



CONSTRUCTION COMMITTEE
APRIL 21, 2005

PROJECT: METRO GOLD LINE EASTSIDE EXTENSION, METRO ORANGE LINE, EXPOSITION LIGHT RAIL TRANSIT AND FUTURE BUS AND RAIL TRANSIT PROJECTS

CONTRACT: CALIFORNIA WATER SERVICE COMPANY

ACTION: APPROVE UTILITY COOPERATIVE AGREEMENT WITH CALIFORNIA WATER SERVICE COMPANY

RECOMMENDATION

Authorize the Chief Executive Officer to execute an Amended and Restated Utility Cooperative Agreement between California Water Service Company and the Los Angeles County Metropolitan Transportation Authority (LACMTA) to define the responsibilities of each party for design and construction of the California Water Service Company and/or LACMTA facilities.

BACKGROUND

This Utility Cooperative Agreement Amendment is needed to ensure overall effective development of California Water Service Company designs, design reviews, and rearrangements for the Metro Gold Line Eastside Extension Light Rail Transit project, Metro Orange Line (San Fernando Valley Bus Rapid Transit) project, the Exposition Light Rail Transit project and future Bus and Rail Transit projects. Establishing a clear and consistent framework of roles, responsibilities and procedures for coordination of the planning, design and construction of all utility rearrangements will facilitate the extensive coordination between LACMTA and California Water Service Company. This agreement includes financial responsibility for delays caused by either party.

FINANCIAL IMPACT

Funding for this scope of work is included in each major capital project's estimated total project cost. The annual work plans associated with this Utility Cooperative Agreement will be included in each fiscal year project budget. The LACMTA FY05 budget included costs for California Water Service Company relocations necessitated by the Eastside Light Rail Transit Project.

Since this is a multi-year agreement, the respective project managers and Chief Capital Management Officer will be accountable for budgeting necessary utility relocation review and implementation costs for each Project in future years.

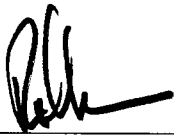
ALTERNATIVES CONSIDERED

With respect to the overall Utility Cooperative Agreement, California Water Service Company and LACMTA could develop and execute completely a new cooperative agreement for each project. This duplicative effort would take months of extensive attorney and staff discussion, review and negotiation to draft each agreement, and is therefore not recommended.

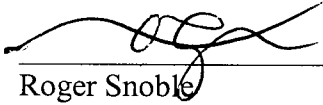
ATTACHMENT

A. Amended and Restated Utility Cooperative Agreement

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John C. Higgins, Third Party Administration Manager



Richard Thorpe
Chief Capital Management Officer
Construction Project Management



Roger Snoble
Chief Executive Officer

**UTILITY COOPERATIVE AGREEMENT
FOR RAIL AND BUSWAY TRANSIT PROJECTS**

BETWEEN

CALIFORNIA WATER SERVICE COMPANY

AND THE

**LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION
AUTHORITY**

DATED: _____

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**UTILITY COOPERATIVE AGREEMENT
FOR RAIL AND BUSWAY TRANSIT PROJECTS
BETWEEN CALIFORNIA WATER SERVICE
AND THE
LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY**

THIS AGREEMENT, dated _____, 2004 is made by and between the Los Angeles County Metropolitan Transportation Authority (“MTA”) and California Water Service Company (“Utility”). As used in this Agreement, terms identified by initial capital letters shall have the meanings set forth in Article 1, or as elsewhere provided in this Agreement.

RECITALS

A. MTA is a public entity created by the California State Legislature for many purposes including, but not limited to, the design, construction, and operation of rail and bus transit systems and other transportation facilities in Los Angeles County.

B. MTA proposes to design, construct and operate facilities necessary and convenient for various rail and busway transit systems within the County of Los Angeles. MTA’s proposed projects include, without limitation, the following projects:

- The Metro Eastside Light Rail Transit Project (the “Eastside LRT Project”), which is an approximately 6 mile light rail line currently proposed to traverse portions of the City of Los Angeles and unincorporated areas of the County of Los Angeles, between Union Station and Pomona Boulevard/Atlantic Boulevard (as said proposed route may be modified by MTA from time to time).
- The San Fernando Valley East-West Transit corridor (the SFV BRT Project, which is an approximately 14 mile bus rapid transit line currently proposed to traverse portions of the City of Los Angeles between North Hollywood and

Warner center (as said proposed route may be modified by MTA from Time to time)

- The Wilshire Corridor Bus Rapid Transit Project (the “Wilshire BRT Project”), which is an approximately 14 mile bus rapid transit line currently proposed to run along Wilshire Boulevard in portions of the Cities of Los Angeles, Santa Monica and Beverly Hills, and in unincorporated areas of the County of Los Angeles, between Western Avenue and a terminus located in the City of Santa Monica (as said proposed route may be modified by MTA from time to time).
- The Exposition Corridor Light Rail Transit Project (the “Expo LRT Project”), which is an approximately 9 mile light rail line currently proposed to traverse the City of Los Angeles, extending southward from Downtown Los Angeles to Exposition Park, and then westward along Exposition Boulevard to Venice Boulevard/Robertson Boulevard (as said proposed route may be modified by MTA from time to time).

C. MTA historically has used the “Design/Bid/Build” method of project delivery for its rail transit projects. However, MTA anticipates adopting the “Design/Build” method of project delivery for the SFV BRT Project and for the at-grade portion of the Eastside Project (from Union Station to the portal at 1st and Clarence Streets and from the 1st/Lorena Station to the Pomona/Atlantic Station), and may elect to utilize Design/Build for other projects in the future. The use of Design/Build will require numerous changes in MTA’s approach to those of its projects, which are delivered in whole or in part on a Design/Build basis.

D. From time to time the construction or improvement of MTA's rail and busway transit systems (including but not limited to those described in Recital B above) will require the Rearrangement of portions of certain Utility Facilities. The Parties desire to cooperate to the end that such Rearrangements be held to a minimum consistent with MTA's requirements and that Rearrangements, when required, be effected with the greatest expedition and least interference with the operations of either of the Parties.

E. Utility and MTA are parties to that certain Original Agreement for the Long Beach – Los Angeles Light Rail Transit System dated February 26, 1986 between the Southern California Water Service Company and the Los Angeles County Metropolitan Transportation Authority and its predecessors, which among other things, establishes procedures for the Rearrangement of Utility Facilities affected by certain rail transit systems constructed or to be constructed by MTA.

F. The Parties desire to amend the Original Agreement in order (1) to apply its terms to MTA’s proposed Busway transit systems as well as to all proposed rail transit systems; (2) to establish terms as are necessary or appropriate to accommodate Design/Build as well as Design/Bid/Build; and (3) to establish an Agreement for the working relationships.

NOW, THEREFORE, in consideration of the covenants contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Utility and MTA agree to, and do hereby, establish an Agreement (including any Exhibits thereto) in full as follows:

Article 1 General Provisions

1.1 Scope of Agreement

1.1.1. This Agreement addresses the four Transit Projects described in Recital B above as well as any other MTA projects, which meet the definition of “Transit Project”, set forth in Section 1.3.44 below. Among other things, this Agreement specifies (a) the procedures which MTA and Utility will follow in identifying, planning, designing and effecting all Rearrangements of Utility Facilities that are necessary in order for MTA to construct and operate Transit Projects, and (b) the manner in which Utility and MTA will be reimbursed for their respective costs of such activities. Both MTA and Utility agree that each will cooperate and coordinate with the other in all activities covered by this Agreement and any supplemental agreements hereto.

1.1.2. This Agreement shall not negate or modify the terms and conditions of (a) any legally binding easements or other use and/or occupancy agreements between Utility and

MTA with respect to the occupancy by Utility Facilities of, or any interest of Utility in, real property owned by or under the operating jurisdiction of MTA, (b) any such easements or other agreements between Utility and any former owner of real property now or hereafter owned by MTA, and to which MTA has become or hereafter becomes a successor either by assignment or by operation of law, or of (c) any such easements or other agreements between Utility and any other governmental agency with respect to real property owned by or under the operating jurisdiction of such governmental agency, and in which MTA has a statutory or other right to install Transit Project Facilities.

1.2 Duration of Agreement

The initial term of this Agreement (the “Initial Term”) shall commence on the Effective Date and shall terminate on the later of (a) June 30, 2016, or (b) one hundred twenty (120) days after MTA’s written notice to Utility that all construction for the Eastside LRT Project, the SFV BRT Project, the Wilshire BRT Project and the Expo LRT Project that might directly impact Utility Facilities has been completed. This Agreement shall automatically be renewed for consecutive one year terms commencing on the day following the last day of the Initial Term and on each subsequent anniversary of such day, unless either Party provides written notice of termination to the other no later than ninety (90) days prior to the end of any term (including the Initial Term).

1.3 Definitions

For the purpose of this Agreement, the following terms shall have the meanings set forth below:

1.3.1. Abandonment is the permanent termination of service of an existing Utility Facility (or portion thereof) as authorized by Utility, and, if the Utility Facility or portion thereof is not being removed from its existing location, the work necessary to permit such Utility Facility to remain in place in accordance with applicable law.

1.3.2. Betterment is a Replacement Facility, or component thereof, that will increase or upgrade the level of service, capacity, capability, efficiency or function of a Replacement

Facility over that which was provided by the corresponding Conflicting Facility (“upgrade”). However, the following shall not be considered Betterments:

(a) An upgrade that is necessary to accommodate the Subject Transit Project.

(b) An upgrade resulting from Design or Construction in accordance with the applicable Utility Standards as set forth in Section 2.6; provided, however, that any upgrade beyond the minimum level required by such applicable Utility Standards shall be considered a “Betterment.”

(c) Measures to mitigate environmental impacts identified in the Transit Project's final Environmental Impact Report or Statement, and which are mutually agreed to be a Transit Project responsibility; provided, however, that any upgrade beyond minimal applicable requirements shall be considered a “Betterment”.

(d) Replacement of devices or materials no longer regularly manufactured with the next highest grade or size.

Certain revisions or additions to Utility Standards may also be a Betterment, as set forth in Section 2.5. The term “Betterment” shall also include any new or upgraded facilities or portion thereof added to a Replacement Facility at Utility’s request for the purpose of improving Utility Facilities or services, and which are not otherwise excluded from the definition of Betterment as set forth above. Betterments shall be entirely financed at the expense of Utility.

1.3.3. Busway Project is any busway system of MTA, which is constructed for the public transportation of passengers. A Busway Project may be located on an exclusive busway or may share the roadway with other vehicles. “Busway Project” may refer to any one of the busways, and any portion or section thereof, as the context may require.

1.3.4. Conditional Design Submittal means a submittal by MTA to Utility of the Design for components of a particular Rearrangement (or elements thereof) prior to

completion of the Final Design for the entire Rearrangement, as more particularly set forth in Section 2.4.4.

1.3.5. Conflicting Facility is an existing Utility Facility, which MTA determines is so situated as to require Rearrangement in order to construct and operate the Project without adversely impacting that Utility Facility.

1.3.6. Construction or Construct is work of removal, demolition, replacement, restoration, alteration, realignment, building, fabrication, landscaping, supporting or relocation.

1.3.7. Construction Contract is a contract with a Construction Contractor for Construction of Transit Project Facilities and/or related Rearrangements.

1.3.8. Construction Contractor is a contractor that is engaged to Construct a project pursuant to a Design/Bid/Build procurement.

1.3.9. Construction Costs are those types of costs that are customarily reflected in a Construction Contract, by industry standards.

1.3.10. Cost is all authorized direct and indirect costs as further defined in Article 8 for costs incurred by Utility, and in Article 9 for costs incurred by MTA, and subject to the provisions of Article 11.

1.3.11. County is the County of Los Angeles, California.

1.3.12. Cutoff Date means the earliest date on which Utility received written notice (i) identifying a Utility Facility site as land proposed to be included in a Transit Project, or (ii) of MTA's acquisition of title in respect to a Utility Facility site.

1.3.13. Design means that engineering and architectural and other design work and the resulting maps, plans, drawings, computer software, estimates and specifications, which are necessary to Construct Rearrangements and/or Transit Projects.

1.3.14. Design/Bid/Build (“D/B/B”) means the method of project delivery in which a design consultant is engaged to prepare the Final Design for a Transit Project and a Construction Contractor is engaged under a separate contract to Construct the project based on the Final Design.

1.3.15. Design/Build (“D/B”) is the method of project delivery in which a Design/Build Contractor is engaged to furnish the Final Design of and to Construct a project.

1.3.16. Design/Build Contract (“D/B Contract”) is a contract with a D/B Contractor for Design and Construction of Transit Project Facilities and/or related Rearrangements.

1.3.17. Design/Build Contractor (“D/B Contractor”) is defined as a single entity or joint venture, which is engaged by MTA to complete the Design of and to Construct a Transit Project pursuant to a Design/Build procurement.

1.3.18. Design Development is the phase of the Design process, which validates schematic design concepts and system criteria and develops a clear indication of design solutions for requirements outlined in the Preliminary Engineering Design phase. At the completion of Design Development, major features of the architectural, structural Design and third party interfaces have advanced in conjunction with performance specifications, thereby providing the basis for Final Design.

1.3.19. Dispute has the meaning set forth in Section 13.1

1.3.20 Eastside LRT Project has the meaning set forth in Recital B of this Agreement 1.3.21 Effective Date is the date on which this Agreement has been approved by Utility’s and MTA’s respective Boards and has been fully executed on behalf of both MTA and Utility.

