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**THE STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF TRANSPORTATION**



*William Cass, P.E.*  
*Assistant Commissioner*

*Andre Briere*  
*Deputy Commissioner*

His Excellency, Governor Christopher T. Sununu  
 and the Honorable Council  
 State House  
 Concord, NH 03301

Bureau of Rail & Transit  
 November 27, 2022

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**REQUESTED ACTION**

The Department of Transportation requests placing this item on the Consent Calendar.

Authorize the Department of Transportation to enter into a contract with the Merrimack & Grafton Railroad, Inc. (Vendor # 336981), dba New England Southern Railroad, One Railway Lane, Burlington, VT 05401, for the use of the state-owned Concord – Lincoln Railroad Corridor, from Concord to Tilton, for freight railroad service. This Agreement is effective January 1, 2023, with Governor and Executive Council approval, through December 31, 2032, with a provision for renewal for an additional 10-year period, subject to Governor and Council approval, through December 31, 2042.

Income from the agreement will be credited as follows:

04-096-096-964010-2991  
 Special Railroad Fund  
 009-407323 Agency Income

**EXPLANATION**

The Department of Transportation owns the Concord-Lincoln Railroad Line, including a section that remains available for freight railroad services and connects at Concord, NH to the regional and national freight railroad network. This section has been included in Operating Agreements between the Department of Transportation and three successive freight railroad providers, as approved by the Governor and Council, since 1975.

More recently, on November 14, 2012 the Governor and Council approved an Operating Agreement between the Department of Transportation and the New England Southern Railroad (NESR) to provide freight railroad service on the state-owned Concord – Lincoln Railroad Corridor from Concord to Tilton for the period of July 1, 2012 through June 30, 2022. On June 30, 2020 the Department of Transportation consented to an assignment of the 2012 Operating Agreement from the New England Southern Railroad to the Merrimack & Grafton Railroad Corporation (MGRR) as the Merrimack & Grafton Railroad acquired the New England Southern Railroad. The Merrimack & Grafton Railroad Corporation (MGRR) continues doing business as New England Southern Railroad (NESR).

Pursuant to Section 1.3 of the current Operating Agreement, MGRR notified the Department on January 5, 2021 that it wished to renew its operating agreement. The Department and MGRR began active negotiations for the terms of a new 10-year Operating Agreement and requested additional time; a 6-month extension, Amendment #1, was approved by Governor and Council, as Item 5D, on December 8, 2021 and extended the completion date until December 31, 2022. The Department and MGRR have negotiated a renewed Operating Agreement for a ten-year period through December 31, 2032. This renewed Agreement allows MGRR and its shippers to continue to use the line for freight rail services.

This Agreement has been reviewed and approved by the Office of the Attorney General for form and execution. Copies of the fully executed Agreement have been provided to the Secretary of State's Office and the Department of Administrative Services. Subsequent to the Governor and Council approval, a copy of the Agreement will be on file with the Department of Transportation.

Your approval of this resolution is respectfully requested.

Sincerely,

A handwritten signature in cursive script that reads "William Cass".

William Cass, P.E.  
Assistant Commissioner

Attachments

**OPERATING AGREEMENT**

**ON THE  
STATE-OWNED PORTION OF THE CONCORD-LINCOLN RAILROAD LINE**

**BETWEEN**

**STATE OF NEW HAMPSHIRE  
DEPARTMENT OF TRANSPORTATION**

**AND**

**MERRIMACK & GRAFTON RAILROAD CORPORATION  
dba NEW ENGLAND SOUTHERN RAILROAD**

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## OPERATING AGREEMENT

THIS OPERATING AGREEMENT ("Agreement") is made and entered into this 8<sup>th</sup> day of December 2022, between the State of New Hampshire, through the New Hampshire Department of Transportation, 7 Hazen Drive, P.O. Box 483, Concord, NH 03302-0483 ("the State") and Merrimack & Grafton Railroad Corporation, dba New England Southern Railroad, One Railway Lane, Burlington, VT 05401 ("the Contractor"), collectively referred to as ("the Parties").

WHEREAS, the State owns a portion of the Concord-Lincoln Railroad Line, as more particularly described in Section 2.1; and

WHEREAS, the Contractor provides Service on the Concord-Lincoln Railroad Line pursuant to an Assignment dated June 30, 2020 of the Operating Agreement between the State and New England Southern Railroad dated April 19, 2012; and

WHEREAS, pursuant to Section 1.3 of the Operating Agreement dated April 19, 2012, the State and the Contractor desire to enter into a new Operating Agreement pursuant to the following terms and conditions:

### ARTICLE I - GENERAL CONDITIONS

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

- a. "Completion Date" means December 31, 2032, unless this Agreement is otherwise extended or renewed in accordance with Section 1.3.1 of this Agreement.
- b. "Contracting Officer" means the Commissioner of the New Hampshire Department of Transportation (NHDOT), or her successor or her 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.
- c. "Contractor" means Merrimack & Grafton Railroad Corporation, a duly authorized railroad operating under the authority of the Surface Transportation Board and doing business as New England Southern Railroad, One Railway Lane, Burlington, VT 05401.
- d. "Contractor's Representative" means representative of the Contractor responsible for making contract decisions and will be the Contractor's contact for the Contracting Officer.
- e. "Effective Date" means the date this Agreement is approved by the Governor and Council of the State of New Hampshire.

- f. **"Facilities"** – collectively means the real estate, track, culverts, bridges, signals, switches, structures, buildings, and related railroad transportation property over which Service is to be provided.
- g. **"Final Report"** – means a 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 Completion Date.
- h. **"FRA"** means the Federal Railroad Administration of the United States Department of Transportation.
- i. **"Line"** means the portion of the Line from MP C 0.58 (Station 25+69.4) in Concord, New Hampshire to MP 21.90 (Station 1152+07) in Tilton, NH.
- j. **"Major Maintenance Expenditure"** means any expenditure to address a condition on the Line that interrupts or is likely to lead to the interruption of Service or a condition that results or could result in bridge weight capacity restrictions on the Line while the condition exists. Major Maintenance Expenditures include, but are not limited to, bridge failures/rehabilitation, slope failures, culvert failures, major washouts and bridge weight capacity upgrades.
- k. **"Gross Operating Revenue"** means those revenues derived by the Contractor from providing Service on the Line.
- 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. **"Operating Year"** means January 1 to December 31.
- n. **"Service"** means revenue freight trains carrying goods or returning from delivering goods on behalf of shippers and receivers.
- o. **"STB"** means the Surface Transportation Board.
- p. **"Subcontractor"** means an individual, partnership, firm, corporation, or any combination thereof, or joint venture, to whom the Contractor subcontracts any part of this Agreement.
- q. **"Termination Report"** means a 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.
- r. **"User Fee"** means the fee to be paid by the Contractor to the State for use of the Line to provide Service, as more particularly defined in Article IV of this Agreement.

## 1.2. EFFECTIVE DATE/COMPLETION OF SERVICES.

- 1.2.1 Notwithstanding any provision of this Agreement to the contrary, this Agreement, and all obligations of the Parties hereunder, is subject to the approval of the Governor and Council of the State of New Hampshire. This Agreement shall become effective on the date the Governor and Council approve this Agreement.
- 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,

including without limitation any obligation to pay the Contractor for any costs incurred or Service performed.

- 1.2.3 After termination of the Agreement the Parties shall be relieved of all obligations hereunder, except the Contractor shall at its own expense terminate its operations, relinquish the property, and file documents for discontinuance of service with the STB, and submit the final User Fee payment and a Final Report in accordance with the format and schedule of reports described in Exhibit A attached hereto and incorporated herein by this reference (hereinafter "Report and Payment Schedule"). Further, the Contractor's continuing duty to maintain financial records per Section 4.5.1, the Contractor's duty to defend, indemnify and hold harmless the State per Section 1.12.1, and the Contractor's hiring limitation in Section 1.6.2 shall survive termination of this Agreement.

### 1.3. RENEWAL OF AGREEMENT.

- 1.3.1 The Contractor shall notify the State by **certified mail** no earlier than 18 months before the Completion Date, but 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, 2033. If the Contractor and the State cannot agree upon a new operating agreement by June 30, 2032 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 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 New Hampshire Secretary of State, and in good standing under the laws of New Hampshire, 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;
  - 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:

Selden Houghton, President  
Vermont Rail System  
One Railway Lane  
Burlington, VT 05401  
(802) 658-2550  
shoughton@vrs.us.com

- f. The Operation Manager is:

Shane Filskov, Vice President and General Manager  
Vermont Rail System  
One Railway Lane  
Burlington, VT 05401  
(802) 658-2550

**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 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. Notwithstanding the above, no part of this Operating Agreement shall be considered a waiver by Contractor of rights conferred upon rail carriers by federal law or the jurisdiction and authority of the Surface Transportation Board.
- 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, gender identity, disability, sexual orientation, national origin, or military status 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.



**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 provided that the hiring of any such person as a result of a response to any general solicitation for employment through an untargeted advertisement made in the ordinary course of business shall not constitute a breach of this provision. This provision shall survive termination of this Agreement.

**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"):
- a. failure to perform the Service satisfactorily or on schedule as reasonably determined by the Contracting Officer;
  - b. failure to submit any report required hereunder; and
  - c. failure of the Contractor to maintain the records required hereunder, or to permit access thereof;
  - d. failure to pay the User Fee to the State as required hereunder; and/or
  - e. 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, terminate this Agreement, effective two (2) days after giving the Contractor written notice of termination;
- 1.7.2.2 Treat this Agreement as breached and pursue any of its remedies at law or in equity, or both.

**1.8. TERMINATION OF AGREEMENT.**

- 1.8.1 In the event this Agreement is terminated for any reason prior to the Completion Date, 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 Termination Report.
- 1.8.2 Except pursuant to the Force Majeure provisions of Section 3.6.1, if at any time after the Effective Date the Contractor conducts Service for fewer than twelve (12) days during an Operating Year for the first three (3) Operating Years, or for fewer than thirty-six (36) days for the remaining Operating Years, the State may terminate the Agreement.
- 1.8.3 In the event of a termination or expiration of this Agreement, the Contractor agrees that it shall, at its sole expense, obtain the necessary approvals from the STB to discontinue operations and turn over operating authority to a new railroad operator.

**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. TAXES AND UTILITIES.**

- 1.10.1 All applicable railroad or corporate taxes assessed by the State of New Hampshire, including those specified in New Hampshire RSA 72 and RSA 82, or the Federal Government as a result of this Agreement are the responsibility of the Contractor.
- 1.10.2 The Contractor shall be responsible for arranging and paying for any and all utility services, including but not limited to water, gas, and electricity, required for the Facilities during the term of this Agreement.
- 1.10.3 The Contractor shall not deduct from the User Fee payments to the State any costs for taxes and/or utilities paid by the Contractor.

**1.11. ASSIGNMENT/DELEGATION/SUBCONTRACTS.**

- 1.11.1 The Contractor shall not assign, or otherwise transfer any interest in this Agreement without the prior written consent of the Contracting Officer. For purposes of this paragraph, a Change of Control shall constitute an assignment. "Change of Control" means (a) merger, consolidation, or a transaction or series of related transactions in which a third party, together with its affiliates, becomes the direct owner of fifty

percent (50%) or more of the voting shares or similar equity interests, or combined voting power of the Contractor, or (b) the sale of all or substantially all of the assets of the Contractor.

1.11.2 None of the Service shall be subcontracted by the Contractor without the prior written consent of the Contracting Officer. For the purposes of this Agreement, the Contractor need not seek the prior written consent of the Contracting Officer for the following affiliate of Contractor: Vermont Railway, Inc. The State is entitled to copies of all subcontracts and assignment agreements and shall not be bound by any provisions contained in a subcontract or an assignment agreement to which the State is not a party.

## **1.12. INDEMNIFICATION.**

1.12.1 Unless otherwise exempted by law, the Contractor shall defend, indemnify and hold harmless the State, its agencies, officers and employees, from and against any and all claims, demands, losses, liabilities, penalties, fines, judgments, awards, and costs for any personal injury or property damages, or other claims asserted against the State, its agencies, officers or 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, its employees, lessees, or Subcontractors, including but not limited to negligence, reckless or intentional conduct. The State shall not be liable for any costs incurred by the Contractor arising under this Section 1.12.1. 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 shall survive the termination of this Agreement.

## **1.13. INSURANCE.**

1.13.1 The Contractor shall, at its sole expense, obtain and maintain in force, and shall require any Assignee to obtain and maintain in force, the following insurance:

- A. Railroad Comprehensive Liability and Contractual Liability Insurance shall be purchased with the State named as an Additional Named Insured by Contractor in the following amounts, with a maximum SIR of One Hundred Thousand Dollars (\$100,000):
  - i. Five Million Dollars (\$5,000,000) for normal freight service
  - ii. Seven Million Dollars (\$7,000,000) if hazardous materials are shipped, each occurrence.
- B. Commercial Automobile Liability Insurance covering all motor vehicles including owned, hired, borrowed, and non-owned vehicles. Limits of Liability:

\$1,000,000 Combined Single Limit for bodily Injury & Property Damage. This provision shall apply equally to approved Subcontractors.

- C. In accordance with RSA 281-A, and subject to the exception for certain railroad employees described in RSA 281-A:2, VI(a), the Contractor shall maintain, and require any Subcontractor or assignee to secure and maintain, payment of Workers' Compensation in connection with activities which the person proposes to undertake pursuant to this Agreement. The State shall not be responsible for payment of any Workers' Compensation premiums or for any other claim or benefit for Contractor, or any Subcontractor or employee of Contractor, which might arise under applicable State of New Hampshire Workers' Compensation laws in connection with the performance of this Agreement. Where applicable, Federal Employer Liability Act Coverage Endorsement shall be included.
- D. Pollution Liability Insurance issued to and covering the liability of the Contractor arising out of the pollution or impairment of the environment, including costs of investigation and clean-up, caused by or relating to the Contractor's performance of services under this Agreement. Coverage under this policy (or policies) shall have limits of liability not less than \$1,000,000 per occurrence.
- E. Contractor shall require approved subcontractors to obtain and maintain in force Comprehensive Liability and Contractual Liability Insurance, with the State named as an Additional Named Insured. Coverage under this policy (or policies) shall have limits of liability not less than \$1,000,000 per occurrence and \$2,000,000 in the aggregate, and shall include Railroad Endorsement CG 2417 or its equivalent where appropriate. The State of New Hampshire, its agencies, and its agents and employees shall be named as additional insureds.

