

The following items are handouts for the December 3, 2020 NVTC Meeting.

PASSENGER RAIL OPERATIONS AND ACCESS AGREEMENT

Between

THE VIRGINIA DEPARTMENT OF RAIL AND PUBLIC TRANSPORTATION

and

**NORTHERN VIRGINIA TRANSPORTATION COMMISSION AND POTOMAC AND
RAPPAHANNOCK TRANSPORTATION COMMISSION, OWNERS AND
OPERATORS OF THE VIRGINIA RAILWAY EXPRESS**

CONCERNING COMMUTER PASSENGER RAIL SERVICE

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1 NTD: Section headings updated. Final headings and page numbers to be updated for execution version.

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EXHIBIT LIST

EXHIBIT	TITLE
A	<u>THE PLAN</u> (<i>The Northern Virginia and Potomac and Rappahannock Transportation Commissions Commuter Rail Operations Liability Insurance Plan</i>)
B	<u>SERVICE PLAN</u>
C	<u>PLANNED IMPROVEMENTS</u>
D	<u>PASSENGER STATION FACILITY-GROUND LEASE AGREEMENT</u>

PREAMBLE

THIS PASSENGER RAIL OPERATIONS AND ACCESS AGREEMENT ("**Agreement**") is dated [December](#) [●], 2020 and is between the (i) the Virginia Department of Rail and Public Transportation, a body corporate and political subdivision of the Commonwealth of Virginia, and (ii) the NORTHERN VIRGINIA TRANSPORTATION COMMISSION and the POTOMAC AND RAPPAHANNOCK TRANSPORTATION COMMISSION, bodies politic and corporate and political subdivisions of the Commonwealth of Virginia, established under the provisions of the Transportation District Act of 1964, as amended, and having principal places of business at 2300 Wilson Boulevard, Suite 620, Arlington, Virginia 22201, and 14700 Potomac Mills Road, Woodbridge, Virginia 22192, respectively (hereinafter, individually, a "**Commission**" and, collectively, the "**Commissions**").

EXPLANATORY STATEMENT

A. Since 1992, the Commissions have been engaged in operating and planning the expansion of a public commuter passenger rail system known as the Virginia Railway Express ("**VRE**") that operates within the railroad right-of-way, which right-of-way contains certain railroad tracks and other railroad assets, generally between Washington, D.C. and Richmond (the "**RF&P Corridor**"); the RF&P Corridor is currently owned by CSX Transportation, Inc. ("**CSXT**").

B. The Commissions currently have in place an *Amended and Restated Operating/Access Agreement* with CSXT dated July 1, 2011, as amended (the "**CSXT Operating Agreement**"), which, among other things, permits current VRE commuter passenger rail service within the RF&P Corridor.

C. The Commissions and CSXT, by agreement in 2002, established a corridor improvement program, overseen by a corridor task force which included representatives of the Commonwealth of Virginia, the purpose of which was to identify and fund capital improvement projects in the RF&P Corridor which would increase capacity to enable additional passenger rail service.

D. The Commonwealth of Virginia ("**Commonwealth**"), acting through the Department, has worked collaboratively with the Commissions to advance commuter rail service in the RF&P Corridor,

and also, beginning in 2009, currently sponsors inter-city passenger rail transportation in the RF&P Corridor through an agreement with the National Railroad Passenger Corporation ("NRPC"), which itself operates its own inter-city passenger rail service in the Corridor.

E. The Commonwealth, acting through the Department, has entered into a comprehensive rail agreement ("Comprehensive Rail Agreement") with CSXT under which the Commonwealth intends to purchase approximately half of CSXT's interest in the railroad tracks and other railroad assets along the RF&P Corridor (the "Virginia-Acquired RF&P Assets"), splitting the RF&P Corridor longitudinally and sharing it with CSXT.

F. Under the Comprehensive Rail Agreement, the Commonwealth and CSXT intend to execute a series of specific rail infrastructure improvement projects to facilitate the separation of freight and passenger rail services along the RF&P Corridor, where feasible, so the two services may operate side-by-side on separate dedicated railroad tracks and other infrastructure and facilities.

G. By separating freight and passenger operations within the RF&P Corridor, the Commonwealth desires to continue to work collaboratively with the Commissions to facilitate improved inter-city and commuter passenger rail service between Richmond and Washington, D.C., including continuing to make the Virginia-

Acquired RF&P Assets available to the Commissions for VRE operations, and to facilitate the expansion of VRE service.

H. Accordingly, the parties agree to continuation of the Commissions' existing commuter passenger rail service and the terms on which such service will be expanded after the Commonwealth acquires the Virginia-Acquired RF&P Assets, all as more particularly set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and promises herein contained, the parties hereto agree as follows:

ARTICLE ONE

DEFINITIONS

1.1 DEFINITIONS. The following terms (except as otherwise expressly provided or unless the context otherwise requires) for all purposes of this Agreement shall have the meanings hereafter specified:

Agreement: Defined in the Preamble.

Claim: Any and all claims, disputes, disagreements, causes of action, demands, suits, or other proceedings, in all cases related in any way to (i) the Commissions' operation of Passenger Station Facilities or (ii) the Commissions' provision of the Service (or failure to provide the Service) under this Agreement.

Commissions: Defined in the Preamble.

Commission Fiscal Year: The fiscal year of the Commissions beginning July 1.

Comprehensive Rail Agreement: Defined in paragraph B of the Explanatory Statement.

Contract Fee: The Track Dispatching and Maintenance Fee plus the Station Lease Payments, payable by the Commissions to the Department.

CSXT: Defined in paragraph A of the Explanatory Statement.

CSXT Operating Agreement: Defined in paragraph E of the Explanatory Statement.

CSXT-Retained RF&P Assets: The portion of the RF&P Corridor that is retained by CSXT, whether owned by CSXT or under its primary control through an agreement with a third party owner other than the Commonwealth, the Department, or an agency, authority, or other instrumentality of the Commonwealth.

CSXT Tracks: The railroad tracks that are included within the CSXT-Retained RF&P Assets, including but not limited to signaling facilities.

Department: The Virginia Department of Rail and Public Transportation.

Division: The Division of Risk Management of the Commonwealth of Virginia.

Effective Date: The date the last party to this Agreement executes it by signing the signature page.

Emergency: Any unplanned event within RF&P Corridor that:
(i) presents an immediate or imminent threat to the long term integrity of any part of the Tracks or other railroad assets, to

the environment, to property adjacent to the RF&P Corridor, or to the safety of rail workers, customers, or passengers; (ii) has jeopardized the safety of rail workers, customers, or passengers; (iii) is a declared state of emergency pursuant to Commonwealth or federal law, or (iv) is recognized or declared by any law enforcement agency or any other governmental entity as an emergency.

Equipment: The locomotives and cars complying with Section 2.4 of this Agreement which are at any time used by the Commissions, or either of them, or by an agent or Operator, to provide the Service over the Tracks.

Existing Service: The Service existing immediately prior to the Effective Date, and excluding the Planned Additional Service.

Force Majeure Event: The occurrence of any of the following events that materially and adversely affects the performance of either party's obligations, provided that such events (or effects of such events) could not have been avoided by the exercise of reasonable caution, due diligence, or efforts by the affected party: (a) war (including civil war and revolution), invasion, armed conflict, violent acts of a foreign enemy, military or armed blockage, or military or armed takeover of a project, in each case occurring within the Commonwealth of Virginia; (b) any act of

terrorism or sabotage that causes direct physical damage to Virginia-Acquired RF&P Assets or otherwise directly causes interruption to construction or direct losses during operation; (c) nuclear explosion or contamination, in each case causing direct physical damage to the Virginia-Acquired RF&P Assets or radioactive contamination of them; (d) riot and civil commotion on or in the immediate vicinity of the Virginia-Acquired RF&P Assets; (e) flood, earthquake, hurricane, tornado and other significant storm or weather occurrence, in each case that causes directly physical damage to the Virginia-Acquired RF&P Assets; (f) a pandemic; (g) federal or state declared emergency; and (h) fire or explosion not attributable to the Commissions or any Operator that directly impacts a material element of the physical improvements to the Virginia-Acquired RF&P Assets.

Improvements: Changes in, additions and betterments to the Tracks or other railroad assets within the RF&P Corridor. Improvements are not limited to the Virginia-Acquired RF&P Assets, but may also be made to the CSX-Retained RF&P Assets.

Losses: With respect to any Virginia Indemnatee, any losses, liabilities, judgments, damages, fees (including the costs of legal defense and other legal fees), penalties, fines, sanctions, charges, or out-of-pocket and documented costs of any kind or nature, or expenses actually suffered or incurred by such Virginia

Indemnatee, including as a result of any injury to or death of persons or damage to or loss of property, as a sanction assessed by a governmental or quasi-governmental entity, in all cases, (i) related in any way to the Commissions' operation of passenger facilities, (ii) related in any way to the Commissions' provision of the Service (or failure to provide the Service) under this Agreement, or (iii) which is exacerbated by the operation of the Service over the Tracks, or by the presence of cars, Equipment, personnel, contractors, agents, or passengers of the Commissions or an Operator on or about the RF&P Corridor.

NRPC: National Railroad Passenger Corporation.

Operator: Any person, firm, corporation, or other legal entity contracting with or utilized by the Commissions to operate all or any part of the Service or to be responsible for providing and supervising on-train personnel for operation of the Equipment and Trains.

Passenger Station Facilities: Passenger stations, station platforms, and certain additional, ancillary facilities located on platforms, including, among others, canopies elevators, stairways, and elevated walkways, and including real property parcels on which such facilities may be located, in all cases owned by the Department and leased to the Commissions for the Commissions to

pick up and discharge passengers in its provision of the Service. The Passenger Station Facilities are listed in the Passenger Station Facility-Ground Lease Agreement.

Passenger Station Facility-Ground Lease Agreement:

The separate Passenger Station Facility-Ground Lease Agreement between the Commissions and the Department, for the leasing of certain real property for the operation of those Passenger Station Facilities enumerated in **EXHIBIT D** (Passenger Station Facility-Ground Lease Agreement), as amended from time to time.

Plan: The Northern Virginia and Potomac and Rappahannock Transportation Commissions Commuter Rail Operations Liability Insurance Plan established by the Division in accordance with Section 2.2-1839 of the Code of Virginia, and attached hereto as **EXHIBIT A** (The Plan), as such may be amended from time to time.

Planned Additional Service: The additional commuter passenger rail service (*i.e.*, in addition to the Existing Service) to be added to the Service pursuant to the Comprehensive Rail Agreement by the Department and the Commissions incrementally (i) as the Department acquires the Virginia-Acquired RF&P Assets, and (ii) as the Planned Improvements are completed. The Planned

Additional Service is depicted, along with the Existing Service, in **EXHIBIT B** (Service Plan).

Planned Additional Service Long Stop Date: ~~For any~~ (A) For the first train slot (scheduled to be available in 2021) the date that is ~~thirty-six~~ months after the Department has provided to the Commissions written notice that they may begin such component of the Planned Additional Service, and (B) for any other component(s) of the Planned Additional Service for which the Department has provided to the Commissions written notice that they may begin such component(s) of the Planned Additional Service, the date that is twelve months after such notice.

Planned Improvements: Those Improvements listed in **EXHIBIT C** (Planned Improvements), which the Department intends to carry out, in cooperation with CSXT, and with funding from the Commissions among other sources, after acquiring the Virginia-Acquired RF&P Assets so that the Commissions may incorporate components of the Planned Additional Service.

RF&P Corridor: Defined in paragraph A of the Explanatory Statement, and includes both the Virginia-Acquired RF&P Assets as well as the CSXT-Retained RF&P Assets.

Service: The commuter passenger rail service operating within the RF&P Corridor by the Commissions under the authority

granted by the CSXT Operating Agreement and this Agreement. Service includes the movement of Trains operated at the times, between the mile posts, with the frequencies, and Equipment specified in **EXHIBIT B**, attached hereto, and the movement of Special Trains allowed pursuant to Section 3.2. Service may be amended at any time by written agreement of the parties, including adding components of the Planned Additional Service when permitted under the Comprehensive Rail Agreement.

Special Train: Any Train that is in addition to the regularly-scheduled commuter passenger rail service permitted under this Agreement, such as excursion trains or tourist trains, in each case as may be allowed pursuant to Section 3.2 of this Agreement.

Station Lease Payments: Periodic rental payments paid by the Commissions to the Department under the Passenger Station [Facility Ground](#) Lease Agreement.

Substitute Operating Period: A period of time selected by the Department for up to five years as an initial term, during which the Department contracts with an entity other than the Commissions to provide passenger rail service with respect to unused Planned Additional Service components pursuant to Section 2.10. The Substitute Operating Period may be extended by the

Department for successive periods of no longer than one year each. However, if at least one hundred-eighty (180) days prior to either (a) the expiration of an initial up-to-five-year Substitute Operating Period, or (b) the expiration of any extended Substitute Operating Period, the Commissions confirm they are willing and able to utilize the applicable unused Planned Additional Service components for the Service, then the Department may not extend the applicable Substitute Operating Period beyond the then-current term.

Track Dispatching and Maintenance Fee: The periodic fee paid by the Commissions to the Department covering the Department's [costs to dispatch and maintain]² the Virginia Tracks (and other railroad assets made available by the Department and utilized by the Commissions) attributable to the Service. The Track Dispatching and Maintenance Fee will equal the (i) the amounts charged by CSXT or other contractors to the Department for dispatching and maintenance performed by CSXT or such other contractors on the Virginia-Acquired RF&P Assets within the VRE territory pursuant to the Comprehensive Rail Agreement, minus (ii) any portion of such amounts paid to the Department by NRPC as

² **NOTE TO VRE:** Virginia working on obtaining maintenance and dispatching cost estimate from CSX.

incremental costs attributable to inter-city passenger rail service over the Virginia Tracks.

Tracks: The railroad tracks that are included within the Virginia-Acquired RF&P Assets and the CSXT-Retained RF&P Assets, including but not limited to signaling facilities.

Train: A locomotive unit, or more than one unit coupled, with or without cars, whether or not carrying passengers, having not less than 4.0 horsepower per trailing ton, displaying markers or carrying an end of train device, and capable of adhering to the schedule standards specified for the Service.

Trust Fund: The Commuter Rail Operations Liability Insurance Trust Fund administered by the Division pursuant to the Plan.

Virginia Indemnities: The Commonwealth of Virginia, the Commonwealth Transportation Board, the Department, and any of the officers, directors, employees, agents, or servants of such entities.

Virginia-Acquired RF&P Assets: The portion of the railroad line between Richmond, Virginia, and Washington, D.C. that is owned (or under its primary control through an agreement with an owner party other than CSXT) by the Commonwealth, the

Department, or an agency, authority, or other instrumentality thereof. The Virginia-Acquired RF&P Assets may increase as the Planned Improvements, or other Improvements, are completed and the Commonwealth, the Department, or an agency, authority, or other instrumentality thereof acquires (i) new railroad assets within the RF&P Corridor, or (ii) existing assets from CSXT within the RF&P Corridor.

Virginia Tracks: The railroad tracks that are included within the Virginia-Acquired RF&P Assets, including but not limited to signaling facilities. The Virginia Tracks shall include such other parallel or related railroad operating facilities of the Commonwealth, the Department, or an agency, authority, or other instrumentality thereof as may at the instruction of the Department from time to time be temporarily used for the operation of the Service. The rail facilities within the definition of Virginia Tracks may be further changed at any time by written agreement of the parties.