1.3.22 Not Used

1.3.23 Expo LRT Project has the meaning set forth in Recital B of this Agreement.

1.3.24 Facility is defined as real or personal property located within the route, such as structures, improvements, and other properties under the jurisdiction of County and shall include, but not limited to, streets, highways, bridges, alleys, storm drains, sanitary sewers,

landscaping, trees, traffic signals, street lights, parking meters and police and fire alarm systems.

1.3.25 Final Design is the phase of the Design process that provides the detailed design and technical specifications for all temporary and permanent project facilities. This phase addresses and resolves all Design review comments, construction issues, and third party comments and finalizes all engineering, architectural, and system designs necessary for complete construction documents. The term also includes the products of such phase of the Design process. A detailed Final Design may be furnished on MTA's behalf either by a D/B Contractor or by a design consultant (and in the latter case, some elements of the Final Design also may be furnished by a Construction Contractor).

1.3.26 Hazardous Materials means "hazardous substances" as that term is defined in Division 20, Chapter 6.8 of the California Health & Safety Code.

1.3.27 Initial Term has the meaning set forth in Section 1.2 of this Agreement.

1.3.28 MTA is the Los Angeles County Metropolitan Transportation Authority and, as the context may require, its officers, employees, agents, contractors and subcontractors.

1.3.29 MTA Fiscal Year is each one-year period commencing on July 1 of a calendar year and terminating on June 30 of the following calendar year.

1.3.30 MTA Representative is the person, or person holding a specified position, designated by the MTA pursuant to Section 1.4.

1.3.31 Non-Construction Costs means those types of Costs that are not Construction Costs.

1.3.32 Original Agreement has the meaning set forth in Recital E.

1.3.33 Parties are MTA and Utility collectively, and a "Party" is defined as each of MTA and Utility individually.

1.3.34 Preliminary Engineering ("PE") Design is the phase of the Design process which takes a Transit Project from a conceptual state to a level of project Design definition that describes

the Transit Project technical and architectural approach in order to determine environmental and community impacts, interfaces with utilities and existing infrastructure/facilities, operational characteristics, an estimate of project costs and a project execution schedule. The term also includes the products of such phase of the Design process. The PE Design phase for a Transit Project is initiated at the conclusion of the Draft Environmental Impact Statement and after the selection of the locally preferred alignment.

1.3.35 Project Plans are MTA's drawings, plans and specifications for a Subject Transit Project, which MTA has identified as the plans on which Design of the affected Rearrangements should be based. Utility acknowledges that Project Plans may or may not be at a Final Design level.

1.3.36 Protected Materials is any paleontological, archeological, cultural, or similar resources requiring protection pursuant to applicable law during Construction.

1.3.37 Rail Project means those rail transitways of MTA that are adopted for Construction for the public transportation of passengers. "Rail Project" may refer to any one of such transitways, and any portion or section thereof, as the context may require.

1.3.38 Rearrangement or Rearrange is all work on Utility's Facilities that is necessary to accommodate a Transit Project (as more particularly described in Section 1.5.2), including without limitation, Design, removal, replacement, alteration, reconstruction, support, protection in place, Abandonment or relocation of a Conflicting Facility or portion thereof, whether permanent or temporary.

1.3.39 Replacement Facility is a Utility Facility that may be constructed or provided under the terms of this Agreement as a consequence of the Rearrangement of a Conflicting Facility or portion thereof and which meets applicable Utility Standards (including any Betterments which the Parties agree to incorporate therein). A Replacement Facility may be an entirely new Utility Facility, or an existing Utility Facility, as modified by the Rearrangement work.

1.3.40 SFV BRT Project has the meaning set forth in Recital B of the Agreement.

1.3.41 Subject Transit Project, when referenced in connection with a particular Rearrangement, means the Transit Project which necessitates such Rearrangement; provided, however, that if MTA enters into more than one D/B Contract or Construction Contract for a particular Transit Project, then where the context so requires, the term “Subject Transit Project” shall refer to that portion of such Transit Project which is being constructed by a particular D/B Contractor or Construction Contractor and which necessitates such Rearrangement.

1.3.42 Substitute Facility means a Utility Facility equal, in terms of service, capacity, service life, capability, appearance, efficiency and function, to the corresponding Conflicting Facility that requires Rearrangement, but which also includes any upgrades to any of the foregoing that would not be considered Betterments pursuant to this Agreement.

1.3.43 Temporary Facility is a Facility constructed for the purpose of ensuring continued service during a Rearrangement and/or any work on a Utility Facility to accommodate the construction of a Transit Project, but which will be removed or restored to its original condition after such construction activities are completed.

1.3.44 Transit Projects are Rail Projects and Busway Projects collectively, and a “Transit Project” is defined as an individual Rail Project or Busway Project, as the context may require. The Transit Projects include, but are not limited to, the MTA projects described in Recital B. Where the context so requires, “Transit Project” also refers to the Design and Construction undertaken by or at the direction of MTA in order to create a Rail Project or Busway Project.

1.3.45 Transit Project Facility means a facility that is a component of or appurtenance to a Transit Project.

1.4.46 Transit Project Right of Way means (a) real property owned by MTA and used (or proposed to be used) for Transit Project purposes, and (b) those portions of public streets or rights-of-way on which are located (or proposed to be located) any Transit Project Facilities or which are otherwise used (or proposed to be used) by MTA for Transit Project purposes.

1.3.47 Utility is defined as California Water Service Company, and, as the context may require, its officers, employees, agents, contractors and subcontractors.

1.3.48 Utility Comment Due Date means as follows:

(a) For each Rearrangement that is to be included in MTA's Construction Contract or D/B Contract for the Subject Transit Project, the "Utility Comment Due Date" means the deadline scheduled by the Parties pursuant to Article 2 for delivery of the non-Designing Party's final comments on the Design product for such Rearrangement, prior to issuance of the solicitation documents for such Construction Contract or D/B Contract.

(b) For each Rearrangement that is not to be included in MTA's Construction Contract or D/B Contract for the Subject Transit Project, the "Utility Comment Due Date" means the earlier of (i) the Rearrangement Deadline, and (ii) the Subject Transit Project Deadline, as said terms are defined below. The "Rearrangement Deadline" is defined as the deadline scheduled by the Parties pursuant to Article 2 for delivery of the non-Designing Party's final comments on the Design product for a Rearrangement, prior to issuance of the solicitation documents (by Utility or by MTA, as applicable) for Construction services for such Rearrangement. The "Transit Project Deadline" means the date of issuance of the solicitation documents for MTA's Construction Contract or D/B Contract for a Subject Transit Project.

1.3.49 Utility Facility is defined as any structure, improvement or other facility impacted by Transit Project Construction, that is used for the provision of Water services by Utility to the public and shall include, but not be limited to, valves, pipes, casings and encasements together with any and all equipment, apparatus or structures appurtenant thereto or associated therewith.

1.3.50 Utility Representative means the person, or the persons holding the specified position(s), designated by Utility pursuant to Section 1.4.

1.3.51 Utility Standards means the latest editions of Utility's written standards specified in Exhibit 1 attached hereto that are in effect as of the Effective Date, as the same may be modified from time to time thereafter, but only to the extent that such modifications do not result in Betterments pursuant to Section 2.5.

1.3.52 Wilshire BRT Project has the meaning set forth in Recital B of this Agreement

1.3.53 Work Order is that document which MTA shall issue to Utility authorizing funding for Utility's performance of Design, Design review, inspection, Construction and/or supply of materials and equipment, under the terms and conditions of this Agreement. Utility's failure to execute a Work Order shall not excuse Utility's performance of any obligation under this Agreement.

1.3.54 Window means the scheduled period of time during which Utility will be able to pursue its work for a particular Rearrangement without causing interference with or receiving interference from construction work on the Subject Transit Project.

1.4 Utility Representative and MTA Representative

1.4.1. Utility Representative. For each Transit Project, Utility shall designate a person, or the holder of a specified office or position, to act as the Utility Representative for such Transit Project. A single individual may be the Utility Representative for more than one Transit Project, to the extent necessary depending on the requirements of the Transit Project(s) to which he or she is assigned. The Utility Representative(s) shall be dedicated to their assigned Transit Project(s) to assist MTA in the delivery of such Transit Project(s) and each component thereof in a timely manner. The Utility Representative(s) will have the responsibility and authority (i) to manage and coordinate interaction of Utility (including without limitation Utility departments or other constituent or related entities) with MTA and its contractors, (ii) to produce the necessary billings, work documents and reports on production, Cost and Work Order status, (iii) to undertake reviews, provide comments and issue approvals as required by this Agreement, and (iv) to cause Utility to pay MTA's billings for its Costs that are reimbursable hereunder. Utility may change a designated Utility Representative by providing fourteen (14) days prior written notification to MTA. Utility shall remove and replace any Utility Representative within fourteen (14) days after MTA's written request therefor. All Utility Representatives shall be subject to MTA approval.

1.4.2. MTA Representative. For each Transit Project, the Chief Executive Officer of MTA shall designate a person, or the holder of a specified office or position, to act as the MTA Representative for such Transit Project. At MTA's option, a single individual may serve as the MTA Representative for any number of Transit Projects. The MTA

Representative will have the responsibility to manage and coordinate MTA interaction with Utility, and to cause production of the necessary Design and Construction documents for Utility review and/or approvals as called for under this Agreement, to issue Work Orders, and to undertake reviews and issue approvals as required by this Agreement. The MTA may change its designated MTA Representative by providing fourteen (14) days prior written notification to Utility.

1.5 Coordination and Cooperation

1.5.1 The Parties hereby acknowledge that the timely completion of each Transit Project will be influenced by the ability of MTA and Utility to coordinate their activities, communicate with each other, and respond promptly to reasonable requests. As information becomes available for each Transit Project, MTA will promptly provide to Utility such plans for the Project as will enable Utility to determine which Utility Facilities may be impacted thereby. The Parties will endeavor to agree on the plans and specifications for each Rearrangement prior to the giving of formal notice to Utility of a required Rearrangement. This Section 1.5.1 is directory only and compliance therewith or agreement upon plans and specifications as aforesaid shall not be a condition precedent to the giving of formal notice to Utility of a required Rearrangement.

1.5.2 Cooperation. Rearrangement of a Utility Facility may be necessary in order to accommodate a Transit Project for either or both of the following reasons: (a) a physical conflict between the Transit Project (including its construction, operation, maintenance or use) and the Utility Facility, and/or (b) an incompatibility between the Transit Project Facilities as designed and the Utility Facility based on the requirements of Utility Standards, MTA's applicable standards, or applicable law (even though there is no physical conflict). Relocation of Utility Facilities will be avoided whenever it is possible to do so without causing increased costs for or delay in a Transit Project. When reasonably possible in accordance with the foregoing, as determined by MTA, Utility Facilities will be left in place and protected. When relocation or other Rearrangement of Utility Facilities cannot be avoided in accordance with the foregoing, Utility agrees to such Rearrangement as MTA determines is reasonably necessary and to cooperate with MTA's requirements for the Subject Transit Project, in accordance with the provisions of this Agreement. Where there are joint users of any such

Utility Facilities or any part thereof or of space thereon or therein, Utility shall use its best efforts to cooperate with MTA in identifying any joint users and obtaining their cooperation.

1.6 Design/Build Contractor.

The Parties acknowledge that MTA's utilization of Design/Build for certain Transit Projects (or portions thereof) may have an impact on the processes governed by this Agreement. Without limiting the generality of the foregoing, Utility acknowledges that development of a Design/Build Transit Project will require strict compliance with the scheduling requirements of this Agreement, and that failure to meet the deadlines set forth in this Agreement or in the applicable Work Order could cause MTA and/or its D/B Contractor to incur substantial costs as a result of such delay, or in taking measures to avoid resulting delay to the Transit Project. The consequences of Utility's failure to meet a deadline are addressed in Section 11.4. Utility further acknowledges that the D/B Contractor may be assigned various tasks, including tasks assigned to the MTA Representative hereunder (e.g. coordination of design and resolving design issues with Utility that ordinarily would be performed by MTA's own staff or design consultants). Accordingly, if MTA enters into a D/B Contract for a Transit Project, the Parties agree as follows:

1.6.1 Without limiting MTA's rights to delegate the performance of Design and Construction tasks hereunder to consultants and contractors, MTA may delegate to the D/B Contractor the duty to perform any of MTA's obligations hereunder in lieu of MTA, as designated by MTA in its sole discretion in the D/B Contract; Provided, however, that the obligation to make payments or advance funds pursuant to Article 1 will not be delegated to the D/B Contractor, and Utility shall have no right to seek such payments from the D/B Contractor.

1.6.2 The D/B Contractor may exercise certain of MTA's rights hereunder but only to the extent designated by MTA in the D/B Contract (without limiting MTA's right to exercise such rights).

1.6.3 MTA may add the D/B Contractor as a required notice recipient pursuant to Section 0 for certain notices hereunder, as specified by MTA.

1.6.4 The D/B Contractor has authority to provide approvals, consents, permissions, satisfactions, authorizations and the like only where expressly permitted hereunder or pursuant to the D/B Contract.

1.6.5 The D/B Contractor may, if MTA so requests, become a party to this Agreement by amendment, provided that such amendment does not increase the financial burden on Utility beyond any that may otherwise be required hereunder.

1.6.6 The procurement documents and resulting D/B Contract shall make specific reference to this Agreement and shall incorporate this Agreement.

1.6.7 Upon its entry into a D/B Contract, MTA shall notify Utility as to (a) the name of the D/B Contractor (and relevant contact information), (b) any modification to the notice requirements, and (c) the obligations and rights hereunder that have been delegated to the D/B Contractor in the D/B Contract.

