

**OPERATING AGREEMENT**

**ON THE  
STATE-OWNED PORTIONS OF THE MOUNTAIN DIVISION AND/OR CONWAY  
BRANCH RAILROAD LINE  
BETWEEN**

**STATE OF NEW HAMPSHIRE  
DEPARTMENT OF TRANSPORTATION**

**AND**

**RAILROAD CORPORATION**

**DRAFT**

Contractor Initials \_\_\_\_\_  
Date \_\_\_\_\_

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## ARTICLE I – GENERAL CONDITIONS

1.1 DEFINITIONS - As used herein, the following terms have the meanings indicated:

- a. “Agreement” - means the Operating Agreement dated \_\_\_\_\_.
- b. “Monthly Gross Operating Revenue”—means those revenues derived monthly by the Contractor from providing Service to shippers on the Line.
- b. “Commencement Date” – means the date on which the Contractor commences Service.
- c. “Completion Date” – means (insert date = Commencement date + 10 years) unless this Agreement is otherwise extended or renewed.
- d. “Contractor”- means INSERT RAILROAD CORPORATION NAME & ADDRESS
- e. “Contracting Officer” – means Commissioner, New Hampshire Department of Transportation (NHDOT), or Commissioner’s duly authorized representative having an address of 7 Hazen Drive, P.O. Box 483, Concord, NH 03302-0483. The Contracting Officer shall be the representative of the State hereunder. In the event of any dispute hereunder, the interpretation of this Agreement and the resolution of any disputes by the Contracting Officer shall be final.
- f. “Contractor’s Representative” means representative of the Contractor responsible for making contract decisions and will be the Contractor’s contact for the State’s Contract Officer
- g. “Effective Date” means the date this Agreement is approved by the Governor and Council of the State of New Hampshire.
- h. “FRA” means the Federal Railroad Administration.
- i. “Line” – means the State-owned railroad line beginning in TOWN at MP XX.XX and heading DIRECTION to MP XX.XX in TOWN as more particularly described in Section 2.1.
- j. “Major Maintenance Expenditure”—means any expenditure to address a condition on the Line that prevents Service on the Line while the condition exists. Major Maintenance Expenditures include, but are not limited to, bridge failures/rehabilitation, major washouts, crossing rehabilitation/reconstruction.
- k. “Operating Year” – means January 1 to December 31.
- l. “Operations Manager” means the Contractor’s representative responsible for day-to-day operation and maintenance on the State owned line who will be the contact for the Bureau of Rail and Transit personnel.
- m. “OTM” – means Other Track Materials including, but not limited to joint bars, bolts, tie plates, spikes and rail anchors.
- n. “Service” – WILL DEPEND ON PROPOSED SERVICE (means revenue freight trains carrying goods or returning from delivering goods on behalf of shippers and receivers on the Line(s) or passenger rail service on the Line(s).)
- o. “State” - means the State of New Hampshire, through the Department of Transportation
- p. “STB” means the Surface Transportation Board.
- q. “Subcontractor” – means an individual, partnership, firm, corporation, or any combination thereof, or joint venture, to whom the Contractor sublets any part of this Agreement.

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- r. "Rail facility and rail facilities" collectively means the track, bridges, signals, switches, structures, buildings, and related railroad transportation property located on the one or more segments over which service is to be provided.
- s. "Users Fee" – means fee to be paid by the Contractor to State for the use of the Line to provide the Services, as more particularly defined in Section 4.3.1.

1.2. EFFECTIVE DATE/COMPLETION OF SERVICES.

1.2.1 Notwithstanding any provision of this Agreement to the contrary, and subject to the approval of the Governor and Executive Council of the State of New Hampshire, this Agreement, and all obligations of the parties hereunder, shall not become effective until the date the Governor and Executive Council approve this Agreement ("Effective Date").

1.2.2 Any Service performed by the Contractor prior to the Effective Date shall be performed at the sole risk of the Contractor, and in the event that this Agreement does not become effective, the State shall have no liability to the Contractor.

