

**COMMUTER RAIL OPERATING AGREEMENT**

**CONTRACT NO. 159-12**

**BETWEEN**

**MASSACHUSETTS BAY  
TRANSPORTATION AUTHORITY**

**AND**

**KEOLIS COMMUTER SERVICES, LLC**

**February 5, 2014**

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**THIS AGREEMENT** (this “**Agreement**”) is dated February 5, 2014 (the “**Commencement Date**”) and made between:

**MASSACHUSETTS BAY TRANSPORTATION AUTHORITY**, a body politic and corporate and a political subdivision of The Commonwealth of Massachusetts (the “**Commonwealth**”), established under the provisions of M.G.L. c. 161A, as amended (the “**Act**”), and with a principal place of business at 10 Park Plaza, Boston, Massachusetts 02116 (the “**MBTA**”); and Keolis Commuter Services, LLC, a limited liability company organized and existing under the laws of Delaware, with an office at 470 Atlantic Avenue, 5<sup>th</sup> Floor, Boston, Massachusetts 02110 (the “**Operator**”).

This Agreement comprises this **Part 1** (including Sections 1 through 47) as well as **Schedule 1** (Definitions) through **Schedule 16** (Extension of Term) of Part 1.

## **INTRODUCTION**

**WHEREAS**, the MBTA is responsible for providing public transportation services in certain areas of the Commonwealth, including commuter rail services as more particularly described herein (the “**Commuter Rail System**”); and

**WHEREAS**, the MBTA has elected to operate the Commuter Rail System and provide the services related thereto through a contract with an experienced operator of commuter rail systems; and

**WHEREAS**, the MBTA has conducted a comprehensive, multi-phase, open, fair and competitive selection process in order to identify a suitable operator (the “**Procurement Process**”); and

**WHEREAS**, the Operator has submitted a proposal (the “**Proposal**”) as part of the procurement process, which the MBTA has determined to be the most advantageous to the MBTA, and the MBTA further has determined that the Proposal adequately demonstrates that the Operator is capable of operating the Commuter Rail System and delivering the MBTA’s goals for the Commuter Rail System in a cost-effective, reliable and competent manner; and

**WHEREAS**, the MBTA and the Operator have agreed to set out herein their mutual rights and obligations in connection with the provision by the Operator of the required services for the Commuter Rail System, in accordance with the terms and conditions of this Agreement;

**NOW, THEREFORE**, in consideration of their mutual undertakings and agreements hereunder, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the MBTA and the Operator undertake and agree as follows:

## 1. DEFINITIONS AND INTERPRETATION

- 1.1 In this Agreement (including all Schedules and Exhibits hereto) defined terms shall have the meanings assigned to them in **Schedule 1** (Definitions), unless otherwise defined in context, or the context clearly requires otherwise.
- 1.2 The words “hereof”, “herein” and “hereunder” and words of similar import when used in this Agreement shall refer to this Agreement.
- 1.3 Any word herein which is expressed in the masculine or neuter gender shall be deemed to include the masculine, feminine and neuter genders. Any word herein which is expressed in the singular or plural number shall be deemed, whenever appropriate in the context, to include the singular and plural.
- 1.4 Definitions contained in this Agreement which identify documents, including, without limitation, the Contract Documents, shall be deemed to include all amendments and supplements to such documents from the date hereof, and all future amendments and supplements thereto entered into from time to time to satisfy the requirements of this Agreement. Reference to this Agreement contained in any of the foregoing documents shall be deemed to include all amendments and supplements to this Agreement.

## 2. COMMENCEMENT

This Agreement shall take effect and be binding upon execution by both Parties.

## 3. TERM

This Agreement shall expire on June 30, 2022, as such date may be extended in accordance with the provisions of **Schedule 16** (Extension of Term) (the “**Expiration Date**”), unless terminated earlier pursuant to the provisions of **Schedule 2** (Conditions Precedent) or **Schedule 12** (Defaults, Remedies, and Termination).

## 4. OPERATOR REPRESENTATIONS AND WARRANTIES

The Operator represents and warrants that:

- 4.1 **Corporate Power.** It is duly incorporated, validly existing and in good standing under the laws of the state of its incorporation, and (b) that it has full corporate power to own, lease, and operate its properties and assets, to conduct its business as such business is currently being conducted, to perform the Services, and to consummate the transactions contemplated by this Agreement.
- 4.2 **Authority.** This Agreement has been duly authorized, executed and delivered by the Operator and constitutes the valid and binding obligation of the Operator, enforceable against the Operator in accordance with its terms, subject to the effect of bankruptcy, insolvency, moratorium and other laws now or hereafter in effect relating to and affecting the rights of creditors generally and to equitable principles of general application.

- 4.3 **No Breaches.** Neither the execution nor delivery of this Agreement, nor the consummation of any of the transactions contemplated herein, will result in the breach of any term or provision of, or constitute a default under, any charter provision or bylaw, or material agreement (subject to any applicable required consent), or Applicable Law to which it is a party or which is otherwise applicable to it. The Operator further represents and warrants that no approval or authorization is required for the execution and delivery of this Agreement by the Operator that has not already been obtained.
- 4.4 **Compliance with Applicable Law.** Neither the Operator, nor to its knowledge, any Subcontractor has been charged with or is in material violation of any Applicable Law governing the operation of its business, which has had or could have a material adverse affect on the Operator's or any such Subcontractor's performance of the Services.
- 4.5 **Permits and Approvals.** The Operator shall maintain, and cause each Subcontractor to maintain, throughout the Term all required consents, approvals, licenses and permits from Governmental Authorities necessary for the performance of the Services by the Operator and the Subcontractors hereunder.
- 4.6 **No Litigation.** There is no action, suit, proceeding at law or in equity, arbitration or administrative or other proceeding by or before (or, to the Operator's knowledge, any investigation by) any Governmental Authority, pending or contemplated by the Operator, or to the Operator's knowledge, pending or contemplated by any Subcontractor, or threatened against the Operator or any Subcontractor, which has or could have a material adverse affect on the performance of the Services by the Operator or any Subcontractor.
- 4.7 **Financial Statements.** The financial statements furnished to the MBTA by the Operator in the Proposal were prepared in accordance with the applicable Accounting Standards, are true and correct and fairly present in all material respects the financial position of Keolis (a French *société anonyme*) ("**Keolis SA**"), Société Nationale des Chemins de Fer Français ("**SNCF**") and Keolis Commuter Services, LLC as of the respective dates of such financial statements and the results of operations of Keolis SA, SNCF and Keolis Commuter Services, LLC for the periods then ended. There has been no material adverse change in the financial position or business operations of Keolis SA, SNCF and Keolis Commuter Services, LLC since the date of such financial statements.

## 5. **MBTA REPRESENTATIONS AND WARRANTIES**

The MBTA represents and warrants that:

- 5.1 **Authority.** This Agreement has been duly authorized, executed and delivered by the MBTA and constitutes the valid and binding obligation of the MBTA, enforceable against the MBTA in accordance with its terms, subject to the effect of bankruptcy, insolvency, moratorium and other laws now or hereafter in effect relating to and affecting the rights of creditors generally and to equitable principles of general application.
- 5.2 **No Breaches.** Neither the execution nor delivery of this Agreement, nor the consummation of any of the transactions contemplated herein, will result in the breach of

any term or provision of, or constitute a default under, the Act or bylaws of the MBTA, or any material agreement (subject to any applicable required consent), or Applicable Law to which it is a party or which is otherwise applicable to it. The MBTA further represents and warrants that no approval or authorization is required for the execution and delivery of this Agreement by the MBTA.

- 5.3 **No Litigation.** There is no action, suit, proceeding at law or in equity, arbitration or administrative or other proceeding by or before (or, to the MBTA's knowledge, any investigation by) any Governmental Authority, pending or contemplated by the MBTA or, to the MBTA's knowledge, threatened against the MBTA, which has or could have a material adverse affect on the performance by the MBTA of its obligations under this Agreement.
- 5.4 **DISCLAIMER.** EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, THE MBTA MAKES NO OTHER REPRESENTATIONS AND WARRANTIES (AND EXPRESSLY DISCLAIMS ANY AND ALL SUCH WARRANTIES), WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT.

## 6. PERFORMANCE OF OBLIGATIONS

- 6.1 The Operator shall perform the Services in accordance with the terms of this Agreement and with that degree of skill, diligence, prudence and foresight that would be exercised by a skilled and experienced operator of a commuter rail system, similar in size, scope and complexity to the Commuter Rail System. Without limiting the foregoing, the Operator shall render, and cause the Subcontractors to render, all Services in a professional and workmanlike manner, by individuals of appropriate skill, training and experience, employing requisite resources and materials, and that such Services shall be of a high grade, nature and quality.
- 6.2 The Commuter Rail IT Environment shall conform in all material respects to the Documentation, applicable Service Levels and all other requirements set out (as such terms are defined in **Schedule 3.15** (Intellectual Property; Ownership), or otherwise contemplated by, this Agreement and the Contract Documents.
- 6.3 All Services and Deliverables (including, but not limited to Operator Software and Services) provided pursuant to this Agreement, shall either be originally created by the Operator, or the Operator shall obtain all necessary rights to properly allow for the transfer of rights set out in this Agreement, including in accordance with the provisions of **Schedule 3.15** (Intellectual Property; Ownership) and **Schedule 15** (Obligations Associated with Termination).
- 6.4 The Operator shall perform the Services at all times in accordance with Applicable Law. The Operator shall promptly comply with any specific safety instructions or directions given by any Governmental Authority relating to the Services.

- 6.4.1 All Services and Deliverables (including, but not limited to, Operator Software) will not and shall not infringe any intellectual property right held by any Third Party.
- 6.5 The Operator shall not take any actions that (i) create, or purport to create, any obligation on behalf of the MBTA, or (ii) grant, or purport to grant, any rights or immunities to any Third Party under the MBTA's intellectual property or proprietary rights.
- 6.6 The Operator shall cooperate with the MBTA and act reasonably and in good faith in the performance of the Services and the exercise of its rights pursuant to this Agreement.
- 6.7 The MBTA shall act reasonably and in good faith in and about the performance of its obligations under, and the exercise of its rights pursuant to, this Agreement.

## 7. PAYMENT

- 7.1 The MBTA shall pay to the Operator for the proper performance of the Agreement Services in accordance with the provisions of this Agreement, the Services Fee equal to two billion, six hundred and eighty-six million, three hundred and forty-four thousand, two hundred and ninety-four Dollars (\$2,686,344,294), in accordance with **Schedule 7** (Payments), subject to authorized increases and decreases in accordance with the provisions of **Schedules 7** (Payments) and **8** (Changes). The MBTA shall pay the Operator for the proper performance of Supplemental Work in accordance with the provisions of **Schedules 7** (Payments) and **9** (Supplemental Work).

## 8. PERFORMANCE GUARANTEE

The Operator shall provide to the MBTA, as a condition to the issuance of the NTP and maintain throughout the Term, the Performance Guarantees which shall include (a) an irrevocable letter of credit, and (b) the Guaranty. The requirements for each of these Performance Guarantees are set forth in Appendix 2 (Performance Guarantees) to **Schedule 2** (Conditions Precedent).

## 9. SERVICE CHANGES

The MBTA may, at any time throughout the Term, issue Service Change Notices directing the Operator to make changes within the general scope of this Agreement to the Agreement Services that may include additions and modifications to, and reductions of the Agreement Services, in accordance with the provisions of **Schedule 8** (Changes).

## 10. DISPUTES

- 10.1 The MBTA and the Operator intend to resolve all disputes under this Agreement to the best of their abilities in an informal manner. To accomplish this end, the Parties will use an alternative dispute resolution process to resolve disputes in a manner designed to avoid litigation, in accordance with the provisions of **Schedule 11** (Settlement of Disputes). The Parties agree that the alternative dispute resolution process will include, at a minimum, an obligation to attempt to resolve disputes through communications between their respective staffs, and, if resolution is not reached at that level, a procedure

for review and action on such disputes by appropriate management level officials within the MBTA and the Operator's organization.

- 10.2 In the event that a resolution of the dispute is not mutually agreed upon, the Parties can agree to mediate the dispute or proceed with litigation, in accordance with the provisions of **Schedule 11** (Settlement of Disputes).
- 10.3 During the pendency of any dispute between the Parties, the respective obligations of the Parties under this Agreement, to the extent that they are the subject of any such dispute, shall continue to the same extent, and in the same manner and form, as existed prior to any such dispute; provided, however, that pending final settlement of the applicable dispute, the Operator shall perform those obligations that are the subject of any such dispute in the manner directed by the MBTA.

## 11. **OTHER CONTRACTOR AND THIRD PARTY ACCESS**

- 11.1 **Permit to Enter.** The MBTA shall enter into the MBTA's standard "**permit to enter**" with any Other Contractor or Third Party to enter onto the Service Property. No Other Contractor or Third Party shall be allowed to enter onto the Service Property without first executing such a permit to enter and without the MBTA or such Third Party notifying the Operator of the activities of such Other Contractor or Third Party. The MBTA may, in entering into any such permit to enter with such Other Contractor or Third Party, place reasonable conditions or restrictions on Other Contractors or Third Parties that exceed the normal conditions and restrictions contained in the standard permit to enter. If the MBTA and the Operator are unable to agree upon a standard permit to enter, then the MBTA may allow Other Contractors or Third Parties access to the Service Property upon such terms and conditions as the MBTA establishes.
- 11.2 **Governmental Authorities.** The Operator shall grant access to the Commuter Rail Property to any Governmental Authority. The Operator shall immediately notify the MBTA when any state or Federal inspector, law enforcement or emergency personnel enters the Service Property. In addition, the Operator shall provide the MBTA with copies of all reports and other materials furnished to the Operator by any Governmental Authority concerning the Services or the Commuter Rail Property, within 24 hours of the Operator's receipt of such reports and other materials.

## 12. **EXAMINATION AND AUDIT**

- 12.1 The Operator shall maintain, and require the Subcontractors to maintain, in accordance with generally accepted accounting principles, books, records, accounts, reports and other compilations of data pertaining to the Services (including the Financial Statements) and its performance of its obligations set out in this Agreement (collectively, "**Records**") as required by this Agreement, and in accordance with the provisions of **Schedule 3.14** (Reporting and Submittals). Upon reasonable advance written notice (provided that twenty-four (24) hours prior written notice shall be deemed reasonable) (each, an "**Audit Notice**"), the MBTA or its designated representatives (including a private auditing firm) shall have the right for any purpose and on any Business Day during normal business

hours to examine, copy (and take full possession of said copies) and audit all Records of the Operator including, but not limited to, Records of actual operations and maintenance performance, Operator Personnel information (consistent with any restrictions imposed on the Operator by Applicable Law), including without limitation, all costs, wages, prices and rates incurred or negotiated by the Operator in connection with such Operator Personnel, and all Operator Confidential Information.

- 12.2 The Operator shall maintain at its local office, or such other place as may be approved by the MBTA in writing, and make available to the MBTA all Records maintained by the Operator for the purposes of performing financial, compliance, performance audits related to this Agreement, and for any other purposes identified by the MBTA in the Audit Notice.
- 12.3 The Operator shall permit access to its Records and Operator Confidential Information by the United States Secretary of Labor for purposes of investigating compliance with Applicable Law pertaining to fair employment practices.
- 12.4 The Operator shall permit access to and copying of its Records and Confidential Information by any other Governmental Authority including, but not limited to, the FTA, DOT, and the United States Comptroller General, for purposes of any inquiry or investigation to ascertain compliance with Applicable Law.
- 12.5 The Operator shall maintain all Records required under this Agreement for a period of not less than seven years after the Termination Date, or such longer period as may be required by the MBTA's Records retention policy, as in effect from time to time, upon notice to the Operator, or, in the event of litigation or settlement of claims arising from the performance of this Agreement, until the disposition of all such litigation, appeals, claims or exceptions related thereto, whichever is longer.
- 12.6 In addition to all other rights and remedies available to the MBTA, the MBTA shall be entitled to withhold from each Monthly Fee an amount equal to five percent (5%) of the Fixed Fee for each Reporting Period in which the MBTA reasonably determines that the Operator is failing to timely comply with its obligations set out in this Section 12 (Examination and Audit) (the "**Audit Non-Compliance Holdback**"). The MBTA shall pay the Operator the applicable Audit Non-Compliance Holdback within thirty (30) days of the MBTA's determination that the Operator has fully complied with its obligations set out in this Section 12 (Examination and Audit). The Parties acknowledge and agree that the Operator's sole remedy for an Audit Non-Compliance Holdback shall be the MBTA's payment of the Audit Non-Compliance Holdback. For purposes of clarification, and not limitation, the Operator shall not be entitled to any interest on the Audit Non-Compliance Holdback or recovery of damages due to an Audit Non-Compliance Holdback.

### 13. **MONITORING OF OPERATOR PERFORMANCE**

- 13.1 The MBTA may for its own purposes monitor or review proposals, plans or reports (or any aspect thereof) of the Operator under this Agreement, but no review, comment, statement, report or undertaking made or given by or on behalf of the MBTA during such

review or monitoring (and no failure to undertake, make or give any review, comment or statement) shall operate to exclude or relieve either Party from or reduce or otherwise affect the obligations of such Party under this Agreement.

- 13.2 The exercise by or on behalf of the MBTA of (or, as the case may be, any failure to exercise) any of its functions, rights or obligations in respect of any review or monitoring process shall not in any way impose any liability, express or implied, on the MBTA to any other party, except to the extent that the exercise (or failure to exercise) of any of such functions, rights or obligations results in a breach by the MBTA of an express provision of this Agreement.

#### 14. INDEMNIFICATION AND INSURANCE

- 14.1 **Environmental Indemnification.** The term "**Pre-Existing Indemnified Environmental Claims**" means any adverse environmental conditions or environmental impairment which existed in or on the Service Property as of the Commencement Date, or which arise due to events that occurred prior to the Commencement Date, or which arise after the Commencement Date as a result of acts or omissions of the MBTA or any of its directors, officers, agents or contractors (other than the Operator). The MBTA agrees to indemnify, defend, and hold the Operator harmless from and against any claims, causes of action, damages, fines or penalties arising with respect to Pre-Existing Indemnified Environmental Claims, except to the extent such Pre-Existing Indemnified Environmental Claims (i) exist as a result of the Operator's acts or omissions, or (ii) were caused by a Third Party prior to the Commencement Date during a time in which the Operator had a contractual relationship with the MBTA. The Operator agrees to indemnify, defend, and hold the MBTA harmless from and against any claims, causes of action, damages, fines or penalties with respect to any adverse environmental conditions or environmental impairment (a) arising on or after the Commencement Date but before the Termination Date, (b) arising after the Termination Date due to events that occurred on or after the Commencement Date but before the Termination Date, and (c) due to the acts or omissions of the Operator or any Subcontractor, including, without limitation, vandalism in, on, or about the Commuter Rail Property.

- 14.2 **Indemnification by the Operator.** Except as expressly set forth in Section 14.1 (Environmental Indemnification), to the fullest extent permitted by Applicable Law, the Operator agrees to protect, defend, indemnify and hold harmless, the MBTA, MassDOT, and all of their directors, officers, agents, and employees from and against any and all claims, demands, judgments, suits, actions, and causes of action of every nature and character (collectively, "**Claims**"), and any fines, penalties, losses, damages (including, notwithstanding the provisions of Section 15 (No Consequential or Special Damages), below, incidental, actual, consequential, indirect and environmental pollutions), costs, charges or expenses, whether direct or indirect, and liability of every name and nature related to such Claims ("**Liabilities**") for or due to any loss or injury to persons or damages to real or tangible property resulting from the negligence or misconduct of the Operator, Operator Personnel, or Subcontractors, or the performance or non-performance by the Operator, Operator Personnel or any Subcontractor of the Services, and for

liabilities imposed upon the MBTA arising under Applicable Law as a result of the Operator's failure to comply with Applicable Law in the performance of the Services.

- 14.2.1 The MBTA agrees that the Operator shall not be responsible for any Claims or Liabilities that may be imposed upon or incurred by or asserted against the Operator to the extent that those Claims or Liabilities are caused by the negligent act or negligent failure to act by the MBTA, provided that the Operator, Operator Personnel or a Subcontractor, as applicable, has not itself acted negligently or negligently failed to act with respect to same.
- 14.3 **Defense of Indemnification.** The Operator shall be notified in writing by the MBTA within a reasonable period of time of the assertion of any Claim against it that the Operator is obligated to indemnify, as described above (the "**Indemnified Claim**"). If the MBTA decides to itself conduct the defense of an Indemnified Claim against it or to conduct any other response itself, the Operator shall reimburse the MBTA for all reasonable costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) incurred by the MBTA in connection with the MBTA's defense of the Indemnified Claim against it and/or the conduct of all response actions. If the MBTA decides to have the Operator defend the Indemnified Claim or handle the response action, the MBTA shall notify the Operator of that decision in writing. In such instances, the Operator shall bear the entire cost thereof and shall have sole control of the defense of any Indemnified Claim and all negotiations for its settlement or compromise, provided that the MBTA is fully indemnified by the Operator and that the settlement or compromise shall not include the admission of guilt or comparable plea, wrongdoing or negligence, the permitting or imposition of civil or criminal penalties or indictments, or the entering of consent decrees or orders of any kind, by the Operator on behalf of the MBTA, or any other action that would materially prejudice the rights of the MBTA without the MBTA's express prior written approval. The MBTA shall cooperate fully with the Operator in the defense of any Indemnified Claim, at the Operator's sole cost and expense.
- 14.4 **Applicability.** The provisions of Sections 14.1 (Environmental Indemnification), 14.2 (Indemnification by the Operator) and 14.3 (Defense of Indemnification) shall not apply to any Claims that are covered by the insurance policy required to be maintained pursuant to **Schedule 10** (Insurance), Section 2 (MBTA Liability Insurance/Cost Sharing Re: Self Insurance).
- 14.5 **Restitution.** The Operator hereby expressly agrees to hold the MBTA harmless against all audit exceptions or denials of reimbursement arising from the Operator's violation of the terms and conditions of Applicable Law. The Operator shall make restitution to the MBTA of any such amounts that are withheld from the MBTA by any Governmental Authority due to the Operator's noncompliance with Applicable Law, provided that in the event of any claim for such restitution the MBTA shall provide the Operator with prompt notice of such claim and allows the Operator to contest such claim. Restitution by the Operator shall be made no later than 60 days after receipt of notice from the MBTA that restitution is due to the MBTA pursuant to this Section 14.5 (Restitution); provided, however, that in lieu of receiving a restitution payment pursuant to this Section 14.5

(Restitution), the MBTA shall be entitled to set off (pursuant to Section 47 (Set Off)) amounts due to it relating to the Operator's noncompliance with Applicable Law.

14.6 **Insurance to be Carried by the Operator.** The Operator will carry and maintain, throughout the Term all insurance required pursuant to and in accordance with the provisions of **Schedule 10** (Insurance).

## 15. NO CONSEQUENTIAL OR SPECIAL DAMAGES

In no event shall either Party have any liability to the other on account of consequential, indirect, punitive, exemplary, special or incidental damages, lost profits, lost revenues, or otherwise, whether arising under this Agreement or by virtue of a claim in tort; provided, however, that this Section 15 (No Consequential or Special Damages) shall not limit a Party's rights to termination payments payable under **Schedule 12.3** (Events of Default and Termination Events), Section 3 (Termination Events), or damages (i) which are fines, penalties or other charges assessed by a Governmental Authority, (ii) which arise out of occurrences actually covered by any valid and collectible insurance maintained by either or both Parties, or (iii) which are expressly provided for in this Agreement.

## 16. CONFIDENTIAL INFORMATION

16.1 In performing this Agreement, each Party (the "**Disclosing Party**") may from time to time during the Term disclose to the other Party (the "**Receiving Party**") certain Confidential Information, as defined below. This Section 16 (Confidential Information) shall govern the use of such Confidential Information.

16.2 The term "**Confidential Information**" shall consist of all non-public information (in any medium) related to, disclosed or otherwise created pursuant to this Agreement, whether oral or in writing: (a) that concerns the business, personnel, marketing, financial, employee, planning, technical, or operations data, source code, specifications, drawings, plans, diagrams, sketches, renderings, maps, surveys, photographs and other confidential or proprietary information of the Disclosing Party; (b) that is marked confidential, restricted or proprietary by either Party or any other person to whom such Party has an obligation of confidence at the time of disclosure or a reasonable period thereafter; provided, however, that (i) the Party marking the material confidential, restricted or proprietary has a good faith basis for asserting that the designated material falls within category "(a)" of this Section 16.2, and (ii) the failure of either Party to so mark any material shall not relieve the Receiving Party of the obligation to maintain the confidentiality of any unmarked material which the Receiving Party knows or should reasonably know contains Confidential Information; or (c) that by the nature of the circumstances surrounding disclosure, should in good faith be treated as confidential.

For purposes of this Agreement and except as set forth herein, information submitted with the Proposal shall be treated as Confidential Information and utilized on a "need to know" basis in accordance with Massachusetts Public Records Laws (M.G.L. c. 66, §10).

16.3 **Protection of Confidential Information.** The Receiving Party will not use any Confidential Information of the Disclosing Party for any purpose not expressly permitted

by this Agreement, and will disclose the Confidential Information of the Disclosing Party only to those parties, including employees, contractors, subcontractors, suppliers and agents of the Receiving Party who have a need to know such Confidential Information for the purposes of this Agreement and who are under a duty of confidentiality no less restrictive than the Receiving Party's duty hereunder, and otherwise in accordance with Applicable Law. The Receiving Party will protect the Disclosing Party's Confidential Information from unauthorized use, access, or disclosure in the same manner as the Receiving Party protects its own confidential or proprietary information of a similar nature, but shall in no event use less than a reasonable standard of care and diligence.

- 16.3.1 **Exceptions.** The Receiving Party's obligations hereunder with respect to any Confidential Information of the Disclosing Party will terminate if and when the Receiving Party can document that such information: (a) was already known to the Receiving Party at the time of disclosure by the Disclosing Party; (b) was disclosed to the Receiving Party by a third party who had the right to make such disclosure without any confidentiality restrictions; (c) is or has become generally available to the public through no fault of the Receiving Party; (d) is independently developed by the Receiving Party without access to, or use of, the Disclosing Party's Confidential Information; (e) is necessary for the Receiving Party to enforce its rights under this Agreement in connection with a legal proceeding; or (f) is required by Applicable Law to be disclosed, provided that the Receiving Party notifies the Disclosing Party of such required disclosure promptly and in writing and cooperates with the Disclosing Party, at the Disclosing Party's reasonable request and expense, in any lawful action to contest or limit the scope of such disclosure.
- 16.3.2 **Delivering Confidential Information.** At any time during the Term, the Operator shall promptly deliver to the MBTA any and all Confidential Information of the MBTA on any media as the MBTA shall request. Notwithstanding anything to the contrary, the Operator shall promptly provide the MBTA with copies of any Confidential Information (regardless of the Disclosing Party's identity) upon the MBTA's request including, but not limited to, in connection with the MBTA's efforts pursuant to Section 2 (Preparation for Re-Procurement) of Schedule 15.1 (Re-Procurement Provisions).
- 16.3.3 **Securing Confidential Information.** The Operator hereby represents, warrants and covenants that upon the expiration or termination of this Agreement, any Confidential Information of the MBTA that is to be retained by the Operator for any approved purposes shall be certified as such and shall be maintained in a secure facility and consistent with all security standards set out in this Agreement, and that the Operator shall maintain care, custody, and control over any and all media containing such Confidential Information while in such secure facility and until any and all media containing such Confidential Information are either returned to the MBTA or destroyed as provided in Section 16.3.4 (Destroying Confidential Information).

- 16.3.4 **Destroying Confidential Information.** Except as provided in Section 16.3.3 (Securing Confidential Information), at the expiration or termination of this Agreement, unless otherwise instructed in writing by the MBTA, the Operator shall destroy its copies of such Confidential Information of the MBTA in all media such that recognition or reconstruction of the Confidential Information is precluded. Unless otherwise permitted by the MBTA, cross-cut shredding of hardcopy items, physical destruction of diskettes, floppies, CDs, DVDs, videos, and any other recordable media, deleting of electronic items by permanent deletion or non-retrievable/irreversible placement in delete-overwrite status are the MBTA's required methods of such destruction with respect to documents or materials containing Confidential Information that the MBTA has instructed are to be destroyed.
- 16.3.5 **Unauthorized Release of Confidential Information.** In the event that a Party learns or believes that Confidential Information has been released, or believes that Confidential Information is about to be released, such Party shall immediately notify the other Party.
- 16.3.6 **Public Records.** Notwithstanding anything in this Agreement to the contrary, the Parties acknowledge and agree that their rights and obligations regarding Confidential Information are subject to the Massachusetts Public Records Laws (M.G.L. c. 66) as well as the definition of "public record" pursuant to M.G.L. c. 4 §7, cl. 26.

## 17. INTELLECTUAL PROPERTY RIGHTS AND INFORMATION TECHNOLOGY

- 17.1 The Operator shall comply with its obligations regarding intellectual property as set out in this Agreement including, but not limited to, those obligations in **Schedule 3.15** (Intellectual Property; Ownership).
- 17.2 The Operator shall provide information technology services and support in accordance with its obligations set out in this Agreement including, but not limited to, those set out in **Schedule 3.16** (Information Technology Requirements), **Schedule 3.17** (IT Security) and **Schedule 3.18** (Service Level Agreement and Service Credits).

## 18. SECURITY REQUIREMENTS

In its performance of the Services, the Operator shall comply with all security requirements (including, but not limited to, the MBTA's security requirements) set out in this Agreement including, but not limited to, those stated in this Section 18 (Security Requirements), **Schedule 3.5** (Safety and Security) and **Schedule 3.17** (IT Security). The Operator shall:

- 18.1 Submit a mobilization organization structure in accordance with its obligations set out in Section 1.7 of **Schedule 3.12** (Mobilization) at or prior to the Mobilization Commencement Date. The Operator shall also submit a complete list of Operator Personnel and Subcontractors that will perform the Services under this Agreement at or

prior to the commencement of Mobilization Services and again at or prior to the Agreement Services Commencement Date. At a minimum, the list shall include:

- 1) Name and Employee Number/Identifier;
- 2) Address;
- 3) Job Title; and
- 4) Hours and Location of Work.

The Operator shall provide the MBTA with prompt notification (and in the case of any Management Employee, notification within three Business Days), in writing, of any listed Operator Personnel or Subcontractors who leave the Operator's (direct or indirect) employment and/or any new Operator Personnel or Subcontractors who are to be added by the Operator. The Operator shall provide at least quarterly, or more frequently upon the request of the MBTA, periodic updates of the list required pursuant to Section 18.1 throughout the Term.

