

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

STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

AND

NEW ENGLAND SOUTHERN RAILROAD CORPORATION
GOFFSTOWN, NH 03045

April 19, 2012

Contractor Initials SW
Date 4-21-12

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ARTICLE I - GENERAL CONDITIONS

1.1 DEFINITIONS

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

- a. "Contractor"- New England Southern Railroad Corp., 143 New Boston Road, Goffstown, NH 03045.
- b. "State" - means the State of New Hampshire.
- c. "FRA" means the Federal Railroad Administration.
- d. "STB" means the Surface Transportation Board.
- e. "Service" - means rail freight transportation.
- f. "Contracting Officer" - Commissioner, New Hampshire Department of Transportation (NHDOT), or his duly authorized representative having an address of 7 Hazen Drive, P.O. Box 483, Concord, NH 03302-0483. The Contracting Officer shall be the representative of the State hereunder. In the event of any dispute hereunder, the interpretation of this Agreement and the resolution of any disputes by the Contracting Officer shall be final.
- g. "Agreement" - means this Operating Agreement dated April 19, 2012.
- h. "Facilities" collectively means the real estate, track, bridges, signals, switches, structures, buildings, and related railroad transportation property over which Service is to be provided, excluding transload facilities constructed by the Contractor.
- i. "Effective Date" means the date this Agreement is approved by the Governor and Council of the State of New Hampshire or the Contractor obtains operating authority from the STB, whichever occurs last.
- j. "Commencement Date" - July 1, 2012
- k. "Completion Date" - June 30, 2022.
- l. "Operating Year" - January 1 to December 31.
- m. "Users Fee" - Fee to be paid by the Contractor to State for the use of the Facilities.
- n. "Subcontractor" - An individual, partnership, firm, corporation, or any combination thereof, or joint venture, to whom the Contractor sublets any part of this Agreement.

1.2 EFFECTIVE DATE/COMPLETION OF SERVICES

- 1.2.1 Notwithstanding any provision of this Agreement to the contrary, and subject to the approval of the Governor and Executive Council of the State of New Hampshire, this Agreement, and all obligations of the parties hereunder, shall not become effective until the date the Governor and Executive Council approve this Agreement ("Effective Date")
- 1.2.2 Any Service performed by the Contractor prior to the Effective Date shall be performed at the sole risk of the Contractor, and in the event that this Agreement does not become effective, the State shall have no liability to the Contractor, including without limitation any obligation to pay the Contractor for any costs incurred or Service performed.

1.3 RENEWAL OF AGREEMENT

- 1.3.1 The Contractor shall notify the State by certified mail no later than one year prior to the Completion Date that the Contractor wishes to enter into renegotiations for a new Agreement for an additional ten (10) year period beginning July 1, 2022. If the

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Contractor and the State cannot agree upon new Operating Agreement by January 1, 2022, the State may at that time solicit proposals from other persons to operate the Facilities and have no further obligations for renewal of this Agreement with the Contractor.

1.4 CONTRACTOR'S REPRESENTATION AND WARRANTIES

1.4.1 The Contractor represents and warrants the following:

- a. The Contractor is a corporation duly organized, validly registered with the Secretary of State, and in good standing under the laws of the State, and is duly qualified to do business in each jurisdiction where its business or the ownership of its property requires such qualification;
- b. The Contractor has the full power and authority to enter into this Agreement and to carry out the functions that it has undertaken in this Agreement;
- c. All corporate and other proceedings required to be taken by or on the part of the Contractor to authorize it to enter into this Agreement and perform the Service have been duly taken; and
- d. The execution of this Agreement and the operation of the Service will not violate any statute, rule, regulations, order, writ, injunction or decree of any court, administrative agency or governmental body.

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

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

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

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

1.6. PERSONNEL.

1.6.1 The Contractor shall at its own expense provide all personnel necessary to perform the Service. The Contractor warrants that all personnel engaged in the Service shall be

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qualified to perform the Service, and shall be properly licensed and otherwise authorized to do so under all applicable laws.

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

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

1.7 EVENT OF DEFAULT/REMEDIES.

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

1.7.1.1 failure to perform the Service satisfactorily or on schedule;

1.7.1.2 failure to submit any report required hereunder;

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

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

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

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

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

1.8. TERMINATION.

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

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1.9. CONTRACTOR'S RELATION TO THE STATE.