1.6.8 Utility agrees to coordinate its efforts and to cooperate with the D/B Contractor and with MTA as reasonably requested by MTA or the D/B Contractor in light of the involvement of the D/B Contractor as described in such notification.

1.7 Interpretation and Application of Utility Standards

1.7.1. With respect to both Design and Construction, in interpreting applicable Utility Standards, and in exercising any discretion granted to Utility staff by applicable Utility Standards, Utility shall make such interpretations and exercise such discretion in such a manner as to impose the minimum requirements necessary to achieve reasonable goals of public health, safety and functionality. Any Design or Construction issues affecting Rearrangements which are not addressed by applicable Utility Standards shall be resolved in such a manner as to impose the minimum requirements necessary to make a Replacement Facility the equivalent (in terms of capability, appearance, efficiency and function) of the

Conflicting Facility which it replaces and to otherwise minimize Rearrangement work while achieving reasonable goals of public health, safety and functionality.

1.7.2. If a disagreement arises between Utility and MTA (or its contractors or consultants) with respect to a Design issue, then upon receiving notice of such disagreement from either Utility or MTA's contractors or consultants, the MTA Representative shall promptly investigate and shall notify Utility of his or her determination as to the appropriate resolution of such disagreement in accordance with this Agreement. If, within fourteen (14) days after receiving the MTA Representative's notice, Utility notifies MTA that it disagrees with the MTA Representative's determination, the dispute shall be resolved in accordance with Article 13. If Utility does not timely give such notice, then the MTA Representative's determination shall prevail. Prior to resorting to the terms of Article 13 for resolution of the dispute, the Parties shall meet and confer in a joint working group consisting of appropriate members selected by each Party to attempt to resolve the dispute.

1.7.3. If MTA receives from Utility a written nonconformance notice in accordance with Section 2.4.5, or either Party issues a written nonconformance notice in accordance with Article 6, the MTA Representative shall promptly investigate and notify Utility of MTA's determination as to whether (a) correction of the completed work is necessary in order to prevent public health and/or safety risks and/or to achieve the level of functionality for a Rearrangement required by the Design approved by the Parties, or (b) correction is not necessary in order to achieve such purposes. If, within seven (7) days after receiving the MTA Representative's notice, Utility notifies MTA that it disagrees with MTA's determination, then the dispute shall be resolved in accordance with Article 13. If Utility does not timely give such notice, then the MTA Representative's determination shall prevail. Prior to resorting to the terms of Article 13 for resolution of the dispute, the Parties shall meet and confer in a joint working group consisting of appropriate members selected by each Party to attempt to resolve the dispute. If the MTA Representative, joint working group, or the dispute resolver pursuant to Article 13, as applicable, determines that correction is necessary, then the Party responsible for such work shall cause its contractors to correct or resolve the nonconformance. If the MTA Representative, joint working group, or such dispute resolver, as applicable, determines that correction is not necessary, then such nonconformance shall be deemed waived.

Correction of any nonconformance waived pursuant to this Section 1.7.3 shall not be a condition to Utility's acceptance of a completed Rearrangement.

Article 2

Design

2.1 Design Coordination

The MTA Representative and the Utility Representative shall use their best efforts to agree upon written general guidelines, working relationships and administrative policies to implement the approval procedures with respect to Design review, and coordination of Construction, right-of-way acquisition and Rearrangement of Utility Facilities in order to permit the timely Construction of Transit Projects. All such guidelines, relationships, policies, procedures and coordination shall be consistent with this Agreement and, in the event of any conflict between the provisions thereof and this Agreement, the provisions of this Agreement shall prevail. MTA shall consult with the Utility Representative in establishing the schedule for Design of Rearrangements to be consistent with MTA's schedule for each Transit Project.

2.2 Identification of Utility Facilities

2.2.1. Within thirty (30) days after request by MTA, Utility shall identify and disclose to MTA all Utility Facilities, which are located on, in, under or over the locations, which MTA indicates may be affected by a Transit Project. Utility and MTA shall take reasonable actions to verify such information. Utility shall be responsible for all costs and expenses incurred by MTA (including, without limitation, costs of delay and other costs incurred by MTA or paid by MTA to its contractors) resulting from or which arise out of Utility's failure to timely or accurately disclose such Utility Facilities.

2.2.2. Utility shall pay to MTA any amount due pursuant to this Section 2.2 within sixty (60) days after receipt of demand therefor, or, at MTA's election, MTA shall have the right to deduct any such amount due from the payment (or payments, if necessary) next due to Utility under this Agreement.

2.3 Design by Utility

If MTA and Utility mutually agree that Utility shall Design a specific Rearrangement, then following receipt by MTA of an estimate from Utility (using Form 60 as described in Section 11.2, if applicable), MTA shall issue a Work Order to Utility and shall deliver to Utility, Project Plans for the appropriate portion of the Subject Transit Project. Upon receipt of such Work Order and Project Plans, Utility shall proceed to Design such Rearrangement in accordance with the following:

2.3.1. Utility shall diligently perform its Design work in conformance with MTA's Design schedule for the Subject Transit Project, and shall coordinate throughout Design with MTA as is necessary to develop plans satisfactory to both MTA and Utility for each Rearrangement, subject to the requirements of this Agreement. The schedule for Utility's completion of Design, coordination requirements, review procedures, and related provisions shall be included as attachments to the Work Order, which shall also include the not-to-exceed cost of completing the Design of the specific Rearrangements. Betterments shall be addressed in accordance with Section 2.5.

2.3.2. Utility shall prepare a complete set of Design plans and specifications for each Rearrangement, together with (a) Utility's itemized estimate of the total Cost of work in accordance with the competitive bidding requirements set forth in Section 5.2.3, and (b) an estimate of the time needed to perform the required Rearrangement Construction. During Utility's Design process for each Rearrangement, MTA shall have the right to review and comment on the plans and specifications as well as on the Cost and time estimates. In order to facilitate such review, Utility shall submit to MTA its Design product for each Rearrangement at the completion of the Preliminary Engineering and Design Development phases; provided, however, that MTA shall provide any comments on such Design products to Utility within 30 days after receipt. All final Designs, including time and cost estimates, shall be subject to MTA's written approval. Unless otherwise expressly provided for herein, Utility may not change the plans and specifications prior to or during the progress of Construction, except with prior written concurrence of MTA. MTA's review and approval of any Design furnished by Utility shall be solely for purposes of assessing compatibility of the Rearranged Utility Facilities with the Subject Transit Project, coordination with MTA's work on the Subject

Transit Project, and Cost issues. MTA has and undertakes no duty to review such Designs for their quality or for the adequacy of Rearranged Utility Facilities (as designed) for the purposes for which they are intended to be used.

2.3.3. Utility shall be responsible for errors in and omissions from any Designs prepared or provided by Utility, its consultants or contractors.

2.3.4. The following scheduling provisions shall apply:

(a) Utility shall deliver the Final Design for each Rearrangement to MTA for its review and approval in accordance with the schedule established in the applicable Work Order authorizing such Design work. Unless otherwise agreed by the Parties, each Work Order shall provide that Final Design for the subject Rearrangement shall be due within 30 days after the later of (a) Utility's receipt of such Work Order, and (b) Utility's receipt of the appropriate Project Plans.

(b) Utility shall submit to MTA any modified Design necessitated by MTA's review and comments pursuant to Section 2.3.2, within fourteen (14) days, or such later date as the Parties may mutually agree, after Utility's receipt of MTA's comments.

(c) Following any modification by MTA of construction plans for the Subject Transit Project, Utility shall have a reasonable amount of time, as the Parties may mutually agree, in which to complete redesign of its Rearrangements. Each Party shall reasonably exercise its right to approve the timing for submittals of a revised Design, considering MTA's schedule for the Subject Transit Project, Utility's workload for carrying out its public utility duties, the type of Utility Facilities involved, the extent of the modification of the construction plans for the Subject Transit Project, and the extent of the resulting changes necessary to the Rearrangement Design.

2.4 Design Performed by MTA

If MTA and Utility mutually agree that MTA shall Design a specific Rearrangement, MTA shall issue Work Orders for Utility to review plans and specifications as required, and the following procedures shall govern:

2.4.1. Coordination of Design and the development of the Design plans and specifications shall be accomplished through the MTA Representative who shall confer from time to time with the Utility Representative, except to the extent that responsibility for same has been delegated to MTA's consultants and/or contractors in accordance with Sections 2.10.

2.4.2. MTA or its D/B Contractor shall submit to Utility plans and specifications for each Rearrangement at the Preliminary Engineering, Design Development and Final Design stages for Utility review and approval or comment consistent with the requirements of this Agreement; provided, however, that the schedule for such submittals and responses shall conform to MTA's schedule for the subject Transit Project and to the following requirements:

(a) Within five (5) business days after receipt of any Design submittal, (i) Utility shall inform MTA whether the submittal is sufficiently complete for Utility review purposes, and (ii) if not sufficiently complete, Utility shall so notify MTA, or shall return the submittal to MTA together with an identification of those portions that are not sufficiently complete and a description of the missing information listing the deficiencies. If no such notice or return is received by MTA within such seven (7) days, the submittal shall be deemed complete and acceptable for review purposes. For purposes of this Section 2.4.2(a), the determination as to whether a Conditional Design Submittal is sufficiently complete for Utility review purposes shall be based solely on whether the information provided is sufficient to review the particular components or elements as to which Utility's review has been requested.

(b) Within thirty (30) days after receipt of each submittal, Utility shall review and approve the submittal or transmit its comments to MTA. If no comments are received within such period, then the contents of such submittal shall be deemed complete and satisfactory to, and approved by, Utility.

(c) The provisions of this Section 2.4.2 also will apply to any resubmittal of a Design by MTA, whether in response to a Utility notice or return of an incomplete submittal, or in response to substantive Utility comments.

2.4.3. Utility shall confine its comments with respect to Rearrangements to the issue of compliance with applicable Utility Standards as established in Section 2.6. Utility agrees that during the Final Design stage, it shall not raise any new issues, or make any comments that are inconsistent with its comments (or lack of comment) on earlier submittals, or with any changes thereto agreed to by Utility and MTA. Utility's approval of the Final Design for any Rearrangement will not be withheld if the submittal is consistent with (a) the most recent previous submittal, modified as appropriate to respond to Utility comments on such submittal and to reflect any subsequent changes agreed to by Utility and MTA, or (b) earlier submittals which have been approved (or deemed complete and approved) by Utility. Any comments made by Utility that do not conform to the requirements of this Section 2.4.3 shall be considered Betterments and shall be addressed in accordance with Section 2.5. However, subject to the first sentence of this Section 2.4.3, Utility shall have the right to make new comments on any material changes from previous submittals.

2.4.4. Utility recognizes that time is of the essence for all Transit Projects, and that certain Transit Projects (whether procured on a D/B basis or on a D/B/B basis) may involve Conditional Design Submittals by MTA's consultants or contractors to facilitate early Construction of components of a Rearrangement (or elements thereof) prior to completion and approval of Final Design therefor. Each Conditional Design Submittal will identify the particular components or elements as to which Utility's review and consent to early construction by MTA's contractors is being requested. Utility agrees to review and consent to early construction (subject to Section 2.4.5 and to the timing and other requirements of this Agreement) all such Conditional Design Submittals in order to facilitate such early Construction. Utility's comments on Conditional Design Submittals shall identify any aspects of the identified components or elements, which do not conform to applicable Utility Standards, based on the information provided.

2.4.5. The Parties recognize that the use of Conditional Design Submittals might result in Design or Construction of Rearrangements (or components thereof) that are non-conforming to applicable Utility Standards. If, upon inspection of any completed Rearrangement (or any component thereof) that was Constructed pursuant to Section 2.4.4, Utility determines that such facility or component does not conform to applicable Utility Standards, then Utility will provide immediate verbal notice of nonconformance to the MTA Representative as well as to MTA staff (as designated by the MTA Representative), followed by a written nonconformance notice to the MTA Representative within 5 days after making such determination. Such written notice shall include an explanation of Utility's desired resolution. Work shall not be stopped as a result of any such nonconformance unless otherwise determined by MTA, and the Parties shall proceed in accordance with Section 1.6.3. Utility's failure to provide either timely verbal or timely written notice of a claimed nonconformance in accordance with this Section 2.4.5 shall waive any further right to object thereto.

2.5 Betterments

2.5.1. During the Preliminary Engineering Design phase but in any event not later than the applicable Utility Comment Due Date for each Rearrangement, Utility shall inform MTA what Betterments, if any, Utility desires so that MTA can review the Betterments and determine whether they satisfy the requirements set forth in Section 2.5.2. Each Design furnished by Utility shall specifically identify any Betterments included in such Design. MTA may also identify Betterments included in Designs furnished by Utility or in comments provided by Utility on MTA-furnished Designs, by giving written notice thereof to Utility during the Design review process.

2.5.2. It is understood and agreed that MTA shall have no obligation for the Cost of any Betterment (whether or not identified pursuant to Section 2.5.1), and that no Betterment may be performed in connection with any Rearrangement (whether Designed or Constructed by Utility or by MTA) which is incompatible with the subject Transit Project or which cannot be performed within the constraints of applicable law, any applicable governmental approvals and/or MTA's schedule for the subject Transit Project. If MTA determines, in its sole discretion, that any proposed Betterment is not consistent or compatible with the requirements

of this Section 2.5.2, then MTA shall have the right to refuse to allow such Betterment, or to condition construction of such Betterment upon such modifications as MTA deems appropriate. Utility shall bear the Cost of all Betterments included in each Rearrangement, by crediting or paying MTA therefor, as applicable, in accordance with Article 9.