VRE: Defined in paragraph A of the Explanatory Statement.

ARTICLE TWO

CONDITIONS

2.1 Other Operating Agreements. The Commissions acknowledge that they have executed the CSXT Operating Agreement and separate agreements with Norfolk Southern Railway and NRPC, which agreements grant the Commissions the right to operate commuter passenger rail service over the lines of each of those railroads. The Commissions shall promptly provide the Department with current copies of such agreements and any subsequent amendments thereto, upon the execution of such agreements or amendments.

2.2 More Favorable Provisions. In the event that the terms and provisions of any agreement described in Section 2.1 shall at any time be interpreted, modified, or amended so as to become more favorable to the named counter-parties than the terms and provisions of this Agreement are to the Department, in the sole judgment of the Department, then the Department may request the Commissions' agreement to modify this Agreement so as to incorporate such interpretation, modification, or amendment, in whole or in part, by amendment to this Agreement.

2.3 Operator. The Commissions shall not self-operate the Service, but shall operate the Service through one or more

Operators. The Commissions will be free to select an Operator at their discretion based upon criteria, developed in consultation with the Department, designed to obtain an Operator qualified to operate trains on property of Class One railroads. An Operator must comply at all times with all applicable provisions of this Agreement. The Commissions shall not have the right to assign this Agreement or any portion hereof to any other person or entity, or to permit any person or entity other than an Operator to exercise such rights or enter upon the property of the Department without the written consent of the Department. The retention of an Operator by the Commissions shall not relieve the Commissions of any of their obligations under this Agreement. If at any time an Operator becomes unacceptable to the Department, the Department shall notify the Commissions and the Parties shall thereafter meet and confer within a reasonable time to develop a mutually-agreed resolution to the objections raised by the Department, which resolution may include removal and replacement of the Operator.

2.4 Inspection of Equipment. The Department shall have no responsibility, but shall have the right, to cause a third party to perform an audit-style inspection (*i.e.*, a spot inspection and not a comprehensive inspection), itself or through a contractor, of any Equipment of the Commissions used in the Service to ensure compliance with this Agreement

and federal law. Such inspections shall be at the Department's sole cost and expense, and shall not be done more than once each year. However, the parties agree that any such inspection shall not be construed to shift any liability for any such Equipment from Commissions to the Department, nor shall any such inspection be construed to reduce the Commissions' duty to indemnify the Virginia Indemnitees under Article 9. The Department shall have no responsibility to maintain, service, or repair any of the Equipment of the Commissions, but all such Equipment shall at all times comply with applicable federal (including without limitation the federal Locomotive Inspection Act and the Federal Safety Appliance Acts, each as amended, and with all regulations adopted pursuant to either Act), state, and local laws, regulations and requirements.

2.5 Operating and Safety Rules. (a) Operation of the Service shall at all times comply with CSXT's operating rules, safety rules, instructions, and other regulations until such time as Complete Separation or Maximum Feasible Separation (each as defined within the Comprehensive Rail Agreement) is achieved between the Virginia Acquired RF&P Assets and the CSXT-Retained RF&P Assets. At such time, the Department and the Commissions may agree upon specific operating rules that are

different than, or supplemental to, CSXT's operating rules. CSXT's operating rules shall continue in effect until different or supplemental rules are agreed upon. The Commissions, an Operator, and all personnel of either who are present on the Equipment at any time shall comply fully with the applicable laws, regulations or rules, whether federal, state, or local, covering the operation, maintenance, condition, inspection, testing, or safety of personnel or Equipment employed in the maintenance and operation of any of the Trains.

(b) **Operating Personnel.** The Commissions shall ensure that all persons operating Equipment or Trains over the Tracks are fully competent, trained, and qualified for the tasks they are performing in accordance with standards applicable to operation of trains on property of class one railroads.

(c) **Radios.** The Commissions, at their sole expenses, shall obtain, install, and maintain, in all locomotives used with Commission's Trains operating over the Tracks, functioning radios to transmit and receive appropriate frequencies, as necessary.

(d) **Investigations.** Any investigation or hearing concerning the violation of any operating rule or safety rule of the Department by any of the employees of the Commissions or of

its Operator may be attended by any official of the Commissions or of the Operator designated by the Commissions.

(e) **Right to Exclude Personnel.** The Department shall have the right to exclude from the Virginia Tracks or other Virginia-Acquired RF&P Assets any employee of the Commissions or its Operator found to be in violation of applicable law. The exercise of such right, and any and all Losses that may arise therefrom shall be excluded from the indemnification provisions of Article Nine of this Agreement when such an employee is excluded by the Department.

2.6 Modifications to Service. The Department retains exclusive authority to approve or reject, in its sole discretion, any proposed modification of the Service (other than the components of the Planned Additional Service to which the Department is entitled under the Comprehensive Rail Agreement and which are identified as being for commuter rail service) or of its scheduled operations. In addition, the Department retains the right to require the construction of additional Improvements, and appropriate modification to the Contract Fee, whenever the Commissions propose modifications to the Service or to its scheduled operations, other than components of the Planned Additional Service, provided such additional Improvements are necessary to enable the requested

modifications to the Service or scheduled operations. However, in the event of an Emergency that requires a short-term modification to the Service for which prior approval cannot be obtained reasonably, the Commissions may make such reasonable modifications as are necessary to continue the Service in a safe and reliable manner in coordination with the entity that is responsible for dispatching the relevant portion of Tracks. If the Commissions implement such a short-term modification, they shall: (i) within 24 hours of the event or occurrence giving rise to the emergency conditions notify the Department of the emergency in writing, and (ii) within five business days of the event or occurrence giving rise to the emergency conditions provide to the Department for its approval or rejection a written plan to continue the Service in a safe and reliable manner for the expected duration of the emergency condition. Notwithstanding the foregoing, the Commissions shall have the right to annul Trains and to provide less than the full Service for limited periods necessitated by unforeseen circumstances including but not limited to weather events, Equipment malfunctions, conflicts with NRPC, freight, and other trains, and government holidays and work cancellations.

2.7 Regulatory Approvals. In the event that operation of any portion of the Service requires the prior approval of or exemption from regulations by the Surface Transportation Board, the Federal Railroad Administration, or any other governmental agency, securing such approval or exemptions shall be the exclusive responsibility of the Commissions. The Department will make reasonable efforts to support the actions which the Commission may initiate pursuant to this Section.

2.8 Other Trains. The Department shall in no event be responsible for or liable to the Commissions, or its Operator, or any passenger for the consequences of any delays or cancellations of the Service due to conflicts with CSXT's freight service, NRPC's inter-city passenger service, weather, labor difficulties, track or equipment failure, conflicting schedules or missed connections of NRPC trains or of trains of CSXT, or from other causes. Notwithstanding the foregoing, the Department acknowledges the importance to the Commissions' commuter rail service of on-time performance and agrees to endeavor to provide an average monthly on-time performance of 90% within the Virginia-Acquired RF&P Assets and, to the extent reasonably possible, the RF&P Corridor. In the event an average on-time performance of 90% is not met

in any month, the parties shall meet during the next month to discuss the reasons why the aforesaid on-time performance average was not met and what steps can be taken to meet or exceed that average.

2.9 Planned Improvements. After acquiring the Virginia-Acquired RF&P Assets, the Department will endeavor to complete the Planned Improvements as described more completely in **EXHIBIT C**.

2.10 Planned Additional Service. The parties acknowledge and agree that the Comprehensive Rail Agreement makes available certain future passenger rail service slots identified in **EXHIBIT B** (Service Plan), and that the Department has the right to such slots designated for commuter rail service, subject to the Comprehensive Rail Agreement, and the Department will make available to the Commissions under the terms of this Agreement the additional slots identified in **EXHIBIT B** (Service Plan) for commuter rail service. As the Planned Improvements are completed incrementally, the Department will provide written notice to the Commissions of their right to begin the corresponding components of the Planned Additional Service by using those service slots associated with the completed Planned Improvements. However, the Department does not guarantee the completion of any or all of the

Planned Improvements, or the start of the Planned Additional Service and the Planned Additional Service may be suspended under the conditions provided in the Comprehensive Rail Agreement. For the avoidance of doubt, the Commissions shall have no right to commence any component of the Planned Additional Service unless the Department provides written notice to the Commissions that they may begin such component. Upon delivery by the Department to the Commissions of written notice of the completion of certain Planned Improvements and the Commissions' right to begin operating certain components of the Planned Additional Service, the Commissions shall: (i) on or before the Planned Additional Service Long Stop Date, adopt a budget allocating funds to support the corresponding components of the Planned Additional Service, and (ii) begin such corresponding components of the Planned Additional Service no later than the beginning of the Fiscal Year immediately following the Fiscal Year during which the budget in (i) was adopted. If the conditions of (i) and (ii) in the preceding sentence are not met, the Department may, upon written notice to the Commissions, elect to receive and use the unused Planned Additional Service components for commuter or inter-city passenger rail service. The Department may utilize such components for a Substitute Operating Period. The Commissions and the Department shall work in good faith to agree upon access and use of any

Commission-owned passenger rail facilities for such commuter or inter-city passenger rail service during any Substitute Operating Period. If the Commissions do not meet conditions (i) and (ii) above because the Department does not discount the Contract Fee as provided in Section 5.1(d) in the Fiscal Year in which the Planned Additional Service component(s) is required to begin, then the Commissions' obligation to meet conditions (i) and (ii) shall be tolled until the Fiscal Year in which the full eighty four percent (84%) Contract Fee discount is provided.

2.11 Improvements. The Commissions at any time may propose to the Department Improvements to the Virginia-Acquired RF&P Assets. Upon such a proposal being made the parties will confer to discuss whether to develop such proposed Improvements, cost sharing for such proposed Improvements, and other related issues. However, no Improvements will be made to the Virginia-Acquired RF&P Assets without the express written consent of the Department.

ARTICLE THREE

ACCESS

3.1 Commissions' Access Rights. The Department hereby grants to the Commissions, subject to the terms and conditions of this Agreement, the right to use (i) the Virginia-Acquired RF&P Assets, including the Virginia Tracks, and (ii) those passenger rights that the Department enjoys over the CSXT-Retained RF&P Assets, in both cases with the Trains to provide the Service. Except as provided in Section 2.10 with respect to unused components of the Planned Additional Service, the Commissions shall have the exclusive right to operate commuter rail service using the Virginia-Acquired RF&P Assets, including the Virginia Tracks, and shall be the sole provider of such services on the Virginia-Acquired RF&P Assets, including the Virginia Tracks, unless otherwise agreed by the Commissions and the Department. The Department expressly reserves the right to construct future assets within the Virginia-Acquired RF&P Corridor from which the Commissions may be excluded.

3.2 Special Trains. In addition to the rights stated in Section 3.1 above, the Department may permit the operation of Special Trains by the Commissions in addition to those **EXHIBIT B** (Service Plan), as well as those necessary to qualify an Operator, provide employee training, and test Equipment and Trains, which permission

shall not be unreasonably withheld. The Commissions shall submit their requests for Special Trains in writing to the Department at least seven business days prior to the proposed date of operations. No Special Train shall be run without the prior written agreement of the Department and the Commissions and on reasonable terms and conditions and with such proof of insurance and indemnification as are satisfactory to the Department but not more than those provided for in Article Nine.

3.3 Limitation of Access Rights. The rights granted to the Commissions herein shall relate solely to use of the Virginia Tracks and other Virginia-Acquired RF&P Assets required for the operation of Trains in the provision of the Service.

3.4 Passenger Station ~~Facility~~ Ground Lease Agreement. Contemporaneously with the execution and delivery of this Agreement, the Department will execute and deliver the Passenger ~~Stations Facility~~ Station Ground Lease Agreement in substantially the form of **EXHIBIT D** (Passenger ~~Stations Facility~~ Station Ground Lease Agreement), whereby the Department will lease to the Commissions certain real property for the operation of each of the Passenger ~~Stations~~ Station Facilities enumerated in that exhibit. It is contemplated that the Passenger ~~Stations Facility~~ Station Ground Lease Agreement may be amended or restated concerning the

construction, maintenance, and use, during the term of this Agreement, of additional Passenger ~~Stations~~Station Facilities. The Passenger ~~Stations Facility~~Station Ground Lease Agreement and other amendments or restatements shall impose no liability on the Department (or its officers, agents, or employees).

ARTICLE FOUR

TERM

4.1 Effective Date and Expiration. This Agreement shall become effective and shall commence as of the Effective Date, and unless terminated earlier in accordance with its provisions, or with the written consent of both parties, shall continue in effect until the Commissions cease to operate the Service. At or about the fifth anniversary of this Agreement, representatives of the Commissions and the Department shall meet to review operation of this Agreement and discuss possible modifications thereof. Modifications agreed upon by the parties shall be set forth in a written amendment to this Agreement signed by the parties.

4.2 Termination by Commissions. The Commissions shall have the right to terminate this Agreement only (i) if (whether due to lack of funding, inability to obtain the required insurance, or otherwise) they become unable to provide the Service, and (ii) upon 12 months' prior written notice to the Department. Upon any such termination notice delivered to the Department, the Commissions shall cooperate with the Department, and if the Department elects to procure a replacement entity to provide the Service, use their best efforts to assist the Department to procure such replacement entity, with any necessary modifications to the Service. The Department shall have a right of first refusal (but

not the duty) to purchase any Equipment and/or Passenger Station Facilities sold by the Commissions after the delivery of a termination notice to the Department.

4.3 Liabilities after Termination. Termination or expiration of this Agreement for any cause shall not relieve any of the parties hereto from any obligations or liabilities accrued under this Agreement as of the time such termination becomes effective. Without limiting the foregoing, it is specifically recognized that any obligation on the part of a party to assume financial responsibility, to indemnify and insure or to make a payment of money shall survive termination or expiration of this Agreement. It is further recognized that grant funding providers of the Commissions, including but not limited to the Federal Transit Administration and the Federal Railroad Administration, may retain an interest in Improvements funded in whole or in part with grant funds which interests shall run with the Improvements upon termination or expiration of this Agreement.

ARTICLE FIVE

PAYMENT

5.1 General Premise. (a) The premise upon which the Department and the Commissions have agreed to the Service pursuant to this Agreement is that the Department will permit operation of the Service (i) over the Virginia Tracks and other Virginia-Acquired RF&P Assets, and (ii) subject to those passenger rights that the Department enjoys over the CSXT-Retained RF&P Assets, with the following conditions: (1) the Commissions will make payment to the Department of the Contract Fee; and (2) Virginia Indemnitees will incur no Losses or potential Losses arising from the Service (or failure of Commissions to provide the Service) in any way and the Commissions will indemnify the Virginia Indemnitees against any Losses or potential Losses, and will defend any Claims, related to the Service, in accordance with and as more fully described in Article Nine.

(b) **Contract Fee.** The Commissions agree to pay the Department a Contract Fee (comprised of the Track Dispatching and Maintenance Fee and the Station Lease Payments). The parties agree that, as the Planned Improvements are completed incrementally, and as other Improvements may be completed, the mileage of the Virginia Tracks may increase and the number of Passenger Station Facilities leased to the Commissions by the Department may increase.

