County: TARRANT
Highway: SH 183
Limits: FROM SH121 IN BEDFORD TO FM157
Fed. Proj. No.: N/A
ROW CSJ No.: 0364-05-038

MASTER UTILITY ADJUSTMENT AGREEMENT
(Developer Managed)
Agreement No.: 183-U-0504

THIS AGREEMENT, by and between NTE Mobility Partners LLC, hereinafter identified as the "**Developer**", Bluebonnet Contractors, LLC, hereinafter identified as the "**Design-Build Contractor**" and the City of Euless, Texas hereinafter identified as the "**Owner**", is as follows:

WITNESSETH

WHEREAS, the STATE OF TEXAS, acting by and through the Texas Department of Transportation, hereinafter identified as "TxDOT", is authorized to design, construct, operate, maintain, and improve turnpike projects as part of the state highway system throughout the State of Texas, all in conformance with the provisions of Chapters 203 and 223, Texas Transportation Code, as amended; and

WHEREAS, the TxDOT proposes to construct a turnpike project identified as the North Tarrant Express Project (the "Facility"); and

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

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

WHEREAS, pursuant to that certain Design-Build Contract by and between the Developer and the Design-Build Contractor with respect to the Facility (the "Design-Build Contract"), the Design-Build Contractor has undertaken the obligation to design and construct the Facility, which includes the Adjustment at Design-Builder's expense, subject to the provisions herein; and

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

WHEREAS, the Design-Build Contractor has notified the Owner that certain of its facilities and appurtenances (the "Owner Utilities") are in locational conflict with the Facility (and/or with the "Ultimate Configuration" of the Facility), and the Owner has requested that the Developer and the Design-Build Contractor undertake the Adjustment of the Owner Utilities pursuant to §203.092, Texas Transportation Code, as amended, and Rule 21.23 of Title 43, as necessary to accommodate the Facility (and the Ultimate Configuration); and

WHEREAS, the Owner Utilities and the proposed Adjustment of the Owner Utilities are described as follows: to adjust an 2420 linear feet of wastewater line and 5276 linear feet of water line along the south ROW of SH 183 in Euless from approx NTE BL Sta. 1266+30 to 1317+25. The relocation will be for like-kind facilities inside TxDOT ROW. and;

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

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

AGREEMENT

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

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

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

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

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

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

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

(a) Upon execution of this Agreement by the Developer, the Design-Build Contractor and the Owner, the Developer will submit this Agreement, together with the attached Plans, to TxDOT for its review and approval as part of a package referred to as a "Utility Assembly". The parties agree to cooperate in good faith to modify this Agreement and/or the Plans, as necessary and mutually acceptable to all parties, to respond to any comments made by TxDOT thereon. Without limiting the generality of the foregoing, (i) the Owner agrees to respond (with comment and/or acceptance) to any modified Plans and/or Agreement prepared by the Design-Build Contractor in response to TxDOT comments within **fourteen (14) business days** after receipt of such modifications; and (ii) if the Owner originally prepared the Plans, the Owner agrees to modify the Plans in response to TxDOT comments and to submit such modified Plans to the Design-Build Contractor for its comment and/or approval (and re-submittal to TxDOT for its comment and/or approval) within **fourteen (14) business days** after receipt of TxDOT's comments. The Owner's failure to timely respond to any modified Plans submitted by the Design-Build Contractor pursuant to this paragraph shall be deemed the Owner's approval of same. If the Owner fails to timely prepare modified Plans which are its responsibility hereunder, then the Design-Build Contractor shall have the right to modify the Plans for the Owner's approval as if the Design-Build Contractor had originally prepared the Plans. The Design-Build Contractor shall be responsible for providing Plans to and obtaining comments on and approval of the Plans from the Developer. Approval of the Plans by the Design-Build Contractor shall be deemed to be Developer approval of the Plans. The process set forth in this paragraph will be repeated until the Owner, the Developer, the Design-Build Contractor and TxDOT have all approved this Agreement and accepted the Plans.