2.5.3. For a Rearrangement to be Constructed by MTA, the price which Utility shall pay for each included Betterment shall equal the estimated incremental additional Cost for the Rearrangement resulting from such Betterment, calculated in accordance with Section 9.6. MTA shall give notice to Utility of the applicable prices for such Betterments, and shall include in such notice supporting estimates (by MTA's design consultant or Design/Build Contractor, as applicable) of the additional Costs for Design and Construction of each approved Betterment as well as MTA's supporting estimate of MTA's additional Costs. Utility shall notify MTA of any such Betterments, which Utility elects to include in a Rearrangement within thirty (30) days after receipt of MTA's notice of the Betterment prices; Utility's notice shall include a commitment to pay the applicable Betterment prices specified in MTA's notice. Utility's failure to timely deliver its notice and commitment with respect to any Betterment shall be deemed an election not to obtain such Betterment, and MTA may thereafter proceed without such Betterment. Utility shall deposit the full price with MTA for each Betterment elected by Utility within sixty (60) days after receipt of MTA's demand therefor. If Utility fails to make such payment, then MTA may elect, in its sole discretion, to proceed without such Betterment. If MTA does not demand advance payment, or if Utility fails to timely respond to a demand for advance payment and MTA nevertheless proceeds with such Betterment, then Utility shall pay the amount due within sixty (60) days after receipt of MTA's invoice; or, at MTA's election, MTA shall have the right to deduct the amount due from the payment (or payments, if necessary) next due to Utility under this Agreement.

2.6 General Design Criteria for Rearrangements

2.6.1. Utility shall notify MTA of any revisions or additions to the Utility Standards promptly after their formal issuance or adoption. The Design and Construction of each Rearrangement, whether undertaken by Utility or by MTA (or by their consultants or contractors), shall conform to the Utility Standards, together with any revisions or additions thereto which are required to be incorporated into the Utility Standards pursuant to the

following provisions (such standards, together with any such required revisions and additions, are sometimes referred to in this Agreement as “applicable Utility Standards”):

(a) The Design shall incorporate any revisions or additions to the Utility Standards of which Utility has notified MTA on or before the earlier of (i) thirty (30) days after their formal issuance or adoption, and (ii) the applicable Utility Comment Due Date.

(b) The Design also shall incorporate any revisions or additions to the Utility Standards of which Utility notifies MTA after the deadline established pursuant to subparagraph (a) above but prior to the scheduled deadline for the non-Designing Party’s final comments on the Final Design for the Rearrangement, provided that (i) such revisions or additions do not require Design changes necessitating resubmittal of the Design to the non-Designing Party and do not increase the cost of and/or time for Construction of either the Rearrangement or the Subject Transit Project as initially estimated, or (ii) such revisions or additions result from changes in federal or State laws, rules or regulations which mandate incorporation of the changes into the Design and provided further, that if a Conditional Design Submittal has been approved by Utility for such Rearrangement or a component thereof prior to Utility’s notice to MTA of such revisions or additions, the Design shall not be required to incorporate any such revisions or additions, the Design shall not be required to incorporate any such revisions or additions not required by Utility Standards.

2.6.2. In all cases, Utility Standards shall be interpreted in accordance with Section 0- (but should be) Except as provided above in Section 2.6.1, any increase in requirements of, or variance from, the applicable Utility Standards pursuant to this Section 2.6 which is proposed by Utility shall be incorporated into the Design or Construction of Rearrangements only if agreed by MTA in its sole discretion; in such event, the increase or variance shall be considered a Betterment and shall be addressed in accordance with Section 2.5. MTA shall receive a credit or reimbursement for any additional Costs that it incurs due to such Betterment in accordance with Section 9.6.

2.7 General Requirements

2.7.1. Utility agrees that it shall not adopt any new Utility Standards, or otherwise amend or supplement any existing Utility Standards, for the sole or primary purpose of affecting any Transit Project.

2.7.2. All Utility Standards shall be applied to the Rearrangements hereunder in the same manner as they are applied by Utility to projects, which are (a) financed primarily by Utility, (b) comparable to the Rearrangements of Utility Facilities hereunder, and (c) constructed for Utility by its own forces or by its contractors.

2.8 Changes in Approved Designs

MTA or Utility may make changes to a previously approved Design prior to or during the progress of Construction only with written concurrence of the other Party. Except where changes are required to accommodate different site conditions, MTA shall have no obligation to consent to or approve any requested changes which will (a) necessitate resubmittal of Design to Utility, (b) delay Construction of the Subject Transit Project or any portion thereof, or (c) increase the cost of Construction of either the Rearrangement or the Subject Transit Project. The increased Cost, if any, attributable to changes in approved plans or specifications requested by Utility and approved by MTA shall be borne by Utility; however, changes required by different site conditions shall be borne by the Party responsible to pay for the approved Construction.

2.9 Construction Staging Plans

During Design of a Transit Project, MTA shall develop construction staging plans. Construction staging plans shall provide for, among other-things, the handling of vehicular and pedestrian traffic on streets adjacent to Transit Project construction and shall show construction phases, street closings, detours, warning devices and other pertinent information. To assist MTA in coordination and the development of construction staging plans, Utility shall furnish to MTA during Design the following information in writing, together with such other relevant information as MTA may reasonably request:

- (a) Utility Facilities in which service must be maintained throughout interruption of service.
- (b) Utility Facilities in which service may be permanently abandoned.
- (c) Utility Facilities which may be temporarily abandoned and the maximum allowable duration of abandonment.
- (d) Proposed sequence of Construction of Utility Facility Rearrangements.
- (e) Estimates of duration of street closures or restrictions necessary to construct Rearrangements of Utility Facilities.
- (f) Rights-of-way, which must be acquired for Replacement Facilities and Rearrangements.

2.10 Delegation of MTA Duties to Contractors and Consultants

Without limiting MTA's right to delegate other tasks hereunder to its consultants and contractors, MTA shall have the right to delegate to its consultants and contractors the task of coordinating directly with Utility with respect to Design matters, including without limitation the submittal of Design for Utility review and discussion of Utility comments. Upon its entry into a contract with a contractor or consultant to which MTA intends to make such a delegation, MTA shall notify Utility as to (a) the name of such contractor or consultant (and relevant contact information), (b) the tasks hereunder that have been delegated to such contractor or consultant, and (c) any modification to the notice requirements of Section 15.2. Utility agrees to coordinate its efforts and cooperate with such contractor or consultant and with MTA as reasonably requested by MTA or such contractor or consultant in accordance with such notification.

2.11 Coordination of Rearrangements

During the process of Design, MTA and Utility shall decide whether the necessary Rearrangements of Conflicting Facilities on any section of a Transit Project route can best be performed by Utility or MTA, and prior to or concurrently with construction of the Project, by

MTA, or through a combination of such alternatives; the Parties shall implement such decision in accordance with Article 5.

2.12 Reproducible Contract Documents

MTA and Utility agree to provide the other with suitable reproducible copies of those final contract documents that they have prepared or caused to be prepared to govern the performance of a given Rearrangement by their respective contractor so that each Party may compile a complete set of contract documents. Each Party shall prepare or cause to be prepared the contract documents for which it is responsible in accordance with its drafting standards.

2.13 Component Design of Rearrangement

The Parties may mutually agree that rather than one Party designing an entire Rearrangement, each Party shall design certain components or elements of such Rearrangement. In such case, the provisions of this Article 2, which apply to the Design of a Rearrangement by a Party, shall apply instead to the Design of those components or elements, which are such Party's responsibility.

Article 3 **Permits**

Utility shall be responsible for timely obtaining (or causing its contractor(s) to obtain) all necessary permits, authorizations and approvals (collectively, "Permits") as may be required by any and all governmental agencies and/or railroad operators for performance of each Rearrangement, including, without limitation, any certifications or other authorizations required by MTA; provided, however, MTA shall be responsible for obtaining (or causing its contractor(s) to obtain) all such permits and other authorizations required for any Construction to be performed by its contractor(s) in accordance with Article 5. Each Party shall use reasonable efforts (the cost of which shall be considered a Cost hereunder) to assist the other Party in securing Permits. Notwithstanding the foregoing, the term "Permits" shall not include any rights necessary for Utility's ongoing occupancy of any Transit Project Right-of-Way or of any other public right-of-way, which rights are addressed in Article 3 hereof. Each Party

shall comply with the terms of all applicable Permits in carrying out its assigned work hereunder.

Article 4

Acquisition of Replacement Rights-of-Way

4.1 Replacement Rights-of-Way

Within 30 days after request by MTA, Utility shall deliver to MTA copies of any agreements or other documents evidencing Utility's franchise, easements, or other existing rights in real property for its Utility Facilities that are located within a proposed Transit Project area. The location and type of replacement rights in real property shall be mutually agreed upon in accordance with this Agreement. To the extent Design, Construction and operation of the Subject Transit Project will permit, Replacement Facilities shall be located in public ways where the Utility Facilities being replaced are in public ways and in private ways where the Utility Facilities being replaced are in private rights-of-way, and shall otherwise be of the same character and scope as those replaced. Utility shall not obtain greater rights (e.g., an easement in lieu of an existing license) unless MTA determines that such rights are appropriate in the interest of Transit Project economy or to meet the requirements of the Project. Utility shall be responsible for obtaining any replacement rights on private property located outside the Transit Project Right-of-Way owned by MTA, unless MTA elects to do so, and Utility shall be responsible for obtaining any franchise replacement rights. Where replacement rights are to be acquired within Transit Project Right-of-Way owned by MTA, MTA shall be responsible for providing such replacement rights. Subject to the provisions of this Section 4.1, all real property interests obtained shall be in a legally binding form reasonably acceptable to both Utility and the provider of such rights. The appraisals for any replacement rights acquired through condemnation shall be subject to approval by both Parties before acquisition. Any increase in any previously approved negotiated purchase price shall require approval of both Parties. Any replacement right-of-way, which exceeds that replaced (except as permitted in this Section 4.1), either in area or in type of rights, will be considered a Betterment to the extent that it upgrades the existing right or interest, which it replaces. Notwithstanding the above, Utility will be responsible for obtaining any temporary construction easements or other real property rights (e.g., for installation of temporary Utility

Facilities) that are needed for any Rearrangement Construction which Utility is performing, and the cost of such easements or other rights shall be considered a “Cost” hereunder. Similarly, MTA will be responsible for obtaining any temporary construction easements or other real property rights that are needed for Rearrangement Construction, which MTA is performing, and the cost of such easements or other rights shall be considered a “Cost” hereunder. The Parties shall use their best efforts in acquiring right-of-way so as not to impair MTA’s schedule.

4.2 Reimbursement for Real Property Interest Costs

Real property interest Costs shall be invoiced separately from other Cost items, but shall be reimbursable to the extent provided in Articles 8 .

4.3 Conveyance by Utility

If any Facilities are to be Abandoned in place (as agreed upon by MTA and Utility), Utility shall provide written evidence in a form and substance reasonably satisfactory to MTA that the affected landowner finds such abandonment to be acceptable and shall thereafter indemnify and hold MTA free and harmless from any claims, liabilities, losses, costs or expenses, including reasonable attorneys’ fees, arising therefrom, except to the extent caused by the landowner’s or MTA’s (including their agents’ or subcontractors’) negligence.

4.4 Right of Entry.

Each Party shall permit the other immediate entry upon, and use of, all of such Party’s right-of-way located within or near the route of a Transit Project, whenever necessary for a purpose related to construction of the Transit Project or related to the maintenance, operation or inspection of Utility Facilities during Transit Project construction and where not inconsistent in time or manner of exercise either with Utility’s discharge of its duty as a public utility or with MTA’s discharge of its duties with respect to the Transit Project. Provided, however, that nothing herein excuses either Party from notifying Underground Service Alert in advance of any excavation, as required by the provisions of Government Code §§ 4216, et seq., and both parties shall comply with the applicable provisions set out therein. MTA shall cause its contractors to ascertain from Utility and plainly mark before any excavations are made and during all time that work is being performed in such area, the

exact location of all Utility Facilities which may be below the surface of the ground or otherwise not plainly visible. Except as provided in the Design for the Rearrangement of Utility Facilities, MTA and its contractors shall not interfere with the operation of Utility Facilities. If any other Utility Facilities are damaged by MTA's contractors in the course of construction work, Utility shall immediately repair the damage as required to maintain service to its customers and, except as otherwise set forth in Section 2.2, MTA shall reimburse, or shall cause its contractor to reimburse, Utility for its actual and reasonable costs incurred to repair the damaged Utility Facilities (or, if approved by both MTA and Utility, MTA's contractor shall repair the damage at no cost to Utility (except as otherwise set forth in Section 2.2)). If any of MTA's property is damaged by Utility or its contractors in the course of its construction work, Utility shall immediately report such damage to MTA and shall repair the damage at its sole cost to the reasonable satisfaction of MTA or, at MTA's election, MTA shall cause such damage to be repaired and Utility promptly shall reimburse MTA for MTA's actual and reasonable costs incurred in connection with such repair.