1.2.3 After the Completion Date the parties shall be relieved of all obligations hereunder, except the Contractor shall terminate its operations, relinquish the property, and file documents for discontinuance of service with the Surface Transportation Board and submit the final User Fee payment, a Final Report in the format of monthly reports described in Exhibit A and the Contractor's continuing duty to maintain financial records per Section 4.5 paragraph 4.5.1.

1.3. RENEWAL OF AGREEMENT.

1.3.1 The Contractor shall notify the State by certified mail no later than one year prior to the Completion Date that the Contractor wishes to enter into renegotiations for a new agreement for an additional ten (10) year period beginning January 1, 2016. If the Contractor and the State cannot agree upon a new Operating Agreement by July 1, 2015, or the State is not satisfied with the Contractor's level of service during the term of this Agreement the State may at that time solicit new Requests for Proposals to operate the Line(s) and have no further obligations for renewal of this Agreement with the Contractor.

1.4. CONTRACTOR'S REPRESENTATION AND WARRANTIES.

1.4.1 The Contractor represents and warrants the following:

- a. The Contractor is a corporation duly organized, validly registered with the Secretary of State, and in good standing under the laws of the State, and is duly qualified to do business in each jurisdiction where its business or the ownership of its property requires such qualification;
- b. The Contractor has the full power and authority to enter into this Agreement and to carry out the functions, which it has undertaken in this Agreement;

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- c. All corporate and other proceedings required to be taken by or on the part of the Contractor to authorize it to enter into this Agreement and perform the Service have been duly taken; and
- d. The execution of this Agreement and the operation of the Service will not violate any statute, rule, regulations, order, writ, injunction or decree of any court, administrative agency or governmental body.
- e. The Contractor's Representative is"
  - Name \_\_\_\_\_
  - Company \_\_\_\_\_
  - Street Address \_\_\_\_\_
  - City, State and Zip \_\_\_\_\_
  - Tel: ( ) - \_\_\_\_\_
- f. The Contractor's Operation Manager is:
  - Name \_\_\_\_\_
  - Company \_\_\_\_\_
  - Street Address \_\_\_\_\_
  - City, State and Zip \_\_\_\_\_
  - Tel: ( ) - \_\_\_\_\_

**1.5. COMPLIANCE BY CONTRACTOR WITH LAWS AND REGULATIONS/ EQUAL EMPLOYMENT OPPORTUNITY.**

1.5.1 In connection with the performance of the Service, the Contractor shall comply with all applicable statutes, laws, regulations, and orders of federal, state, county or municipal authorities with appropriate jurisdiction which impose any obligation or duty upon the Contractor, including, but not limited to, civil rights and equal opportunity laws. In addition, the Contractor shall comply with all applicable copyright laws.

1.5.2 During the term of this Agreement, the Contractor shall not discriminate against employees or applicants for employment because of race, color, religion, creed, age, sex, handicap, sexual orientation, or national origin and will take affirmative action to prevent such discrimination.

1.5.3 If this Agreement is funded in any part by monies of the United States, the Contractor shall comply with all the provisions of Executive Order No. 11246 ("Equal Employment Opportunity"), as supplemented by the regulations of the United States Department of Labor (41 C.F.R. Part 60), and with any rules, regulations and guidelines as the State of New Hampshire or the United States issue to implement these regulations. The Contractor further agrees to permit the State or United States access to any of the Contractor's books, records and accounts for the purpose of ascertaining compliance with all rules, regulations and orders, and the covenants, terms and conditions of this Agreement.

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## 1.6. PERSONNEL.

1.6.1 The Contractor shall at its own expense provide all personnel necessary to perform the Service. The Contractor warrants that all personnel engaged in the Service shall be qualified to perform the Service, and shall be properly licensed and otherwise authorized to do so under all applicable laws.

1.6.2 Unless otherwise authorized in writing, during the term of this Agreement, and for a period of six (6) months after the Completion Date, the Contractor shall not hire, and shall not permit any subcontractor or other person, firm or corporation with whom it is engaged in a combined effort to perform the Service to hire, any person who is a State employee or official, who is materially involved in the procurement, administration or performance of this Agreement. This provision shall survive termination of this Agreement.

1.6.3 The Contracting Officer or his or her successor shall be the State's representative. In the event of any dispute concerning the interpretation of this Agreement, the Contracting Officer's decision in his/her reasonable discretion shall be final for the State.