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

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

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

(b) All Federal laws, regulations, decrees, ordinances and policies applicable to projects receiving Federal funding, financing and/or credit assistance (including without limitation 23 CFR 645 Subparts A and B, incorporated herein by this reference);

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

(d) The standard specifications, standards of practice, and construction methods (collectively, "standards") which the Owner customarily applies to utility facilities comparable to the Owner Utilities that are constructed by the Owner or for the Owner by its contractors at the Owner's

expense, which standards are current at the time this Agreement is signed by the Owner, and which the Owner has submitted to the Design-Build Contractor in writing.

(e) Upon completion of construction of each specific Utility Adjustment, the Design-Build Contractor will provide "As built" (including Plans and Specifications). All "As built" will be submitted in GIS format.

(f) Upon completion of construction of each specific Utility Adjustment, the Owner shall be provided with a 2-Year Maintenance Bond.

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

4. **Responsibility for Costs of Adjustment Work**. With the exception of any Betterment (hereinafter defined), the parties shall allocate the cost of any Adjustment between themselves as identified in Exhibit A and in accordance with § 203.092, Texas Transportation Code. An allocation percentage may be determined by application of an Eligibility Ratio, if appropriate, as detailed in Exhibit A. TxDOT shall have no liability to the Owner for any such costs. The Owner expressly acknowledges that it shall be entitled to compensation only from the Design-Build Contractor for any Adjustment costs for the Owner Utilities covered by this Agreement, including costs with respect to real property interests (either acquired or relinquished), and specifically acknowledges that it shall not be entitled to compensation or reimbursement from TxDOT or the State of Texas.

The cost of the water adjustment and the cost of the wastewater adjustment should be calculated separately. No combined eligibility ratio.

5. **Construction by the Design-Build Contractor**.

(a) The Owner hereby requests that the Design-Build Contractor perform the construction necessary to adjust the Owner Utilities and the Design-Build Contractor hereby agrees to perform such construction. All construction work hereunder shall be performed in a good and workmanlike manner, and in accordance with the Plans (except as modified pursuant to Paragraph 16).

(b) The Design-Build Contractor shall retain such contractor or contractors as are necessary to adjust the Owner Utilities, in accordance with the CDA.

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

6. **Reimbursement of Owner's Indirect Costs**.

(a) Design-Build Contractor agrees to reimburse the Owner its share of the Owner's indirect costs (e.g., engineering, inspection, testing, ROW) as identified in Exhibit A. When requested by

the Owner, monthly progress payments will be made. The monthly payment will not exceed 80% of the estimated indirect work done to date. Once the indirect work is complete, final payment of the eligible indirect costs will be made. Intermediate payments shall not be construed as final payment for any items included in the intermediate payment.

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

☒ (1) Actual related indirect costs accumulated in accordance with (i) a work order accounting procedure prescribed by the applicable Federal or State regulatory body, or (ii) established accounting procedure developed by the Owner and which the Owner uses in its regular operations or,

☐ (2) The agreed sum of $_____ ("Agreed Sum") as supported by the analysis of the Owner's estimated costs attached hereto as part of Exhibit A; or

(c) All indirect costs charged to the Design-Build Contractor by the Owner shall be reasonable and shall be computed using rates and schedules not exceeding those applicable to similar work performed by or for the Owner at the Owner's expense. Design-Build Contractor's performance of the Adjustment work hereunder and payment of the Design-Build Contractor's share of the Owner's costs pursuant to this Agreement, if applicable, shall be full compensation to the Owner for all costs incurred by the Owner in Adjusting the Owner Utilities (including without limitation costs of relinquishing and/or acquiring right of way), and TxDOT shall have no liability to the Owner for any such costs.

(d) Eligible Owner indirect costs shall include only those authorized under 23 C.F.R. Part 645, Subpart A. The Owner agrees that costs referenced in 23 C.F.R. Section 645.117(d)(2) are not eligible for reimbursement. These regulations can be found at: http://www.access.gpo.gov/nara/cfr/waisidx_04/23cfr645_04.html

7. **Advancement of Funds by Owner for Construction Costs**.

(a) Advancement of Owner's Share of Estimated Costs

Exhibit A shall identify all estimated engineering and construction-related costs, including labor, material, equipment and other miscellaneous construction items. Exhibit A shall also identify the Owner's and Design-Build Contractor's respective shares of the estimated costs.

