

## **DISPUTES BOARD AGREEMENT**

THIS DISPUTES BOARD AGREEMENT is made and entered into this 1st day of March, 2013, (the "Effective Date") by and between the Texas Department of Transportation ("TxDOT"), and NTE Mobility Partners Segments 3 LLC, a Delaware limited liability company ("Developer"). TxDOT and Developer are sometimes referred to individually herein as a "Party" and collectively as the "Parties."

### RECITALS

A. TxDOT and Developer are parties to that certain Facility Agreement, North Tarrant Express Segments 3A & 3B Facility, dated as of the Effective Date.

B. Section 17.8.4 of the Agreement, provides for the establishment and operation of a disputes review board to resolve each Dispute if, as and when a Dispute arises under the Agreement, other than certain Disputes specified in Section 17.8.1.5 of the Agreement.

NOW THEREFORE, in consideration of the terms, conditions, covenants and agreements contained herein and in the Agreement, the receipt and sufficiency of which the Parties hereby acknowledge, the Parties hereby agree as follows:

#### **Section 1. Definitions and References.**

1.1 Definitions. All capitalized terms used in this Disputes Board Agreement and not defined or modified herein shall have the same meaning as set forth in the Agreement.

1.2 Reference Section of Agreement. Section 17.8.4 of the Agreement discusses the Disputes Board's role in resolving Disputes and is incorporated herein by reference.

1.3 Section References. Unless expressly indicated otherwise, all references in this Disputes Board Agreement to a "Section" mean the Section contained in this Disputes Board Agreement.

#### **Section 2. Purpose and Role of the Disputes Board; Binding Disputes Board Decision.**

The sole purposes of the Disputes Board are to fairly and impartially consider all Disputes brought to it and to resolve such Disputes in a Disputes Board Decision. The Disputes Board is not a supervisory, advisory, or facilitating body and has no role other than as expressly described in this Disputes Board Agreement and in Section 17.8.4 of the Agreement. Notwithstanding the fact that each Disputes Board member will have been engaged by a Party under a Disputes Board Member Joinder Agreement, none of the Disputes Board members shall consider themselves an appointee, representative, agent or advocate of the Party who engaged him or her. Disputes Board members are charged with discharging their responsibilities hereunder in an impartial, objective, independent and professional manner without regard to the particular interests of either Party.

### **Section 3. Selection, Replacement and Removal of Disputes Board Members and Candidates.**

#### **3.1 Selection of Disputes Board Candidates and Disputes Board Members.**

3.1.1 At all times, each Party shall endeavor to maintain a list of five candidates who satisfy the Disputes Board Member Qualifications set forth in Section 4 and have been approved or deemed approved by the other Party to serve on the Disputes Board (each such list being a "Disputes Board Member Candidates List"). No Party shall communicate *ex parte* with a person on its or the other Party's Disputes Board Member Candidates List regarding the substance of a Dispute.

3.1.2 Whenever a Dispute that is subject to the Dispute Resolution Procedures is referred to the Disputes Board for resolution, each Party shall, within 15 days after notice of such referral is given or received (or within seven days after notice of a Fast-Track Dispute is given or received), appoint and engage one of the approved candidates on its Disputes Board Member Candidates List to serve on the Disputes Board. The Disputes Board empanelled to resolve each Dispute shall consist of three individuals, except as otherwise provided for resolution of Small Claims under Section 5.3.3 or resolution of Disputes that arise under Part D of Exhibit 7 as set forth in Section 3.1.5 or as the Parties may agree pursuant to Section 3.1.4. The panel shall consist of (a) one member selected by TxDOT, (b) one member selected by Developer and (c) a third member selected pursuant to Section 3.1.3. To set forth the terms and conditions of such appointment and engagement, each Party and its appointed Disputes Board member shall enter into a Disputes Board Member Joinder Agreement in the form attached hereto as Attachment 1.

