify the Plans for the Owner's approval as if the Developer had originally prepared the Plans. The process set forth in this paragraph will be repeated until the Owner, the Developer, and the Department have all approved this Agreement and the Plans.

(b) The parties hereto acknowledge and agree that the Department's review, comments, and/or approval of a Utility Assembly or any component thereof is solely for the purpose of ascertaining matters of particular concern to the Department, and the Department has, and by its review, comments and/or approval of such Utility Assembly or any component thereof undertakes, no duty to review the Utility Assembly or its components for their quality or for the adequacy of Adjusted facilities (as designed) for the purposes for which they are intended to be used or for compliance with law or applicable standards (other than Department requirements).

3. **Design and Construction Standards.** All design and construction performed for the Adjustment work which is the subject of this Agreement shall comply with and conform to the following:

(a) All applicable local, state and federal laws, regulations, decrees, ordinances and policies, including the UAR, the Utility Manual issued by TxDOT (to the extent its requirements are mandatory for Utility Adjustments necessitated by the Facility, as stated in the CDA and communicated to the Owner by the Developer or TxDOT), the requirements of the CDA, and the policies of TxDOT;

(b) The terms of all governmental permits or other approvals, as well as any private approvals of third parties necessary for such work; and

(c) The standard specifications, standards of practice, and construction methods (collectively, "standards") which the Owner customarily applies to facilities comparable to the Owner Utilities that are constructed by the Owner or for the Owner by its contractors at the Owner's expense, which standards are current at the time this Agreement is signed by the Owner, and which the Owner has submitted to the Developer in writing.

Such design and construction also shall be consistent and compatible with (i) the Developer's current design and construction of the Facility, (ii) TxDOT's projected design for the Facility as it will ultimately be built out in the future (the "Ultimate Design"), and (iii) any other utilities being installed in the same vicinity. The Owner acknowledges receipt from the Developer of Facility plans and Ultimate Design documents as necessary to comply with the foregoing. In case of any inconsistency among any of the standards referenced in this Agreement, the most stringent standard shall apply.

4. **Construction by the Owner; Scheduling.**

(a) The Owner hereby agrees to perform the construction necessary to Adjust the Owner Utilities. All construction work hereunder shall be performed in a good and workmanlike manner, and in accordance with the Plans (except as modified pursuant to Paragraph 17). The Owner agrees that during the Adjustment of the Utility, Owner and its contractors will coordinate their work with the Developer so as not to interfere with the performance

of work on the Facility by the Developer or by any other party. "Interfere" means any action or inaction that interrupts, interferes, delays or damages Facility work.

(b) The Owner may utilize its own employees or may retain such contractor or contractors as are necessary to Adjust the Owner Utilities, through the procedures set forth in Form TxDOT-U-48 "Statement Covering Contract Work" attached hereto as Exhibit C. If the Owner utilizes its own employees for the Adjustment of the Utility, a Form TxDOT-U-48 is not required. If the Adjustment of the Utility is undertaken by the Owner's contractor under a competitive bidding process, all bidding and contracting shall be conducted in accordance with all federal and state laws and regulations applicable to the Owner and the Facility.

(c) The Owner shall obtain all permits necessary for the construction to be performed by the Owner hereunder, and the Developer shall cooperate in that process as needed.

(d) The Owner shall commence its construction for Adjustment of each Owner Utility hereunder promptly after (i) receiving written notice to proceed therewith from the Developer, and (ii) any right of way necessary for such Adjustment has been acquired either by the Department (for Adjusted facilities to be located within the Facility right of way) or by the Owner (for Adjusted facilities to be located outside of the Facility right of way), or a right-of-entry permitting Owner's construction has been obtained from the landowner by the Developer or by the Owner with the Developer's prior approval. The Owner shall notify the Developer at least 72 hours prior to commencing construction for the Adjustment of each Owner Utility hereunder.