The Owner shall advance to the Design-Build Contractor its allocated share of the estimated costs for construction and engineering work to be performed by Design-Build Contractor, in accordance with the following terms:

☒ The adjustment of the Owner's Utilities does not require advancement of funds.

☐ The adjustment of the Owner's Utilities does require advancement of funds and the terms agreed to between the Design-Build Contractor and Owner are listed below.

[Insert terms of advance funding to be agreed between Design-Build Contractor and Owner.]

The City of Euless will provide its share of the relocation costs upon completion and acceptance of the relocations.

(b) Adjustment Based on Actual Costs or Agreed Sum

[Check the one appropriate provision]:

☒ The Owner is responsible for its share of the Design-Build Contractor's actual cost for the Adjustment, including the identified Betterment. Accordingly, upon completion of all Adjustment work to be performed by both parties pursuant to this Amendment, (i) the Owner shall pay to the Design-Build Contractor the amount, if any, by which the actual cost of the Betterment (as determined in Paragraph 9(b)) plus the actual cost of Owner's share of the Adjustment (based on the allocation set forth in Exhibit A) exceeds the estimated cost advanced by the Owner, or (ii) the Design-Build Contractor shall refund to the Owner the amount, if any, by which such advance exceeds such actual cost, as applicable.

☐ The Agreed Sum is the agreed and final amount due for the Adjustment, including any Betterment, under this Amendment. Accordingly, no adjustment (either up or down) of such amount shall be made based on actual costs.

8. **Invoices.** Each invoice submitted by the Owner shall be prepared in the form and manner prescribed by 23 C.FR. Part 645, Subpart A. On invoices prepared by either the Owner or the Design-Build Contractor, all costs developed using the "Actual Cost" method shall be itemized in a format allowing for comparisons to the approved Estimates, including listing each of the services performed, the amount of time spent and the date on which the service was performed. The original and three (3) copies of each invoice, together with (1) such supporting information to substantiate all invoices as reasonably requested, and (2) such waivers and releases of liens as the other party may reasonably require, shall be submitted to the other party at the address for notices stated in Paragraph 22, unless otherwise directed pursuant to Paragraph 22. The Owner and the Design-Build Contractor shall make commercially reasonable efforts to submit final invoices not later than one hundred twenty (120) days after completion of work. The Owner and the Design-Build Contractor hereby acknowledge and agree that any costs not submitted to the other party within eighteen months following completion of all Adjustment work to be performed by the parties pursuant to this Agreement shall be deemed to have been abandoned and waived.

9. **Betterment and Salvage**.

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

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

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

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

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

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

(vi) any upgrading required by the Owner's written "standards" meeting the requirements of Paragraph 3(d).

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

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

(b) It is understood and agreed that neither the Developer nor the Design-Build Contractor shall pay for any Betterments and that the Owner shall be solely responsible therefore. No Betterment may be performed hereunder which is incompatible with the Facility or the Ultimate Configuration or which cannot be performed within the other constraints of applicable law, any applicable governmental approvals, and the requirements imposed on the Developer by the CDA, including without limitation the scheduling requirements thereunder. Accordingly, the parties agree as follows *[check one box that applies, and complete if appropriate]*:

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

☐ The Adjustment of the Owner Utilities pursuant to the Plans includes Betterment to the Owner Utilities by reason of *[insert explanation, e.g. "replacing 12" pipe with 24" pipe]*:_____. The Design-Build Contractor has provided to the Owner comparative estimates for (i) all work to be performed by the Design-Build Contractor pursuant to this Agreement, including work attributable to the Betterment, and (ii) the cost to perform such work without the Betterment, which estimates are hereby approved by the Owner. The estimated cost of the Design-Build Contractor's work hereunder which is attributable to Betterment is $_____, calculated by subtracting (ii) from (i). The percentage of the total cost of the Design-Build Contractor's work hereunder which is attributable to Betterment is _____%, calculated by subtracting (ii) from (i), which remainder is divided by (i).