- 18.2 Conduct for all current and future Operator Personnel, a legally available criminal background check, as further described in **Schedule 3.9** (Management and Personnel). The Operator shall provide written documentation to the MBTA, in form and substance satisfactory to the MBTA, which demonstrates the Operator's compliance with the aforementioned requirements. Furthermore, the Operator shall conduct background and driver history checks at least once every two years during such employees' employment by the Operator, or as otherwise specified by the MBTA.

The MBTA reserves the right to have MBTA Transit Police perform the required background checks, and shall promptly notify the Operator in writing of any such action and the results thereof.

- 18.3 Distribute an MBTA-issued photograph Operator identification badge to all Operator Personnel and Subcontractors who work on any of the Commuter Rail Property in accordance with the provisions of **Schedule 3.5** (Safety and Security), Section 3.6.

- 18.4 Insure that the Operator Personnel and Subcontractors:

18.4.1 Are not allowed on or in any of the Commuter Rail Property, other than as a Customer, except as required for the performance of the applicable Services;

18.4.2 Are not allowed on or in any of the Commuter Rail Property, other than as a Customer, before or after service hours, unless explicitly contractually required to be there; and

18.4.3 Are forbidden from carrying firearms on or in any of the Commuter Rail Property.

- 18.5 Provide to the MBTA, upon its request and to the extent permitted by Applicable Law, any documents that pertain to:

- 1) The conduct of any Operator Personnel or any Subcontractor on or in any of the Commuter Rail Property;
- 2) Security training required under this Agreement; and
- 3) Monitoring/auditing of Operator Personnel and Subcontractors while on or in any of the Commuter Rail Property.

The MBTA shall not disclose any such information to a third-party, except in accordance with Applicable Law, and shall otherwise store and disseminate any information provided by the Operator in response to such request, and indicated by the Operator to be confidential, in accordance with Applicable Law.

- 18.6 If, at any time during the Term, the MBTA establishes new or revised security policies or procedures that may affect the Operator, or any Operator Personnel or Subcontractors and their respective performance of the Services, the MBTA shall so notify the Operator in writing, and the Operator thereafter shall comply with such policies and procedures to the same extent as if stated herein.

## 19. ADMINISTRATION

The Senior Director and the Operator General Manager and their respective senior staff shall meet not less often than monthly. The purpose of the meeting will be to review and discuss any pending issues relating to the Commuter Rail Property, Operator Personnel, any pending Service Changes or Supplemental Work, the Operator's performance of the Services, including compliance with any outstanding Remedial Plans, issues regarding any Operator Remedial Performance Notice, and any other matters identified by either Party prior to the meeting.

- 19.1 The Operator General Manager, or his designee, shall prepare the agenda for each meeting, including any item that the Senior Director or his designee shall request be included on such agenda.
- 19.2 The Operator General Manager, or his designee, shall be responsible for keeping the minutes of all such meetings and circulating them to the attendees following the meeting.

## 20. SUBCONTRACTING

The Operator shall give its personal attention to the fulfillment of this Agreement and the performance of the Services, as well as directing, monitoring, and coordinating all necessary liaisons with the Subcontractors to ensure the successful performance of its obligations under this Agreement.

- 20.1 The Operator shall not subcontract for any of the Services without the written consent of the MBTA; provided, however, that no prior approval of the MBTA shall be required as to (a) Subcontracts with Subcontractors identified in the Proposal; (b) Subcontracts with vendors currently approved by the MBTA; and (c) Subcontracts under which the aggregate amount payable to the Subcontractor in any twelve-month period does not exceed \$250,000. Any subcontracting of the Services shall not release the Operator of its liability under this Agreement.

- 20.1.1 The Operator shall not subcontract the performance of the Commuter Rail Services or the operation of Special Trains or Excursion Trains.
- 20.1.2 The Operator shall subcontract for the provision of Environmental Services, including the disposal of hazardous waste and pest control services as described in **Schedule 3.8** (Environmental Services), provided that with the prior written approval of the MBTA, the Operator may perform such Environmental Services utilizing Operator Personnel. The MBTA may not unreasonably withhold approval of the Operator's proposal to perform such Environmental Services.
- 20.2 All Subcontractors shall be bound by the applicable terms of this Agreement with respect to their performance of the Services, including but not limited to compliance with Applicable Law and MBTA insurance requirements.
- 20.3 The Operator shall include in all Subcontracts, and the Subcontractors shall include in all lower tier Subcontracts the provisions listed in Sections 21 (Workplace Environment), 24 (Preference for Recycled Products), 25 (Anti-Boycott Covenant) and 27 (Federal Requirements) (to the extent indicated therein), including the provisions of the corresponding Schedules.
- 20.4 Each Subcontractor shall look only to the Operator for the payment of claims of any nature whatsoever arising out of its Subcontract. The Operator shall include in all Subcontracts that the Subcontractor shall make no claim whatsoever against the MBTA for any Services performed or thing done by reason of the Subcontract, or for any other cause whatsoever that may arise by reason of the relationship created between the Operator and such Subcontractor.
- 20.5 In the event that the Operator terminates a Subcontractor, the MBTA shall not be liable to the Operator or to such Subcontractor for any damages, whether direct, consequential, incidental, liquidated or otherwise, resulting from the termination of such Subcontractor.

## 21. **WORKPLACE ENVIRONMENT**

The Operator and Operator Personnel shall comply with the provisions of **Schedules 3.5** (Safety and Security) and **3.9** (Management and Personnel), as well as the MBTA Dignity in the Workplace requirements, as set forth below. The Operator Personnel who violate this policy shall not be permitted to perform any of the Services and shall be removed as an Operator employee hereunder. The Operator also agrees to include these requirements in each Subcontract relating to be applicable to the Subcontractor and its employees.

- 21.1 **MBTA Dignity in the Workplace Policy.** In accordance with Applicable Law, existing collective bargaining agreements, and consistent with its existing policies, the MBTA demands of itself and its employees that all work and work-related activities be conducted with complete respect for the dignity of all employees. In practice, this means that no action, inaction or language which would offend a reasonable employee or which any reasonable employee deems unwelcome will be tolerated. All personnel decisions

under this Agreement and any Subcontract will be based solely on objective consideration of relevant articulated factors. No such personnel decision will directly or indirectly be based on consideration of a person's age, race, sex, religion, creed, color, sexual orientation, national origin, disability/handicap, ancestry or Vietnam era veteran's status. These prohibitions on harassment and impermissible discrimination are absolute.

## 22. **LEGAL RELATIONS AND RESPONSIBILITY TO THE PUBLIC**

22.1 **Operator Compliance.** The Operator shall keep fully informed about and shall comply with the provisions of all Applicable Law in the performance of the Services.

22.2 **Subcontractor Compliance.** The Operator shall be responsible for the compliance of, or failure to comply by, the Subcontractors with the requirements of Applicable Law in the performance of the Services.

22.3 **Laws to be Observed; Change in Law.** If either Party discovers a discrepancy or inconsistency between a provision or term in this Agreement and an Applicable Law, such Party shall promptly notify the other Party in writing of the discrepancy or inconsistency. Notwithstanding anything to the contrary, the Operator shall conform to all Applicable Law, as the same may be in effect from time to time during the Term, subject to the provisions of **Schedule 8** (Changes).

## 23. **DEPENDENT CARE ASSISTANCE PROGRAM**

Pursuant to Section 7 of Chapter 521 of the Massachusetts Acts of 1990, as amended by Chapter 329 of the Massachusetts Acts of 1991, and the regulations issued pursuant thereto, 102 CMR §12.00, and in accordance with the applicable certification provided by the Operator prior to the issuance of the NTP, the Operator shall establish and maintain a dependent care assistance program, or offer its employees child care tuition assistance or on-site or near site subsidized child care placements.

## 24. **PREFERENCE FOR RECYCLED PRODUCTS**

To the extent applicable, the MBTA has agreed to comply with U.S. Environmental Protection Agency "*Comprehensive Procurement Guidelines for Products Containing Recovered Materials*," 40 C.F.R. Part 247, implementing Section 6002 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §6962 (the "**RCRA and its Implementing Regulations**"), and otherwise provide a competitive preference for products and services that conserve natural resources and protect the environment and are energy efficient. The Operator shall comply with the RCRA and its Implementing Regulations and shall include the requirements of this Section 24 (Preference for Recycled Products) in each Subcontract.

## 25. **ANTI-BOYCOTT COVENANT**

The Operator represents, warrants and covenants that during the Term neither it nor any Affiliate shall participate in or cooperate with an international boycott, as defined in Section 999(b) (3) and (4) of the Internal Revenue Code of 1986, as amended, or engage in conduct declared to be

unlawful by M.G.L. c. 151E §2. Any breach of the representation, warranty and covenant contained in this Section 25 (Anti-Boycott Covenant) shall constitute a Breach.

## 26. PICKETING

The Operator shall use all reasonable, legal and practicable means to (a) ensure that all collective bargaining agreements between the Operator and representatives of Operator Personnel and those of Subcontractors include provisions prohibiting strikes or other work stoppages, (b) enforce such provisions, and (c) promptly obtain judicial or administrative relief in the event of any strike or work stoppage, whether or not in violation of the terms of any collective bargaining agreement. If any Operator Personnel or any employees of the Subcontractor picket or otherwise disrupt facilities of the MBTA in connection with a labor dispute between such employees and the Operator or the Subcontractor, as applicable, and if the Operator, at the written request of the MBTA, is unable to terminate the picketing or disruption within six hours of receiving such written request, the Operator shall reimburse the MBTA for legal and related expenses incurred by the MBTA in its efforts to terminate such picketing or disruption.

## 27. FEDERAL REQUIREMENTS

Payments to be made under this Agreement will be funded, in part, through Federal assistance awarded by the FTA through a grant agreement with the MBTA. Any violation of a Federal requirement applicable to this Agreement may result in penalties to the violating party.

The Operator shall at all times comply with all applicable FTA regulations, policies, procedures and directives, including without limitation those listed directly or by reference in the agreement (Form FTA MA (18) dated October 1, 2012) between the MBTA and FTA (as amended from time to time, the “**FTA Master Agreement**”), as they may be amended or promulgated from time to time during the term of this Agreement (collectively, “**FTA Requirements**”). The Operator's failure to so comply shall constitute a material breach of this Agreement.

The Operator shall be a “Third Party Contractor” for purposes of the application of FTA Requirements. In applying the following provisions, the Subcontracts to which such provisions apply shall be those specified in the “Flow Down Requirements” set forth in FTA’s Best Practices Manual, Appendix A, Section A.1 – *Federally Required and Other Model Contract Clauses*, applicable to the provisions below.

**27.1 Civil Rights and Equal Opportunity.** The MBTA is an Equal Opportunity Employer. As such, the MBTA agrees to comply with all applicable civil rights statutes and implementing regulations issued by FTA. Apart from inconsistent requirements imposed by Federal statutes or regulations, the MBTA agrees to comply with the requirements of 49 U.S.C. §5323(h)(2) by not using any Federal assistance awarded by FTA to support procurements using exclusionary or discriminatory specifications.

The Operator shall at all times comply with the following requirements and shall include these requirements in each Subcontract.

27.1.1 **Nondiscrimination.** In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. §2000d, Section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. §6102, Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. §12132, and Federal transit law at 49 U.S.C. §5332, the Operator agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age, or disability. In addition, the Operator agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA may issue. The Operator shall also comply with all applicable requirements under Title VI of the Civil Rights Act, as amended, 42 U.S.C. § 2000d *et seq.*, with the Title VI Program of the MBTA, and with all applicable FTA Circulars (including FTA Circular 4702.1B) and federal regulations (including 49 C.F.R. Part 21) implementing Title VI, including general requirements of Title VI as follows:

27.1.1.1 Public participation plan including public outreach efforts and involvement activities to ensure meaningful access to activities;

27.1.1.2 Procedures for tracking and investigating Title VI complaints;

27.1.1.3 List of public transportation-related Title VI investigations, complaints and lawsuits;

27.1.1.4 Language assistance programs (for providing language assistance to persons with limited English proficiency);

27.1.1.5 Title VI notices to the public and instructions to the public regarding how to file a Title VI complaint (notifying public of their rights afforded to them by Title VI); and

27.1.1.6 Environmental Justice analysis.

27.1.2 **Race, Color, Creed, National Origin, Sex.** In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. §2000e, and Federal transit laws at 49 U.S.C. §5332, the Operator agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor regulations, “*Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor,*” 41 C.F.R. Parts 60 *et seq.* (which implement Executive Order No. 11246, “*Equal Employment Opportunity,*” as amended by Executive Order No. 11375, “*Amending Executive Order 11246 Relating to Equal Employment Opportunity,*” 42 U.S.C. §2000e note), and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect the Services. The Operator agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment,

upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the Operator agrees to comply with any implementing requirements FTA may issue.

- 27.1.3 **Age.** In accordance with Section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §623 and Federal transit law at 49 U.S.C. §5332, the Operator agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, the Operator agrees to comply with any implementing requirements FTA may issue.
- 27.1.4 **Disabilities.** In accordance with Section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. §12112, the Operator agrees that it will comply with the requirements of U.S. Equal Employment Opportunity Commission, “*Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act,*” 29 C.F.R. Part 1630, pertaining to employment of persons with disabilities. In addition, the Operator agrees to comply with any implementing requirements FTA may issue.
- 27.2 **Debarment, Suspension, Ineligibility and Voluntary Exclusion.** The Operator agrees that it will not engage third party participants that are debarred or suspended except as authorized by the DOT regulations entitled, “*Nonprocurement Suspension and Debarment,*” 2 C.F.R. Part 1200, which adopt and supplement the United States Office of Management and Budget’s “*Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement),*” 2 C.F.R. Part 180, and Executive Orders Nos. 12549 and 12689, “*Debarment and Suspension,*” 31 U.S.C. § 6101 note. The Operator will review the 'Excluded Parties Listing System' at <http://epls.gov/>, if required by DOT regulations, 2 C.F.R. Part 1200.
- 27.3 **Lobbying.** The Operator shall have filed with the Proposal the certification required by 49 CFR Part 20, “*New Restrictions on Lobbying.*” The Operator certifies and shall cause each Subcontractor to certify that it will not use and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. In addition, the Operator shall disclose and shall cause each Subcontractor to disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to such Federal contract, grant or award covered by 31 U.S.C. 1352. Such disclosures shall be forwarded up from each tier of Subcontractor to the Operator and then to the MBTA.
- 27.4 **No Federal Government Obligation To Third Parties.** This Agreement is governed by applicable Federal requirements and standards as set forth in FTA Circular 4220.1F entitled “*Third Party Contracting Requirements.*”

- 27.4.1 Each of the MBTA and the Operator acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of this Agreement, absent the express written consent by the Federal Government, the Federal Government is not a party to this Agreement and shall not be subject to any obligations or liabilities to the MBTA, the Operator or any other party pertaining to any matter resulting from this Agreement. The Operator agrees to include a similar provision to the foregoing, in each Subcontract, without modification, except to identify the subcontractor who will be subject to its provisions.
- 27.5 **Program Fraud and False or Fraudulent Statements and Related Acts.** The Operator acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. §§3801 *et seq.*, and U.S. DOT regulations, “*Program Fraud Civil Remedies*,” 49 C.F.R. Part 31, apply to its performance of the Services. By execution of this Agreement, the Operator certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or it causes to be made, pertaining to this Agreement or the Services. In addition to other penalties that may be applicable, the Operator further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986, as amended, on the Operator to the extent the Federal Government deems appropriate.
- 27.5.1 The Operator also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under this Agreement, the Federal Government reserves the right to impose the penalties of 18 U.S.C. §1001 and 49 U.S.C. §5307(n)(1) on the Operator, to the extent the Federal Government deems appropriate.
- 27.5.2 The Operator agrees to include the provisions of Sections 27.5.1 and 27.5.2 in each subcontract relating to the Services. The Operator further agrees that such provisions shall not be modified, except to identify the subcontractor who will be subject to the provisions.
- 27.6 **Energy Conservation.** The Operator agrees to comply with mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act.
- 27.7 **Clean Air.** The Operator agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. §§7401, *et seq.* The Operator agrees to report each violation to the MBTA and agrees that the MBTA will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office. The Operator also agrees to include the foregoing provisions in each subcontract exceeding \$100,000 relating to the Services.
- 27.8 **Clean Water.** The Operator agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251, *et seq.* The Operator agrees to report each violation to the MBTA and

understands and agrees that the MBTA will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office. The Operator agrees to include these requirements in each subcontract exceeding \$100,000 relating to the Services.

**27.9 Cargo Preference.** The Operator agrees:

27.9.1 To use a privately owned United States Flag Commercial Vessels to ship at least 50% of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to this Agreement to the extent such vessels are available at fair and reasonable rates for United States Flag Commercial Vessels.

27.9.2 To furnish within 20 working days following the date of loading for shipments originating within the United States, or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy or rated "on-board" commercial ocean bill-of-lading in English for each shipment of cargo described in the section above to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, D.C. 20590 and to the MBTA (including through the Operator in the case of a Subcontractor's bill-of-lading).

27.9.3 To include these requirements in all Subcontracts relating to the Services when the Subcontract may involve the transport of equipment, material or commodities by ocean vessel.

**27.10 Fly America.** The Operator agrees to comply with 49 U.S.C. §40118 (the "Fly America Act") in accordance with the General Services Administration's regulations at 41 C.F.R. Part 301-10, which provide that recipients and subrecipients of Federal funds and their contractors are required to use U.S. Flag air carriers for U.S. Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act. The Operator shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. Flag air carrier was not available or why it was necessary to use a foreign air carrier and shall, in any event, provide a certificate of compliance with the Fly America Act requirements. The Operator agrees to include the requirements of this Section 27.10 (Fly America) in all subcontracts relating to the Services that may involve international air transportation.

**27.11 Buy America.** The Operator agrees to comply with 49 U.S.C. 5323(j) and 49 C.F.R. Part 661, which provide that Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA-funded projects are produced in the United States, unless a waiver has been granted by the FTA or the product is subject to a general waiver. General waivers are listed in Appendix A to 49 C.F.R. 661.7. Separate requirements for

rolling stock are set out at 49 U.S.C. 5323(j)(2)(C) and 49 C.F.R. 661.11. Rolling stock must be assembled in the United States and have a 60 percent domestic content.

27.12 **Notification of Federal Participation for States.** To the extent applicable, the Operator agrees to comply with 49 U.S.C. §114(s) and implementing U.S. DOT regulations, “Protection of Sensitive Information,” 49 C.F.R. Part 15; and with 49 U.S.C. §114(s) and implementing U.S. Department of Homeland Security, Transportation Security Administration regulations, “Protection of Sensitive Security Information,” 49 C.F.R. Part 1520.

27.13 **Incorporation of FTA Terms.** The preceding provisions include, in part, certain Standard Terms and Conditions required by DOT, whether or not expressly set forth in the preceding Operating Agreement provisions. All contractual provisions required by DOT, as set forth in the FTA’s Circular 4220.1F are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA-mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement, unless such order of precedence should be deemed to create a violation of state law or local ordinance. The Operator shall not perform any act, fail to perform any act, or refuse to comply with any MBTA requests which would cause the MBTA to be in violation of such FTA-mandated terms and conditions.

## 28. **DISADVANTAGED BUSINESS ENTERPRISES**

The MBTA has adopted a Disadvantaged Business Enterprise Policy in accordance with Federal regulations issued by the U.S. Department of Transportation (49 C.F.R. Part 26). The Operator shall comply with the requirements of **Schedule 3.13** (Affirmative Action/Equal Opportunity/DBE) in order to ensure that Disadvantaged Business Enterprises (“**DBEs**”) will be afforded every practicable opportunity to participate in the performance of the Services.

## 29. **OPERATOR’S LOCAL AREA OFFICE**

The Operator shall establish prior to the issuance of the Notice to Proceed, and maintain throughout the Term, a local office within the Service Area to facilitate clear and timely communications between the Operator and the MBTA.

## 30. **ARM’S LENGTH DEALINGS**

The Operator shall ensure that every Subcontract or other arrangement or transaction to which it may become party in connection with this Agreement and the performance of the Services with any person is on *bona fide* arm’s length terms, unless otherwise expressly approved in writing by the MBTA.

## 31. **NO PERSONAL LIABILITY OF MBTA OFFICIALS**

In carrying out any of the provisions of this Agreement, or in exercising any power or authority granted to them or within the scope of this Agreement, there shall be no liability upon any director, member, officer, employee, agent or any authorized representative of the MBTA or

MassDOT, either personally or their official capacity, it being understood that in all such matters they act solely as agents and representatives of the MBTA or MassDOT, as applicable, or both.

**32. NO BENEFIT TO ELECTED OFFICIALS**

The Parties agree that no member of or delegate to the Congress of the United States shall be admitted to any share or part of this Agreement or to any benefit arising therefrom. The Parties agree that no director, member, officer, or employee of the MBTA, MassDOT, or any state or local public body of any city or town within the Service Area, as the same may be expanded from time to time, during his or her tenure shall have any interest direct or indirect, in this Agreement or the proceeds thereof.

**33. NOTICES**

Except for any notice required under Applicable Law to be given in another manner, any notice, demand, request or other communication which any Party hereto may be required or may desire to give hereunder shall be in writing and shall be deemed to have been properly given if (a) sent by a nationally-recognized overnight courier service that obtains receipts, (b) delivered personally by a courier that obtains receipts, (c) mailed by United States certified mail (with return receipt requested and postage prepaid), or (d) sent by email (with a copy of such email and proof of transmission thereof sent via one of the methods of delivery set forth in clauses (a), (b) or (c) hereof), addressed in each case as set forth below. Each such notice shall be effective upon receipt.

If to the MBTA: General Counsel, MassDOT/MBTA, Ten Park Plaza, Boston, MA 02116

With a copy to: Chief Operating Officer, MBTA, 45 High Street, Boston, MA 02110

If to the Operator: General Manager, Keolis Commuter Services, LLC, 470 Atlantic Avenue, 5<sup>th</sup> Floor, Boston, MA 02110

With a copy to: President, Keolis Commuter Services, LLC, c/o Keolis America, Inc., 51 Monroe Street, Suite 601, Rockville, MD 20850

**34. VENUE; WAIVER OF JURY TRIAL**

34.1 THE OPERATOR IRREVOCABLY (A) SUBMITS TO THE EXCLUSIVE JURISDICTION OF THE STATE AND FEDERAL COURTS HAVING JURISDICTION IN THE CITY OF BOSTON, COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS, AND (B) WAIVES ANY OBJECTION WHICH IT MAY HAVE AT ANY TIME TO THE LAYING OF VENUE OF ANY PROCEEDING BROUGHT IN ANY SUCH COURT, WAIVES ANY CLAIM THAT ANY PROCEEDING HAS BEEN BROUGHT IN AN INCONVENIENT FORUM AND FURTHER WAIVES THE RIGHT TO OBJECT, WITH RESPECT TO SUCH PROCEEDING, THAT SUCH COURT DOES NOT HAVE JURISDICTION OVER SUCH PARTY. THE OPERATOR FURTHER AGREES AND CONSENTS THAT, IN

ADDITION TO ANY METHODS OF SERVICE OF PROCESS PROVIDED FOR UNDER APPLICABLE LAW, ALL SERVICE OF PROCESS IN ANY PROCEEDING IN ANY COMMONWEALTH OF MASSACHUSETTS OR UNITED STATES COURT SITTING IN THE CITY OF BOSTON, COUNTY OF SUFFOLK MAY BE MADE BY CERTIFIED OR REGISTERED MAIL, RETURN RECEIPT REQUESTED, DIRECTED TO THE OPERATOR AT THE ADDRESS INDICATED IN SECTION 33 (NOTICES) OF PART 1, AND SERVICE SO MADE SHALL BE COMPLETE UPON RECEIPT; EXCEPT THAT IF THE OPERATOR SHALL REFUSE TO ACCEPT DELIVERY, SERVICE SHALL BE DEEMED COMPLETE FIVE DAYS AFTER THE SAME SHALL HAVE BEEN SO MAILED.

34.2 THE MBTA AND THE OPERATOR EACH WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING TO ENFORCE OR DEFEND ANY RIGHTS UNDER THIS AGREEMENT OR RELATING THERETO OR ARISING FROM THE SERVICES WHICH ARE THE SUBJECT OF THIS AGREEMENT AND AGREE THAT ANY SUCH ACTION OR PROCEEDING SHALL BE TRIED BEFORE A COURT AND NOT BEFORE A JURY.

**35. TRANSFER OR ASSIGNMENT OF CONTRACT**

Neither this Agreement nor any interest herein shall be assigned, pledged or otherwise transferred by the Operator without the prior written consent of the MBTA. If the Operator makes any such assignment, pledge or other transfer without the prior written consent of the MBTA, this Agreement shall be voidable at the election of the MBTA. The MBTA may impose such additional conditions or terms under this Agreement, in connection with its consent to any such assignment, pledge or other transfer, as may be deemed necessary to ensure the performance of the terms of this Agreement by the assignee. Moreover, unless otherwise agreed to in writing by the MBTA, any transfer by the Operator shall not release the Operator of its liability under this Agreement.

**36. NO WAIVER**

None of the provisions of this Agreement, unless otherwise specified, shall be considered waived by either Party unless such waiver is in writing and signed by both Parties. No such waiver shall be construed as a modification of any of the provisions of this Agreement or as a waiver of any past or future default or breach hereof, except as expressly stated in such waiver.

**37. SEVERABILITY**

In the event any provision of this Agreement, or of any Schedule or Exhibit hereto, shall be determined, declared, or adjudged invalid, illegal, unconstitutional, or otherwise unenforceable, such determination, declaration, or adjudication shall in no manner affect the remainder of this Agreement, which shall remain in full force and effect as if such provision declared, determined, or adjudged invalid, illegal, unconstitutional, or otherwise unenforceable, was not originally contained in this Agreement.

38. **HEADINGS NOT BINDING**

The headings appearing in this Agreement have been inserted for identification and reference purposes only, and are not to be considered as defining or limiting in any way the scope or intent of the provisions hereof.

39. **BINDING EFFECT**

This Agreement shall be binding upon and shall inure to the benefit of the respective successors and permitted assigns of the Operator and the MBTA.

40. **NO THIRD PARTY BENEFICIARIES**

Nothing in this Agreement shall be deemed to create any right in any person not a Party hereto other than permitted successors and assigns of a Party hereto, and this Agreement shall not be construed in any respect to be a contract in whole or in part for the benefit of a Third Party except as aforesaid.

41. **SURVIVAL**

The following shall survive any termination or expiration of this Agreement: (i) Section 4 (Operator Representations and Warranties) of **Part 1**; (ii) Section 5.4 (Disclaimer) of **Part 1**; (iii) the Indemnification Survival Provisions; (iv) Section 16 (Confidential Information) of **Part 1**; (v) the General Survival Provisions; (vi) the IP Survival Provisions; (vii) any other provision of this Agreement expressly noted to survive; and (viii) any other provision of this Agreement that, by the nature of its terms, should survive the termination or expiration of this Agreement.

42. **MODIFICATIONS**

This Agreement shall only be modified by a written agreement duly signed by Persons authorized to sign agreements on behalf of the Operator and of the MBTA. Any variance from the terms and conditions of this Agreement, or any order or other written notification given by either Party to the other that is not duly authorized, shall be of no force or effect.

43. **ENTIRE AGREEMENT**

43.1 This Agreement, together with the other Contract Documents, constitute the complete and entire agreement between the Operator and the MBTA and supersedes any prior representations, understandings, communications, commitments, agreements or proposals, oral or written, including the Proposal to the extent not specifically incorporated herein, and is not intended to confer upon any person other than the Parties any rights or remedies hereunder.

43.2 The Operator hereby acknowledges that it is not entering into this Agreement in reliance on any warranties, representations or undertakings howsoever or to whomsoever made.

43.3 The Operator irrevocably and unconditionally waives any right which it may otherwise have to claim damages in respect of and/or to rescind this Agreement on the basis of any

warranty, representation (whether negligent or otherwise, and whether made prior to and/or in this Agreement) or undertaking howsoever or to whomsoever made unless and to the extent that such warranty, representation or undertaking was made fraudulently.

43.4 Subject to the order of precedence set out in Section 44 (Precedence of Documents), the MBTA hereby incorporates into this Agreement the Operator's Proposal in its entirety, with the exception of the position of the Security Liaison referenced in Section 3.A (Draft Operator System Security Compliance Plan (OSSCP)) of the Operations and Management portion of the Operator's Proposal. The Operator represents and warrants that a complete and final copy of the Proposal is attached hereto as **Schedule A** (Proposal).

#### 44. **PRECEDENCE OF DOCUMENTS**

44.1 **Order of Precedence.** Subject to Section 44.2 (Exception to Order of Precedence), in the event of an inconsistency or conflict in any of the terms and conditions, requirements or provisions contained in the documents that comprise this Agreement and the other Contract Documents, the inconsistency shall be resolved by giving precedence, in descending order, to the following: (i) Change in Law Notices; (ii) Service Change Notices; (iii) Amendments to this Agreement; (iv) this Agreement; (v) Contract Documents (other than this Agreement), including Incorporated Proposal Provisions; and (vi) Performance Guarantees, certificates, affidavits and other pertinent forms.

44.2 **Exception to Order of Precedence.** The term "**Priority Proposal Commitment**" means those portions of the Incorporated Proposal Provisions that include commitments, deliverables, services, activities, tasks, functions or responsibilities that (i) exceed those set out in this Agreement (other than the Incorporated Proposal Provisions), or (ii) are otherwise materially more beneficial to the MBTA than those set out in this Agreement (other than the Incorporated Proposal Provisions). Notwithstanding anything to the contrary, to the extent that the MBTA determines, in its sole discretion, that a portion of the Incorporated Proposal Provisions constitutes a Priority Proposal Commitment or that a Priority Proposal Commitment conflicts with a term or provision of the Agreement (other than the Incorporated Proposal Provisions), then the term or provision of the Priority Proposal Commitment shall control and take precedence over the term or provision of the Agreement (other than the Incorporated Proposal Provisions); provided, however, that the MBTA shall have the right, in its sole discretion, to obligate the Operator to deliver what is set out in this Agreement (other than the Incorporated Proposal Provisions) in lieu of the Priority Proposal Commitment. By way of clarifying example, and not limitation, if the MBTA determines that an Incorporated Proposal Provision includes a Priority Proposal Commitment, then the Operator shall be obligated to meet the Priority Proposal Commitment set out in the Incorporated Proposal Provision.