1.13.2 The policies described in Section 1.13 herein shall be on policy forms and endorsements issued by insurers authorized to conduct business in the State of New Hampshire and in accordance with any statutes or rules governing said insurers.

1.13.3 The Contractor shall furnish to the Contracting Officer a certificate(s) of insurance for all insurance required under this Agreement. The Contractor shall also furnish to the Contracting Officer, or her successor, certificate(s) of insurance for all renewal(s) of insurance required under this Agreement no later than ten (10) days prior to the expiration date of each insurance policy. The certificate(s) of insurance and any renewals thereof shall be attached and are incorporated herein by reference.

#### **1.14. WAIVER OF BREACH.**

1.14.1 No failure by either Party 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 either Party to enforce each and all of the provisions hereof upon any further or other Event of Default on the part of either Party.

**1.15. NOTICE.**

1.15.1 Any notice by a party hereto to the other party shall be deemed given when received (or upon attempted delivery if delivery is not accepted). Such notices shall be in writing and sent by registered or certified mail (return receipt requested) with the United States Postal Service addressed to the Parties at the following addresses:

To the State:            Railroad Planner  
New Hampshire Department of Transportation  
Bureau of Rail & Transit  
PO Box 483  
Concord, NH 03302-0483

To the Contractor:    Selden Houghton, President  
Vermont Rail System  
One Railway Lane  
Burlington, VT 05401  
(802) 658-2550

**1.16. AMENDMENT.**

1.16.1 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.

**1.17. CONSTRUCTION OF AGREEMENT AND TERMS.**

1.17.1 This Agreement shall be governed, interpreted, and 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. Any actions arising out of this Agreement shall be brought and maintained in New Hampshire Superior Court which shall have exclusive jurisdiction thereof.

**1.18. THIRD PARTIES.**

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

**1.19. HEADINGS.**

1.19.1 The headings throughout this 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.

**1.20. DISPUTE RESOLUTION.**

1.20.1 The Contracting Officer shall be the State's representative. In the event of any dispute concerning this Agreement, the interpretation of this Agreement and the resolution of any disputes by the Contracting Officer shall be final for the State but not Contractor.

**1.21. SEVERABILITY.**

1.21.1 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.

**1.22. ENTIRE AGREEMENT.**

1.22.1 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 Facilities consists of the state-owned portion of the Concord-Lincoln Railroad Line, as more particularly described as follows:

Being all the property of every kind and description, real, personal and mixed that was acquired by the State of New Hampshire from the Boston and Maine Corporation, Debtor, and owners unknown by condemnation as described in the Declaration of Taking filed with the Merrimack County Superior Court dated October 30, 1975, as amended by Order of the Merrimack County Superior Court dated February 27, 1980, and any other amendments thereto, and recorded at the Merrimack County Registry of Deeds on February 29, 1980, Book 1336, Pages 893 through 904, the Belknap County Registry of Deeds, Book 786, Pages 69-80, and the Grafton County Registry of Deeds, Book 1393, Pages 586-597, and said demised property being located in the Cities of Concord, Franklin and Laconia and the Towns of Canterbury, Northfield, Tilton, Belmont, Gilford, Meredith, New Hampton, Ashland, Bridgewater, Plymouth, Campton, Thornton, Woodstock and Lincoln, Counties of Merrimack, Belknap and Grafton; on file in the records of the New Hampshire Department of Transportation, Bureau of Rail & Transit. Also, being all the property and of every kind and description, real, personal and mixed acquired by the State of New Hampshire Department of Transportation from the Boston and Maine Corporation by

Release Deed and recorded on November 24, 1998, in the Merrimack County Registry of Deeds, Book 2128, Pages 1749 to 1753, and said demised property located in the City of Concord, County of Merrimack; on file in the records of the New Hampshire Department of Transportation, Bureau of Rail & Transit. Said property specific to this Agreement includes all real property, railroad and other fixtures and devices on the railroad corridor formerly owned by the Boston and Maine Corporation, from MP C 0.58 (Engineering Station 25+69.4), in Concord to MP C 21.90 (Engineering Station 1152+07) in Tilton, as shown on the plans of Federal Valuation Survey dated June 30, 1914, Section 21, Sheets 36 to 57, on file in the records of the New Hampshire Department of Transportation, Bureau of Rail and Transit.

Said property specific to this Agreement includes all real property, railroad and other fixtures and devices on the railroad corridor formerly owned by the Boston and Maine Corporation, from MP C 0.58, Engineering Valuation Section 21, Sheet 36, Station 25+69.4 in Concord, NH to MP C 21.90, Valuation Section 21, Sheet 57, Station 1152+07 in Tilton on the state-owned Concord to Lincoln Railroad Line.

2.1.1 The Contractor shall permit the Plymouth & Lincoln Railroad Corporation, its successors and assigns, to access the Silver Lake Road at-grade crossing, including in the limits of the Line, for entry onto the Concord-Lincoln Railroad Corridor north of the crossing for maintenance of way and inspection purposes. To maintain the integrity of the separation of the operations of each railroad, the Contractor shall provide by the lining and locking of the mainline switch at MP C 21.81 (Station 1146+78) to the reversed or diverting position with a M&G/NEGS lock. The operation of the switch will be governed by the Contractor.

2.2 Upon written agreement signed by the Contractor and the Contracting Officer, the Contracting Officer and the Contractor may at any time reduce the scope of Facilities subject to this Agreement.

2.3 As permitted by RSA 228:67 and other applicable state law, the State may sell portions of the Facilities which in the reasonable judgment of the Contracting Officer, are not needed for present or future railroad operations. If the State sells any portion of the Facilities during the term of this Agreement, such portion shall automatically be excluded from the Facilities described in Section 2.1 and shall no longer be subject to this Agreement.

2.4 Facilities

2.4.1 The Facilities remain the property of the State, which reserves to itself the right to grant easements, contracts, leases, and other rights therein which do not, in the reasonable judgment of the Contracting Officer, conflict with the operations described in Article III of this Agreement. The State reserves to itself all rents, fees and revenues derived from such grants.

2.4.2 To the extent permitted by law, the Contracting Officer expressly reserves the right to authorize public outdoor recreational activity, including but not limited to recreational trails and the activities set forth in RSA 212:34, 1(c), on any portion of the Facilities during the term of this Agreement which do not, in the reasonable judgment of the Contracting Officer after consultation with the Contractor, conflict with the operations described in Article III of this Agreement. If the Contractor, after consultation with the Contracting Officer, believes that recreational use conflicts with the operations described in Article III of this Agreement, the Contractor shall provide written notice to the Contracting Officer describing with particularity the conflict between such operations and recreational use. In the event public recreational use is authorized by the Contracting Officer, the Contracting Officer shall provide written notice to the Contractor and the parties shall cooperate and supply any necessary information to support such recreational use and ensure that the use does not interfere with the operations described in Article III of this Agreement.

Without limiting the foregoing the Parties contemplate that the year-round recreational trail use on the Facilities, pursuant to the terms of one or more municipal rail trail agreements with the Towns of Northfield, Belmont, and Tilton, will continue during the term of this Agreement pursuant to preexisting recreational agreements authorized by the State, by and through its agencies.

2.4.3 The State reserves to itself all rents, fees, and revenues derived from any authorized public recreational usage. The State and the Contractor, as owner and occupant of the Facilities, respectively, shall be entitled to and avail themselves of any and all recreational immunities under the law, including but not limited to RSA 508:14 and RSA 212:34.

- 2.5 The Contractor shall make no alterations to the Facilities, both real and personal, or construct any building or make other improvements on the Facilities beyond normal maintenance without the prior written consent of the Contracting Officer. Such consent shall not be unreasonably withheld, delayed or conditioned. All alterations, changes, and improvements built, constructed, or placed on the Facilities by the Contractor, shall unless otherwise provided by written agreement between the Contracting Officer 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 or scrap materials generated as a part of normal Maintenance of Way shall become the property of the Contractor, unless otherwise indicated in writing by the Contracting Officer.
- 2.6 If requested by the Contractor, and at the Contracting Officer's option, 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. If accepted by 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 Contracting Officer's satisfaction. Any such insurance shall comply with Section 1.13.2 and the Contractor shall provide proof of such insurance to the Contracting Officer in accordance with Section 1.13.3.



## **2.7. LEASING TO SHIPPERS & RECEIVERS.**

- 2.7.1 The Contractor, with prior written approval by the Contracting Officer, may lease portions of the Facilities to others, including shippers and receivers, for railroad-related purposes, including but not limited to the construction and operation of railroad sidings, loading platforms, transloading facilities, and other railroad-related facilities. The Contracting Officer shall not unreasonably withhold, delay nor condition such approval. In no event shall the Contracting Officer approve a lease pursuant to Section 2.7 if the completion date of such lease is later than the Completion Date of this Agreement.
- 2.7.2 Leases pursuant to Section 2.7 shall be subject to appropriate local taxes, and revenues from such leases shall be included in the Contractor's Gross Operating Revenue.
- 2.7.3 To obtain the Contracting Officer's approval, the Contractor shall provide to the Contracting Officer written notice of its desire to lease a portion of the Facilities and shall submit a copy of the proposed terms of the lease between the Contractor and the Contractor's lessee. Leases under this Section 2.7 shall be subject to this Agreement and this Agreement shall be incorporated by reference into any such lease.
- 2.7.4 In the event the Contractor seeks to lease a portion of the Facilities pursuant to this Section 2.7, the Contractor agrees to require the lessee to agree to the following terms:
- a. **INSPECTION.** The State has the right to enter the leased premises in the case of emergency, or to inspect it or make necessary repairs, alterations, improvements, or to exhibit the leased premises to others, or whenever necessary to determine the condition of the leased premises.
  - b. **INDEMNIFICATION.** Unless otherwise exempted by law, the Contractor's lessee shall defend, indemnify and hold harmless the State, its officers and employees, from and against any and all claims, demands, losses, liabilities, penalties, fines, judgments, awards, and costs for any personal injury or property damages, or other claims asserted against the State, its officers or 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 lessee, its employees, or subcontractors, including but not limited to negligence, reckless or intentional conduct. 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 shall survive the termination of the lease between the Contractor and the Contractor's lessee.

- c. **MODIFICATIONS.** The Contractor's lessee shall submit to the Contracting Officer a plan showing any proposed changes to the leased premises and shall obtain approval and permission from the Contracting Office prior to performing any work or modifications to the leased premises or its operations. In the event the plan is approved by the Contracting Officer, the Contractor's lessee shall apply for and obtain all necessary State, federal, and local permits or approvals prior to performing any work or modifications to the leased premises.
- d. **INSURANCE.** The Contractor's lessee shall, at its sole expense, maintain the following minimum insurance requirements:
  - i. **Commercial General Liability:** \$1,000,000 each occurrence and \$2,000,000 general aggregate. The General Liability policy shall include Railroad Endorsement CG 2417 or its equivalent. The State of New Hampshire, its agencies, and its agents and employees shall be named as additional insureds.
  - ii. **Commercial Automobile Liability Insurance** covering all motor vehicles including owned, hired, borrowed, and non-owned vehicles. Limits of Liability: \$1,000,000 Combined Single Limit for bodily Injury & Property Damage.

**Railroad Protective Public and Property Damage Liability:** \$1,000,000 each occurrence and \$2,000,000 in the aggregate.

**Workers' Compensation Insurance** in the amount as required by N.H. RSA 281-A.

The policies described in this Section 2.7.4 herein shall be on policy forms and endorsements approved for use in the State of New Hampshire by the New Hampshire Department of Insurance and issued by insurers licensed in the State of New Hampshire.

Notwithstanding the foregoing, the Contracting Officer, in her sole discretion and taking into account the scope and character of the lessee's operations, may increase the required liability insurance requirements.

- 2.7.5 The Contracting Officer reserves the right to require the Contractor and the Contractor's lessee to include additional terms beyond those set forth in Section 2.7.4 in any proposed lease if the Contracting Officer, in the Contracting Officer's reasonable discretion, determines that such terms are necessary after evaluating the nature of the lessee's proposed use of the Facilities.

## ARTICLE III - OPERATIONS

### 3.1 SERVICE AREA.

3.1.1 The Contractor shall, between the Effective Date and the Completion Date, manage and operate Service, pursuant to Surface Transportation Board Decision Docket No. FD 36405, in the area from MP C 0.58 in Concord to MP C 21.90 in Tilton, said area being that property described in 2.1 above. The Contractor shall be solely responsible for all phases and requirements of its operation, including, but not limited to, dispatching of trains, assignment of power and cars, scheduling, workforce, equipment, advertising, and marketing. The Contractor may charge a reasonable fee for operations on the Service Area by other railroad operators.

3.1.1.1 Operating Service on other sections of the state-owned Concord – Lincoln Railroad Corridor. The Contractor is also an assigned Common Carrier pursuant to Surface Transportation Board Decision Docket No. FD 36405 and shall operate Service from MP C 21.90 in Tilton to MP P 21.30 in Lincoln (Exhibit F). Prior to commencing Service in the area from MP C 21.90 in Tilton to MP P 21.30 in Lincoln, the Contractor and Plymouth & Lincoln Railroad, or current operator, shall execute a letter of understanding or other similar document to provide clear delegation of the responsibilities for dispatching of trains, maintenance of track, and other operating details. Such agreement shall be provided to the Contracting Officer for review and shall include any terms or conditions that the Contracting Officer may reasonably require.