Accordingly, the parties agree the Contract Fee may increase as the mileage of the Virginia Tracks increases and as the Department leases to the Commissions additional property for Passenger Station Facilities. If the basis upon which the Contract Fee is assessed is modified, resulting in likely cost increases to the Commissions, the Department shall provide to the Commissions notice of such modification not less than one hundred-eighty (180) days prior to the start of the Commissions' Fiscal Year during which such modification will be applied. The Commissions shall pay the applicable components of the Contract Fee to the Department no more than 30 days after the Department submits a proper invoice to the Commissions for such applicable components.

(c) **Audit**. The basis for the amounts payable to the Department under this Agreement shall be subject to audit or review by either party for up to three years following payment thereof. Notwithstanding the foregoing, the Track Dispatching and Maintenance Fee shall be subject to audit and review only to the extent necessary to verify (i) the amounts charged by CSXT or other contractor to the Department for dispatching and maintenance performed by CSXT or other contractor on the Virginia-Acquired RF&P Assets within the VRE territory pursuant to the Comprehensive Rail Agreement, and/or (ii) any portion of such amounts paid to

the Department by NRPC as incremental costs attributable to inter-city passenger rail service over the Virginia Tracks.

(d) Track Dispatching and Maintenance Fee Discount.

In its sole discretion, the Department may discount the Track Dispatching and Maintenance Fee by up to eighty-four percent (84%).

5.2 Conditional Payments - NRPC. In addition to the payments specified hereinabove, the Commissions shall also pay to the Department monthly, within thirty (30) days of demand when supported by appropriate documentation, that portion of any amounts which the Department shall have been forced to pay to NRPC pursuant to an operating agreement between the Department and NRPC (as it may from time to time be amended) governing the operation of inter-city passenger service over Virginia Tracks which is attributable to the abnormal operation or the malfunction of the Service.

5.3 Other Payments. In addition to the payments specified elsewhere in this Article Five, the Commissions shall also pay to the Department, within thirty (30) days of demand, when supported by appropriate documentation, any amounts which become due to be so paid pursuant to the provisions of Article Two and Article Nine.

ARTICLE SIX

MAINTENANCE AND DISPATCHING

6.1 Track Maintenance. The Department shall, during the term of this Agreement, cause CSXT or other contractors to maintain the Virginia Tracks in a condition that will accommodate the operation of the Service, and no less than that required to prevent any downgrade to the Virginia Tracks below Class 4 pursuant to 49 C.F.R. § 213.9 (or any successor regulation). However, the Department shall have no duty to maintain the CSXT Tracks, and the Department does not guarantee the condition of the Virginia Tracks or that the Service will not be delayed or interrupted. If the Commissions contend the Department has failed to cause CSXT or other contractors to maintain the Virginia Tracks as anticipated by this Article Six, the Commissions may submit written notice of such contention to the Department, and within 30 days of such written notice the parties shall meet and confer to address and resolve such failure. If such meeting and conference does not finally resolve the issues noticed in the written notice submitted by the Commissions, either party may submit the matter pursuant to the dispute resolution provisions of this Agreement. However, in no event shall such failure, including but not limited to any FRA findings or reports, impose any liability on any of the Virginia Indemnitees except as provided by Article Nine hereof with respect

to gross negligence, nor shall any such failure absolve the Commissions of any of the obligations imposed upon them by Article Nine hereof.

6.2 CSXT's Performance of Track Maintenance. The parties acknowledge their mutual expectation that, notwithstanding Section 6.1, CSXT (as a contractor to the Department) will undertake maintenance of all of the Virginia Tracks on behalf of the Department at least until Phase 2 of the Planned Improvements is complete. At such time as the Department decides to procure a contractor other than CSXT to perform Track Maintenance, it shall consult with the Commissions on criteria for contractor selection to the end of ensuring the interests of the Department and the Commissions are protected.

6.3 Clearing Wrecked Equipment. The Commissions will clear any crippled, disabled, or wrecked Trains or Equipment of the Commissions impeding traffic on the Virginia Tracks.

6.4 Passenger Station Facilities Maintenance. The Commissions shall be responsible to perform, at their own costs and expense, all maintenance and operation activities with respect to the Passenger Station Facilities used by the Commissions with respect to the Service, except to the extent maintenance obligations are imposed upon other users of those Passenger Station

Facilities, as noted in the Passenger Station ~~Facility~~Ground Lease Agreement.

6.5 Dispatching. The Department shall, during the term of this Agreement, cause CSXT or other contractors to dispatch the Virginia Tracks. The Parties acknowledge and agree that, because such dispatching services will be undertaken by parties other than the Department, the Department is not able to guarantee any outcomes with respect to such dispatching services. At such time as the Department decides to procure a contractor other than CSXT or NRPC to perform track dispatching, it shall consult with the Commissions on criteria for contractor selection to the end of ensuring the interests of the Department and the Commissions are protected.

ARTICLE SEVEN

CLAIMS SERVICE

7.1 Claims Service. The provision of Claims handling service in connection with any aspect of the Service shall be the exclusive responsibility of the Commissions, and in no event shall the Commissions or its Operator assert any right to require provision of such Claims handling service from the Department or any affiliate thereof.

ARTICLE EIGHT

LAW ENFORCEMENT SERVICES

8.1 Police. The provision of law enforcement services in connection with any aspect of the commuter passenger rail service shall be the exclusive responsibility of the Commissions, and in no event shall the Commissions or any Operator assert any right to require provision of the services of such law enforcement services from the Department. The Department shall be responsible for providing law enforcement services, including the policing of trespassers, on the Virginia Tracks and other Virginia-Acquired RF&P Assets. The Commissions will use reasonable efforts to have the local law enforcement personnel with whom the Commissions work to cooperate with the Department's and CSXT's law enforcement personnel with regard to the Department's and CSXT's policing of trespassers within the RF&P Corridor.

ARTICLE NINE

RISK OF LIABILITY

9.1 General Indemnity and Duty to Defend.

The Commissions shall indemnify the Virginia Indemnitees against any Losses or potential Losses by a Virginia Indemnatee, related in any way to or arising from the Commissions' acts or failure to act (i) related in any way to the Commissions' operation of passenger facilities, or (ii) in providing the Service, including, without limitation, for the Commissions' failure to comply with this Agreement or applicable law. The Commissions shall indemnify the Virginia Indemnitees under this Article Nine whether or not such Losses or potential Losses are caused, in whole or in part, by the negligence, regardless of its character or degree, of a Virginia Indemnatee, and whether the damages are compensatory, punitive, or exemplary, provided, however, the Commissions shall not be required to indemnify Commonwealth employees and contractors in their individual capacities with respect to their own gross negligence (*i.e.*, wanton and willful misconduct). In addition, the Commissions shall defend the Virginia Indemnitees against all Claims asserted by third parties against a Virginia Indemnatee (i) related in any way to the Commissions' operation of passenger facilities, (ii) related in any way to or arising from the Commissions' acts or failure to act in providing the Service,

or (iii) which are exacerbated by the operation of the Service over the Tracks, or by the presence of cars, Equipment, personnel, contractors, agents, or passengers of the Commissions or an Operator on or about the RF&P Corridor.

9.2 (a) Commuter Rail Operations Liability Insurance Plan.

To guarantee payment of their obligations under this Article Nine, the Commissions shall, subject to the approval and continuing supervision of the Division, procure and at all times maintain a policy or policies of liability insurance, with annual aggregate limits of at least \$295,000,000.00 (or with such additional limits as may be required by the provisions of Section 9.3 hereof) covering the liability assumed by the Commissions under this Article Nine. Such insurance may consist of a program of self-insurance approved and administered by the Division for up to Five Million Dollars (\$5,000,000.00), with the balance of the coverage (at least \$290,000,000.00 in excess of the \$5,000,000.00 self-insured retention) to be obtained through commercial insurance. All insurance policies shall name the Department as an additional insured, shall provide liability insurance covering the liabilities assumed by the Commissions under this Agreement, and shall be endorsed to provide that the insurance company will give the Department thirty (30) days prior written notice if the policies are to be terminated or modified during the term of this

Agreement. The Commissions shall provide the Department with copies of all commercial insurance policies, including all current endorsements, carried by the Commissions pursuant to this Section 9.2, and a copy of all agreements, including amendments thereto, between the Commissions and the Division relating to the coverage, structure, administration, or funding of the Commissions' insurance program at least ten (10) business days before the commencement of any such policy, including all current endorsements. Such copy shall be delivered to:

Director

Virginia Department of Rail and Public Transportation

600 East Main Street, Suite 2102

Richmond, VA 23219

Counsel for the Department of Rail and Public Transportation

Transportation Section

Office of the Attorney General

202 North 9th Street

Richmond, VA 23219

(b) **The Plan**. In accordance with Section 2.2-1839 of the Code of Virginia, the Division has established the Plan, a copy of which is attached as **EXHIBIT A** (The Plan). [As soon as

practicable after the execution of this Agreement, and in all cases prior to the Commissions operating trains on any tracks owned by the Department, the Parties shall cooperate in good faith, working with the Division, to add the Virginia Indemnitees to the Plan as insureds (or collectively as an insured), whether through an endorsement or through another means satisfactory to the Department. Thereafter, the Parties shall collaborate in good faith, working with other stakeholders, to update the Plan itself for accuracy. The Plan is and shall be maintained by the Commissions and administered by the Division. It is the intention of the parties that the Plan provides coverage for all liability which is or may be imposed upon or assumed by the Commissions under this Article Nine. The parties further agree that, subject to the additional criteria set forth in this Article Nine (including, but not limited to Sections 9.2 and 9.3), the Plan is sufficient, as of the date hereof, to fulfill the obligations of the Commissions with respect to the procurement and maintenance of liability insurance pursuant to Section 9.2(a). Subject to the limits of Virginia law, the Commissions' obligation set forth herein is absolute and Commissions shall be obligated to indemnify all Virginia Indemnitees for all Losses, potential Losses, and obligated to defend Claims as set forth in Section 9.1(a) of this

Agreement. The Plan shall not be amended without the agreement of the Department evidenced by amendment of this Agreement.

(c) **Plan Reports**. The Commissions shall provide to the Department a copy of all reports which are submitted pursuant to the Plan. The reports to be made pursuant to the Plan shall include the balance sheets and income statements of the Trust Fund.

(d) **Insurance Coverage Floor**. If, at any time, the total insurance coverage applicable to the liabilities assumed by the Commissions under this Article Nine falls below \$295,000,000.00 or, because of pending Claims, is reasonably expected to fall below \$295,000,000.00 (or, in each case, such greater coverage as may be required by the provisions of Section 9.3), or such coverage is otherwise subject to challenge or diminution for any reason (including, without limitation, court decisions or applicable laws or regulations affecting the validity or enforceability of the Plan or this Article Nine), the Commissions will ensure that notice of such fact is provided promptly by the Division to the Commissions, the Department, and the Operator. If the Commissions fail to immediately (*i.e.*, the day of such notice) restore the available insurance coverage to \$295,000,000.00 (or such higher level as may be required by the provisions of Section 9.3), or to otherwise obtain relief from any

other causes which may diminish such coverage for any reason, the Service and all rights granted the Commissions under Article Three of this Agreement shall be immediately suspended and shall not be resumed until the full \$295,000,000.00 in insurance coverage (or such higher levels as may be required by the provisions of Section 9.3) has been obtained; provided, however, the suspension of passenger service shall not occur until after the Department has consulted with the Commissions and determined that the coverage specified herein will not be promptly restored. Any increase in the amount of insurance coverage which results from the application of Section 9.3 shall automatically cause a proportionate adjustment to the limits specified in this Subsection 9.2(d).

(e) **Trust Fund**. The Division administers the Trust Fund for the purposes of implementing and funding the Commissions' obligations under the Plan and this Article Nine. The Commissions shall ensure that, at all times, the Trust Fund is solvent and adequately funded for the purposes contemplated by this Article Nine, and shall arrange for a review by the Division of the financial condition of such Trust Fund and the commercial insurance and self-insurance maintained under the Plan, from time to time, as requested by the Department. Such review shall include a written certification to the Department that the Trust Fund is solvent, and that if the Plan's insurance program fails to comply with the

requirements of this Article Nine, or the Trust Fund is not adequately funded, the Division shall promptly give notice of such fact to the Department, the Commissions, and the Operator. If the Department determines that the Trust Fund is not adequately funded, the Department may give notice of such fact to the Commissions. If the Commissions fail to immediately (*i.e.*, the day of such notice by the Division or the Department) provide funding in amounts determined by the Division or by the Department to be adequate or obtain the required insurance, the Service and all rights of the Commissions under Article Three of this Agreement shall be immediately suspended until such funding and/or insurance is provided; provided, however, the suspension of the Service shall not occur until after the Department has consulted with the Commissions and determined that adequate funding and/or insurance will not be promptly restored. Notwithstanding the foregoing, in the event that the Division fails to comply with any of the requirements of this Agreement, including but not limited to those set forth in this Article Nine, the Commissions shall take all actions, including the commencement of litigation and/or direct purchase of policies of insurance, to prevent a breach of such requirement.

(f) **Material Breach for Failure to Failure to Comply with Insurance Requirements.** In the event that the Department

determines that either this Article Nine or the Plan (or the insurance coverage provided thereunder) is invalid or unenforceable for any reason, or that the Commissions have otherwise failed to comply with their obligations under this Article Nine, such determination shall constitute a material breach of this Agreement.

9.3 Increases in Insurance Amounts under the Plan and Liability Limits under the Agreement. (a) If, as a result of any statute enacted by the Commonwealth of Virginia or the federal government, the maximum liability limitation of Commissions is increased to an amount in excess of \$295,000,000.00, then the minimum liability limit of \$295,000,000.00 set forth in Section 9.2 of this Article shall be automatically increased to the new maximum statutory liability of the Commissions and the liability insurance shall be amended to reflect such higher amount. If the exposure of any Virginia Indemnatee to liability under this Agreement or under the Passenger Station ~~Facility~~Ground Lease Agreement is increased by statute or judicial decision, the limits on the liability of the Commissions pursuant to this Agreement shall be increased proportionately and the limits of the liability insurance carried by the Commissions shall be increased to reflect such increased exposure. As a condition to employing self-insurance to cover such higher amount of increased exposure, the

Commissions agree to obtain the advance approval of the Division. In the event the Commissions fail to obtain and maintain the insurance required by this Section for any reason (including the unavailability of such insurance), then either party shall have the right to suspend the Service immediately upon delivery of written notice to the other.

(b) **Review of Claims; Adjustments**. At any time during the term of this Agreement, upon the Department's request, the parties hereto will review and evaluate the number and cost of Claims which have been made against the insurance carried by the Commissions, the actual and potential liabilities incurred by the Commissions for death, personal injury, or property damage, any relevant judicial decisions, inflation and current trends in the cost of tort claims, and the likelihood and potential cost of future Claims. Based on this review and evaluation, the parties will determine whether there are reasonable grounds to increase the limits and expand the coverage of the insurance required to be carried by the Commissions under Subsection 9.2(a) and Subsection 9.2(d) hereof. If the parties are unable to agree, the dispute shall be handled pursuant to Article Eleven hereof; provided, however, that in no event shall the liability of the Commissions or the amount of insurance to be carried by the Commissions be reduced below the limits required by Sections 9.2 and 9.3 hereof.