3.1.3 The two members whom TxDOT and Developer appoint to the Disputes Board shall, within 15 days after their appointment (or within seven days after their appointment, if the Dispute for resolution is a Fast-Track Dispute), select the third Disputes Board member (the "Disputes Board Chair") from among the remaining candidates that appear on the Parties' respective Disputes Board Member Candidate Lists. If the two Disputes Board members appointed by TxDOT and Developer are unable to reach agreement on their selection of the Disputes Board Chair within such time period, then either TxDOT or Developer or both shall request that the Chief Administrative Judge of the Travis County District Courts select the Disputes Board Chair from among the remaining candidates who appear on the Parties' Disputes Board Member Candidate Lists and meet the Disputes Board Member Qualifications. Both Parties waive all rights to appeal the decision of the Chief Administrative Judge, except if the individual designated by such judge to serve as the Disputes Board Chair is not among the candidates remaining on the Parties' Disputes Board Member Candidate Lists or does not meet the Disputes Board Member Qualifications. Within 15 days after the selection of the Disputes Board Chair by the two appointed members or the Chief Administrative Judge (or within seven days after such selection if the Dispute is a Fast-Track Dispute), the Party on whose list the Disputes Board Chair appears and the individual selected to serve as the Disputes Board Chair shall enter into a Disputes Board Member Joinder Agreement.

3.1.4 The Parties may mutually agree at any time prior to issuance of a Disputes Board Decision that the relevant Dispute shall be resolved by the Disputes Board Chair alone rather than by the three member panel, and any such agreement shall be irrevocable when signed in writing. If the Parties so agree, they shall issue a joint written directive stating their mutual agreement that the Disputes Board Chair alone shall resolve the relevant Dispute. Thereafter, the Disputes Board Chair rather than the Disputes Board shall

resolve the relevant Dispute in accordance with the terms and conditions of this Disputes Board Agreement.

3.1.5 Disputes that arise under Section 1.5.3 of Part D of Exhibit 7 to the Agreement with respect to the forecasts of traffic and revenue under Sections 1.5.2(a) and 1.8 of Part D of Exhibit 7 to the Agreement (such a Dispute a “GP Capacity Improvements T&R Dispute”) and that are referred to the Disputes Board for resolution shall be heard and decided by a specially constituted subcommittee of such Disputes Board (such subcommittee a “T&R Disputes Board Subcommittee”). The T&R Disputes Board Subcommittee shall consist of the Disputes Board Chair and three new members selected by the Disputes Board Chair in accordance with this Section 3.1.5. Subject to the provisions of this Section 3.1.5, a T&R Disputes Board Subcommittee that is constituted in accordance with this Section 3.1.5 shall constitute a Disputes Board for the sole purpose of resolving a GP Capacity Improvements T&R Dispute, shall not have any authority to resolve any other Dispute, and a Disputes Board Decision by a T&R Disputes Board Subcommittee with respect to a GP Capacity Improvements T&R Dispute shall be binding on the Disputes Board in connection with any related Dispute.

(a) Immediately after receipt of written notice of a GP Capacity Improvements T&R Dispute, the Disputes Board Chair shall provide TxDOT and Developer the opportunity to make recommendations to, and consult with, the Disputes Board Chair regarding the persons to be appointed as the three additional members to the T&R Disputes Board Subcommittee. The Disputes Board Chair shall decide upon the procedures for receiving recommendations and conducting consultations, which in any case shall be on an expedited basis and shall treat each Party in a non-discriminatory manner. For this limited purpose, the Parties expressly waive the application of Commercial Rule R-10 set forth in Attachment 2 attached hereto.

(b) Each of the three new members of the T&R Disputes Board Subcommittee appointed by the Disputes Board Chair shall satisfy the following qualifications: (i) Not less than 20 years of experience working at a nationally or internationally recognized traffic and revenue consulting firm; (ii) not be subject to disqualification pursuant to Section 4.2, and (iii) not have worked for a consulting firm that has provided traffic and revenue consulting services to either Party in connection with the Dispute or the Facility.

(c) The members of the T&R Disputes Board Subcommittee selected in accordance with this Section 3.1.5 shall constitute Dispute Board members for the sole purpose of a GP Capacity Improvements T&R Dispute and be subject to all the provisions of this Disputes Board Agreement governing Dispute Board members with respect to the subject GP Capacity Improvements T&R Dispute, except that Sections 3.2, 4.1 and 4.3 shall not apply.

(d) When hearing and deciding upon any GP Capacity Improvements T&R Dispute, the T&R Disputes Board Subcommittee shall use as its baseline reference the traffic and revenue study and projections prepared by the traffic and revenue consultant that TxDOT and Developer mutually retain pursuant to Section 1.5.2 of Part D of Exhibit 7 to the Agreement. The Parties shall have the right to present arguments and evidence, including traffic and revenue studies and projections from other traffic and revenue consultants, in support of or in opposition to the study and projections of the mutually retained traffic and revenue consultant. The T&R Disputes Board Subcommittee shall duly weigh and consider all such evidence and arguments presented, and shall have the power to accept, modify, supplement or reject the baseline reference.