44.3 **No Advantage Based on Errors.** Either Party shall not take advantage of any apparent error or omission in this Agreement or any of the other Contract Documents. In the event that either Party shall discover such an error or omission, such Party shall notify the other Party immediately. The MBTA shall then make such corrections and interpretations as

may be deemed necessary for fulfilling the intent of this Agreement and the other Contract Documents.

**45. EXECUTION IN COUNTERPARTS**

This Agreement may be executed in counterparts, each of which, when taken together, shall be construed as one and the same instrument. Delivery of an executed counterpart of a signature page of this Agreement by electronic transmission or telecopy shall be effective as delivery of a manually executed counterpart.

**46. GOVERNING LAW**

This Agreement and the transactions to which it relates, shall be governed by, construed in and enforced in accordance with the laws of the Commonwealth of Massachusetts, without reference to choice of law or conflicts of law principles.

**47. SET OFF**

- 47.1 The MBTA may set off (or recover from, in the case of the Letter of Credit) any amount (a) payable to the MBTA, or (b) that the MBTA reasonably believes to be otherwise due and owing to it by the Operator (including, but not limited to, as a result of the Operator's failure to perform any of its obligations under this Agreement), against any combination of the following: (i) any Monthly Payment or other payment payable to the Operator under this Agreement, or (ii) the Letter of Credit. If the amount payable, or otherwise due and owing, to the MBTA is unascertained, the MBTA may in good faith estimate the amount and set off (or recover) based on the estimate, subject to the MBTA accounting to the Operator when that amount is ascertained.
- 47.2 The Operator must make all payments due under this Agreement to the MBTA without set off or counterclaim and without any deduction, except as otherwise agreed in writing by the Parties.
- 47.3 Nothing in Section 47 (Set Off) is effective to create a security interest. Section 47.1 is without prejudice to any right of set off or other right to which the MBTA is at any time otherwise entitled, whether by operation of Applicable Law, contract or otherwise.

*[Remainder of this page intentionally left blank.]*

IN WITNESS WHEREOF the MBTA and the Operator have executed this Agreement under seal as of the date above first written.

**MASSACHUSETTS BAY TRANSPORTATION AUTHORITY**

By: Beverly A. Scott  
Name: ~~D~~ Beverly A. Scott  
Title: MBTA General Manager and Rail and Transit Administrator

Approved as to form:

By: Paige Scott Reed  
Name: Paige A. Scott Reed  
Title: MassDOT and MBTA General Counsel

**KEOLIS COMMUTER SERVICES, LLC**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

[SIGNATURE PAGE FOR OPERATING AGREEMENT – CONTRACT NO. 159-12]

#27485475\_v1

IN WITNESS WHEREOF the MBTA and the Operator have executed this Agreement under seal as of the date above first written.

**MASSACHUSETTS BAY TRANSPORTATION AUTHORITY**

By: \_\_\_\_\_  
Name: Dr. Beverly A. Scott  
Title: MBTA General Manager and Rail and Transit Administrator

Approved as to form:

By: \_\_\_\_\_  
Name: Paige A. Scott Reed  
Title: MassDOT and MBTA General Counsel

**KEOLIS COMMUTER SERVICES, LLC**

By:                     *Stownsend.*                      
Name:                     *Steve H. Townsend*                      
Title:                     *President*                    

[SIGNATURE PAGE FOR OPERATING AGREEMENT – CONTRACT NO. 159-12]

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## SCHEDULE 1 DEFINITIONS

As used in this Agreement, including in all Schedules and Exhibits hereto, the following terms shall have the following respective meanings, unless the context clearly requires otherwise. In addition to the definitions appearing in this **Schedule 1** (Definitions), definitions applicable to particular Schedules are included therein, including in **Schedule 3.15** (Intellectual Property; Ownership) relating to the Commuter Rail IT Environment and related obligations.

“**AAR**” means the Association of American Railroads.

“**Accounting Standards**” means GAAP or IFRS.

“**ACSES**” means the Advanced Civil Speed Enforcement System.

“**Act**” means M.G.L. c. 161A, as amended.

“**ADA**” means the Americans with Disabilities Act of 1990, 42 U.S.C. §12101, *et seq.*

“**Affiliate**” means any other Person controlled by, controlling or under common control with the Operator, including without limitation any Subsidiary of the Operator. For purposes of this definition, “**control**,” when used with respect to any specified Person, means the power to direct the management and policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise.

“**Agreement**” means this Operating Agreement, including all sections, Schedules, Appendices and Exhibits hereto, as the same may be amended, modified, supplemented, renewed, replaced or restated from time to time by the Parties.

“**Agreement Assets**” has the meaning assigned in **Schedule 14** (Preservation of Assets).

“**Agreement Services**” means the Transportation Services, Engineering Services, Mechanical Services, Environmental Services, Commuter Rail IT Environment, Customer Services and all other services, activities, tasks, functions and responsibilities required pursuant to **Schedule 3** (Agreement Services) to be performed by the Operator under this Agreement related to and necessary for the performance of the Commuter Rail Services, all as more particularly described in **Schedule 3** (Agreement Services), and all other services, activities, tasks, functions and responsibilities of the Operator functionally related thereto. The Agreement Services do not include Supplemental Work.

“**Agreement Services Commencement Date**” means the date that the Operator is authorized and directed by the MBTA to commence the performance of the Agreement Services (excluding only Mobilization Services, which shall be provided by the Operator during the Mobilization Period), pursuant to the issuance of the Notice to Commence Services.

“**Agreement Year**” means each one year period, consisting of twelve calendar months, commencing on July 1 and ending on the following June 30.

“**Allowance Item[s]**” has the meaning set forth in **Schedule 7.1** (Fees), Section 3.1 (Allowances).

“**Amtrak**” means the National Railroad Passenger Corporation.

“**Annual Fee**” means the amount that the MBTA agrees to pay the Operator each Agreement Year for the performance of the Agreement Services, including Allowance Items, as set forth in **Schedule 7** (Payments), subject to adjustment in accordance with the provisions of **Schedule 7** (Payments) and **Schedule 8** (Changes). The Annual Fee shall not include compensation for Supplemental Work, which shall be reimbursed separately according to the provisions of **Schedule 9** (Supplemental Work).

“**Applicable Law**” means all statutes, ordinances, by-laws, codes, rules, rulings, regulations, restrictions, orders, judgments, decrees, writs, judicial or administrative interpretations and injunctions, whether now or hereafter enacted, promulgated or issued by any Governmental Authority affecting this Agreement, the Commuter Rail System, the Commuter Rail Services, the Commuter Rail Property, the Services, Operator Personnel or the Operator, or the ownership, construction, development, maintenance, management, repair, use, occupancy, possession or operation of any of the foregoing.

“**APTA**” means the American Public Transportation Association.

“**AREMA**” means the American Railway Engineering and Maintenance of Right-of-Way Association.

“**Asset Register**” means the Asset Register, dated as of September 5, 2012, prepared by the MBTA and provided to the Operator at the Mobilization Commencement Date.

“**Attleboro Line**” means the MBTA rail line, previously acquired by the MBTA from the trustees of the Penn Central Transportation Company, running from South Station in the City of Boston to the Massachusetts-Rhode Island state line, more particularly described in the Attleboro Line Agreement.

“**Attleboro Line Agreement**” means the agreement between the MBTA and Amtrak dated July 1, 2003, as amended.

“**Automatic Vehicle Locator**” or “**AVL**” means any GPS-based system that allows Customers to know the location of trains via display monitors at terminals and stations, computer displays, smart phones and other electronic media.

“**Boston Engine Terminal**” or “**BET**” has the same meaning as “**CRMF**.”

“**Blended Inflation Rate**” has the meaning assigned in **Schedule 16** (Extension of Term), Section 1.3.

“**Breach**” has the meaning set forth in **Schedule 12.1** (Remedial Plans and Remedial Agreements).

**“Business Day”** means any day that is not a Saturday, a Sunday or a Holiday.

**“Cancelled Train”** means any scheduled train that (i) does not depart from its initial terminal, or (ii) departs from its initial terminal later than the next scheduled train departing from the same terminal and for the same route and destination.

**“Capital Spares”** means capially funded major components purchased as part of a larger procurement (*e.g.*, a rolling stock procurement that includes spare traction motors and a main generator), which may not be used as parts of normal spare pools without specific written authorization from the MBTA.

**“Capital Stock”** means all shares, options, warrants, general or limited partnership interests, membership interests or other equivalents (regardless of how designated) of or in a corporation, partnership, limited liability company or equivalent entity, whether voting or nonvoting, including common stock, preferred stock or any other “equity security” (as such term is defined in Rule 3a11-1 of the General Rules and Regulations promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934), and including, without limitation stock or equity appreciation rights.

**“CETC”** means the Centralized Electrification and Traffic Control facility located at South Station in Boston, Massachusetts.

**“CETC Back-Up”** means the alternate facility for CETC located at the MBTA’s Dispatching Center, 32 Cobble Hill Road, Somerville, Massachusetts.

**“Change”** means a Service Change or a Change in Law.

**“Change in Law”** means the occurrence, after (the date of issuance of Addendum No. 5 to the Request for Proposals for Contract No. 159-12), of any of the following: (i) the adoption or taking effect of any Applicable Law, (ii) any change in any Applicable Law, or (iii) the making or issuance of any request, guideline or directive (whether or not having the force of law) by any Governmental Authority, in all cases that directly relate to and have a direct effect on the provision of the Commuter Rail Services and not including any judgement, or judicial or administrative order or consent decree, or modification of the same, that results from the Operator’s failure to properly perform the Services in accordance with the provisions of this Agreement.

**“Change of Control”** means (i) any event, transaction or occurrence as a result of which (x) the holders of the outstanding Capital Stock of the Operator and/or any Parent immediately before consummation of such event, or transaction or occurrence, or series of related events, transactions or occurrences, do not, immediately after consummation of such event, transaction or occurrence or series of related events, transactions or occurrences, retain, directly or indirectly, Capital Stock representing at least 75% of the voting power of such Person (or, in the case of a merger, consolidation, reorganization or recapitalization involving such Person, the survivor thereof) or (y) any Person or “group” (other than a Person that is an equity owner on the Commencement Date) shall obtain “beneficial ownership” (as such terms are defined under Section 13d-3 of and Regulation 13D under the Securities Exchange Act of 1934), either directly or indirectly, of more than 33% of the Operator’s, any Member’s or any Parent’s outstanding

Capital Stock having the right to vote for the election of directors (or equivalent functionaries) under ordinary circumstances; (ii) at any time SNCF ceases to, directly or indirectly, own Capital Stock of the Operator representing at least 30% of the voting power of the Operator; or (iii) at any time Keolis SA ceases to, directly or indirectly, own Capital Stock of the Operator representing at least 45% of the voting power of the Operator.

"**Commencement Date**" has the meaning set out in the preface to the Introduction.

"**Commonwealth**" means the Commonwealth of Massachusetts.

"**Communication Systems**" as described in Appendix 1 (Service Property & Support Property) to this **Schedule 1** (Definitions).

"**Commuter Rail Employee Positions**" means those positions used in the provision of Commuter Rail Services on the date immediately prior to the Commencement Date that were or are subject to being filled through advertisement and award in accordance with applicable collective bargaining agreements.

"**Commuter Rail IT Environment**" has the meaning set forth in Appendix 1 (Definitions) to **Schedule 3.15** (Intellectual Property; Ownership).

"**Commuter Rail Property**" means, collectively, the Service Property, the Support Property and the Service Equipment.

"**Commuter Rail Services**" means the operation of commuter rail trains and Special Trains within the Commuter Rail System, together with other services, activities, tasks, functions and responsibilities of the Operator functionally related thereto.

"**Commuter Rail Services Revenue**" means all funds received from or on behalf of Customers for Commuter Rail Services, including Special Trains, whether by cash, check, credit card, debit card or otherwise.

"**Commuter Rail System**" means those commuter rail lines, as set forth in the Asset Register, as the same may be expanded or contracted from time to time pursuant to the provisions of **Schedule 8** (Changes).

"**Commuter Rail Trains**" means the passenger trains owned by the MBTA and used by the Operator in the provision of the Agreement Services.

"**Compliance Holdback**" means, collectively, the (i) Audit Non-Compliance Holdback, and (ii) Re-Procurement Non-Compliance Holdback.

"**Conduct Unbecoming an Employee**" means conduct by Operator Personnel that is not consistent with the objectives and standards established in this Agreement, including without limitation the specific conduct set forth in **Part 1**, Section 21 (Workplace Environment) and **Schedule 3.9** (Management and Personnel).

“**Continuation Notice**” means a written notice from the MBTA to the Operator of the MBTA’s determination to extend the Expiration Date, as the same may have been previously extended, in accordance with the provisions of **Schedule 16** (Extension of Term).

“**Contract Documents**” means, collectively, this Agreement, the Asset Register, the Third Party Railroad Agreements, the FTA Master Agreement, and the Incorporated Proposal Provisions, if any, as the same may be amended, modified, supplemented, extended, replaced or restated from time to time.

“**Crew Run**” means a crew utilization schedule or schedule of crew personnel duties, including days and hours of duty, relief days, trains to be worked by number and location, report and terminal time, meal period, rest period and any other related duties.

“**CRMF**” means the MBTA’s Commuter Rail Maintenance Facility located at 70 Rear Third Avenue, Somerville, Massachusetts; also known as the “**Boston Engine Terminal**” or “**BET.**”

“**CROCC**” means the MBTA’s Commuter Rail Operations Control Center located at 32 Cobble Hill Road, Somerville, Massachusetts.

“**CSX**” means CSX Transportation, Inc.

“**CSXT Boston & Albany Line**” means that portion of the rail line owned by CSX and located west of Worcester, Massachusetts beginning at CP 45.

“**Culvers**” as described in Appendix 1 (Service Property & Support Property) to this **Schedule 1** (Definitions).

“**Customer**” means a passenger on or utilizing the Commuter Rail System, including a Person on, preparing to enter onto, or exiting a commuter rail train, a Special Train or any of the Service Property.

“**Customer Delay**” means the difference between the actual time and the scheduled time, based on the published schedule, that a Customer arrives or departs at the initial or destination station.

“**Customer Service**” means those Agreement Services described in **Schedule 3.7** (Operator Customer Service Responsibilities), and all services functionally related thereto.

“**Days**” or “**days**” means calendar days, unless otherwise specified.

“**DBE**” means a Disadvantaged Business Enterprise, as further defined in 49 C.F.R. Part 26, and as further described in **Part 1**, Section 28 (Disadvantaged Business Enterprises) and **Schedule 3.13** (Affirmative Action/Equal Opportunity/DBE).

“**Delay Reports**” means those reports identified as such in **Schedules 3.1** (Transportation Services) and **3.14** (Reporting and Submittals).

“**Direct Agreement**” has the meaning assigned in **Schedule 14** (Preservation of Assets).

**“Dispatch Centers”** or **“MBTA Dispatch Centers”** means the CROCC, the CETC and the CETC Back-Up, and any other permanent or temporary control stations designated from time to time by the MBTA, upon notice to the Operator.

**“Dispatching Services”** means, without limitation: control of all trains, track cars and other activities controlled from the Dispatch Centers, the maintenance and publication of NORAC compatible rule books and associated employee timetables, and the provisions of rules and safety supervision services for the Commuter Rail System, as more specifically described in **Schedule 3.1** (Transportation Services).

**“DOT”** means the U.S. Department of Transportation.

**“Drawbridges”** as described in Appendix 1 (Service Property & Support Property) to this **Schedule 1** (Definitions).

**“Electrical Systems”** as described in Appendix 1 (Service Property & Support Property) to this **Schedule 1** (Definitions).

**“Electrification System”** means all equipment or facilities required to provide electric traction trains, including but not limited to power sources and control systems.

**“Eligible Management Employee”** means a Person who was employed as of December 31, 2012 in providing Commuter Rail Services by the prior operator of the Commuter Rail System, in a non-represented or exempt managerial or supervisory position below the level or grade of assistant general manager/division engineer or the equivalent.

**“Eligible Union Employee”** means a Person who was employed as of December 31, 2012 in providing Commuter Rail Services by the prior operator of the Commuter Rail System, and who held a position on a seniority roster.

**“Emergency”** means an event that involves or exposes the MBTA, Operator Personnel, Customers, or the general public to the risk of service disruption, personal injury, property damage, liability for regulatory noncompliance, or environmental hazard, as determined by the MBTA in its sole discretion. An Emergency includes, but is not limited to: (i) a derailment; (ii) a fatality or other incident at a grade crossing; (iii) a Customer, Operator Personnel or MBTA employee fatality, or a serious illness or injury to any of the foregoing Persons requiring admission to a hospital; (iv) an evacuation of a passenger train; (v) vandalism; (vi) a strike or work stoppage; (vii) a fire; (viii) an oil spill or other threat of release of Hazardous Materials; (ix) severe weather conditions; or (x) acts of terrorism.

**“Engineering Services”** means those Agreement Services described in **Schedule 3.2** (Engineering Services), and all services functionally related thereto.

**“Engineering Services Plan”** means the plan so named and described in **Schedule 3.2** (Engineering Services).

**“Engineering Services Standards”** has the meaning assigned to such term in **Schedule 3.2** (Engineering Services).

**“Environmental Laws”** means all applicable federal, state and local laws, by-laws, rules, regulations, codes and ordinances, and any judicial or administrative interpretations thereof, and the requirements of any Governmental Authority having or claiming jurisdiction with respect thereto, applicable to the regulation or protection of the environment, the health and safety of Persons and property and all other environmental matters and shall include, but shall not be limited to, all orders, decrees, judgments and rulings imposed through any public or private enforcement proceedings relating to Hazardous Materials or to the existence, use, discharge, release, containment, transportation, generation, storage, management or disposal thereof, or otherwise regulating or providing for the protection of the environment applicable to all or any portion of the Commuter Rail Property, and relating to Hazardous Materials, or to the existence, use, discharge, release or disposal thereof. Environmental Laws presently include, but are not limited to, the following laws: the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §9601 *et seq.*), the Hazardous Materials Transportation Act (49 U.S.C. §1801 *et seq.*), the Safe Drinking Water Act (42 U.S.C. §300(f) *et seq.*), the Pollution Prevention Act (42 U.S.C. §13101 *et seq.*), the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. §136 *et seq.*), the Resource Conservation and Recovery Act (42 U.S.C. §6901 *et seq.*), the Federal Clean Water Act (33 U.S.C. §1251 *et seq.*), the Federal Clean Air Act (42 U.S.C. §7401 *et seq.*) and M.G.L. c. 21E.

**“Environmental Services”** means those Agreement Services described in **Schedule 3.8** (Environmental Services).

**“Environmental Services Work Item”** means any task required to be performed by the Operator as part of the Environmental Services.

**“Environmental Subcontractor”** means a Subcontractor providing Environmental Services, as described in **Schedule 3.8** (Environmental Services), and all services functionally related thereto.

**“Environmental System”** means any system or equipment on the Service Property that is operated or designed to improve environmental quality, or reduce the environmental impacts of providing the Commuter Rail Services, including but not limited to underground and aboveground tank systems, oil/water separator systems, catch basins, onsite subsurface disposal systems, wastewater pre-treatment facilities and wastewater reuse facilities, as more particularly described in **Schedule 3.8** (Environmental Services).

**“EPA”** means the U.S. Environmental Protection Agency.

**“Estimated Services Fee Adjustment”** has the meaning assigned in **Schedule 8.4** (Services Fee Adjustment), Section 1.2.1.

**“Event of Default”** has the meaning set forth in **Schedule 12.3** (Events of Default and Termination Events).

**“Excursion Train”** means any train operated by the Operator pursuant to a lease agreement between the MBTA and the Operator, as described in **Schedule 3.1** (Transportation Services).

**“Expiration Date”** has the meaning set forth in **Part 1**, Section 3 (Term).

“**Fare**” means the amount charged a Customer for a trip on a commuter rail train, collected through any MBTA ticket option, as the same may be revised by the MBTA from time to time.

“**FFP Form**” means the Fixed Price Proposal Form submitted with the Proposal.

“**Final Services Fee Adjustment**” has the meaning assigned in **Schedule 8.4** (Services Fee Adjustment), Section 1.3.2.

“**Financial Statements**” means the most recent audited annual financial statements of the Operator, including a statement of financial position as of each fiscal year end, and statements of cash flows and activities for the year ended on such date, and notes thereto, prepared on a basis consistently applied and in accordance with Accounting Standards, together with a report of the Operator’s independent certified public accountants to the effect that they have audited such statements in accordance with the applicable Accounting Standards and that such statements present fairly the financial position and results of operations of the Operator at such date and for such period. Such financial statements shall include additional supporting schedules, in form and substance reasonably satisfactory to the MBTA, detailing (i) expenditures by functional area (*e.g.*, transportation, engineering, mechanical, and administrative) and major cost category (*e.g.*, labor, materials, services and utilities), and (ii) revenue sources, profits, and dividends or distributions of profits.

“**Fixed Fee**” means, in relation to any Reporting Period, that portion of the Monthly Fee in an amount equal to one-twelfth of the Net Annual Fee.

“**Fleet Service Change**” has the meaning assigned in **Schedule 8.4** (Services Fee Adjustment), Section 1.4.

“**Force Majeure Event**” has the meaning assigned in **Schedule 12.4** (Force Majeure Events).

“**FRA**” means the Federal Railroad Administration.

“**FTA**” means the Federal Transit Administration.

“**FTA Master Agreement**” as defined in **Part 1**, Section 27 (Federal Requirements).

“**GAAP**” means generally accepted accounting principles in the United States set forth in the opinions and pronouncements of the Accounting Principles Board and the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board, consistently applied.

“**General Survival Provisions**” means, collectively, the following sections of Part 1: (i) Section 31 (No Personal Liability of MBTA Officials); (ii) Section 33 (Notices); (iii) Section 34 (Venue; Waiver of Jury Trial); (iv) Section 35 (Transfer or Assignment of Contract); (v) Section 36 (No Waiver); (vi) Section 37 (Severability); (vii) Section 38 (Headings Not Binding); (viii) Section 39 (Binding Effect); (ix) Section 40 (No Third Party Beneficiaries); (x) Section 41 (Survival); (xi) Section 42 (Modifications); (xii) Section 43 (Entire Agreement); (xiii) Section 44 (Precedence of Documents); (xiv) Section 45 (Execution in Counterparts); and (xv) Section 46 (Governing Law).

**“Good Industry Practice”** means the exercise of that degree of skill, diligence, prudence, foresight and operating practice that would reasonably and ordinarily be expected from a skilled and experienced owner or operator, as the case may be, seeking in good faith to comply with its contractual obligations and with all Applicable Law, and engaged in the same type of undertakings as the MBTA and the Operator, as the case may be, hereunder, and under the same or similar circumstances and conditions, and using information reasonably available at the relevant time.

**“Good Working Condition”** means safe, fully functional and meeting or exceeding the minimum maintenance standards set forth in this Agreement and the requirements of Applicable Law.

**“Governmental Authority”** means any federal, state, county or municipal government, or political subdivision thereof, any governmental or quasi-governmental agency, authority, board, bureau, commission, department, instrumentality, or public body, or any court, administrative tribunal, or public utility.

**“GPS”** means a Global Positioning System, *i.e.*, a satellite-based system of identifying latitude and longitude that may be superimposed onto maps and displayed on computer displays, smart phones and other electronic media.

**“Guarantor”** means each "guarantor" party to the Guaranty.

**“Guaranty”** means the guaranty contemplated by **Appendix 2** (Performance Guarantees) to **Schedule 2** (Conditions Precedent), in form and substance satisfactory to the MBTA.

**“Handover Package”** means, collectively, the information, data, reports and other materials required to be provided by the Operator to the MBTA at or prior to the Termination Date, in accordance with the provisions of **Schedule 15.3** (Handover Package).

**“Hazardous Materials”** means and includes asbestos, flammable materials, explosives, radioactive or nuclear substances, polychlorinated biphenyls, other carcinogens, oil and other petroleum products, radon gas, urea formaldehyde, chemicals, gases, solvents, pollutants or contaminants that could be a detriment or pose a danger to the environment or to the health or safety of any Person, and any other pollution, contamination or hazardous or toxic materials, wastes and substances which are defined, determined or identified as such in any Environmental Laws.

**“Holiday”** means those holidays designated by the MBTA from time to time, which, as of the Commencement Date, are: New Year's Day, Martin Luther King's Birthday, President's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day.

**“IFRS”** means the International Financial Reporting Standards as issued by the International Accounting Standards Board.

**“Implementation Date”** has the meaning assigned in **Schedule 8.1** (Changes).

**“Incorporated Proposal Provisions”** means those provisions, submissions, sections and plans included in the Proposal that the MBTA designates at time of award of Contract No. 159-12 as Incorporated Proposal Provisions.

**"Indemnification Survival Provisions"** means, collectively, the following sections of Part 1: (i) Section 14.1 (Environmental Indemnification); (ii) Section 14.2 (Indemnification by the Operator); (iii) Section 14.3 (Defense of Indemnification); (iv) Section 14.5 (Restitution); and (v) the Parties' indemnification obligations to the extent not addressed in nos. (i) through (iii) of this sentence.

**“Initial Joint Audit”** means the audit undertaken by the MBTA and the Operator prior to the Agreement Services Commencement Date, as described in **Schedule 4.1** (Obligations Concerning Commuter Rail Property).

**"IP Survival Provisions"** means, collectively, the following Sections: (i) Section 1 (IT Ownership) of **Schedule 3.15** (Intellectual Property; Ownership); (ii) Section 2 (Grant of Rights to MBTA) of **Schedule 3.15** (Intellectual Property; Ownership); and (iii) Section 16 (IT Transition Support) of **Schedule 3.16** (Information Technology Requirements).

**“Key Contracts”** means those contracts relating to the provision of the Agreement Services listed in Appendix 1 (List of Key Contracts) to **Schedule 14.2** (Key Contracts).

**“Labor Dispute”** means a strike, work stoppage, lock-out, work cessation, or other similar action designed to stop, interrupt, or impact the performance of the Services.

**“Late Train”** means any train arriving at its destination terminal platform or any intermediate station platform more than four minutes and 59 seconds after its scheduled arrival or departure time.

**“Major Repair”** as described in **Schedule 3.2** (Engineering Services).

**“Maintenance Cost Schedules”** means the Maintenance Cost Schedules submitted by the Operator with the Proposal.

**“Management Employee”** means a Person employed by the Operator in providing the Services in a non-represented or exempt managerial or supervisory position.

**“Management Information System”** means a type of Software that constitutes a database or other digital content management system for collecting, compiling, processing, searching and reporting data and other associated functionality.

**“MassDOT”** means the Massachusetts Department of Transportation.

**“Material Damage”** means damage, other than normal wear and tear, to the Commuter Rail Property which, in the aggregate for any occurrence, costs more than \$25,000 to repair or reconstruct or, if such damage is not repairable, the property that is damaged costs more than \$25,000 to replace or reconstruct.

“**MBTA**” means the Massachusetts Bay Transportation Authority, including its directors, officers, employees and duly authorized agents and representatives.

“**MDEP**” means the Massachusetts Department of Environmental Protection.

“**MDPU**” means the Massachusetts Department of Public Utilities.

“**Mechanical Services**” means the Agreement Services described in **Schedule 3.3** (Mechanical Services), and all services functionally related thereto.

“**Mechanical Services Plan**” means the plan described as part of the Mechanical Services in **Schedule 3.3** (Mechanical Services).

“**Member**” means any of Keolis Rail Services America, LLC and SNCF America Inc.

“**Mobilization Commencement Date**” means the date on which the MBTA provides the Operator with the Notice to Proceed.

“**Mobilization Period**” means the period beginning on the Notice to Proceed Date and ending on the Agreement Services Commencement Date.

“**Mobilization Plan**” means the Mobilization Plan developed by the Operator and approved by the MBTA pursuant to **Schedule 3.12** (Mobilization).

“**Mobilization Services**” means those Agreement Services described in **Schedule 3.12** (Mobilization) (and elsewhere in this Agreement that pertain to the Mobilization Services) that the Operator shall commence performing on the Mobilization Commencement Date, as more fully described in the Mobilization Plan, and all services functionally related thereto.

“**Monthly Fee**” means the fee paid to the Operator for the performance of the Agreement Services for each Reporting Period, as set forth in **Schedule 7.1** (Fees).

“**Monthly Passes**” means joint-use tickets honored for transportation on MBTA subways, buses, and harbor ferries as well as within the Commuter Rail System.

“**Necessary Consents**” means all licenses, permits, approvals, consents, authorizations, or agreements issued, granted or obtained, or required to be issued, granted or obtained, by or from any Governmental Authority, in connection with the provision or performance of the Services.

“**Net Annual Fee**” means for each Agreement Year, the Annual Fee less Allowance Items, as set forth in **Schedule 7.1** (Fees), Section 2 (Fixed Fee).

“**NORAC**” means the Northeast Operating Rules Advisory Committee.

“**Normal consumption**” means the steady, planned level use of materials and parts necessary to support the proper performance of the Agreement Services.

“**Normal replacement**” means the scheduled replacement of a piece of Service Equipment or Support Property at the end of its life expectancy.

**“Notice to Commence Services”** means the issuance by the MBTA to the Operator of a written notice to proceed with the Agreement Services, specifying the Agreement Services Commencement Date.

**“Notice to Proceed”** or **“NTP”** means the issuance by the MBTA to the Operator of a written notice to proceed with the Mobilization Services, upon the Operator’s fulfilling all of the conditions precedent, as set forth in **Schedule 2** (Conditions Precedent), subject to any express waiver of a condition precedent by the MBTA.

**“Notice to Proceed Date”** means the date of issuance of the NTP by the MBTA to the Operator. By way of clarification, the Notice to Proceed Date is the same date as the Mobilization Commencement Date.

**“Obsolete Material”** means materials, equipment, and parts no longer required for use in the normal operation and maintenance of the Commuter Rail Property, and may include unique material that is only used under extraordinary circumstances, such as in an Emergency, and, once identified, should be kept on hand at a minimum book value.

**“OCC”** means the Operations Control Center.

**“OEM”** means the original equipment manufacturer.

**“Off-Peak Commuter Periods”** means those times not denoted as Peak Periods on the public timetables published by the MBTA.

**“On-Time Performance”** or **“OTP”** has the meaning assigned in **Schedule 3.1** (Transportation Services).

**“Operating Rule Book”** has the meaning assigned in **Schedule 3.1** (Transportation Services).

**“Operator General Manager”** or **“OGM”** means the current occupant of the position described in **Schedule 3.9** (Management and Personnel).