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

1.10 ASSIGNMENT/DELEGATION/SUBCONTRACTS.

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

1.11 INDEMNIFICATION.

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

1.12. INSURANCE.

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

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

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

1.12.3 The Contractor shall furnish to the Contracting Officer, or his or her successor, a certificate(s) of insurance for all insurance required under this Agreement. Contractor shall also furnish to the Contracting Officer, or his or her successor, certificate(s) of insurance for all renewal(s) of insurance required under this Agreement no later than fifteen (15) days prior to the expiration date of each of the insurance policies. The

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certificate(s) of insurance and any renewals thereof shall be attached and are incorporated herein by reference. Each certificate(s) of insurance shall contain a clause requiring the insurer to endeavor to provide the Contracting Officer, or his or her successor, no less than ten (10) days prior written notice of cancellation or modification of the policy.

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

1.13. WAIVER OF BREACH

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

1.14. NOTICE.

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

1.15. AMENDMENT.

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

1.16 CONSTRUCTION OF AGREEMENT AND TERMS.

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

1.17. THIRD PARTIES.

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

1.18 HEADINGS.

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

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1.19 SEVERABILITY.

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

1.20 ENTIRE AGREEMENT.

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

ARTICLE II - PHYSICAL DESCRIPTION

2.1 The Facilities are described as follows:

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

2.2 RESERVATIONS TO THE STATE

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

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2.3 ALTERATIONS TO THE FACILITIES

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

2.4 STATE OWNED EQUIPMENT AND MATERIALS

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

ARTICLE III - OPERATIONS

3.1 SERVICE AREAS

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

3.1.2 The Contractor agrees to provide cars, locomotives and all other things as necessary to afford the degree and quality of Service reasonably requested by its shippers.

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

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

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Services under all applicable laws. The Contractor shall not hire as an employee, and it shall not permit any subcontractor or other person, firm or corporation with whom it is engaged in a combined effort to perform the Services, to hire, any person who has a contractual relationship with the State, or who is a State officer or employee, elected or appointed.

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

3.2 MAINTENANCE

- 3.2.1 Equipment - The Contractor shall be responsible for proper upkeep and maintenance of all equipment it uses, either supplied by the State or the Contractor, and shall ensure that equipment is in compliance with all current FRA regulations. State equipment shall be returned to the State in as good condition as when received except for ordinary wear and tear.
- 3.2.2 Track - The Contractor shall be responsible for the proper upkeep and maintenance of Facilities. Said upkeep and maintenance shall include but not be limited to:
 - a. Surface and alignment
 - b. Brush and vegetation control (all brush to be chipped)
 - c. Drainage and ditches
 - d. All operating signals to be kept in good operating condition
 - e. Crossing and switches to be kept in good operating condition. The Contractor shall provide a flagman during the passage of trains for the protection of any crossing protected by signals where the signal is not operating for any reason.
 - f. Snow removal and winter maintenance when needed for service.
- 3.2.2.1 The Contractor shall be responsible to perform all work and routine maintenance necessary to maintain the track from MP C 0.58 in Concord to MP P 17.60 in Northfield at FRA Class I (Class II where track is so classified) Track Safety Standards or better, and in any event will expend no less than twenty (20%) percent of annual gross freight operating revenue on actual track maintenance during each year of this Agreement, and will include a report of maintenance expenses on a form and according to a schedule to be specified by the State (See Exhibit A). Credit for these expenditures may be carried forward to future years at the State's discretion.

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

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

3.3 INSPECTION

- 3.3.1 The Contractor shall patrol the Facilities and inspect the track in accordance with FRA Track Safety Standards subpart F (49 CFR 213.233) and submit an inspection report in a timely manner but no more than one (1) week after each inspection. Should any defects be found, the Contractor shall take the appropriate remedial action in a timely manner in accordance with such regulations and notify the Contracting Officer in writing of said remedial action.
- 3.3.2 The Contracting Officer has the right to monitor the Contractor to ensure that the Contractor complies with the conditions of this Agreement. The Contracting Officer shall be granted full access to the operations and shall have the authority to direct the Contractor to remedy deficiencies as per FRA Track Safety Standards under this Agreement.
- 3.3.3 The Contracting Officer may take any action, including the field inspection of any project site and the inspection of the rail facilities, equipment, and all books and records of Contractor and of any contractor or subcontractor relating to any project or task accomplished under this Agreement.
- 3.3.3.1 The purpose of such inspection shall be:
- To ensure that work complies with the contract specifications.
 - To verify quantitative measures of materials installed, such as tie counts.
 - To verify labor and materials charges for contracts providing for payment on an actual cost basis ("force account work").