3.2 Replacing Candidates on a Party's Disputes Board Member Candidates List.

3.2.1 At any time, either Party may replace any individual on its respective Disputes Board Member Candidates List that is not then serving on the Disputes Board; provided, however, that no such individual shall be added to the Disputes Board Member Candidates List of the proposing Party (the "Nominating Party") until complete Disclosure Statements relating to such individual are furnished to the other Party (the "Evaluating Party") and the Evaluating Party approves or is deemed to approve such individual for inclusion on the Nominating Party's Disputes Board Member Candidates List. "Disclosure Statements" shall consist of the proposed Disputes Board Member candidate's resume of experience and a discussion of the Disputes Board Member Qualifications as they apply to the proposed candidate. Within 30 days after the Evaluating Party receives a proposed candidate's Disclosure Statements (the "Disputes Board Member Candidate Evaluation Period"), the Evaluating Party shall evaluate the proposed candidate's Disclosure Statements and notify the Nominating Party as to whether the candidate is approved by the Evaluating Party for inclusion on the Nominating Party's Disputes Board Member Candidates List.

3.2.2 During the Disputes Board Member Candidate Evaluation Period, the Evaluating Party (a) shall submit written inquiry to the Nominating Party if, in the Evaluating Party's reasonable judgment, the Disclosure Statements for the proposed candidate are incomplete such that, if they are not supplemented to the Evaluating Party's reasonable satisfaction, such incompleteness will comprise a basis for the Evaluating Party's disapproval of the proposed candidate and (b) may submit written inquiries to the Nominating Party if the Evaluating Party has questions or concerns about the proposed candidate's qualifications to serve on the Disputes Board in light of the Disputes Board Member Qualifications. Within 15 days after the Nominating Party's receipt of any such written inquiry from the Evaluating Party, the Nominating Party shall (or shall cause the proposed candidate to) furnish a written response to the Evaluating Party's inquiry. The Evaluating Party may submit up to three such written inquiries. The Disputes Board Member Candidate Evaluation Period shall be extended a total of 30 days (including the 15 day inquiry response period) for each written inquiry made by the Evaluating Party. The submission of incomplete Disclosure Statements (following written inquiry from the Evaluating Party so that the Nominating Party has the opportunity to supplement any such incomplete Disclosure Statements) or failure by the Nominating Party or its proposed candidate to fully respond to the Evaluating Party's written inquiry shall constitute a basis for the Evaluating Party to disapprove the proposed candidate during the Disputes Board Member Candidate Evaluation Period. If the Evaluating Party notifies the Nominating Party of its approval, or does not notify the Nominating Party of its disapproval, of a proposed candidate within the Disputes Board Member Candidate Evaluation Period (as it may be extended), such candidate shall be approved or deemed approved by the Evaluating Party.

3.2.3 During the course of the Nominating Party replacing five consecutive potential candidates on its Disputes Board Member Candidates List on a cumulative basis over time, the Evaluating Party may, upon notice to the Nominating Party, disapprove up to two proposed candidates for any or no reason. The Evaluating Party may, upon notice to the Nominating Party, only disapprove subsequently proposed candidates of the Nominating Party based on any such candidate's failure to satisfy the Disputes Board Member Qualifications (which failure shall be described in reasonable detail in the Evaluating Party's notice of disapproval).

3.2.4 If the Evaluating Party does not approve a proposed candidate for inclusion on the Nominating Party's Disputes Board Member Candidates List, the Nominating Party shall propose subsequent candidates in reasonably rapid succession, and the selection process shall continue until the Evaluating Party's approval is obtained or deemed obtained as to a proposed candidate's inclusion on the Nominating Party's Disputes Board Member Candidates List.

3.2.5 If the Evaluating Party disapproves a proposed candidate of the Nominating Party due to failure of such candidate to satisfy the Disputes Board Member Qualifications, but the Nominating Party disagrees that such candidate is not qualified or eligible for service, the Nominating Party may seek resolution pursuant to Section 17.8.4 of the Agreement.