**“Operator Remedial Performance Notice”** has the meaning assigned in **Schedule 6.1** (Performance Evaluation), Section 5 (Operator Notice of Failure to Achieve Performance Levels).

**“Operator Personnel”** means all Eligible Union Employees and Eligible Management Employees who are hired by the Operator, and all other employees directly engaged by the Operator to perform any of the Services, but not including Subcontractors. As used in this Agreement, unless otherwise noted, the term **“employee(s)”** means Operator Personnel.

**“Other Contractors”** means contractors engaged by the MBTA to perform work or services, other than the Services.

**“Other Required Work”** means work related to the Agreement Services that a Third Party desires to subcontract to the Operator, and that the MBTA directs the Operator to perform subject to the provisions of **Schedule 9** (Supplemental Work).

“**OT Waiver**” has the meaning assigned in **Schedule 6.1** (Performance Evaluation), Section 1.1.6.

“**Overhead Bridges**” as described in Appendix 1 (Service Property & Support Property) to this **Schedule 1** (Definitions).

“**Parent**” means Keolis SA and SNCF.

“**Party**” or “**Parties**” means, singly and collectively, the MBTA and the Operator, and their respective permitted successors and assigns.

“**Peak Commuter Period**” means those times denoted as Peak Periods by shading or other means in the public timetable for Commuter Rail Services published by the MBTA.

“**Performance Failure Payment**” means an amount assessed by the MBTA and payable by, or otherwise collectable from, the Operator as described in **Schedule 6.1** (Performance Evaluation), Section 2 (Performance Determination).

“**Performance Guarantees**” as described in **Part 1**, Section 8 (Performance Guarantee).

“**Person**” means any individual, general partnership, limited partnership, limited liability company, corporation, joint venture, trust, business trust, cooperative, association, foreign trust, foreign business organization, or other entity recognized as legally distinct for any purpose, and the heirs, executors, administrators, legal representatives, successors, and assigns of such “Person” where the context so permits.

“**Primary Agreement Assets**” means those assets of the Operator listed in Appendix 1 (List of Primary Agreement Assets) to **Schedule 14.3** (Designation of Agreement Assets).

“**Proposal**” means the proposal, as amended, submitted by the Operator in response to the MBTA’s Request for Proposals for the Commuter Rail Services, Contract No. 159-12.

“**Records**” has the meaning set forth in **Part 1**, Section 12.1.

“**Relevant Term**” has the meaning assigned in **Schedule 12.1** (Remedial Plans and Remedial Agreements), Section 1.2.1.

“**Remedial Performance Level**” means, in relation to a Performance Area identified in **Schedule 6.1** (Performance Evaluation), the number or percentage set forth in Appendix 7 (Remedial Performance Standards) to **Schedule 6.1** (Performance Evaluation).

“**Reporting Period**” means each one-month period during the Term, commencing on the first day of each month and ending on the last day of the same month. The first Reporting Period shall commence on July 1, 2014.

“**Rolling Stock Fleet**” means the Service Equipment.

“**Right of Way**” as described in the Asset Register.

“**Right of Way Assets**” Appendix 1 (Service Property & Support Property) to this **Schedule 1** (Definitions).

“**RSSE**” means rolling stock support equipment, as described in **Schedule 3.2** (Engineering Services).

“**Safety Stock**” means inventory of specific critical parts, typically those critical to train operation with long lead times that are kept on hand to deal with surges in demand (*e.g.* wheels).

“**Scrap Material**” means materials, equipment, and parts no longer required for use in the normal operation and maintenance of the Commuter Rail Property, which can be safely disposed of without adversely impacting the proper performance of the Agreement Services, and which may be sold to a third party for re-use, sold to a scrap dealer or simply discarded and removed from the Service Property.

“**Senior Director**” or “**MBTA’s Senior Directory**” means the current occupant of the position of Senior Director of Railroad & Water Transportation at the MBTA, or the occupant of such other position at the MBTA who becomes responsible for discharging the responsibilities of the Senior Director of Railroad & Water Transportation with respect to the management and oversight of the Commuter Rail Services and this Agreement, or his or her designee, as notified in writing by the MBTA to the Operator from time to time.

“**Service Area**” has the meaning assigned in the Act.

“**Service Change**” means an MBTA-directed modification to the Agreement Services, as implemented from time to time in accordance with the provisions of **Schedule 8** (Changes).

“**Service Disruption**” means a delay to one or more commuter rail trains due to any of the following causes: an Emergency, a serious mechanical problem, a disabled train, or any other disruptions that cause a significant impact on the Commuter Rail Services.

“**Service Equipment**” means the locomotives, rail passenger cars, and non-revenue rolling stock that are owned or controlled by the MBTA and made available for use by the Operator in the performance of the Agreement Services, as more particularly identified in the Asset Register.

“**Service Line**” means those service lines comprising the Commuter Rail System, as the same may be revised by the MBTA from time to time.

“**Service Property**” as described in Appendix 1 (Service Property & Support Property) to this **Schedule 1** (Definitions) and identified in the Asset Register.

“**Service Schedules**” means the MBTA’s schedules for the arrival and departure times of commuter rail trains for each Service Line, designating weekday, Saturday, Sunday and Holiday schedules, and denoting peak and off-peak periods, as displayed in the public timetables.

“**Services**” means all of the services required to be performed by the Operator pursuant to this Agreement, including the Agreement Services and Supplemental Work.

**“Services Fee”** means the aggregate of the Annual Fees to be paid by the MBTA to the Operator for the Term of this Agreement. The Services Fee, as of the Commencement Date, is set forth in **Part 1**, Section 7 (Payment).

**“Services Fee Adjustment”** has the meaning assigned in **Schedule 8.2** (Implementation of Change), Section 1.1.

**“Signal Systems”** as described in Appendix 1 (Service Property & Support Property) to this **Schedule 1** (Definitions) and in the Asset Register.

**“Southside S&I Facility”** means the MBTA’s commuter rail storage, inspection and maintenance facility located at Widett Circle in South Boston, Massachusetts.

**“Spare”** means extra parts held in reserve from time to time for use in the performance of the Agreement Services.

**“Special Train”** means a commuter rail train that is not regularly scheduled but that is operated by the Operator as directed by the MBTA, as more particularly described in **Schedule 3.1** (Transportation Services), but not including Excursion Trains.

**“State of Good Repair”** means such condition of specified Support Property that allows it to operate under normal conditions with only routine scheduled maintenance for the duration of its life expectancy.

**“State”** means the Commonwealth.

**“Station”** as described and identified in the Asset Register.

**“Subcontractor”** means any subcontractor, supplier, vendor or other Person contracted by the Operator to perform a portion of the Services.

**“Subsidiary”** means, with respect to any Person, (i) any corporation of which an aggregate of more than 50% of the outstanding Capital Stock having ordinary voting power to elect a majority of the board of directors of such corporation (irrespective of whether, at the time, Capital Stock of any other class or classes of such corporation shall have or might have voting power by reason of the happening of any contingency) is at the time, directly or indirectly, owned legally or beneficially by such Person or one or more Subsidiaries of such Person, or with respect to which any such Person has the right to vote or designate the vote of 50% or more of such Capital Stock whether by proxy, agreement, operation of law or otherwise, and (ii) any partnership or limited liability company in which such Person or one or more Subsidiaries of such Person shall have an interest (whether in the form of voting or participation in profits or capital contribution) of more than 50% or of which any such Person is a general partner or may exercise the powers of a general partner. Unless the context otherwise requires, each reference to a Subsidiary shall be a reference to a Subsidiary of the Operator.

**“Successor Operator”** means a successor operator to the Operator, as more fully described in **Schedule 15** (Obligations Associated with Termination).

“**Supplemental Work**” means work that the Operator is obligated to perform as part of this Agreement at the direction of the MBTA from time to time, in accordance with the provisions of **Schedule 9** (Supplemental Work), for which the Operator is separately compensated and which is not included in the Annual Fee.

“**Support Inventory**” means spare parts, consumables, shop supplies, removed and rebuilt spare parts, capital spares, manuals, forms, keys and other property and materials that are required for the proper performance of the Agreement Services.

“**Support Property**” means equipment, tools, machines (including the IT Infrastructure), non-revenue (non-rolling stock) vehicles (including automobiles and work equipment), and materials (including Support Inventory) related to the maintenance of the Service Equipment and the Service Property, as more particularly described in Appendix 1 (Service Property & Support Property) to this **Schedule 1** (Definitions) and in the Asset Register.

“**Surplus Material**” means materials, equipment, and parts in excess of the level required to support the normal operation and maintenance of the Commuter Rail Property.

“**Term**” means the period of approximately eight years commencing on the Commencement Date and ending on the Expiration Date, as the same may be extended pursuant to **Schedule 16** (Extension of Term) or decreased pursuant to **Schedule 12** (Defaults, Remedies, and Termination).

“**Terminated Train**” means any scheduled train that departs its initial terminal and (i) does not complete its schedule, or (ii) is coupled to and assisted by a following train, or (iii) is delayed by more than 40 minutes at any point along its route.

“**Termination Costs**” shall mean the following costs to the extent actually expended by the Operator and the Subcontractors (i) costs of terminating leases for offices and other real property in Massachusetts used solely for performance of the Services, and (ii) other reasonable, unreimbursed costs directly attributable to such termination and not attributable to the fault of neglect of the Operator or its Subcontractors.

“**Termination Date**” means the earlier to occur of the Expiration Date or the date that this Agreement is terminated pursuant to **Schedule 12.2** (Termination).

“**Termination Notice**” means the written notice from the MBTA to the Operator terminating this Agreement, in accordance with the provisions of **Schedule 12.2** (Termination).

“**Third Party**” means any Person other than the MBTA, the Operator, or a Third Party Railroad.

“**Third Party Railroad**” means any of Amtrak, CSX, Pan Am and Rhode Island Department of Transportation, and any successor or assign.

“**Third Party Railroad Agreements**” means any agreement between the MBTA and a Third Party Railroad, and any amendment, modification or supplement thereto.

**“Track Structures”** as described in Appendix 1 (Service Property & Support Property) to this **Schedule 1** (Definitions).

**“Train”** means a commuter rail train or a Special Train.

**“Train Staffing Plan”** means that part of the Transportation Service Plan dealing specifically with required train and engine staffing levels, as more particularly described in **Schedule 3.1** (Transportation Services).

**“Transportation Services”** means the Agreement Services described in **Schedule 3.1** (Transportation Services), and all services functionally related thereto.

**“Undergrade Bridges”** as described in Appendix 1 (Service Property & Support Property) to this **Schedule 1** (Definitions).

**“Virtual Warehousing”** means the use of electronic inventory tracking and accounting systems to manage similar materials used for different purposes, rather than using physically separate warehousing space to separate materials by use, including the development and implementation of protocols governing how materials are ordered, charged out for use, and handled during stock-outs, as more particularly described in Section 1 (Materials Management) of **Schedule 3.4** (Materials Management and Procurement).

## APPENDIX 1 TO SCHEDULE 1

### SERVICE PROPERTY & SUPPORT PROPERTY

#### 1. SERVICE PROPERTY

The Service Property comprises the Building Assets, the Track Structure, the Undergrade Bridges, the Overhead Bridges, the Draw Bridges, the Culverts, the Right-of-Way Assets, the Electrical Systems, the Signal Systems, and the Communication Systems.

##### 1.1 Building Assets

The Building Assets include all terminal facilities, maintenance facilities, layover/storage facilities, maintenance-of-way (M/W) headquarters reporting facilities, M/W material yards, shops, trailers, garages, buildings, station buildings, sheds, offices, office buildings, shanties, drawbridge towers, pump houses, signal cases, signal bungalows, containers, signal houses, control towers, fan houses, warehouses, substations, sub-station buildings and enclosures, and dwellings owned or controlled by the MBTA and used in connection with the provision of the Commuter Rail Services, as more particularly described in the Asset Register.

- 1.1.1 The Building Assets include the electrical systems, electrical services, plumbing systems, structural systems, HVAC systems, lubrication dispensing systems, fueling systems, compressed air systems, sanding systems, elevators, escalators, fire suppression systems, exhaust evacuation systems, roadways, parking areas, drainage systems, drop tables, cranes, pits, Blue Flag systems, air drying systems, lighting, fencing, gates, security systems, railings, fall protection systems, drip collection systems, life safety devices and systems, health and wealth areas, lighting systems (including parking lots), signage, doors, windows, roofs, gutters, downspouts, floors, walls, ceilings, wall coverings, foundations, masonry, ramps, stairs, exterior finishes, interior finishes, utility services/connections, piping, water distribution systems, fans, underground vaults/rooms, air dampers systems, boilers, air/exhaust analysis devices and systems, pumps, platforms, walkways, ramps, stairways, parking lots and canopies, benches, trash receptacles, catch basins, retention basins, detention basins, oil-water separating systems, filtration systems, storage tanks, pavement markings, fences, guardrails, painted surfaces, shelters, canopies, schedule cases, bulletin boards, curb stops, curbing, curb cuts, ADA requirements, signage, public address systems, train annunciation systems, gutters, downspout, trail blazers, sign posts, telephones, telephone systems, bicycle racks, pedestrian overpasses, pedestrian crossings, storage sheds, windscreens, parking pay boxes, fold-up platform edges, driveways, walkways, and bollards.

## 1.2 Track Structures

A Track Structure includes, but is not limited to, the rails, ties, timbers, joint bards, compromise barbs, track bolts, washer, nut locks, spacers, keepers, plates, cut spikes, lockspikes, screw lags, drive lags, clips, shoulders, fastening assemblies, switch points, stockrails, sliders, braces, heel blocks, switch rods, connecting rods, detector rods, gage plates, separation plates, hook plates, guard rails, point protectors, switch stands, derails, pipe connections, switch bolts, switch lubrication, self aligning shoulder plates, switch rails, ballasts, sub-ballast, asphalt underlayment, geotextile, subdrains, underdrains, grade crossings, pavement (concrete and bituminous asphalt), rubber, timber, Nelson Rails, Nelson Chairs, street drainage, road surface, sidewalk surface special trackwork, approach slabs, backwalls, wingwalls ballast retainer, ballast mats, rip rap and tide gates.

## 1.3 Undergrade Bridges

The Undergrade Bridges contained within the Right-of-Way are identified in the Asset Register. These facilities include, but are not limited to, abutments, piers, wingwalls, retaining walls, right-of-way walls, boundary walls, footings, bearing seats, approach slabs, backwalls, bearings, stiffeners, rivets, bolts, bracings, stringers, piles, beams, floorbeams, girders, ties, timbers, planks, railings, walkways, fencing, barriers, utility support plates, connection plates, bearing plates, cross-bracing, knee-bracing, deck plates, weepholes, drainage systems, waterproofing, ballast, gutters, scuppers, pipes, tubes, retainers, rail supports, rails, rail connectors, spacer blocks, structural members, prime members, secondary members, bridge attachments, bridge markers, bridge name signs, bridge painting for graffiti, patching, testing, lighting systems, concrete members, steel members, wooden members, granite blocks, masonry blocks, concrete blocks and conduits.

## 1.4 Overhead Bridges

The Overhead Bridges contained within the Right-of-Way are identified in the Asset Register. These facilities include, but are not limited to, abutments, piers, wingwalls, retaining walls, underdecks, stringers, floorbeams, girders, bracings, planks, timbers truss members, connectors, concrete, plates, bearings, drainage systems, railings, piles, fencing, barriers, supports, bridge members, superstructure members, substructure members, approach slabs, pipes, conduits, bridge markers, painting for graffiti removal and bridge attachments.

## 1.5 Drawbridges

The Drawbridges contained within the Right-of-Way are identified in the Asset Register. These include, but are not limited to, equipment, all structural members including structural, steel and wood, and mechanical parts such motors, pipes, tubes, cables, switches, electrical parts, wires, boxes, conduit systems, machinist parts, control units, switch locks, nuts, bolts, transformers, grounding, electrical parts, cable, test equipment,

meters, computers, generators, rails, conleys, pumps, counterweights, ties, timber, planks, walkways railings, expansion joints, rails, rail members, spacer blocks, movement control, fire detector communication lines, piers, abutments approach members, slabs, piles, markers, navigation lights, navigation warnings, signs, clearance markers, protection barriers as well as items to be maintained on non-movable bridges.

## 1.6 Culverts

The Culverts contained within the Right-of-Way are identified in the Asset Register. These facilities include, but are not limited to, inlet members, outlet members, barrel members, aprons, inner walls, outer walls, waterways, concrete, steel, blocks, bricks, stone, wingwalls, covers, pipes, joints, cracks, cleanings, flood control, markers, erosion control, flow control, headwalls, Faso walls and barrier walls.

## 1.7 Right-Of-Way Assets

The assets contained in the Right-of-Way include, but are not limited to, fencing, gates, posts, locks, bollards, guard rails, signage, sign posts, sign attachments, access roads, culverts, ditches, catch basins, drainage systems, vegetation, trees, landscaping, retaining walls, slopes, slope stabilization, access stairs, utility crossings, utility occupations, leases, licenses, easements, property lines, viaducts, detention basins, retention basins, conduits, structures, markers, mileposts and all other railroad structures and appurtenances that may be located within the width of the Right-of-Way.

## 1.8 Electrical Systems

The Electrical Systems contained within the Right-of-Way include, but are not limited to, the drawings, transformers, commercial metered power systems (primary and secondary), switchgears, power feeds, programmable logic controllers, electrical sign systems, grounding, circuit breakers, distribution systems, cases, lighting and lighting systems, unit substations, metering equipment, trough systems, cable, cable assemblies, transfer switches, locks, electronic equipment, train layover systems, feeder receptacle stations, panel boards, instrumentation house substations, signal poles, signal lines and test equipment.

## 1.9 Signal Systems

The Signal Systems contained within the Right-of-Way are identified in the Asset Register. These systems include, but are not limited to, the plans, signal switches and rods, foul wires, track leads, circuit controllers, spring switch buffers, pipe connections, electric devices, wires, cables, trough systems, conduit systems, trays, electric locks, power switches, airlines, signal bridges, cantilevers, insulated joints, track circuits, cab signal systems, rail bonding, plug connectors, signal power systems, rectifiers, batteries, transfer equipment, signal transformers, un-interruptible power supply systems (UPS), signal power houses, signal power cases, grounding, signal poles and pole lines, automatic highway crossing warning systems, signal instrument shelters, wayside cases, junction boxes, signal instrument racks, entrance racks, relays and plugboards (vital and non-vital), vital interlocking systems, supervisory control systems, data transmission

systems, supervisory control workstations, local area networks, supervisory control servers, recording devices, hot journal detectors, wheel impact detectors, dragging equipment detectors, hazard detectors, fire detection and suppression systems, printed circuit boards, circuit breakers, fuses, diodes, resistors, reactors, capacitors, terminal blocks, lightning arrestors, wire terminals, wire tags, padlocks (switch, signal, communications, electrical), cable entrances, entrance pipes, rubber floor mats, light bulbs, masts, signal lenses and guards, and test equipment. All apparatus, cabling, conduit, and devices related to Positive Train Control systems also are part of the Signal Systems.

#### 1.10 **Communication Systems**

The Communications Systems contained within the Right-of-Way include, but are not limited to, the plans, communication wires, cables, fiber optic cables and systems, alarm and security systems, radio systems (train and security), frequency coordination, public address systems (field), public address control systems (field and office), telephone systems and lines (dispatcher party line, maintenance, emergency, radio, communication and ringdown), closed circuit television systems, train information systems, poles and pole lines, communication shelters, cases, junction boxes, pom systems, remote monitors and control units, electronic sign systems, conduit systems, communications cabinets, equipment racks and test equipment.

#### 2. **SUPPORT PROPERTY**

The Support Property includes, but is not limited to, utility vehicles, pickups, rack body trucks, geometry evaluation cars, dump trucks, vans, suburbans, hydrail suburbans, boom trucks, hydrail grapple trucks, snow fighter trucks, welding trucks, hydrail pickups, tractor trailers, bucket trucks, cube vans, hydrail boom trucks, utility trucks, line trucks, hydrail bucket trucks, sedans, tampers, ballast compactors, trench compactors, hand tampers, spike drivers, ballast regulators, rail alignment lasers, tie removers, tie inserters, tie carts, scarifiers, tie handlers, hydro spikers, hand spikers, air drivers, pneumatic spike drivers, plate placers, alignment beams, tie borers, spike pullers, rail tensors, nut removers, impact wrenches, rail drills, track grinders, profile grinders, rail bond grinders, cross cut grinders, stock rail grinders, rail saws, bonding drills, weld shears, swing loaders, power brooms, loaders, municipal tractors, lumber forks, boom attachments, bucket attachments, prime mover, rail car mover, pallet forks, wheel chair lifts, industrial trucks, forklifts, backpack blowers, hand blowers, snow blowers, jet snow blowers, hand tractors, snow plows, backhoes, sand/salt spreaders, cranes, excavators and attachments, brush cutters, tree clippers, grass trimmers, brush clippers, mowers, chain saws, paint sprayers, motor cars, tool/supply carts, push carts, electronic test equipment, trailers, storage containers, light plants, electric signs, pumps, power units, scaffolding, boats, mixers, office equipment, office furniture, pavement cutters, mobile radios, air conditioners, cameras, typewriters, weedwackers, computer equipment and networks (including CADD and CAM systems), copiers, kitchen appliances, confined space equipment and safety equipment. In addition, the following tools that are not maintained under the mechanical services agreement: generators, air compressors, piercing tools,

light plants, drills hand tools, drill presses, saws, wrenches, vacuum cleaners, hoists, recovering units, washers/cleaners, lifts and sandblasting equipment.

**SCHEDULE 2**  
**CONDITIONS PRECEDENT**

**1. SATISFACTION OF CONDITIONS PRECEDENT TO NOTICE TO PROCEED**

- 1.1 As soon as the MBTA is satisfied that each of the conditions precedent set forth below has been satisfied (except to the extent waived by the MBTA, subject to such conditions as the MBTA shall impose to any such waiver) it shall issue to the Operator a Notice to Proceed. Upon the issuance of the Notice to Proceed, the Operator shall commence performing the Mobilization Services.
- 1.1.1 If the MBTA waives the satisfaction of any conditions precedent pursuant to Section 1.1 of this **Schedule 2** (Conditions Precedent), the Operator shall ensure that such conditions precedent, together with any conditions attaching to such waiver, are satisfied as soon as reasonably practicable thereafter, or at such other later time as the MBTA may stipulate.
- 1.2 All insurance required to be carried by or on behalf of the Operator as of the date of issuance of the Notice to Proceed, in accordance with the provisions of **Schedule 10** (Insurance), shall be in full force and effect, and copies of the required certificates or copies of policies shall have been provided to the MBTA, in accordance with the provisions of **Schedule 10** (Insurance).
- 1.3 The MBTA shall have received the duly authorized and executed Performance Guarantees.
- 1.4 All corporate and other proceedings of the Operator, each Member and each Parent and all Third Party consents and approvals necessary in connection with the transactions contemplated by this Agreement, and all documents and instruments incidental thereto, shall be satisfactory in form and substance to the MBTA; and the MBTA shall have received such counterpart originals or certified or other copies of all such documents and instruments and all records of partnership, corporate and other proceedings in connection with such transactions, and such incumbency and signature certificates of officers of the Operator, each member and each Parent, and opinions of the Operator's counsel and counsel to each Guarantor (and, if required by the MBTA, of local counsel or foreign counsel, if applicable) for the Operator and each Guarantor) to the effect that, among other things, the Contract Documents to which the Operator is a party and the Guaranty of each Guarantor have been duly executed by the Operator and each Guarantor and are enforceable against such parties in accordance with their respective terms, which opinions otherwise shall be in form and substance, and from law firms, satisfactory to the MBTA.
- 1.5 The MBTA shall have received from the Operator, each Member and each Parent, a certified copy of its operating agreement/charter, by-laws and other organizational documents.
- 1.6 The representations and warranties of the Operator set forth in **Part 1**, Section 4 (Operator Representations and Warranties) shall be true and correct in all material

respects as of the Commencement Date and as of the date of issuance of the Notice to Proceed.

- 1.7 The MBTA shall receive the most recent Financial Statements of the Operator, each Member and each Parent.
- 1.8 There shall be no action, suit, investigation or proceeding (or basis therefor), at law or in equity, before or by any Governmental Authority, which challenges, or might challenge, directly or indirectly, the selection of the Operator to perform this Agreement or the authorization, execution, delivery, validity or enforceability of this Agreement, or materially, adversely affect the Operator's, each Member's or Guarantor's ability to perform this Agreement or the Guaranty, as applicable.
- 1.9 The MBTA shall have received completed and duly executed Proposal Forms, in the forms required to be submitted with the Proposal by the Operator, each Member and each Parent as well as its Subcontractors, as applicable.
- 1.10 The MBTA shall have received the Operator's organizational chart as required pursuant to **Schedule 3.9** (Management and Personnel).
- 1.11 The MBTA shall have received the information required for all Operator Personnel who will be performing the Mobilization Services required by **Part 1**, Section 18.1.
- 1.12 The MBTA shall have received the Mobilization Plan, in accordance with the provisions of **Schedule 3.12** (Mobilization) and all applicable submittals listed in Appendix 1 (Required Submittals) to this **Schedule 2** (Conditions Precedent).

## 2. **SATISFACTION OF CONDITIONS PRECEDENT TO NOTICE TO COMMENCE SERVICES**

- 2.1 As soon as the MBTA is satisfied that each of the conditions precedent set forth below has been satisfied (except to the extent waived by the MBTA, subject to such conditions as the MBTA shall impose to any such waiver) it shall issue to the Operator a Notice to Commence Services. Upon the issue of the Notice to Commence Services, the Operator shall commence performing the Agreement Services (excluding only the Mobilization Services, which shall have been performed during the Mobilization Period), effective on the Agreement Services Commencement Date.
  - 2.1.1 If the MBTA waives the satisfaction of any conditions precedent pursuant to Section 2.1 of this **Schedule 2** (Conditions Precedent), the Operator shall ensure that such conditions precedent, together with any conditions attaching to such waiver, are satisfied as soon as reasonably practicable thereafter, or at such other later time as the MBTA may stipulate.
- 2.2 All actions required by the Operator pursuant to the Mobilization Plan have been completed.

- 2.3 All actions necessary to transfer the Eligible Union Employees and Eligible Management Employees from the current operator of the Commuter Rail Services to the Operator as of the Agreement Services Commencement Date.
- 2.4 All actions necessary to transfer the Commuter Rail Property from the current operator of the Commuter Rail Services to the Operator have been completed.
- 2.5 The Initial Joint Audit has been completed.
- 2.6 All Necessary Consents for the commencement of the Agreement Services by the Operator have been obtained, or will be issued or transferred to the Operator effective as of the Agreement Services Commencement Date.
- 2.7 All insurance required to be carried by or on behalf of the Operator as of the Agreement Services Commencement Date, in accordance with the provisions of **Schedule 10** (Insurance), shall be in full force and effect, and copies of the required certificates or copies of policies shall have been provided to the MBTA, in accordance with the provisions of **Schedule 10** (Insurance).
- 2.8 The MBTA shall have received the information required for all Operator Personnel who will be performing the Mobilization Services required by **Part 1**, Section 18.3.
- 2.9 The MBTA shall have received and approved, as applicable, all submittals listed in Appendix 1 (Required Submittals) to this **Schedule 2** (Conditions Precedent).

### 3. **TERMINATION OF AGREEMENT**

- 3.1 The MBTA may give notice to the Operator terminating this Agreement if:
  - 3.1.1 the conditions to the issuance of the Notice to Proceed set forth in Section 1 (Satisfaction of Conditions Precedent to Notice to Proceed) of this **Schedule 2** (Conditions Precedent) have not been met within 60 days of the Commencement Date; or
  - 3.1.2 the conditions to the issuance of the Notice to Commence Services set forth in Section 2 (Satisfaction of Conditions Precedent to Notice to Commence Services) of this **Schedule 2** (Conditions Precedent) have not been met within six months of the issuance of the Notice to Proceed; or
  - 3.1.3 the MBTA reasonably considers that any condition precedent will not be satisfied by the date specified in Section 3.1.1 or 3.1.2 of this **Schedule 2** (Conditions Precedent), as applicable.
- 3.2 If such notice is given, the Agreement shall terminate on the date specified in such notice (the “**Early Termination Date.**”)

- 3.2.1 On termination of this Agreement pursuant to Section 3.1 of this **Schedule 2** (Conditions Precedent), neither Party shall have any liability to the other Party, except:
- 3.2.1.1 their respective obligations as to confidentiality under **Part 1**, Section 16 (Confidential Information);
  - 3.2.1.2 any other obligations which, by their nature, survive the termination of this Agreement; and
  - 3.2.1.3 any breach of their respective obligations under this Agreement arising in respect of the period prior to the Early Termination Date, other than with respect to the conditions precedent.

**APPENDIX 1**  
**REQUIRED SUBMITTALS**

This Appendix does not include submittals and other Deliverables required pursuant to **Schedules 3.15** (Intellectual Property; Ownership) through **3.18** (Service Level Agreement and Service Credits). Any such Deliverables shall be provided in accordance with such Schedules.