(e) The Owner shall expeditiously stake the survey of the proposed locations of the Owner Utilities being adjusted, on the basis of the final approved Plans. The Developer shall verify that the Owner Utilities, whether moving to a new location or remaining in place, clear the planned construction of the Facility as staked in the field as well as the Ultimate Design.

(f) The Owner shall complete all of the Utility reconstruction and relocation work, including final testing and acceptance thereof (check one box that applies):

☐ on or before _____, 20___.

☐ a duration not to exceed _____ calendar days upon notice to proceed by the Developer.

(g) The amount of reimbursement due to the Owner pursuant to this Agreement for the affected Adjustment(s) shall be reduced by ten percent (10%) for each 30-day period (and by a pro rata amount of said ten percent (10%) for any portion of a 30-day period) by which the final completion and acceptance date for the affected Adjustment(s) exceeds the applicable deadline. The provisions of this Paragraph 4(g) shall not limit any other remedy available to the Developer at law or in equity as a result of the Owner's failure to meet any deadline hereunder.

The above reduction applies except to the extent due to (i) Force Majeure as described in Paragraph 25(c), (ii) any act or omission of the Developer, if the Owner fails to meet any deadline established pursuant to Paragraph 4(f), or (iii) if the Developer and TxDOT determine, in their sole discretion, that a delay in the relocation work is the result of circumstances beyond the control of the Owner or Owner's contractor and the Developer will not reduce the reimbursement.

5. **Developer Responsible for Costs of Work.** With the exception of any "Betterment" as defined in Paragraph 10, all work to be performed pursuant to this Agreement shall be at the sole cost and expense of the Developer, including but not limited to the engineering costs of the Owner. All costs charged to the Developer by the Owner shall be reasonable and shall be computed using rates and schedules not exceeding those applicable to the similar work performed by or for the Owner at the Owner's expense. The costs paid by the Developer pursuant to this Agreement shall be full compensation to the Owner for all costs incurred by the Owner in Adjusting the Owner Utilities (including without limitation costs of relinquishing and/or acquiring right of way), and the Department shall have no liability to the Owner for any such costs. Owner expressly acknowledges that it shall only be entitled to compensation for any Adjustment(s) covered by this Agreement, including costs with respect to real property interests (either acquired or relinquished), from the Developer as set forth in this Agreement, and specifically acknowledges that it shall not be entitled to compensation or reimbursement from Department or the State of Texas.

6. **Costs of the Work.**

(a) The Owner's costs for Adjustment of the Owner Utilities shall be derived from (i) the accumulated total of costs incurred by the Owner for design and construction of such Adjustment, plus (ii) the Owner's other related costs to the extent permitted pursuant to Paragraph 6(c) (including without limitation the eligible engineering costs incurred by the Owner for design prior to execution of this Agreement), plus (iii) the Owner's right of way acquisition costs, if any, which are reimbursable pursuant to Paragraph 16.

(b) The Owner's costs associated with Adjustment of the Owner Utilities shall be developed pursuant to the method checked and described below *[check only one box]*:

☐ (1) Actual costs accumulated in accordance with a work order accounting procedure prescribed by the applicable Federal or State regulatory body; or

☐ (2) Actual costs accumulated in accordance with an established accounting procedure developed by the Owner and which the Owner uses in its regular operations; or

☐ (3) The agreed sum of $ _____, as supported by the analysis of estimated costs attached hereto as part of Exhibit A.

(c) Eligible Owner costs shall include only those authorized under 23 C.F.R. Part 645, Subpart A. The Owner agrees that costs referenced in 23 C.F.R. Section 645.117(d)(2) are not eligible for reimbursement. These regulations can be found at: http://www.access.gpo.gov/nara/cfr/waisidx_03/23cfr645_03.html.