3.1.1.2 In the event that the Contractor operates between MP C 21.90 in Tilton, NH and MP P 21.30 in Lincoln, NH, in accordance with its STB permissions, any revenue derived therefrom shall be subject to the five percent (5%) User Fee as set forth in Section 4.3. Further, to the extent that the Contractor operates between MP C 21.90 in Tilton, NH and MP P 21.30 in Lincoln, NH, the Contractor shall pay the State no less than twenty percent (20%) of the proportion of revenue derived from such operations towards Maintenance of Way or, with the written approval of Contracting Officer and the Plymouth and Lincoln Railroad, its successors or assigns, contribute equivalent in-kind maintenance services. This obligation is separate from and in addition to the Annual Maintenance Requirement set forth in Section 3.2.3.1. Payment pursuant to this section shall be made payable to "Treasurer, State of New Hampshire" and shall be sent in accordance with Section 4.1.1. Any amounts paid to the State under this section shall exclusively be deposited into the Special Railroad Fund established by RSA 228:68 and shall only be expended in accordance with RSA 228:69. Failure to make payments pursuant to this section shall constitute an Event of Default pursuant to Section 1.7 of this Agreement. By way of example only, if Contractor earns revenue of \$10,000 from a 72.3 mile freight move where 70.5% of the move is north of Tilton (21.3 miles on the NEGS and 51.0 miles over the P&L), Contractor will pay the State a Maintenance of Way Fee of 20% of (70.5% of \$10,000), totaling \$1,409.99, or

contribute an equivalent amount of in-kind maintenance services if Contracting Officer so approves. The Contractor will also pay a User Fee of 5% (\$500 total per the example). See the table below to illustrate this mileage-based proration of miles, gross revenue, User Fee, and maintenance for a sample freight move from Concord to Lincoln that includes the full STB limits of the Contractor.

**REVENUE EXAMPLE**

**Miles Proration  
(Freight move using entire limits of Contractor's STB limits  
on state-owned Concord-Lincoln Railroad Corridor)**

	<b>Total Concord-Lincoln</b>	<b>Concord - Tilton</b>	<b>Tilton - Lincoln</b>
<b>Mile Posts</b>	MP C 0.58 - MP P 21.30	MP C 0.58 - MP C 21.90	MP C 21.90 - MP P 21.30
<b>Miles</b>	72.3	21.3	51.0
<b>% of Miles</b>	100.0%	29.5%	70.5%
<b>Gross Revenue</b>	\$10,000.00	\$2,950.05	\$7,049.95
<b>User Fee (5%)</b>	\$500.00	\$147.50	\$352.50
<b>MOW (20%)</b>	\$2,000.00	\$590.01	\$1,409.99

The Contractor shall include a report of maintenance expenses for any operations it undertakes between MP C 21.90 in Tilton, NH and MP P 21.30 in Lincoln, NH in accordance with the Report and Payment Schedule (Exhibit A).

- 3.1.2 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 and receivers and customary in Contractor's industry.
- 3.1.3 The Contractor will endeavor to negotiate mutually acceptable rates and terms of service with shippers and receivers. and commence Service.
- 3.1.4 Notwithstanding any other provisions of this Agreement, the Contractor agrees to allow temporary Service by others in the event, that after consultation with the Contractor, 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 and such temporary service occurs at no expense to Contractor. 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 Service.
- 3.1.5 The Contractor will conform to the State's "Guidelines Governing the Operation of On-Track Equipment on State-owned Railroad Lines," and will incorporate these Guidelines into its current Timetable.

3.1.6 The Contractor shall immediately report all incidents as required by RSA 367:56 and the "Rail Safety Section Notification Requirements" attached hereto as **Exhibit B** and incorporated herein.

### 3.2. MAINTENANCE.

3.2.1 The Contractor shall at all times during the term of this Agreement keep and maintain all Facilities in a reasonably safe condition for the use intended.

3.2.2 **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 ensure that equipment is in compliance with all applicable FRA regulations. State-owned equipment shall be returned to the State in as good condition as when received except for ordinary wear and tear.

3.2.3 **FACILITIES** – The Contractor shall be responsible for the proper upkeep and routine maintenance of the Facilities ("Maintenance of Way"). Maintenance of Way shall include, but not be limited to:

- a. Track maintenance, which shall include but not be limited to maintenance of rails, ties, and other track materials ("OTM"), track alignment, and all other maintenance and repairs necessary to preserve integrity of track surface and structure
- b. Bridge maintenance, as further described in Section 3.2.4, and which shall include all maintenance and repairs necessary to preserve the integrity of railroad owned bridge structures (excludes overhead bridges (OH) and bridges maintained under separate agreements). Bridge list, Exhibit E attached.
- c. Brush, tree and vegetation control (debris may remain unless, in the reasonable determination of the Contracting Officer, is deemed a threat to rail operations, drainage systems, or adjacent properties; in these instances, the Contractor shall remove or chip).
- d. Drainage systems and drainage structures
- e. All operating signals to be kept in good operating condition
- f. Crossing and switches to be kept in good operating condition. The Contractor shall provide a flagger during the passage of trains or other on-track movements for the protection of any crossing protected by signals where the signal is not operating for any reason.
- g. Snow removal and winter maintenance when needed for Service.
- h. Railroad signage, including ENS Signs (all crossings) and roadway at grade crossing signage (excludes private crossings as identified by NHDOT) consistent with the latest edition of MUTCD
  - Said railroad signage shall be for the installation of new signage and/or the replacement of existing signage when damaged, missing or as otherwise required.
- i. All other maintenance requirements set forth in Section 3.2

3.2.3.1 The Contractor shall be responsible to perform all work and routine maintenance necessary to maintain the Line at FRA Class 1 Track Safety Standards or better. In any event, Contractor will expend no less than twenty (20%) percent of the first \$1,250,000 of Annual Gross Operating Revenue on Maintenance of Way, and fifteen percent (15%) thereafter, exclusive of inspections ("Annual Maintenance Requirement"), during each Operating Year of this Agreement. The Contractor shall include a report of maintenance expenses in accordance with the Report and Payment Schedule (**Exhibit A**). In the event the Contractor exceeds the Annual Maintenance Requirement for an Operating Year, maintenance expenditures may be carried forward, at the Contracting Officer's sole discretion, and applied to the next Operating Years' Annual Maintenance Requirement. The Contractor's performance shall satisfy all obligations required of the owner of a railroad, set forth in Part 213 of the FRA Track Safety Standards (49 C.F.R §§ 213-213.369). Along with the Part 213 and Part 237, emphasis shall also be placed on railroad system drainage, unblocking culverts and ditch line routine maintenance to maintain storm flows. In the event the Contractor does not meet the Annual Maintenance Requirement for an Operating Year, the Contractor shall pay the remaining unspent portion of the Annual Maintenance Requirement to the State within sixty (60) days after the end of the Operating Year. The payment shall be made payable to "Treasurer, State of New Hampshire" and shall be sent in accordance with Section 4.1.1. Any amounts paid to the State under this section shall exclusively be deposited into the Special Railroad Fund established by RSA 228:68 and shall only be expended in accordance with RSA 228:69. Failure to make payments pursuant to this section shall constitute an Event of Default pursuant to Section 1.7. of the Agreement.

### 3.2.4 STRUCTURES (BRIDGES & CULVERTS)

3.2.4.1 The Contractor shall be responsible for routine maintenance of structures and shall make needed repairs necessary to keep structures safe for their intended use in providing Service. Said routine maintenance shall include, but not be limited to, track, guard rails, bridge track timbers, OTM, the cleaning and removal of debris (bearings, flanges, bottom chords etc.), lubrication of bearing surfaces, scour and erosion protection and vegetation control within the general vicinity of the structures (brush and trees) and OTM.

3.2.4.2 The State as track and bridge owner and the Contractor as operator will be subject to the latest provisions of 49 CFR Part 237 - Bridge Safety Standards, and incorporated herein by reference. If the State is not able to pay the cost of performing the inspections required under 49 CFR Part 237 due to insufficient funds in the Special Railroad Fund established by RSA 228:68, the State shall provide written notice to the Contractor, and upon receipt of such notice, Contractor may pay the cost of such inspections in order to operate Service and meet the requirements of 49 CFR Part 237. The Contractor shall have no right to recover from the State the costs of performing any such inspections. Notwithstanding any language in Section 3.4.3.1 to the contrary, Contractor's cost for inspections under

this Section 3.4.4.2 shall be credited towards Contractor's Annual Maintenance Requirement and at the sole discretion of the Contracting Officer such credit may carry forward to be applied to the next Operating Year's Annual Maintenance Requirement. The Contractor shall comply with the State's Bridge Management Program incorporated herein by reference and made a part hereof. In the event that the State is unable to pay for the cost of performing inspections under this Section and the Contractor elects not to pay such inspection costs, the Contractor shall have no claim against the State for any delay or disruption to the Contractor's operations resulting, in whole or in part, from the State's inability to pay and the State shall have no claim against Contractor or grounds to terminate this Agreement for any related delay or disruption to Service, including the minimum annual service obligations of Section 1.8.2.

- 3.2.5 In the event a Major Maintenance Expenditure is required the Contractor shall assist in all necessary repairs and shall be responsible for 10% of each occurrence defined as a Major Maintenance Expenditure, but be limited in its direct financial contribution to ten thousand dollars (\$10,000.00) in the aggregate per Operating Year. However, the Contractor waives any claims to damages for any delays in repairing or reopening the Lines after such an occurrence and the State reserves to itself the decision whether, when and how such repairs and reopening will be done, in the reasonable discretion of the Contracting Officer.
- 3.2.6 In the event a Major Maintenance Expenditure is required as a result of Contractor's failure to perform routine and proper maintenance as required in this Agreement, Contractor shall be responsible for the full cost of repairs.
- 3.2.7 If the Contractor fails to perform maintenance as required in Section 3.2, the State shall give written notice of such failure in accordance with Section 1.14. Failure to perform maintenance in accordance with Section 3.2 constitutes a material breach of this Agreement.
- 3.2.8 If within thirty (30) days of receipt of such notice, Contractor has not completed or taken steps to Contracting Officer's satisfaction to perform the required maintenance work, the State reserves the right to perform such maintenance work at Contractor's sole cost and expense.

### **3.3. INSPECTION.**

- 3.3.1 The Contractor shall patrol the Line and formally inspect the track in accordance with FRA Track Safety Standards subpart F (49 C.F.R § 213.233) and record the inspection per 49 C.F.R. §213.241. The Contractor shall submit an inspection report within thirty (30) days after each inspection. Should any deviations from the requirements be found, the Contractor shall take immediate appropriate remedial action and provide written notice to the Contracting Officer of said remedial action.

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 and shall be granted reasonable access to the operations and the Facilities for this purpose. The Contracting Officer shall have the authority to direct the Contractor through its Operations Manager or his designee to remedy deficiencies from the requirements of FRA Part 213 Track Safety Standards as they apply to those classifications established in this Agreement.

3.3.3 The Contracting Officer may take any action, including the field inspection of any project site and the inspection of the Facilities, equipment, and all books and records of the Contractor relating to Service on the Line and of any contractor or Subcontractor relating to any project or task accomplished under this Agreement. The Contractor shall authorize access dates and times for these inspections.

3.3.3.1 The purpose of such inspection shall be, but is not 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 Facilities, provided that such projects do not unreasonably interfere with the 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 construction contract. Any contract under this Section 3.4.1 shall require certain conditions, including, without limitation, minimum insurance requirements, indemnity obligations, and cooperation with the Contractor. The Contracting Officer shall have the right, after consultation with Contractor, to adjust trips not published in the regular railroad schedule to accommodate the construction.

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 Facilities will be safeguarded. The Contractor may require a flagger and/or railroad inspector at a construction site if the Contractor deems it



necessary, the cost of said services to be paid by the constructing entity to the Contractor.

3.4.3 The Contractor may construct sidings to new shippers and receivers on the Line. Any and all costs and expenses related to the construction of sidings and appurtenances thereto shall be the responsibility of the shipper or receiver. The responsible shipper or receiver shall be billed for all costs and expenses after the Contracting Officer reviews and approves the proposed plans, including, but not limited to location, alignment, materials, and safety appliances.

3.4.4 Any expenditures by the State pursuant to this Section 3.4 shall not diminish the obligation of the Contractor pursuant to Section 3.2.3.1 or any other provision of this Agreement.

### **3.5. FREIGHT TARIFFS.**

3.5.1 The Contractor shall endeavor to negotiate mutually acceptable and industry standard rates and terms of service with shippers. Once the Contractor has negotiated such mutually acceptable rates, upon request the Contractor shall make the Contractor's portion of the agreed upon rates available to the Contracting Officer for confidential review. All such confidential information provided by the Contractor will be kept confidential to the extent allowed by law, including NH RSA 91-A. The Contracting Officer or the State may endeavor to assist in mediation, however the STB shall be the mediator and arbitrator of freight rates.

### **3.6. FORCE MAJEURE.**

3.6.1 In no event shall any party be deemed in default of this Agreement for any loss, damage, injury, delay, failure or inability to meet all or any portion of its obligation caused by or arising from any event beyond its reasonable 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 Effective Date of this Agreement; by flood, natural disaster, or by acts of God; by strikes or other labor trouble; by explosions, fires, acts of war, terrorism, or vandalism until such events are remedied.

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

### **4.1. PAYMENTS AND REPORTING.**

4.1.1 The Contractor shall make User Fee payments and submit reports required under this Agreement directly to:

New Hampshire Department of Transportation  
Bureau of Rail & Transit  
Railroad Planner  
7 Hazen Drive  
P.O. Box 483  
Concord, NH 03302-0483

- 4.1.2 In addition to mailing reports in accordance with Section 4.1.1, the Contracting Officer may require Contractor to also submit electronic copies of all reports required under this Agreement. If electronic submission is required, the Contracting Officer shall provide to the Contractor the acceptable email address(es) to which reports can be submitted.

#### **4.2. SCHEDULE OF PAYMENTS AND REPORTS.**

- 4.2.1 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 Gross Operating Revenue is earned.
- 4.2.2 The Contractor shall be responsible for collecting revenues and for delivering freight traffic reports, marketing reports, revenue reports and maintenance cost reports in accordance with the Report and Payment Schedule (**Exhibit A**). The Contractor shall submit all reports required under this Agreement in a form and substance satisfactory to the Contracting Officer.

#### **4.3. USER FEE PAYMENT.**

- 4.3.1 The Contractor shall pay five (5%) percent of its Monthly Gross Operating Revenue as a User Fee to the State, payable to: "Treasurer, State of New Hampshire."
- 4.3.2 The Contractor may, where directed in writing by the Contracting Officer, deduct from User Fee payments the cost of specific expenditures including but not limited to Major Maintenance Expenditures.
- 4.3.3 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.