**NTP = Notice to Proceed**  
**NTCS = Notice to Commence Services**

One Time, Non-Recurring Submittals

ODRL#	Description	Due Date
ODRL 3.9-003	The Operator Organization Chart	Commencement Date
ODRL 3.12-001	Mobilization Plan	At time of NTP
ODRL 3.12-002	Mobilization Organization	At time of NTP
ODRL 3.12-003	Third Party Mobilization Services List	At time of NTP
ODRL 3.12-004	MBCR Transition Services List	At time of NTP
ODRL 3.12-005	FRA/Regulatory Agency Deliverable Spreadsheet	At time of NTP
ODRL 3.12-006	Mobilization Milestone Schedule	At time of NTP
ODRL 3.12-007	Mobilization Plan Underlying Assumptions	At time of NTP
ODRL 3.12-008	Mobilization Overlaps & Mitigation	At time of NTP
ODRL 3.12-009	Mobilization Status Meeting Schedule	At time of NTP
ODRL 3.12-010	Document & Template Spreadsheet	At time of NTP
ODRL 3.12-011	Safety Sensitive Subcontractor Positions	At time of NTP
ODRL 3.3-01	Equipment List (ELIST) - Proposed	30 days after NTP
ODRL 3.3-03	Maintenance Allocation Chart (MAC) - The Operator Proposed	30 days after NTP
ODRL 3.3-05	Life Cycle Maintenance (LCM) Program - The Operator Proposed	30 days after NTP
ODRL 3.3-07	Comprehensive Preventive Maintenance, Inspection and Cleaning Plan	At time of NTP
ODRL 3.3-09	Cleaning Standards - proposed	At time of NTP
ODRL 3.5-029	Inventory of Safety Sensitive Positions	At time of NTP
ODRL 3.3-23	Maintenance Management System Procurement Specification for review and approval	60 days after NTP
ODRL 3.9-018	Written Union Notification of the Operator Selection	10 days after NTP
ODRL 3.9-019	Labor terms & Pledge to Comply	10 days after NTP
ODRL 3.3-26	Maintenance Operation and Fleet Performance Report format for review and approval	30 days after NTP
ODRL 3.8-001	Resumes for two full-time environmental compliance staff	30 days after NTP
ODRL 3.8-002	Draft Permit Management Program	30 days after NTP
ODRL 3.8-004	Monthly Compliance Summary Example Report	30 days after NTP
ODRL 3.8-039	Slug Control Plan & Pretreatment Report	30 days after NTP
ODRL 3.8-020	Draft Individual O&M Plans, Staffing Plans & Inspection Plans	45 days after NTP
ODRL 3.8-024	OWS Spare Parts List & Inventory	45 days after NTP
ODRL 3.8-027	On-site Disposal System Spare Parts List & Inventory	45 days after NTP
ODRL 3.8-033	Tank System Spare Parts List & Inventory	45 days after NTP
ODRL 3.8-037	Draft CRMF O&M Manual, SOPs & Staffing Plan	45 days after NTP
ODRL 3.8-040	CRMF Wastewater System Spare Parts List & Inventory	45 days after NTP
ODRL 3.8-042	Draft Widett O&M Manual, SOPs & Staffing Plan	45 days after NTP
ODRL 3.8-044	Widett Wastewater System Spare Parts List & Inventory	45 days after NTP
ODRL 3.1-001	Transportation Service Plan	60 days after NTP
ODRL 3.1-021	Draft Policy and Procedure for Periodic Updates	60 days after NTP
ODRL 3.3-02	Equipment List (ELIST) - submitted for Final Approval	60 days after NTP
ODRL 3.3-04	Maintenance Allocation Chart (MAC) - submitted for Final Approval	60 days after NTP

ODRL 3.3-06	Life Cycle Maintenance (LCM) Program - submitted for Final Approval	60 days after NTP
ODRL 3.3-08	Comprehensive Preventive Maintenance, Inspection and Cleaning Plan - submitted for Final Approval	60 days after NTP
ODRL 3.3-10	Cleaning Standards - submitted for Final Approval	60 days after NTP
ODRL 3.3-12	Fleet Maintenance Plan - for Final Approval	60 days after NTP
ODRL 3.3-14	Weekly Maintenance Production Plan - proposed draft form	60 days after NTP
ODRL 3.3-16	Weekly Maintenance Production Report	60 days after NTP
ODRL 3.3-18	Maintenance Management System Plan	60 days after NTP
ODRL 3.3-19	Maintenance Standards Manual (MSM)	60 days after NTP
ODRL 3.3-20	Calibration Procedure Management Plan	60 days after NTP
ODRL 3.3-21	Rail Vehicle Non-Revenue Fleet – comprehensive preventive maintenance program	60 days after NTP
ODRL 3.3-22	Mobile Wreck Cranes - comprehensive preventive maintenance program	60 days after NTP
ODRL 3.3-24	FRA Defect Report - Rolling Stock	60 days after NTP
ODRL 3.3-25	FRA Compliance Management Plan	60 days after NTP
ODRL 3.3-28	Maintenance Cost per Vehicle per Year	60 days after NTP
ODRL 3.4-01	Materials Management Plan	60 days after NTP
ODRL 3.4-10	Scrap & Obsolete Material Handling	60 days after NTP
ODRL 3.4-13	Inventory Maintenance Plan	60 days after NTP
ODRL 3.4-14	None on Hand Material Action List	60 days after NTP
ODRL 3.4-15**	None on Hand Material Meeting Plan	60 days after NTP
ODRL 3.4-22	Fuel Accounting Plan	60 days after NTP
ODRL 3.5-001	Safety Incident Reporting & Review Process	60 days after NTP
ODRL 3.5-002	Emergency Action Process Improvement Plan	60 days after NTP
ODRL 3.5-019	Contingency Plan	60 days after NTP
ODRL 3.7-001	Lost & Found Procedures	60 days after NTP
ODRL 3.7-007	Alternate Transportation Protocols	60 days after NTP
ODRL 3.8-007	Draft Emergency Spill Response/Spill Prevention Control and Countermeasure (SPCC) Plan	60 days after NTP
ODRL 3.8-011	Draft Hazardous Materials Management Plan	60 days after NTP
ODRL 3.8-014	Draft Environmental Services Work Plan	60 days after NTP
ODRL 3.10-007	Locomotive Engineer Certification	60 days after NTP
ODRL 3.10-008	Conductor Certification	60 days after NTP
ODRL 3.10-009	QMP Training Program	60 days after NTP
ODRL 3.10-010	QMP Refresher Training Program	60 days after NTP
ODRL 3.10-011	Railroad Workplace Safety Programs	60 days after NTP
ODRL 3.10-012	Emergency Preparedness Program	60 days after NTP
ODRL 3.10-013	Refrigerant Handling Training Program	60 days after NTP
ODRL 3.10-018	New Employee Competency Evaluation and Orientation Training Program	60 days after NTP
ODRL 3.10-023	O&M Agreement Training Complete	60 days after NTP
ODRL 3.10-005	First Responder Training Program	60 days after NTP
ODRL 3.1-011	Operator Transportation Dept. Org Chart	90 days after NTP
ODRL 3.1-012	Train Staffing Plan	90 days after NTP
ODRL 3.1-022	Draft Employee Timetable, Operating Rule Book and Train Dispatcher's Manual	90 days after NTP
ODRL 3.1-023	Spreadsheet of Rule Books/Manuals	90 days after NTP

ODRL 3.1-024	Timetable Schedule Pages for Publication	90 days after NTP
ODRL 3.2-001	Engineering Services Plan	90 days after NTP
ODRL 3.2-024	Station Inspection Form	90 days after NTP
ODRL 3.2-026	Preliminary Support Property & Facilities Maintenance Plan	90 days after NTP
ODRL 3.2-028	Facility Inspection Form	90 days after NTP
ODRL 3.2-085	Lock Out / Tag Out Procedure	90 days after NTP
ODRL 3.2-087	Electrical Testing and Maintenance Plan	90 days after NTP
ODRL 3.2-091	Electrical Maintenance & Testing Report Template	90 days after NTP
ODRL 3.2-101	Annual Fuel Usage Audit Report Form	90 days after NTP
ODRL 3.2-109	Fire Protection System/Call Box Inventory	90 days after NTP
ODRL 3.3-11	Maintenance Interval Forms - submitted for Approval	90 days after NTP
ODRL 3.4-02	Critical Material List	90 days after NTP
ODRL 3.4-05	New Fleet Parts Lists	90 days after NTP
ODRL 3.4-06	Unique Parts/Safety Stock Lists	90 days after NTP
ODRL 3.4-19	Materials MIS Operational & Current	90 days after NTP
ODRL 3.4-20	MBTA Materials Management Data Upload	90 days after NTP
ODRL 3.4-21	Fuel Test Plan	90 days after NTP
ODRL 3.4-30	Locomotive Idle Time Minimization Plan	90 days after NTP
ODRL 3.4-33	Warranty Control & Administration Plan	90 days after NTP
ODRL 3.5-003	Operator System Safety Compliance Plan	90 days after NTP
ODRL 3.5-012	Operator System Security Compliance Plan	90 days after NTP
ODRL 3.5-015	Emergency Preparedness Plan	90 days after NTP
ODRL 3.5-017	Emergency Response Plan	90 days after NTP
ODRL 3.5-022	Drug Free Workplace Policy	90 days after NTP
ODRL 3.7-012	Customer Service Satisfaction Plan	90 days after NTP
ODRL 3.7-014	Media Communications Events List	90 days after NTP
ODRL 3.8-003	Final Permit Management Program	90 days after NTP
ODRL 3.8-008	Final Emergency Spill Response/Spill Prevention Control and Countermeasure (SPCC) Plan	90 days after NTP
ODRL 3.8-018	Health & Safety Plan	90 days after NTP
ODRL 3.10-014	Carman Training Program	90 days after NTP
ODRL 3.10-015	Signalman Training Program	90 days after NTP
ODRL 3.10-016	Machinist/Electrician/Pipefitter/Sheet Metal Worker Training & Qualification Program	90 days after NTP
ODRL 3.10-017	Standardized Qualification Test and Practical Examination Materials	90 days after NTP
ODRL 3.2-018	Temporary Speed Restriction Removal Schedule	120 days after NTP
ODRL 3.2.029	Rolling Stock Support Equipment (RSSE) Condition Assessment	120 days after NTP
ODRL 3.2-037	Preliminary Elevator & Escalator Inspection & Maintenance Program	120 days after NTP
ODRL 3.2-039	Preliminary Station, Building and Facility Maintenance Program	120 days after NTP
ODRL 3.2.050	Preliminary Bridge Maintenance Plan	120 days after NTP
ODRL 3.2-052	Preliminary Drawbridge Maintenance Plan	120 days after NTP
ODRL 3.2-054	Preliminary Drawbridge Operation Manual	120 days after NTP
ODRL 3.2-057	Preliminary Timber Bridge Deck Replacement Plan	120 days after NTP
ODRL 3.2-059	Preliminary Tunnel Operation and Maintenance Manual	120 days after NTP

ODRL 3.2-061	Preliminary Culvert Replacement Plan	120 days after NTP
ODRL 3.2-066	Preliminary Signal Failure Reduction Program	120 days after NTP
ODRL 3.2-074	Preliminary Grade Crossing Event Recorder Program	120 days after NTP
ODRL 3.2-078	Preliminary Interlocking Event Recorder Program	120 days after NTP
ODRL 3.2-080	Preliminary Switch Machine Replacement Plan	120 days after NTP
ODRL 3.2-082	Preliminary Pole Line Retirement and Replacement Program	120 days after NTP
ODRL 3.2-084	Preliminary Pole Replacement Program	120 days after NTP
ODRL 3.2-086	Electrical and Lighting Equipment Field Inspection & Asset Inventory Update	120 days after NTP
ODRL 3.2-097	Energy Consumption Strategy	120 days after NTP
ODRL 3.2-099	Non-Revenue Vehicle & Work Equipment Inspection Form	120 days after NTP
ODRL 3.2-110	Facility Condition Assessment	120 days after NTP
ODRL 3.6-001	Quality Assurance Program Plan	120 days after NTP
ODRL 3.6-002	Quality Control Manual for Transportation Services	120 days after NTP
ODRL 3.6-003	Quality Control Manual for Customer Service & Information	120 days after NTP
ODRL 3.6-004	Quality Control Manual for Engineering Services	120 days after NTP
ODRL 3.6-005	Quality Control Manual for Mechanical Services	120 days after NTP
ODRL 3.6-006	Quality Control Manual for Materials Management	120 days after NTP
ODRL 3.6-007	Calibration Standards, Processes, Procedures and Documentation	120 days after NTP
ODRL 3.6-008	Workmanship Standards	120 days after NTP
ODRL 3.6-009	Commuter Rail Function, Processes & Procedures Master List	120 days after NTP
ODRL 3.6-010	Configuration Management Plan	120 days after NTP
ODRL 3.6-011	Software Configuration Management Plan (SCMP)	120 days after NTP
ODRL 3.6-012	The Operator Audit Plan	120 days after NTP
ODRL 3.6-015	Quality Control Manual for Capital Support	120 days after NTP
ODRL 3.10-026	Initial Training Plan	120 days after NTP
ODRL 3.10-028	Non-Revenue QMP Training Program	120 days after NTP, and updates as rolling stock added
ODRL 3.1-007	Fare Collection Procedures	120 days after NTP
ODRL 3.5-027	Drug & Alcohol Test Guidelines	120 days after NTP
ODRL 3.9-015	Baseline Competency Test Plan	120 days after NTP
ODRL 3.4-18	Materials MIS Plan	135 days after NTP
ODRL 3.4-04	New Fleets Parts & Materials Plan	Prior to NTCS
ODRL 3.4-11	Obsolete, Surplus & Scrap Material Sales Escrow Account Report	Prior to NTCS
ODRL 3.9-001	List of OGM Designees	Prior to NTCS
ODRL 3.9-004	List of ODGM Designees	Prior to NTCS
ODRL 3.10-021	New Fleet OEM Technical Assistance	Prior to NTCS
ODRL 3.10-022	Shop Equipment OEM Technical Assistance	Prior to NTCS
ODRL 3.2-017	Tie Replacement Plan (becomes part of ODRL 3.2-002)	August 1 of Agreement Year 1
ODRL 3.2-096	Electric Service Database	90 days after NTCS
ODRL 3.4-07	Repair-and-Return List	6 months after Mobilization Commencement Date
ODRL 3.4-03	Kitting Plan	12 months after Mobilization Commencement Date

Daily Submittals

ODRL#	Description	Due Date
ODRL 3.1-003	On Time Performance	Daily
ODRL 3.1-005	Late, Terminated, Cancelled Trains	Daily
ODRL 3.1-006	On Time Performance, Customer Delays, Penalty Delays, Cancelled Trains	Daily, monthly, annual
ODRL 3.1-009	Revenue Report	Daily
ODRL 3.1-014	07:00 Train & Engine Staffing Report	Daily
ODRL 3.4-23	Fuel Report	Daily
Operations	Dispatcher's turnover sheets for each ACD during the course of prior day. Weather observation, safety rule, bulletins in effect, Speed Summary, etc.	Daily
Operations	Summary of unusual and extraordinary occurrences including discussion of major delays for prior day's operation	Daily
Operations	Detail report on all mechanical failures occurring in prior day's service, containing information on unit number, engineer, location, minutes delayed, supervisor notified, delay cause, and description	Daily
Operations	Listing of all incidents of vandalism reported during prior day's service, including trains affected, location, time, delays and injuries, if any	Daily
Operations	List of all trains where equipment assigned to train was not in normal scheduled equipment cycle sorted by Division, listed in order of departure time, showing train ID, cycle ID number of required seats, equipment assigned, and dispatcher's narrative	Daily
Operations	Check Sheet for each line showing each train, lead unit, minutes late, passengers carried, number of seats in consist, number of seats short, if any, number of standees based on difference between seating capacity of consist and reported passenger count	Daily
Operations	List of all consists assigned for the morning lineup with cycle ID, all units assigned, first train, time due for servicing, seating capacity sorted by consist ID	Daily
Engineering	List all locations with temporary speed restrictions, identifying line, mileposts, track(s) affected, passenger speed, freight speed, whether signs are posted, reason for restriction, and estimated time of cancellation	Daily
Engineering	Detail report on all incidents and equipment failures occurring in prior day's service.	Daily
Engineering	Listing of train delays for Engineering Department for prior service day, sorted by cause with duration, location, responsible party, and description of delays	
Mechanical	A report on the previous day's operations, including reports as to the performance of equipment, the availability of Service Equipment, mechanical delays and the causes thereof, information as to train consists and reports of unusual occurrences in the operation of the Service Equipment	Daily
Mechanical	Reports as to incidences of vandalism during the previous day	Daily
Mechanical	Reports as to failures of rolling stock that occurred during the previous day, and the Operator's analysis of the cause of such failures	Daily
Mechanical	Service Equipment assignments to trainsets for the current day's a.m. Peak Commuter Period and previous day's p.m. Peak Commuter Period	Daily
Mechanical	By noon on each day, a summary of the current day's morning equipment status report including: assignments, available for service spares, maintenance spares, long term holds, storage. For equipment not available for service, list date taken out of service, number of elapsed calendar days, and estimated date of return to service.	Daily

Weekly Submittals

ODRL#	Description	Due Date
ODRL 3.2-005	Track Outage Report	Weekly
ODRL 3.2-111	Manager System-Wide Service Property Inspection	Weekly
ODRL 3.3-15	Weekly Maintenance Production Plan	No later than 3:00 pm on each Friday
ODRL 3.3-17	Weekly Maintenance Production Report	No later than 10:00 am on each Monday
ODRL 3.4-24	Fuel Report	Weekly
ODRL 3.7-002	Customer Fliers & Bulletins	Weekly
ODRL 3.9-016	Hiring Progress Report	Weekly during Mobilization
ODRL 3.9-017	Non-MBCR Workforce Hiring Explanations	Weekly during Mobilization

Monthly Submittals

ODRL#	Description	Due Date
ODRL 3.1-006	On Time Performance, Customer Delays, Penalty, Late, Cancelled Trains and Terminated Trains	Daily, monthly, annually
ODRL 3.1-010	Unsold Monthly Passes	Monthly
ODRL 3.2-007	Supervisory Track & Right-of-Way Inspection Reports	Monthly
ODRL 3.2-008	Track Geometry Car Inspection Report	Each Jul 1, Oct 1, Jan 1 and Apr 1
ODRL 3.2-011	Turnout Inspection Report	Monthly
ODRL 3.2-012	Joint Switch Inspection Report	Monthly
ODRL 3.2-013	Track Inspection Summary Report	Monthly
ODRL 3.2-035	Station Cleaning Report	Monthly
ODRL 3.2-041	Station Building and Facility Services Staffing Plan Update	Monthly
ODRL 3.2-069	FRA Test Compliance Report	Monthly
ODRL 3.2-090	Electrical Maintenance & Testing Report	Monthly
ODRL 3.2-092	Electrical Maintenance & Testing Meeting Schedule	Monthly
ODRL 3.2-093	Electrical Maintenance & Testing Meeting Agenda	Monthly
ODRL 3.2-104	Winter Pre-Season Checklist	September 15th, annually & updated monthly
ODRL 3.3-13	Fleet Maintenance Plan – Real-time	Monthly and Upon Request
ODRL 3.3-27	Maintenance Operation and Fleet Performance Report	Monthly
ODRL 3.3-29	MTBSF Report	Monthly
ODRL 3.4-12	Obsolete, Surplus & Scrap Material Sales Escrow Account Report	Monthly
ODRL 3.4-25	Fuel Report	Monthly
ODRL 3.4-27	Fuel Apparatus Inspection, Maintenance, Calibration & Overhaul Report	Monthly
ODRL 3.4-28	Fuel Usage By Locomotive Report	Monthly
ODRL 3.4-29	Operator Fuel Purchases	Monthly
ODRL 3.8-005	Monthly Compliance Summary Report	Monthly
ODRL 3.8-009	Fuel Usage Report	Monthly
ODRL 3.8-045	Open Environmental Site Report	Monthly
ODRL 3.9-012	The Operator Employee Headcount Report	Monthly
ODRL 3.10-001	Training Schedules	1st day of the month, monthly
ODRL 3.14-001	NTD Monthly Reporting	Monthly

Quarterly Submittals

ODRL#	Description	Due Date
ODRL 3.1-013	Train Staffing Plan Update	Quarterly
ODRL 3.2-025	Quarterly Facility Inspection (uses ODRL 3.2-018)	Quarterly
ODRL 3.2-045	Quarterly Tunnel & Ventilation Inspection Reports	Quarterly, available on request
ODRL 3.2-047	Special Bridge Inspection Reports	Quarterly, available on request
ODRL 3.2-108	Engineering Services Plan Update	Annually starting February 1st with quarterly updates
ODRL 3.4-08	Damaged Inventory Report	Quarterly, 1st day of February, May, August & November
ODRL 3.5-008	Safety Performance Reports	Quarterly
ODRL 3.5-014	Security Issue & Incidents Report	Quarterly
ODRL 3.6-014	The Operator Audit Summary Report	Quarterly
ODRL 3.7-008	List of Alternate Transportation Bus Lines	90 days after NTP and quarterly thereafter
ODRL 3.7-010	Quarterly Customer Comment and Complaint Report	90 days after Commencement and quarterly thereafter
Schedule 13	Management Prepared Semi-Annual Financial Statements	Semi-Annually, within 60 days of FY Q2 end

## Annual Submittals

ODRL#	Description	Due Date
ODRL 3.1-002	Transportation Service Plan Update	April 1st, annually
ODRL 3.1-006	On Time Performance, Customer Delays, Penalty Delays, Cancelled Trains	Daily, monthly, annual
ODRL 3.2-002	Annual Engineering Services Plan	Preliminary Draft – December 1, annually Final Draft – February 1, annually
ODRL 3.2-004	Annual Recommended Capital Improvement Plan	December 1, annually
ODRL 3.2-009	Grade Crossing Inspection Report	Annually
ODRL 3.2-015	Rail Grinding Plan	December 31, annually
ODRL 3.2-016	Rail Replacement Plan (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-019	Grade Crossing Improvement Plan (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-020	List of Flood-Prone Locations & Mitigating Measures (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-021	Drainage Ditch Reshaping Plan (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-022	Fencing Installation Plan (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-023	Structural Inspection Report	Annually
ODRL 3.2-027	Support Property & Facilities Maintenance Plan (becomes part of Annual Engineering Services Plan, ODRL 3.2-002)	Annually
ODRL 3.2-030	RSSE Condition Assessment Update (becomes part of Annual Engineering Services Plan - ODRL 3.2-002)	Annually
ODRL 3.2-031	RSSE Good Working Order Program (becomes part of Annual Engineering Services Plan - ODRL 3.2-002)	Annually
ODRL 3.2-032	RSSE Normal Replacement Program (becomes part of Annual Engineering Services Plan - ODRL 3.2-002)	Annually
ODRL 3.2-033	Building & Facility Operating & Access Hours	As needed & annually
ODRL 3.2-034	Station Cleaning Schedule (becomes part of Annual Engineering Services Plan - ODRL 3.2-002)	Annually
ODRL 3.2-038	Elevator & Escalator Inspection & Maintenance Program (becomes part of Annual Engineering Services Plan - ODRL 3.2-002)	Annually
ODRL 3.2-040	Station, Building and Facility Maintenance Program (becomes part of Annual Engineering Services Plan - ODRL 3.2-002)	Annually
ODRL 3.2-042	Landscaping Plan	By March 1st of each Contract Year
ODRL 3.2-044	Annual Bridge, Tunnel, Culvert, Pedestrian Structure Inspection Reports	Annually, available on request
ODRL 3.2-048	Underwater Inspection Reports	Every 5 years, available on request
ODRL 3.2-049	Drawbridge Inspection Reports	Quarterly, available on request
ODRL 3.2-051	Bridge Maintenance Plan (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-053	Drawbridge Maintenance Plan (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-055	Drawbridge Operation Manual (becomes part of ODRL 3.2-002)	Annually
ODRL3.2-056	Timber Bridge Deck Replacement Plan (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-058	Tunnel Operation and Maintenance Manual (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-060	Culvert Replacement Plan (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-065	Signal Failure Reduction Program (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-071	Line Plans, Track Charts, Interlocking Books (6 sets)	March 1st, annually
ODRL 3.2-073	Grade Crossing Event Recorder Program (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-077	Interlocking Event Recorder Program (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-079	Switch Machine Replacement Plan (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-081	Pole Line Retirement and Replacement Program (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-083	Pole Replacement Program (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-094	Thermo Graphic Survey	Annually
ODRL 3.2-095	Energy Conservation & Utilization Summary Report	Periodically, but not less than annually

ODRL 3.2-098	Update to Energy Consumption Strategy	Annually
ODRL 3.2-100	Annual Fuel Usage Audit Report	Annually
ODRL 3.2-102	Review of Operators' Licenses	Annually
ODRL 3.2-103	Snow Plan	Labor Day, annually
ODRL 3.2-104	Winter Pre-Season Checklist	September 15th, annually & updated monthly
ODRL 3.2-107	Five Year Work Forecast (becomes part of ODRL 3.2-002)	Annually
ODRL 3.2-108	Engineering Services Plan Update	Annually starting July 1 with quarterly updates
ODRL 3.4-09	Physical Inventory Count	June 30th, annually
ODRL 3.4-26	Fuel Report	Annual
ODRL 3.5-004	Operator Safety Compliance Plan Update	October 1st, annually
ODRL 3.5-013	Operator System Security Compliance Plan Update	October 1st, annually
ODRL 3.5-016	Emergency Preparedness Plan Update	May 1st, annually & 60 days before sent to FRA
ODRL 3.5-018	Emergency Response Plan Update	August 1st, annually
ODRL 3.5-020	Contingency Plan Update	August 1st, annually
ODRL 3.5-023	Drug Free Workplace Policy Update	August 1st, annually
ODRL 3.5-028	Drug & Alcohol Test Guidelines Update	August 1st, annually
ODRL 3.7-011	Annual Customer Service Improvement Plan	October 1, annually
ODRL 3.7-013	Customer Service Satisfaction Plan Update	March 12, annually
ODRL 3.9-011	Complete the Operator Employee Records	September 1st, annually
ODRL 3.9-013	Annual Staffing v Work Report	September 1st, annually
ODRL 3.9-014	Annual Staffing Review/Evaluation	October 1st, annually
ODRL 3.10-002	Operator Annual Employee Training Plan	August 1st, annually
ODRL 3.10-006	First Responder Training Program Resubmission	September 1st, annually
ODRL 3.10-024	O&M Agreement Refresher Training	Every other year
ODRL 3.14-002	NTD Annual Reporting	Annually
Schedule 13	Audited Financial Statements	Annually, within 120 days of Operator FY End

On Request & As Occurs Submittals

ODRL#	Description	Due Date
ODRL 3.1-008	Changes to Fare Collection Procedures	Prior to implementation
ODRL 3.1-017	Preliminary Incident/Accident Report	2 hours after service restored
ODRL 3.1-018	Interim Incident/Accident Report	24 hours after service restored
ODRL 3.1-019	Final Incident/Accident Report	2 weeks after service restored
ODRL 3.1-020	Final Incident/Accident Report Update	30 days after Final Incident/Accident Report
ODRL 3.2-003	Service Diversion Plan	As Required
ODRL 3.2-006	FRA Mandated Track & Right-of-Way Inspection Reports	As Required
ODRL 3.2-010	Special Track & Right of Way Reports	After Severe Weather
ODRL 3.2-014	Rail Testing and Corrective Action Report	After Testing
ODRL 3.2-033	Building & Facility Operating & Access Hours	As needed & annually
ODRL 3.2-036	Fire Protection System & Call Box Inspection Reports	Upon request
ODRL 3.2-043	Drainage System Designs	Before construction
ODRL 3.2-044	Annual Bridge, Tunnel, Culvert, Pedestrian Structure Inspection Reports	Annually, available on request
ODRL 3.2-045	Quarterly Tunnel & Ventilation Inspection Reports	Quarterly, available on request
ODRL 3.2-046	Emergency Bridge Strike Inspection Reports	Immediately, available on request
ODRL 3.2-047	Special Bridge Inspection Reports	Quarterly, available on request
ODRL 3.2-048	Underwater Inspection Reports	Every 5 years, available on request
ODRL 3.2-062	Crossing Plan, Layouts, Traffic Counts	Upon request
ODRL 3.2-063	Initial False Proceed Signal Indication Report	<24 hrs after incident
ODRL 3.2-064	Final False Proceed Signal Indication Report	<15 days after incident
ODRL 3.2-067	Train Control & Signal Inspection & Test Report	<24 hrs after inspection or test
ODRL 3.2-068	Final Train Control & Signal Inspection & Test Report	2 business days after first report (03-067)
ODRL 3.2-070	Signal System Modification/New Installation As-Built Drawings	30 days after installation
ODRL 3.2-072	Highway Rail Crossing Information	Upon request
ODRL 3.2-075	Grade Crossing Malfunction Report	<24 hrs after incident
ODRL 3.2-076	Wayside Signal Apparatus Test Reports	Upon request
ODRL 3.2-088	Planned Track Outage Notification	35 days before outage
ODRL 3.2-089	Unplanned Track Outage Notification	Immediately
ODRL 3.2-096	Electric Service Database	90 days after Commencement, available upon request
ODRL 3.2-105	Storm Plan	Before every storm
ODRL 3.2-106	Post Storm Fitness Report	After each storm
ODRL 3.3-13	Fleet Maintenance Plan – Real-time	Monthly and Upon Request
ODRL 3.4-16	None on Hand Material List	5 days after Material Meetings
ODRL 3.4-17	Truck Car Fluid Technical Specifications	Before placing order
ODRL 3.4-32	Capital Spare Component Usage Justification Report	15 days before use
ODRL 3.5-005	Operator Safety Compliance Plan Changes	45 days before effective date
ODRL 3.5-006	MBTA Requested Operator Safety Compliance Plan Changes	45 days after request
ODRL 3.5-009	Unsafe, Non-Secure Condition Notification	Immediate
ODRL 3.5-010	Hazardous Condition Report	One business day after discovery