7. **Billing, Payment, Records and Audits: Actual Cost Method.** The following provisions apply if the Owner's costs are developed under procedure (1) or (2) described in Paragraph 6(b):

(a) After (i) completion of all Adjustment work to be performed pursuant to this Agreement, (ii) the Developer's final inspection of the Adjustment work by Owner hereunder (and resolution of any deficiencies found), and (iii) receipt of an invoice complying with the applicable requirements of Paragraph 9, the Developer shall pay to the Owner an amount equal to ninety percent (90%) of the Owner's costs as shown in such final invoice (less amounts previously paid, and applicable credits). After completion of the Developer's audit referenced in Paragraph 7(c) and the parties' mutual determination of any necessary adjustment to the final invoice resulting therefrom, the Developer shall make any final

payment due so that total payments will equal the total amount reflected on such final invoice (as adjusted, if applicable).

(b) When requested by the Owner and properly invoiced in accordance with Paragraph 9, the Developer shall make intermediate payments to the Owner based upon the progress of the work completed at not more than monthly intervals, and such payments shall not exceed eighty percent (80%) of the Owner's eligible costs as shown in each such invoice (less applicable credits). Intermediate payments shall not be construed as final payment for any items included in the intermediate payment.

(c) The Owner shall maintain complete and accurate cost records for all work performed pursuant to this Agreement, in accordance with the provisions of 23 C.F.R. Part 645, Subpart A. The Owner shall maintain such records for four (4) years after receipt of final payment hereunder. The Developer and its representatives shall be allowed to audit such records during the Owner's regular business hours. Unsupported charges will not be considered eligible for reimbursement. The parties shall mutually agree upon (and shall promptly implement by payment or refund, as applicable) any financial adjustment found necessary by the Developer's audit. The Department, the FHWA, and their respective representatives also shall be allowed to audit such records upon reasonable notice to the Owner, during the Owner's regular business hours.

8. **Billing and Payment: Agreed Sum Method.** If the Owner's costs are developed under procedure (3) described in Paragraph 6(b), then the Developer shall make payment to the Owner in the agreed amount, after (a) completion of all Adjustment work to be performed pursuant to this Agreement, (b) the Developer's final inspection of the Adjustment work by Owner hereunder (and resolution of any deficiencies found), and (c) receipt of an invoice complying with the applicable requirements of Paragraph 9.

9. **Invoices.** Each invoice submitted by the Owner (i) shall be prepared in the form and manner prescribed by 23 C.F.R. Part 645, Subpart A, and (ii) if the Owner's costs are developed under procedure (1) or (2) described in Paragraph 6(b), shall list each of the services performed, the amount of time spent and the date on which the service was performed. The original and three (3) copies of each invoice shall be submitted to the Developer at the address for notices stated in Paragraph 23, unless otherwise directed by Developer pursuant to Paragraph 23. The Owner shall make commercially reasonable efforts to submit final invoices not later than one hundred twenty (120) days after completion of work. The Owner hereby acknowledges and agrees that any of its costs not submitted to the Developer within eighteen months following completion of all Adjustment work to be performed by both parties pursuant to this Agreement shall be deemed to have been abandoned and waived.

10. **Betterment.**

(a) For purposes of this Agreement, the term "Betterment" means any upgrading of an Owner Utility being Adjusted that is not attributable to the construction of the Facility and is made solely for the benefit of and at the election of the Owner, including but not limited to an increase in the capacity, capability, efficiency or function of the Adjusted Utility over that provided by the existing Utility facility or an expansion of the existing Utility facility; provided, however, that the following are not considered Betterments:

(i) any upgrading which is required for accommodation of the Facility;

(ii) replacement devices or materials that are of equivalent standards although not identical;

(iii) replacement of devices or materials no longer regularly manufactured with the next highest grade or size;

(iv) any upgrading required by applicable laws, regulations or ordinances;

(v) replacement devices or materials which are used for reasons of economy (e.g., non-stocked items may be uneconomical to purchase);

(vi) any upgrading required by the Owner's written "standards" meeting the requirements of Paragraph 3(c); or

(vii) any discretionary decision by a Utility Owner that is contemplated within a particular standard described in clause (vi) above.