### 3.3 Removal of Disputes Board Member; Appointment of Replacement.

3.3.1 Subject to Section 3.3.2, any of the Persons specified in this Section 3.3.1 at any time may terminate the appointment of a Disputes Board member (including the Disputes Board Chair) due to (a) Disputes Board Member Conflict of Interest or (b) Disputes Board Member Misconduct (such termination constituting a termination "For Cause" hereunder). Subject to Section 3.3.2, termination for Cause shall be effective upon service of such Person's notice of termination on the affected Disputes Board member and the Parties. Following termination and removal For Cause, or the death or resignation of a Disputes Board member, the Disputes Board shall not proceed with the resolution of the applicable Dispute until a replacement has been appointed.

(a) Any two members of the Disputes Board may terminate the third Disputes Board member's appointment For Cause;

(b) TxDOT and Developer may, upon mutual agreement, terminate any Disputes Board member's appointment For Cause or without cause; and

(c) TxDOT or Developer may unilaterally terminate the appointment of any Disputes Board member For Cause.

3.3.2 If a Disputes Board member's appointment is terminated For Cause and a Party disagrees that such Disputes Board member should have been terminated For Cause, such Party may, within five Business Days after such Party receives notice of the Disputes Board member's termination of appointment, seek resolution pursuant to Section 17.8 of the Agreement. The Disputes Board member who is the subject of the disputed termination For Cause shall not participate in the resolution of such Dispute, but may be called to provide testimony and evidence. A Party may not unilaterally or by mutual agreement with the other Party terminate the appointment of any Disputes Board member For Cause and then dispute the propriety of such termination. If the resolution of the Dispute is that termination of a Disputes Board member For Cause was unjustified, such termination shall be void.

3.3.3 In the event that one or more Disputes Board members needs to be replaced due to removal, death or resignation of one or more Disputes Board members, replacement Disputes Board members shall be appointed in the same manner as the predecessor Disputes Board members until the Disputes Board is reconstituted as a three person board. The Parties shall commence the process to appoint each replacement Disputes

Board member as soon as notice of removal, death or resignation is given or received and shall complete the appointment as soon as possible, but in no event more than 30 days thereafter.

#### **Section 4. Qualifications and Conduct of Disputes Board Members.**

“Disputes Board Member Qualifications,” as they pertain to each Disputes Board Member or proposed candidate for inclusion on a Party’s Disputes Board Member Candidate List, consist of the requisite experience described in Section 4.1 and the absence of grounds for disqualification as described in Section 4.2.

4.1 Requisite Experience. Except as otherwise set forth in Section 3.1.5, all Disputes Board members shall be attorneys who (a) are retired judges with at least ten years prior experience as a sitting judge or (b) are active members of the State Bar of Texas or any other state bar (of the United States) with at least ten years prior experience acting as mediators, arbitrators or dispute board members for commercial disputes, in either case who have not been subject to disciplinary action within the past ten years. Preference shall be given to attorneys who, in addition to meeting the foregoing qualifications, are also experienced in interpreting or adjudicating contract rights and claims involving financing, design, construction, operations and/or maintenance of public infrastructure projects. The other Party cannot disapprove a proposed candidate for inclusion on a Party’s Dispute Board Member Candidate List due to lack of preferred qualifications if the Candidate List includes two other candidates who have one of the preferred qualifications.

4.2 Disqualification. No Disputes Board member shall have a Disputes Board Member Conflict of Interest or a financial interest in the Facility, in any Contract or in the outcome of any Dispute decided hereunder, except for payments to that member for services on the Disputes Board.

#### 4.3 Effect of Party’s Prior Approval of Disputes Board Member.

4.3.1 An Evaluating Party’s approval or deemed approval of a proposed candidate for inclusion on the Nominating Party’s Disputes Board Member Candidates List shall constitute an irrevocable waiver of any subsequent objection to such individual’s lack of qualifications under Section 4.1 (except if such individual’s lack of qualifications constitutes Misconduct, as addressed in Section 4.3.2).

4.3.2 No approval or deemed approval by the Evaluating Party of a proposed candidate for inclusion on the Nominating Party’s Disputes Board Member Candidates List shall constitute a waiver of any objection to a Conflict of Interest or Misconduct of such individual under Section 4.2, except that any matter fully disclosed in an individual’s Disclosure Statements prior to inclusion of such individual on the Nominating Party’s Disputes Board Member Candidates List with the approval or deemed approval of the Evaluating Party may not be subsequently asserted by the Evaluating Party as a Conflict of Interest or Misconduct constituting grounds for termination and removal of such individual from the Nominating Party’s Disputes Board Member Candidates List or from service as a Disputes Board member.