## 1.7. EVENT OF DEFAULT/REMEDIES.

1.7.1. Any one or more of the following acts or omissions of the Contractor shall constitute an event of default hereunder ("Event of Default"):

1.7.1.1. failure to perform the Service satisfactorily or on schedule as reasonably determined by the State.

1.7.1.2. failure to submit any report required hereunder;

1.7.1.3. failure of the Contractor to maintain the records required hereunder, or failure to permit access thereof; and/or

1.7.1.4. failure to perform any other covenant, term or condition of this Agreement.

1.7.2. Upon the occurrence of any Event of Default, the State may take any one, or more, or all, of the following actions:

1.7.2.1. give the Contractor a written notice specifying the Event of Default and requiring it to be remedied within thirty (30) days from the date of the notice; and if the Event of Default is not timely remedied, the State may terminate this Agreement, effective two (2) days after giving the Contractor notice of termination;

1.7.2.2. treat the Agreement as breached and pursue any of its remedies at law or in equity, or both.

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## 1.8. TERMINATION.

1.8.1 In the event of an early termination of this Agreement for any reason, the Contractor shall comply with Section 1.2.3 and deliver to the Contracting Officer, not later than fifteen (15) days after the date of termination, a report (“Termination Report”) containing all information required by the various reporting provisions of the Agreement, from the date of the last such reports through and including the date of termination. The form, subject matter, content, and number of copies of the Termination Report shall be identical to those of any Final Report described in the attached EXHIBIT A.

## 1.9. CONTRACTOR’S RELATION TO THE STATE.

1.9.1. In the performance of this Agreement the Contractor is in all respects an independent contractor, and is neither an agent nor an employee of the State. Neither the Contractor nor any of its officers, employees, agents or members shall have authority to bind the State or receive any benefits, workers’ compensation or other emoluments provided by the State to its employees.

## 1.10. ASSIGNMENT/DELEGATION/SUBCONTRACTS.

1.10.1 The Contractor shall not assign, or otherwise transfer any interest in this Agreement without the prior written consent of the Contracting Officer, which shall not be unreasonably withheld. None of the Service shall be subcontracted by the Contractor without the prior written consent of the State, which shall not be unreasonably withheld.

## 1.11. INDEMNIFICATION.

1.11.1 The Contractor shall defend, indemnify and hold harmless the State, its officers and employees, from and against any and all losses suffered by the State, its officers and employees, and any and all claims, liabilities or penalties asserted against the State, its officers and employees, by or on behalf of any person, on account of, based or resulting from, arising out of (or which may be claimed to arise out of) the acts or omissions of the Contractor. Notwithstanding the foregoing, nothing herein contained shall be deemed to constitute a waiver of the sovereign immunity of the State, which immunity is hereby reserved to the State. This covenant in Section 1.11.1 shall survive the termination of this Agreement.

## 1.12. INSURANCE.

1.12.1 The Contractor shall, at its sole expense, obtain and maintain in force, and shall require any subcontractor or assignee to obtain and maintain in force, the following insurance:

1.12.1.1 Railroad Liability and Contractual Liability Insurance shall be purchased with the State named as co-insured in the following amounts

- a. three million dollars (\$3,000,000) for normal freight service
- b. five million dollars (\$5,000,000) if hazardous materials are shipped each occurrence, with a deductible of twenty-five thousand dollars (\$25,000) maximum.
- c. ten million (\$10,000,000) dollars, at a minimum, for passenger service

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1.12.2 The policies described in subparagraph 1.12.1 herein shall be on policy forms and endorsements approved for use in the State of New Hampshire by the NH Department of Insurance, and issued by insurers licensed in the State of New Hampshire.

1.12.3 The Contractor shall furnish to the Contracting Officer, or his or her successor, a certificate(s) of insurance for all insurance required under this Agreement. Contractor shall also furnish to the Contracting Officer, or his or her successor, certificate(s) of insurance for all renewal(s) of insurance required under this Agreement no later than fifteen (15) days prior to the expiration date of each of the insurance policies. The certificate(s) of insurance and any renewals thereof shall be attached and are incorporated herein by reference. Each certificate(s) of insurance shall contain a clause requiring the insurer to endeavor to provide the Contracting Officer, or his or her successor, no less than ten (10) days prior written notice of cancellation of the policy. Provided further that Contractor shall be obligated to notify the Contracting Officer within ten (10) days of any modification of the policy.