#### **4.4. ACCOUNTING AND AUDITS.**

- 4.4.1 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 that 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

IN WITNESS WHEREOF, we have hereunto set our hands on the 6<sup>th</sup> day of December, 2022.

**MERRIMACK & GRAFTON RAILROAD CORPORATION  
dba NEW ENGLAND SOUTHERN RAILROAD**

BY: [Signature]

TITLE: President

THE STATE OF Vermont, COUNTY OF Chittenden

On this 6<sup>th</sup> day of December, 2022, before me, Pamela Lefebvre the undersigned officer, personally appeared Elden Houghton 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.

[Signature]  
NOTARY PUBLIC  
Pamela D. Lefebvre  
Notary Public State of Vermont  
Commission #: 157.0008726  
Commission Expires: 1/31/2023

**THE STATE OF NEW HAMPSHIRE**

BY: [Signature]

TITLE: Commissioner

THE STATE OF NEW HAMPSHIRE, COUNTY OF MERRIMACK

On this 8<sup>th</sup> day of December, 2022, before me, Natasha Field the undersigned officer, personally appeared William Cass 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.

**NATASHA A. FIELD - Notary Public  
State of New Hampshire  
My Commission Expires May 1, 2024**  
[Signature]  
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 December 6, 2022.

OFFICE OF ATTORNEY GENERAL

BY: Samuel Burgess  
Attorney

APPROVED by Governor and Executive Council on \_\_\_\_\_, 2022, ITEM # \_\_\_\_.

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

**EXHIBIT A**  
**MERRIMACK & GRAFTON RAILROAD**  
**REPORT & PAYMENT DUE DATE SCHEDULE**

<b>JANUARY</b>		<b>DUE DATE</b>
Freight Operating Revenue	User Fees	March 1
Freight Revenue/Traffic Reports		March 1
<b>FEBRUARY</b>		<b>DUE DATE</b>
Freight Operating Revenue	User Fees	April 1
Freight Revenue/Traffic Reports		April 1
Marketing Report (Jan-June)		April 1
<b>MARCH</b>		<b>DUE DATE</b>
Freight Operating Revenue	User Fees	May 1
Freight Revenue/Traffic Reports		May 1
<b>APRIL</b>		<b>DUE DATE</b>
Freight Operating Revenue	User Fees	June 1
Freight Revenue/Traffic Reports		June 1
Marketing Report (Jan-June)		June 30
<b>MAY</b>		<b>DUE DATE</b>
Freight Operating Revenue	User Fees	July 1
Freight Revenue/Traffic Reports		July 1
MOW Report (Apr-June)		July 31
<b>JUNE</b>		<b>DUE DATE</b>
Freight Operating Revenue	User Fees	August 1
Freight Revenue/Traffic Reports		August 1
<b>JULY</b>		<b>DUE DATE</b>
Freight Operating Revenue	User Fees	September 1
Freight Revenue/Traffic Reports		September 1
<b>AUGUST</b>		<b>DUE DATE</b>
Freight Operating Revenue	User Fees	October 1
Freight Revenue/Traffic Reports		October 1
MOW Report (July-Sept)		October 31
<b>SEPTEMBER</b>		<b>DUE DATE</b>
Freight Operating Revenue	User Fees	November 1
Freight Revenue/Traffic Reports		November 1
<b>OCTOBER</b>		<b>DUE DATE</b>
Freight Operating Revenue	User Fees	December 1
Freight & Passenger Revenue Reports		December 1
Marketing Report (July-Dec)		December 31
<b>NOVEMBER</b>		<b>DUE DATE</b>
Freight Operating Revenue	User Fees	January 1
Freight Revenue/Traffic Reports		January 1
MOW Report (Oct-Dec)		January 31
<b>DECEMBER</b>		<b>DUE DATE</b>
Freight Operating Revenue	User Fees	February 1
Freight Revenue/Traffic Reports		February 1

Initial \_\_\_\_\_

**NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION**  
**BUREAU OF RAIL & TRANSIT**  
**RAIL SAFETY SECTION**  
**NOTIFICATION REQUIREMENTS**

**INCIDENTS INVOLVING RAILROADS (RSA 367:56)**

NOTIFICATION **BY THE RAILROAD** IS REQUIRED FOR:

1. All incidents involving a fatality.
2. All grade crossing accidents.
3. All grade crossing signal system activation failures as defined in 49 CFR Part 234.5.
4. All incidents involving the leakage or spillage of material as a result of railroad operations or incidents.
5. All derailments involving cars containing commodities required to be placarded by 49 CFR Part 172
6. Derailments involving:
  - More than one (1) car, (include a power unit as a car), or
  - The car is not in the normal upright operating position, or
  - The car has traveled more than 200 feet derailed, or
  - The car has traveled through a grade crossing derailed.
7. Any incident involving the movement of on-track equipment, Motorcars, or Rail-Bikes that results in personal injury to a non-railroad employee.

**THE NOTIFICATION NUMBERS ARE:**

Monday – Friday  
0800 - 1600 hours

Railroad Inspector: (603) 271-2448 (office phone)  
 Bureau of Rail & Transit: (603) 271-2468  
 Bureau Administrator: (603) 271-3497  
 Railroad Operations Engineer: (603) 271-3465

Nights, weekends and holidays

NH Transportation Systems Management & Operations Systems (TSMO) 603-271-6862

- TSMO will contact the Railroad Inspector, Bureau Administrator, Railroad Operations Engineer and State Police as necessary and in accordance with written work instructions that include after-hours procedures.

Note: The Railroad Inspector must be contacted and/or a voicemail message left for him. If staff is unable to speak directly with Railroad Inspector, after leaving a message for the Inspector, proceed with contacting the Bureau Administrator and then Railroad Operations Engineer. Current staff (as of 10/07/2022: Railroad Inspector—Anthony Murphy, Bureau Administrator—(Division Director - Shelley Winters) & Railroad Operations Engineer – Chuck Corliss)

**THE INFORMATION NEEDED WILL BE:**

1. Name of the railroad
2. Name of the caller and call back number
3. Location of the incident, town, street, station, and ENS sign #etc.
4. Any fatalities or personal injuries
5. Any hazardous materials involved

**INCIDENTS THAT INVOLVE HAZARDOUS MATERIALS, PLEASE CALL 911, NOTIFY THE LOCAL FIRE DEPARTMENT. YOU ARE ALSO REQUIRED TO NOTIFY THE HAZARDOUS MATERIALS UNIT AT 1-800-346-4009 AND THE N.H. STATE POLICE DISPATCH AT 603-271-3636.**

Initial \_\_\_\_\_

# Exhibit C

Concord to Lincoln  
Railroad Corridor

CSX

I-393

South End of  
"Line" MP C 0.58  
Sta 25+69.4

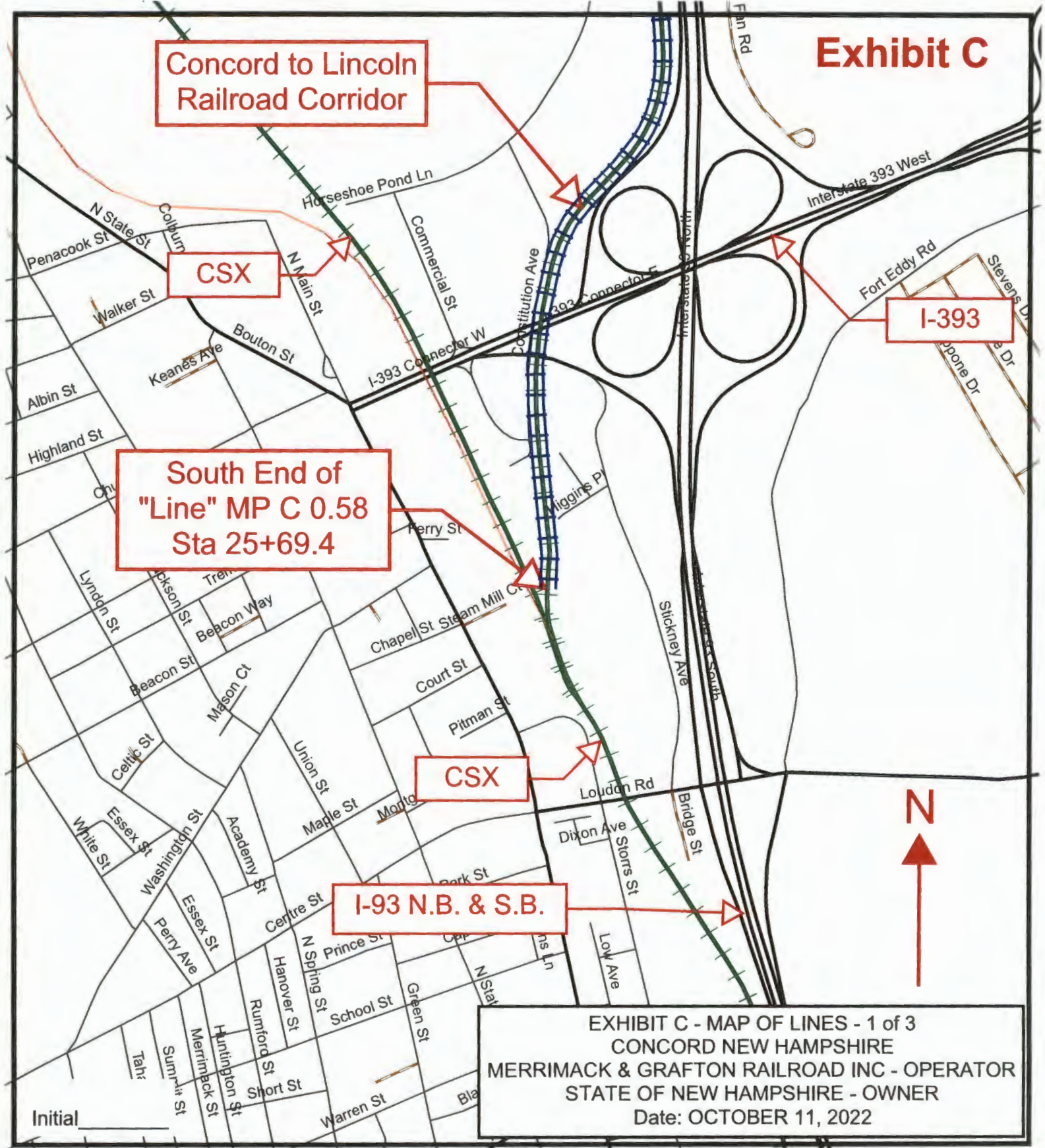
CSX

I-93 N.B. & S.B.

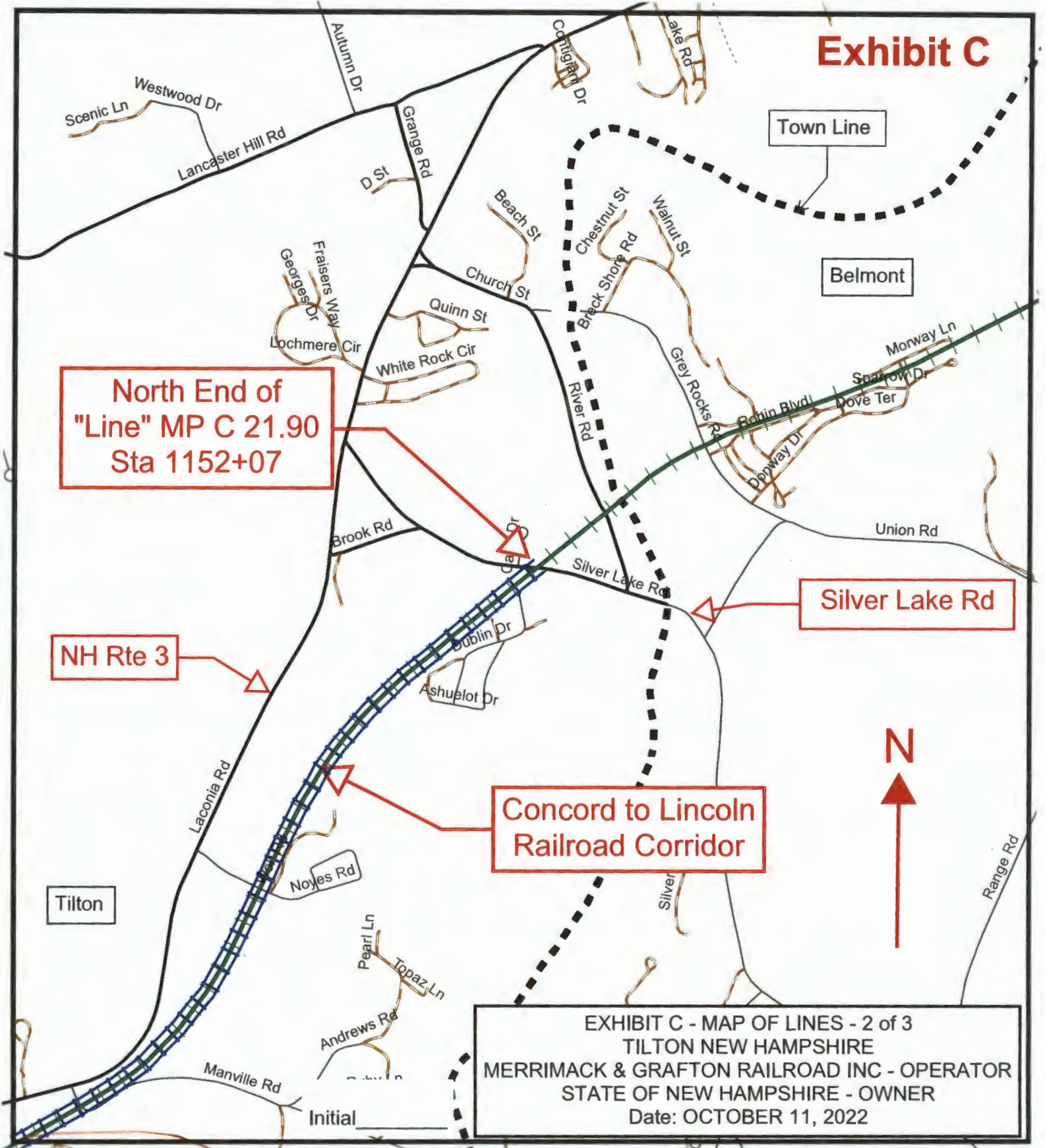


EXHIBIT C - MAP OF LINES - 1 of 3  
CONCORD NEW HAMPSHIRE  
MERRIMACK & GRAFTON RAILROAD INC - OPERATOR  
STATE OF NEW HAMPSHIRE - OWNER  
Date: OCTOBER 11, 2022