(c) If Paragraph 9(b) identifies Betterment, the Owner shall advance to the Design-Build Contractor, at least **fourteen (14) business days** prior to the date scheduled for commencement of construction for Adjustment of the Owner Utilities, the estimated cost attributable to Betterment as set forth in Paragraph 9(b). Should the Owner fail to advance payment to the Design-Build Contractor fourteen (14) business days prior to commencement of the Adjustment construction, the Design-Build Contractor shall have the option of commencing and completing (without delay) the Adjustment work without installation of the applicable Betterment. *[If Paragraph 9(b) identifies Betterment, check the one appropriate provision]*:

☐ The estimated cost stated in Paragraph 9(b) is the agreed and final amount due for Betterment hereunder, and accordingly no adjustment (either up or down) of such amount shall be made based on actual costs.

☐ The Owner is responsible for the Design-Build Contractor's actual cost for the identified Betterment. Accordingly, upon completion of all Adjustment work to

be performed by both parties pursuant to this Agreement, (i) the Owner shall pay to the Design-Build Contractor the amount, if any, by which the actual cost of the Betterment (determined as provided below in this paragraph) exceeds the estimated cost advanced by the Owner, or (ii) the Design-Build Contractor shall refund to the Owner the amount, if any, by which such advance exceeds such actual cost, as applicable. Any additional payment by the Owner shall be due within **sixty (60) calendar days** after the Owner's receipt of the Design-Build Contractor's invoice therefore, together with supporting documentation; any refund shall be due within **sixty (60) calendar days** after completion of the Adjustment work hereunder. The actual cost of Betterment incurred by the Design-Build Contractor shall be calculated by multiplying (i) the Betterment percentage stated in Paragraph 9(b), by (ii) the actual cost of all work performed by the Design-Build Contractor pursuant to this Agreement (including work attributable to the Betterment), as invoiced by the Design-Build Contractor to the Owner.

(d) If Paragraph 9(b) identifies Betterment, the amount of Betterment in Owner's indirect costs shall be determined by applying the percentage of the Betterment calculated in Paragraph 9(b). The Owner's invoice to the Design-Build Contractor for the Design-Build Contractor's share of the Owner's indirect costs shall credit the Design-Build Contractor with any Betterment amount determined pursuant to this Paragraph 9(d).

(e) For any Adjustment from which the Owner recovers any materials and/or parts and retains or sells the same, after application of any applicable Betterment credit, the Owner's invoice to the Design-Build Contractor for its costs shall credit the Design-Build Contractor with the salvage value for such materials and/or parts, determined in accordance with 23 C.F.R. Section 645.105(j).

(f) The determinations and calculations of Betterment described in this Paragraph 9 shall exclude right of way acquisition costs. Betterment in connection with right-of-way acquisition is addressed in Paragraph 15.

10. **Management of the Adjustment Work.** The Design-Build Contractor will provide project management during the Adjustment of the Owner Utilities.

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

12. **Inspection and Acceptance by the Owner**.

(a) Throughout the Adjustment construction hereunder, the Owner shall provide adequate inspectors for such construction. The work shall be inspected by the Owner's inspector(s) at least once each working day, and more often if such inspections are necessary for prudent installation. Further, upon request by the Design-Build Contractor or its contractors, the Owner shall furnish an inspector at any reasonable time in which construction is underway pursuant to this Agreement, including occasions when construction is underway in excess of the usual forty (40)

hour work week and at such other times as reasonably required. The Owner agrees to promptly notify the Design-Build Contractor of any concerns resulting from any such inspection.

(b) The Owner shall perform a final inspection of the adjusted Owner Utilities, including conducting any tests as are necessary or appropriate, within **five (5) business days** after completion of construction hereunder. The Owner shall accept such construction if it is consistent with the performance standards described in Paragraph 3, by giving written notice of such acceptance to the Design-Build Contractor within said **five (5) day** period. If the Owner does not accept the construction, then the Owner shall, not later than the expiration of said **five (5) day** period, notify the Design-Build Contractor in writing of its grounds for non-acceptance and suggestions for correcting the problem, and if the suggested corrections are justified, the Design-Build Contractor will comply. The Owner shall re-inspect any revised construction (and re-test if appropriate) and give notice of acceptance, not later than **five (5) business days** after completion of corrective work. The Owner's failure to inspect and/or to give any required notice of acceptance or non-acceptance within the specified time period shall be deemed acceptance.