1.12.4 Within ten (10) days prior to the start of operation and annually thereafter, the Contractor shall provide the Contracting Officer with a certificate evidencing the continual existence of required insurances.

#### 1.13. WAIVER OF BREACH

1.13.1 No failure by the State to enforce any provisions hereof after any Event of Default shall be deemed a waiver of its rights with regard to that Event of Default, or any subsequent Event of Default. No express failure to enforce any Event of Default shall be deemed a waiver of the right of the State to enforce each and all of the provisions hereof upon any further or other Event of Default on the part of the Contractor.

#### 1.14. NOTICE.

1.14.1 Any notice by a party hereto to the other party shall be deemed to have been duly delivered or given at the time of mailing by certified mail, postage prepaid, in a United States Post Office addressed to the parties at the addresses given above.

#### 1.15. AMENDMENT.

1.15.1 This Agreement may be amended, waived or discharged only by an instrument in writing signed by the parties hereto and only after approval of such amendment, waiver or discharge by the Governor and Executive Council of the State of New Hampshire.

#### 1.16. CONSTRUCTION OF AGREEMENT AND TERMS.

1.16.1 This Agreement shall be construed in accordance with the laws of the State of New Hampshire, and is binding upon and inures to the benefit of the parties and their respective successors and assigns. The wording used in this Agreement is the wording chosen by the parties to express their mutual intent, and no rule of construction shall be applied against or in favor of any party.

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1.17. THIRD PARTIES.

1.17.1 The parties hereto do not intend to benefit any third parties and this Agreement shall not be construed to confer any such benefit.

1.18. HEADINGS.

1.18.1 The headings throughout the Agreement are for reference purposes only, and the words contained therein shall in no way be held to explain, modify, amplify or aid in the interpretation, construction or meaning of the provisions of this Agreement.

1.19. SEVERABILITY.

1.19.1 In the event any of the provisions of this Agreement are held by a court of competent jurisdiction to be contrary to any state or federal law, the remaining provisions of this Agreement will remain in full force and effect.

1.20. ENTIRE AGREEMENT.

1.20.1 This Agreement, which may be executed in a number of counterparts, each of which shall be deemed an original, constitutes the entire Agreement and understanding between the parties, and supersedes all prior Agreements and understandings relating hereto.

**ARTICLE II - PHYSICAL DESCRIPTION**

2.1. Physical Description. The Line consists of the State-owned portion of the Mountain Davison railroad line and/or Conway Branch railroad line as specifically described as follows:

MORE DETAILED DESCRIPTION BASED ON SECTIONS OF THE LINE(S)  
THAT ARE PROPOSED TO BE USED INCLUDING DEED INFORMATION,  
VALUATION STATIONS, MILE POSTS, AND TOWNS AND COUNTIES  
INCLUDED IN SERVICE AREA

2.2 All rail facilities remain the property of the State which reserves to itself the right to grant further easements, contracts, leases, and other rights therein which do not, in the reasonable judgment of the State, unreasonably interfere with the performance of the Service by the Contractor. The State reserves to itself all rents, fees and revenues derived from such grants. Provided, however, that Contractor shall not be responsible for performing any physical alterations to the Line to accommodate such uses and Contractor shall not be responsible for the cost of repairing any damage to the Line resulting from such third party use.

2.3 The Contractor shall make no alterations to the State's property, both real and personal, or construct any building or make other improvements on the State's property beyond normal maintenance without the prior written consent of the State. All alterations, changes, and improvements built, constructed, or placed on the State's property by the Contractor, shall unless

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otherwise provided by written agreement between the State and the Contractor, be the property of the State and remain on the State's property at the expiration or sooner termination of this Agreement. Salvageable materials generated, as a part of normal maintenance shall become the property of the Contractor.

