# FACILITY CONCESSION AGREEMENT

# SH 130 SEGMENTS 5 AND 6 FACILITY

**Between**

**Texas Department of Transportation**

**and**

**SH 130 Concession Company, LLC**

Dated March 22, 2007

**11.2.6** For the avoidance of doubt, Developer is prohibited by Law and this Section 11.2 from placing or permitting any outdoor advertising within the boundaries of the Facility Right of Way.

## 11.3 Competing Facilities

### 11.3.1 TxDOT Rights

**11.3.1.1** Except for the limited rights to compensation provided to Developer under Section 11.3.2, TxDOT will have the unfettered right in its sole discretion, at any time and without liability, to finance, develop, approve, construct, expand, improve, modify, upgrade, add capacity to, reconstruct, rehabilitate, restore, renew and replace any existing and new transportation or other facilities (including, without limitation, free roads, connecting roads, service roads, frontage roads, turnpikes, managed lanes, HOT/HOV lanes, light rail, freight rail, bus lanes, etc.) (collectively, "TxDOT Projects") both within the Airspace and outside the Facility Right of Way, and whether adjacent to, nearby or otherwise located as to affect the Facility, its operation and maintenance (including, without limitation, the costs and expenses thereof), its vehicular traffic and/or its revenues.

**11.3.1.2** TxDOT Projects include those facilities (a) owned or operated by TxDOT, including those owned or operated by a private entity pursuant to a contract with TxDOT; (b) owned or operated by a joint powers authority or similar entity to which TxDOT is a member, (c) owned or operated by a Governmental Entity pursuant to a contract with TxDOT, including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities, and (d) owned or operated by a Governmental Entity (including, without limitation, regional mobility authorities, joint powers authorities, counties and municipalities) with respect to which TxDOT has contributed funds, in-kind contributions or other financial or administrative support. The foregoing rights include the ability to institute, increase or decrease tolls on such facilities or modify, change or institute new or different operation and maintenance procedures.

**11.3.1.3** TxDOT will have the right, without liability, to make non-discretionary distributions of federal and other funds for any transportation projects, programs and planning, to analyze revenue impacts of potential Competing Facilities, and to exercise all its authority to advise and recommend on transportation planning, development and funding.

### 11.3.2 Exclusive Covenants and Remedies Regarding Competing Facilities

This Section sets forth Developer's sole and exclusive rights and remedies with respect to Competing Facilities, and supersedes any provisions of the FCA Documents to the contrary. Such rights and remedies are subject to Section 11.3.3.

**11.3.2.1** The Compensation Amount owing from TxDOT to Developer on account of the Competing Facility shall be equal to the loss of Toll Revenues, if any, attributable to the Competing Facility less the increase in Toll Revenues, if any, attributable to (a) other Competing Facilities, but only to the extent that the amount of any such reduction has not been previously recognized under Section 13.2.3.4, (b) any direct southern extension to SH 130 in operation at the time Developer first delivers its Claim for compensation to TxDOT or (c) any prior decrease in the maximum daytime posted speed limit for passenger vehicles on all or a substantial portion of I-35 where it runs generally parallel to the Facility below the maximum daytime posted speed limit on the Setting Date. For purposes of the foregoing clause (c),

temporary decreases, lasting 10 days or less, in the maximum daytime posted speed limit for construction, maintenance, expansion or diversions shall not be considered. The foregoing Compensation Amount shall be determined in the same manner, and subject to the same conditions and limitations, as for a Compensation Event under Section 13.2; as well as the procedures in this Section.

**11.3.2.2** TxDOT may, but is not obligated to, deliver to Developer a notice of potential Competing Facility at any time from and after the selection thereof as the preferred alternative under a NEPA decision or local project decision and prior to opening of the potential Competing Facility to traffic. TxDOT shall include in such notice (a) a reasonable description of the Competing Facility, including any right of way alignments, number of lanes, location and other pertinent features, (b) a statement whether the potential Competing Facility will be tolled, and if so the intended toll rate schedule by vehicle classification, and (c) any traffic and revenue studies and analyses available to TxDOT for the potential Competing Facility.