#### **Section 5. Procedures and Scope of Work of the Disputes Board.**

5.1 Procedures; Modification of Procedures. The Disputes Board shall conduct its proceedings to resolve a Dispute in accordance with the requirements specified or referenced herein; provided, however, that:

(a) The Parties may jointly modify the procedures applicable to the Disputes Board's proceedings to resolve a Dispute, effective upon the Disputes Board Chair's receipt of the Parties' written notice describing such modification in detail (the foregoing being without limitation to any requirements applicable to the Parties' amendment of the Agreement or any requirements applicable to modification of the DRP Rules or the Sections of the Code under which the DRP Rules are promulgated); and

(b) The Disputes Board may modify the procedures applicable to its proceedings to resolve a Dispute so as to be more responsive to the needs of the Parties, provided that (i) the Disputes Board Chair issues written notice to the Parties describing the proposed modification in detail and (ii) both Parties give their written consent thereto. Such modification shall take effect upon the Disputes Board Chair's receipt of the Parties' written consent.

5.2 Jurisdiction. If a responding Party asserts that a particular claim, demand, dispute, disagreement or controversy is a matter identified in Section 17.8.1.5 of the Agreement as beyond the Dispute Board's authority, the Disputes Board shall hear, consider and render a determination with respect to such assertion as a preliminary matter prior to consideration of the underlying matter. If the Disputes Board determines that the claim, demand, dispute, disagreement or controversy is a matter identified in Section 17.8.1.5 of the Agreement as beyond its authority, then it shall issue a Disputes Board Decision dismissing the same, without prejudice to the claiming Party's right to appeal such Disputes Board Decision in accordance with Section 17.8.5.1 of the Agreement or to pursue the claim, demand, dispute, disagreement or controversy in the proper jurisdiction. If the Disputes Board determines the claim, demand, dispute, disagreement or controversy is a matter within its authority, it shall issue such determination in writing to the Parties, including its reasoning, proceed to consideration of the underlying matter, and include in the Disputes Board Decision on the underlying matter findings of fact, conclusions and a decision on the issue of its authority. No appeal may be taken from the Disputes Board's determination that it has the requisite authority over the matter until a Disputes Board Decision is rendered on the underlying matter. If the responding Party asserts lack of authority before the Disputes Board prior to hearings on the underlying matter, then the responding Party's appearance in the Disputes Board proceedings to contest the underlying matter shall be without waiver of or prejudice to its right to appeal in accordance with Section 17.8 of the Agreement the Disputes Board's determination of authority.

### 5.3 Procedures for Disputes Board's Resolution of Disputes.

5.3.1 The Disputes Board shall conduct its proceedings in accordance with the Commercial Rules, including any time periods listed therein for actions by the Disputes Board. "Commercial Rules" means the dispute resolution proceedings set forth in Attachment 2 attached hereto. For Fast-Track Disputes, the time frames provided in the Commercial Rules for Expedited Procedures (as defined in Attachment 2) shall apply in accordance with the Commercial Rules.

5.3.2 Each Disputes Board member, or the Disputes Board Chair on behalf of the Disputes Board, shall promptly notify the Parties if any circumstance has arisen or is likely to arise that would prevent prompt resolution of the applicable Dispute in accordance with the Commercial Rules and this Disputes Board Agreement.

5.3.3 The following provisions pertain to Small Claims:

(a) A "Small Claim" is a Claim or related or similar Claims that arise fairly contemporaneously out of the same set of acts, events or circumstances, that the Parties mutually agree to have resolved solely by the Disputes Board Chair, and that the Parties mutually agree will be subject to an aggregate cap on award. A non-binding example of a Small Claim is where the cumulative amount in controversy of a Claim or related or similar Claims is \$500,000 or less.

(b) Once the Disputes Board Chair is appointed to resolve a Small Claim, the other two Disputes Board members shall be released from further service. Alternately, the Parties may, but are not obligated to, bypass appointment of two Dispute Board members and directly select a mutually acceptable individual from the Dispute Board Member Candidates Lists to serve as the Disputes Board Chair to resolve the Small Claim. Thereafter, in the context of the Disputes Board Chair's resolution of a Small Claim hereunder, all references in the dispute resolution procedures established in Section 17.8.4 of the Agreement to the "Disputes Board" or the "Disputes Board members" shall mean and refer to the Disputes Board Chair. At any time prior to the close of the Disputes Board hearing under R-27 of the Commercial Rules, if, due to amendment of the Dispute as to the amount in controversy, aggregation of the Dispute with other Disputes or other changes that cause a Party to no longer consent to resolution of the Dispute as a Small Claim by the Dispute Board Chair, such Party may, upon notice to the Disputes Board Chair and the other Party, withdraw its assent to resolution of the Dispute as a Small Claim by the Disputes Board Chair and require that a full three-member Disputes Board be empanelled to resolve such Dispute.