Initial



# Exhibit C



North End of  
"Line" MP C 21.90  
Sta 1152+07

NH Rte 3

Concord to Lincoln  
Railroad Corridor

Silver Lake Rd

Tilton

Belmont

Town Line

EXHIBIT C - MAP OF LINES - 2 of 3  
TILTON NEW HAMPSHIRE  
MERRIMACK & GRAFTON RAILROAD INC - OPERATOR  
STATE OF NEW HAMPSHIRE - OWNER  
Date: OCTOBER 11, 2022



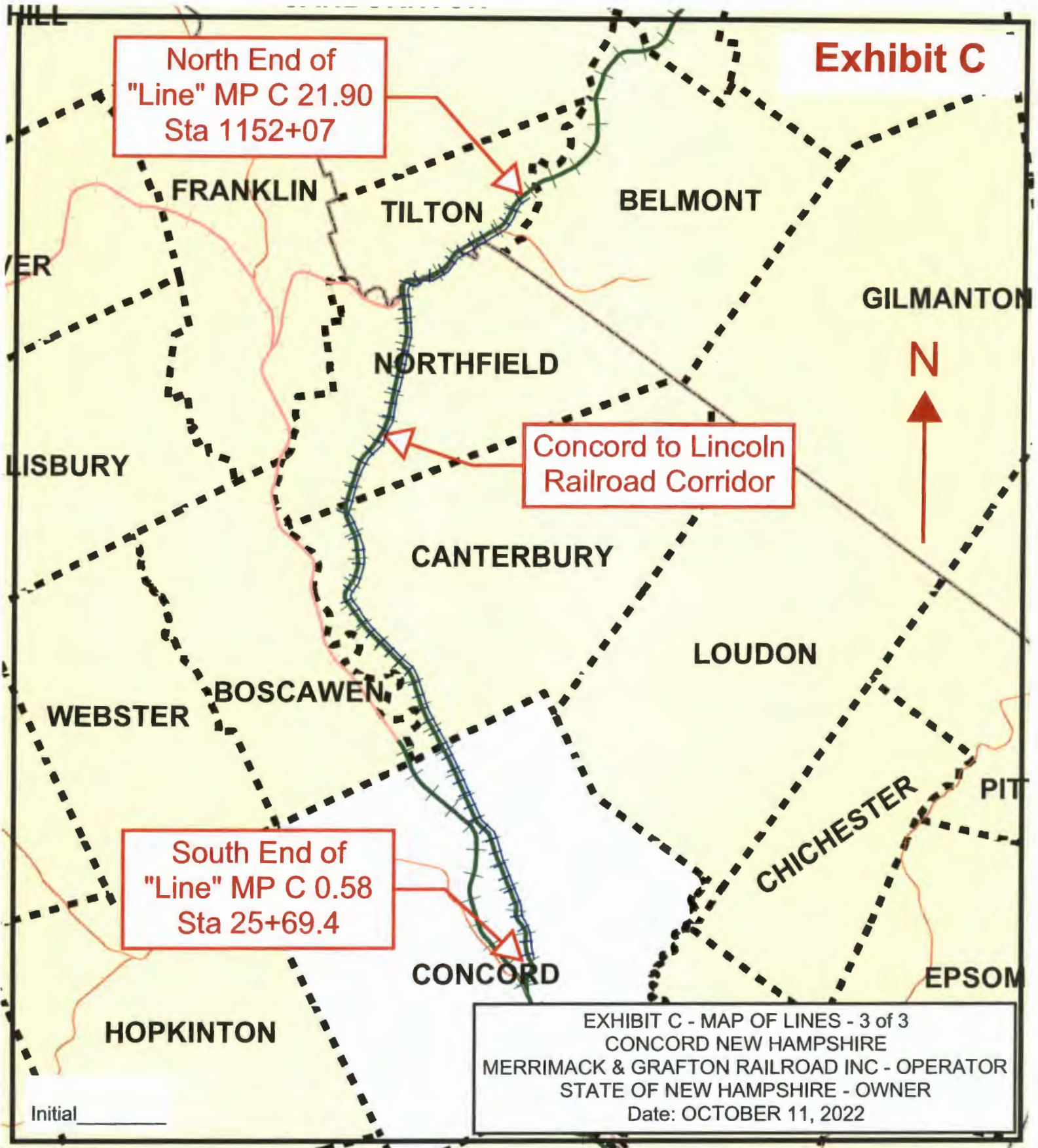
# Exhibit C

North End of  
"Line" MP C 21.90  
Sta 1152+07

Concord to Lincoln  
Railroad Corridor

South End of  
"Line" MP C 0.58  
Sta 25+69.4

EXHIBIT C - MAP OF LINES - 3 of 3  
CONCORD NEW HAMPSHIRE  
MERRIMACK & GRAFTON RAILROAD INC - OPERATOR  
STATE OF NEW HAMPSHIRE - OWNER  
Date: OCTOBER 11, 2022



Initial \_\_\_\_\_

State-owned Concord-Lincoln Corridor  
 CONCORD - TILTON  
 MP C 0.58 to MP C 21.90

Maintenance of Way (MOW)									
Merrimack & Grafton dba New England Southern Railroad - (802) 658-2550									
<b>Daily Report</b>									
Date:									
Supervisors Name:									
Identify equipment utilized and number of hours used.									
Equipment:	Hours:	Rate	Total	Personnel Name:	Hours:	Rate	OT/Rate	Total	
Locomotives									
MOW RR Cars									
Track Equipment									
Vehicles									
Pickup Truck									
HiRail Truck									
Dump Truck									
Other Equipment:	Hours:			Materials:	Qty:	Rate	Total		
Misc. Equipment									
Work Undertaken:				Contractors:					Total
Location:	Description								

**NEW ENGLAND SOUTHERN RAILROAD****BRIDGE LIST**

7 July 2021

**Concord Subdivision**

<b>BRIDGE</b>	<b>SPAN</b>	<b>TYPE</b>	<b>LENGTH</b>	<b>CROSSING</b>	<b>BUILT</b>
1.51	1-10	TPT	110'-5"	Wattanutmon Brook	1931
1.54	1-12	TPT	134'-5"	Access Road	1931
1.72	1-3	TRT	134'-2"	Merrimack River	1907
2.93	1	Timber Stringers	8'-6"	Bowen Brook	
5.20	1	Stone Arch	14'-0"	Hayward Brook	
6.40	OH	I-Beams & Conc.		Route 4 Ramp	
6.47	OH	I-Beams & Conc.		Route 4	
17.53	1	Rolled Beams	35'-0"	Williams Brook	
18.30	1-2	DPG	120'-6"	Winnepesaukee River	
18.48	OH	Prestressed Beam		School St.	
18.61	1-3	DPG	139'-0"	Winnepesaukee River	
18.78	1-5	DPG	182'-6"	Winnepesaukee River	1921
19.60	OH	DPG		I-93 NB and SB	
19.61	OH	DPG		I-93 NB and SB	
19.99	1-4	Timber Stringer	52'-6"	Hunt Brook	
Count: 10 Rail Bridges			931'-4"		

50283

SERVICE DATE – JUNE 5, 2020

DO

FR-4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36405]

Merrimack & Grafton Railroad Corporation—Change of Operators Exemption—Line of New England Southern Railroad Co.

Merrimack & Grafton Railroad Corporation (MGRC), a noncarrier, has filed a verified notice of exemption under 49 C.F.R. § 1150.31 to replace New England Southern Railroad Co. (NESR) as the operator of an approximately 73-mile railroad line (the Line) owned by the State of New Hampshire. According to MGRC, the Line extends from milepost P 21.30 at Lincoln, N.H., to milepost C 0.58 at Concord, N.H., where the Line connects with tracks owned by Pan Am Railways.

MGRC states that it is a wholly owned subsidiary of Trans Rail Holding Company (TRHC) and was formed for the purpose of becoming the new operator of the Line. According to MGRC, NESR currently provides common carrier rail operations over the Line pursuant to an Operating Agreement between NESR and the New Hampshire Department of Transportation (NHDOT). According to MGRC, on April 30, 2020, TRHC entered into an agreement to purchase some of the business assets of NESR. As part of that agreement, NESR will assign all of its rights and obligations under the Operating Agreement to MGRC, subject to NHDOT's approval, which MGRC states that it will obtain prior to the assignment.

This transaction is related to a concurrently filed verified notice of exemption in Trans Rail Holding Co.—Continuance of Control Exemption—Merrimack & Grafton Railroad, Docket No. FD 36403, in which TRHC seeks to continue in control of MGRC upon MGRC's becoming a Class III rail carrier.

MGRC certifies that the transaction does not involve any provision in any agreement that would limit future interchange with a third-party connecting carrier. MGRC certifies that its projected annual revenues as a result of this transaction will not result in its becoming a Class II or Class I rail carrier and further certifies that its projected annual revenues will not exceed \$5 million. Under 49 C.F.R. § 1150.32(b), a change in operator requires that notice be given to shippers. MGRC certifies that notice of the change in operator was provided to the shippers on the Line.

The transaction may be consummated on or after June 20, 2020, the effective date of the exemption (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than June 12, 2020 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36405, must be filed with the Surface Transportation Board either via e-filing or in writing addressed to 395 E Street, S.W., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on

MGRC's representative, Thomas W. Wilcox, GKG Law, P.C., 1055 Thomas Jefferson Street, N.W., Suite 500, Washington, DC 20007.

According to MGRC, this action is categorically excluded from environmental review under 49 C.F.R. § 1105.6(c) and from historic preservation reporting requirements under 49 C.F.R. § 1105.8(b)(1).

Board decisions and notices are available at [www.stb.gov](http://www.stb.gov).

Decided: June 2, 2020.

By the Board, Allison C. Davis, Director, Office of Proceedings.

# State of New Hampshire

## Department of State

### CERTIFICATE

I, David M. Scanlan, Secretary of State of the State of New Hampshire, do hereby certify that MERRIMACK & GRAFTON RAILROAD CORPORATION is a New Hampshire Profit Corporation registered to transact business in New Hampshire on May 14, 2020. I further certify that all fees and documents required by the Secretary of State's office have been received and is in good standing as far as this office is concerned.

Business ID: 842185

Certificate Number: 0005903071



IN TESTIMONY WHEREOF,  
I hereto set my hand and cause to be affixed  
the Seal of the State of New Hampshire,  
this 1st day of December A.D. 2022.

A handwritten signature in black ink, appearing to read "David M. Scanlan".

David M. Scanlan  
Secretary of State

**CERTIFICATE OF SECRETARY**

**MERRIMACK & GRAFTON RAILROAD CORPORATION**

This Certificate is delivered in connection with negotiations between the Merrimack & Grafton Railroad Corporation ("Company") and the State of New Hampshire ("State") of approximate even date herewith regarding a proposed Operating Agreement between the State and Company. The undersigned hereby attest and certify as follows:

1. That I, Mary Anne Michaels, hereby certify that I am the duly appointed Treasurer and Secretary of the Company at this date.
2. That the Company is duly organized, validly existing, and in good standing under and by the virtue of the laws of the State of New Hampshire.
3. Attached hereto as "Exhibit A" is a full, true and correct copy of the portion of Minutes from a meeting of the Board of Directors of the Company held on the 1st day of December, 2022, pursuant to the Bylaws of the Company at which a quorum of the Directors were present and voted to authorize Selden Houghton, President, to enter into contracts or agreements on behalf of the Company with the State and any of its agencies or departments and further is authorized to execute any documents which may in his judgment be desirable or necessary to effect the purpose this vote.
4. I hereby certify that said vote has not been revoked, modified, rescinded, repealed or amended and remains in full force and effect as of this date. I further certify that it is understood that the State of New Hampshire will rely on this certificate as evidence that the person listed above currently occupies the position indicated and that he has full authority to bind the Company. To the extent that there are any limits on the authority of any listed individual to bind the Company in contracts with the State of New Hampshire, all such limitations are expressly stated herein.

**IN WITNESS WHEREOF**, I have signed this Certificate as of the 6th day of December, 2022, for and on behalf of the Company.



Mary Anne Michaels, Secretary

STATE OF VERMONT  
COUNTY OF CHITTENDEN, SS

At Burlington, Vermont this 6th day of December, 2022, personally appeared the person identified in the foregoing certificate, known to me to be the Secretary of the corporation identified in the foregoing certificate, and acknowledged that she executed the foregoing certificate.

In witness whereof I hereunto set my hand and official seal.

Before Me



Notary Public

(My commission expires Feb. 10, 2023.)



**EXHIBIT A**  
**MINUTES OF MERRIMACK & GRAFTON RAILROAD CORPORATION**

Excerpt of Minutes of 1st day of December, 2022, Telephonic – Electronic  
Meeting Of the Board of Directors  
Of  
**MERRIMACK & GRAFTON RAILROAD CORPORATION**

---

**RESOLVED**, unanimously by the Board, that the Company enter into negotiations with the State of New Hampshire to amend or otherwise extend its Operating Agreement with the State of New Hampshire on such terms as may reasonably be negotiated.

**RESOLVED**, unanimously by the Board, that Selden Houghton, President, be authorized to enter into contracts or agreements on behalf of the Company with the State and any of its agencies or departments and further is authorized to execute any documents which may in his judgment be desirable or necessary to effect the purpose of this vote and the Corporation shall be bound thereby.



# CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)  
11/28/2022

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

**IMPORTANT:** If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER Phone: 800-722-7722 Fax 315-768-8403  
LINCOLN TRANSPORTATION INS BROKERS, INC.  
5920 AIRPORT ROAD  
ORISKANY NY 13424

CONTACT NAME: LINCOLN TRANSPORTATION INS BROKERS, INC.  
PHONE (A/C No. Ext): 800-722-7722 FAX (A/C No.): 315-768-8403  
E-MAIL ADDRESS: beth.garguilo@lincolnins.com

INSURED  
VERMONT RAILWAY, INC.  
Merrimack & Grafton Railroad Corporation  
1 RAILWAY LANE  
BURLINGTON VT 05401

INSURER(S) AFFORDING COVERAGE		NAIC #
INSURER A :	Indian Harbor Insurance Company	36940
INSURER B :	Liberty Surplus Insurance Corporation	10725
INSURER C :		
INSURER D :		
INSURER E :		
INSURER F :		

COVERAGES CERTIFICATE NUMBER: 19272 REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADOL INSR	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
A	GENERAL LIABILITY	Y		US00080902LI22A	11/01/22	11/01/23	EACH OCCURRENCE	\$ 15,000,000
	<input type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input checked="" type="checkbox"/> CLAIMS-MADE <input type="checkbox"/> OCCUR <input checked="" type="checkbox"/> COMP RAILROAD LIABILITY GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC						DAMAGE TO RENTED PREMISES (Ea occurrence) \$ MED. EXP (Any one person) \$ PERSONAL & ADV INJURY \$ 15,000,000 GENERAL AGGREGATE \$ 30,000,000 PRODUCTS - COMP/OP AGG \$ 30,000,000 \$	
	AUTOMOBILE LIABILITY						COMBINED SINGLE LIMIT (Ea accident)	\$
	<input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON-OWNED AUTOS						BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (per accident) \$ \$	
B	UMBRELLA LIAB	Y		XSHV867822-3	11/01/22	11/01/23	EACH OCCURRENCE	\$ 20,000,000
	<input checked="" type="checkbox"/> EXCESS LIAB <input type="checkbox"/> CLAIMS-MADE <input type="checkbox"/> DED <input type="checkbox"/> RETENTION \$						AGGREGATE \$ 40,000,000 \$	
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY						WC STATUTORY LIMITS	OTH ER \$
	ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below						E.L. EACH ACCIDENT	\$
							E.L. DISEASE-EA EMPLOYEE	\$
							E.L. DISEASE-POLICY LIMIT	\$

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 101, Additional Remarks Schedule, if more space is required)

The State of New Hampshire is additional insured to the above railroad liability coverage as required by written contract. Excess liability coverage is follow-form. Cancellation is with 90 days written notice with exception of 30 days written notice for non-payment of premium.

### CERTIFICATE HOLDER

### CANCELLATION

The State of New Hampshire

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

Attention:

AUTHORIZED REPRESENTATIVE

*Charles Kupiec*  
Charles Kupiec



# CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

12/07/2022

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

**IMPORTANT:** If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

<b>PRODUCER</b> Essex Agency Inc, 2 Railroad Street P.O. Box 239 Essex Junction VT 05453-0239	<b>CONTACT NAME:</b> Jennie Wafer <b>PHONE (A/C, No, Ext):</b> (802) 878-5334 <b>E-MAIL ADDRESS:</b> jwafer@essexagency.com	<b>FAX (A/C, No):</b> (802) 878-0852
	<b>INSURER(S) AFFORDING COVERAGE</b>	
<b>INSURED</b> VERMONT RAILWAY INC. and MERRIMACK & GRAFTON RAILROAD, COROP 1 RAILWAY LANE BURLINGTON VT 05401	<b>INSURER A:</b> Union Insurance Company	<b>INSURER B:</b> <b>INSURER C:</b> <b>INSURER D:</b> <b>INSURER E:</b> <b>INSURER F:</b>

**COVERAGES**

CERTIFICATE NUMBER: 22-23

REVISION NUMBER:

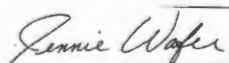
THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
	<b>COMMERCIAL GENERAL LIABILITY</b> <input type="checkbox"/> CLAIMS-MADE <input type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC OTHER:						EACH OCCURRENCE \$ DAMAGE TO RENTED PREMISES (Ea occurrence) \$ MED EXP (Any one person) \$ PERSONAL & ADV INJURY \$ GENERAL AGGREGATE \$ PRODUCTS - COMP/OP AGG \$ \$
A	<b>AUTOMOBILE LIABILITY</b> <input checked="" type="checkbox"/> ANY AUTO OWNED AUTOS ONLY <input type="checkbox"/> HIRED AUTOS ONLY <input type="checkbox"/> AUTOS ONLY <input type="checkbox"/> SCHEDULED AUTOS NON-OWNED AUTOS ONLY			CAA5176277-18	11/01/2022	11/01/2023	COMBINED SINGLE LIMIT (Ea accident) \$ 1,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ Uninsured motorist \$ 10,000
	<b>UMBRELLA LIAB</b> <input type="checkbox"/> OCCUR <b>EXCESS LIAB</b> <input type="checkbox"/> CLAIMS-MADE DED RETENTION \$						PROPERTY DAMAGE EACH OCCURRENCE \$ AGGREGATE \$ \$
	<b>WORKERS COMPENSATION AND EMPLOYERS' LIABILITY</b> ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	Y/N	N/A				PER STATUTE OTH-ER E.L. EACH ACCIDENT \$ E.L. DISEASE - EA EMPLOYEE \$ E.L. DISEASE - POLICY LIMIT \$

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

Vermont Railway, Inc and Merrimack &amp; Graafton Railroad Corporation are named insureds.

**CERTIFICATE HOLDER****CANCELLATION**

State of New Hampshire PO Box 483 Concord NH 03302	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS. AUTHORIZED REPRESENTATIVE 
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December 2, 2022

Shelley Winters  
Director of Aeronautics, Rail & Transit  
New Hampshire Department of Transportation  
PO Box 483, 7 Hazen Drive  
Concord, New Hampshire, 03302-0483

Subject: The Merrimack & Grafton Railroad Corporation SIR of \$100,000.00

Sent via email to: [Michelle.L.Winters@dot.nh.gov](mailto:Michelle.L.Winters@dot.nh.gov)

Dear Ms. Winters:

Peter Young, with Vermont Rail Systems, which includes New Hampshire's The Merrimack & Grafton Railroad Corporation, has asked that I write you to share that Vermont Rail Systems, through its largest rail operating company, Vermont Railway, Inc., maintains a \$1,800,000 Line of Credit with Northfield Savings Bank. This Line of Credit has been handled as agreed. It is my limited understanding that this information may enable The Merrimack & Grafton Railroad Corporation to benefit from an SIR level of \$100,000.00.

Please reach out to me by email or by phone at 802-871-4484 should you need clarification or additional information.

*Sincerely,*

A handwritten signature in blue ink that reads "Wright C. Preston".

Wright C. Preston  
Senior Vice President  
Commercial Lending

CC: Peter F Young, General Counsel, Vermont Rail Systems

50 cam



Victoria F. Sheehan  
Commissioner

THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF TRANSPORTATION



William Cass, P.E.  
Assistant Commissioner

His Excellency, Governor Christopher T. Sununu  
and the Honorable Council  
State House  
Concord, NH 03301

Bureau of Rail & Transit  
November 10, 2021

REQUESTED ACTION

The Department of Transportation requests placing this item on the Consent Calendar.

Authorize the Department of Transportation to enter into a contract amendment with the Merrimack & Grafton Railroad, Inc. (Vendor # 336981), One Railway Lane, Burlington, VT 05401, to amend the completion date from June 30, 2022 to December 31, 2022 for the use of the state-owned Concord – Lincoln Railroad Corridor from Concord to Tilton for freight railroad service. This amendment is effective July 1, 2022, with Governor and Executive Council approval, through December 31, 2022. The current operating agreement was approved by Governor and Council on November 14, 2012, Item 162.

Income from the agreement will be credited as follows:

04-096-096-964010-2991  
Special Railroad Account  
009-407323 Agency Income

EXPLANATION

On November 14, 2012 the Governor and Council approved an Operating Agreement between the Department of Transportation and the New England Southern Railroad to provide freight railroad service on the state-owned Concord – Lincoln Railroad Corridor from Concord to Tilton for the period of July 1, 2012 through June 30, 2022.

On June 30, 2020 the Department of Transportation consented to an assignment of the 2012 Operating Agreement from the New England Southern Railroad to the Merrimack & Grafton Railroad Corporation (MGRR) as the Merrimack & Grafton Railroad acquired the New England Southern Railroad.

Pursuant to Section 1.3 of the current Operating Agreement, MGRR notified the Department on January 5, 2021 that it wished to renew its operating agreement. The Department and the Attorney General's Office has been actively developing an updated railroad operating agreement template, but that has yet to be finalized. Upon completion, that template will be used to actively negotiate final terms and conditions with MGRR to result in a new 10-year Operating Agreement that will then be submitted to Governor and Council for approval. This subject Amendment will extend the current Operating

Agreement for six (6) months to allow time for completion of the template and final negotiations to conclude.

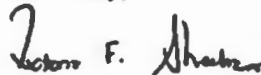
Additionally, the state-owned Concord – Lincoln Railroad Corridor has another railroad operator, Plymouth & Lincoln Railroad (PLRR), that operates on the northern section of the corridor, from Northfield to Lincoln; the current PLRR Operating Agreement expires on December 31, 2021. The MGRR and PLRR utilize the same state-owned railroad corridor, are each responsible for different portions of it, are required to interchange and work cooperatively relative to the use of the line, and therefore should be subject to similar terms and conditions. As such, in an attempt to address holistic use of the state-owned Concord – Lincoln Railroad Corridor and align both railroads contract terms, time-only extensions will be pursued for both railroads in order that subsequent 10-year operating agreements will have common terms and conditions, including commencement and completion dates.

As the railroad line is active and MGRR has ongoing railroad operations, this Amendment allows MGRR to continue to use the line for, primarily freight rail services, while negotiations conclude and the State aligns the agreements for both MGRR and PLRR.

This Amendment has been reviewed and approved by the Office of the Attorney General for form and execution. Copies of the fully executed Amendment have been provided to the Secretary of State's Office and the Department of Administrative Services. Subsequent to the Governor and Council approval, a copy of the Amendment will be on file with the Department of Transportation.

Your approval of this resolution is respectfully requested.

Sincerely,



Victoria F. Sheehan  
Commissioner

Attachments

## AMENDMENT TO OPERATING AGREEMENT

This AMENDMENT TO THE OPERATING AGREEMENT ("Amendment") is entered into this 19<sup>th</sup> day of October, 2021, by and between the State of New Hampshire, acting by and through the New Hampshire Department of Transportation, Bureau of Rail and Transit, PO Box 483, Concord, NH 03302-0483, (hereinafter referred to as "State") and Merrimack & Grafton Railroad Corporation, One Railway Lane, Burlington, VT 05401, (hereinafter referred to as "the Contractor"), collectively referred to as ("the Parties").

WHEREAS, the State and the Contractor, pursuant to an Assignment dated June 30, 2020, are parties to the Operating Agreement between the State and New England Southern Railroad Corporation dated April 19, 2012, approved by the New Hampshire Governor and Executive Council on November 14, 2012 ("Operating Agreement");

WHEREAS, pursuant to the Operating Agreement, the Contractor provides service on the Concord to Lincoln Railroad Line, as more particularly described in Section 3.1 of the Operating Agreement;

WHEREAS, pursuant to Section 1.1.1(k), the Completion Date of the Operating Agreement is June 30, 2022;

WHEREAS, pursuant to Section 1.3.1, the Parties are negotiating for a new operating agreement, but will not be able to finalize a new agreement and seek approval of the Governor and Council of New Hampshire before the current Operating Agreement expires on June 30, 2022; and

WHEREAS, the Parties desire for the Contractor to continue its use and operation of the Concord to Lincoln Railroad Line pursuant to the terms of the current Operating Agreement during negotiations.


NOW THEREFORE, the Parties agree to amend the Operating Agreement as follows:

1. Section 1.1.1(k) of the Operating Agreement shall be amended to extend the Completion Date of June 30, 2022 for an additional six (6) months. The amended Completion Date shall be December 31, 2022. The Operating Agreement shall terminate on December 31, 2022, unless terminated sooner in accordance with Section 1.7 or Section 1.8 of the Operating Agreement.
2. If the Parties enter into a new operating agreement on or before December 31, 2022, the current Operating Agreement shall automatically terminate upon the effective date of the new agreement.
3. Section 1.3.1 of the Operating Agreement shall be replaced with the following: If the Contractor and the State cannot agree upon a new agreement by December 31, 2022, the State shall have no further obligations for renewal of the Operating Agreement with the Contractor.
4. The Parties agree that all other provisions of the Operating Agreement not amended herein shall remain in full force and effect.

5. This Amendment and all obligations of the parties hereunder shall become effective upon approval by the New Hampshire Governor and Executive Council.

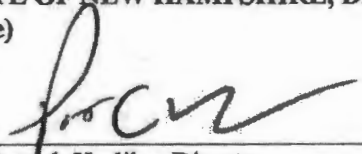
IN WITNESS WHEREOF, the Parties hereto have set their hands the date first-written above.

**Merrimack & Grafton Railroad Corporation  
(Contractor)**

By:  Date: 9/14/2021

Print Name and Title  
**Selden Houghton  
President**


**STATE OF NEW HAMPSHIRE, DEPARTMENT OF TRANSPORTATION  
(State)**

By:  Date: 10/19/2021  
Patrick Herlihy, Director  
Division of Aeronautics, Rail & Transit  
New Hampshire Department of Transportation

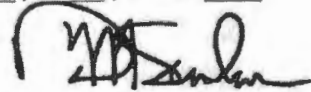
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The foregoing Amendment, having been reviewed by this office, is approved as to form and execution on November 10, 2021.

OFFICE OF THE ATTORNEY GENERAL

By:   
Assistant Attorney General

Approved by Governor and Council on DEC 08 2021, 20  , Item #   .

ATTEST:   
Secy. of State  
**DEPUTY SECRETARY OF STATE**



**State of New Hampshire**  
**Department of State**

**CERTIFICATE**

I, William M. Gardner, Secretary of State of the State of New Hampshire, do hereby certify that MERRIMACK & GRAFTON RAILROAD CORPORATION is a New Hampshire Profit Corporation registered to transact business in New Hampshire on May 14, 2020. I further certify that all fees and documents required by the Secretary of State's office have been received and is in good standing as far as this office is concerned.