ODRL 3.5-011	Unacceptable Hazardous Condition Report	One hour after discovery
ODRL 3.5-016	Emergency Preparedness Plan Update	May 1st, annually & 60 days before sent to FRA
ODRL 3.5-021	OSCP, OSSCP, EPP, ERP Violation Notification	Immediate
ODRL 3.5-024	Report of Drug/Alcohol Abuse	Within 24 hours
ODRL 3.5-025	Drug Free Workplace Policy Violation Report	5 days after incident
ODRL 3.5-030	OSCP, OSSCP, EPP, ERP Violation Incident Report	Immediately
ODRL 3.5-031	OSCP, OSSCP, EPP, ERP Violation Interim Written Report	24 hours after incident
ODRL 3.5-032	Violation Incident Final Written Report	30 days after incident
ODRL 3.5-033	Report of FRA or Other Regulatory Agency Visit	2 hours after arrival
ODRL 3.6-013	The Operator Audit Reports and Findings	30 days after audit completion
ODRL 3.7-003	Response to Customer Complaint	5 days after complaint
ODRL 3.7-004	Customer Complaint Reports to MBTA	5 days after complaint
ODRL 3.7-005	Customer Complaint Updates	Every 5 days after original complaint
ODRL 3.7-009	Independent Auditor Reports	Immediately
ODRL 3.8-006	All Applications for Permits, Certificates, Licenses & Regulatory Agency Correspondence	Within 90 days before expiration
ODRL 3.8-010	All EPA Reports for CRMF Facility-Wide Emissions Cap	Per Permit
ODRL 3.8-012	Final Hazardous Materials Management Plan	Within 30 days of receipt of MBTA's comments
ODRL 3.8-013	Copies of All Waste Management Documentation	Immediately Upon Receipt
ODRL 3.8-015	Final Environmental Services Work Plan	Within 30 days of receipt of MBTA's comments
ODRL 3.8-016	Copies of all Correspondence with Regulatory Agencies	Immediately
ODRL 3.8-017	Copy of Inventory & Spare Parts/Tools List	Immediately
ODRL 3.8-019	Drainage Inspection Forms	Immediately
ODRL 3.8-021	Final Individual O&M Plans, Staffing Plans & Inspection Plans	Within 15 days of receipt of MBTA's comments
ODRL 3.8-022	OWS Inspection Forms & Reports	Immediately
ODRL 3.8-023	NPDES Monitoring Reports	Per Permit
ODRL 3.8-025	On-site Disposal System Inspection Forms & Reports	Immediately
ODRL 3.8-026	On-site Disposal System Pumping Reports	Immediately
ODRL 3.8-028	Tank System Inspection Schedule, Forms & Reports	Immediately
ODRL 3.8-029	Tank System Leak Detection Testing Schedule & Reports	Immediately
ODRL 3.8-030	Tank System Corrosion Protection System Testing Schedule & Reports	Immediately
ODRL 3.8-031	Stage II Recovery System Testing Schedule & Reports	Immediately
ODRL 3.8-032	UST System Tightness Testing Schedule & Reports	Immediately
ODRL 3.8-034	Tank Overfill Alarm System Testing Schedule & Reports	Immediately
ODRL 3.8-035	CRMF MWRA Monitoring Reports	Per Permit
ODRL 3.8-036	CRMF MWRA O&M Logs & Reports	Immediately
ODRL 3.8-038	Final CRMF O&M Manual, SOPs & Staffing Plan	Within 15 days of receipt of MBTA's comments
ODRL 3.8-041	Widett Permit Monitoring Reports & Logs	Immediately
ODRL 3.8-043	Final Widett O&M Manual, SOPs & Staffing Plan	Within 15 days of receipt of MBTA's comments
ODRL 3.9-002	Acting OGM	2 days after vacancy
ODRL 3.9-005	Names of Officer Candidates	100 days before filling vacancy
ODRL 3.9-006	Names of Interim Officers	One day before filling vacancy
ODRL 3.9-007	Names of Replacement Officers	30 days before filling vacancy

ODRL 3.9-008	Wrongful Termination Suits [7.1.5(E)]	24 hours after suit is filed
ODRL 3.9-009	Contr. Personnel performing non-Agreement services	5 days after assignment
ODRL 3.9-010	The Operator Employee Records	Upon request
ODRL 3.10-003	Monthly Training Report	Prior to effective date
ODRL 3.10-004	Operator Book of Rules & Related Materials	Prior to effective date
ODRL 3.10-025	Annual Training Plan Review Meeting	45 days after Plan submitted

On Demand Submittals

ODRL#	Description	Due Date
ODRL 3.1-004	On Time Performance History	Operator retains, available on demand
ODRL 3.1-015	Dispatching Records	On demand
ODRL 3.1-016	FRA Required Logs & Records	Operator retains, available on demand
ODRL 3.1-025	Third Party Meeting Minutes	On demand
ODRL 3.1-026	Supplemental On Time Performance Report	On demand
ODRL 3.3-30	Supplemental MTBSF Report	On demand
ODRL 3.3-31	Supplemental Maintenance Operation and Fleet Performance Report	On demand
ODRL 3.4-31	Property Purchase & Tax Law Compliance Documentation	Operator retains
ODRL 3.5-007	The Operator Safety Audits	On demand
ODRL 3.5-026	Violator Return to Work Certification	On demand
ODRL 3.7-006	Complete Customer Complaints	On demand

ODRL#	Description	Due Date
ODRL 3.10-019	New Technician Qualification & Pay Rates	60 days after NTP
ODRL 3.10-020	New Technician Training Programs	60 days after NTP
ODRL 3.14-003	NTD Safety & Security Reporting	On Demand

**APPENDIX 2**  
**PERFORMANCE GUARANTEES**

1. The Operator shall provide to the MBTA at or prior to the Commencement Date, and maintain throughout the Term, Performance Guarantees that meet the requirements of Sections 1.1 and 1.2 of this Appendix 2 (Performance Guarantees) to **Schedule 2** (Conditions Precedent).
  - 1.1 The Operator shall provide an irrevocable letter of credit in the amount of \$20 million and in substantially the form attached to this Appendix 2 (Performance Guarantees) to **Schedule 2** (Conditions Precedent) or in a form otherwise agreed upon by the Parties (the **“Letter of Credit”**). The Letter of Credit shall be issued by a bank with an underlying rating of A+ or better by Standard & Poor’s Ratings Services, a division of the McGraw-Hill Companies, Inc. and Aa3 or better by Moody’s Investors Service, Inc. (a **“Qualified Bank”**).
    - 1.1.1 The Letter of Credit shall be held by the MBTA as security for the faithful performance by the Operator of all the terms of this Agreement to be observed and performed by the Operator. If any amount owed by the Operator to the MBTA pursuant to the terms of this Agreement shall be overdue and unpaid, or should the MBTA make payments to Third Parties or any Third Party Railroad on behalf of the Operator, or if the Operator shall fail to perform any of the terms of this Agreement in accordance with the terms hereof or pay any of its Subcontractors for Services performed hereunder, then the MBTA may at its option, and without prejudice to any other remedy which the MBTA may have on account thereof, draw on the Letter of Credit in such amount as may be necessary to make any such payments and to compensate the MBTA for all amounts owed by the Operator to the MBTA pursuant to this Agreement, including any amounts paid by the MBTA on behalf of the Operator and other sums owing to the MBTA on account of any loss, damage or expense sustained by the MBTA due to the Operator’s failure to perform Services in accordance with the provisions of this Agreement.
    - 1.1.2 The Letter of Credit shall have an initial term of not less than 18 months. Not later than 30 days prior to the stated expiration date of the Letter of Credit, the Operator shall renew, or cause the renewal of, the Letter of Credit, or replace, or cause the replacement of, the Letter of Credit with one or more replacement letters of credit from a Qualified Bank and having a stated amount equal to the amount available to be drawn under the existing Letter of Credit as of the date of replacement and otherwise shall be substantively identical to the initial Letter of Credit (a **“Replacement Letter of Credit”**). In the event the Operator fails to so renew, cause the renewal of, replace or cause the replacement of, the Letter of Credit, as applicable, the MBTA may draw on the full available amount of the Letter of Credit then in effect.
    - 1.1.3 In the event that: (i) the issuer of a Letter of Credit shall no longer be a Qualified Bank, or (ii) the issuer of a Letter of Credit shall fail to honor any

properly documented request to draw thereon by the MBTA (each a “**replacement event**”), the Operator shall provide a Replacement Letter of Credit from a Qualified Bank (other than an issuer described in the foregoing clauses (i) or (ii)) within 30 Days following the subject replacement event.

1.1.3.1 If the MBTA does not receive a Replacement Letter of Credit from a Qualified Bank within 30 Business Days following a replacement event, the MBTA may draw on the full available amount of the Letter of Credit then in effect.

1.1.3.2 Amounts drawn under Section 1.1.2 or Section 1.1.3.1 of this Appendix 2 (Performance Guarantees) to **Schedule 2** (Conditions Precedent) and received by the MBTA shall be held directly by the MBTA and shall be available to be applied by the MBTA in accordance with the provisions of Section 1.1.1 of this Appendix 2 (Performance Guarantees) to **Schedule 2** (Conditions Precedent).

1.1.3.3 (i) The failure of the issuer of the Letter of Credit to honor a drawing described in Section 1.1.2 of this Appendix 2 (Performance Guarantees) to **Schedule 2** (Conditions Precedent) and (ii) the failure of the issuer of the Letter of Credit to honor a drawing described in Section 1.1.3.1 of this Appendix 2 (Performance Guarantees) to **Schedule 2** (Conditions Precedent) (and, with respect to clause (ii), the Operator has not timely provided a Replacement Letter of Credit meeting the requirements of Section 1.1.3 of this Appendix 2 (Performance Guarantees) to **Schedule 2** (Conditions Precedent)), in each case, shall constitute an Event of Default.

1.1.4 In all cases, the costs and expenses of establishing, renewing, substituting, canceling, increasing, reducing and maintaining the Letter of Credit shall be borne by the Operator.

1.1.5 The term "Letter of Credit" shall refer to the initial Letter of Credit, as it may be amended from time to time, and any Replacement Letter of Credit, as it may be amended from time to time.

1.2 In addition to the requirements of Section 1.1 of this Appendix 2 (Performance Guarantees) to **Schedule 2** (Conditions Precedent), the Operator shall provide from each Guarantor identified in the Proposer’s Statement of Qualifications for Contract No. 159-12, a guarantee of the Operator’s obligations under this Agreement substantially in the form attached to this Appendix 2 (Performance Guarantees) to **Schedule 2** (Conditions Precedent). The Guaranty shall clearly state that the Guarantor will provide the financial support and human resources needed by the Operator to successfully complete performance of this Agreement. The Guarantor shall guarantee absolutely the full, prompt, and complete performance by the Operator of all the terms, conditions, and obligations contained in this Agreement, as it may be amended from time to time, and

other obligations of every nature and kind that now or may in the future arise out of or in connection with this Agreement, including any and all financial commitments, obligations, and liabilities up to a maximum amount of \$20 million. The MBTA may call upon the Guaranty, in lieu of drawing upon the Letter of Credit, as the MBTA shall determine, in its sole discretion. The Guarantor shall be precluded from transferring the Guaranty to any other person or entity without the prior express written approval of the MBTA, which approval the MBTA may grant, withhold, or condition in its sole and absolute discretion.

[FORM OF LETTER OF CREDIT]\*

IRREVOCABLE STANDBY LETTER OF CREDIT NUMBER: [\_\_\_\_\_]

Beneficiary:

Amount:  
\$20,000,000 United States Dollars

Credit Available With:  
[Issuing Bank], [\_\_\_\_\_] Branch  
by Sight Payment

Ladies and Gentlemen:

At the request and for the account of our customer, [\_\_\_\_\_] (the “**Applicant**”), we hereby issue in your favor, and on behalf of the Applicant, our Irrevocable Standby Letter of Credit No. [\_\_\_\_\_] (this “**Letter of Credit**”) available to be drawn in an amount not to exceed Twenty Million United States Dollars (US \$20,000,000) (the “**Stated Amount**”). This Letter of Credit is issued to you in respect of the obligations of the Applicant pursuant to that certain Operating Agreement, dated as of July 1, 2014 (the “**Agreement**”), entered into by and between the Applicant and the above-named Beneficiary (the “**Beneficiary**”). This Letter of Credit is effective immediately.

This Letter of Credit shall terminate upon the first to occur of (a) not less than 18 months following the Commencement Date, as the same may be modified pursuant to the terms of this Letter of Credit (the “**Stated Expiration Date**”), (b) the date on which drawings hereunder total the Stated Amount at such time, or (c) the date on which this Letter of Credit is surrendered to us by you. The earliest to occur of the dates described in the previous sentence shall constitute the “**LOC Expiration Date**”. This Letter of Credit shall be surrendered to us by you on the LOC Expiration Date.

It is a condition of this Letter of Credit that the Stated Expiration Date shall be deemed automatically extended without amendment for an additional period(s) of one (1) year from then effective Stated Expiration Date, unless at or before sixty (60) days prior to any such expiration date we shall notify the Beneficiary by registered mail or overnight courier at the above address that we elect not to consider this Letter of Credit extended for any such additional one year period. However, the final Stated Expiration Date will be \_\_\_\_\_, \_\_\_\_.

Subject to the provisions herein, we shall make funds available to you under this Letter of Credit against presentation to us of a sight draft substantially in the form of **Annex A** attached hereto (the “**Sight Draft**”) and a drawing certificate substantially in the form of **Annex B** attached hereto (the “**Drawing Certificate**”), each purportedly signed by an authorized officer of the Beneficiary.

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\* NOTE TO PROPOSERS: Proposers must insert information where prompted. Proposers may provide multiple letters of credit, provided that the aggregate stated amounts of such letters of credit total at least U.S. \$20,000,000. If providing multiple letters of credit, please modify the Stated Amount to reflect the relevant stated amount of each letter of credit. The letter of credit shall otherwise be submitted in accordance with this form, unmodified.

Only you are permitted to make a drawing under this Letter of Credit. Subject to the provisions herein, we hereby authorize you to make drawings hereunder in an aggregate amount not in excess of the Stated Amount from the date hereof through our close of business on the LOC Expiration Date. Partial drawings are permitted under this Letter of Credit and each partial drawing shall reduce the amount thereafter available hereunder for drawings under this Letter of Credit. Upon payment of drawings in an aggregate amount equal to the Stated Amount, we shall be fully discharged of our obligations under this Letter of Credit and we shall not thereafter be obligated to make any further payments under this Letter of Credit.

Presentation of the Sight Draft and the Drawing Certificate (which shall each be dated the date of presentation) shall be made to our office located at [\_\_\_\_\_] Attention: [\_\_\_\_\_] (or any such address and contact information provided by us in writing to you) (i) by physical delivery of such documents to such office, or (ii) by facsimile transmission of such documents to such office at facsimile number [\_\_\_\_\_] followed by physical delivery of such documents by courier. Our only obligation with regard to a drawing under this Letter of Credit shall be to examine the documents submitted to us and to pay in accordance therewith if the terms and conditions of this Letter of Credit have been satisfied.

A presentation under this Letter of Credit may be made only on a Business Day. If any request for payment hereunder is presented in compliance with the terms of this Letter of Credit to us at the address mentioned above on any Business Day, payment will be made on the next Business Day. As used herein, a "Business Day" shall mean any day on which commercial banks are not authorized or required by law to close in Boston, Massachusetts.

If a demand for payment made hereunder does not conform to the terms and conditions of this Letter of Credit, we shall give you notice (in writing) that your demand for payment was not effected in accordance with the terms and conditions of this Letter of Credit, as it may be amended, stating the reasons therefor and that we will upon your instructions hold any documents at your disposal or return the same to you. Upon being notified that the demand for payment was not effected in conformity with this Letter of Credit, you may attempt to correct any such non-conforming demand to the extent you are able to do so; provided, however, that any documents presented to correct such nonconforming demand must be presented on or prior to the LOC Expiration Date.

Communications to us with respect to this Letter of Credit shall be in writing and shall be addressed to us at [\_\_\_\_\_], Attention: [\_\_\_\_\_] and physically delivered in person or facsimile transmission, provided that the original of any Sight Draft or Drawing Certificate or any other communications shall be sent to us at such address by overnight courier for our receipt on the next Business Day after the date of any such facsimile transmission.

This Letter of Credit sets forth in full the terms of our undertaking and this undertaking shall not in any way be modified, amended, limited or amplified by reference to any document, instrument or agreement referred to herein, except for **Annex A** and **Annex B**; and any such reference shall

not be deemed to incorporate herein by reference any document, instrument, or agreement. This Letter of Credit may not be amended except in writing signed by the Beneficiary and us.

All banking charges, including any advising and negotiating bank charges, are for the account of the Applicant.

This Letter of Credit and the attached Annexes are subject to the Uniform Customs and Practice for Documentary Credits (2007 revisions), International Chamber of Commerce Publication Number 600, as amended from time to time (the "UCP"). To the extent that provisions of this Letter of Credit are not covered by the UCP, this Letter of Credit shall be governed by, and enforced and construed in accordance with, the laws of the Commonwealth of Massachusetts.

Very Truly Yours,

[Issuing Bank]

By: \_\_\_\_\_

Name:

Title:

**ANNEX A**

**FORM OF SIGHT DRAFT**

[Letterhead of Beneficiary]

[Date]

The undersigned hereby demands payment under the [Issuing Bank], Irrevocable Standby Letter of Credit Number [\_\_\_\_\_], dated [July 1, 2014] of USD [\$20,000,000].

U.S. \$ [\_\_\_\_\_][amount not to exceed amount available under the Irrevocable Standby Letter of Credit].

[INSERT WIRE INSTRUCTIONS]

FOR VALUE RECEIVED AND DRAWN UNDER THE [ISSUING BANK] IRREVOCABLE STANDBY LETTER OF CREDIT NUMBER [\_\_\_\_\_].

MASSACHUSETTS BAY TRANSPORTATION  
AUTHORITY

By: \_\_\_\_\_

Name:

Title:

Duly Authorized

**ANNEX B**

**FORM OF DRAWING CERTIFICATE**

[Letterhead of Beneficiary]

[Date]

[Issuing Bank]

[address]

Attention: [\_\_\_\_\_]

Re: Drawing Certificate

Ladies and Gentlemen:

The undersigned, an authorized officer of Massachusetts Bay Transportation Authority (the **“Beneficiary”**) hereby certifies to [Issuing Bank], with reference to its Irrevocable Standby Letter of Credit No. [\_\_\_\_\_] (the **“Letter of Credit”**) (with terms used herein and not defined having the same meanings assigned to them in the Letter of Credit):

1. In accordance with the Agreement, the Beneficiary is entitled to draw on the Letter of Credit in an amount at least equal to the amount specified in the accompanying site draft.
2. Except where the Beneficiary has been precluded by applicable law from delivering same to the Account Party, attached is a copy of the letter dated at least five (5) Business Days’ prior to the drawing under this Letter of Credit addressed to the Applicant reading as follows: “We hereby indicate our intention to draw under Irrevocable Standby Letter of Credit No. [\_\_\_\_\_] issued by [Issuing Bank] for your account, in accordance with the provisions of the Schedule 2, Appendix 2 of the Agreement.”

IN WITNESS WHEREOF, the undersigned has executed and delivered this Certificate on behalf of the Beneficiary as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

**[FORM OF GUARANTY]**

**PERFORMANCE GUARANTY**

Reference is hereby made to the Commuter Rail Operating Agreement Contract No. 159-12 dated February 5, 2014 (as amended, modified, supplemental, extended, replaced or restated from time to time, the “**Agreement**”) between Keolis Commuter Services, LLC, a Delaware limited liability company (the “**Operator**”), and Massachusetts Bay Transportation Authority, a body politic and corporate and a political subdivision of The Commonwealth of Massachusetts (the “**MBTA**”). For and in consideration of the sum of Ten and No/100 Dollars (\$10.00) and other good and valuable consideration paid or delivered to each of the Persons listed on the signature pages hereof under the caption “Guarantors” (each a “**Guarantor**” and, collectively, the “**Guarantors**”), the receipt and sufficiency whereof are hereby acknowledged by Guarantors, and to induce the MBTA to enter into the Agreement, Guarantors hereby represent, warrant, and covenant to the MBTA as follows:

1. Defined Terms. Capitalized terms used but not otherwise defined in this Guaranty shall have the meaning assigned thereto in the Agreement. In addition, the following terms shall have the meanings ascribed to them below:

“**Capital Stock**” means (i) with respect to a Person that is a corporation, any and all shares, interests or equivalents in capital stock (whether voting or nonvoting, and whether common or preferred) of such corporation, and (ii) with respect to a Person that is not a corporation, any and all partnership, membership, limited liability company or other equity interests of such Person.

“**Guaranty**” means this Performance Guaranty.

“**Insolvency Proceedings**” means:

(i) any corporate action, legal proceedings or other procedure or step is taken in relation to:

(a) the suspension of payments, a moratorium of any indebtedness, dissolution, the opening of proceedings for *sauvegarde*, *redressement judiciaire* or *liquidation judiciaire* or reorganization (in the context of a *mandate ad hoc* or of a *conciliation* or otherwise) of any Guarantor;

(b) a composition, compromise, assignment or arrangement with any creditor of any Guarantor outside of the ordinary course of such Guarantor’s business;

(c) the appointment of a liquidator, receiver, administrator, administrative receiver, provisional administrator, *mandataire ad hoc*, *conciliateur* or other similar officer in respect of any Guarantor or any of its assets;

(d) enforcement of any security over any assets of any Guarantor;

(ii) any Guarantor applies for *mandate ad hoc* or *conciliation* in accordance with articles L. 611-3 to L. 611-15 of the French *Code de Commerce*;

(iii) a judgment for *sauvegarde*, *redressement judiciaire* or *liquidation judiciaire* or for *cession totale ou partielle de l'entreprise* is entered in relation to a Guarantor under articles L.620-1 to L. 670-8 of the French *Code de Commerce*; or

(iv) any procedure, judgment or step is taken in any jurisdiction which has effects similar to those referred to in clauses (i), (ii) and (iii) above.

**“Material Adverse Change”** means (a) a material adverse change in the business, prospects, operations, results of operations, assets, liabilities or condition (financial or otherwise) of any Guarantor or the Operator, or (b) a material impairment of any Guarantor's or the Operator's ability to perform its obligations under this Guaranty or the Operating Agreement Documents, as applicable.

**“Operating Agreement Documents”** means, collectively, the Agreement and the other Contract Documents.

**“Solvent”** means, with respect to any Person, that:

(i) such Person is not deemed for the purposes of any Applicable Law to be unable to pay its debts as they fall due;

(ii) such Person has not admitted its inability to pay its debts as they fall due:

(iii) such Person has not suspended making payments of any of its debts or announced an intention to do so;

(iv) such Person, by reason of actual or anticipated financial difficulties, has not begun negotiations with any creditor for the rescheduling or restructuring of any of its indebtedness;

(v) such Person's assets are greater than or equal to its liabilities (taking into account contingent and prospective liabilities);

(vi) such Person is not subject to any insolvency proceeding, receivership proceeding or any Chapter of the United States Bankruptcy Code of 1978 or any local equivalent of any of the foregoing;

(vii) no moratorium has been declared in respect of such Person's indebtedness;  
or

(viii) such Person is not subject to any similar local law process not described in clauses (i) to (vii) above.

2. Guaranty. Each Guarantor unconditionally, absolutely and irrevocably guarantees to the MBTA that: (a) the Operator shall fully perform the Services and all of its other non-monetary obligations to the MBTA under, arising from, relating to or in connection with the Operating Agreement Documents (collectively, the “**Service Obligations**”) in accordance with the terms thereof or otherwise; and (b) the Operator shall fully and punctually pay any and all of its monetary obligations to the MBTA under, arising from, relating to or in connection with the Operating Agreement Documents in accordance with the terms thereof or otherwise, as the same become due and payable (the matters described in clauses (a) and (b) above, collectively the “**Guaranteed Obligations**”). The obligations of each Guarantor under this Guaranty are independent of the Guaranteed Obligations, and a separate action or actions may be brought and prosecuted against such Guarantor to enforce this Guaranty, irrespective of whether any action is brought against the Operator or any other Guarantor or whether the Operator or any other Guarantor is joined in any such action or actions. With respect to the Guaranteed Obligations described in clause (b) above, each Guarantor acknowledges and agrees that its obligations hereunder in respect thereof constitute a guaranty of payment and not of collection.

3. Operator's Defaults. In the event that the Operator does not perform the Service Obligations as guaranteed pursuant to Section 2(a), then (a) each Guarantor shall perform or cause the performance of Service Obligations in accordance with the applicable Operating Agreement Documents or otherwise, including, without limitation, by providing financial support and human resources to the Operator necessary to perform such obligations; (b) each Guarantor shall indemnify the MBTA from all costs and expenses the MBTA may actually incur by reason of the Operator's failure to perform the Service Obligations as guaranteed pursuant to Section 2(a); (c) in the event that the MBTA shall pay any costs in connection with the performance of the Service Obligations, each Guarantor shall reimburse the MBTA for all sums so paid by the MBTA; and (d) each Guarantor shall pay any and all expenses (including, without limitation, all reasonable attorneys' fees and expenses) actually incurred by the MBTA in enforcing any rights under this Guaranty and/or collecting the Guaranteed Obligations. The obligations of each Guarantor under clauses (b), (c) and (d) above shall be payable by such Guarantor to the MBTA upon demand by the MBTA to such Guarantor. All monetary obligations of Guarantors under this Guaranty shall be paid in United States Dollars (“**Dollars**”).

4. Specific Enforcement. Each Guarantor acknowledges and agrees that it will be impossible to measure accurately the damages to the MBTA resulting from a breach of the agreement of Guarantors set forth in clause (a) of Section 3; that such a breach will cause irreparable injury to the MBTA and that the MBTA will have no adequate remedy at law in respect of such breach and, as a consequence, agrees that such agreement shall be specifically enforceable against Guarantors, and such Guarantor hereby waives and agrees not to assert any defense based on the denial of any of the foregoing acknowledgements by such Guarantor in an action for specific enforcement of such agreement and further waives any requirement for a bond or other security in connection therewith.

5. Reinstatement of Refunded Payments. If, for any reason, any payment to the MBTA of any of the Guaranteed Obligations or any other obligation of any Guarantor hereunder is required to be refunded by the MBTA to the Operator, or paid or turned over to any other Person, including, without limitation, by reason of the operation of bankruptcy, reorganization,

receivership or insolvency laws or similar laws of general application relating to creditors' rights and remedies now or hereafter enacted, each Guarantor agrees to pay the amount so required to be refunded, paid or turned over (the **“Turnover Payment”**). The obligations of Guarantors hereunder shall not be treated as having been discharged by the original payment giving rise to the Turnover Payment, and this Guaranty shall be treated as having remained in full force and effect for any such Turnover Payment so made by the MBTA, as well as for any amounts not theretofore paid to the MBTA on account of such obligations.

6. Rights of the MBTA to Deal with Collateral, Operator and Other Persons. Each Guarantor hereby consents and agrees that the MBTA may at any time, and from time to time, without thereby releasing such Guarantor from any liability hereunder and without notice to or further consent from such Guarantor, either with or without consideration: release or surrender any lien or other security of any kind or nature whatsoever held by it or by any Person on its behalf or for its account, securing any obligation hereby guaranteed; substitute for any collateral so held by it, other collateral of like kind, or of any kind; modify the terms of the Agreement or any other Operating Agreement Document; grant releases, compromises and indulgences with respect to any Persons now or hereafter liable thereunder; and release any other guarantor or take or fail to take any action of any type whatsoever. No such action which the MBTA shall take or fail to take in connection with the Agreement or any other Operating Agreement Document, or any security for the payment and performance of the obligations of the Operator to the MBTA or for the performance of any obligations or undertakings of the Operator, nor any course of dealing with the Operator or any other Person, shall release any Guarantor's obligations hereunder, affect this Guaranty in any way or afford any Guarantor any recourse against the MBTA. The provisions of this Guaranty shall extend and be applicable to all renewals, amendments, extensions, substitutions, consolidations, restatements and modifications of the Agreement or any other Operating Agreement Document.

7. No Contest with the MBTA; Subordination. So long as any Guaranteed Obligation remains undischarged or unpaid, each Guarantor hereby (a) postpones and subordinates any right of subrogation such Guarantor has or may have against the Operator with respect to the Guaranteed Obligations, (b) postpones any right to proceed against the Operator or any other Person, now or hereafter, for contribution, indemnity, reimbursement, or any other suretyship rights and claims (irrespective of whether direct or indirect, liquidated or contingent) with respect to the Guaranteed Obligations, and (c) postpones any right to proceed or to seek recourse against or with respect to any property or asset of the Operator. Each Guarantor hereby subordinates any and all indebtedness and other liabilities of the Operator now or hereafter owed to such Guarantor to the discharge and payment in full of the Guaranteed Obligations and agrees that until such discharge and payment, (i) it shall not demand or accept any payment from the Operator on account of such indebtedness or liabilities or sue therefor or otherwise attempt to collect thereon, (ii) it shall not claim any offset or other reduction of such Guarantor's obligations hereunder because of any such indebtedness or liabilities, and (iii) it shall not take any action to obtain any lien in any asset of the Operator. If, notwithstanding the foregoing sentence, any Guarantor shall collect, enforce or receive any amounts in respect of such indebtedness or liabilities, such amounts shall be collected, enforced and received by such Guarantor as trustee for the MBTA, and such Guarantor shall deliver any such amounts to the MBTA to be held as cash collateral or, at the option of the MBTA, to be applied to the Guaranteed Obligations in such manner and in such order as the MBTA in its absolute and sole discretion elects. In the event of any dissolution, winding up, liquidation, readjustment,

reorganization or other similar proceedings relating to the Operator (whether voluntary or involuntary, partial or complete, and whether in bankruptcy, insolvency or receivership, or upon a general assignment for the benefit of creditors), the Guaranteed Obligations shall first be discharged and paid in full before any Guarantor shall be entitled to receive and to retain any payment in respect of such indebtedness or liabilities and, in order to implement the foregoing: (a) all payments and distributions of any kind or character in respect of thereof to which any Guarantor would be entitled if such indebtedness and liabilities were not subordinated pursuant to this Section 7 shall be made directly to the MBTA; (b) each applicable Guarantor shall promptly file a claim or claims, in the form required in such proceedings, for the full outstanding amount of such indebtedness and liabilities, and shall cause all payments and other distributions in respect thereof to be made directly to the MBTA to be held as cash collateral or applied to the Guaranteed Obligations as set forth above; and (c) each Guarantor hereby irrevocably agrees that the MBTA may, in the name of such Guarantor or otherwise, demand, sue for, collect, receive and receipt for any and all such payments or distributions.

8. Waiver of Defenses. Each Guarantor hereby agrees that its obligations hereunder shall not be affected or impaired by, and, to the extent permitted by applicable law, hereby waives and agrees not to assert or take advantage of any defense based on:

- (a) any statute of limitations in any action hereunder or for the payment or performance of any obligation hereby guaranteed;
- (b) the incapacity, lack of authority, death or disability of the Operator or any other Person;
- (c) the dissolution or termination of existence of the Operator or any Guarantor;
- (d) the voluntary or involuntary liquidation, sale or other disposition of all or substantially all of the assets of the Operator;
- (e) the voluntary or involuntary receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, assignment, composition, or readjustment of, or any similar proceeding affecting, the Operator or any Guarantor, or any of the Operator's or any Guarantor's properties or assets;
- (f) any failure or delay of the MBTA to commence an action against the Operator, to assert or enforce any remedies against the Operator under the Agreement or any other Operating Agreement Document or to realize upon any collateral;
- (g) any failure of any duty on the part of the MBTA to disclose to any Guarantor any facts they may now or hereafter know regarding the Operator, whether such facts materially increase the risk to any Guarantor or not;
- (h) failure to accept or give notice of acceptance of this Guaranty by the MBTA;
- (i) failure to make or give notice of presentment and demand for payment of any of the indebtedness or performance of any of the obligations hereby guaranteed;

- (j) failure to make or give protest and notice of dishonor or of default to any Guarantor or to any other Person with respect to the indebtedness or performance of obligations hereby guaranteed;
- (k) failure to make or give any and all other notices whatsoever to which any Guarantor might otherwise be entitled;
- (l) any lack of diligence by the MBTA in collection, protection or realization upon any collateral securing the performance and payment of obligations hereby guaranteed;
- (m) the invalidity or unenforceability of the Agreement or any other Operating Agreement Document;
- (n) the compromise, settlement, release or termination of any or all of the obligations of the Operator under the Agreement or any other Operating Agreement Document; or
- (o) to the fullest extent permitted by law, any other legal, equitable or surety defenses whatsoever to which any Guarantor might otherwise be entitled, it being the intention that the obligations of each Guarantor hereunder are absolute, unconditional and irrevocable.