2.4 The State may provide the Contractor with State-owned railroad equipment under the jurisdiction of the Bureau of Rail and Transit, which it may declare available to the Contractor. Said equipment shall be used solely for the provision of Service under this Agreement and shall be insured by the Contractor to the State's reasonable satisfaction.

2.5 The Contractor agrees that all rail and OTM currently located on the State railroad property and similar materials that may be provided to the Contractor by the State in the future shall only be used on the State's railroad line.

2.6 Except where otherwise provided by shippers, the Contractor agrees to provide cars, locomotives and all other things as necessary to afford the degree and quality of service reasonably requested by its shippers on the Line(s) or as required to provide passenger rail services.

### **ARTICLE III - OPERATIONS**

#### **3.1 SERVICE AREAS:**

3.1.1 The Contractor shall, between the Commencement Date and the Completion Date, manage and operate the Service in the active service area from MP XX.X in TOWN to MP XX.XX in TOWN, said active service area being a portion of the Line(s) described in Article 2.1. The Contractor shall be solely responsible for all phases and requirements of its operation, including, but not limited to, assignment of power and cars, scheduling, workforce, equipment, advertising, and marketing. Dispatching control of the Line(s) shall be subject to mutual agreements with existing operators that are currently under agreement to NHDOT to operate services on the line.

(1) Conway Scenic Railroad (CSRR) is currently under agreement to NHDOT and has the exclusive right to operate tourist excursion trains between Mile Post P56.0 in Conway to Mile Post P101 in Whitefield and CSRR shall retain dispatching control of the Line.

(2) NH Central Railroad (NHCRR) operates freight service between Mile Post P101 in Whitefield to Mile Post P103.2 in Whitefield and has operating rights to Mile Post P111.57 in Lunenburg, Vermont. Any proposed train movements through this portion of the Line must be covered by a mutual agreement with NHCRR, including train movements that are coordinated with NHCRR.

3.1.2 The Contractor will negotiate mutually acceptable rates and terms of service with shippers and commence Service. Upon commencement of Service the Contractor shall provide a minimum of 60 days of Service during that and subsequent operating years.

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3.1.3 Notwithstanding any other provisions of this Agreement, the Contractor agrees to allow provision of temporary Service by others in the event that the Contracting Officer reasonably determines that the Contractor is unable to provide Service for reasons other than inability to reach agreement with shippers and/or the Contracting Officer regarding rates and terms of service on the Line(s). Notice of Service by others must be given to the Contractor in writing and such temporary Service shall cease when Contractor has shown to the reasonable satisfaction of the Contracting Officer that Contractor has regained the ability to provide the Service.

3.1.4 The Contractor shall at its own expense provide all personnel necessary to perform the Services. The Contractor warrants that all personnel engaged in the Services shall be qualified to perform the Services, and shall be properly licensed and otherwise authorized to do so under all applicable laws. Unless otherwise authorized in writing, during the term of this Agreement, and for a period of six (6) months after the Completion Date, the Contractor shall not hire, and it shall not permit any subcontractor or other person, firm or corporation with whom it is engaged in a combined effort to perform the Services, to hire, any person who is a State employee or official, who is materially involved in the procurement, administration, or performance of this Agreement. This provision shall survive termination of this Agreement.

3.1.5 The State shall provide, and the Contractor shall conform to the State's "Guidelines Governing the Operation of On-Track Equipment on State-owned Railroad Lines," and shall incorporate these Guidelines into its current Time Table for the Line.

3.1.6 Any derailment must be immediately reported to the NHDOT and service resumed within 48 hours.

## 3.2 MAINTENANCE.

3.2.1 EQUIPMENT - The Contractor shall be responsible for proper upkeep and maintenance of all equipment it uses, either supplied by the State or the Contractor, and shall insure that equipment is in compliance with all current applicable FRA regulations. State equipment shall be returned to the State in as good condition as when received except for ordinary wear and tear.

3.2.2 TRACK - The Contractor shall be responsible for the proper upkeep and maintenance of track facilities in the areas over which it provides Service. Said upkeep and maintenance shall include but not be limited to:

- a. Surface and alignment
- b. Brush and vegetation control (all brush to be chipped)
- c. Drainage and ditches
- d. All operating signals to be kept in good operating condition
- e. Crossing and switches to be kept in good operating condition. The Contractor shall provide a flagman during the passage of trains for the protection of any crossing protected by signals where the signal is not operating for any reason.
- f. Snow removal and winter maintenance when needed for service.