(c) From and after the Owner's acceptance (or deemed acceptance) of an adjusted Owner Utility, the Owner agrees to accept ownership of, and full operation and maintenance responsibility for, such Owner Utility.

13. **Design Changes.** The Design-Build Contractor will be responsible for additional Adjustment design and the Design-Build Contractor will be responsible for additional construction costs necessitated by design changes to the Facility, upon the terms specified herein.

14. **Field Modifications.** The Developer and the Design-Build Contractor shall provide the Owner with documentation of any field modifications, including Utility Adjustment Field Modifications as well as minor changes described in Paragraph 16(b), occurring in the Adjustment of the Owner Utilities.

15. **Real Property Interests.**

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

(b) If acquisition of any new easement or other interest in real property ("New Interest") is necessary for the Adjustment of any Owner Utilities, then the Owner shall be responsible for undertaking such acquisition. The Owner shall implement each acquisition hereunder expeditiously so that related Adjustment construction can proceed in accordance with the Developer's and the Design-Build Contractor's Facility schedules. The Design-Build Contractor shall be responsible for its share (as specified in Paragraph 4) of the actual and reasonable acquisition costs of any such New Interest (including without limitation the Owner's reasonable overhead charges and reasonable legal costs as well as compensation paid to the landowner), excluding any costs attributable to Betterment as described in Paragraph 15(c), and subject to the provisions of Paragraph 15(e); provided, however, that all acquisition costs shall be subject to the Design-Build Contractor's prior written approval. Eligible acquisition costs shall be segregated from other costs on the Owner's estimates and invoices. Any such New Interest shall have a written valuation and shall be acquired in accordance with applicable law.

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

(d) For each Existing Interest located within the final Facility right of way, upon completion of the related Adjustment work and its acceptance by the Owner, the Owner agrees to execute a quitclaim deed or other appropriate documentation relinquishing such Existing Interest to TxDOT, unless the affected Owner Utility is remaining in its original location or is being reinstalled in a new location within the area subject to such Existing Interest. All quitclaim deeds or other relinquishment documents shall be subject to TxDOT's approval as part of its review of the Utility Assembly as described in Paragraph 2. For each such Existing Interest relinquished by the Owner, the Design-Build Contractor shall do one of the following to compensate the Owner for such Existing Interest, as appropriate:

(i) If the Owner acquires a New Interest for the affected Owner Utility, the Design-Build Contractor shall reimburse the Owner for the Design-Build Contractor's share of the Owner's actual and reasonable acquisition costs in accordance with Paragraph 15(b), subject to Paragraph 15(c); or

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

The compensation provided to the Owner pursuant to either subparagraph (i) or subparagraph (ii) above shall constitute complete compensation to the Owner for the relinquished Existing Interest and any New Interest, and no further compensation shall be due to the Owner from the Developer, the Design-Build Contractor or TxDOT on account of such Existing Interest or New Interest(s).

(e) The Owner shall execute a Utility Joint Use Acknowledgment (ROW-U-JUAA) for each Adjustment where required pursuant to TxDOT policies. All Utility Joint Use Acknowledgments shall be subject to TxDOT approval as part of its review of the Utility Assembly as described in Paragraph 2.

16. **Amendments and Modifications.** This Agreement may be amended or modified only by a written instrument executed by the parties hereto, in accordance with Paragraph 16(a) or Paragraph 16(b) below.

(a) Except as otherwise provided in Paragraph 16(b), any amendment or modification to this Agreement or the Plans attached hereto shall be implemented by a Utility Adjustment Agreement Amendment ("UAAA") in the form of Exhibit B hereto (TxDOT-CDA-U-35A-DM). The UAAA form can be used for a new scope of work with concurrence of the Developer, the Design-Build Contractor and TxDOT as long as the Design and Construction responsibilities have not changed. Each UAAA is subject to the review and approval of TxDOT, prior to its becoming effective for any purpose and prior to any work being initiated thereunder. The Owner agrees to keep and track costs for each UAAA separately from other work being performed.