9.4 Passenger Station ~~Facility~~ ~~Ground~~ Lease Agreement;

Indemnity. The rights granted to the Commissions in this Agreement relate to use of the Virginia Tracks for the operation of Trains. Immediately upon the execution and delivery of this Agreement, the parties shall execute and deliver the Passenger ~~Stations Facility~~ Station Ground Lease Agreement with respect to the Passenger Station Facilities enumerated in **EXHIBIT D** (Passenger ~~Stations Facility~~ Station Ground Lease Agreement). It is contemplated that the Passenger ~~Stations Facility~~ Station Ground Lease Agreement may be amended or restated concerning the construction, maintenance, use, and removal of additional platforms or certain ancillary facilities located on platforms, including, among others, canopies, elevators, stairways, elevated walkways, for the accommodation of the Commissions' passengers. It is understood that the indemnification and insurance provisions of this Article Nine of this Agreement shall apply with respect to such construction, maintenance, use, and removal by the Commissions, any Operator, its or their employees, agents, contractors, passengers, invitees, and the general public of all Passenger Station Facilities used by the Commissions with respect to the Service.

9.5 Environmental Conditions; Indemnity. The Commissions expressly understand and agree that their obligations to indemnify

the Virginia Indemnitees under the provisions of this Article Nine also extend to and include the obligation to indemnify against any and all Losses or potential Losses, and to defend Claims suffered by or asserted against a Virginia Indemnatee, as a direct or indirect result of or due to the presence or escape of any hazardous materials, substances, wastes, or other environmentally regulated substances on or from the Tracks, a Train, or Equipment which presence or escape is attributable in any way to, or is exacerbated by, the operation of the Service over the Tracks or the presence of the Commissions' or any Operator's Equipment, personnel, or passengers on or about the Corridor.

9.6 Notice of Third-Party Claims. (a) The Department shall give notice to the Division and to the Commissions as soon as reasonably practicable whenever it receives credible notice from any third party that it is the intention of such third party to hold a Virginia Indemnatee responsible for an incident for which the Commissions are potentially liable under Article Nine.

(b) **Duty to Cooperate.** The Department agrees: (1) to cooperate in the defense of Claims of which it gives the Division notice hereunder; (2) to allow the Division, within its sole discretion (~~subject to Section 2.2-514 of the Code of Virginia~~ and consistent with all legal requirements), to settle or defend any

such Claim; and (3) to execute all documents reasonably required to enable the Division to recover amounts paid by the Division on behalf of the Commissions to persons other than the Department.

12-1-2020 DRAFT

ARTICLE TEN

RISK OF LABOR CLAIMS

For the avoidance of doubt, under Article Nine, the Commissions will indemnify and defend the Virginia Indemnitees against any Losses or potential Losses flowing from collective bargaining agreements to which the Commissions are a party or employee protective conditions imposed by a governmental agency on the Commissions.

ARTICLE ELEVEN

DISPUTE RESOLUTION

11.1 Efforts to Resolve; Advisory Opinions. The parties hereto shall make every reasonable effort to settle any dispute arising out of this Agreement without resorting to litigation. If the parties so agree, they may retain a disinterested person experienced in railroad operations, or an accountant or attorney if appropriate, to render his or her objective advice and opinions, which shall be advisory only and not binding unless the parties agree in writing to be bound by his or her judgment in a particular instance.

11.2 Legal Actions. Any claims or controversy between the Commissions and the Department, except matters which are within the discretion or judgment of the Department, which cannot be resolved by the parties concerning the interpretation, application, or implementation of this Agreement, may be resolved by either party filing a legal action. All litigation between the parties arising out of or pertaining to this Agreement shall be filed, heard, and decided in either (i) a Virginia Circuit Court with jurisdiction, or (ii) the United States District Court for the Eastern District of Virginia.

11.3 Duty to Continue Performance. Pending final resolution of any dispute, the parties will continue to fulfill their respective obligations under this Agreement.

11.4 Dispute Resolution Costs. Each party shall bear the costs and expenses incurred by it in connection with any litigation, and neither party will seek or accept an award of attorneys' fees or costs incurred in connection with the resolution of a dispute pursuant to this Article Eleven.

ARTICLE TWELVE

MATERIAL BREACH

12.1 Material Breach - Safety. Failure on the part of the Commissions or its Operator to comply with the conditions of Article Two related to safety of operations or as provided in Subsection 2.5(a) of Article Two, or failure to comply with any other conditions of Article Two shall constitute a material breach by the Commissions.

12.2 Material Breach - Plan. Failure on the part of the Commissions to comply with the material provisions of Article Nine hereof, including their obligation to obtain and maintain insurance for the benefit of the Department, shall constitute a material breach by the Commissions.

12.3 Material Breach - General. Failure on the part of the Commissions to substantially comply with any material obligation under this Agreement shall constitute a material breach by the Commissions.

12.4 Suspension and Termination for Material Breach. If the Commissions are in material breach of this Agreement, the Department may among other remedies available to it at law or in

equity, upon written notice to the Commissions, immediately suspend the Service until the Commissions have effected a cure with respect to the material breach, or until the Commissions have commenced a cure and are diligently pursuing completion thereof - in either case to the reasonable satisfaction of the Department. Upon any written notice provided by the Department to the Commissions of material breach by the Commissions (and even if the Department has not elected to suspend the Service) the parties shall meet and confer with respect to the cure to be pursued by the Commissions. The Department may terminate this Agreement if the Commissions have failed to cure or to commence a cure and diligently pursue the completion thereof within 180 days of the applicable notice of material breach delivered by the Department. However, even if this Agreement is not terminated, nothing shall compel the Department to lift any suspension of the Service until the Commissions have effected a cure with respect to the applicable material breach, or until the Commissions have commenced a cure and are diligently pursuing completion thereof - in either case to the reasonable satisfaction of the Department.

ARTICLE THIRTEEN

NOTICES

13.1 Notice. Any report, notice, or other communication required or permitted hereunder shall, unless otherwise specified, be in writing and shall be delivered (i) by email with a return email by the recipient acknowledging receipt, (ii) by hand, or (iii) deposited in the United States mail, postage prepaid, addressed as follows:

If to the Department:

Director

Virginia Department of Rail and Public Transportation

600 East Main Street, Suite 2102

Richmond, VA 23219

Counsel for the Department of Rail and Public Transportation
Transportation Section

Office of the Attorney General

202 North 9th Street

Richmond, VA 23219

If to Commissions:

Chief Executive Officer

Virginia Railway Express

1500 King Street, Suite 202

Alexandria, Virginia 22314

[add email]

(With a copy to the

County Attorney of Arlington County

2100 Clarendon Boulevard, Suite 403

Arlington, Virginia 22201)

Either party may change the address at which it shall receive communications and notifications hereunder by notifying the other party in writing of such change.

ARTICLE FOURTEEN

MISCELLANEOUS

14.1 Force Majeure. Each party will be excused from performance of any of its obligations hereunder (except Article Nine), to the other party, where such nonperformance is occasioned by a Force Majeure Event, provided that the party excused hereunder shall use all reasonable efforts to minimize its nonperformance and to overcome, remedy or remove such event in the shortest practical time. The Department and the Commissions shall promptly undertake and complete the repair, restoration, or replacement of any their respective property which is necessary for the provision of the Service, or for the performance of any of one another's obligations hereunder which is damaged or destroyed as a result of a Force Majeure Event.

14.2 Headings. The article and section headings herein are for convenience only and shall not affect the construction hereof.

14.3 Written Modifications. Neither this Agreement nor any of the terms hereof may be terminated, amended, supplemented, waived or modified orally, but only by an instrument in writing signed by all of the parties hereto, unless a specific provision hereof expressly permits one party to effect termination, amendment, supplementation, waiver or modification hereunder, in which case

such change shall be made in accordance with the terms of such provision.

14.4 Exhibits. All exhibits attached hereto, and as they may be amended, are integral parts of this Agreement and the provisions set forth in the exhibits shall bind the parties hereto to the same extent as if such provisions had been set forth in their entirety in the main body of this Agreement.

14.5 Severability. In the event that any provision of this Agreement is found to be invalid or unenforceable in any respect, the remaining provisions shall remain in full force and effect as if the unenforceable provision were deleted.

14.6 No Waiver. The failure of either party to insist at any time upon the strict observance or performance of any of the provisions of this Agreement, or to exercise any right or remedy in this Agreement, shall not impair any such right or remedy to be construed as a waiver or relinquishment thereof.

14.7 No Third-Party Beneficiaries. Except (for the purposes of Article Nine only) for those Virginia Indemnitees and the CSXT Indemnitees that are not a party to this Agreement, this Agreement and each and every provision hereof are for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be construed as creating or

increasing any right in any third party to recovery by way of damages or otherwise against either of the parties hereto.

14.8 Assignment. The Department ~~may~~ shall assign all of its duties and rights under this Agreement to the Virginia Passenger Rail Authority, without the prior consent of the Commissions. Otherwise, the rights and obligations of the Department and the Commissions hereunder may be assigned only with the prior consent of the other parties.

~~14.9 The Department may continue to use its staff to support the Virginia Passenger Rail Authority in performing or exercising its duties and rights under this Agreement, even after this Agreement has been assigned to the Virginia Passenger Rail Authority.~~
14.9 Joint and Several Liability - Commissions.

While it is understood and agreed that the Commissions shall act together in all matters affecting the Service, the rights and obligations of the Commissions hereunder shall be shared jointly and severally.

14.10 Governing Laws. This Agreement shall be governed by the laws of the Commonwealth of Virginia, without regard for conflict of laws principles.

IN WITNESS WHEREOF, the Department and the Commissions have caused their names to be signed hereto by their officers thereunto duly

authorized and their seals, duly attested, to be hereunto affixed
as of the day and year first above written.

[SIGNATURES PAGES FOLLOW]

12-1-2020 DRAFT

Attest:

VIRGINIA DEPARTMENT OF RAIL AND
PUBLIC TRANSPORTATION

Secretary

By: _____

Title: _____

12-1-2020 DRAFT

Attest:

NORTHERN VIRGINIA TRANSPORTATION
COMMISSION

Secretary

By: _____

Title: _____

Attest:

POTOMAC AND RAPPAHANNOCK
TRANSPORTATION COMMISSION

Secretary

By: _____

Title: _____

EXHIBIT A - THE PLAN

[TO COME]

12-1-2020 DRAFT

EXHIBIT B – SERVICE PLAN

[INDICATIVE PLAN INCLUDED – NOT YET FINALIZED]

12-1-2020 DRAFT

EXHIBIT C – PLANNED IMPROVEMENTS

Project Name	Project Limits
L’Enfant Fourth Track and Station Improvements	CFP 112.2 – CFP 111.5
New Long Bridge for Passenger Rail	CFP 111.5 – CFP 110.1
Alexandria Fourth Track	CFP 110.1 – CFP 104.3
Franconia Springfield Bypass	CFP 98.8 – CFP 96.2
Railroad Bridge Over Newington Road	CFP 96.2 – CFP 95.1
Franconia to Lorton Third Track	CFP 95.1 – CFP 92.3
Railroad Bridge Over Route 1	CFP 91.1 – CFP 90.1
Neabsco Creek to Woodbridge Third Track – Siding D	CFP 88.7 - CFP 84.8
Aquia Creek Third Track – Siding E	CFP 70.7 – CFP 68.1
Potomac Creek Third Track – Siding A	CFP 65.2 – CFP 61.3
Crossroads Third Track – Siding F	CFP 52.8 – CFP 48.7
Woodford to Milford Third Track – Siding B	CFP 43.5 – CFP 40.4
Hanover Third Track – Siding C	CFP 18.7 – CFP 15.5

EXHIBIT D

PASSENGER STATION ~~FACILITY~~ GROUND LEASE AGREEMENT

12-1-2020 DRAFT

Exhibit D

Passenger Station ~~Facility~~ Ground Lease Agreement

PASSENGER STATION ~~FACILITY~~ GROUND LEASE AGREEMENT

THIS PASSENGER STATION ~~FACILITY~~ GROUND LEASE AGREEMENT (“Lease Agreement”) is made and entered into this [●] day of [●], 2020, by and between the VIRGINIA DEPARTMENT OF RAIL AND PUBLIC TRANSPORTATION (“DRPT”) as Lessor, and THE NORTHERN VIRGINIA TRANSPORTATION COMMISSION and THE POTOMAC AND RAPPAHANNOCK TRANSPORTATION COMMISSION, jointly and severally, as Lessee, bodies politic and corporate and political subdivisions of the Commonwealth of Virginia, established under provisions of the Transportation District Act of 1964, as amended (each a “Commission” and, collectively, the “Commissions”).

WITNESSETH:

WHEREAS, DRPT is the owner of certain interests in real estate in the Commonwealth of Virginia and other improvements on such land; and

WHEREAS, the real estate acquired by DRPT included, among improvements, passenger rail facility improvements made by the Commissions (“VRE Stations Sites”) and passenger rail facility improvements made prior to the start of the Commissions’ commuter rail service in 1992 (“Legacy Station Sites”); and

WHEREAS, the parties have entered into a Passenger Rail Operations and Access Agreement dated [●], 2020 (the “Operating Agreement”) under which they have agreed to enter into this Lease Agreement; and

WHEREAS, the purpose of this Lease Agreement is to set forth the terms and conditions on which the Commissions shall lease certain real property and certain improvements owned by DRPT, including the Legacy Station Sites, from DRPT, for the construction, maintenance, and operation of commuter rail facilities.

NOW THEREFORE, for and in consideration of the rents or sums of money hereinafter agreed to be paid by the Commissions, and of the covenants upon the part of the Commissions to be kept and performed, as hereinafter expressed, it is agreed between the parties hereto as follows:

1. PREMISES

Subject to the terms of this Lease Agreement, DRPT hereby leases to the Commissions the rights described herein to each of the properties more particularly described on Appendix A, as amended from time to time (hereinafter referred to collectively, as the “Premises” and, individually, either as a VRE Station Site or a Legacy Station Site). The parties may agree, from time to time, to amend this Lease Agreement to provide for the leasing of additional property by DRPT to the Commissions. In such event, any such additional property shall also be referred

to as a “VRE Station Site,”⁺ the term “Premises” shall include such additional property, and the rent due hereunder shall be adjusted accordingly, as provided by Section 3(c) hereof.

2. TERM

(a) This Lease Agreement shall become effective as of [●] (the “Commencement Date”) and shall continue in effect for the life of, and be coterminous with, the Operating Agreement. The period between the Commencement Date and the expiration or early termination of this Lease Agreement shall be the “Term.”

(b) At any time during the Term, either party may deliver notice to the other party of such party’s wish to arrange a meeting of representatives of the Commissions and DRPT to review this Lease Agreement and to discuss possible modifications thereof. However, neither DRPT nor the Commissions shall be obligated to modify this Lease Agreement, except as provided in Section 3.

3. RENT

(a) During the Term, the Commissions will pay to DRPT rental amounts as shown on Appendix B on a yearly basis for the use and occupancy of the premises, which rental shall be payable in arrears. Rental payments will be due during the month of July covering the annual period between (i) July 1 of the immediately-prior calendar year, and (ii) June 30 of the then-current calendar year.