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3.2.2.1 The Contractor shall be responsible to perform all work and routine maintenance necessary to maintain the active service area from MP XX.XX in TOWN to MP XX.XX in TOWN at FRA Class (INSERT #) Track Safety Standards and all other remaining track from MP XX.XX in TOWN to MP XX.XX in TOWN shall be maintained at FRA Class (INSERT #) Track Safety Standards and in any event shall expend no less than twenty (20%) percent of Annual Gross Operating Revenue on actual track maintenance exclusive of inspections, and shall include a report of maintenance expenses on a form and according to a schedule to be specified by the State. (See EXHIBIT A). The Contractor's performance shall satisfy all obligations required on the owner of a railroad, set forth in Part 213 of the FRA Track Safety Standards (49 CFR 213).

3.2.2.2 The Contractor shall obtain the State's permission regarding any work performed on the Line(s) excluding the routine maintenance listed above. The State shall have no responsibility to pay for any maintenance work performed on the Line(s) by the Contractor that did not have the State's authorization prior to the work being performed.

3.2.3 STRUCTURES (BRIDGES & CULVERTS) – Subject to the cost limitation set forth in Section 3.2.4, the Contractor shall be responsible for maintaining structures and shall make needed repairs necessary to keep structures safe for their intended use in providing the Service. Said maintenance shall include but not be limited to the cleaning and removal of debris, lubrication of bearing surfaces, scour and erosion protection.

3.2.3.1 The Contractor shall comply with all requirements of 49 CFR, Part 237 per the State's Bridge Management Program for the Line(s) as described in Section 2.1, including providing bridge ratings, weight limits and inspections if the State is unable to perform these services.

3.2.4 In the event a Major Maintenance Expenditure is required the Contractor shall assist in all necessary repairs, but be limited in its direct financial contribution to five thousand (\$5,000) dollars per operating year in the aggregate. However, the Contractor waives any claims to damages for any delays in repairing or reopening the line after such an occurrence and the State reserves to itself the decision whether, when and how such repairs and reopening will be done, in its reasonable discretion. Provided further that priority shall be given to Major Maintenance Expenditures in the active service area or other areas on the Line(s) in which the Contractor provides the Service.

### 3.3 INSPECTION.

3.3.1 The Contractor shall patrol the active service area and formally inspect the track as per FRA Track Safety Standards subpart F (49 CFR 213.233) and submit an inspection report in a timely manner but no more than one (1) month after each inspection. Should any defects be found, the Operator shall take the appropriate remedial action and notify the Contracting Officer in writing of said remedial action." In addition, the Operator is required to make daily inspections of the tracks ahead of the first train of the day between MP P76.5 at Notchland and MP P85.0 at Crawford Station to look for track blockages.

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3.3.2 The Contracting Officer has the right to monitor the Contractor to ensure that the Contractor complies with the conditions of this Agreement. The Contracting Officer shall be granted full access to the operations and shall have the authority to direct the Contractor through its General Manager or designee to remedy deficiencies as per FRA Class 2 Track Safety Standards Track Safety Standards under this Agreement and as required to provide the Services.

3.3.3 The State will conduct their own Hy-rail inspections of the Line from time to time as they deem necessary and the Contractor will authorize access dates and times for these inspections.

3.3.4 The Contracting Officer may take any action, including the field inspection of any project site and the inspection of the rail facilities, equipment, and all books and records of Contractor relating to Service on the Line and of any contractor or subcontractor relating to any project or task accomplished under this Agreement.

3.3.4.1 Such inspection shall include, but not be limited to:

- a. Ensure that work complies with the contract specifications.
- b. Verify quantitative measures of materials installed, such as tie counts.
- c. Verify labor and materials charges for contracts providing for payment on an actual cost basis (“force account work”).
- d. Verify the quantities of uninstalled State-owned materials and the security of same against damage, theft, or use other than for approved projects.
- e. Provide any other information requested by the Contracting Officer.