(c) The Disputes Board Chair shall have no authority to award compensation or damages in a Disputes Board Decision regarding a Small Claim aggregating more than the mutually agreed aggregate cap on award, and TxDOT or Developer as the claiming Party, as the case may be, asserting a Small Claim hereby irrevocably waives any right, at law or in equity, to any damages or award arising out of such Small Claim in excess of such cap.

#### 5.4 Aggregation of Disputes.

(a) Except with respect to GP Capacity Improvements T&R Disputes, either Party shall be entitled to request the Disputes Board to aggregate the consideration of multiple Disputes for resolution by the Disputes Board where common questions of fact, Law and contract interpretation and the efficiencies to be gained in conducting a single proceeding to resolve all such Disputes merit the aggregate consideration of all such Disputes. Upon receipt of such a request, the Disputes Board shall consider the aggregated Disputes in a single proceeding unless, as a preliminary matter, the Disputes Board determines (after considering any evidence presented by the Parties in support of, or in opposition to, the proposed aggregation) that this is inappropriate. The Disputes Board shall revise or deny the proposed aggregation if there are insufficient common questions of fact, Law and contract interpretation among the proposed aggregated Disputes, or if the efficiencies to be gained by conducting a single proceeding to resolve such Disputes are outweighed by the need for separate and independent resolution of some or all of the proposed aggregated Disputes. The Disputes Board shall specify, in a Disputes Board Decision on this matter, which Disputes (if any) are to be aggregated and which Disputes (if any) are to be excluded from aggregation. Those not aggregated shall be considered by a separately empanelled Disputes Board in a separate proceeding. A Disputes Board Decision regarding whether Disputes will be aggregated for resolution in a single proceeding before the Disputes Board shall be final, binding and not subject to appeal.

(b) In the event of concurrent GP Capacity Improvements T&R Disputes or GP Capacity Improvements T&R Disputes that are concurrent with a Dispute regarding the determination of the GP Public Funds Amount for the same GP Capacity Improvements, such Disputes shall be aggregated and considered in a single proceeding before a Disputes Board that has constituted a T&R Disputes Board Subcommittee in accordance with Section 3.1.5.

5.5 Issuance of Disputes Board Decision and Any Minority Report. The Disputes Board should make every effort to reach a unanimous decision among the Disputes Board members. If this proves infeasible, for Disputes other than GP Capacity Improvements T&R Disputes, the dissenting Disputes Board member may prepare a minority report. With respect to GP Capacity Improvements T&R Disputes, a decision by three of the four members of the T&R Disputes Board Subcommittee, or if there is no majority decision, a unanimous decision by two of the T&R Disputes Board Subcommittee members who were appointed by the Disputes Board Chair, shall constitute the Disputes Board Decision with respect to such GP Capacity Improvements T&R Disputes. Within 20 days after the final hearing on a Dispute (and within five days after the final hearing on a Fast-Track Dispute), the Disputes Board Chair shall issue to the Parties the Dispute Board Decision, including the Disputes Board's and T&R Disputes Board Subcommittee's written findings of fact and conclusions of law in support of the Disputes Board Decision. For the limited purpose of any GP Capacity Improvements T&R Dispute, the Parties hereby expressly waive the application of Commercial Rule R-32 set forth in Attachment 2 attached hereto.

5.6 Confidential Materials; Return or Destruction Thereof. "Confidential Materials" are all documents, other written materials and information presented or exchanged in a proceeding before the Disputes Board that are confidential pursuant to Section 17.8.9 of the Agreement. Each Disputes Board member shall maintain the privacy of Confidential Materials pursuant to Section 17.8.9 of the Agreement. Within 30 days after the Disputes Board Chair receives written notice of issuance of a final, non-appealable order on a Dispute that was the subject of a Disputes Board Decision, the Disputes Board Chair shall furnish written notice to each Party listing the Confidential Materials in the Disputes Board's possession and, except for those Confidential Materials that a Party directs the Disputes Board to return to such Party in writing within 15 days after receipt of such notice, the Disputes Board Chair shall destroy all copies of all Confidential Materials in the Disputes Board's possession. Until the time for the Disputes Board Chair's issuance of the foregoing written notice, the Disputes Board shall hold all Confidential Materials in confidence.