9. Right of Set-Off. Upon the occurrence of, and during the continuation of, an Event of Default, each Guarantor irrevocably authorizes the MBTA without notice to such Guarantor to, regardless of the adequacy of any collateral, set-off and apply any and all deposits and any other credits or claims held or owing by the MBTA to or for the credit or the account of such Guarantor, or any part thereof in such amounts as the MBTA may elect, against and on account of the Guaranteed Obligations and/or to be held as cash collateral therefor, whether or not the MBTA has made any demand for payment and although such obligations, liabilities and claims may be contingent or unmatured.
10. Rights and Remedies of MBTA. Upon the occurrence of, and during the continuation of, an Event of Default, the MBTA shall have the right to enforce this Guaranty in accordance with the terms hereof, and its rights, powers, and remedies hereunder shall be nonexclusive and cumulative of all other rights, powers and remedies provided under the Operating Agreement Documents or by law or in equity.
11. Application of Payments. Each Guarantor hereby authorizes the MBTA and, without notice to such Guarantor, to apply to the Guaranteed Obligations all payments received from the Operator or from such Guarantor or realized from any collateral security in such manner and in such priority as the MBTA in its absolute and sole discretion elects.
12. Bankruptcy or Insolvency. If there shall be pending any bankruptcy or insolvency case or similar proceeding with respect to any Guarantor under federal bankruptcy law or any other applicable law or in connection with the insolvency of any Guarantor, or if a liquidator, receiver, or trustee shall have been appointed for any Guarantor or any Guarantor's properties or assets (or any portion thereof), the MBTA may file such proofs of claim and other papers or documents as may be necessary or advisable in order to have the claims of the MBTA allowed in any proceedings relative to the applicable Guarantor, or any of the applicable Guarantor's properties or assets, and, irrespective of whether the indebtedness or

other obligations of the Operator guaranteed hereby shall then be due and payable, by declaration or otherwise, the MBTA shall be entitled and empowered to file and prove a claim for the whole amount of any sum or sums owing with respect to the indebtedness or other obligations of the Operator guaranteed hereby, and to collect and receive any moneys or other property payable or deliverable on any such claim.

13. Representations and Warranties. Each Guarantor represents and warrants to the MBTA that:

- (a) Such Guarantor (i) is duly organized and validly existing under the laws of the jurisdiction of its organization, (ii) is duly qualified as a foreign entity and in good standing under the laws of each jurisdiction where its ownership, lease or operation of property or the conduct of its business requires such qualification or operations, (iii) is in compliance in all respects with all laws, rules and regulations applicable to it, and all contractual obligations to which it is party, and (iv) has the power and authority, and the legal right, to own and operate its properties, to lease the property it operates as lessee and to conduct the business in which it is currently engaged and in which it proposes to be engaged after the date hereof.
- (b) The execution, delivery and performance by such Guarantor of this Guaranty are within its powers, have been duly authorized by all necessary action and do not contravene any applicable law, rule, regulation or order or any restriction binding on or affecting such Guarantor.
- (c) No consent or authorization of, filing with or other act by or in respect of, any Governmental Authority or any other Person is required in connection with the execution, delivery and performance by such Guarantor or the validity or enforceability against such Guarantor of this Guaranty except for (i) any consent, authorization, filing or other act which has been made or obtained and is in full force and effect, and (ii) any consent, authorization, filing or other act which has been waived. This Guaranty has been duly executed and delivered by such Guarantor, and it constitutes the legal, valid and binding obligation of such Guarantor enforceable against it in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and by general equitable principles.
- (d) The execution, delivery and performance of this Guaranty will not result in, or require, the creation or imposition of any lien on any of its properties pursuant to any applicable law or any agreement to which such Guarantor is a party.
- (e) There is no litigation, proceeding, labor strike, condemnation or other dispute pending, or threatened in writing against such Guarantor or its property that, if adversely determined, would result in a Material Adverse Change.
- (f) Such Guarantor has good and, as applicable, valid record title to all material properties purported to be owned thereby.
- (g) Such Guarantor has all material permits, licenses, authorizations and approvals required for it to lawfully own, lease, control, manage and operate its properties and business. No condition exists or event has occurred which, in itself or with the giving of notice or lapse of time or both, would

result in the suspension, revocation, impairment, forfeiture or non-renewal of any such permit, license, authorization or approval.

(h) Société nationale des chemins de fer français (“**SNCF**”) owns 99.99986739878% of all of the Capital Stock of SNCF Partipations SAS (“**SNCF SAS**”); SNCF SAS indirectly owns 100% of all of the Capital Stock of SNCF America Inc., a Delaware corporation (“**SNCF America**”); and SNCF America owns 40% of all of the Capital Stock of the Operator.

(i) Keolis owns 100% of all of the Capital Stock of Keolis America Inc., a Delaware corporation (“**KAI**”); KAI owns 100% of all the Capital Stock of Keolis Rail Services America, LLC, a Delaware limited liability company (“**KRSA**”); and KRSA owns 60% of all of the Capital Stock of the Operator.

(j) On the date hereof, immediately after giving effect to the execution and delivery by such Guarantor of this Guaranty and by the Operator of the Agreement, such Guarantor is Solvent.

(k) The execution and delivery by the Operator of the Agreement confers a direct and material benefit on such Guarantor.

The representations and warranties set forth in this Section 13 shall survive the execution and delivery of this Guaranty.

14. Covenants. Each Guarantor covenants that, until the Guaranteed Obligations have been discharged and paid in full:

(a) except to the extent the MBTA provides its prior written consent (which, in the event of a corporate reconstruction, merger or consolidation due to a change in law or regulation, shall not be unreasonably withheld), the representations and warranties set forth in Section 13(h) and Section 13(i) will continue to be true;

(b) it will not sell all or substantially all of its assets;

(c) it will not suspend or go out of a substantial portion of its business;

(d) it will not enter into or suffer any Insolvency Proceeding;

(e) it will not enter into any corporate reconstruction, merger or consolidation, except for any merger in respect of which such Guarantor is the surviving entity thereof;

(f) it will keep in full force and effect its legal existence; and

(g) it will comply with all laws, statutes, rules, requirements and ordinances of all Government Authorities applicable to it or its business, except where noncompliance therewith could not reasonably be expected to result in a Material Adverse Change.

For purposes hereof, a “corporate reconstruction” includes, in relation to any Guarantor, any contribution of part of its business in consideration of shares (*apport partiel d’actifs*) and any

demerger (*scission*) implemented in accordance with articles L.236-1 to L.236-24 of the French *Code de commerce*.

15. Notices. Except for any notice required under applicable law to be given in another manner, any notice, demand, request or other communication which any party hereto may be required or may be given hereunder shall be in writing and shall be deemed to have been properly given if (a) sent by a nationally-recognized overnight courier service that obtains receipts, (b) delivered personally by a courier that obtains receipts, (c) mailed by United States certified mail (with return receipt requested and postage prepaid), or (d) sent by email (with a copy of such email and proof of transmission thereof sent via one of the methods of delivery set forth in clauses (a), (b) or (c) above), addressed in each case as set forth below. Each such notice shall be effective upon receipt.

If to the MBTA:           Massachusetts Bay Transportation Authority  
Ten Park Plaza  
Boston, MA 02116  
Attn: General Counsel, Mass DOT/MBTA  
Email: [paige.scottreed@dot.state.ma.us](mailto:paige.scottreed@dot.state.ma.us)

With a copy to:       Massachusetts Bay Transportation Authority  
45 High Street  
Boston, MA 02110  
Attn: Chief Operating Officer  
Email: [SMcCarthy@MBTA.com](mailto:SMcCarthy@MBTA.com)

If to Keolis:           Keolis  
c/o Keolis America Inc.  
51 Monroe Street, Suite 601  
Rockville, MD 20850  
Attn: Executive Vice President, International  
Email: [stownsend@keolis.com](mailto:stownsend@keolis.com)

With a copy to:       Keolis  
20 rue Lepeletier 75320  
Paris Cedex 09, France  
Attn: Executive Vice President, International  
Email: [Emmanuel.boisselet@keolis.com](mailto:Emmanuel.boisselet@keolis.com)

If to SNCF:           Société nationale des chemins de fer français  
c/o SNCF America Inc.  
51 Monroe Street, Suite 608  
Rockville, MD 20850  
Attn: Directeur Strategie Groupe  
Email: [alain.leray@sncf.fr](mailto:alain.leray@sncf.fr)

With a copy to: Société nationale des chemins de fer français  
2 Place aux Etoiles  
93200 Saint Denis  
France  
Attn: Directeur Strategie Groupe  
Email: [Laurent.trevisani@sncf.fr](mailto:Laurent.trevisani@sncf.fr)

16. CHOICE OF LAW AND VENUE; JURY TRIAL WAIVER; SOVEREIGN IMMUNITY WAIVER.

(a) THE VALIDITY OF THIS GUARANTY, THE CONSTRUCTION, INTERPRETATION AND ENFORCEMENT HEREOF, AND THE RIGHTS OF GUARANTORS AND THE MBTA WITH RESPECT TO ALL MATTERS ARISING HEREUNDER OR RELATED HERETO SHALL BE DETERMINED UNDER, GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, WITHOUT REGARD TO ANY CONFLICT OF LAW RULES THAT WOULD RESULT IN THE APPLICATION OF ANY LAW OTHER THAN THE LAW OF THE COMMONWEALTH OF MASSACHUSETTS.

(b) GUARANTORS AND THE MBTA (I) IRREVOCABLY AGREE THAT ALL ACTIONS, CLAIMS OR PROCEEDINGS ARISING IN CONNECTION WITH, OR RELATING TO, THIS GUARANTY SHALL BE TRIED AND LITIGATED EXCLUSIVELY IN THE STATE COURTS OF THE COMMONWEALTH OF MASSACHUSETTS AND/OR FEDERAL COURTS LOCATED IN THE COUNTY OF SUFFOLK, THE COMMONWEALTH OF MASSACHUSETTS (AND, IF APPLICABLE, ANY APPELLATE COURT FROM ANY THEREOF) AND (II) EXPRESSLY AND IRREVOCABLY SUBMIT AND CONSENT IN ADVANCE TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS IN ANY SUCH ACTION, CLAIM OR PROCEEDING AND GUARANTORS AND THE MBTA, TO THE FULLEST EXTENT THEY MAY EFFECTIVELY DO SO, HEREBY IRREVOCABLY WAIVE ANY OBJECTION WHICH THEY HAVE OR MAY HAVE TO THE JURISDICTION OF SUCH COURTS BASED UPON LACK OF PERSONAL JURISDICTION, IMPROPER VENUE OR FORUM NON CONVENIENS, PROVIDED, HOWEVER, NOTWITHSTANDING THE FOREGOING, ANY GUARANTOR OR THE MBTA MAY COMMENCE ANY ACTION OR OTHER PROCEEDING (INCLUDING ADMINISTRATIVE PROCEEDING) IN ANY OTHER JURISDICTION TO ENFORCE A JUDGMENT ISSUED BY ANY SUCH COURT. EACH GUARANTOR HEREBY IRREVOCABLY WAIVES PERSONAL SERVICE OF THE SUMMONS, COMPLAINT AND OTHER PROCESS ISSUED IN ANY SUCH ACTION, CLAIM OR PROCEEDING AND IRREVOCABLY AGREES THAT SERVICE OF ANY SUMMONS, COMPLAINT AND OTHER PROCESS IN ANY SUCH PROCEEDING MAY BE MADE BY MAIL ADDRESSED TO IT AT THE ADDRESS SET FORTH HEREIN OR TO ITS PROCESS AGENT (AS DEFINED BELOW), AND THAT SERVICE SO MADE SHALL BE DEEMED COMPLETED UPON THE EARLIER OF SUCH PERSON'S ACTUAL RECEIPT THEREOF OR 3 DAYS AFTER DEPOSIT IN THE U.S. MAILS, PROPER POSTAGE PREPAID.

(c) EACH GUARANTOR HEREBY IRREVOCABLY APPOINTS CT CORPORATION SYSTEM (THE “**PROCESS AGENT**”), WITH AN OFFICE ON THE DATE HEREOF AT 155 FEDERAL STREET, SUITE 700, BOSTON, MASSACHUSETTS 02110, UNITED STATES OF AMERICA, AS ITS AGENT TO RECEIVE ON BEHALF OF ITSELF AND ITS PROPERTY SERVICE OF COPIES OF THE SUMMONS AND COMPLAINT AND ANY OTHER PROCESS WHICH MAY BE SERVED IN ANY SUCH ACTION OR PROCEEDING. SUCH SERVICE MAY BE MADE BY MAILING OR DELIVERING A COPY OF SUCH PROCESS TO GUARANTORS IN CARE OF THE PROCESS AGENT (OR ANY SUCCESSOR THERETO, AS THE CASE MAY BE) AT SUCH PROCESS AGENT’S ABOVE ADDRESS (OR THE ADDRESS OF ANY SUCCESSOR THERETO, AS THE CASE MAY BE), AND GUARANTORS HEREBY IRREVOCABLY AUTHORIZE AND DIRECT THE PROCESS AGENT (AND ANY SUCCESSOR THERETO) TO ACCEPT SUCH SERVICE ON THEIR BEHALF. GUARANTORS SHALL APPOINT A SUCCESSOR AGENT FOR SERVICE OF PROCESS SHOULD THE AGENCY OF CT CORPORATION SYSTEM TERMINATE FOR ANY REASON, AND FURTHER SHALL AT ALL TIMES MAINTAIN AN AGENT FOR SERVICE OF PROCESS IN BOSTON, MASSACHUSETTS, SO LONG AS THERE SHALL BE OUTSTANDING ANY OBLIGATIONS UNDER THIS GUARANTY. GUARANTORS SHALL GIVE ADVANCE NOTICE TO THE MBTA OF ANY APPOINTMENT OF SUCCESSOR AGENTS FOR SERVICE OF PROCESS, AND PROMPTLY SHALL OBTAIN FROM EACH SUCCESSOR AGENT A LETTER OF ACCEPTANCE OF APPOINTMENT AND PROMPTLY DELIVER THE SAME TO THE MBTA. AS AN ALTERNATIVE METHOD OF SERVICE, GUARANTORS ALSO IRREVOCABLY CONSENT TO THE SERVICE OF ANY AND ALL PROCESS IN ANY SUCH ACTION OR PROCEEDING BY THE MAILING OF COPIES OF SUCH PROCESS TO THEM AT THEIR ADDRESS SPECIFIED IN SECTION 15.

(d) WITHOUT WAIVER OF THEIR RIGHTS OF APPEAL PERMITTED BY RELEVANT LAW, GUARANTORS AGREE THAT A FINAL JUDGMENT IN ANY SUCH ACTION OR PROCEEDING SHALL BE CONCLUSIVE AND MAY BE ENFORCED IN OTHER JURISDICTIONS BY SUIT ON THE JUDGMENT OR IN ANY OTHER MANNER PROVIDED BY APPLICABLE LAW.

(e) EACH GUARANTOR WAIVES ANY RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING TO ENFORCE OR DEFEND ANY RIGHTS UNDER THIS GUARANTY OR RELATING HERETO AND AGREES THAT ANY SUCH ACTION OR PROCEEDING SHALL BE TRIED BEFORE A COURT AND NOT BEFORE A JURY.

(f) TO THE EXTENT THAT SNCF OR ANY OF ITS REVENUES, ASSETS OR PROPERTIES SHALL BE ENTITLED TO ANY SOVEREIGN IMMUNITY UNDER THE U.S. FOREIGN SOVEREIGN IMMUNITY ACT OF 1976 (28 U.S.C. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602-1611) FROM SUIT, FROM THE JURISDICTION OF ANY COURT LISTED OR REFERRED TO IN SECTION 16(B), FROM ATTACHMENT IN AID OF EXECUTION OF JUDGMENT, FROM EXECUTION OF A JUDGMENT OR FROM ANY OTHER LEGAL OR JUDICIAL PROCESS OR REMEDY, AND TO THE EXTENT IN JURISDICTIONS LISTED OR REFERRED TO IN SECTION 16(B) THERE SHALL BE ATTRIBUTED SUCH AN IMMUNITY, SNCF IRREVOCABLY AGREES NOT TO CLAIM AND IRREVOCABLY AND UNCONDITIONALLY WAIVES SUCH IMMUNITY TO THE

FULLEST EXTENT PERMITTED BY THE LAWS OF THE REPUBLIC OF FRANCE, THE UNITED STATES, THE COMMONWEALTH OF MASSACHUSETTS AND ANY OTHER JURISDICTION REFERRED TO IN SECTION 16(B). THE WAIVER OF IMMUNITIES HEREIN CONSTITUTES ONLY A LIMITED AND SPECIFIC WAIVER FOR ACTIONS, CLAIMS OR SUITS BROUGHT BY THE MBTA ARISING FROM OR RELATING TO THIS GUARANTY AND UNDER NO CIRCUMSTANCES SHALL IT BE INTERPRETED AS A GENERAL WAIVER OF SNCF OR A WAIVER WITH RESPECT TO PROCEEDINGS UNRELATED TO THIS GUARANTY.

17. Withholding Taxes. All payments made by Guarantors hereunder will be made free and clear of, and without deduction or withholding for, any present or future taxes, levies, imposts, duties, fees, assessments or other charges of whatever nature now or hereafter imposed by any jurisdiction or by any political subdivision or taxing authority thereof or therein with respect to such payments (but excluding, any tax imposed by any jurisdiction or by any political subdivision or taxing authority thereof or therein measured by or based on the net income or net profits of the MBTA, and all interest, penalties or similar liabilities with respect thereto) (all such non-excluded taxes, levies, imposts, duties, fees, assessments or other charges being referred to collectively as “**Taxes**”). If any Taxes are so levied or imposed, each Guarantor agrees to pay the full amount of such Taxes, and such additional amounts as may be necessary so that every payment of all amounts due under this Agreement or under any note, including any amount paid pursuant to this Section 17 after withholding or deduction for or on account of any Taxes, will not be less than the amount provided for herein; provided, however, that Guarantors shall not be required to increase any such amounts payable to the MBTA if the increase in such amount payable results from the MBTA’s own willful misconduct or gross negligence. Guarantors will furnish to the MBTA, as promptly as possible after the date the payment of any Taxes is due pursuant to applicable law, certified copies of tax receipts evidencing such payment by Guarantors.

18. Judgment Currency.

(a) The obligations of Guarantors hereunder to make payments in Dollars shall not be discharged or satisfied by any tender or recovery pursuant to any judgment expressed in or converted into any currency other than Dollars, except to the extent that such tender or recovery results in the effective receipt by the MBTA of the full amount of Dollars expressed to be payable to the MBTA under this Guaranty.

(b) If any sum due from any Guarantor hereunder (a “**Sum**”), or any order, judgment or award given or made in relation to a Sum, has to be converted from the currency (the “**First Currency**”) in which that Sum is payable into another currency (the “**Second Currency**”) for the purpose of:

- (i) making or filing a claim or proof against such Guarantor; or
- (ii) obtaining or enforcing an order, judgment or award in relation to any litigation or arbitration proceedings,

such Guarantor shall, within 3 Business Days of demand, indemnify the MBTA against any cost, loss or liability arising out of or as a result of the conversion, including any discrepancy between (A) the rate of exchange used to convert that Sum from the First Currency into the Second Currency and (B) the rate or rates of exchange available to the MBTA at the time of its receipt of that Sum.

(c) In this Section 18, the “**Spot Rate**” means, in relation to the MBTA, the spot rate of exchange of the MBTA or the bank selected by the MBTA for the purchase of any currency with any other currency in the applicable foreign exchange market.

(d) The MBTA may convert any moneys received, recovered or realized in any currency under this Guaranty (including the proceeds of any previous conversion under this Section 18) from their existing currency into any other currency, by purchasing that other currency at the Spot Rate.

19. No Waiver. None of the provisions of this Guaranty, unless otherwise specified, shall be considered waived by the MBTA unless such waiver is in writing and signed by the MBTA. No such waiver shall be construed as a modification of any of the provisions of this Guaranty or as a waiver of any past or future default or breach hereof, except as expressly stated in such waiver.

20. Headings Not Binding. The headings appearing in this Guaranty have been inserted for identification and reference purposes only, and are not to be considered as defining or limiting in any way the scope or intent of the provisions hereof.

21. Binding Effect. This Guaranty shall be binding upon and shall inure to the benefit of the respective successors and permitted assigns of the MBTA and each Guarantor. Without the prior written consent of the MBTA, which the MBTA may grant, withhold or condition in its absolute and sole discretion, no Guarantor shall assign this Guaranty or delegate any of its duties hereunder to any Person and any unconsented assignment shall be absolutely void.

22. Governing Law. This Guaranty and the transactions to which it relates, shall be governed by, construed in and enforced in accordance with the laws of The Commonwealth of Massachusetts, without reference to choice of law or conflicts of law principles.

23. Changes in Writing; No Revocation. This Guaranty may not be changed orally, and no obligation of any Guarantor can be released or waived except by a writing signed by a duly authorized officer of the MBTA. This Guaranty shall be irrevocable by Guarantors until the Guaranteed Obligations have been discharged and paid in full.

24. Entire Agreement; Amendments. This Guaranty contains the entire agreement of Guarantors and the MBTA with respect to the subject matter hereof and supersedes all prior oral or written agreements or statements relating to such subject matter, and none of the terms and provisions hereof may be waived, amended or terminated except by a written instrument signed by Guarantors and the MBTA.

25. Counterparts. This Guaranty may be executed in counterparts, each of which, when taken together, shall be construed as one and the same instrument. Delivery of an executed

counterpart of a signature page of this Guaranty by electronic transmission or telecopy shall be effective as delivery of a manually executed counterpart.

26. Limitation on Liabilities. Notwithstanding anything to the contrary contained in this Guaranty, the liability of Guarantors under Section 2 and Section 3(a), (b) and (c) shall be limited to \$20,000,000 in the aggregate, which limitation only shall be applicable after the commencement by the MBTA of its enforcement right pursuant to Section 10.

[Signature pages follow]

Signed as a sealed instrument this 5<sup>th</sup> day of February, 2014.

“GUARANTORS”

SOCIÉTÉ NATIONALE DES CHEMINS  
DE FER FRANÇAIS

By: \_\_\_\_\_  
Name:

Duly authorised to represent the company by a  
power of signature dated 30 January, 2014  
executed by Mr Guillaume Pepy, Chairman of  
the Board of Societe Nationale des Chemins de  
Fer Francais.

#### NOTARIAL CERTIFICATE

I, Maitre Henry LETULLE, Notary in Paris, hereby certify that \_\_\_\_\_,  
duly empowered by a power of signature dated 30 January, 2014 executed by Mr Guillaume  
Pepy, Chairman of the Board of Societe Nationale des Chemins de Fer Francais, acting for  
Société Nationale des Chemins de Fer Français, a French State Owned Company, having its  
registered office at 2 Place aux Etoiles 93633 La Plaine St. Denis CEDEX, France, and  
registered under number 552 049 447 with the RCS in Bobigny duly signed the preceding  
document in Paris.

Personally Known \_\_\_\_\_  
Produced Identification \_\_\_\_\_  
Type of Identification \_\_\_\_\_

KEOLIS

By: \_\_\_\_\_

Name:

Duly authorised to represent the company by a power of attorney dated \_\_\_\_\_, 2014 executed by Mr Jean-Pierre Farandou, président directeur général of Keolis.

NOTARIAL CERTIFICATE

I, Maitre Henry LETULLE, Notary in Paris, hereby certify that \_\_\_\_\_, duly empowered by a power of attorney dated \_\_\_\_\_, 2014 executed by Mr. Jean-Pierre Farandou, président directeur général of Keolis, acting for Keolis, a Société anonyme, having its registered office at 20 rue Le Pelletier 75320, Paris Cedex 09, France, and registered under number 552 111 809 with the RCS in Paris duly signed the preceding document in Paris.

Personally Known \_\_\_\_\_

Produced Identification \_\_\_\_\_

Type of Identification \_\_\_\_\_

[SIGNATURE PAGE FOR PERFORMANCE GUARANTY (Page 2 of 3)]

Agreed to:

**MASSACHUSETTS BAY TRANSPORTATION AUTHORITY**

By: \_\_\_\_\_

Name: Dr. Beverly A. Scott

Title: MBTA General Manager and Rail and Transit Administrator

Approved as to form:

By: \_\_\_\_\_

Name: Paige A. Scott Reed

Title: MassDOT and MBTA General Counsel

[SIGNATURE PAGE FOR PERFORMANCE GUARANTY (Page 3 of 3)]

**SCHEDULE 3  
AGREEMENT SERVICES**

Schedule 3.1	Transportation Services
Schedule 3.2	Engineering Services
Schedule 3.3	Mechanical Services
Schedule 3.4	Materials Management and Procurement
Schedule 3.5	Safety and Security
Schedule 3.6	Quality
Schedule 3.7	Operator Customer Service Responsibilities
Schedule 3.8	Environmental Services
Schedule 3.9	Management and Personnel
Schedule 3.10	Training of Operator Personnel
Schedule 3.11	Construction Support Including PTC
Schedule 3.12	Mobilization
Schedule 3.13	Affirmative Action/Equal Opportunity/DBE
Schedule 3.14	Reporting and Submittals
Schedule 3.15	Intellectual Property; Ownership
Schedule 3.16	Information Technology Requirements
Schedule 3.17	IT Security
Schedule 3.18	Service Level Agreement and Service Credits

**[SEE VOLUME II]**

**SCHEDULE 4**  
**MBTA ASSETS AND THIRD PARTY AGREEMENTS**

Schedule 4.1            Obligations Concerning Commuter Rail Property

Schedule 4.2            Third Party Agreements

**SCHEDULE 4.1**  
**OBLIGATIONS CONCERNING COMMUTER RAIL PROPERTY**

**1. RIGHT OF ACCESS**

- 1.1 The MBTA hereby grants the Operator, Operator Personnel and Subcontractors the right to enter upon and use the Service Property solely for the purposes of performing the Services.
- 1.2 The MBTA shall use reasonable efforts to ensure that Other Contractors and Third Parties do not unreasonably interfere with the Operator's performance of the Services and that access by Other Contractors or Third Parties to the Service Property is limited to the degree of access granted by the MBTA or necessary for the performance of the duties of such parties.

**2. MBTA'S RIGHT TO INSPECT**

- 2.1 The MBTA (which shall include its duly authorized agents and representatives, including MBTA Contractors (each an "**Authorized Person**") shall have the right to enter upon the Service Property at any time and without notice for purposes of inspecting and examining the Commuter Rail Property, or otherwise monitoring compliance with the terms of this Agreement.
- 2.2 Each Authorized Person shall be permitted to occupy locomotive and cab control car operating cabs, coaches, and non-revenue consists, subject to the provisions of Section 2.3 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property), in order to monitor, among other things, train and rolling stock performance, Operator Personnel performance, Right of Way inspection, technical monitoring of onboard systems, and safety compliance, and for any other purposes deemed necessary or appropriate by the MBTA.
- 2.3 Each Authorized Person shall carry appropriate identification while on the Service Property. Prior to entering onto the Service Property for any of the purposes described in Section 2.2 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property), each Authorized Person shall be appropriately trained and qualified by the Operator on Roadway Worker Protection ("**RWP**") regulations and/or other operating rules qualifications as required by Applicable Law or Good Industry Practice, at the Operator's sole cost and expense without any additional charge to the MBTA.
  - 2.3.1 The Operator shall provide RWP and other operating rules qualifications training on a periodic basis throughout each Agreement Year in order to facilitate the training and qualification of Authorized Persons, and annual RWP re-training and re-certification, as necessary or required by Applicable Law or Good Industry Practice.
  - 2.3.2 The Operator shall issue proper identification that identifies each Authorized Person, following completion of the training and qualification process described in Section 2.3.1 of this **Schedule 4.1** (Obligations Concerning

Commuter Rail Property), as RWP-certified and approved to occupy locomotive and cab control car operating cabs.

2.3.3 The MBTA shall identify which Authorized Persons shall be trained and granted specific access as described in Section 2.3 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property) and shall provide an initial list of such Authorized Persons to the Operator no later than the Agreement Services Commencement Date. The MBTA shall provide an updated list of Authorized Persons to the Operator on a quarterly basis, or more frequently if necessary to accommodate any scheduled inspections or required access.

2.4 The Operator shall provide the MBTA any data and information related to the Commuter Rail Property as the MBTA may request from time to time.

### 3. **CONDITION OF PROPERTY - INITIAL JOINT AUDIT**

3.1 In accordance with **Schedule 3.12** (Mobilization), the MBTA and the Operator shall conduct an Initial Joint Audit. Completion of the Initial Joint Audit shall be a condition precedent to the issuance of the Notice to Commence Services, unless otherwise waived by the MBTA in its sole discretion.

3.2 The purpose of such Initial Joint Audit shall be to identify and establish the condition of the Commuter Rail Property and the quantities and condition of the Support Inventory as of the Agreement Services Commencement Date.

3.3 The Operator shall be obligated to accept all of the Commuter Rail Property on an “as is” basis, as set forth in the Initial Joint Audit, as of the Agreement Services Commencement Date, without any adjustment to the Annual Fee, and shall be responsible for correcting, remedying or resolving any conditions of the Commuter Rail Property through the performance of the Agreement Services in accordance with the provisions of **Schedules 3.2** (Engineering Services) and **3.3** (Mechanical Services).

### 4. **ALTERATIONS OR MODIFICATIONS**

4.1 The Operator shall not materially alter or modify, except in accordance with its obligations under this Agreement, any of the Commuter Rail Property (a “**modification**”) without the prior written approval of the MBTA, including any modification proposed by the Operator to the Rolling Stock Fleet (or any part thereof) or any other asset covered under a warranty agreement. If the MBTA approves any such modification, and approves the Operator undertaking any such modification, it shall be undertaken as Supplemental Work.

4.2 If the Operator determines that any such modification is necessary, it shall notify the MBTA in writing (ODRL 01-004) at least 30 days prior to the date the Operator proposes to start such modification work, and shall proceed as directed by the MBTA.