#### 3.4 CONSTRUCTION PROJECTS.

3.4.1 The Contracting Officer reserves the right to advertise and let construction rehabilitation projects within the confines of the Line(s), provided that such projects do not unreasonably interfere with Contractor’s ability to provide Service. The construction contractor to whom this work may be awarded shall have the right to perform the work so described in the contract. The Contracting Officer shall have the right to adjust trips not published in the regular railroad schedule to accommodate the construction schedule.

3.4.2 The Contracting Officer will from time to time allow utility projects to be constructed within the railroad right-of-way. Construction contractors for these projects will be required to enter into a license with the State, which will require certain conditions such as liability insurance, and to cooperate with the Contractor in assuring that the work be performed in such a manner that the tracks, operations and appurtenances of the rail facility will be safeguarded. The Contractor may require a flagman and/or railroad inspector at a construction site if it deems it necessary at the expense of the construction contractor.

3.4.3 The Contractor may be called upon to construct sidings to new shippers on the line. The construction of sidings and appurtenances thereto may be billed to the shipper after the State reviews the proposed plans, including, but not limited to location, alignment, materials, safety appliances, and the State issues its approvals.

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### 3.5 FREIGHT RATES AND TARIFFS

The Contractor shall negotiate mutually acceptable rates and terms of service with shippers. Once the Contractor has negotiated such mutually acceptable rates, the Contractor shall submit the agreed upon rates to the State for review. In the event that the State reasonably believes that the agreed upon rates are too low, the State may elect to not approve such rates and mediate with the Contractor and shipper(s) regarding higher rates. In the event that the State reasonably believes that the agreed upon rates are too high, the State may elect to not approve such rates and mediate with the Contractor and shipper(s) regarding lower rates. Notwithstanding the foregoing, in the event that the State and the Contractor cannot agree on appropriate rates to shippers, the case shall be referred to the Surface Transportation Board.

### 3.6 FORCE MAJEURE

The parties hereto will be excused from performance of any of their respective obligations hereunder occasioned by any event beyond their respective control, including, without limitation, any action of any federal, state or local agency or instrumentality; by government authorities including compliance with environmental quality, energy conservation and occupational safety requirements adopted or effected after the date of this Agreement; by acts of God; by strikes or other labor trouble; by explosions, fires, or vandalism until such events are remedied.

## **ARTICLE IV - USER FEE PAYMENTS, ACCOUNTING AND AUDITS**

### 4.1 PAYMENTS AND REPORTING

The Contractor shall make User Fee payments and submit reports required under this article directly to the State of New Hampshire, Department of Transportation, Bureau of Rail and Transit.

### 4.2 SCHEDULE OF PAYMENTS AND REPORTS

Payments shall be paid monthly, based upon the level of operation, as explained below. Payments shall be made no later than thirty (30) days after the end of each calendar month that the revenue producing carload (freight or passenger) is moved and will include a report of freight traffic and passenger traffic on a form and according to a schedule to be specified by the State. Passenger rail reports will include a breakdown of the number and type of tickets sold during the reporting period. If combination tickets are sold, the rail fare portion of the tickets shall be clearly stated and shall be reported at the rate agreed to by the Contracting Officer and the Contractor. (See EXHIBIT A)

### 4.3 USER FEE PAYMENT:

4.3.1 The Contractor shall pay five (5%) percent of its gross monthly freight revenue and 10% of its gross monthly passenger service revenue as a User Fee to the State, payable to: "Treasurer, State of New Hampshire".

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4.3.2 The Contractor may, where directed in writing by the Contracting Officer, deduct from payments the cost of specific expenditures including but not limited to major maintenance projects in track work or structure repair.

#### 4.4 LATE PAYMENT.

Should any payment be received more than five (5) days after the due date, the State shall be entitled to a five (5%) percent late charge on that month's User Fee.

#### 4.5 ACCOUNTING AND AUDITS.

4.5.1 The Contracting Officer shall have access, during regular working hours, for the purpose of audit and examination, to any books, documents, papers, and records of the Contractor which may be related or pertinent to this Agreement during the period of this Agreement and for a period of five (5) years after the termination of this Agreement. The Contractor shall impose this requirement of each of its subcontractors.