4.5 Quitclaim by Utility

Upon completion of each Rearrangement of Utility Facilities hereunder, and the discharge by MTA of its obligations to Utility hereunder in respect thereto, and the acceptance by Utility of replacement rights for the Rearranged Facility if appropriate pursuant to Section 4.1, Utility shall, upon MTA's demand, quitclaim to MTA or the owner of record (or otherwise terminate by appropriate documentation) all of Utility's right, title and interest in and to any real property on which were situated any Facilities entirely dismantled under a Rearrangement of Utility Facilities hereunder. In addition, for any Utility Facilities located within the Transit Project Right-of-Way owned by MTA, which are being Abandoned in place or dismantled, but are not being replaced by a Rearranged Facility, upon request by MTA, Utility shall quitclaim to MTA (or otherwise terminate by appropriate documentation) all of Utility's right, title and interest in and to any such portion of such Transit Project Right-of-Way on which such Utility Facilities were located.

4.6 Joint Use

If Utility Facilities located in Transit Project Right-of-Way are not required to be Rearranged hereunder and a quitclaim is not required to be provided to MTA pursuant to Section 4.5 (e.g., the Utility Facility is relocated within the original Facility area, the Utility Facility is merely protected in place, or there is no existing Utility easement in the easement area), then Utility shall execute an agreement in form and substance satisfactory to MTA whereby Utility agrees to the joint use of the subject property by both Utility and MTA.

Article 5 **Construction of Rearrangements**

5.1 Responsibility for Construction

MTA shall perform (through its contractors) all Construction for each Rearrangement, unless, during the process of Design Engineering, MTA and Utility mutually agree that Utility shall perform all or part of the Construction for a Rearrangement. Utility may perform such Construction either prior to Construction of the Subject Transit Project, concurrently with such Construction, or through a combination of said alternatives, as mutually agreed by the Parties.

5.2 MTA Construction of Rearrangements

5.2.1. Unless otherwise agreed by the Parties pursuant to Section 5.1, MTA may advertise, award and administer the Construction of any Rearrangement of any Conflicting Facilities. Utility agrees to coordinate its efforts and cooperate with MTA's contractors performing Construction, as reasonably requested by MTA or such contractor.

5.2.2. MTA shall be responsible for all claims and stop notices or mechanic's liens filed by MTA's contractor, sub-contractors, and material and labor providers for work performed on Utility Facilities.

5.2.3. MTA shall notify Utility at least seven (7) days prior to commencing the Construction for each Rearrangement so that Utility may make arrangements for such inspection and record keeping as Utility may desire .

5.3 Utility Construction of Rearrangements.

If the Parties mutually agree that Utility shall perform all or part of the Construction of a specific Rearrangement, MTA shall issue a Work Order to Utility for such Construction, and Utility will advertise, award and administer a contract(s) for the Construction of the Rearrangement. In such event:

5.3.1. Utility shall commence and diligently prosecute the Construction of such Rearrangement to completion as authorized by Work Order, in conformance with the time schedule set forth in the Work Order. Such Construction shall coincide closely and be coordinated with MTA's Construction schedule for the Subject Transit Project, including the schedule for Construction of Rearrangements of utility, cable, pipeline, and other facilities in the same segment or portion of the Transit Project. Utility shall coordinate its work with other Facility owners and contractors performing work that may connect, complement or interfere with Utility's work hereunder or with Utility Facilities.

5.3.2. In the event that Temporary Facilities are necessary to effect a Rearrangement being Constructed by Utility, Utility may use lands owned or controlled by MTA for the purpose of erecting such Temporary Facilities thereon, provided that MTA shall have approved in writing the location and duration of such Temporary Facilities. Upon completion of the Rearrangement, Utility shall remove all such Temporary Facilities and shall restore the area as near as practical to its original condition (unless Utility and MTA mutually agree to another arrangement), all at MTA's cost.

5.3.3. Utility shall notify MTA at least seven (7) days prior to commencing the Construction for each Rearrangement so that MTA may make arrangements for such inspection and record keeping as MTA may desire.

5.3.4. For all work by Utility's forces or its contractors pursuant to Article 5.1, MTA shall include detailed environmental controls in the applicable Work Order, tailored to the specific work site. All such work shall comply with such Work Order requirements as well as with the environmental controls established in the Construction Contract or D/B Contract, as applicable, for the Subject Transit Project, including without limitation construction noise and vibration control, pollution controls, archeological and paleontological coordination and

requirements with respect to biological resources, historic properties, and parklands. In case of inconsistency, the more stringent requirements shall prevail.

5.3.5. A separate Work Order will be issued for Construction of each Rearrangement.

5.4 Maintenance

Utility shall schedule, in concurrence with MTA, any routine maintenance of Utility Facilities so as not to interfere with the Transit Project Construction.

5.5 "As-Built" Drawings

MTA and Utility shall each maintain a set of "as-built" plans of Rearrangements performed by MTA and Utility, respectively, during the progress of construction. Within sixty (60) days following the completion and acceptance of each Rearrangement, the Party that performed the work shall furnish the other Party with reproducible "as-built" drawings showing such Rearrangement as installed by the performing Party and all contract records pertaining to such as-builts. All "as-built" plans (whether provided by MTA or by Utility) shall be in a format, which conforms to MTA's requirements for the Subject Transit Project, as specified in the Construction Contract or Design/Build Contract for the Subject Transit Project. If the drawings submitted by either Party are incomplete or nonconforming to such required format, they will be returned to that Party for correction at its expense.

5.6 Underground Service Alert

Prior to any commencement of underground work by either Party, Underground Service Alert shall be notified in accordance with California law by such Party or its contractor.

5.7 Utility Activities

If Utility plans to undertake any activities (including without limitation construction of new facilities, repairs or modifications to existing Utility Facilities, and similar activities) in (deleted but should remain) the Transit Project or Rearrangement Construction, Utility will coordinate such activity with MTA so that such activity will not delay or otherwise interfere with such Construction, and MTA shall reasonably cooperate with Utility with regard to same;

provided, however that if MTA determines that such activity will delay or otherwise conflict with such Construction, MTA shall have the right to condition the implementation of such activity on such scheduling adjustments and/or other modifications as MTA deems appropriate, and if modification cannot resolve the delay or conflict or Utility refuses to make such modification, in which case Utility shall not implement such activity. The provisions of this Section 5.7 shall not apply in emergency situations; however, in such situations Utility will coordinate with MTA to the extent feasible in light of the circumstances.

Article 6 **Inspection**

6.1 Inspection During Construction

6.1.1. Notwithstanding Utility inspection or approval of any Construction, all work performed by either Party, which affects Construction of a Transit Project shall be subject to MTA inspection and final approval. MTA and Utility also may inspect the Construction of Rearrangements to ensure that the work has been performed in conformance with the Design approved by the Parties.

6.1.2. All Rearrangement Construction of Utility Facilities by MTA shall be inspected by Utility. Utility shall provide inspectors to observe and inspect the Rearrangement of Utility Facilities so that upon completion of Construction, Utility will have a basis for acceptance of the work. All such inspection services shall be authorized by MTA under the appropriate Work Order. Utility's inspectors shall be dedicated to MTA's Transit Projects to the extent necessary so as to be available, upon MTA's request and at MTA's expense, as needed throughout Construction to support MTA's schedule for the Subject Transit Project. Utility's inspectors shall cooperate and coordinate with the MTA Representative and MTA's contractors and shall coordinate with the MTA Representative so as to provide safe access to Project sites by Utility inspectors.

At the inspections provided in accordance with Sections 6.1.1 and 6.1.2, above, each Party shall inform the other of any deficiencies or discrepancies in any work discovered in the course of such inspection. Utility will provide immediate verbal notice of nonconformance to MTA's Representative as well as to MTA staff or contractors (as designated by the MTA Representative), followed by a written nonconformance notice not later than one business day after discovery. Likewise, MTA will provide immediate verbal notice of nonconformance to the Utility Representative (or to such other Utility staff as may be designated by the Utility Representative), followed by a written nonconformance notice not later than one business day after discovery. Each nonconformance notice shall include an explanation of the resolution desired by the notifying Party. Work shall not be stopped as a result of any such nonconformance unless otherwise determined by MTA. All notices of nonconformance provided by either party shall be addressed in accordance with Section 1.7.3.

6.2 Final Inspection

As soon as the work of any specific Rearrangement has been completed, the Party, which performed the Construction work, shall notify the other party in writing that the Rearrangement is ready for final inspection. All final inspections by Utility will be completed within seven (7) calendar days following request for same by MTA's contractor. The final inspection of any Rearrangement or Transit Project Facility shall be attended by the MTA Representative and the Utility Representative. Each Party will provide to the other Party's Representative immediate verbal notice of any deficiencies or discrepancies in any Construction work discovered in the course of the final inspection, followed by a written nonconformance notice within one business day thereafter. Each nonconformance notice shall include an explanation of the notifying party's desired resolution. Work shall not be stopped as a result of any such nonconformance unless otherwise determined by MTA. All notices of nonconformance provided by either Party shall be addressed in accordance with Section 1.7.3. Both Parties' inspectors shall be available to observe and inspect any corrective work performed, as needed to support MTA's schedule for the Transit Project. Promptly upon completion of the Rearrangement of a Utility Facility by MTA's contractors (including if

applicable, completion of any corrective work performed), Utility shall furnish its notice of completion and acceptance thereof in writing. Upon such acceptance, title to such Utility Facility shall automatically vest in Utility (if not already so vested), and Utility shall assume full responsibility for such Utility Facility. Notwithstanding the foregoing, MTA shall have responsibility and liability for correction of any hidden defects in any Rearrangement work performed by MTA's contractors and not discovered by Utility prior to acceptance.

6.2 Materials Testing

Utility shall have the right to test materials used in Construction of Utility Facilities by MTA's contractors, upon 24 hours prior written notice to MTA and the contractor. MTA shall have the right to have its witnesses attend all such tests. Utility shall provide copies of the testing reports within 24 hours after each test, as well as providing to MTA access to the samples used and to the testing laboratory for inspection of its equipment. Testing shall be authorized by MTA under an appropriate Work Order, and the costs thereof, including any travel expenses incurred for off-site inspection and testing, shall be considered Costs of Rearrangement.

Article 7 **Disposition of Salvaged Materials**

7.1 Salvage by MTA

MTA may salvage certain materials from the Conflicting Facility belonging to the Utility during the course of its work on a Rearrangement. If MTA desires to use such salvaged materials, subject to the consent of Utility, materials removed shall be stored by MTA until such time as the progress of work allows the reinstallation of such materials. Materials, which are not to be reused, and which Utility desires to retain shall be returned by MTA to a mutually suitable location. If the materials removed by MTA are not reusable by MTA and are not desired by Utility, such materials shall become the property of MTA unless the approved Design provides otherwise.

7.2 Salvage by Utility

Salvaged materials, which are removed by Utility and not reused in a Rearrangement, shall be retained by Utility.

7.3 Salvage Credits

MTA shall receive a credit or payment, as provided in Article 9 of this Agreement, for salvage, storage and transporting of such materials described herein which are retained by Utility.

Article 8

Reimbursements to Utility

8.1 Reimbursement to Utility

The issuance of a Work Order (following MTA receipt of a Utility estimate using Form 60 or other form required by MTA as described in Section 11.3) shall obligate MTA to reimburse Utility, subject to the terms of this Agreement, for the “Costs,” as hereinafter defined of all activities or work performed or materials acquired by Utility, its consultants or contractors pursuant to such Work Order, to the extent only that such activities, work or materials are within the scope of this Agreement as established pursuant to Section 1.1, and except to the extent that such Costs are not MTA’s responsibility pursuant to this Agreement or pursuant to the agreements referred in Section 1.1.2. For purposes of determining the amounts due from MTA to Utility pursuant to this Article 8, the term “Cost” shall mean all actual, allowable, allocable and reasonable direct and indirect costs necessarily incurred by Utility and attributable to such activities, work or materials, less credits to MTA as provided in Article 9 of this Agreement. Subject to the foregoing, direct costs shall include allowable direct labor, equipment and materials costs spent specifically for work performed under this Agreement. MTA’s obligation to reimburse Utility for Costs shall be subject to the limitations established in Article 11.

8.2 Reimbursement for Abandoned Conflicting Facility

In those cases wherein MTA and Utility agree that the construction of a Transit Project will eliminate the service need for a specific Conflicting Facility, such Conflicting Facility

may be Abandoned by Utility, and MTA shall not be required to replace or compensate Utility for such Conflicting Facility, except for reasonable and necessary Costs incurred in severing and demolishing such Conflicting Facility and in restoring the subground and ground surfaces as appropriate; provided, however, that under no circumstances shall MTA be responsible for any Abandonment, remediation or other Costs relating to the presence or existence of any environmental hazard on, in, under or about a Conflicting Facility or other Utility Facility, including but not limited to the presence of any Hazardous Materials. At MTA's election, MTA may itself undertake the activities described in this Section 8.2, the Costs of which shall be reimbursable to MTA as provided in Article 9.

Article 9

Reimbursements and Credits to MTA

9.1 Credits to MTA Where Utility Performs Work

MTA shall receive a credit against work performed by Utility under this Agreement at MTA's expense, for salvage and Betterments of Utility Facilities. The amount of credits shall be determined as provided below in this Article 9. All credits pertaining to a particular Rearrangement or other item of work hereunder shall be reflected on the applicable invoice(s) submitted by Utility.

9.2 Payments to MTA Where MTA Performs Work

Where MTA performs work hereunder, MTA shall receive compensation from Utility (by credit or payments as provided below) for salvage, as applicable, as well as for Costs incurred by MTA for Betterments, for its activities with respect to Hazardous Materials or Protected Materials pursuant to Article 12, and for any other Costs incurred by MTA which are Utility's responsibility pursuant to this Agreement or pursuant to the agreements referred to in Section 1.1.2. The amount of compensation shall be determined as provided below in this Article 9. To the extent possible, MTA may take such compensation in the form of credits against amounts owed by MTA to Utility in connection with the same Transit Project for which the compensation is owed. MTA shall invoice Utility for any remaining amounts due in accordance with Section 11.6, and Utility shall make payments to MTA in accordance with Section 11.7.