(b) In the event of the addition of property to this Lease Agreement pursuant to Section 1, Appendix B shall be amended to reflect the annual rent attributable to such property, and the Commissions shall pay prorated annual rent proportional to the partial year the Commissions had use of such property under this Lease Agreement.

(c) [reserved]

(d) [reserved]

(e) During the Term, if the Commissions’ use of the premises materially changes or if DRPT otherwise deems it necessary to adjust the rental amounts, then DRPT may provide written notice to the Commissions no later than 180 days prior to the beginning of the Commissions’ next-occurring fiscal year that DRPT intends to modify the annual rental amounts upon the start of such upcoming fiscal year. Thereafter, the parties may meet and confer in good faith with respect to the appropriate modifications to the annual rental amounts. However, after such meeting and conference, DRPT, acting reasonably, shall have the unilateral right to modify the annual rental amounts for the upcoming fiscal year and shall notify the Commissions of its final determination with respect to such modifications no later than 60 days prior to the beginning of the fiscal year during which the modifications will take effect. ‡ In no event shall the annual rental amount for any component of the Premises exceed the rental amount paid by the

Commissions to CSXT with respect to such component of the Premises as of December 1, 2020, escalated by three percent (3%) on each anniversary of December 1, 2020.²

(f) If the Commissions shall default in the payment of rent for a period of thirty (30) days after the same shall be due as herein provided, the Commissions shall pay DRPT a late charge at the rate of one and one-half percent (1.5%) per month on the amount in default until all defaults in payments are cured. Any subsequent rent shall be applied first toward any unpaid penalty amounts and payments in default, then the balance, if any, shall be applied toward such subsequent rent obligations then due. The provisions of this Subsection (f) of Section 3 shall be in addition to the rights of DRPT provided in Section 12 hereof.

(g) Acceptance of rent by DRPT, even though the Commissions are in default of other terms of this Lease Agreement, shall not be deemed a waiver by DRPT of a default of any other provision of this Lease Agreement.

4. USE

(a) The Commissions will occupy and use the premises only for the purposes permitted by this Section 4. No assignment or sublease of this Lease Agreement or any part of the term shall be made by the Commissions without the prior written consent of DRPT, which consent may be withheld for any reason. Occupation, use and possession of the VRE Station Sites shall be by the Commissions and those to whom the Commissions grant permission to occupy and use the premises, and no other person or corporation. Occupation, use and possession of the Legacy Station Sites shall be by the Commissions and those to whom the DRPT grants permission to occupy and use the Legacy Station Sites.

(b) Unauthorized use by the Commissions of the premises or DRPT's adjoining property, if any, shall constitute a default and, at the option of DRPT, shall be cause for termination in accordance with Section 12(a) hereof.

(c) The premises shall be used by the Commissions solely for the construction of the commuter rail station and related facilities and improvements, and subject to the provisions of Section 7 hereof, the maintenance and operation of such improvements and the premises, and the embarking and debarking of passengers on the Virginia Railway Express (as defined in the Operating Agreement) commuter service and the passengers of other passenger rail service providers permitted by the Commissions to use the VRE Station Sites. In addition, portions of the VRE Station Sites may be used for commercial activities including but not limited to the following: (1) passenger ticket sales by a vending-type machine and (2) newspaper and periodicals vending sales, provided such activities do not unreasonably interfere with DRPT's use of its property or pose an unreasonably safety risk to freight or passenger rail operations.

5. USE OF PROPERTY; HAZARDOUS SUBSTANCE

(a) The Commissions shall not cause or permit any Hazardous Substance to be used, stored, generated or disposed of on or in the premises by the Commissions, their agents, employees, contractors or invitees, without first obtaining DRPT's written consent, which consent

may be withheld for any reason. The Commissions shall indemnify and hold harmless the “Virginia Indemnitees” (as defined in the Operating Agreement), pursuant to the terms of Section 10 hereof, from any and all claims, damages, fines, judgments, penalties, costs, liabilities or losses, arising from the use, generation or disposal of Hazardous Substances or the contamination of the premises in any manner caused or permitted by the Commissions, the Operator (as defined in the Operating and Access Agreement), or the Commissions’ passengers or invitees. This indemnification includes, without limitation, any and all costs incurred by DRPT because of any investigation of the premises or any cleanup, removal or restoration mandated by a federal, state, or local agency or political subdivision. Without limitation of the foregoing, if the Commissions cause or permit the presence of any Hazardous Substance on the premises that results in contamination, the Commissions shall promptly, at their sole expense, take any and all necessary actions to return the premises to the condition reasonably equivalent to that existing on the premises at the commencement of the Lease term. The Commissions shall first obtain DRPT’s approval for any such remedial action; however, this requirement shall not limit the Commissions’ right to take immediate remedial action to mitigate damages caused by Hazardous Substances.

(b) As used herein, “Hazardous Substance” means any substance that is toxic, ignitable, reactive or corrosive and that is regulated by any local government, the Commonwealth of Virginia, or the United States government. “Hazardous Substance” includes any and all materials or substances that are defined as “hazardous waste”, “extremely hazardous waste” or a “hazardous substance” pursuant to state, federal, or local governmental law. “Hazardous Substance” includes, but it not restricted to, asbestos, polychlorinated biphenyls (PCBs), petroleum, solvents, printing inks, pesticides, solvents, and leads.

6. RIGHTS RESERVED BY DRPT

(a) DRPT reserves unto itself, its licensees, successors and assigns: (1) working in coordination with the Commissions and subject to their consent, the right to use the airspace above existing and future stations owned by DRPT for residential, commercial, and office purposes, and to use airspace above any Segment it acquires to access train stations and platforms and to construct new train stations and platforms; and (2) the right to enter, or to have its contractors enter, upon the premises after reasonable advance notice except in the event emergency circumstances necessitate lesser notice in which case notice practicable under the circumstances shall be provided, for the purpose of maintaining and operating railroad track or tracks, signal and communication facilities and any other DRPT owned apparatus, equipment and facilities located on or adjacent to the premises.

(b) In its exercise of the rights reserved in Section 6(a), DRPT shall use its best efforts not to unreasonably interfere with the Commissions’ use of the premises. If DRPT believes that it will significantly interfere with the Commissions’ use of the premises, DRPT will give the Commissions as much advance notice as is practicable under the circumstances.

(c) **[reserved]**³.

(d) In the event that DRPT grants rights to, or enters into agreements with, easement grantees, licensees, or other third parties affecting the premises, subsequent to the date of this Lease Agreement, such rights and agreements shall be consistent with, and shall not unreasonably interfere with, the Commissions' existing use of the affected premises under this Lease Agreement. The Commissions shall not be responsible for any costs or expenses incurred in the exercise of the aforesaid rights, including those that would not have been necessary but for the Commissions use and occupation of the premises.

7. IMPROVEMENTS AND ALTERATIONS

(a) Unless otherwise agreed by the parties, any improvements to or alterations of the VRE Station Sites shall be made by, and at the expense of the Commissions, but only with prior written approval of DRPT which approval shall not be unreasonably withheld. All such improvements and alterations shall be made in a good and workmanlike manner and in compliance with all applicable laws and regulations, and shall conform to the plans and specifications approved by DRPT. The Commissions will secure all necessary permits or licenses in any way connected with said improvements or structures and will pay any and all taxes levied against such improvements or structures; said improvements or structures being the sole property of the Commissions. The Commissions shall also be responsible for taxes, licenses, permits, etc., required in connection with any business conducted by or for the Commissions on the premises. If in DRPT's sole discretion the use of a flagman is required for the construction and maintenance of any improvements or the premises, the Commissions shall provide a flagman at the Commissions' expense.

(b) The Commissions shall pay the full amount of any and all taxes levied or assessed on account of personal property placed on the premises by the Commissions and any penalties in connection therewith. The Commissions shall be responsible for all listing and other duties in connection with the taxation of said improvements and personal property.

8. CONDITION AND MAINTENANCE

The Commissions have inspected the premises prior to execution of this Lease Agreement and accept the premises as is. The Commissions shall maintain the VRE Station Sites, including all improvements and any structures thereon, in accordance with the transit asset management standards promulgated by the Federal Transit Administration. The Commissions shall maintain the Legacy Station Sites, in whole or in part, according to the allocation of maintenance responsibilities described in other agreements with third parties. The VRE Station Sites and any improvements or structures hereafter erected by the Commissions on the VRE Station Sites or the Legacy Station Sites shall be maintained by and at the Commissions' sole expense.

9. UTILITIES

The Commissions shall pay for all utilities incident to its use and occupation of the premises, including special or other tax assessments related thereto. DRPT will cooperate, at no cost to the Commissions, in the expeditious approval of utilities located on the premises necessary for the Commissions' use and occupation of the premises.

10. RISK OF LIABILITY AND INSURANCE

It is understood and agreed that, as contemplated by Article 9 of the Operating Agreement, the Commissions' obligation to indemnify and insure Virginia Indemnites pursuant to the provisions of Article 9 of the Operating Agreement (which provisions shall survive for the purposes of this Lease Agreement notwithstanding the prior expiration or termination of the Operating Agreement) shall extend to and include all losses, costs, expenses, damages and liability which is attributable to, or exacerbated by, the construction, maintenance, and use of the premises and all improvements to the premises and all other activities undertaken on or about the premises by the Commissions, any Operator (as defined by the Operating Agreement), and their respective employees, agents, contractors, passengers, and invitees.

11. CONDEMNATION

In the event a station site is condemned by public authority through the exercise of eminent domain, or is sold to or acquired by any public authority under threat of condemnation, thereupon vesting the title in said public authority, this Lease Agreement shall immediately terminate with respect to such station site. In such event, the Commissions shall have no claim or right to share in compensation attributable to DRPT's property and improvements other than for improvements made at the cost of the Commissions. The foregoing shall in no manner limit the Commissions' right to all compensation for and damages to all structures, other improvements and the contents thereof owned or placed by the Commissions, or in which the Commissions have any interest, which are attributable to the exercise of eminent domain or other acquisition by a public authority. DRPT shall not be liable for any inconvenience or damage to the Commissions caused by the aforesaid action of a public authority.

12. TERMINATION

(a) If the Commissions shall default in the timely payment of any installment of rent, or shall fail to keep and perform any of its covenants and agreements herein contained, and if any such default shall continue for a period of thirty (30) days from the date the Commissions receive written notice from DRPT to cure such default, or in the alternative, the Commissions fail to undertake such measures within such 30 days as will reasonably cure such default, the Commissions' rights under this Lease Agreement may be suspended by written notice of DRPT and such suspension shall be lifted by DRPT upon the cure of such breach to DRPT's reasonable satisfaction, or upon earlier written notice of DRPT.

(b) Upon expiration or termination of the Operating Agreement, unless otherwise agreed by the parties, the Commissions shall promptly vacate the premises and remove therefrom all structures, other improvements and contents thereof owned or placed thereon or therein by the Commissions, or in which the Commissions have any interest, including the debris from the removal thereof, and restore the premises to a condition satisfactory to DRPT, all to be completed at the Commissions' cost and expense within twelve (12) months after the date of said termination. It is hereby agreed that the standard for such restoration shall be a condition equal to or better than that of the premises on the date such premises were first leased to the Commissions, reasonable wear and tear of structures excluded, but specifically including a requirement for grading and seeding of disturbed areas. In the event of failure of the Commissions to comply, after

specific notice to the Commissions, all such structures, improvements and contents thereof are to be considered and treated as having been abandoned by the Commissions and, at the option of DRPT, the ownership of same is to be considered surrendered to DRPT, to be removed, used, destroyed or otherwise as DRPT sees fit and without waiving or reducing the right of DRPT, hereby agreed to, to seek and obtain judgment against the Commissions for any delinquent rental payment, or for any expense and damages resulting from failure of the Commissions to keep and perform its covenants and agreements herein contained.

(c) Termination or expiration of this Lease Agreement shall not deprive DRPT or the Commissions of any other action or remedy against the other which existed prior to such termination. It is expressly understood and agreed that the provisions of Section 10, the obligations of the Commissions to pay amounts accrued under this Lease Agreement, and the provisions of Section 12(b) shall survive the termination or expiration of this Lease Agreement for any reason.

13. DAMAGE OR DESTRUCTION BY FIRE OR NATURAL CAUSES

(a) If during the Term, one or more of the station sites on the premises are damaged by fires, floods, windstorms, earthquakes, explosions, hurricanes, tornadoes, strikes, acts of public enemy, incidences of terrorism, wars or riots, civil disturbances, acts of God, or other casualty, so that the same are rendered unsuitable for the operation of the Commissions' business, and if said station sites cannot be repaired within one hundred eighty (180) days from the time of said damage, then this Lease Agreement shall terminate with respect to the locations so damaged or destroyed, as of the date of such damage or destruction. In such event, the parties shall amend this Lease Agreement to remove the damaged or destroyed station sites from the description of the premises in Appendix A, with a corresponding reduction in the rent. However, if the premises can with reasonable diligence be repaired, or a repair commenced, within one hundred eighty (180) days, the station sites shall be, by the Commissions, repaired as quickly as is reasonably possible, and this Lease Agreement shall remain in full force and effect.

(b) No compensation or claim or diminution of rent will be allowed or paid by DRPT by reason of inconvenience, annoyance, or injury to business arising from the necessity of repairing the premises or any portion thereof, however the necessity may occur. The Commissions understand and agree that for this reason they will have adequate insurance available to protect their interests in the event of such a casualty.

14. LIMITATIONS

Any approval or permission given by DRPT hereunder or failure of DRPT to object to work done on the premises or use made thereof, including but not limited to the failure of DRPT to object to any material used or method of construction, or plans and specifications for any improvements to, or replacements, restorations or alterations of the premises, shall not be construed as an admission of responsibility by DRPT, or as a waiver of any obligations of the Commissions under this Lease Agreement.

15. GENERAL PROVISIONS

(a) This Lease Agreement shall be governed by and construed under the laws of the Commonwealth of Virginia, without regard for conflict of laws principles.

(b) This Lease Agreement may be amended only by a written instrument executed and delivered by both parties.

(c) This Lease Agreement, including Appendices annexed to this Lease Agreement, and including the Operating Agreement, constitutes the entire agreement of the parties with respect to its subject matter and supersedes all prior or contemporaneous, oral or written, agreements or understandings with respect to such subject matter.

(d) This Lease Agreement shall be binding upon and inure to the benefit of the parties' respective successors and assigns; provided, however, that the Commissions may not assign or sublease the premises or improvements to the premises, without the prior written consent of DRPT, which consent may be withheld for any reason.

(e) All notices, requests, consents and approvals required or permitted under this Lease Agreement shall be in writing and shall be deemed delivered upon personal delivery or upon mailing to the parties at the addresses set forth below or such other addresses as the parties may designate by delivery of prior notice to the other party:

If to DRPT:

[•]

With a copy to:

[•]

If to Commissions:

Chief Executive Officer

Virginia Railway Express

1500 King Street, Suite 202

Alexandria, VA 22314

Virginia Railway Express

With a copy to:

Counsel for the Commissions

1500 King Street, Suite 202

Alexandria, VA 22314

(f) Each Commission shall be jointly and severally liable for payment of rent and other sums due under this Lease Agreement, and for performance of all other terms and conditions of this Lease Agreement. DRPT may exercise any or all remedies it may have against either or both Commissions.