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

3.4 CONSTRUCTION PROJECTS:

- 3.4.1 The Contracting Officer reserves the right to advertise and let construction rehabilitation projects within the confines of the Facilities. The construction contractor to whom this work may be awarded shall have the right to perform the work so described in the contract. Any expenditures by the State pursuant to this Section 3.4 shall not diminish the obligation of the Contractor pursuant to Section 3.2.2.1 or any other provision of this Agreement.
- 3.4.2 The Contracting Officer will from time to time allow utility projects to be constructed within the railroad right-of-way. Construction contractors for these projects will be required to enter into a license with the State, which will require certain conditions such as liability insurance, and to cooperate with the Contractor in assuring that the work be performed in such a manner that the tracks, operations and appurtenances of the rail facility will be safeguarded. The Contractor may require a flagman and/or railroad inspector at a construction site if he deems it necessary, the cost of said services to be paid by the constructing entity to the Contractor.
- 3.4.3 At the request of a shipper and with the concurrence of the State, the Contractor or a subcontractor approved by the State may construct sidings to new shippers on the Facilities at shippers' or the Contractor's expense. These sidings and appurtenances shall become the property of the State.

3.5 FREIGHT TARIFFS

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

3.6 FORCE MAJEURE

- 3.6.1 The parties hereto will be excused from performance of any of their respective obligations hereunder occasioned by any event beyond their respective control, including, without limitation, any action of any federal, state or local agency or instrumentality; by government authorities including compliance with environmental quality, energy conservation and occupational safety requirements adopted or effected after the date of this Agreement; by acts of God; by strikes or other labor trouble; by explosions, fires, or vandalism until such events are remedied; provided, however, that the party claiming force majeure shall take all reasonable actions to eliminate or end the force majeure condition.

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ARTICLE IV - USER FEE PAYMENTS, ACCOUNTING AND AUDITS

4.1 PAYEE

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

4.2 FREQUENCY OF PAYMENT

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

4.3 USER FEE PAYMENT

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

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

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

4.4 LATE PAYMENT

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

4.5 ACCOUNTING AND AUDITS

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

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- 4.5.2 If, as a result of any audit, the Contracting Officer determines that the amount paid to the State is less than the amount owed, the Contractor shall pay the difference to State within thirty (30) days of the determination.
- 4.5.3 If, as a result of any audit, the Contracting Officer determines that the amount paid to the State is more than the amount owed, State will make repayment or credit the Contractor accordingly, so far as appropriations allow, the overpayment to the State.
- 4.5.4 The Contractor shall be responsible for collecting revenues and for delivering traffic reports, marketing reports, revenue reports and maintenance cost reports on forms and according to a schedule to be specified by the State. (See EXHIBIT A)

ARTICLE V - MARKETING EFFORT

5.1 BUSINESS PRACTICES

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

ARTICLE VI - OTHER OPERATORS

6.1 COOPERATION WITH OTHER OPERATIONS

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

ARTICLE VII - TERMINATION OF AGREEMENT

7.1 OBLIGATIONS

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

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IN WITNESS WHEREOF, we have hereunto set our hands on the 23RD day of April, 2012.

NEW ENGLAND SOUTHERN RAILROAD CORP.

BY: *Peter M. Dearness*

THE STATE OF NEW HAMPSHIRE, COUNTY OF Merrimack

On this 23RD day of April, 2012, before me, Carla Nielsen the undersigned officer, personally appeared Peter M. Dearness known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that he has executed the same for the purposes therein contained.

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

Carla Nielsen

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

THE STATE OF NEW HAMPSHIRE

BY: *Michael P. Bell*
Dyson Commissioner, Department of Transportation

This is to certify that the Operating Agreement shown above has been reviewed by this office, and is approved as to form and execution on June 19, 2012.

OFFICE OF ATTORNEY GENERAL

BY: *D. Hill*
Assistant Attorney General
David M. Hill

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

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

Contractor Initials *AD*
Date 4-21-12