9.3 MTA's Costs

For purposes of determining the amounts due from Utility to MTA pursuant to this Article 9, the term "Cost" shall mean all actual, allowable and reasonable direct and indirect costs incurred by MTA and attributable to activity or work performed or materials acquired in performing a task pursuant to this Agreement. Subject to the foregoing, direct costs shall include allowable direct labor, equipment and materials costs spent specifically for work performed under this Agreement, and shall include but not be limited to those associated with Design, project review, construction management, permit fees, inspection, processing, remediation plan development and implementation, real property acquisition and contract administration. Indirect costs shall include administrative and overhead costs at the rate therefor established by MTA from time to time. MTA shall maintain its standard forms of records showing actual time expended and costs incurred under each Work Order.

9.4 Survey; Review of Records

The amount of credits or payments, as applicable, due MTA for salvage shall be determined by MTA and confirmed by Utility based upon applicable books, records, documents and other data of Utility. To assist in the determination of credits or payment due MTA under this Agreement, if any, MTA and Utility may conduct an inspection survey and/or inventory of each Conflicting Facility during Design Engineering. Pursuant to a Work Order, Utility shall provide MTA, to the extent such exist and are known and available, with drawings, plans or other records necessary to conduct such survey or inventory. The survey shall describe the physical attributes of the Conflicting Facility such as number, length, diameter, dimensions, type of material, number and type of service connections. The survey shall further describe, for each Conflicting Facility, the date of construction or installation; the present condition; the expected service life of each Conflicting Facility as derived from Utility's records; and whether materials contained therein are salvageable. The results of such survey shall also be applied in the determination of Betterments, as necessary.

9.5 Salvage

As applicable, credit shall be allowed or Utility shall pay for salvage, for items of materials and equipment recovered from the Conflicting Facility in the performance of Rearrangement work which are subsequently retained by Utility in accordance with

Section 7.2. The amount of a salvage credit or payment, if any, shall equal the estimated cost to Utility to acquire like or similar used materials (as depreciated), as determined by mutual agreement, plus storage and transportation Costs.

9.6 Betterments

As applicable, credit shall be allowed or Utility shall pay for Betterment in accordance with the following:

9.6.1. For Rearrangements Constructed by Utility, the amount of a Betterment credit, if any, shall be the estimated cost of the Replacement Facility, minus the estimated cost of a Substitute Facility. The amount of Betterment credit, if any, shall be a fixed amount determined by the Parties during Design Engineering based upon estimates provided by Utility and its contractors and approved by MTA.

9.6.2 For each Betterment included in a Rearrangement Constructed by MTA, the Betterment charge shall be a fixed price established pursuant to the procedure described in Section 2.5.3, and calculated in accordance with the provisions of this Section 9.6.2. The charge for each Betterment shall equal MTA's estimated incremental additional Cost for the Rearrangement resulting from such Betterment, calculated by subtracting the estimated Cost of the Substitute Facility from the estimated Cost of the Replacement Facility. Without limiting the generality of Section 9.3, the calculation of the Cost of the Replacement Facility shall include any additional costs which MTA anticipates will be due to its contractors and/or consultants as a direct result of the Betterment, including, but not limited to, delay, disruption and inefficiency costs.

Article 10 **Indemnity And Insurance**

10.1 Indemnification by Utility

Utility shall indemnify, protect, defend and hold harmless MTA, its respective governing Boards, officers, directors, employees, authorized agents, engineers, contractors and

subcontractors from and against any and all claims, damages, losses, liabilities, costs and expenses (including reasonable attorneys' and expert witness fees and costs) which may arise out of or as a result of any negligent act or omission or willful misconduct of Utility or its officers, agents, employees, engineers, contractors or subcontractors in carrying out Utility's obligations under this Agreement or under any Work Order executed pursuant hereto, except to the extent that such expense, liability or claim is proximately caused by the negligence or willful misconduct of the parties indemnified or their agents, servants, or independent contractors who are directly responsible to such indemnified party.

10.2 Indemnification by MTA

MTA shall indemnify, protect, defend and hold harmless Utility, and its successors and assigns and its shareholders, officers, directors, employees, authorized agents, engineers, contractors, and subcontractors from and against any and all claims, damages, losses, liabilities, costs and expenses (including reasonable attorneys' fees and expert witness fees and costs) which may arise out of or as a result of any negligent act or omission or willful misconduct of the MTA or its officers, agents, employees, engineers, contractors (including the Design/Build contractor), or subcontractors in carrying out MTA's obligations under this Agreement or under any Work Order executed pursuant hereto, except to the extent that such expense, liability or claim is proximately caused by the negligence or willful misconduct of the parties indemnified or their agents, servants, or independent contractors who are directly responsible to such indemnified party.

10.3 Insurance

Any Design Contract, Construction Contract or Design/Build Contract entered into by MTA or Utility in connection with a Rearrangement shall contain a provision which requires the contractor, as part of the liability insurance requirements, to provide an endorsement (using the 1985 edition of form CG-20-10) to each policy of general or automobile liability insurance that names as additional insureds to such policy (not subject to any premiums or assessments) Utility and MTA and their respective directors, officers, employees and authorized agents, as well as such other additional insureds as either Party shall reasonably require (provided that the risk and cost assumed by either Party under this Agreement does not

increase as a result of naming such other additional insureds). The parties referred to in the previous sentence are collectively referred to herein as the "Additional Insured Group". If Utility is itself performing work (including, without limitation, design or inspection by its own forces), Utility shall itself comply with requirement of this Section 10.3. Required coverages and liability amounts for Construction Contractors, Design Contractors, and Design/Build Contractors shall be determined and agreed upon by both Parties and indicated in each Work Order. A Certificate evidencing the required coverage shall be provided directly by the insurer to Utility and MTA, providing that said coverage shall not be reduced in scope or cancelled without thirty (30) days prior written notice to MTA and Utility. Utility recognizes and agrees that all or part of such insurance can be provided by MTA through an owner-controller insurance program.

Article 11

Work Orders and Billings

11.1 Work Performed by Utility

11.1.1. All work performed by Utility under the terms of this Agreement shall be initiated by Work Orders as provided herein. Utility shall have no obligation to perform work hereunder, which is reimbursable by MTA, except to the extent that a commitment to fund such work has been made in a Work Order. Utility's review of Project documents, drawings, etc. furnished by MTA may not be subjected to complete reengineering or technical study; therefore MTA cannot rely on Utility's review to validate MTA's work product.

11.1.2. All work to be performed by Utility under this Agreement will coincide closely with MTA's Design and Construction schedule for each Transit Project. Utility shall allocate sufficient staff and other resources necessary to provide the level of service required to meet the scope of work and said schedules as identified in Work Orders submitted by MTA.

11.2 Work Orders

MTA shall issue Work Orders to Utility, following Utility's submittal of estimates therefor in the form then required by MTA (currently Form 60 as set forth in Exhibit 4, as the same may be amended or replaced from time to time by notice from MTA to Utility), to

authorize Utility's performance of all work and the purchase of all materials and equipment required under the terms and conditions of this Agreement. Utility shall complete (either through its own forces or through its consultants, contractors or subcontractors) all work authorized by any Work Order, except as otherwise provided in Section 11.3.4. Contractors engaged by Utility to perform work covered by this Agreement shall comply with all applicable labor and other laws and agreements. Utility shall cooperate with MTA and take such actions as the MTA may reasonably request, to ensure such compliance. Each Work Order issued under the terms of this Agreement shall specify the work to be performed and any materials or equipment to be acquired, the maximum amount of money which Utility may expend therefor, and a schedule, including the estimated starting and finishing dates for work so authorized. Work Orders shall impose schedules, which are consistent with and supportive of MTA's Design, and Construction schedule. Utility shall not be authorized to do any work, and shall not be paid, credited or reimbursed for Costs or expenses associated with any work, not requested by Work Order, unless otherwise mutually agreed in writing. Under no circumstances shall Utility receive payment for, or reimbursement of, any Costs associated with or related to Betterments, and the issuance of a Work Order authorizing Utility work or other activity respecting a Betterment shall not constitute the agreement of MTA to make any payments to Utility in respect thereto.

11.3 Work Order Changes

11.3.1. Utility shall not order or direct work which would cause Construction Costs to exceed the maximum amount allowable therefor in any Work Order, without the prior approval of MTA as set forth in a Work Order revision in accordance with Section 11.3.3. Utility agrees to use its best efforts to perform such work within the maximum amount specified therefor in each Work Order. Utility agrees to notify MTA if at any time Utility has reason to believe that the Construction Costs which it expects to incur under any Work Order in the next 60 days, when added to all Construction Costs previously incurred under such Work Order, will exceed 75% of the maximum Construction Costs specified in the Work Order, or if at any time Utility has reason to believe that the total Construction Costs under said Work Order will be in excess of ten percent (10%) greater or less than previously estimated. Utility may request revision of Work Orders to increase the maximum allowable

Construction Costs thereunder, in the event of anticipated Construction Cost overruns. MTA will consider, and may not unreasonably withhold its approval of, any increase in the maximum allowable amount of Construction Costs, which is due to a necessary change in the scope of the subject Construction, provided that Utility notifies MTA within three (3) business days after becoming aware of the event or situation causing such anticipated change. MTA may withhold its approval, in its sole discretion, of any other increase in Construction Costs above the maximum allowable amount authorized in the applicable Work Order. Without MTA's prior approval, Utility will not be reimbursed for Construction Costs expended in excess of maximum amounts allowable therefor authorized in a Work Order

11.3.2. Utility shall not order or direct work which would cause Non-Construction Costs to exceed the maximum amount allowable therefor in any Work Order, without the prior written approval of MTA as set forth in a Work Order revision in accordance with Section 11.3.4. Utility agrees to use its best efforts to perform such work within the maximum amount specified therefor in each Work Order. Utility agrees to notify MTA if at any time Utility has reason to believe that the Non-Construction Costs which it expects to incur under any Work Order in the next 60 days, when added to all Non-Construction Costs previously incurred under such Work Order, will exceed 75% of the maximum Non-Construction Costs specified in the Work Order, or if at any time Utility has reason to believe that the total Non-Construction Costs under said Work Order will be in excess of ten percent (10%) greater or less than previously estimated. Utility may request written revisions of Work Orders to increase the maximum allowable Non-Construction Costs thereunder, in the event of anticipated Non-Construction Cost overruns; provided, however, that any such revision is subject to MTA's prior approval. Without MTA's prior approval, Utility will not be reimbursed for Non-Construction Costs expended in excess of maximum amounts allowable therefor authorized in a Work Order.

11.3.3. Utility agrees to notify MTA if at any time Utility has reason to believe that the estimated finishing date of any work under a Work Order will be later than the date authorized in the Work Order. Utility will request written revisions of Work Orders in the event of anticipated completion delays; provided, however, that subject to Section 15.11, MTA may withhold its approval of any modification of scheduling requirements in its sole discretion.

11.3.4. Any revision to a Work Order requested by Utility shall be submitted in writing to MTA for its prior approval. If MTA fails to respond in writing to a requested revision within fourteen (14) days after receipt thereof, the revision shall be deemed rejected; provided, however, that MTA may extend such period by giving written notice to Utility before its expiration. Notwithstanding the foregoing, any proposed revision occasioned by emergency field construction difficulties may be submitted to MTA orally, by telephone, and later confirmed in writing by Utility; in such event, MTA agrees to act on such oral request as promptly as possible, and the MTA Representative may convey MTA's decision orally, to be confirmed later in writing. All Work Order revision requests shall include an estimate for the Work Order revision in the form then required by MTA (currently Form 60 as set forth in Exhibit 4, as the same may be amended or replaced from time to time by notice from MTA to Utility). Without MTA's prior approval, Utility will not be reimbursed for costs to correct defective performance by Utility, its consultants or contractors.

11.3.5. MTA may terminate, in writing, any Work Order at any time in its sole discretion, but MTA shall reimburse Utility in accordance with this Agreement for Costs, if any, already incurred by Utility thereunder, and Costs, if any, necessary to restore Utility's Facilities in the process of Rearrangement to a permanent condition suitable for the provision of service to the public (unless MTA is taking over such work pursuant to Section 11.4.3). If restoration is necessary, MTA will authorize the Costs therefor in its written termination of the Work Order.

11.4 Deadlines and Delays

11.4.1. Utility shall perform its work under this Agreement in accordance with the deadlines and schedules established in this Agreement or in the applicable Work Order. Subject to Section 15.11, if Utility fails to meet a deadline established in this Agreement or in the applicable Work Order for Construction or any other activity, then Utility shall be responsible for all actual documented costs and expenses incurred by MTA (including, without limitation, costs of delay and other costs incurred by MTA or paid by MTA to its contractors) and arising out of such delay. Utility shall pay to MTA any amount due pursuant to this Section 11.4.1 within 90 days after receipt of demand therefor, or, at MTA's election, MTA shall have the right to deduct any amount due from Utility to MTA pursuant to this

Section 11.4.1 from the payment (or payments, if necessary) next due to Utility under this Agreement.

11.4.2. If MTA or its contractor fails to complete any work hereunder by the applicable deadlines established in this Agreement or in the respective Work Orders, then any affected deadlines for Utility's Construction or other activities under this Agreement or any Work Order shall be revised accordingly.