5.7 Dissolution of Disputes Board. Once there is issued a final, non-appealable order on a Dispute that was the subject of a the Disputes Board Decision, the Disputes Board shall be dissolved and the Disputes Board members serving on such Disputes Board shall be released from further service.

**Section 6. Reserved.**

**Section 7. TxDOT and Developer Responsibilities.**

7.1 TxDOT Responsibilities. TxDOT shall serve upon each Disputes Board member one copy of the Agreement. TxDOT shall also serve upon each Disputes Board member (and concurrently upon Developer) any other documents which are or may become pertinent to the activities of the Disputes Board, including but not limited to any Change Order, Directive Letter or other written direction, instruction, determination or decision of TxDOT.

7.2 Developer Responsibilities. Developer shall serve on each Disputes Board member (and concurrently on TxDOT) one set of any documents which are or may become pertinent to the activities of the Disputes Board, except those documents furnished by TxDOT. Such documents may include, but shall not be limited to, any drawings or sketches, calculations, procedures, schedules, estimates or other documents and Submittals which are used in the performance of the Work or in justifying or substantiating Developer's position.

7.3 Parties' Responsibilities for Costs and Expenses; Cooperation.

7.3.1 Each Party shall be responsible and make payment for its one-half share of all facilities fees, support services costs and other expenses of the Disputes Board's proceedings within 30 days after receipt of invoices for such costs and expenses. A Party that disputes an invoice for any such cost or expense relating to the Disputes Board's proceedings shall notify the other Party of such dispute promptly after receipt of such invoice. If either Party fails to pay its share of the amount owing under any invoice for such costs and expenses at the time required for payment, then, unless the non-paying Party has promptly disputed the amount due, (a) the other Party may make payment in lieu of the non-paying Party and (b) the paying Party will be entitled to recover (or offset) the amount paid on behalf of the refusing Party, with interest at a floating rate equal to the LIBOR in effect from time to time until the date the amount due is paid, no matter which Party is the prevailing Party.

7.3.2 Each Party shall diligently cooperate with the Disputes Board and the other Party and shall perform such acts as may be necessary to obtain an efficient and expeditious resolution of the Dispute submitted to the Disputes Board. If either Party fails to diligently cooperate with the Disputes Board or the other Party (upon evidence of such failure presented to and evaluated by the Disputes Board) and the Disputes Board determines that such failure was egregious, the Disputes Board shall take into account such egregious failure to cooperate in its Disputes Board Decision; subject, however, to the limitations on the Disputes Board's authority set forth in Section 17.8.4.1 of the Agreement.

**Section 8. Term.**

Consistent with the DRP Rules, the term of this Disputes Board Agreement shall commence on the Effective Date and continue in full force and effect for the Term of the Agreement and thereafter for so long as either Party has any obligation under the FA Documents until the applicable statute of limitations on any Dispute in regard to such obligation has expired.

**Section 9. Payment of Disputes Board Members' Fees, Costs and Expenses.**

9.1 Payment for Services. Payment of fees for work performed and services rendered by each Disputes Board member and for his or her direct out-of-pocket costs and expenses shall be calculated in accordance with the payment terms set forth for such Disputes Board member in his or her Disputes Board Member Joinder Agreement. The personal services of the Disputes Board member are a condition to receiving payments hereunder. Such payments shall be full compensation for work performed and services rendered by each respective Disputes Board member, and for all labor, materials, supplies, equipment and incidentals necessary for such Disputes Board member's participation on the Disputes Board.

9.2 Disputes Board Member Invoices. Each Disputes Board member shall submit invoices concurrently to TxDOT and Developer on a monthly basis for payment of the full

amount due for such Disputes Board member's work performed and services rendered in the prior month. Such invoices shall be in a format approved by TxDOT and Developer, accompanied by an itemization of days and hours billed along with a description of activities performed during each day in that billing period, and an itemization of direct non-salary costs incurred supported by copies of the original bills, invoices, expense accounts and miscellaneous supporting data. Such invoices shall specify that the invoiced Party is responsible only for one-half of the invoiced amount. The amount to be paid shall be established from the applicable billing rate set forth in each Disputes Board member's Disputes Board Member Joinder Agreement plus costs and expenses in accordance with such agreement.