4.5.2 If, as a result of any audit, the Contracting Officer determines that the amount paid to the State is less than the amount owed, the Contractor shall pay the difference to State within thirty (30) days of the determination.

4.5.3 If, as a result of any audit, the Contracting Officer determines that the amount paid to the State is more than the amount owed, State will make repayment or credit the Contractor accordingly, so far as appropriations allow, the overpayment to the State.

4.5.4 The Contractor shall be responsible for collecting revenues and for delivering monthly traffic and ridership reports, monthly revenue reports, quarterly maintenance cost reports, and quarterly marketing reports on forms and according to a schedule to be specified by the State. (See EXHIBIT A)

### **ARTICLE V - MARKETING EFFORT**

5.1 The Contractor will make every effort to market the Line(s) in order to make Services profitable and to maintain good business and working relationships with local businesses, State and local government officials, employees, and other railroads, and will report on the marketing effort on a form and according to a schedule to be specified by the State. (See EXHIBIT A)

### **ARTICLE VI - OTHER OPERATORS**

6.1 In all of its operations and use of the property indicated herein, the Contractor will cooperate with other potential operators in the use of rail facilities. The Contractor shall enter into a mutually acceptable agreement with other operators already operating on the Line(s) as noted below:

- Conway Scenic Railroad (CSRR) is currently under agreement to NHDOT and has the exclusive right to operate tourist excursion trains between Mile Post P56.0 in Conway to Mile Post P101 in Whitefield. As CSRR is under agreement to NHDOT and provides seasonal tourist excursion train service, the Contractor shall be required

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to enter into a mutually acceptable agreement with CSRR regarding the terms and conditions relating to the use of the rail facilities, including, without limitation, commercially reasonable terms and conditions relating to liability protection for CSRR and compensation due to CSRR relating to the use of the rail facilities. At all times CSRR's service shall have priority over all other users, including the Contractor, and CSRR shall retain dispatching control of the Line.

- NH Central Railroad (NHCR) operates freight service between Mile Post P101 in Whitefield to Mile Post P103.2 in Whitefield and has operating rights to Mile Post P111.57 in Lunenburg, Vermont. Any proposed train movements through this portion of the Line must be covered by a mutual agreement with NHCR, including train movements that are coordinated with NHCR.

**ARTICLE VII - TERMINATION OF AGREEMENT**

7.1 The parties will be excused from the performance of any of their obligation under this Agreement if performance becomes impossible due to any event beyond their control, including acts of God, explosions, fires and vandalism.

7.2 If at any time after the commencement of Service pursuant to Sections 3.1.2 the Contractor operates the Service fewer than sixty (60) days during that or subsequent Operating Years, this Agreement may be terminated and the parties shall be subject to Article I, Section 1.2.3.

IN WITNESS WHEREOF, we have hereunto set our hands on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

RAILROAD

BY: \_\_\_\_\_  
Name \_\_\_\_\_, Title \_\_\_\_\_

THE STATE OF NEW HAMPSHIRE  
COUNTY OF \_\_\_\_\_

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, \_\_\_\_\_ the undersigned officer, personally appeared \_\_\_\_\_ known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that he has executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
NOTARY PUBLIC

Contractor Initials \_\_\_\_\_  
Date \_\_\_\_\_

THE STATE OF NEW HAMPSHIRE

BY: \_\_\_\_\_  
NAME  
Commissioner

THE STATE OF NEW HAMPSHIRE  
COUNTY OF MERRIMACK

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, \_\_\_\_\_ the undersigned officer, personally appeared INSERT COMMISSIONER'S NAME, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that he has executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
NOTARY PUBLIC

This is to certify that the Operating Agreement shown above has been reviewed by this office, and is approved as to form and execution on \_\_\_\_\_, 20\_\_.

OFFICE OF ATTORNEY GENERAL

BY: \_\_\_\_\_  
Assistant Attorney General

**APPROVED** by Governor and Executive Council on \_\_\_\_\_, 20 \_\_, ITEM # \_\_\_\_\_.

ATTEST: \_\_\_\_\_  
Secretary of State

Contractor Initials \_\_\_\_\_  
Date \_\_\_\_\_