11.4.3. In addition to and without limiting any rights or remedies available under this Section 11.4 or otherwise, if Utility fails to complete its work on any Rearrangement on or before the deadline established in the applicable Work Order, or if MTA reasonably determines that Utility will be unable to timely complete such work, MTA (without incurring any liability other than for Costs incurred as set forth in Section 11.3.5, if applicable) may terminate Utility's work on such Rearrangement by giving notice to Utility in accordance with Section 11.3.5, and either perform the remaining work itself or cause such work to be performed by MTA's contractor. If MTA takes over work as provided in this Section 11.4.3, Utility shall cooperate and assist MTA as provided in this Agreement.

11.5 Procedures for Utility Billings to MTA

11.5.1. The following procedures will be observed for submission of monthly billings by Utility to MTA, on a progress basis, for work performed by Utility under a specific Work Order, which is reimbursable by MTA. Utility's billings shall begin as soon as practicable following the commencement of a specific Rearrangement or other work under a given Work Order. Each billing (a) shall specify Costs incurred for that billing period, (b) shall bear MTA's Work Order number, (c) shall be supported by copies of invoices and other Cost data, including without limitation a breakdown of the direct and indirect Costs (including personnel names), and the equipment and material cost incurred during the billing period, (d) shall be addressed to the MTA Representative, and (e) shall be maintained for inspection and, at MTA's option, audit on file in Utility's Accounting Center. Each billing shall be noted as either progress or final, and shall include a certification that the charges identified in such billing were appropriate and necessary to performance of the referenced contract and have not previously been billed or paid. Utility shall submit the Electronic Billing Invoice Packet

(including all time sheets and materials billings) to MTA by the next to last business day of the month. Utility agrees to submit a final report of expenditures to MTA within 60 days after completion and acceptance of the work covered by the Work Order. The final billing, with a notation that all work covered by a given Work Order has been performed, shall recapitulate prior progress billings and shall show inclusive dates upon which work billed therein was performed shall be submitted to MTA as soon as practicable, but no later than six months, following completion of the Rearrangement.

11.5.2. Utility agrees to retain, or cause to be retained, for inspection, copying and, at MTA's option, audit by MTA or other governmental auditors for the period required pursuant to Section 11.8, all records and accounts relating to the Work Order or other work performed under this Agreement; provided, however, that if any actions brought under the dispute resolution provisions of this Agreement have not been finally resolved by the foregoing deadline, then any records which pertain to any such actions shall be maintained until such actions have been finally resolved.

11.6 Procedures for MTA Billings to Utility

11.6.1. In those cases in which MTA performs Rearrangement, Betterment or other work payable by Utility under the terms of this Agreement, MTA shall submit regular monthly progress billings to Utility indicating actual work performed during the billing period, the direct and indirect Costs thereof, Utility's share of such Costs, and any amount thereof being paid through the application of credits against amounts owed by MTA to Utility. MTA billing shall begin as soon as practicable following the commencement of a specific Rearrangement or other work, and shall follow MTA's standard billing procedures. Each billing shall be noted as either progress or final, shall be addressed to the Utility Representative, and shall include a certification that the charges identified in such billing were appropriate and necessary to performance of the referenced contract and have not previously been billed or paid. The final billing, with a notation that all work covered thereby has been performed, shall be submitted to Utility as soon as practicable following the completion of the Rearrangement or other work.

11.6.2. MTA agrees to retain, or cause to be retained, for audit by Utility or other governmental auditors for the period required pursuant to Section 11.8, all records and accounts relating to Construction of the Rearrangement or other work performed under this Agreement; provided, however, that if any actions brought under the dispute resolution provisions of this Agreement have not been finally resolved by the foregoing deadline, then any records which pertain to any such actions shall be maintained until such actions have been finally resolved.

11.7 Payment of Billings

Payment of each bill properly submitted pursuant to Sections 11.5 or 11.6 shall be due within sixty (60) days of receipt thereof; provided, however, that (a) all such payments shall be conditional, subject to post-audit adjustments, (b) final payment for each Rearrangement shall be contingent upon final inspection (and acceptance, where applicable) of the work by the Party billed for such work, which inspection (and acceptance, where applicable) will not be unreasonably withheld or delayed, and (c) MTA may withhold credit amounts due MTA if Utility has not posted such credits within sixty (60) days after submittal of requests for same by MTA.

11.8 Inspection and Audit

Upon reasonable notice, each Party (and its authorized representatives) shall have reasonable rights to inspect, audit and copy, during normal business hours, the other's relevant records relating to its performance hereunder (and all Costs incurred with respect thereto) for each Transit Project and related Rearrangements, from the date hereof through and until expiration of three (3) years after the later of (a) the accepted completion of all Rearrangements for such Transit Project and (b) payment of all final billings owed to such Party related to such Transit Project and related Rearrangements, or such later date as is required under other provisions of this Agreement. Each Party shall bear its own costs and expenses in connection with undertaking any inspection, copying and audit, and in responding thereto. Examination of a document or record on one occasion shall not preclude further or reexamination of such document or record on subsequent occasions. By providing any of its records to the other Party for examination, the Party providing such records represents and

warrants that such records are accurate and complete. The Parties shall mutually agree upon any financial adjustment found necessary by any audit. If the Parties are unable to agree on such adjustment, then the matter shall be resolved pursuant to Article 13. The rights granted pursuant to this Section 11.8 shall not obligate either Party to inspect, audit, or copy the other Party's records nor shall either Party be entitled to utilize or rely on the other Party's audit results, absent such other Party's consent. Utility and MTA shall insert into any contracts entered into by Utility or MTA, respectively, for the performance of work on Rearrangements hereunder the above requirements, as appropriate, and also a clause requiring their respective contractors to include the above requirements, as appropriate, in any subcontracts or purchase orders. In the case of such contractors, subcontractors and suppliers, the records subject to the above requirements shall include, without limitation, any relevant records as to which a tax privilege might otherwise be asserted.

11.9 Payment Control

This Agreement (and any Supplemental Agreements hereto) shall provide the sole authority and guidance for Cost reimbursements, credits and payments with respect to work, which is the subject of this Agreement.

Article 12 **Hazardous Materials and Protected Materials**

12.1 Scope

The responsibilities of the Parties with respect to Hazardous Materials or Protected Materials discovered during, or which require protective, managerial, custodial or remedial action as a result of, the Rearrangement of Utility Facilities to accommodate a Transit Project shall be governed by applicable law, except as otherwise provided in this Article 12.

Notwithstanding any contrary provision of this Agreement, this Agreement does not obligate MTA to undertake remediation of any Hazardous Materials or protection of any Protected Materials or to undertake any other action with respect to Hazardous Materials or Protected Materials, which is not legally required in order to proceed with a Transit Project or the

Rearrangement of Utility Facilities hereunder. The provisions of this Section 12.1 shall prevail over any contrary provisions of this Agreement.

12.2 Utility Representations

Utility Facilities are located in existing rights-of-way. Utility represents and warrants to MTA, to the best of its knowledge at the time the facilities were installed, that there are no contamination issues at, on or up to one foot below the existing Utility Facilities. Utility makes no warranties or representations with respect of the rearrangement of its Facilities. Utility shall indemnify, defend and hold harmless MTA, its respective governing boards, officers, directors, employees, authorized agents, engineers, contractors and subcontractors, and their respective successors and assigns, from and against any claims, liabilities, losses or actions arising out of any breach of Utility's representations and warranties in this Section 12.2.

12.3 Investigation of Sites and Preparation of Environmental Impact Reports

As between Utility and MTA, MTA shall be responsible, at MTA expense, for the investigation of potential Hazardous Materials sites and Protected Materials sites within the area that would directly impact Construction of a Transportation Project or a Rearrangement of Utility Facilities hereunder.

12.4 Responsibility for Notification and/or Remedial or Protective Action

If Hazardous Materials or Protected Materials are found by either Party during the Construction of a Rearrangement for a Transit project, such Party shall immediately notify the other Party and shall make any required notifications to the required Federal, Utility, and/or Local Agency (ies) in accordance with applicable law.

Article 13

Resolution Of Disputes

13.1 Disputes

In the event of a claim or dispute arising between Utility and MTA out of or relating to this Agreement or any Work Order or other agreement executed pursuant hereto, including without limitation: (a) any claim based on or arising from an alleged tort relating to the subject matter of this Agreement, (b) any dispute seeking equitable relief, (c) the failure of the Parties to agree upon the terms of such further agreements as are herein required to be executed by the Parties, and (d) any dispute as to the interpretation of technical requirements (collectively, a "Dispute"), the Parties agree to follow the mechanisms set forth below in this Article 13 in order to obtain prompt and expeditious resolution of any such Dispute. Specifically, Disputes shall be resolved through judicial reference as provided in Section 13.3, except as otherwise provided in (i) Section 13.4 with respect to Provisional Relief (as defined below), or (ii) in the case of a Dispute involving an amount in controversy of \$250,000 or less, Section 13.3, where the complaining Party elects to pursue binding arbitration. Where required pursuant to Section 1.7.2 or 1.7.3, the Parties shall meet and confer in a joint working group prior to resorting to the terms of this Article 13 for resolution of the Dispute.

13.2 Judicial Reference

Except as otherwise provided in Section 13.1, any Dispute shall be heard and determined by a referee appointed pursuant to California Code of Civil Procedure Section 638, subdivision (a) to hear and determine any and all of the issues in the action, whether of fact or of law, in accordance with Code of Civil Procedure Section 644, subdivision (a). The venue of any proceeding hereunder shall be in the County (unless changed by order of the referee).

13.2.1. Procedure for Appointment. The Party seeking to resolve the Dispute shall file in court and serve on the other Party a complaint describing the matters involved in the Dispute. Service of the complaint shall be as prescribed by law. At any time after service of the complaint, any Party may request the designation of a referee to try the action. Thereafter the Parties shall use their best efforts to agree upon the selection of a referee. If the Parties are unable to agree upon a referee within ten days after a written request to do so by any Party, then any Party may petition the presiding judge of the County Superior Court to appoint a referee. The presiding judge shall have the power to assign said request to such judge of the Superior Court, as the presiding judge deems appropriate. For the guidance of the judge making the appointment of such referee, the Parties agree that the person so appointed shall be a retired judge or a lawyer experienced in the subject matter of the Dispute. The provisions of California Code of Civil Procedure Sections 640, 641 and 642 shall be applicable to the appointment of a referee hereunder. In addition to the grounds set forth in Code of Civil Procedure Sections 170.1 *et seq.* and 641, each Party shall have the right to exercise one peremptory challenge to any referee appointed.

13.2.2. Standards for Decision. The referee shall try and decide the Dispute according to all of the substantive and procedural laws of the Utility of California (unless the Parties stipulate to the contrary), and shall report a statement of decision thereon. When the referee has decided the Dispute, the referee shall also cause the preparation of a judgment based on said decision. The parties recognize and accept the provisions of Code of Civil Procedure Section 644(a), which provides as follows:

“In the case of a consensual general reference pursuant to Section 638, the decision of the referee or commissioner upon the whole issue must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, or with the judge where there is no clerk, judgment may be entered thereon in the same manner as if the action had been tried by the court.”

The judgment to be entered by the Superior Court, based upon the decision of the referee, shall be appealable in the same manner as if the judge signing the judgment had tried the case.

13.2.3. Scope of Authority. The referee shall have the authority to award any remedy or relief that a court of this Utility could order or grant, except that the referee shall have no power over MTA to award any injunctive relief which would stop or otherwise interfere with any construction relating to a Transit Project, or any portion thereof, unless such relief is requested by MTA or for reasons of imminent danger to public health or safety.

13.2.4. Failure to Appear. The reference proceeding may proceed in the absence of a Party who, after due notice, fails to appear.

13.3 Arbitration

Any Dispute seeking damages aggregating \$250,000 or less shall, in preference to judicial reference in accordance with Section 13.2, be submitted to binding arbitration in accordance with the rules of the American Arbitration Association or pursuant to California Code of Civil Procedure Sections 1280 *et seq.*, if so elected by the complaining Party. Any decision by such arbitrator shall be binding on the Parties and judgment thereon may be entered in any court having jurisdiction thereof. If the Parties are unable to agree upon an arbitrator within ten days of a written request to do so by any Party, then any Party may thereafter either petition the court to have one appointed pursuant to California Code of Civil Procedure Section 1281.6 or elect to proceed pursuant to the Rules of the American Arbitration Association. The arbitrator shall be a retired judge or a lawyer experienced in the subject matter of the dispute. The venue of any arbitration shall be in the County.

13.4 Provisional Relief

Notwithstanding the requirements of Sections 13.2 and 13.3, a Party may seek from the County Superior Court any interim or provisional relief that may be necessary to protect the rights or property of that Party (“Provisional Relief”) without first attempting to resolve the Dispute through the provisions of this Article. Notwithstanding the foregoing, no provisional remedy of any type or nature shall be available to stop or otherwise interfere with any Construction relating to a Transit Project, or any portion thereof, unless requested by MTA, or required to prevent imminent danger to public health or safety. Following the appointment of a referee pursuant to Article 13 any Provisional Relief, which would be available from a court of law, shall be available from the referee subject to the limitations set forth in Article 13.