Business ID: 842185

Certificate Number: 0005441967



IN TESTIMONY WHEREOF,

I hereto set my hand and cause to be affixed  
the Seal of the State of New Hampshire,  
this 10th day of September A.D. 2021.

A handwritten signature in cursive script, appearing to read "William M. Gardner".

William M. Gardner  
Secretary of State

CERTIFICATE OF SECRETARY

MERRIMACK & GRAFTON RAILROAD CORPORATION

This Certificate is delivered in connection with negotiations between the Merrimack & Grafton Railroad Corporation ("Company") and the State of New Hampshire ("State") of approximate even date herewith regarding a proposed amendment to the Operating Agreement between the State and Company. The undersigned hereby attest and certify as follows:

1. That I, Mary Anne Michaels, hereby certify that I am the duly appointed Treasurer and Secretary of the Company at this date.
2. That the Company is duly organized, validly existing, and in good standing under and by the virtue of the laws of the State of New Hampshire.
3. Attached hereto as "Exhibit A" is a full, true and correct copy of the portion of Minutes from a meeting of the Board of Directors of the Company held on the 6th day of September, 2021, pursuant to the Bylaws of the Company at which a quorum of the Directors were present and voted to authorize Selden Houghton, President, to enter into contracts or agreements on behalf of the Company with the State and any of its agencies or departments and further is authorized to execute any documents which may in his judgment be desirable or necessary to effect the purpose this vote.
4. I hereby certify that said vote has not been revoked, modified, rescinded, repealed or amended and remains in full force and effect as of this date. I further certify that it is understood that the State of New Hampshire will rely on this certificate as evidence that the person listed above currently occupies the position indicated and that he has full authority to bind the Company. To the extent that there are any limits on the authority of any listed individual to bind the Company in contracts with the State of New Hampshire, all such limitations are expressly stated herein.

IN WITNESS WHEREOF, I have signed this Certificate as of the 17<sup>th</sup> day of September, 2021, for and on behalf of the Company.

  
Mary Anne Michaels,  
Secretary

STATE OF VERMONT  
COUNTY OF CHITTENDEN, SS

At Burlington, Vermont this 17 day of September, 2021, personally appeared the person identified in the foregoing certificate, known to me to be the Secretary of the corporation identified in the foregoing certificate, and acknowledged that she executed the foregoing certificate.

In witness whereof I hereunto set my hand and official seal.

Before me,

  
Notary Public  
(My commission expires Feb. 10, 23.)

**EXHIBIT A**  
**MINUTES OF MERRIMACK & GRAFTON RAILROAD CORPORATION**

Excerpt of Minutes of 6<sup>th</sup> day of September, 2021, Telephonic – Electronic Meeting  
Of the Board of Directors  
Of  
**MERRIMACK & GRAFTON RAILROAD CORPORATION**

---

**RESOLVED**, unanimously by the Board, that the Company enter into negotiations with the State of New Hampshire to amend or otherwise extend its Operating Agreement with the State of New Hampshire on such terms as may reasonably be negotiated.

**RESOLVED**, unanimously by the Board, that Selden Houghton, President, be authorized to enter into contracts or agreements on behalf of the Company with the State and any of its agencies or departments and further is authorized to execute any documents which may in his judgment be desirable or necessary to effect the purpose of this vote and the Corporation shall be bound thereby.

**FURTHER RESOLVED**, unanimously by the Board, that the current vacancy on the Board of Directors of the Corporation be filled and that Mary Anne Michaels be named as a Director of the Corporation to fill said vacancy and further that Mary Anne Michaels be elected to serve as the Treasurer and Secretary of the Corporation with such appointment and election to take effect immediately.



# CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

11/11/2021

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER Phone: 800-722-7722 Fax: 315-788-8403  
**LINCOLN TRANSPORTATION INS BROKERS, INC.**  
 5920 AIRPORT ROAD  
 ORISKANY NY 13424

CONTACT NAME: **LINCOLN TRANSPORTATION INS BROKERS, INC.**  
 PHONE (AAC, No, Ext): **800-722-7722** FAX (AAC, No): **315-788-8403**  
 E-MAIL ADDRESS: **beth.garguilo@lincolnins.com**

INSURED  
**VERMONT RAILWAY, INC.**  
 Merrimack & Grafton Railroad Corporation  
 1 RAILWAY LANE  
 BURLINGTON VT 05401

INSURER(S) AFFORDING COVERAGE	NAIC #
INSURER A : Indian Harbor Insurance Company	38940
INSURER B : Liberty Surplus Insurance Corporation	10725
INSURER C : Liberty Surplus Insurance Corporation	10725
INSURER D :	
INSURER E :	
INSURER F :	

**COVERAGES**

CERTIFICATE NUMBER: 18182

REVISION NUMBER:

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR (LTR)	TYPE OF INSURANCE	ADOL NO	SUBR WVO	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
A	GENERAL LIABILITY COMMERCIAL GENERAL LIABILITY <input checked="" type="checkbox"/> CLAIMS-MADE   OCCUR <input checked="" type="checkbox"/> COMP RAILROAD LIABILITY  GEN'L AGGREGATE LIMIT APPLIES PER: POLICY PRO-JECT   LOC AUTOMOBILE LIABILITY ANY AUTO — SCHEDULED ALL OWNED — AUTOS HIRED AUTOS — NON-OWNED — AUTOS			US00080902L21A	11/01/21	11/01/22	EACH OCCURRENCE \$ 15,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ MED. EXP (Any one person) \$ PERSONAL & ADV INJURY \$ 15,000,000 GENERAL AGGREGATE \$ 30,000,000 PRODUCTS - COMP/OP AGG \$ 30,000,000 COMBINED SINGLE LIMIT (Ea accident) \$ BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$
C	UMBRELLA LMB   OCCUR EXCESS LMB   CLAIMS-MADE DED   RETENTION \$ WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/DIRECTOR EXCLUDED? Y/N (Mandatory in NY) If yes, describe under DESCRIPTION OF OPERATIONS below			XSHV857822-3	11/01/21	11/01/22	EACH OCCURRENCE \$ 20,000,000 AGGREGATE \$ 40,000,000 WC STATUTORY LIMITS OTH ER \$ E.L. EACH ACCIDENT \$ E.L. DISEASE-EA EMPLOYEE \$ E.L. DISEASE-POLICY LIMIT \$

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (Attach ACORD 181, Additional Remarks Schedule, if more space is required)

The State of New Hampshire is additional insured to the above railroad liability coverage as required by written contract. Excess liability coverage is follow-form. Cancellation is with 90 days written notice with exception of 30 days written notice for non-payment of premium.

**CERTIFICATE HOLDER****CANCELLATION**

The State of New Hampshire

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

Attention:

AUTHORIZED REPRESENTATIVE

*Erena Figler*  
 ERENA FIGLER

## ASSIGNMENT, CONSENT AND ASSUMPTION AGREEMENT

This ASSIGNMENT, CONSENT AND ASSUMPTION AGREEMENT (this "Agreement"), dated as of the 30th day of June 2020, is entered into by and between the STATE OF NEW HAMPSHIRE, acting through its DEPARTMENT OF TRANSPORTATION ("NHDOT"), NEW ENGLAND SOUTHERN RAILROAD CO. aka NEW ENGLAND SOUTHERN RAILROAD CORPORATION, a Delaware corporation ("Assignor") and MERRIMACK & GRAFTON RAILROAD CORPORATION, a New Hampshire corporation ("Assignee").

WHEREAS, NHDOT and Assignor are parties to an Operating Agreement for the State Owned Portion of the Concord to Lincoln Railroad Line approved by New Hampshire Governor and Council on November 14, 2012 ("Operating Agreement") pursuant to which Assignor operates on portions of said Railroad Line, a copy of which is incorporated herein and attached hereto as Appendix A; and

WHEREAS, Assignor and Trans Rail Holding Company, a Vermont corporation, have entered into a Business Asset Purchase Agreement dated as of April 30, 2020 (as may have been amended, the "BAPA"), pursuant to which Assignor is selling, transferring, assigning, conveying and delivering to Assignee or its designee certain assets, including Assignee's rights under the Operating Agreement; and

WHEREAS, Trans Rail Holding Company has designated Assignee, as its wholly owned subsidiary, to take title to the assets being transferred under the BAPA; and

WHEREAS, Assignee has relied upon Assignor's warranty that Assignor is not in default of the Operating Agreement or aware of any acts or omissions constituting an event of default as defined therein; and

WHEREAS, Assignor and Assignee have requested that NHDOT confirm it is not aware of nor advised Assignor of acts or omissions constituting an Event of Default as that term is defined in the Operating Agreement; and

WHEREAS, the consent of NHDOT to the assignment of the Operating Agreement is required pursuant to Section 1.10.1 of the Operating Agreement; and

WHEREAS, Assignor desires to assign the Operating Agreement to Assignee, and Assignee desires to accept such assignment, both in accordance with the terms of the BAPA, effective as of the Closing Date (as defined in the BAPA) (the "Effective Date"), which the parties acknowledge may not occur until such time as NHDOT delivers its written consent to such assignment; and

WHEREAS, Assignor and Assignee have requested that NHDOT grant such consent to the assignment of the Operating Agreement pursuant hereto;

NOW, THEREFORE, the parties agree as follows:

1. Assignment. As of the Effective Date, Assignor hereby transfers and assigns to Assignee all of its rights and interests in, to and under the Operating Agreement.

2. Assumption. As of the Effective Date, Assignee hereby agrees to comply with the terms and conditions of, and accepts and assumes and undertakes to perform all of Assignor's rights, title, interests, duties and obligations in, to and under, the Operating Agreement from that date forward.

3. Consent to Assignment. NHDOT hereby acknowledges and agrees that Assignor is in good standing and in compliance with the requirements of the Operating Agreement, that it is not aware of nor advised Assignor of any unpaid fee or acts or omissions constituting an Event of Default as that term is defined in the Operating Agreement, and does hereby consent to the assignment of the Operating Agreement to Assignee as of the Effective Date. NHDOT further agrees to hold Assignee harmless from any and all acts or omissions of the Assignor. Upon receipt by NHDOT of written notice executed by Assignor and Assignee confirming that the Closing under the BAPA has been completed, the NHDOT and Assignee shall execute an appropriate consent amendment to the Operating Agreement.

4. Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and the respective successors and assigns of the parties hereto.

5. Further Assurances. At any time and from time to time after the Effective Date, at the request of Assignee and without further consideration, Assignor shall execute and deliver such other instruments of assignment and confirmation and to take such other action as Assignee may reasonably request as necessary or desirable in order to more effectively transfer and assign to Assignee the Operating Agreement.

6. GOVERNING LAW. THIS AGREEMENT SHALL BE GOVERNED BY AND BE CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW HAMPSHIRE.

7. Amendment. This Agreement may be amended, modified or supplemented only by a written instrument executed by Assignor, Assignee and NHDOT.

8. No Waiver. Neither the failure nor any delay on the part of any party to this Agreement to exercise any right, remedy, power or privilege under this Agreement or the Operating Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any right, remedy, power or privilege preclude any other or further exercise of the same or of any other right, power or privilege, nor shall any waiver of any right, remedy, power or privilege with respect to any occurrence be construed as a waiver of such right, remedy, power or privilege with respect to any other occurrence. No waiver shall be effective unless it is in writing and signed by the party asserted to have granted such waiver.


9. Counterparts. This Agreement may be signed in any number of identical

counterparts, each of which shall be an original (including signatures delivered via facsimile or electronic mail) with the same effect as if the signatures thereto and hereto were upon the same instrument. The parties hereto may deliver this Agreement by facsimile or electronic mail and each party shall be permitted to rely upon the signatures so transmitted to the same extent and effect as if they were original signatures. This Agreement shall become effective when each party hereto shall have received a counterpart hereof signed by each other party hereto.

[signature page to follow]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

State of New Hampshire,  
Department of Transportation

  
\_\_\_\_\_  
Signature

Victoria Shelton, Commissioner  
Name and Title

6/30/2020  
Date


New England Southern Railroad Co.  
(aka New England Southern Railroad Corporation)

  
\_\_\_\_\_  
Signature

Peter M. Dearness, President  
Name and Title

June 24, 2020  
Date

Merrimack & Grafton Railroad Corporation

  
\_\_\_\_\_  
Signature

Selden Houghton, President  
Name and Title

6/23/2020  
Date



**OPERATING AGREEMENT**  
**ON THE**  
**STATE-OWNED PORTION OF THE CONCORD TO LINCOLN RAILROAD LINE**  
**BETWEEN**

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF TRANSPORTATION**

**AND**

**NEW ENGLAND SOUTHERN RAILROAD CORPORATION**  
**GOFFSTOWN, NH 03045**

**April 19, 2012**

Contractor Initials SWJ  
Date 4-21-12

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Contractor Initials AW  
Date 4-21-12

## ARTICLE I - GENERAL CONDITIONS

### 1.1 DEFINITIONS

1.1.1 As used herein, the following terms have the meanings indicated:

- a. "Contractor"- New England Southern Railroad Corp., 143 New Boston Road, Goffstown, NH 03045.
- b. "State" - means the State of New Hampshire.
- c. "FRA" means the Federal Railroad Administration.
- d. "STB" means the Surface Transportation Board.
- e. "Service" - means rail freight transportation.
- f. "Contracting Officer" - Commissioner, New Hampshire Department of Transportation (NHDOT), or his 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.
- g. "Agreement" - means this Operating Agreement dated April 19, 2012.
- h. "Facilities" collectively means the real estate, track, bridges, signals, switches, structures, buildings, and related railroad transportation property over which Service is to be provided, excluding transload facilities constructed by the Contractor.
- i. "Effective Date" means the date this Agreement is approved by the Governor and Council of the State of New Hampshire or the Contractor obtains operating authority from the STB, whichever occurs last.
- j. "Commencement Date" - July 1, 2012
- k. "Completion Date" - June 30, 2022.
- l. "Operating Year" - January 1 to December 31.
- m. "Users Fee" - Fee to be paid by the Contractor to State for the use of the Facilities.
- n. "Subcontractor" - An individual, partnership, firm, corporation, or any combination thereof, or joint venture, to whom the Contractor sublets any part of this Agreement.