[Include the following for fiber optic Owner Utilities only:] Extension of an Adjustment to the nearest splice boxes shall not be considered a Betterment if required by the Owner in order to maintain its written telephony standards.

Any upgrading required by the Owner's written "standards" meeting the requirements of Paragraph 3(c) shall be deemed to be of direct benefit to the Facility.

(b) It is understood and agreed that the Developer will not pay for any Betterments and that the Owner shall not be entitled to payment therefor. No Betterment may be performed in connection with the Adjustment of the Owner Utilities which is incompatible with the Facility or the Ultimate Design or which cannot be performed within the other constraints of applicable law, any applicable governmental approvals, and the requirements imposed on the Developer by the CDA, including without limitation the scheduling requirements thereunder. Accordingly, the parties agree as follows *[check one box that applies, and complete if appropriate]*:

☐ The Adjustment of the Owner Utilities pursuant to the Plans does not include any Betterment.

☐ The Adjustment of the Owner Utilities pursuant to the Plans includes Betterment to the Owner Utilities by reason of *[insert explanation, e.g. "replacing 12" pipe with 24" pipe]*: _____. The Owner has provided to the Developer comparative estimates for (i) all costs for work to be performed by the Owner pursuant to this Agreement, including work attributable to the Betterment, and (ii) the cost to perform such work without the Betterment, which estimates are hereby approved

by the Developer. The estimated amount of the Owner's costs for work hereunder which is attributable to Betterment is $_____, calculated by subtracting (ii) from (i). The percentage of the total cost of the Owner's work hereunder which is attributable to Betterment is _____%, calculated by subtracting (ii) from (i), which remainder shall be divided by (i).

(c) If Paragraph 10(b) identifies Betterment, then the following shall apply:

(i) If the Owner's costs are developed under procedure (3) described in Paragraph 6(b), then the agreed sum stated in that Paragraph includes any credits due to the Developer on account of the identified Betterment, and no further adjustment shall be made on account of same.

(ii) If the Owner's costs are developed under procedure (1) or (2) described in Paragraph 6(b), the parties agree as follows *[If Paragraph 10(b) identifies Betterment <u>and</u> the Owner's costs are developed under procedure (1) or (2), check the <u>one</u> appropriate provision]*:

☐ The estimated cost stated in Paragraph 10(b) is the agreed and final amount due for Betterment hereunder. Accordingly, each intermediate invoice submitted pursuant to Paragraph 7(b) shall credit the Developer with an appropriate percentage of the agreed Betterment amount, proportionate to the percentage of completion reflected in such invoice. The final invoice submitted pursuant to Paragraph 7(a) shall credit the Developer with the full-agreed Betterment amount. No other adjustment (either up or down) shall be made based on actual Betterment costs.

☐ The Owner is responsible for the actual cost of the identified Betterment, determined by multiplying (a) the Betterment percentage stated in Paragraph 10(b), by (b) the actual cost of all work performed by the Owner pursuant to this Agreement (including work attributable to the Betterment), as invoiced by the Owner to the Developer. Accordingly, each invoice submitted pursuant to either Paragraph 7(a) or Paragraph 7(b) shall credit the Developer with an amount calculated by multiplying (x) the Betterment percentage stated in Paragraph 10(b), by (y) the amount billed on such invoice.

(d) The determinations and calculations of Betterment described in this Paragraph 10 shall exclude right of way acquisition costs. Betterment in connection with right-of-way acquisition is addressed in Paragraph 16.

11. **<u>Salvage.</u>** For any Adjustment from which the Owner recovers any materials and/or parts and retains or sells the same, after application of any applicable Betterment credit, the Developer is entitled to a credit for the salvage value of such materials and/or parts, determined in accordance with 23 C.F.R. Section 645.105(j). If the Owner's costs are developed under procedure (1) or (2) described in Paragraph 6(b), then the final invoice submitted pursuant to Paragraph 7(a) shall credit the Developer with the full salvage value. If the Owner's costs are developed under procedure (3) described in Paragraph 6(b), then the agreed sum stated in that Paragraph includes any credit due to the Developer on account of salvage.