(g) This Lease Agreement ~~may~~shall be assigned by DRPT to the Virginia Passenger Rail Authority to undertake DRPT's obligations and activities contemplated by this Lease Agreement.

12-1-2020 DRAFT

|

IN WITNESS WHEREOF, the parties hereto have executed this Master Lease Agreement
as of the day and year first above written.

VIRGINIA PASSENGER RAIL AUTHORITY, LESSOR

By: _____
Name: _____
Title: _____

NORTHERN VIRGINIA
TRANSPORTATION COMMISSION, LESSEE

By: _____
Name: _____
Title: _____

POTOMAC AND RAPPAHANNOCK
TRANSPORTATION COMMISSION, LESSEE

By: _____
Name: _____
Title: _____

APPENDIX A

STATION SITE	ADDRESS	LEASED FACILITIES	EXHIBIT ⁴¹
Leeland	275 Leeland Road Falmouth, VA 22405	Land	
Brooke	1721 Brooke Road Stafford, VA 22554	Land	
Rippon	15511 Farm Creek Drive Woodbridge, VA 22191	Land	
Woodbridge	1040 Express Way Woodbridge, VA 22191	Land ⁵² ; East and West Platforms	
Fredericksburg	200 Lafayette Boulevard Fredericksburg, VA 22401	East and West Platforms	
Quantico	550 Railroad Avenue Quantico, VA 22134	Station Building and Land ⁶³	
Lorton	8990 Lorton Station Boulevard Lorton, VA 22079	Land	
Franconia-Springfield	6880 Frontier Drive Springfield, VA 22150	Land	
Crystal City	1503 Crystal Drive Arlington, VA 22202	Land	
Alexandria	110 Callahan Drive Alexandria, VA 22301	East and West Platforms	
L'Enfant	6th and 7th Street at C Street, SW Washington, DC 20024	Land	
L'Enfant Storage Tracks	Washington, DC	Land	
Spotsylvania	9442 Crossroads Parkway Fredericksburg, VA 22408	Land	

¹ NTD: Need to ultimately incorporate descriptive exhibits for each station site.

⁵² NTD: CSX to retain land under platform on CSX-retained side of corridor.

⁶³ NTD: CSX to retain land under platform on CSX-retained side of corridor.

|

APPENDIX - B

ANNUAL RENTAL AMOUNTS

Annual rental amounts shall be one dollar per year per station site, unless and until such rental amounts are modified according to the terms of the Lease Agreement.

12-1-2020 DRAFT

PASSENGER RAIL IMPROVEMENTS AND FUNDING AGREEMENT

Dated [●], 2020

between

NORTHERN VIRGINIA TRANSPORTATION COMMISSION AND POTOMAC AND
RAPPAHANNOCK TRANSPORTATION COMMISSION
as Virginia Rail Express

and

VIRGINIA DEPARTMENT OF RAIL AND PUBLIC TRANSPORTATION

EXHIBIT TABLE

EXHIBIT	TITLE
EXHIBIT A	DEFINITIONS
EXHIBIT B	PHASES 1 AND 2 OF PROGRAM PROJECTS
EXHIBIT C	SUPPORTED PROGRAM ELEMENTS

PASSENGER RAIL IMPROVEMENTS AND FUNDING AGREEMENT

This PASSENGER RAIL IMPROVEMENTS AND FUNDING AGREEMENT (this “Agreement”) is made and entered into this [●] day of [●], 2020 and is between the (i) Virginia Department of Rail and Public Transportation (“DRPT”), a an agency of the Commonwealth of Virginia (“Commonwealth”) and (ii) The Northern Virginia Transportation Commission and the Potomac and Rappahannock Transportation Commission, bodies politic and corporate and political subdivisions of the Commonwealth, established under the provisions of the Transportation District Act of 1964, as amended, and having principal places of business at 2300 Wilson Boulevard, Suite 620, Arlington, Virginia 22201, and 14700 Potomac Mills Road, Woodbridge, Virginia 22192, respectively (hereinafter, individually, a “Commission” and collectively the “Commissions”, which together DRPT and the Commissions shall be referred to as the “Parties”).

RECITALS

WHEREAS, the Commissions are engaged in planning and operating a public transportation rail system known as the Virginia Railway Express (“VRE”) that operates over certain railroad tracks and other railroad assets between Washington, D.C. and Spotsylvania, Virginia, pursuant to the Master Agreement for Provision of Commuter Rail Services in Northern Virginia dated October 3, 1989, as amended (the “Master Agreement”), among the Commissions, the Participating Jurisdictions and the Contributing Jurisdictions (each as defined below);

WHEREAS, the Parties are committed to a substantial increase in commuter passenger rail service provided by VRE between Washington, DC and Virginia cities; and

WHEREAS, to achieve this increase in commuter passenger rail service and enhanced utility, DRPT will acquire the Real Property, and undertake a program of capital projects (such program of capital projects referred to as the “Program”) as set forth in **EXHIBIT B**.

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows.

1. Program Objective; Effectiveness.

- 1.1 One of the principal objectives of DRPT acquiring the Real Property and undertaking the Program Projects is to increase commuter rail services along the RF&P Corridor, while maintaining freight interoperability.
- 1.2 The Parties agree that conditions precedent to the effectiveness of this Agreement are (i) DRPT and CSXT successfully negotiating and entering into the definitive agreements implementing the Term Sheet and the closing of the conveyance from CSXT to DRPT of a passenger easement (later to be converted to fee title or other interest from CSXT to DRPT) over the portion of the RF&P Corridor being conveyed to DRPT, and (ii) the execution of a definitive agreement between DRPT and the Commissions for operation of commuter rail services within the RF&P Corridor.

2. Program Funding Responsibilities.

- 2.1. Commissions Funding Commitment. The Commissions will pay to DRPT the (i) CROC-Backed Debt Proceeds and (ii) CROC Pay-Go Contributions, in each case in support of the Supported Program Elements identified in **EXHIBIT C**, as may be amended by the Parties from time to time.

Collectively, the CROC-Backed Debt Proceeds and the CROC Pay-Go Contributions shall be the “Commissions Funding Commitment”. It is expected that the Commissions’ CROC-Backed Debt debt service obligations shall extend for approximately 30 years, or for such other term as may achieve the objectives of this Agreement. The Commissions’ CROC ~~Pay-Go~~ Pay-Go Contributions shall not exceed 10 years unless such contributions are extended: (i) through the Reserve Recapture Date in accordance with Section 4.5-1 of this Agreement, or (ii) upon mutual agreement in writing by the Parties. In addition, the Commissions will continue to employ good faith efforts to secure sources of third-party funding that may be used in support of the Program Costs, ~~and any such additional sources of funding shall not displace the CROC funds committed under this Agreement, but shall be supplemental and in addition to the Commissions Funding Commitment.~~

- 2.2. DRPT Funding Responsibilities. DRPT will be responsible for sourcing the balance of funding needed in excess of the Commissions Funding Commitment to fund the Program Costs, whether through local, regional, state, federal, or other non-Commissions funding sources. However, upon the request of either Party, the Parties will meet and confer to determine if, subject to the approval of the respective boards of the Commissions-any Commissions-sourced funding in addition to the Commissions Funding Commitment may be made available to support the Program Costs, provided that, in no case shall the Commissions supply more than ten percent (10%) of the Program Costs, unless expressly agreed in writing by the Parties.

3. Source of Commissions Funding Commitment.

The Parties agree the source of the Commissions Funding Commitment shall be the Commuter Rail Operating and Capital Fund (the “CROC”) established under Va. Code § 33.2-3500(B).

4. CROC-Backed Debt.

- 4.1. Subject to the approvals required under Section 9, the Commissions, for the benefit of VRE, will issue CROC-Backed Debt as permitted under Va. Code § 33.2-3502. The Commissions will use best efforts to issue the CROC-Backed Debt no later than November 15, 2021; and the Commissions shall issue the CROC-Backed Debt no later than November 15, 2022, provided that the Parties agree that the issuance of the CROC-Backed Debt will generate sufficient proceeds and otherwise reasonably satisfy the objectives of this Agreement. The Parties shall collaborate on the structuring and offering of the CROC-Backed Debt, including but not limited to undertaking tax due diligence, developing information for offering documents, cooperating in bond validation proceedings, if any, and preparing various bond closing documents. Financing structures may include, but shall not be limited to, public bonds, privately-placed bonds, bank financing, financings under federal or state programs which may include, but shall not be limited to, TIFIA, RRIF-and Virginia Resources Authority (VRA). The CROC-Backed Debt may be credit enhanced, supported by ~~reserves~~ Reserve Accounts, issued in one or more taxable or tax-exempt series, or otherwise structured and offered so as to achieve the objectives of this Agreement.
- 4.2. The CROC-Backed Debt Proceeds will be used for the Supported Program Elements set forth in **EXHIBIT C**, as may be amended by the Parties from time to time, and are expected to be fully expended for Supported Program Elements within eighteen months following issuance, except for

~~such reasonably required reserves as may be used to enhance the marketability any portion~~ of the CROC-Backed Debt Proceeds used to fund Debt Service Reserves. Specifically, the Parties intend the CROC-Backed Debt Proceeds to support acquisition costs of the Real Property within the VRE operating territory. DRPT shall submit a requisition to the Commissions at least 20 days in advance of any planned Real Property installment payment for which the CROC-Backed Debt Proceeds will be used, along with such supporting documentation relating to the acquisition as may be required by the CROC-Back Debt documents. Following receipt of any such requisition which satisfies the requirements of the documents related to the CROC-Backed Debt, the Commissions shall cause to be transferred to DRPT or its order the requisitioned amount of CROC-Backed Debt Proceeds. If the Commissions are unable to transfer the CROC-Backed Debt Proceeds in advance of any such Real Property installment payment because the Commissions have not yet issued the CROC-Backed Debt at the time of the Real Property installment payment, then DRPT will follow the same requisition process after the Commissions have issued the CROC-Backed Debt. DRPT agrees to fully cooperate with the Commissions with respect to any post-issuance securities disclosure, tax, reporting and other compliance as may be required for the CROC-Backed Debt. Depending on the financing structure, this reporting may require information on the progress and delivery of all elements of the Program as described in Exhibit B, not just the Supported Program Elements.

- 4.3. Unless otherwise agreed to in writing by the Parties, the annual CROC-Backed Debt Service payments during the first ten years following the Commissions' first CROC Pay-Go Contribution payment to DRPT shall not exceed the statutory maximum identified in Va. Code § 33.2-3502. After the first ten years following the Commissions' first CROC Pay-Go Contribution payment to DRPT, annual CROC-Backed Debt Service payments shall not exceed \$7,500,000, unless otherwise agreed to in writing by the Parties. CROC-Backed Debt Service payments shall be the highest priority use of the CROC funds. However, the Parties acknowledge that the specific annual amounts of CROC-Backed Debt Service payments and CROC Pay-Go Contributions may vary depending upon general market conditions at the time of the issuance of the CROC-Backed Debt, financing methods available to the Commissions, the achievable credit rating(s) of the proposed CROC-Backed Debt and other factors to be considered by the Commissions in structuring the CROC-Backed Debt offering so as to best achieve the objectives of this Agreement.
- 4.4. The Commissions will strive to maximize the CROC-Backed Debt Proceeds provided in support of the Program, subject to market considerations, overall prudent fiscal management that protects the interests of current and future VRE riders and the member jurisdictions who support VRE, and applicable provisions of this Agreement. VRE's current Financial and Debt Management Principles (adopted November 2013) do not contemplate the issuance of debt backed by a funding source such as CROC. Prior to any CROC-Backed Debt issuance, the Commissions will develop and approve updated Financial and Debt Management Principles, and the process of issuing CROC-Backed Debt will be conducted in accordance with those principles.

4.5. The following principles shall apply to the funding of any Reserve Accounts:

4.5.1. ~~If reserve funds are reasonably required by lenders or investors as part of the CROC Backed Debt issuance, or if reserve funds will enhance creditworthiness in support of the effort to maximize debt proceeds, such reserve funds may be funded with a~~ Reduced CROC Pay-Go

Contributions to Fund Reserve Accounts. The Commissions may fund Reserve Accounts with cash contributions from the CROC or may be funded from the CROC Backed Debt Proceeds. More generally, prudent fiscal management may require the Commissions to fund reasonable additional reserve funds to ensure adequate liquidity, manage cashflows, and support ongoing costs related to the debt issuance. To, which may have the effect of reducing one or more quarterly CROC Pay-Go Contribution payments. Accordingly, to the extent the funding of any such reserves (i) Reserve Account reduces one or more quarterly CROC Pay-Go Contribution payments, or (ii) is funded from the CROC Backed Debt Proceeds (the amount of any such reductions under (i) and amounts under (ii), in aggregate, being the "Reserve Displaced Amount"), the Commission's duty to pay to DRPT the CROC Pay-Go Contributions will be extended beyond Fiscal Year 2031 through the Reserve Recapture Date. However, any such Reserved Displaced Amount payments shall be subordinate to the repayment of any CROC Backed Debt obligations.

4.5.2. Use of CROC-Backed Debt Proceeds to Fund Debt Service Reserves. CROC-Backed Debt Proceeds may be used by the Commissions to fund Debt Service Reserves, but not to fund any other category of Reserve Accounts. The Parties agree that any CROC-Backed Debt Proceeds used by the Commissions to fund Debt Service Reserves will not be subject to the recapture principle set forth in Section 4.5.1 above.

4.5.4.6. As they become due, Commissions shall be solely responsible for, and shall make, all CROC-Backed Debt Service payments pursuant to the corresponding financing agreements. The Commonwealth and DRPT shall have no liability for any CROC-Backed Debt or any other sum secured by or accruing under any financing agreement entered into by the Commissions as a result of this Agreement. No document evidencing CROC-Backed Debt shall contain any provisions whereby a trustee or other person would be entitled to seek payment of such CROC-Backed Debt or any related damages or other amounts from the Commonwealth or DRPT. The Parties acknowledge and agree that the CROC-Backed Debt shall be payable solely from CROC payments received by the Commissions and any other amounts provided therefor in the CROC-Backed Debt documents, which may include, but not shall not necessarily be limited to, ~~reserves~~Reserve Accounts, bond insurance, other credit enhancements or, if agreed to in writing, federal, state or local governmental support.

4.5.1.4.6.1. Each bond, promissory note, or other document evidencing CROC-Backed Debt must include a conspicuous recital on its face stating: (i) payment of the principal and interest does not constitute a claim against DRPT's interest in the Rail Facilities, or any part thereof; (ii) payment of the principal and interest is not an obligation of the Commonwealth or DRPT, or any other agency, instrumentality, or political subdivision of the Commonwealth, moral or otherwise; and (iii) neither the full faith and credit nor the taxing power of the Commonwealth, DRPT, or any other agency, instrumentality, or political subdivision of the Commonwealth is pledged to the payment of the principal and interest on the CROC-Backed Debt; and (iv) the CROC-Backed Debt is a limited obligation of the Commissions payable solely from CROC payments received by the Commissions and other amounts pledged therefor. Nothing herein shall preclude the Commissions from making any clarifications to the foregoing recital that may be reasonably necessary to address any liability of the Commissions themselves.