**11.3.2.3** Within 120 days after TxDOT delivers such notice to Developer, Developer shall deliver to TxDOT a written notice of Claim stating whether Developer believes the potential Competing Facility will have an adverse effect on the amount of Toll Revenues and, if so, a true and complete copy of a preliminary traffic and revenue study and analysis showing the projected effects and a reasonably detailed statement quantifying such effects. Such analysis and quantification shall include data on past Toll Revenues and projected future Toll Revenues with and without the potential Competing Facility. At Developer's request within such 120-day period, TxDOT shall grant reasonable extensions of time for Developer to deliver the written notice of Claim, so long as Developer is making good faith, diligent progress in completing its traffic and revenue analysis and Toll Revenue impact analysis, provided that in no event shall TxDOT be obligated to grant extensions aggregating more than 60 days.

**11.3.2.4** If for any reason Developer fails to deliver such written notice of Claim and related information within the foregoing time period (as it may be extended), Developer shall be deemed to have irrevocably and forever waived and released any Claim or right to compensation for any adverse effect on Toll Revenues attributable to the construction, operation and use of the subject potential Competing Facility or any Competing Facility that is not substantially different from the potential Competing Facility. For this purpose, a Competing Facility ultimately constructed and operated shall be considered substantially different from the subject potential Competing Facility if (a) the route is substantially different, (b) the number of lanes is different, (c) the number of HOV, HOT, truck or other special purpose or restricted use lanes is different or their length is substantially different, (d) the total length is substantially different, (e) highways, roads and facilities having interchange, entrance or exit ramp access to and from the Competing Facility are different, or the design capacity of an interchange, entrance or exit ramp is substantially different, (f) TxDOT stated in its written notice that the potential Competing Facility would be tolled and the actual Competing Facility is not tolled or is tolled at materially lower toll rates for the predominant classifications of vehicles than the rates described in TxDOT's notice, (g) the means for collecting tolls is substantially different (e.g. barrier only vs. barrier-free or open lane tolling) or (h) there are other differences similar in scale or effect to the foregoing differences.

**11.3.2.5** If Developer timely delivers its written notice of Claim and related information, then at TxDOT's request Developer shall engage in good faith, diligent negotiations with TxDOT to mutually determine and settle the Compensation Amount owing from TxDOT to Developer on account of the potential Competing Facility. As part of such negotiations, the Parties shall continue to refine and exchange, on an Open Book basis, plans, drawings,

configurations and other information on the potential Competing Facility, traffic and revenue data, information, analyses and studies, and financial modeling and quantifications of projected Toll Revenue loss, if any. At the request of either Party, the Parties shall engage a neutral facilitator to assist with the negotiations.

**11.3.2.6** If, despite such good faith, diligent negotiations (including exchange of information on an Open Book basis), the Parties are unable to agree upon the Compensation Amount within 90 days after commencement of such negotiations, then either Party may terminate the negotiations upon written notice to the other Party. If the Parties are successful in the negotiations, they shall execute and deliver written agreements and, if necessary, amendments to this Agreement, setting forth all the terms and conditions of settlement, which shall thereafter be final and binding and constitute a full settlement and release of any and all Claims, causes of action, suits, demands and Losses of Developer arising out of the Competing Facility or any similar Competing Facility, except any material changes in operation of a Competing Facility, to the extent not taken into account in any prior determination of Compensation Amount, and any Relief Events or Extended Relief Events related to a Competing Facility. Neither Party thereafter shall have the right to rescind or cancel the settlement for any reason, including differences between the amounts of actual future Toll Revenues and the amount that were previously projected.

**11.3.2.7** If any Competing Facility is opened for traffic operations and is not the subject of compensation settlement under Section 11.3.2.5 or upon opening is substantially different from the Competing Facility that is the subject of compensation settlement (as described in Section 11.3.2.4), then Developer shall be entitled to pursue its Claim for the Compensation Amount on and subject to the following terms and conditions:

(a) Developer shall have a period of up to four years following the opening for traffic operations of the Competing Facility to make a Claim for the Compensation Amount (which may include both past and future adverse effects on the amount of Toll Revenues). Developer shall make a Claim by delivering to TxDOT written notice of the Claim together with the same related information and materials as described in Section 11.3.2.3. The written notice shall state the claimed Compensation Amount and Developer's proposed Base Case Financial Model Update. If for any reason Developer fails to deliver such written notice of Claim and related information within the foregoing time period, Developer shall be deemed to have irrevocably and forever waived and released any Claim or other right to compensation for any adverse effect, past or future, on Toll Revenues attributable to the Competing Facility.