12. **Utility Investigations.** At the Developer's request, the Owner shall assist the Developer in locating any Utilities (including appurtenances) which are owned and/or operated by Owner and may be impacted by the Facility. Without limiting the generality of the foregoing, in order to help assure that neither the Adjusted Owner Utilities nor existing, unadjusted utilities owned or operated by the Owner are damaged during construction of the Facility, the Owner shall mark in the field the location of all such utilities horizontally on the ground in advance of Facility construction in the immediate area of such utilities.

13. **Inspection and Ownership of Owner Utilities.**

(a) The Developer shall have the right, at its own expense, to inspect the Adjustment work performed by the Owner or its contractors, during and upon completion of construction. All inspections of work shall be completed and any comment provided within **five (5) business days** after request for inspection is received.

(b) The Owner shall accept full responsibility for all future repairs and maintenance of said Owner Utilities. In no event shall the Developer or the Department become responsible for making any repairs or maintenance, or for discharging the cost of same. The provisions of this Paragraph 13(b) shall not limit any rights which the Owner may have against the Developer if the Developer damages any Owner Utility as a result of its Facility activities.

14. **Design Changes.** The Developer will be responsible for additional Adjustment design and/or construction costs necessitated by design changes to the Facility, upon the terms specified herein.

15. **Field Modifications.** The Owner shall provide the Developer with documentation of any field modifications, including Utility Adjustment Field Modifications as well as minor changes as described in Paragraph 17(b), occurring in the Adjustment of the Owner Utilities.

16. **Real Property Interests.**

(a) The Owner has provided, or upon execution of this Agreement shall promptly provide to the Developer, documentation acceptable to the Department indicating any right, title or interest in real property claimed by the Owner with respect to the Owner Utilities in their existing location(s). Such claims are subject to the Department's approval as part of its review of the Utility Assembly as described in Paragraph 2. Claims approved by the Department as to rights or interests are referred to herein as "Existing Interests".

(b) If acquisition of any new easement or other interest in real property ("New Interest") is necessary for the Adjustment of any Owner Utilities, then the Owner shall be responsible for undertaking such acquisition. The Owner shall implement each acquisition hereunder expeditiously so that related Adjustment construction can proceed in accordance with the Developer's Facility schedules. The Developer shall be responsible for the actual and reasonable acquisition costs of any such New Interest (including without limitation the Owner's reasonable overhead charges and legal costs as well as compensation paid to the landowner), excluding any costs attributable to Betterment as described in Paragraph 16(c), and subject to the provisions of Paragraph 16(e); provided, however, that all acquisition costs shall be subject to the Developer's prior written approval. Eligible acquisition costs shall be invoiced by the Owner and paid by the Developer pursuant to this Agreement, as a segregated component of the Owner's costs described in Paragraph 6. Any such New Interest shall have a written valuation and shall be acquired in accordance with applicable law.

(c) The Developer shall pay only for replacement in kind of an Existing Interest (e.g., as to width and type), unless a New Interest exceeding such standard (i) is required in order to accommodate the Facility or by compliance with applicable law, or (ii) is called for by the Developer in the interest of overall Facility project economy. Any New Interest which is not Developer's cost responsibility pursuant to the preceding sentence shall be considered a Betterment to the extent that it upgrades the Existing Interest which it replaces, or in its entirety if the related Owner Utility was not installed pursuant to an Existing Interest. Betterment costs shall be solely the Owner's responsibility.

(d) For each Existing Interest located within the final Facility right of way, upon completion of the related Adjustment work and its acceptance by the Owner, the Owner agrees to execute a quitclaim deed or other appropriate documentation relinquishing such Existing Interest to the Department, unless the affected Owner Utility is remaining in its original location or is being reinstalled in a new location within the area subject to such Existing Interest. For each such Existing Interest relinquished by the Owner, the Developer shall do one of the following to compensate the Owner for such Existing Interest, as appropriate:

(i) If the Owner acquires a New Interest for the affected Owner Utility, the Developer shall reimburse the Owner for its actual and reasonable acquisition costs in accordance with Paragraph 16(b); or

(ii) If the Owner does not acquire a New Interest for the affected Owner Utility, the Developer shall compensate the Owner for the fair market value of such relinquished Existing Interest, as mutually agreed between the Owner and the Developer and supported by a written valuation.