9.3 Payment by Parties. Each Party shall be responsible and make payment for one-half of all fees, costs and expenses of the Disputes Board members' service on the Disputes Board. Such costs and expenses include, but are not limited to, required travel of the Disputes Board members, and the costs of witnesses and of any proof produced at the direct request of the Disputes Board. Each Disputes Board member will be paid within 30 days of the Parties' receipt and acceptance of invoices therefor. A Party that disputes a Disputes Board member's invoice shall notify such member and the other Party in writing of such dispute promptly after receipt of such invoice. If either Party fails to pay its share of the amount owing to any Disputes Board member at the time required for payment, then, unless the non-paying Party has promptly disputed the amount due, (a) the other Party may make payment in lieu of the non-paying Party and (b) the paying Party will be entitled to recover (or offset) the amount paid on behalf of the refusing Party, with interest at a floating rate equal to the LIBOR in effect from time to time until the date the amount due is paid, no matter which Party is the prevailing Party.

9.4 Retention of Cost Records and Accounts. Disputes Board members shall keep available for inspection by representatives of TxDOT and Developer, for a period of five years after final payment, the cost records and accounts pertaining to this Disputes Board Agreement and the performance of work and rendition of services as a member of the Disputes Board. If any claim arising out of the Disputes Board member's services or compensation under this Disputes Board Agreement is initiated before the expiration of the five year period, the Disputes Board member shall retain the cost records and accounts until such claim is completed.

9.5 Parties to Bear Own Costs. Each Party shall bear its own costs arising out of or in connection with the Dispute Resolution Procedures. The Party producing a witness shall bear the fees, costs and expenses of such witness, except that the Parties shall split the expenses for any expert witness retained by the Disputes Board to advise them regarding a Dispute.

## **Section 10. Nonassignability.**

Disputes Board members shall not assign or delegate any of the work or services to be rendered in connection with the Dispute Resolution Procedures without the prior written consent of both TxDOT and Developer.

## **Section 11. Legal Relations.**

11.1 Disputes Board Member as Independent Contractor. The Parties mutually understand and agree that any Disputes Board member, in the performance of duties as a Disputes Board member on the Disputes Board, is acting in the capacity of an independent

contractor and not as an employee or agent of TxDOT or Developer. No Disputes Board member will be entitled to any employee benefits from either Party.

11.2 No Effect on Potential Liabilities. Except for the payment, offset and reimbursement obligations agreed to by the Parties as set forth herein, nothing in this Disputes Board Agreement alters the potential liabilities of either Party.

11.3 Damages Waiver. Neither TxDOT nor Developer will hold any Disputes Board member responsible for claims, damages, losses and expenses, including, but not limited to attorneys' fees and expenses, arising out of or resulting from the actions and recommendations of the Disputes Board, and the Parties expressly waive any right to the foregoing, except as a result of fraud, willful misconduct or criminal actions of the applicable Disputes Board member.

**Section 12. Applicable Law.**

The Disputes for resolution by the Disputes Board shall be governed by and resolved under the Laws of the State of Texas, without regard to conflicts of law principles that would refer one to the Laws of another State.

**Section 13. Amendment in Writing.**

This Disputes Board Agreement may be altered, amended or revoked only by an instrument in writing signed by each Party. No verbal agreement or implied covenant or agreement shall be held to vary the terms hereof, any statute, law or custom to the contrary notwithstanding.

**Section 14. Complementary Provisions; Order of Priority.**

The Parties intend for the procedures established in Section 17.8.4 of the Agreement and the terms and conditions of this Disputes Board Agreement to be complementary. In the event of any conflict between this Disputes Board Agreement and Section 17.8.4 of the Agreement, the Agreement shall control.

**Section 15. Notices.**

Notices hereunder shall be sent as provided in Section 24.12 of the Agreement. The address for each Disputes Board member shall be set forth on the signature page of each Disputes Board Member Joinder Agreement.

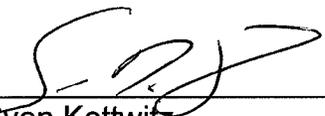
IN WITNESS WHEREOF, the Parties, intending to be legally bound, have executed this Disputes Board Agreement as of the Effective Date.

[Signature Page Immediately Follows]

**Developer:**

**NTE Mobility Partners Segments 3, LLC**

By:   
Name: Nicolas Rubio  
Title: Authorized Representative

By:   
Name: Sven Kottwitz  
Title: Authorized Representative

**TxDOT:**

**TEXAS DEPARTMENT OF  
TRANSPORTATION**

By:   
Phil Wilson  
Executive Director