~~4.5.2.4.6.2.~~ Each bond, promissory note, or other document evidencing CROC-Backed Debt must also include an affirmative statement to the effect that the trustee's or bondholders' sole interest is in the pledged CROC funds, and the trustee and bondholders have no rights by lien or otherwise against DRPT's title to or real property interest in the Rail Facilities or any other facilities owned by DRPT. Similarly, the trustee and bondholders will have no rights by lien or otherwise against the Commissions (except as specifically described in the CROC-Backed Debt documents), the Participating Jurisdictions or the Contributing Jurisdictions.

~~4.6.4.7.~~ If interest on the CROC-Backed Debt is determined to be exempt from federal income taxation, the Parties will take all such actions as may be reasonably required to confirm and thereafter preserve such tax exemption, including, but not limited to:

~~4.6.1.4.7.1.~~ ~~Mutually-mutually~~ agreeing upon a debt term that is appropriate given the useful life of the asset(s) being purchased or constructed and otherwise complies with applicable federal law of tax-exempt obligations;

~~4.6.2.4.7.2.~~ ~~Assisting-assisting~~ with the tax due diligence to be conducted by the Commissions' tax and bond counsel; and

~~4.6.3.4.7.3.~~ ~~Cooperating-cooperating~~ with post-issuance reporting and other compliance relating to the use of the CROC-Backed Debt Proceeds and other matters in order to satisfy all tax-exempt issuance requirements, including arbitrage rebate.

5. CROC Pay-Go Contributions.

- 5.1. In addition to the CROC-Backed Debt Proceeds, for each fiscal quarter during a Collection Period, the Commissions shall pay to DRPT twenty-five percent (25%) of the applicable Annual CROC Pay-Go Contribution, or such lesser amount of CROC funds as the Commissions may actually receive during such fiscal quarter.
- 5.2. The payments described in Section 5.1 may be made by the Commissions to DRPT up to one hundred eighty (180) days after the first day of the applicable fiscal quarter during which the applicable CROC funds are received by the Commissions. For example, the quarterly CROC Pay-Go Contribution payment covering the first fiscal quarter of Fiscal Year 2022 may be paid by the Commissions to DRPT on any date prior to one hundred eighty (180) days after the first day of Fiscal Year 2022. In addition, quarterly CROC Pay-Go Contribution payments shall not be reduced by any amount of CROC-Backed Debt Service payments allocable to CROC-Backed Debt incurred after the final day of the applicable Collection Period.
- 5.3. Upon ~~mutual agreement of the Parties~~sixty (60) days' written notice to DRPT, the Commissions may seek Commonwealth-Transportation-Board-controlled funding to support their commitment under this Agreement. ~~Upon mutual agreement of the Parties, the~~The Commissions may substitute such Commonwealth-Transportation-Board-controlled sources in place of the CROC funds for all or part of any required CROC Pay-Go Contribution to DRPT, provided that the total equivalent amount of the required CROC Pay-Go Contribution is otherwise provided in accordance with the terms of this Agreement. The Commissions may, at their discretion, substitute

any alternative non-Commonwealth-Transportation-Board-controlled capital funding source in place of the CROC funds for all or part of any required CROC Pay-Go Contribution to DRPT, provided that the total equivalent amount of the required CROC Pay-Go Contribution is otherwise provided in accordance with the terms of this Agreement.

- 5.4. The CROC Pay-Go Contributions will be used by DRPT for the purposes established in **EXHIBIT C**.

6. Supported Program Elements; Quarterly Reports.

Unless otherwise mutually agreed in writing by the Parties, the Commissions Funding Commitment will be used to fund Supported Program Elements identified in **EXHIBIT C** attached to this Agreement. Quarterly, DRPT shall generate and deliver to the Commissions a report demonstrating the application of the CROC-Backed Debt Proceeds and CROC Pay-Go Contributions received by DRPT from the Commissions. Such report shall demonstrate the application of such sources during the period covered by the report, and the application of such sources in aggregate with respect to the Program. Such report shall also demonstrate any unused balances of CROC-Backed Debt Proceeds and/or CROC Pay-Go Contributions held by DRPT.

7. Acknowledgment of Commissions' Planned Station Improvements.

In addition to, but separate from, the Program, the Commissions will independently undertake a series of capital project investments in the RF&P Corridor focused primarily (but not exclusively) on passenger station improvements. The Commissions' funding for those passenger station improvements is separate and distinct from the Commissions Funding Commitment contemplated in this Agreement; provided, however, that nothing in this Agreement shall prohibit the Commissions from using CROC payments not otherwise committed to DRPT hereunder to finance future capital improvements of any type. The estimated (but not capped) cost of the Commissions' phase 1 and phase 2 station projects in the RF&P Corridor is \$211,000,000.

8. Continued Use Requirement.

In accordance with Va. Code § 33.2-3501(B), the Parties will collaborate to ensure those assets funded by the Commissions Funding Commitment shall be subject to the continuing use of the Commissions for the useful life of such assets.

9. Appropriation and Approvals.

- 9.1 DRPT'S PAYMENT OF ANY AMOUNTS DUE PURSUANT TO THIS AGREEMENT, OR ITS COMMITMENT TO FUND ANY PROGRAM PROJECTS HEREUNDER, IS SUBJECT TO APPROPRIATION BY THE GENERAL ASSEMBLY AND ALLOCATION BY THE COMMONWEALTH TRANSPORTATION BOARD.
- 9.2 THE COMMISSIONS' DUTY TO MAKE THE CROC-BACKED DEBT SERVICE PAYMENTS AND THE CROC PAY-GO CONTRIBUTIONS ARE SUBJECT TO APPROPRIATION AND RECEIPT OF CROC FUNDS FROM THE COMMONWEALTH AND

ANNUAL APPROPRIATIONS BY THE COMMISSIONS' BOARDS. IN ADDITION, THE ISSUANCE OF THE CROC-BACKED DEBT IS SUBJECT TO THE APPROVAL BY THE COMMISSIONS OF THE FINAL TERMS THEREOF.-

10. Governing Law.

This Agreement shall be governed by the laws of the Commonwealth of Virginia, without regard for conflict of laws principles.

11. Compliance with Law.

The Parties will comply with all applicable state, federal, and local laws and regulations in the performance of this Agreement. The Commissions certify they do not and shall not during the performance of this Agreement knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986.

12. Entire Agreement; Amendment and Modification.

This Agreement between the Parties shall supersede all prior communications and negotiations concerning the subject matter herein. This Agreement may not be modified or amended, except pursuant to a written agreement that is duly authorized, executed and delivered by both Parties.

13. Severability.

If any provision of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, the remainder shall not be affected thereby and each other provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

14. Sovereign Immunity.

Notwithstanding any contrary language, none of the Commonwealth, DRPT or the Commissions waive or abrogate their sovereign immunity, in part or in whole, in any manner, under any theory, hereunder.

15. Assignment.

DRPT ~~may~~shall assign this Agreement to the Virginia Passenger Rail Authority, provided that the Virginia Passenger Rail Authority shall assume all the rights and duties of DRPT hereunder, and provide any reasonable documentation requested by the Commissions relating to such assignment, including documentation relating to preserving the tax-exempt status, if any, of the CROC-Backed Debt. Otherwise, this Agreement shall not be assigned by any Party unless express written consent is given by the other Party.

16. Effective Date; Expiration.

This Agreement will be effective upon the satisfaction of the conditions stated in Section 1.2. It will expire ninety (90) days after the Reserve Recapture Date.

17. Dispute Resolution.

- 17.1. Efforts to Resolve; Advisory Opinions. The Parties hereto shall make every reasonable effort to settle any dispute arising out of this Agreement without resorting to litigation. If the Parties so agree, they may retain a disinterested person experienced in railroad operations, including, but not limited to, the financing of railroads, or an accountant or attorney if appropriate, to render his or her objective advice and opinions, which shall be advisory only and not binding unless the Parties agree in writing to be bound by his or her judgment in a particular instance.
- 17.2. Legal Actions. Any claims or controversy between the Commissions and DRPT may be resolved by either party filing a legal action. All litigation between the Parties arising out of or pertaining to this Agreement shall be filed, heard, and decided in either the Circuit Court for the City of Richmond, Virginia, Division I.
- 17.3. Duty to Continue Performance. Except as may be ordered or permitted by a court of competent jurisdiction, pending final resolution of any dispute, the Parties will continue to fulfill their respective obligations under this Agreement.
- 17.4. Dispute Resolution Costs. Each party shall bear the costs and expenses incurred by it in connection with any litigation, and neither party will seek or accept an award of attorneys' fees or costs incurred in connection with the resolution of a dispute pursuant to this Article Eleven.

18. Notices.

All notices or communications with respect to this Agreement shall be in writing and shall be deemed delivered upon delivery by hand, upon the next Business Day if sent prepaid overnight delivery service, or on the third Business Day following mailing by U.S. Mail, certified, postage prepaid, return receipt requested, to the addresses set forth below or by email that clearly is marked notice in both the text and the subject line. The representatives and/or addresses set forth herein may be changed at any time by written notice to the other Parties sent by a below-listed representative, his/her designee, or interim replacement.

For the Commissions: Chief Financial Officer
Virginia Railway Express
1500 King Street, Suite 2020
Alexandria, VA 22314

Chief Executive Officer
Virginia Railway Express
1500 King Street, Suite 202
Alexandria, VA 22314

Counsel for the Commissions
1500 King Street, Suite 202
Alexandria, VA 22314

For DRPT: Chief Financial Officer
Virginia Department of Rail and Public Transportation

|

600 East Main Street, Suite 2102
Richmond, VA 23219

Director
Virginia Department of Rail and Public Transportation
600 East Main Street, Suite 2102
Richmond, VA 23219

Counsel for the Department of Rail and Public Transportation
Transportation Section
Office of the Attorney General
202 North 9th Street
Richmond, VA 23219

[SIGNATURE PAGE FOLLOWS]

NORTHERN VIRGINIA TRANSPORTATION COMMISSION

By: _____

Witness: _____

POTOMAC AND RAPPAHANNOCK TRANSPORTATION COMMISSION

By: _____

Witness: _____

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF RAIL AND PUBLIC TRANSPORTATION

By: _____

Jennifer Mitchell
Director

Witness: _____

[SIGNATURE PAGE TO PASSENGER RAIL IMPROVEMENTS AND FUNDING AGREEMENT]

DEFINITIONS

“Agreement” is defined in the first paragraph preceding the recitals.

“Annual CROC Pay-Go Contribution” means, for a given Fiscal Year, \$15,000,000 minus any CROC-Backed Debt Service payments paid or scheduled to be paid by the Commissions during that same Fiscal Year, ~~and minus any CROC Funds (but excluding CROC-Backed Debt Proceeds) used during that same Fiscal Year to fund any reserve funds required by lenders with respect to the CROC-Backed Debt.~~ For example, if the CROC-Backed Debt Service for a given Fiscal Year is \$8,000,000, then ~~(assuming no funding of reserve funds during the applicable Fiscal Year)~~ the Annual CROC Pay-Go Contribution for that same Fiscal Year will be \$7,000,000 (paid in equal quarterly payments of \$1,750,000).

“Business Day” means Monday through Friday except federal or Commonwealth holidays.

“Collection Period” means each fiscal quarter beginning in Fiscal Year 2022 and going through the end the Reserve Recapture Date.

“Commissions” is defined in the first paragraph preceding the recitals.

“Commissions Funding Commitment” is defined in Section 2.1.

“Contributing Jurisdictions” means Alexandria and Arlington.

“CROC” is defined in Section 3 and means the Commuter Rail Operating and Capital Fund established under Va. Code §§ 33.2-3500, *et seq.*

“CROC-Backed Debt” means debt incurred by the Commissions in support of the Program and secured by a pledge of CROC funds.

“CROC-Backed Debt Proceeds” means the net proceeds of the CROC-Backed Debt.

“CROC-Backed Debt Service” means for a Fiscal Year or other measurement period, the aggregate of the payments to be made in respect of the principal of and interest on any CROC-Backed Debt and the associated financing costs and expenses, including, but not limited to, trustee’s fees or charges.

“CROC Pay-Go Contributions” means the cash payments from the Commissions to DRPT pursuant to Section 5.1, and collectively will equal the aggregate of all of the Annual CROC Pay-Go Contributions, including as such contributions may be extended through the Reserve Recapture Date.

“CSXT” means CSX Transportation, Inc., a Virginia Corporation.

“Debt Service Reserves” means one or more reserve accounts required by lenders and held or under the control of the trustee with respect to the CROC-Backed Debt, which are for the purposes of backstopping the Commissions’ duty to pay the CROC-Backed Debt Service payments.

“DRPT” is defined in the first paragraph preceding the recitals.

“Fiscal Year” means July 1 to June 30 of any given year.

“Participating Jurisdictions” means Fairfax, Fredericksburg, Manassas, Manassas Park, Prince William, Spotsylvania and Stafford.

“Parties” is defined in the first paragraph preceding the recitals.

“Program” is defined in the third recitals.

“Program Costs” means DRPT’s actual costs to complete the Program Projects, inclusive of the costs to acquire the Real Property, currently estimated to be (but not capped at) \$3,700,000,000.

“Program Project(s)” means those projects listed in **EXHIBIT B**.

“Rail Facilities” means the railroad tracks on which VRE passenger rail service operates, and those stations, platforms, and other railroad assets that are utilized by the VRE passenger rail service.

“Real Property” means, collectively, Segments 1, 2, and 3 as defined in the *Comprehensive Rail Agreement between CSX Transportation, Inc. and the Virginia Department of Rail and Public Transportation*, the execution of which is a condition precedent to the effectiveness of this Agreement.

“Reserve Displaced Amount” is defined in Section 4.5.

“Reserve Accounts” means all Debt Service Reserves and any other reserve accounts not meeting the definition of Debt Service Reserves, which accounts are held, in whole or in part, for the purposes of (i) enhancing creditworthiness in support of the effort to maximize CROC-Backed Debt Proceeds, (ii) enhancing the marketability of the CROC-Backed Debt, (iii) ensuring adequate liquidity, (iv) managing cashflows, and (v) supporting ongoing costs related to the CROC-Backed Debt issuance.

“Reserve Recapture Date” means the first date after the end of Fiscal Year 2031, that the Commissions have paid in full to DRPT ~~the Reserve Displaced Amount~~ (through continued quarterly CROC Pay-Go Contributions payments, or by any other means agreed by the Parties) an amount equal to the aggregate amount of all reductions to any quarterly CROC Pay-Go Contribution payments under Section 4.5.

“RF&P Corridor” means the railroad right-of-way (most of which was previously owned by the Richmond, Fredericksburg and Potomac Railroad Company) generally about 100 feet wide extending approximately 144.8 miles from about CSXT milepost at CFP 112 at the turn off point for Union Station in Washington, D.C. to about CSXT milepost A 29.04, and includes both (i) the right-of-way to be acquired by DRPT plus (ii) the remaining portion of right-of-way to be retained by CSXT adjacent to DRPT’s right-of-way.

“Term Sheet” means the binding term sheet between the Virginia Department of Rail and Public Transportation and CSXT dated December 16, 2019, as amended.

“Virginia Railway Express” or “VRE” is defined in the first recital.