The compensation provided to the Owner pursuant to either subparagraph (i) or subparagraph (ii) above shall constitute complete compensation to the Owner for the relinquished Existing Interest, and no further compensation shall be due to the Owner from either the Developer or the Department on account of such Existing Interest.

(e) The Owner shall execute a Utility Joint Use Acknowledgment (TxDOT-U-80A) for each Adjusted Owner Utility where required pursuant to TxDOT policies.

17. **Amendments and Modifications.** This Agreement may be amended or modified only by a written instrument executed by the parties hereto, in accordance with Paragraph 17(a) or Paragraph 17(b) below.

(a) Except as otherwise provided in Section 17(b), any amendment or modification to this Agreement or the Plans attached hereto shall be implemented by a Utility Adjustment Agreement Amendment (UAAA) in the form of Exhibit B hereto (TxDOT-CDA-U-35A-OM). The UAAA form can be used for a new scope of work with concurrence of the Developer and TxDOT as long as the Design and Construction responsibilities have not changed. Each UAAA is subject to the review and approval of the Department, prior to its becoming effective for any purpose and prior to any work being initiated thereunder. The Owner agrees to keep and track costs separate from other work being performed.

(b) For purposes of this Paragraph 17(b), "Utility Adjustment Field Modification" shall mean any horizontal or vertical design change from the Plans included in a Utility Assembly previously approved by the Department, due either to design of the Facility or to conditions not accurately reflected in the approved Utility Assembly (e.g., shifting the alignment of an 8 in. water line to miss a roadway drainage structure). A Utility

Adjustment Field Modification agreed upon by the Developer and the Owner does not require a UAAA, provided that the modified Plans have been submitted to the Department for its review and comment, and the process for such review and comment has been completed as specified in the CDA. A minor change (e.g., an additional water valve, an added Utility marker at a ROW line, a change in vertical bend, etc.) will not be considered a Utility Adjustment Field Modification and will not require a UAAA, but shall be shown in the documentation required pursuant to Paragraph 15.

18. **Relationship of the Parties.** This Agreement does not in any way, and shall not be construed to, create a principal/agent or joint venture relationship between the parties hereto and under no circumstances shall the Owner or the Developer be considered as or represent itself to be an agent of the other.

19. **Entire Agreement.** This Agreement embodies the entire agreement between the parties and there are no oral or written agreements between the parties or any representations made which are not expressly set forth herein.

20. **Assignment; Binding Effect; Department as Third Party Beneficiary.** Neither the Owner nor the Developer may assign any of its rights or delegate any of its duties under this Agreement without the prior written consent of the other party and of the Department, which consent may not be unreasonably withheld or delayed; provided, however, that the Developer may assign any of its rights and/or delegate any of its duties to the Department or to any other entity engaged by the Department to fulfill the Developer's obligations under the CDA, at any time without the prior consent of the Owner.

This Agreement shall bind the Owner, the Developer, and their successors and permitted assigns, and nothing in this Agreement nor in any approval subsequently provided by either party hereto shall be construed as giving any benefits, rights, remedies, or claims to any other person, firm, corporation or other entity, including, without limitation, any contractor or other party retained for the Adjustment work or the public in general; provided, however, that the Owner and the Developer agree that although the Department is not a party to this Agreement, the Department is intended to be a third-party beneficiary to this Agreement.