### 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, including without limitation any obligation to pay the Contractor for any costs incurred or Service performed.

### 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 July 1, 2022. If the

Contractor Initials sd  
Date 4-21-12

Contractor and the State cannot agree upon new Operating Agreement by January 1, 2022, the State may at that time solicit proposals from other persons to operate the Facilities 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 that it has undertaken in this Agreement;
- 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.

#### 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 statutes, laws, regulations, and orders of federal, state, county or municipal authorities 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.

#### 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

Contractor Initials     *MSJ*      
Date 4-27-12

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 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;

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 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, in the absence of a greater or lesser specification of time, thirty (30) days from the date of the notice; and if the Event of Default is not timely remedied, 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.

#### 1.8. TERMINATION.

1.8.1 In the event of an early termination of this Agreement for any reason other than the completion of the Services, the Contractor shall 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.

Contractor Initials Red  
Date 4-21-12

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. None of the Service shall be subcontracted by the Contractor without the prior written consent of the State.

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 amount of three million dollars (\$3,000,000), or five million dollars (\$5,000,000) if hazardous materials are shipped, each occurrence, with a deductible of twenty-five thousand dollars (\$25,000) maximum. When passenger excursion service is operated, the Contractor shall maintain in force Railroad Liability Insurance in the amount of ten million (\$10,000,000) dollars, with the State named as additional insured.

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 N.H. 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

Contractor Initials Adel  
Date 4-21-12

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 or 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.

### 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.

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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 The Facilities are described as follows:

2.1.1 Being all the property of every kind and description, real, personal and mixed that was acquired by the State of New Hampshire from the Boston and Maine Corporation, Debtor, and owners unknown by condemnation as described in the Declaration of Taking filed with the Merrimack County Superior Court dated October 30, 1975, as amended by Order of the Merrimack County Superior Court dated February 27, 1980, and any other amendments thereto, and recorded at the Merrimack County Registry of Deeds on February 29, 1980, Book 1336, Pages 893 through 904, the Belknap County Registry of Deeds, Book 786, Pages 69-80, and the Grafton County Registry of Deeds, Book 1393, Pages 586-597, and said demised property being located in the Cities of Concord, Franklin and Laconia and the Towns of Canterbury, Northfield, Tilton, Belmont, Gilford, Meredith, New Hampton, Ashland, Bridgewater, Plymouth, Campton, Thornton, Woodstock and Lincoln, Counties of Merrimack, Belknap and Grafton; on file in the records of the New Hampshire Department of Transportation, Bureau of Rail & Transit. Also, being all the property and of every kind and description, real, personal and mixed acquired by the State of New Hampshire Department of Transportation from the Boston and Maine Corporation by Release Deed and recorded on November 24, 1998, in the Merrimack County Registry of Deeds, Book 2128, Pages 1749 to 1753, and said demised property located in the City of Concord, County of Merrimack; on file in the records of the New Hampshire Department of Transportation, Bureau of Rail & Transit.

2.2 RESERVATIONS TO THE STATE

2.2.1 The Facilities shall remain the property of the State, which reserves to itself the right to grant easements, contracts, leases, and other rights therein which do not, in the sole judgment of the State, conflict with the operations described in Article III. The State reserves to itself all rents, fees and revenues derived from such grants. Notwithstanding these provisions, the Contractor with prior approval by the State may lease portions of the Facilities to shippers for construction of railroad sidings, loading platforms and other railroad-related facilities. Such leases shall be subject to appropriate local taxes, and revenues from such leases shall be included in the railroad's gross freight operating revenues.

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## 2.3 ALTERATIONS TO THE FACILITIES

2.3.1 The Contractor shall make no alterations to the Facilities, both real and personal, or construct any building or make other improvements on the Facilities beyond normal maintenance without the prior written consent of the State. Such consent shall not be unreasonably withheld. All alterations, changes, and improvements built, constructed, or placed on the Facilities by the Contractor, shall unless 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 or scrap materials generated as a part of normal maintenance shall become the property of the Contractor.

## 2.4 STATE OWNED EQUIPMENT AND MATERIALS

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

## ARTICLE III - OPERATIONS

### 3.1 SERVICE AREAS

3.1.1 The Contractor shall, between the Effective Date and the Completion Date, manage and operate Service in the active service area from MP C 0.58 in Concord to MP C 22.00 in Lochmere, said active service area being a portion of that property described in 2.1 above. The Contractor shall be solely responsible for all phases and requirements of its operation, including, but not limited to, dispatching of trains, assignment of power and cars, scheduling, workforce, equipment, advertising, and marketing. The Contractor may operate in the inactive service area from MP C 22.00 in Lochmere to MP P 21.30 in Lincoln should new business warrant service, said inactive service area being a portion of that property described in Article 2.1. Should new business warrant said service, the State, Contractor and the Plymouth & Lincoln will execute a Letter of Understanding or similar document, to provide revisions to the responsibility for dispatching of trains, maintenance of track and other operating details. The Contractor is the assigned Common Carrier by the STB from MP C 0.58 in Concord to MP P 21.3 in Lincoln.

3.1.2 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.

3.1.3 Notwithstanding any other provisions of this Agreement, the State may arrange to provide service on a temporary basis if the Contractor is unable to provide service, and the Contractor agrees to allow provision of such temporary Service by others in the event of its inability to provide Service. Notice of Service by others must be given to the State in writing by the Contractor.

3.1.4 The Contractor warrants that all personnel engaged in the Services shall be qualified to perform such Services, and shall be properly licensed and authorized to perform such

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Services under all applicable laws. The Contractor shall not hire as an employee, 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 has a contractual relationship with the State, or who is a State officer or employee, elected or appointed.

- 3.1.5 The Contractor will conform to the State's "Guidelines Governing the Operation of On-Track Equipment on State-owned Railroad Lines," and will incorporate these Guidelines into its current Time Table.
- 3.1.6 If the Contractor intends to provide passenger or tourist excursion service on any portion of the Facilities, the Contractor shall:
- 3.1.6.1 Notify the State in writing no less than sixty (60) days prior to initiation of such service, date of event.
- 3.1.6.2 Obtain whatever other State and Federal approvals are required.
- 3.1.6.3 Submit a certificate of insurance for Railroad Liability and Contractual Liability with the State named as additionally insured in the amount of Ten Million (\$10,000,000) dollars at least ten (10) days prior to commencement of passenger or tourist excursion operations.

### 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 ensure that equipment is in compliance with all current 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 Facilities. 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.
- 3.2.2.1 The Contractor shall be responsible to perform all work and routine maintenance necessary to maintain the track from MP C 0.58 in Concord to MP <sup>C</sup> P 17.60 in Northfield at FRA Class I (Class II where track is so classified) Track Safety Standards or better, and in any event will expend no less than twenty (20%) percent of annual gross freight operating revenue on actual track maintenance during each year of this Agreement, and will include a report of maintenance expenses on a form and according to a schedule to be specified by the State (See Exhibit A). Credit for these expenditures may be carried forward to future years at the State's discretion.

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The Contractor shall satisfy all obligations required by the FRA of a railroad owner, set forth in Part 213 of the FRA Track Safety Standards (49 CFR 213).

- 3.2.3 STRUCTURES (BRIDGES & CULVERTS) - The Contractor shall be responsible for maintaining structures and shall make needed repairs necessary to keep structures safe for the convenience of the railroad and the State. Said maintenance shall include but not be limited to the cleaning and removal of debris, lubrication of bearing surfaces, scour and erosion protection.
- 3.2.4 In the event a major unanticipated maintenance or capital expenditure is required (bridge failure or major washout, etc.) the Contractor shall assist in all necessary repairs, but be limited in its direct financial contribution to five thousand (\$5000.00) dollars per Operating Year, or any amount remaining pursuant to the required expenditures pursuant to Section 3.2.2.1, whichever is greater, 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.
- 3.2.5 The State as track and bridge owner and the Contractor as operator will be subject to the provisions of 49 CFR Part 237 - Bridge Safety Standards, which become effective September 13, 2012. If the State is not able to perform or pay the cost of performing the required inspections, then the Contractor agrees to perform the inspections in order to operate and meet the requirements of 49 CFR Part 237.

### 3.3 INSPECTION

- 3.3.1 The Contractor shall patrol the Facilities and inspect the track in accordance with 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) week after each inspection. Should any defects be found, the Contractor shall take the appropriate remedial action in a timely manner in accordance with such regulations and notify the Contracting Officer in writing of said remedial action.
- 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 to remedy deficiencies as per FRA Track Safety Standards under this Agreement.
- 3.3.3 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 and of any contractor or subcontractor relating to any project or task accomplished under this Agreement.
- 3.3.3.1 The purpose of such inspection shall be:
- To ensure that work complies with the contract specifications.
  - To verify quantitative measures of materials installed, such as tie counts.
  - To verify labor and materials charges for contracts providing for payment on an actual cost basis ("force account work").

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- d. To verify the quantities of uninstalled State-owned materials and the security of same against damage, theft, or use other than for approved projects.
- e. To provide any other information requested by the Contracting Officer relating to the Facilities.

### 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 Facilities. The construction contractor to whom this work may be awarded shall have the right to perform the work so described in the contract. Any expenditures by the State pursuant to this Section 3.4 shall not diminish the obligation of the Contractor pursuant to Section 3.2.2.1 or any other provision of this Agreement.
- 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 he deems it necessary, the cost of said services to be paid by the constructing entity to the Contractor.
- 3.4.3 At the request of a shipper and with the concurrence of the State, the Contractor or a subcontractor approved by the State may construct sidings to new shippers on the Facilities at shippers' or the Contractor's expense. These sidings and appurtenances shall become the property of the State.

### 3.5 FREIGHT TARIFFS

- 3.5.1 On or before the Effective Date, the Contractor shall adopt all existing applicable tariffs, rates, and divisions. Said tariffs, rates, and divisions shall apply to the Service provided pursuant to this Agreement, until such tariffs, rates or divisions are changed in accordance with law. All proposed rates and tariffs under control of the Contractor may be reviewed by the Contracting Officer upon request.

### 3.6 FORCE MAJEURE

- 3.6.1 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; provided, however, that the party claiming force majeure shall take all reasonable actions to eliminate or end the force majeure condition.

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

### 4.1 PAYEE

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

### 4.2 FREQUENCY OF PAYMENT

4.2.1 Payments shall be paid monthly (or less frequently with written approval of the Contracting Officer), based upon the level of operation, as explained below. Payments shall be made no later than thirty (30) days after the last the day of each calendar month that gross freight operating revenues are earned, and will include a report of freight traffic on a form and according to a schedule to be specified by the State. (See EXHIBIT A)

### 4.3 USER FEE PAYMENT

4.3.1 The Contractor shall pay five (5%) percent of annual gross freight operating revenues as a user's fee to the State.

4.3.2 The Contractor may, where directed in writing by and at the sole discretion of 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.

4.3.3 If the Contractor or its subsidiary, Granite State Railroad, provides tourist excursion service, the Contractor shall pay ten (10%) percent of gross ticket sales based on ridership as a users fee to the State. User Fee Payments and Reports shall be received no later than thirty (30) days after the last day of each calendar month that passenger excursion service operated. The Reports will include a breakdown of the number oan type of tickets soled during the reporting period. If combination tickets are sold, the rail fare portion of the tickets shall be clearly stated. At the sole discretion of the Contracting Officer, the user fee payments may be waived if track maintenance costs exceed twenty (20%) percent of annual gross tourist excursion revenue. The State, through the Contracting Officer, may at its sole discretion waive user fee payments for the operation of the Flying Yankee Train.

### 4.4 LATE PAYMENT

4.4.1 Should any payment be received more than five (5) days after the due date, the Contracting Officer shall be entitled to a five (5%) percent late charge added to that month's users 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 that 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.

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- 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 traffic reports, marketing reports, revenue reports and maintenance cost reports on forms and according to a schedule to be specified by the State. (See EXHIBIT A)

#### ARTICLE V - MARKETING EFFORT

##### 5.1 BUSINESS PRACTICES

- 5.1.1 The Contractor will make every effort to market the line in order to make it 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 COOPERATION WITH OTHER OPERATIONS

- 6.1.1 In all of its operations and use of the property indicated herein, the Contractor will cooperate with other potential operators in the use of the rail facilities and not infringe upon their potential contractual rights. The State may at its discretion provide mediation of disputes involving the state-owned railroad corridor consistent with Article I Section 1.1 Definitions, Item 1.1.1 f.

#### ARTICLE VII - TERMINATION OF AGREEMENT

##### 7.1 OBLIGATIONS

- 7.1.1 If at any time after the Commencement Date the Contractor operates the Service fewer than sixty (60) days during any Operational Year, the State may terminate this Agreement and relieve the State and Contractor of all obligations hereunder, except the Contractor's continuing duty to maintain financial records and to continue to defend and hold harmless the State for any claims arising during the period of this Agreement.
- 7.1.2 In the event of a termination or expiration of this Agreement, the Contractor agrees that it shall obtain the necessary approvals from the STB to discontinue operations and turn over operating authority to a new railroad operator.

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Date 4-21-12

IN WITNESS WHEREOF, we have hereunto set our hands on the 23<sup>rd</sup> day of April, 2012.

NEW ENGLAND SOUTHERN RAILROAD CORP.

BY: [Signature]

THE STATE OF NEW HAMPSHIRE, COUNTY OF Merrimack

On this 23<sup>rd</sup> day of April, 2012, before me, Carla Nielsen the undersigned officer, personally appeared Peter M. Dearness 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.

[Signature]  
NOTARY PUBLIC  
CARLA M. NIELSEN, Notary Public  
My Commission Expires June 22, 2016

THE STATE OF NEW HAMPSHIRE

BY: [Signature]  
Dyror  
Commissioner, Department of Transportation

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 June 19, 2012.

OFFICE OF ATTORNEY GENERAL

BY: [Signature]  
Assistant Attorney General  
[Signature]

APPROVED by Governor and Executive Council on NOV 14 2012, 20  , ITEM # 162

ATTEST: [Signature]  
Secretary of State  
**DEPUTY SECRETARY OF STATE**

Contractor Initials [Signature]  
Date 4-21-12