(b) For purposes of this Paragraph 16(b), "Utility Adjustment Field Modification" shall mean any horizontal or vertical design change from the Plans included in a Utility Assembly previously approved by TxDOT, due either to design of the Facility or to conditions not accurately reflected in the approved Utility Assembly (e.g., shifting the alignment of an 8 in. water line to miss a modified or new roadway drainage structure). A Utility Adjustment Field Modification agreed upon by the Developer, the Design-Build Contractor and the Owner does not require a UAAA, provided that the modified Plans have been submitted to TxDOT for its review and comment. A minor change (e.g., an additional water valve, an added utility marker at a ROW line, a change in vertical bend, etc.) will not be considered a Utility Adjustment Field Modification and will not require a UAAA, but shall be shown in the documentation required pursuant to Paragraph 14.

17. **Relationship of the Parties.**

(a) Although some of the duties described in this Agreement are assigned specifically to either the Developer or the Design-Build Contractor, the obligation under this Agreement to design and construct the Facility at the Developer's or Design-Build Contractor's expense, including the Adjustment, is jointly shared by the Developer and the Design-Build Contractor. To the extent Design-Build Contractor fails to perform an express duty or obligation of this Agreement, the Developer is authorized and obligated to provide such performance. Nothing in this Paragraph 17(a) however, alters or shall be construed in any way to alter the obligations, responsibilities, benefits, rights, remedies, and claims between Developer and the Design-Build Contractor under the Design-Build Contract to perform and pay for the Adjustment.

(b) Except as provided in Paragraph 17(a) above, this Agreement does not in any way, and shall not be construed to, create a principal/agent or joint venture relationship between the Owner and the other parties hereto and under no circumstances shall the Owner, the Design-Build Contractor or the Developer be considered as or represent itself to be an agent of another.

(c) Neither this Agreement nor the Design-Build Contract alters, or shall be construed in any way to alter the obligations, responsibilities, benefits, rights, remedies, and claims between the Developer and TxDOT under the CDA to design and construct the Facility, including the Adjustment.

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

19. **Assignment; Binding Effect; TxDOT as Third Party Beneficiary.** None of the Owner, the Developer or the Design-Build Contractor may assign any of its rights or delegate any of its duties under this Agreement without the prior written consent of the other parties and of TxDOT, which consent may not be unreasonably withheld or delayed; provided, however, that the Developer and the Design-Builder may assign any of their rights and/or delegate any of their duties to TxDOT or to any other entity engaged by TxDOT to fulfill the Developer's obligations under the CDA, at any time without the prior consent of the Owner.

This Agreement shall bind the Owner, the Developer, the Design-Build Contractor and their successors and permitted assigns, and nothing in this Agreement nor in any approval subsequently provided by any party hereto shall be construed as giving any benefits, rights, remedies, or claims to any other person, firm, corporation or other entity, including, without limitation, any contractor or other party retained for the Adjustment work or the public in general; provided, however, that the Owner, the Developer and the Design-Build Contractor agree that

although TxDOT is not a party to this Agreement, TxDOT is intended to be a third-party beneficiary to this Agreement.

20. **Breach by the Parties.**

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

(b) If the Developer or the Design-Build Contractor claim that the Owner has breached any of its obligations under this Agreement, the Developer or the Design-Build Contractor will notify the Owner and TxDOT in writing of such breach, and the Owner shall have 30 days following receipt of such notice in which to cure such breach, before the Developer or the Design-Build Contractor may invoke any remedies which may be available to it as a result of such breach.

21. **Traffic Control.** The Design-Build Contractor shall provide traffic control or shall reimburse the Owner for the Design-Build Contractor's share (if any, as specified in Paragraph 4) of the costs for traffic control made necessary by the Adjustment work performed by either the Design-Build Contractor or the Owner pursuant to this Agreement, in compliance with the requirements of the Texas Manual on Uniform Traffic Control Devices. Betterment percentages calculated in Paragraph 9 shall also apply to traffic control costs.