21. **Breach by the Developer.** If the Owner claims that the Developer has breached any of its obligations under this Agreement, the Owner will notify the Developer and the Department in writing of such breach, and the Developer shall have 30 days following receipt of such notice in which to cure such breach, before the Owner may invoke any remedies which may be available to it as a result of such breach; provided, however, that both during and after such period the Department shall have the right, but not the obligation, to cure any breach by the Developer. Without limiting the generality of the foregoing, (a) the Department shall have no liability to the Owner for any act or omission committed by the Developer in connection with this Agreement, including without limitation any reimbursement owed to the Owner hereunder, and (b) in no event shall the Department be responsible for any repairs or maintenance to the Owner Utilities Adjusted pursuant to this Agreement.

22. **Traffic Control.** The Developer shall provide traffic control or reimburse the owner for traffic control made necessary by the Adjustment work performed by either the Developer or the Owner pursuant to this Agreement, in compliance with the requirements of the Texas Manual on Uniform Traffic Control Devices. Betterment percentages calculated in Paragraph 10 shall also apply to the traffic control costs.

23. **Notices.** Except as otherwise expressly provided in this Agreement, all notices or communications pursuant to this Agreement shall be sent or delivered to the following:

The Owner:

Phone:
Fax:

The Developer:

Phone:
Fax:

A party sending a notice of default of this Agreement to the other party shall also send a copy of such notice to the Department, to the attention of the Program Management Team, CDA Utility Manager, at the following address:

The CDA Utility Manager:

Phone:
Fax:

Any notice or demand required herein shall be given (a) personally, (b) by certified or registered mail, postage prepaid, return receipt requested, (c) by confirmed fax, or (d) by reliable messenger or overnight courier to the appropriate address set forth above. Any notice served personally shall be deemed delivered upon receipt, served by facsimile transmission shall be deem delivered on the date of receipt as shown on the received facsimile, and served by certified or registered mail or by reliable messenger or overnight courier shall be deemed delivered on the date of receipt as shown on the addressee's registry or certification of receipt or on the date receipt is refused as shown on the records or manifest of the U.S. Postal Service or such courier. Either party may from time to time designate any other address for this purpose by written notice to the other party; the Department may designate another address by written notice to both parties.

24. **Approvals.** Any acceptance, approval, or any other like action (collectively "Approval") required or permitted to be given by either the Developer, the Owner or the Department pursuant to this Agreement:

(a) Must be in writing to be effective (except if deemed granted pursuant hereto),

(b) Shall not be unreasonably withheld or delayed; and if Approval is withheld, such withholding shall be in writing and shall state with specificity the reason for withholding such Approval, and every effort shall be made to identify with as much detail as possible what changes are required for Approval, and

(c) Except for approvals by the Department, and except as may be specifically provided otherwise in this Agreement, shall be deemed granted if no response is provided to the party requesting an Approval within the time period prescribed by this Agreement (or if no time period is prescribed, then fourteen (14) calendar days), commencing upon actual receipt by the party from which an Approval is requested or required, of a request for Approval from the requesting party. All requests for Approval shall be sent out by the requesting party to the other party in accordance with Paragraph 23.

25. **Time; Force Majeure.**

(a) Time is of the essence in the performance of this Agreement.

(b) All references to "days" herein shall be construed to refer to calendar days, unless otherwise stated.

(c) Neither the Owner nor the Developer shall be liable to the other for any delay in performance under this Agreement from any cause beyond its control and without its fault or negligence ("Force Majeure"), such as acts of God, acts of civil or military authority, fire, earthquake, strike, unusually severe weather, floods or power blackouts. If any such event of Force Majeure occurs, the Owner agrees, if requested by the Developer, to accelerate its efforts hereunder if reasonably feasible in order to regain lost time, so long as the Developer agrees to reimburse the Owner for such the reasonable and actual costs of such efforts.

26. **Continuing Performance.** In the event of a dispute, the Owner and the Developer agree to continue their respective performance hereunder to the extent feasible in light of the dispute, including paying billings, and such continuation of efforts and payment of billings shall not be construed as a waiver of any legal right.