(b) If Developer timely delivers its written notice of Claim and related information, then at TxDOT's request Developer shall deliver to TxDOT, on an Open Book basis, any other information, studies, analyses and documentation used by or available to Developer in support of its Claim or otherwise relevant to the determination of the Compensation Amount (if any), and the Parties shall seek to settle the Claim in good faith. Any unresolved Dispute regarding whether Developer is entitled to any compensation and the amount thereof shall be resolved according to the Dispute Resolution Procedures.

(c) Developer shall bear the burden of proving its Claim.

**11.3.2.8** If any Competing Facility for which compensation is paid pursuant to Section 11.3.2.5 or 11.3.2.6 is modified physically or operationally after opening for traffic operations so that it is substantially different (as described in Section 11.3.2.4) from the original Competing Facility and as a result thereof Developer experiences a further adverse effect on

the amount of Toll Revenues, then Developer shall be entitled to further compensation for such impact, offset by any further gain in Toll Revenues, if any, attributable to other Competing Facilities, or modifications thereof, that are in operation at the time Developer first delivers its Claim for further compensation to TxDOT. The foregoing right to further compensation shall be subject to the same terms and conditions as set forth in Section 11.3.2.7, with the deadline for making Claim running from the date the changes in the original Competing Facility are substantially completed.

### 11.3.3 Waiver of Rights and Remedies Regarding Competing Facilities

**11.3.3.1** Developer acknowledges that TxDOT has a paramount public interest and duty to develop and operate whatever TxDOT Projects it deems to be in the best interests of the State, and that the compensation to which Developer is entitled on account of Competing Facilities is a fair and adequate remedy. Accordingly, Developer shall not have, and irrevocably waives and relinquishes, any and all rights to institute, seek or obtain any injunctive relief or pursue any action, order or decree to restrain, preclude, prohibit or interfere with TxDOT's rights to plan, finance, develop, operate, maintain, toll or not toll, repair, improve, modify, upgrade, reconstruct, rehabilitate, restore, renew or replace Competing Facilities; provided, however, that the foregoing shall not preclude Developer from enforcing its rights to compensation under Section 11.3.2, or claiming any relief in respect to Relief Events or Extended Relief Events, if appropriate. The filing of any such action seeking to restrain preclude, prohibit or interfere with TxDOT's rights shall automatically entitle TxDOT to recover all costs and expenses, including attorneys' fees, of defending such action and any appeals.

## ARTICLE 12. UPGRADES, TECHNOLOGY ENHANCEMENTS AND SAFETY COMPLIANCE

### 12.1 Conditions Requiring Mandatory Upgrades and Technology Enhancements

#### 12.1.1 Capacity Improvements

**12.1.1.1** Developer shall be obligated to make Capacity Improvements to and for the Facility as and when provided in Exhibit 18 to this Agreement.

**12.1.1.2** Required Capacity Improvements will be based on the level of service criteria, requirements and provisions set forth in Exhibit 18. Any Capacity Improvements proposed by Developer shall be subject to review and comment by the Independent Engineer and TxDOT for the purpose of determining, in addition to the matters set forth in Section 6.3.7.1, that the proposed Capacity Improvements are reasonably likely to restore and maintain for a reasonable period of time the minimum required levels of service set forth in Exhibit 18. For the avoidance of doubt, occurrence of the first trigger event described in Section 4.1 of Exhibit 18 signifies a failure to meet the minimum required levels of service. Developer shall bear the burden of proving that its proposed Capacity Improvements will restore minimum required levels of service for a reasonable period of time. Developer shall bear all risk that proposed Capacity Improvements do not restore and maintain minimum required levels of service.

**12.1.1.3** Except as provided in Section 12.1.1.4 and Exhibit 18, and except for TxDOT's right of review and comment on proposed Capacity Improvements, all the provisions of the FCA Documents, including all Technical Requirements and Technical Documents, concerning permitting, Facility Right of Way acquisition, design, construction, insurance, Utility Adjustments, Service Commencement, operation, maintenance and Renewal Work for the Facility shall apply, *mutatis mutandi*, to Capacity Improvements; provided that the