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

The Owner: City Manager

City of Euless
201 N Ector Drive
Euless, TX 76039-3595
Phone: 817-685-1646
Fax: 817-685-1664

The Developer: NTE Mobility Partners LLC
9001 Airport Freeway, Suite 600
North Richland Hills, Texas 76180
Phone: 817-710-0500
Fax:

The Design-Build Contractor: Bluebonnet Contractors, LLC
6851 NE Loop 820, Suite 102
North Richland Hills, Texas 76180

Phone: 817-510-3557
Fax: 817-510-3691

A party sending a notice of default of this Agreement to another party shall also send a copy of such notice to TxDOT and the CDA Utility Manager at the following addresses:

TxDOT:

TxDOT Department of Transportation
Attention: TTA Right of Way
125 E. 11th Street
Austin, Texas 78701-2483
Phone: (512) 936-0980

CDA Utility Manager:

Atkins Global
Attention: Michael Crain
North Texas CDA Project Office
3301 W. Airport Freeway
Bedford, Texas 76021
Phone: (817) 508-7602

Any notice or demand required herein shall be given (a) personally, (b) by certified or registered mail, postage prepaid, return receipt requested, or (c) by reliable messenger or overnight courier to the appropriate address set forth above. Any notice served personally shall be deemed delivered upon receipt, and any notice 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. Any party may from time to time designate any other address for this purpose by written notice to all other parties; TxDOT may designate another address by written notice to all parties.

23. **Approvals.** Any acceptance, approval, or any other like action (collectively "Approval") required or permitted to be given by either the Developer, the Design-Build Contractor, the Owner or TxDOT pursuant to this Agreement:

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

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

(c) Except for approvals by TxDOT, and except as may be specifically provided otherwise in this Agreement, shall be deemed granted if no response is provided to the party requesting an Approval within the time period prescribed by this Agreement (or if no time period is prescribed, then fourteen (14) calendar days), commencing upon actual receipt by the party from which an Approval is requested or required, of a request for Approval from the requesting party. All requests for Approval shall be sent out by the requesting party to the other party in accordance with Paragraph 22.

24. **Time**.

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

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

(c) No party shall be liable to another party for any delay in performance under this Agreement from any cause beyond its control and without its fault or negligence ("Force Majeure"), such as acts of God, acts of civil or military authority, fire, earthquake, strike, unusually severe weather, floods or power blackouts.

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

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

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

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

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

30. **Nondiscrimination**. Each party hereto agrees, with respect to the work performed by such party pursuant to this Agreement, that such party shall not discriminate on the grounds of race, color,

APPROVED BY:
TEXAS DEPARTMENT OF TRANSPORTATION

By: _____
Authorized Signature

Printed Name: Donald C. Toner Jr. SR/WA

Title: Director - Turnpike Right of Way

Texas Turnpike Authority Division

Date: _____

OWNER

The City of Euless

By: _____
Duly Authorized Representative

Printed Name: _____

Title: _____

Date: _____

DESIGN-BUILD CONTRACTOR

Bluebonnet Contractors, LLC

By: _____
Duly Authorized Representative

Printed Name: Jose Carlos Esteban

Title: Chief Executive Officer

Date: _____

DEVELOPER

NTE Mobility Partners LLC

By: _____
Duly Authorized Representative

Printed Name: Steve Hankins, PE

Title: Director of Design & Construction

Date: _____

sex, national origin or disability in the selection and/or retention of contractors and consultants, including procurement of materials and leases of equipment.

~~31.~~ **Applicable Law, Jurisdiction and Venue**. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflict of laws principles thereof. Venue for any action brought to enforce this Agreement or relating to the relationship between any of the parties shall be the District Court of Travis County, Texas or the United States District Court for the Western District of Texas (Austin), or such other venue as agreed by the parties.

32. **Waiver of Consequential Damages.** No party hereto shall be liable to any other party to this Agreement, whether in contract, tort, equity, or otherwise (including negligence, warranty, indemnity, strict liability, or otherwise,) for any punitive, exemplary, special, indirect, incidental, or consequential damages, including, without limitation, loss of profits or revenues, loss of use, claims of customers, or loss of business opportunity.

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

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

35. **Effective Date.** Except for the provisions of Paragraph 2(a) (which shall become effective immediately upon execution of this Agreement by the Owner, the Developer and the Design-Build Contractor without regard to TxDOT's signature), this Agreement shall become effective upon the later of (a) the date of signing by the last party (either the Owner, the Developer or the Design-Build Contractor) signing this Agreement, and (b) the date of TxDOT's approval as indicated by the signature of TxDOT's representative, below.