27. **Equitable Relief**. The Developer and the Owner acknowledge and agree that delays in Adjustment of the Owner Utilities will impact the public convenience, safety and welfare, and that (without limiting the parties' remedies hereunder) monetary damages would be inadequate to compensate for delays in the construction of the Facility. Consequently, the parties hereto (and the Department as well, as a third party beneficiary) shall be entitled to specific performance or other equitable relief in the event of any breach of this Agreement which threatens to delay construction of the Facility; provided, however, that the fact that specific performance or other equitable relief may be granted shall not prejudice any claims for payment or otherwise related to performance of the Adjustment work hereunder.

28. **Authority.** The Owner and the Developer each represents and warrants to the other party that the warranting party possesses the legal authority to enter into this Agreement and that it has taken all actions necessary to exercise that authority and to lawfully authorize its undersigned signatory to execute this Agreement and to bind such party to its terms. Each person executing this Agreement on behalf of a party warrants that he or she is duly authorized to enter into this Agreement on behalf of such party and to bind it to the terms hereof.

29. **Cooperation.** The parties acknowledge that the timely completion of the Facility will be influenced by the ability of the Owner (and its contractors) and the Developer to coordinate their activities, communicate with each other, and respond promptly to reasonable requests. Subject to the terms and conditions of this Agreement, the Owner and the Developer agree to take all steps reasonably required to coordinate their respective duties hereunder in a manner consistent with the Developer's current and future construction schedules for the Facility. The Owner further agrees to require its contractors to coordinate their respective work hereunder with the Developer.

30. **Termination.** If the Facility project is canceled or modified so as to eliminate the necessity of the Adjustment work described herein, then the Developer shall notify the Owner in writing and the Developer reserves the right to thereupon terminate this Agreement. Upon such termination, the parties shall negotiate in good faith an amendment that shall provide mutually acceptable terms and conditions for handling the respective rights and liabilities of the parties relating to such termination.

31. **Nondiscrimination**. Each party hereto agrees, with respect to the work performed by such party pursuant to this Agreement, that such party shall not discriminate on the grounds of race, color, sex, national origin or disability in the selection and/or retention of contractors and consultants, including procurement of materials and leases of equipment.

32. **Captions**. The captions and headings of the various paragraphs of this Agreement are for convenience and identification only, and shall not be deemed to limit or define the contest of their respective paragraphs.

33. **Counterparts.** This Agreement may be executed in any number of counterparts. Each such counterpart hereof shall be deemed to be an original instrument but all such counterparts together shall constitute one and the same instrument.

34. **Effective Date.** Except for the provisions of Paragraph 2(a) (which shall become effective immediately upon execution of this Agreement by both the Owner and the Developer without regard to the Department's signature), this Agreement shall become effective upon the later of (a) the date of signing by the last party (either the Owner or the Developer) signing this Agreement, and (b) the completion of the Department's review as indicated by the signature of the Department's representative, below.

REVIEWED BY:
(insert project name)
Program Management Team
CDA Utility Manager

By: _____
Authorized Signature

Printed
Name: _____

Title: _____

Date: _____

OWNER

_____
[Print Owner Name]

By: _____
Duly Authorized Representative

Printed
Name: _____

Title: _____

Date: _____

DEVELOPER

_____
[Print Developer Name]

By: _____
Duly Authorized Representative

Printed
Name: _____

Title: _____

Date: _____

County:
ROW CSJ No.:
Const. CSJ No.:
Highway:
Limits:
Fed. Proj. No.:

EXHIBIT A

PLANS, SPECIFICATIONS, COST ESTIMATES

County:
ROW CSJ No.:
Const. CSJ No.:
Highway:
Limits:
Fed. Proj. No.:

EXHIBIT B

UTILITY ADJUSTMENT AGREEMENT AMENDMENT
(TxDOT-CDA-U-35A-OM)

County:
ROW CSJ No.:
Const. CSJ No.:
Highway:
Limits:
Fed. Proj. No.:

EXHIBIT C

STATEMENT COVERING CONTRACT WORK
(TxDOT-U-48)