13.5 Consolidation

At MTA's request, the Parties agree that reference or arbitration proceedings arising under this Agreement may be joined or consolidated with reference or arbitration proceedings pending between MTA and other parties, and vice versa, if those reference or arbitration proceedings arise out of the same general transaction or relate to the same subject matter or portion of a Transit Project. Such joinder or consolidation shall be ordered solely upon the request (and not over the objection) of MTA. If a reference or arbitration proceeding arising under this Agreement is joined or consolidated with a proceeding between MTA and any other party (ies), then at MTA's election, the dispute resolution procedures governing such other proceeding shall govern the entire consolidated proceeding, and such consolidated proceeding shall be decided by the arbitrator or other trier of fact appointed for such other proceeding. Similarly, Utility agrees that, at MTA's request, Utility will allow itself to be joined as a party in any dispute resolution proceeding between MTA and a third party that relates to a Utility Facility or Transit Project Construction, and to be bound by any final judgment, ruling or decision reached therein. This Section 13.5 is for the sole benefit of MTA and not for the benefit of any other party.

13.6 Costs

The cost of the proceeding shall initially be borne equally by the Parties to the dispute, but the prevailing Party in such proceeding shall be entitled to recover, in addition to reasonable attorneys' fees and all other costs, its contribution for the reasonable cost of the referee or arbitrator as an item of recoverable costs. If either Party refuses to pay its share of the costs of the proceeding, at the time(s) required, the other Party may do so, in which event that Party will be entitled to recover (or offset) the amount advanced, with interest at the maximum rate permitted by law, even if that Party is not the prevailing Party. The referee or arbitrator shall include such costs in his or her judgment or award.

13.7 Cooperation

The Parties shall diligently cooperate with one another and the referee or arbitrator as applicable, and shall perform such acts as may be necessary to obtain expeditious resolution of an action. If either Party refuses to cooperate diligently, and the other Party, after first giving

notice of its intent to rely on the provisions of this Article 13, incurs additional expenses or attorneys' fees solely as a result of such failure to cooperate diligently, then the referee or arbitrator may award such additional expenses and attorneys' fees to the Party giving such notice, even if such Party is not the prevailing Party in the action.

13.8 Continuing Performance

Notwithstanding any Dispute, the Parties agree that they will continue their respective performances required hereunder, including paying undisputed billings, and such continuation of efforts and payment of billings (whether or not disputed) shall not be construed as a waiver of any legal right or power (a) of any Party under this Agreement or any other agreement or Work Orders executed pursuant hereto, or (b) otherwise available pursuant to applicable law. The Parties acknowledge and agree that delays in Rearrangements will impact the public convenience, safety and welfare, and that monetary damages would be inadequate to compensate for delays in the construction of a Transit Project. Consequently, the Parties shall be entitled to specific performance in the event of any breach of this Agreement, which imminently threatens to delay Transit project construction.

13.9 No Waiver of Damages

Notwithstanding a Party's seeking or securing injunctive relief, it shall be entitled to all consequential damages otherwise available, including but not limited to those resulting from delays in performance under this Agreement.

13.10 Implementation

Each Party will take any action required of it in order to implement (a) an agreed-upon resolution between the Parties, (b) a final judgment entered pursuant to Section 13.2.3, or (c) an arbitration award issued pursuant to Section 13.3.

Article 14

Federal and Other Requirements

This Agreement, as to certain Transit Projects, may be subject to a financial assistance agreement with the U.S. Department of Transportation, Federal Transit Administration and as such is subject to the following terms and conditions as to such Transit Projects only:

14.1 Inspection and Audit.

Utility agrees to comply with the financial record keeping, reporting and such other requirements as may be imposed as a condition to or requirement of funding obtained by MTA from third parties (provided that MTA gives reasonable notice of such requirements to Utility). Utility shall permit the authorized representatives of MTA, the U.S. Department of Transportation, the Comptroller General of the United States, and any other government agency providing funding or oversight on a Transit Project, to inspect and audit during normal business hours and upon reasonable notice, all relevant records relating to performance by Utility, its contractors and subcontractors (as appropriate) under any Work Order issued to Utility for such Transit Project or Rearrangements of Utility Facilities related thereto, from the date of this Agreement through and until expiration of three years after the later of (a) the accepted completion of all Rearrangements for such Transit Project and payment of all final billings owed to Utility related to such Transit Project and related Rearrangements, or (b) such later date as is required by the rules and regulations of any such government agency (provided that MTA gives reasonable notice of such later date to Utility). Each Party shall bear its own costs and expenses in connection with undertaking any audit, and in responding thereto. Examination of a document or record on one occasion shall not preclude further examination of such document or record on subsequent occasions. By providing any of its records for examination pursuant to this Section 14.1, Utility represents and warrants that such records are accurate and complete. Utility shall insert into any contracts it enters into for the performance of work hereunder the above requirements and also a clause requiring the contractors (or consultants) to include the above requirements in any subcontracts or purchase orders. In the

case of such contractors, consultants, subcontractors and suppliers, the records subject to the above requirements shall include, without limitation, any relevant records as to which a tax privilege might otherwise be asserted.

14.2 Interest of Members of Congress

No members of or delegate Congress of the United States shall be admitted to any share or part of this Agreement or to any benefit arising therefrom.

14.3 Prohibited Interests

No member, officer or employee of MTA, or of a local public body, during his or her tenure or for one thereafter shall have any interest, direct or indirect, in this Agreement or the proceeds thereof. To MTA's and Utility's knowledge, no board member, officer or employee of MTA has any interest, whether contractual, noncontractual, financial or otherwise in this transaction, or in the business of Utility; and if any such interest comes to the knowledge of either Party at any time, a full and complete disclosure of all such information will be made in writing to the other party, even if such interest would not be considered a conflict under Article 4 of Division 4 (commencing with Section 1090) or Division 4.5 (commencing with Section 3690) of the Government Code of the State of California.

14.4 Equal Employment Opportunity

In connection with the performance of this Agreement, Utility shall not discriminate against any employee or applicant for employment because of age, race, religion, color, sex, national origin or disability. The Utility shall take affirmative action to insure that applicants are employed, and that employees are treated during their employment, without regard to their age, race, religion, color, sex or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

14.5 Disadvantaged Business Enterprise

In connection with the performance of this Agreement, Utility will cooperate with MTA in meeting all applicable federal regulations with regard to the maximum utilization of disadvantaged business enterprises, and will use its best efforts to ensure that disadvantaged business enterprises shall have the maximum practicable opportunity to compete for subcontract work under this Agreement.

14.6 Prior Approval

This Agreement and all amendments thereto are subject to U.S. Department of Transportation, Federal Transit Administration review and approval.

14.7 General Provisions

Without limiting any other provisions of this Article 14, Utility agrees to comply, and to cause all of its contractors to comply, with all applicable non-discrimination laws, rules and regulations, whether imposed by Federal, Utility or local agency.

Article 15 **Miscellaneous Provisions**

15.1 Approvals, Further Documents and Actions

15.1.1 Any acceptance, approval, consent, permission, satisfaction, agreement, authorization or any other like action (collectively, "Approval") required or permitted to be given by any Party hereto pursuant to this Agreement or any Work Order:

(a) must be in writing to be effective (except as otherwise specifically allowed by this Agreement);

(b) shall not be unreasonably withheld, conditioned or delayed; and if Approval is withheld, such withholding shall be in writing and shall state with specificity the reasons 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) shall be deemed granted if no response is provided to the Party requesting an Approval within the time period prescribed by this Agreement or the applicable Work Order (or if no time period is prescribed, then 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.

15.1.2 The Parties agree to execute such further documents, agreements, instruments, and notices, and to take such further actions, as may be necessary or appropriate to effectuate the transactions contemplated by this Agreement.

15.2 Notices

15.2.1 Except as otherwise provided in this Agreement, all notices or communications pursuant to this Agreement shall be in writing and shall be sent or delivered to the following:

To Utility:

California Water Service Company
3316 W. Beverly Blvd.
Montebello, California 90640-1537
Attention: Dave Karraker

To MTA:

Chief Executive Officer
Los Angeles County Metropolitan Transportation Authority
One Gateway Plaza
Los Angeles, California 90012
Facsimile No.: _____

With a copy to:

Deputy Executive Officer, Project Management
Engineering and Construction Division
Los Angeles County Metropolitan Transportation MTA
One Gateway Plaza
Los Angeles, CA 90012
Facsimile No.: _____

Any notice or demand required 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 address of the respective Parties set forth above. Any notice served personally shall be deemed delivered upon receipt, served by facsimile transmission shall be deemed 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. Utility or MTA may from time to time designate any other address or addressee or additional addressees for this purpose by written notice to the other Party.

15.2.2 Alternate Notice. The Parties may also designate other procedures for the giving of notice as required or permitted under the terms of this Agreement, but each such alternate procedure shall be described in writing and signed by the MTA Representative and by the Utility Representative appointed pursuant to Section 2.10.

15.3 Assignment; Binding Effect

Neither Party shall assign its interest in this Agreement without prior consent of the other Party. Any permitted assignment shall bind and inure to the benefit of the respective successors and permitted assigns of the Parties. Notwithstanding the foregoing, MTA shall have the right to act pursuant hereto by and through its contractors.

15.4 Waiver

The failure of any Party at any time or times to require performance of any provision hereof shall in no manner affect the right at a later time to enforce the same. No waiver by any party of any condition, or of any breach of any term, covenant, representation, or warranty contained

herein, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such condition or breach or waiver of any other condition or of any breach of any other term, covenant, representation or warranty.

15.5 Entire Agreement; Modification

No alteration or variation of the terms of this Agreement shall be valid unless made in writing and signed by the Parties hereto and no oral understanding or agreement not incorporated herein shall be binding on any of the Parties hereto.

15.5.1 In accomplishing all work and performing all other acts required under this Agreement, time is of the essence.

15.5.2 All references to "days" herein shall be deemed to refer to calendar days, unless otherwise specified.

15.6 Legal Rights

This Agreement shall be governed by and construed and enforced in accordance with the laws of the Utility of California. The rights and remedies of MTA and Utility for default in performance under this Agreement or any Work Order are in addition to any other rights or remedies provided by law.

15.7 Gender and Tense

As used in this Agreement, the masculine, feminine and neuter genders, and the singular and plural numbers shall each be deemed to include the other or others whenever the context so indicates. In this Agreement, the words "including", "includes" and "include" shall be deemed to be followed by the words "without limitation", and unless otherwise specified, lists contained in this Agreement shall not be deemed all-inclusive.

15.8 Headings

The headings, which appear at the commencement of each article and section, are descriptive only and for convenience in reference to this Agreement. Should there be any conflict between any heading and the article or section itself, the article or section itself and not the heading shall control as to construction.

15.9 Incorporation of Exhibits and Addenda

Every Exhibit and Addendum for which reference is made in this Agreement is hereby incorporated in this Agreement by this reference.

15.10 Counterpart Originals

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be the original, and all of which together shall constitute one and the same instrument.

15.11 Force Majeure

Neither Party shall be held liable for any loss or damage due to delay or failure in performance of any part of this Agreement from any cause beyond its control and without its fault or negligence; such causes may include acts of God, acts of civil or military authority, government regulations (except those promulgated by the Party seeking the benefit of this section), embargoes, epidemics, war, terrorist acts, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, strikes, power blackouts, other major environmental disturbances or unusually severe weather conditions; provided, however, that lack of funds or funding shall not be considered to be a cause beyond a Party's control and without its fault or negligence. The foregoing events do not constitute force majeure events where they are reasonably foreseeable consequences of Construction. If any of the foregoing events occur, Utility agrees, if requested by MTA, to accelerate its efforts hereunder if reasonably feasible in order to regain lost time, so long as MTA agrees to reimburse Utility for the incremental actual costs of such efforts.

15.12 Construction

The language in all parts of this Agreement shall be in all cases construed simply according to its fair meaning and not strictly for or against any of the Parties.

15.13 Survival

The representations, warranties, indemnities, waivers and dispute resolution provisions set forth in this Agreement, all payment obligations hereunder incurred prior to termination of this Agreement, and all other provisions which by their inherent nature should survive termination of this Agreement, shall survive the termination of this Agreement for any reason whatsoever, and shall remain in effect unless and until terminated or modified in writing by mutual agreement.

15.14 Benefit

The D/B Contractor is an express intended third-parties beneficiary of this Agreement. Except for the foregoing and except to the extent that specific provisions (such as the indemnity provisions) identify third parties and state that they are entitled to benefits hereunder, nothing in the provisions of this Agreement is intended to create duties or obligations to or rights in third parties not parties to this Agreement. Nothing in the provisions of this Agreement is intended to affect the legal liability of either Party to the Agreement to third parties by imposing any standard of care with respect to the development, design, construction, operation or maintenance of highways, Transit Projects and other public facilities, which is different from the standard of care imposed by law.

15.15 Severability

If any part of this Agreement is found to be invalid or unenforceable by a final judgment, ruling or decision reached in accordance with Article 13, or otherwise by a court having proper jurisdiction, such finding shall not invalidate the remaining portions hereof, but such provisions shall remain in full force and effect to the fullest extent permitted by law; provided, however, that the Parties shall immediately renegotiate, reasonably and in good faith, the terms or provisions found to be invalid, as well as any other terms and provisions as necessary to achieve as nearly as possible the Parties' original contractual intent.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as of the date first written above.

“UTILITY”

CALIFORNIA WATER SERVICE
COMPANY

By:  _____

Name: Rob Guzzetta
Title: Vice President

JMK

“MTA”

LOS ANGELES COUNTY
METROPOLITAN
TRANSPORTATION AUTHORITY

By: _____

ROGER SNOBLE
Chief Executive Officer

APPROVED AS TO FORM:

By:  _____

Attorney

APPROVED AS TO FORM:

Lloyd Pellman
County Counsel

By: _____

Deputy

CALIFORNIA WATER SERVICE
COMPANY

By:  _____

Name: Paul G. Ekstrom
Title: Corporate Secretary