~~“DRPT” is defined in the first paragraph preceding the recitals.~~

12-1-2020 DRAFT

EXHIBIT B**PHASE 1 AND 2 OF PROGRAM OF PROJECTS**

Project Name	Project Limits
L'Enfant Fourth Track and Station Improvements	CFP 112.2 – CFP 111.5
New Long Bridge for Passenger Rail	CFP 111.5 – CFP 110.1
Alexandria Fourth Track	CFP 110.1 – CFP 104.3
Franconia Springfield Bypass	CFP 98.8 – CFP 96.2
Railroad Bridge Over Newington Road	CFP 96.2 – CFP 95.1
Franconia to Lorton Third Track	CFP 95.1 – CFP 92.3
Railroad Bridge Over Route 1	CFP 91.1 – CFP 90.1
Neabsco Creek to Woodbridge Third Track – Siding D	CFP 88.7 - CFP 84.8
Aquia Creek Third Track – Siding E	CFP 70.7 – CFP 68.1
Potomac Creek Third Track – Siding A	CFP 65.2 – CFP 61.3
Crossroads Third Track – Siding F	CFP 52.8 – CFP 48.7
Woodford to Milford Third Track – Siding B	CFP 43.5 – CFP 40.4
Hanover Third Track – Siding C	CFP 18.7 – CFP 15.5

SUPPORTED PROGRAM ELEMENTS

- I. CROC-Backed Debt Proceeds shall be used by DRPT to support acquisition costs of the Real Property within the VRE operating territory. However, if in the reasonable opinion of the Commissions' tax and bond counsel, such use of the CROC-Backed Debt Proceeds jeopardizes the tax-exempt status of the CROC-Backed Debt, then the Parties may collaborate in good faith to agree on alternative uses of the CROC-Backed Debt Proceeds, which uses shall maximize the amount the CROC-Backed Debt Proceeds available to support the Program Costs or otherwise achieve the objectives of this Agreement.
- II. CROC Pay-Go Contributions shall be used to support the following Program Projects, and this list of Program Projects supported by the CROC Pay-Go Contributions may be amended in the future, as needed from time to time, upon mutual agreement of the Parties:
 - a. New Long Bridge for Passenger Rail;
 - b. Alexandria Fourth Track; and
 - c. Franconia Springfield Bypass.

TO: Chair Cristol and NVTC Commissioners

FROM: Kate Mattice and Dan Goldfarb, PE and Dinah Girma

DATE: December 2020

SUBJECT: NVTC Transit Resource Center

At the December meeting the Commission will receive an update on the FY 2021 1st Quarter Transit Performance Report and the FY 2021 1st Quarter Parking Utilization Report (Average Weekday).

A. FY 2021 1st Quarter Transit Ridership Report¹

Transit usage continues to be dramatically lower than last year for the region. Transit modes that primarily serve commuter trips (long haul bus, commuter rail, Metrorail) show the highest loss of ridership as compared to last year at this time. As reported in the [MWCOC 2020 Employer Telework Survey](#), this reflects the 82% of survey respondents that reported in June that they have been teleworking since COVID-19 pandemic began, versus 36% pre-pandemic. The levels of telework continue to impact ridership through the 1st quarter of FY 2021.

Transit Boardings in Virginia by System 1 st Quarter FY 2020 (July-September)			
System	FY 20 Q1	FY 21 Q1	Percent Change (2020-2021)
Arlington Transit*	815,512	382,648	-53%
Alexandria DASH	923,564	359,519	-61%
Fairfax County Connector	2,153,065	1,127,328	-48%
Fairfax City CUE	155,217	74,972	-52%
Loudoun County Transit	480,173	77,515	-84%
Omni Ride	601,000	171,014	-72%
Virginia Railway Express	1,192,708	75,990	-94%
Metrobus	4,454,560	1,525,827	-66%
MetroAccess	88,033	30,435	-65%
Total	10,863,832	3,825,248	-65%

Source: OLGA and WMATA | * September data for Arlington Transit was estimated based on existing trends. The data was not available at the time of preparing this report.

¹ NVTC's FY2021 Quarterly Transit Performance Report is a reframed effort that provides an overview of the transit service in Northern Virginia focused on quarterly ridership and parking utilization. The report is compiled at the end of each quarter during the current fiscal year and reflects transit boardings for all modes as well as quarterly parking utilization at WMATA rail facilities. All WMATA related data is provided by WMATA; all local system and VRE data is submitted to Department of Rail and Public Transportation (DRPT) by transit agency staff.

Transit ridership increased by 9% from July to August. A typical, non-pandemic August usually sees ridership drop due to end of summer travel, so an overall increase in transit ridership during the pandemic indicates that some people are returning to transit. September showed ridership increases of 23% over August, some of which may be related to the start of school since some schools in the region did have in-person classes. However, during the pandemic it is more difficult to accurately determine ridership trends.

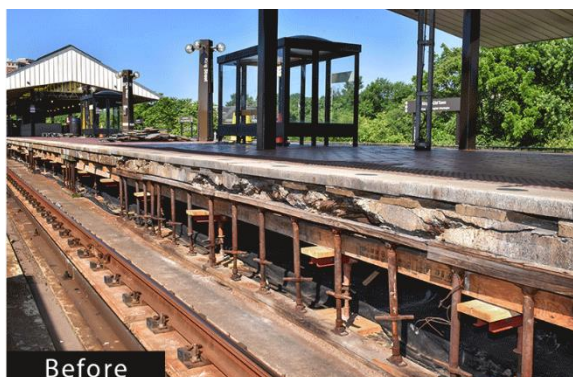
Fairfax County showed the lowest percent decrease as compared to this time last year. Metrobus has higher ridership than Metrorail for this quarter, the opposite of non-pandemic ridership trends. Generally speaking, transit providers report weekday ridership is around 30% to 40% of typical ridership, while weekend ridership is almost equal to pre-pandemic levels. Most providers anticipate resuming fare collection in early 2021 (consistent with Metrobus which resumes fare collection on January 1, 2021) and are installing equipment now to provide safety for drivers and allowing front door boarding.

WMATA Metrorail Virginia Station Entries 1st Quarter FY 2021 (July – September)			
	1st Quarter FY 2020	1st Quarter FY 2021	Percent Change (2020-2021)
Total	10,299,217	1,180,689	-89%
Weekday Average	137,457	3,719	-97%
Saturday Average	56,505	2,298	-96%
Sunday Average	37,884	1,743	-95%

Source: WMATA

Metrorail ridership in Virginia is still significantly impacted due to the COVID-19 pandemic, but Metrorail experienced a 6% increase in ridership when comparing the previous quarter (FY 2020 Q4). To allow for social distancing, WMATA added more buses and trains in August throughout the system which was 75% of pre-pandemic service. WMATA continues to implement its COVID-19 cleaning protocols which include high-touch surfaces wiped down and disinfected and routine deep-cleaning at stations.

Although the pandemic impacted ridership, WMATA took the opportunity of reduced ridership to complete the second round of platform reconstruction at six stations in Fairfax County that had been closed since May 2020; stations were reopened in August and September 2020.



Platform reconstruction work at Ronald Reagan Washington National Airport Station is underway through December 2020; the station will remain open throughout construction.

The attached [Metrorail Ridership by Station in Virginia](#) provides data for the first quarter of FY 2021. The following chart shows those Virginia stations and the change in Metrorail ridership compared to first quarter of FY 2019 and first quarter of FY 2020.

Metrorail Ridership by Virginia Station	
Station	Change from FY 2019 Q1 to FY 2020 Q1
Vienna	-98%
Pentagon	-91%
Dunn Loring	-97%
McLean	-96%
East Falls Church	-96%
Wiehle-Reston East	-96%
Arlington Cemetery	-97%
Crystal City	-92%
Virginia Square	-93%
Greensboro	-94%
Court House	-92%
Spring Hill	-93%
Rosslyn	-90%
Tysons Corner	-93%
Clarendon	-92%
West Falls Church	-89%
Ballston	-84%
Pentagon City	-86%
National Airport	-88%
Eisenhower Avenue	-47%
Franconia Springfield	-31%
Van Dorn	-35%
Braddock Road	-38%
Huntington	-27%
King Street	-35%

Source: WMATA. Ridership is based on station entries only.



B. FY 2021 1st Quarter Parking Utilization Report

The data table below provides a broader comparison of parking usage daily averages between FY 2020 and FY 2021. The map on the following page shows the average daily percent of parking being used at Metro stations in Northern Virginia.

WMATA Virginia Parking Facility Usage (Average Weekday)							
1 st Quarter FY 2021							
Station/Lot	FY 20 Lot Capacity	1 st Quarter FY 20 Lot Usage		FY 21 Lot Capacity	1 st Quarter FY 21 Lot Usage		Utilization Percent Change (2020- 2021)
		Percentage	Daily Average		Percentage	Daily Average	
Huntington*	2,732	19%	519	2,732	3%	91	-82%
West Falls Church	2,009	63%	1,266	1,520	1%	20	-98%
Dunn Loring	1,964	50%	982	1,964	1%	26	-97%
Vienna**	4,719	73%	3,461	4,240	1%	57	-98%
Franconia	5,069	16%	794	5,069	4%	186	-77%
Van Dorn	361	26%	94	361	8%	30	-68%
East Falls Church	422	119%	502	422	1%	6	-99%
Wiehle- Reston East	2,300	94%	2,162	2,300	4%	84	-96%
Northern Virginia Total ¹	19,576	50%	9,780	18,608	3%	500	-95%

Source: WMATA


*Huntington South Garage closed August 2018

**Garage rehab at Vienna NG, 450 spaces; Vienna Lot 1, 479 spaces as of 3/15/20

¹Parking lots at following stations were used to stage equipment since March: Vienna, Dunn Loring, West Falls Church, East Falls Church




Metrorail Ridership by Station in Virginia
1st Quarter FY 2021

Line/Station	Year	July	August	September	Q1 Total	Percent Change FY 20-21
Silver						
Greensboro	FY20	42,810	40,513	41,197	124,520	-94.1%
	FY21	21	2,226	5,051	7,298	
McLean	FY20	66,157	60,683	61,375	188,215	-95.9%
	FY21	45	1,984	5,632	7,660	
Spring Hill	FY20	35,808	32,110	31,112	99,030	-92.5%
	FY21	17	2,231	5,187	7,435	
Tysons Corner	FY20	109,605	107,474	97,583	314,662	-92.7%
	FY21	162	7,274	15,399	22,835	
Wiehle-Reston East	FY20	231,333	207,859	200,717	639,908	-96.1%
	FY21	14	7,898	17,277	25,189	
Total	FY20	485,712	448,639	431,984	1,366,335	-94.8%
	FY21	260	21,613	48,545	70,418	
Orange						
Dunn Loring	FY20	106,252	97,521	95,768	299,541	-97.3%
	FY21	-	4	8,007	8,011	
West Falls Church	FY20	69,325	61,806	64,495	195,626	-89.4%
	FY21	-	10,629	10,140	20,769	
Vienna	FY20	246,697	221,938	223,844	692,479	-97.7%
	FY21	-	-	15,815	15,815	
Total	FY20	422,274	381,265	384,107	1,187,646	-96.2%
	FY21	-	10,633	33,962	44,595	
Silver/Orange						
Ballston	FY20	268,869	250,068	253,518	772,455	-84.3%
	FY21	48,815	39,210	33,337	121,362	
Clarendon	FY20	128,649	119,395	123,286	371,331	-91.5%
	FY21	7,536	9,915	13,970	31,421	
Court House	FY20	176,448	162,520	168,439	507,407	-91.5%
	FY21	12,201	13,376	17,364	42,941	
East Falls Church	FY20	108,845	98,171	101,878	308,894	-96.3%
	FY21	-	2,103	9,234	11,337	
Rosslyn	FY20	377,037	335,701	347,761	1,060,499	-90.4%
	FY21	29,693	32,336	39,843	101,873	
Virginia Square	FY20	105,065	97,245	100,910	303,220	-92.6%
	FY21	5,679	6,864	9,924	22,467	
Total	FY20	1,164,914	1,063,100	1,095,792	3,323,806	-90.0%
	FY21	103,924	103,804	123,671	331,400	
Source: WMATA. Ridership is based on station entries only.						

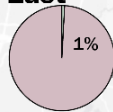
Source: WMATA. Ridership is based on station entries only.



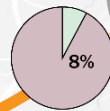
Line/Station	Year	July	August	September	Q1 Total	Percent Change FY 20-21
Blue						
Arlington Cemetery	FY20	58,236	39,580	32,239	130,055	-96.8%
	FY21	71	852	3,224	4,147	
Franconia Springfield	FY20	-	-	106,520	106,520	-30.7%
	FY21	21,565	24,092	28,159	73,816	
Van Dorn	FY20	-	-	42,242	42,242	-35.4%
	FY21	7,212	8,996	11,088	27,296	
Total	FY20	58,236	39,580	181,001	278,817	-62.2%
	FY21	28,848	33,940	42,471	105,260	
Yellow						
Eisenhower Avenue	FY20	-	-	29,875	29,875	-46.7%
	FY21	3,892	5,256	6,764	15,912	
Huntington	FY20	-	-	106,054	106,054	-27.2%
	FY21	24,357	25,270	27,615	77,242	
Total	FY20	-	-	135,930	135,930	-31.5%
	FY21	28,249	30,526	34,378	93,153	
Blue/Yellow						
Braddock Road	FY20	-	1	71,788	71,789	-38.4%
	FY21	12,763	14,135	17,293	44,191	
Crystal City	FY20	354,511	312,946	281,733	949,190	-91.7%
	FY21	21,884	25,268	31,795	78,947	
King Street	FY20	-	-	113,331	113,331	-34.9%
	FY21	22,415	24,062	27,287	73,764	
National Airport	FY20	225,000	203,756	170,839	599,595	-87.5%
	FY21	21,484	25,060	28,639	75,183	
Pentagon	FY20	465,120	439,155	337,117	1,241,392	-90.5%
	FY21	31,322	37,107	49,207	117,636	
Pentagon City	FY20	368,573	336,697	326,117	1,031,387	-85.8%
	FY21	44,059	47,622	54,459	146,141	
Total	FY20	1,413,204	1,292,555	1,300,924	4,006,683	-86.6%
	FY21	153,928	173,254	208,681	535,863	
Total Virginia Stations	FY20	3,544,341	3,225,139	3,529,738	10,299,217	-88.5%
	FY21	315,209	373,770	491,710	1,180,689	
Source: WMATA. Ridership is based on station entries only						
						

FY 2021 **WMATA Virginia Parking Utilization Rate** **(Average Weekday)**

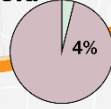
Wiehle-Reston East



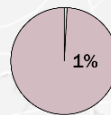
West Falls Church-VT/UVA



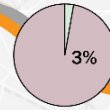
Dunn Loring-Merrifield



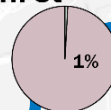
Vienna/Fairfax-GMU



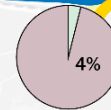
East Falls Church*



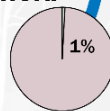
Van Dorn St



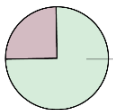
Huntington



Franconia-Springfield



Legend



% FY2021 Utilized Parking by Station

Station	FY21 Lot Capacity
Huntington	2,732
West Falls Church-VT/UVA	2,009
Dunn Loring-Merrifield	1,964
Vienna/Fairfax-GMU	4,240
Franconia-Springfield	5,069
Van Dorn Street	361
East Falls Church	422
Wiehle-Reston East	2,300
Northern Virginia Total	19,097