4.3 Each request from the Operator for a modification shall describe, in detail:

- 4.3.1 the reason for the proposed modification;
  - 4.3.2 the scope of the work required; and
  - 4.3.3 the estimated cost of the required labor, materials and equipment, and shall contain a detailed schematic of the proposed modification and a project schedule identifying the start date, completion date, and significant event dates.
- 4.4 The Operator shall submit to the MBTA appropriate documentation, including as-built drawings and any other documentation required by Applicable Law or as the MBTA may request, to evidence the satisfactory completion of the modification.
- 4.5 The MBTA may require the removal of any modification that was not previously approved by the MBTA, or may remove, at the sole cost and expense of the Operator; any unauthorized modification that is not removed by the Operator within 24 hours after notice from the MBTA.

## 5. OPERATOR'S DUTY OF CARE

- 5.1 Throughout the Term, the Operator shall maintain the Commuter Rail Property in accordance with the requirements of this Agreement, all warranties applicable thereto, and Applicable Law.
- 5.2 At the Termination Date, the Operator shall deliver the Commuter Rail Property to the MBTA in accordance with the provisions of **Schedule 15** (Obligations Associated with Termination), in a condition consistent with the maintenance standards required by this Agreement, and subject to the damage provisions of Section 6 (Notice of Damage to Commuter Rail Property) of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property).
- 5.3 The Operator shall not, without the prior approval of the MBTA, post or affix anything to any of the Commuter Rail Property that is not necessary for or related to the performance of Services, including signs, notices, bumper stickers, decals, plastic "wraps", or advertisements. Without limiting the foregoing, the Operator shall not post or affix any political notices or advertisements to or on any of the Commuter Rail Property.
- 5.4 The Operator shall post Operator Personnel or union communications only on designated bulletin boards located at the Service Property.

## 6. NOTICE OF DAMAGE TO COMMUTER RAIL PROPERTY

- 6.1 The Operator shall submit to the MBTA within 24 hours of the occurrence of any damage to any Commuter Rail Property that the Operator believes may exceed \$10,000:
- 6.1.1 a preliminary report detailing the cause and extent of the damage to such Commuter Rail Property, and

- 6.1.2 an estimate of the cost of repairing, rehabilitating, replacing or reconstructing (collectively, “**repair work**”) the damage, and measures undertaken by the Operator to prevent future similar damage (ODRL 01-006).
- 6.2 Within 30 days of the occurrence of the damage, the Operator shall submit to the MBTA a report further detailing the final estimated of costs of the repair work required to remedy the damage (ODRL 01-007).
7. **REPAIR OF DAMAGE TO COMMUTER RAIL PROPERTY**
- 7.1 The MBTA shall determine in its sole discretion, reasonably exercised, if there has occurred any Material Damage to the Commuter Rail Property after a joint inspection by the MBTA’s Senior Director or his/her designee and the Operator General Manager or his or her designee, and, at the discretion of the MBTA, representatives of Third Parties.
- 7.2 The Operator shall be required to pay the first \$25,000 of the cost of any repair work required to remedy each occurrence of Material Damage to the Commuter Rail Property, and the MBTA shall pay the balance of such costs, regardless of whether the Operator, an Other Contractor or the MBTA performs such repair work, subject to the provisions of Section 7.3 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property).
- 7.3 Any Material Damage determined by the MBTA to have been caused, in whole or in part, by the Operator’s actions or failure to act, or otherwise to perform the Services in accordance with the provisions of this Agreement shall be repaired at the Operator’s sole cost and expense, including:
- 7.3.1 mechanical, electrical, or engineering defects not found or not corrected by the Operator as required by this Agreement;
- 7.3.2 improper, inadequate, or temporary repairs, adjustments, cleanings, inspections, or renewals by the Operator; or
- 7.3.3 the use of unfit, inferior, un-inspected, or non-compliant material by the Operator.
- 7.4 In determining whether any damage is Material Damage, the MBTA shall take into account the actual damage to the Commuter Rail Property, as well as damage to any other assets of the MBTA, the cost of substitute transportation or other services related to correcting the damage, and all other costs estimated by the MBTA to be necessary or appropriate in order to repair or replace property that has suffered Material Damage.
- 7.5 Any Material Damage to the Commuter Rail Property determined by the MBTA to not have been caused by the Operator, as described in Section 7.3 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property), (i) if repaired by the Operator at the written direction of the MBTA, or (ii) if undertaken by the Operator pursuant to Section 7.10 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property), shall constitute Supplemental Work under **Schedule 9** (Supplemental Work), subject to the

provisions of Section 7.3 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property).

- 7.6 The MBTA may, in its discretion, elect to have the repair work performed by an Other Contractor, who may utilize any of the Service Property for the performance of such work.
- 7.6.1 Any Support Inventory that may be used by the Other Contractor in the repair of Material Damage shall be replaced by the MBTA or the Other Contractor.
- 7.6.2 The MBTA shall require any such Other Contractor to repair the Material Damage as promptly as reasonably practicable.
- 7.6.3 In the event that the Material Damage is to any of the Service Equipment, the repair of the Material Damage shall be completed within one year of the date that the Operator notifies the MBTA of the Material Damage, or the MBTA may adjust the Agreement Services or direct the Operator to remove Service Equipment from storage, as more fully described in **Schedule 3.3** (Mechanical Services).
- 7.7 The Operator has the right to inspect, at its sole cost and expense, any repair work performed by Other Contractors. In the event that, in the reasonable opinion of the Operator, the repair work performed by an Other Contractor has not been performed in a manner consistent with the standards required of the Operator under this Agreement, the Operator shall notify the MBTA in writing no more than five Business Days after the Operator's receipt of the inspection report (each, an "**Other Contractor Performance Failure Notice**") (ODRL 01-008). The Operator shall be deemed to have accepted the repair work performed by an Other Contractor, and to have waived its right to claim that work performed by an Other Contractor was not consistent with the standards required of the Operator under this Agreement, if the Operator fails to deliver an Other Contractor Performance Failure Notice within the prescribed five (5) Business Days.
- 7.7.1 If the MBTA is in agreement with the Operator that any such repair work has not been performed in a manner consistent with the standards required of the Operator under this Agreement, then the MBTA shall direct that corrective work be undertaken by such Other Contractor, or by the Operator as Supplemental Work in accordance with the provisions of **Schedule 9** (Supplemental Work).
- 7.8 If there shall be damage to any of the Commuter Rail Property that does not constitute Material Damage, the Operator shall determine, to its best ability, the extent and cause of the damage, and provide a written report to the MBTA, no later than the Business Day following the date on which the MBTA determines that the damage does not constitute Material Damage (ODRL 01-009). All damage reports filed pursuant to this Section 7.8 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property) must specify in detail the cause and extent of the damage and the measures taken by the Operator to prevent similar future damage.

- 7.9 Unless otherwise directed by the MBTA, the Operator shall, within 60 days following submission of a damage report pursuant to Section 7.8 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property), undertake the necessary repair work to correct the damage to the Commuter Rail Property at the Operator's sole cost and expense. The Operator shall notify the MBTA upon completion of such repair work (ODRL 01-010).
- 7.10 The Operator shall promptly repair any damage to the Commuter Rail Property in the event of an Emergency, if necessary to restore the Commuter Rail Services or prevent further damage to Persons or property, without regard to cause or responsibility.
- 7.10.1 The Operator shall maintain accurate cost records pertaining to the activities in the event they are eligible for reimbursement, pursuant to Section 7.5 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property). To the extent the Operator is eligible for reimbursement, the Operator shall invoice the MBTA and provide such cost detail and other information as reasonably required by the MBTA to evidence such reimbursement.

## 8. **SUPPORT PROPERTY**

This Section 8 (Support Property) of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property) shall apply to all Support Property, excluding non-revenue vehicles used in the Agreement Services, which shall be subject to the provisions of Section 9 (Support Property – Non-revenue Vehicles) of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property).

- 8.1 The MBTA shall provide to the Operator, on the Agreement Services Commencement Date, all then existing Support Property.
- 8.2 All Support Property (except for any Operator-owned specialty equipment that was identified in the Proposal and in the Initial Joint Audit as being owned by the Operator), whether in existence on the Agreement Services Commencement Date or hereafter acquired by the MBTA or the Operator shall be owned by the MBTA. Any Support Property acquired in the name of the Operator shall be transferred to the MBTA, in accordance with **Schedule 15** (Obligations Associated with Termination), or earlier at the MBTA's request. The MBTA may at its sole discretion provide additions to the Support Property during the Term.
- 8.3 Replacement of Support Property
- 8.3.1 An item of Support Property with a replacement value of less than \$10,000 that for any reason become unavailable for use in the provision of the Agreement Services shall be promptly replaced by the Operator, unless the same is, in the MBTA's reasonable judgment after consultation with the Operator, no longer used in, useful to, or necessary for the performance of the Agreement Services. The cost of any such replacement made pursuant to this Section 8.3.1 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property) shall be included in the Annual Fee.

- 8.3.2 If the MBTA determines that an item of Support Property with a replacement cost of \$10,000 or more is unavailable for use in the performance of the Agreement Services due, in whole or in part, to the Operator's actions or failure to act, or otherwise to perform the Services in accordance with the provisions of this Agreement, the Operator shall replace such Support Property or reimburse the MBTA for the replacement cost of such Support Property.
- 8.3.3 If an item of Support Property (excluding Support Inventory or materials) with a replacement cost of \$10,000 or more is no longer available for use in the performance of the Agreement Services other than due, in whole or in part, to the Operator's actions or inactions, as described in Section 8.3.2 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property), the MBTA shall, unless it determines (after consultation with the Operator) that the applicable item of Support Property is no longer used in, useful to, or otherwise necessary for the performance of the Agreement Services, (i) replace the applicable item of Support Property, or (ii) direct the Operator to replace the same, and such replacement shall constitute Supplemental Work pursuant to **Schedule 9** (Supplemental Work).
- 8.3.4 In the event that any Support Property (but not including Support Inventory or materials) becomes unavailable, as described in Sections 8.3.1, 8.3.2 or 8.3.3 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property), the Operator shall submit reports to the MBTA within one Business Day of such Support Property becomes unavailable.
- 8.4 The Operator shall only use the MBTA's re-railing cranes after receiving approval from the MBTA.
9. **SUPPORT PROPERTY – NON-REVENUE VEHICLES**
- 9.1 Non-Revenue Vehicles Owned by the MBTA.
- 9.1.1 The MBTA shall provide to the Operator, on or before the Agreement Services Commencement Date, the MBTA-owned non-revenue vehicles comprising a portion of the Support Property (the “**non-revenue support vehicles**”), as identified in the Initial Joint Audit.
- 9.1.2 The MBTA may, in its discretion, provide the Operator additional non-revenue support vehicles during the Term of this Agreement. The MBTA may use any of the non-revenue support vehicles, or direct that Other Contractors may use the same that are not being used by the Operator in the performance of the Agreement Services.
- 9.1.3 The Operator shall be responsible for damage to non-revenue support vehicles occurring while in the Operator's control or during the Operator's operation of such vehicles, and shall reimburse the MBTA for the costs or repairing any such damage, or replacing such vehicle, if determined necessary by the MBTA.

The Operator shall operate and maintain all such non-revenue support vehicles in order to maximum the useful life of each vehicle.

9.1.4 Subject to the damage provisions of Section 9.1.3 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property), the MBTA will replace, at its cost, all vehicles listed in (i) tables 1.4, 1.5 and 1.6 of **Schedule 3.3** (Mechanical Services), and (ii) Section 2.10.5 of Schedule 3.2 (Engineering Services).

9.1.5 All other non-revenue support vehicles shall be replaced on an as-needed basis over the Term, subject to the MBTA's prior approval, by vehicles to be purchased or otherwise acquired by the Operator, subject to the provisions of Sections 8.2 and 9.2.3 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property).

9.1.5.1 The cost of such replacement shall be included in the Annual Fee.

9.1.5.2 Any replaced vehicle shall be returned by the Operator to the MBTA.

## 9.2 Non-Revenue Vehicles Acquired by the Operator.

9.2.1 The Operator shall be responsible for purchasing, leasing or otherwise acquiring, on or before the Agreement Services Commencement Date, any non-revenue support vehicles that the Operator decides are necessary, in addition to those provided by the MBTA, to perform the Agreement Services in accordance with the provisions of this Agreement. The cost of purchasing, leasing or acquiring such vehicles shall be included in the Annual Fee. The quantity, style and use of such additional non-revenue support vehicles shall be approved by the MBTA and shall be consistent with standards for publicly funded vehicles.

9.2.2 The Operator shall be responsible for any damage to such non-revenue support vehicles acquired under Section 9.2.1 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property), and shall maintain the necessary insurance on all such vehicles in accordance with **Schedule 10** (Insurance).

9.2.2.1 If any such non-revenue support vehicle is damaged, destroyed, or otherwise becomes unavailable for use during the Term, the Operator shall replace such vehicle at the Operator's sole cost and expense, unless the Operator shall have determined in good faith, after consultation with the MBTA, that such any such vehicle is no longer necessary for the performance of the Agreement Services.

9.2.3 Any lease or other agreement entered into by the Operator to acquire a non-revenue support vehicle (whether as a replacement vehicle pursuant to Section 9.1.5 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property) or as an additional vehicle pursuant to Section 9.2.1 of this **Schedule 4.1**

(Obligations Concerning Commuter Rail Property)) may be designated a Key Contract and shall provide that the MBTA may assume the lease or other agreement, at any time at the option of the MBTA. The Operator shall transfer the title to any Operator-acquired vehicle in accordance with the provisions of Section 8.2 of this **Schedule 4.1** (Obligations Concerning Commuter Rail Property) upon the direction of the MBTA or otherwise in accordance with the provisions of **Schedule 15** (Obligations Associated with Termination). Notwithstanding the foregoing, the Operator shall retain the use of all such vehicles during the Term.

## 10. **PARKING**

The MBTA expects to provide at the Agreement Services Commencement Date designated parking areas for joint use by the MBTA and Operator Personnel performing work at or from the Cobble Hill engineering headquarters, the CRMF, the Southside S&I Facility, and the Readville facility. The MBTA shall not be responsible to the Operator or any Operator Personnel for any damage or loss of any kind related to any Person's use of any such parking area; all parking areas are unsecured and each Person using the parking area does so at his or her own risk. No vehicles other than Service Equipment and Support Property (such as forklifts and Cushman vehicles) are permitted inside any of the Service Property or other MBTA building or facility, other than in a designated public parking area, including canteen trucks and Operator Personnel vehicles, without the prior written approval of the MBTA. The MBTA shall have no obligation to continue to provide such parking facilities throughout the Term, or to provide substitute facilities if any such facilities are no longer available to the Operator or Operator Personnel.

**SCHEDULE 4.2**  
**THIRD PARTY AGREEMENTS**

**1. THIRD PARTY AGREEMENTS**

The Operator shall at all times perform the Agreement Services in accordance with all Third Party Railroad Agreements and any other agreement or contract between the MBTA and a Third Party and designated as a Contract Document, as provided in **Schedule 3.1** (Transportation Services).

**SCHEDULE 5**

**[INTENTIONALLY LEFT BLANK]**

**SCHEDULE 6**  
**PERFORMANCE**

Schedule 6.1 Performance Evaluation

- Appendix 1: Operator Available Profit and Allocation
- Appendix 2: Performance Failure Payment Calculations - OTP
- Appendix 3: Performance Failure Payment Calculations  
- Seat Availability/Consist Compliance
- Appendix 4: Performance Failure Payment Calculations - Fleet  
Maintenance
- Appendix 5: Performance Failure Payment Calculations - Passenger  
Comfort and Service Amenities
- Appendix 6: Vehicle Cleanliness Matrix
- Appendix 7: Remedial Performance Standards
- Appendix 8: Fleet Inspection Procedures

**SCHEDULE 6.1  
PERFORMANCE EVALUATION**

**1. PERFORMANCE EVALUATION**

The Operator shall perform the Agreement Services at all times in accordance with the standards and provisions set forth in this Agreement. The Operator's performance of the Agreement Services shall be evaluated in four key categories - On Time Performance, Seat Capacity/Consist Compliance, Fleet Maintenance, and Passenger Comfort and Amenities (collectively, the "**Performance Areas**") on a monthly basis, as described below.

**1.1 On Time Performance**

The MBTA will evaluate the Operator's On Time Performance as set forth below. On Time Performance shall be determined in accordance with the provisions of **Schedule 3.1** (Transportation Services), Section 1 (General) and the following provisions:

- 1.1.1 A train's "**Actual Arrival Time**" shall be its arrival time at the final scheduled station, as determined by or calculated from the most accurate means available, in the reasonable opinion of the MBTA.
- 1.1.2 A train's "**Adjusted Arrival Time**" shall be its Actual Arrival Time, less any MBTA approved adjustment (as described in Section 1.1.6 of this **Schedule 6.1** (Performance Evaluation)).
- 1.1.3 A train's "**Scheduled Arrival Time**" shall be that contained in **Schedule 3.1** (Transportation Services), Appendix 1 (Train Arrival Times) for the arrival of the train at its final scheduled station, as such schedules may be revised from time to time by an MBTA approved and authorized schedule adjustment.
- 1.1.4 A train shall be considered an "**On Time Train**" if its Adjusted Arrival Time is:
  - 1.1.4.1 Not greater than its Scheduled Arrival Time, plus a standard allowance of up to four minutes and 59 seconds, at the final scheduled station; or
  - 1.1.4.2 Not greater than its Scheduled Arrival Time, plus any adjustment pursuant to an OT Waiver or that is approved by the MBTA, following receipt of a Track Outage Request Form, as described in **Schedule 3.2** (Engineering Services) (or equivalent documentation established by the MBTA from time to time), that is accepted and approved by the MBTA.
- 1.1.5 Any train not meeting the specific requirements of Section 1.1.4 of this **Schedule 6.1** (Performance Evaluation) shall be recorded as a Late Train, a Terminated Train, or a Cancelled Train, in accordance with the respective definitions of the same appearing in **Schedule 1** (Definitions).

- 1.1.6 The Operator may request a waiver from the MBTA (an “**OT Waiver**”) for a train that does not arrive at its Scheduled Arrival Time (plus a standard allowance of up to four minutes and 59 seconds) at its final scheduled station, due to the occurrence of a Force Majeure Event or if:
- 1.1.6.1 The failure of the train to arrive at its Scheduled Arrival Time was due to (a) an event outside the reasonable control of (i) the Operator or (ii) any Party within the control of the Operator, or (b) the actions or non-actions of Third Parties outside of the reasonable control of the Operator or a Third Party Railroad and not due to the actions or inactions of (i) the Operator or (ii) any Party within the control of the Operator; and
  - 1.1.6.2 The Operator shall have first taken all reasonable and prudent actions to avoid or overcome any initial failure resulting in the delay; and
  - 1.1.6.3 The Operator shall have taken all reasonable and prudent actions to prevent and/or minimize the delay to the greatest number of passengers possible and further have used all available means to restore the service schedule.
- 1.1.7 The MBTA shall determine, in its sole discretion, if an OT Waiver shall apply to a particular train, and if so, the number of minutes that shall be applied to adjust such train’s Actual Arrival Time. The MBTA’s determination with respect to granting an OT Waiver shall be final and binding on the Parties.
- 1.1.8 The number of minutes of adjustment approved by the MBTA in an OT Waiver shall be subtracted from the Actual Arrival Time of the train at its final scheduled station to determine the train’s Adjusted Arrival Time. The result shall be used in determining whether a train is an On Time Train, a Late Train or a Terminated Train.

## 1.2 Seat Availability/Consist Compliance

The MBTA will evaluate the Operator’s compliance with the consist requirements established by the MBTA for the North Division and the South Division Service Lines, as set forth in Appendix 1 (Train Cycle and Train-Consist Requirements) to **Schedule 3.3** (Mechanical Services) (the “**Consist Requirements**”).

- 1.2.1 Compliance with the Consist Requirements will be determined through a comparison of mandated train consist requirements with actual train consists provided for revenue service trains.

## 1.3 Fleet Maintenance

The MBTA will evaluate the Operator’s compliance with the standards established for maintenance of the revenue Rolling Stock Fleet based upon compliance with the state-of-good

repair standards for locomotives, control coaches (“CTCs”) and trailer coaches (“BTCs”) following the prescribed 92-day maintenance interval for locomotives and CTCs, and the prescribed 184-day maintenance interval for BTCs (or the equivalent, as the same may be adjusted from time to time to conform to Applicable Law) as set forth in **Schedule 3.3** (Mechanical Services).

#### 1.4 Passenger Comfort and Service Amenities

The MBTA will evaluate the Operator’s performance with respect to passenger comfort and service amenities through evaluating the following:

##### Part 1

- 1.4.1 HVAC System Failures – Failure to maintain temperatures within the design values;
- 1.4.2 Door Failures - Failure of a door to operate as designed;
- 1.4.3 Lighting System Failures – Failure of 10% or greater of the lights in the interior of a vehicle to remain illuminated for the duration of the trip;
- 1.4.4 Toilet System Failures – Failure of the toilet system to function as designed;
- 1.4.5 Vehicle Cleanliness Failures – Failure of the vehicle to be maintained in a clean state, as indicated in the matrix set forth in Appendix 6 (Vehicle Cleanliness Matrix) to this **Schedule 6.1** (Performance Evaluation); and
- 1.4.6 Communication System Failures – Failure of the Public Address System, Intercom, Signage or Vehicle Radio en-route.

##### Part 2

- 1.4.7 Train Staffing - Compliance with the requirements of the Train Staffing Plan, following submission to and acceptance of the same by the MBTA, as set forth in **Schedule 3.1** (Transportation Services), Section 2.6;
- 1.4.8 Station Maintenance - Compliance with the Station Cleaning Schedule, following submission to and acceptance of the same by the MBTA, as set forth in **Schedule 3.2** (Engineering Services), Section 5.8 (Station Cleaning) and compliance with the other Operator obligations with respect to Station maintenance, as set forth in **Schedule 3.2** (Engineering Services), Section 5.9 (General Building, Facility and Station Maintenance);
- 1.4.9 Snow and Ice Removal - Compliance with the Snow Removal Plan, following submission to and acceptance of the same by the MBTA, as set forth in **Schedule 3.2** (Engineering Services), Section 8 (Snow Removal); and
- 1.4.10 Fare Collection - Failure of the Operator to collect passenger fares.

## 2. PERFORMANCE DETERMINATION

The MBTA shall determine the level of the Operator's performance in each Performance Area, for each Reporting Period, as described below. Where a determination of the level of the Operator's performance is to be made through inspections or audits undertaken by or on behalf of the MBTA, the MBTA shall endeavor to undertake or cause to be undertaken such actions so as to minimize any adverse impacts on the delivery of the Commuter Rail Services.

2.1 with respect to On Time Performance, compliance shall be determined through the reports required to be submitted by the Operator in accordance with the provisions of **Schedule 3.1** (Transportation Services), Section 3 (On Time Performance). The MBTA shall evaluate the Operator's actual performance, as detailed in such reports, and as adjusted by any OT Waivers, and shall calculate the Performance Failure Payment, if any, in accordance with Appendix 2 (Calculation of Performance Failure Payments - On Time Performance) to this **Schedule 6.1** (Performance Evaluation).

2.2 with respect to Seat Availability/Consist Compliance, compliance shall be determined through the reports required to be submitted by the Operator in accordance with the provisions of **Schedule 3.3** (Mechanical Services), Section 10.2.2 (Performance Tracking). The MBTA shall evaluate the Operator's actual performance, as detailed in such reports, and shall calculate the Performance Failure Payment, if any, in accordance with Appendix 3 (Performance Failure Payment Calculations - Seat Availability/Consist Compliance) to this **Schedule 6.1** (Performance Evaluation).

2.3 with respect to Fleet Maintenance, compliance shall be determined through inspections conducted by the MBTA to determine compliance of the inspected locomotive, CTC or BTC, as applicable, with the MBTA-approved inspection forms (the "**inspection forms**"), developed in accordance with **Schedule 3.3** (Mechanical Services), Section 3.8 (Maintenance Interval (MI) Forms), for the locomotive and CTC 92-day maintenance intervals, and the BTC 184-day maintenance interval. Based on the results of the inspection, the MBTA inspector will assign a percentage compliance score for each inspected vehicle, which shall result in a "pass" or a "fail" for the inspection. The percentage compliance score and the pass/fail level will be derived by determining the percentage of compliance of each vehicle with the items and standards set forth in the applicable inspection form. A Performance Failure Payment will be separately calculated, based on the applicable pass/fail rate, in accordance with Appendix 7 (Remedial Performance Standards) to this **Schedule 6.1** (Performance Evaluation), for inspected locomotives, CTCs and BTCs.

2.3.1 The MBTA will conduct monthly inspections of locomotives, CTCs and BTCs following their scheduled 92-day or 184-day maintenance, as applicable. The number of vehicles in each category for which the Operator conducts a maintenance inspection each month will determine the number of vehicles to be inspected by the MBTA in each monthly period. The number of MBTA inspections will correspond with a statistically valid sample population sufficiently sized to provide a 99% confidence level with a confidence interval of 10. An example of the application of this Section 2.3.1 of this **Schedule 6.1**

(Performance Evaluation) is set forth in Appendix 8 (Fleet Inspection Procedures) to this **Schedule 6.1** (Performance Evaluation).

2.3.2 The MBTA shall evaluate the Operator's actual performance for each month, as evidenced by such inspections, and shall calculate the Performance Failure Payments, if any, in accordance with Appendix 4 (Performance Failure Payment Calculations - Fleet Maintenance) to this **Schedule 6.1** (Performance Evaluation).

2.4 with respect to Passenger Comfort and Service Amenities, compliance will be determined through the reports required to be submitted by the Operator in accordance with the provisions of **Schedule 3.3** (Mechanical Services), Section 10.2.1.2 (Service Failures) and through periodic inspections conducted by the MBTA during the Reporting Period. The MBTA shall evaluate the Operator's actual performance, as detailed in such Operator reports and MBTA inspection reports, and shall calculate the Performance Failure Payment, if any, in accordance with Appendix 5 (Performance Failure Payment Calculations - Passenger Comfort and Service Amenities) to this **Schedule 6.1** (Performance Evaluation).

### 3. **CONSEQUENCES OF POOR PERFORMANCE**

3.1 If the Operator fails to comply with the operating standards and provisions set forth in this Agreement with respect to each of the Performance Areas, as determined by the MBTA in accordance with this **Schedule 6.1** (Performance Evaluation), the Operator shall pay to the MBTA in each case a Performance Failure Payment calculated in accordance with Appendices 2 through 5 to this **Schedule 6.1** (Performance Evaluation), by reference to the available amount of the Operator's profit set forth in column 2, and subject to the allocations set forth in columns 3 through 6, of Appendix 1 (Operator Available Profit and Allocation) to this **Schedule 6.1** (Performance Evaluation).

3.2 Failure of the Operator to at least achieve the Remedial Performance Levels specified in Appendix 7 (Remedial Performance Standards) to this **Schedule 6.1** (Performance Evaluation) shall require the Operator to provide to the MBTA an Operator Remedial Performance Notice (as defined in Section 5 (Operator Notice of Failure to Achieve Performance Levels) of this **Schedule 6.1** (Performance Evaluation), below).

3.3 Failure of the Operator to at least meet the Remedial Performance Level relating to a Performance Area, as set forth in Appendix 7 (Remedial Performance Standards) to this **Schedule 6.1** (Performance Evaluation), may constitute an Event of Default under the provisions of Section 1.9 of **Schedule 12.3** (Events of Default and Termination Events).

### 4. **SPECIAL ASSESSMENTS**

4.1 In addition to Performance Failure Payments described above, the Operator shall be assessed Service Credits ("**Special Assessments**"), as described in **Schedule 3.18** (Service Level Agreement and Service Credits).

4.2 Notwithstanding anything to the contrary, when determining cost allocation pursuant to Section 6 (Miscellaneous) of this **Schedule 6.1** (Performance Evaluation), the value of Service Credits assessed against the Operator pursuant to Section 20 (Reports, Plans and Other Deliverables) of **Schedule 3.18** (Service Level Agreement and Service Credits) shall be allocated between OTP and Non-OTP based on the event giving rise to the applicable Service Credit. Service Credits assessed pursuant to Section 20 (Reports, Plans and Other Deliverables) of **Schedule 3.18** (Service Level Agreement and Service Credits) that are not covered by one of the Performance Areas shall be allocated to the Non-OTP portion. By way of clarifying example, and not limitation, a Weekly Maintenance Production Report (ODRL 3.3-017) that is delivered more than six (6) hours after its due date shall be subject to a \$10,000 Service Credit, and the value of such Service Credit shall be applied to the amount allocated to Non-OTP (i.e. column 7 of Appendix 1 (Operator Available Profit and Allocation) to this **Schedule 6.1** (Performance Evaluation)).

## 5. **OPERATOR NOTICE OF FAILURE TO ACHIEVE PERFORMANCE LEVELS**

5.1 Without limiting the provisions of **Schedule 12.1** (Remedial Plans and Remedial Agreements), if the Operator's performance in any Reporting Period is less (or in the case of Passenger Comfort and Service Amenities (other than Train Staffing) if the failures are greater) than the applicable Remedial Performance Level specified for each Performance Area in Appendix 7 (Remedial Performance Standards) to this **Schedule 6.1** (Performance Evaluation), the Operator shall promptly, but not later than five Business Days following the end of the applicable Reporting Period, notify the MBTA in writing of that fact (an "**Operator Remedial Performance Notice**") including in such notice:

5.1.1 a description of the Remedial Performance Level not achieved and the reasons for not achieving such level; and

5.1.2 a description of the remedial actions that the Operator will take to ensure that its future performance will not again fall below such Remedial Performance Level.

5.2 The Operator shall provide to the MBTA in writing, not less frequently than every two weeks thereafter (unless otherwise agreed to by the Parties), a report detailing the results of the implementation of such remedial actions.

5.3 All remedial actions undertaken by the Operator in connection with an Operator Remedial Performance Notice shall be undertaken at its sole cost and expense, without any increase in the Services Fee.

## 6. **MISCELLANEOUS**

6.1 The amount of Performance Failure Payments to be included in calculating the Monthly Fee, in accordance with **Schedule 7.1** (Fees), Section 1.1.2, shall be the aggregate of the OTP Performance Failure Payment plus the total of all other Performance Failure Payments and Special Assessments, calculated as follows:

- 6.1.1 The OTP Performance Failure Payment shall equal the lesser of (a) the OTP Performance Failure Payment calculated in accordance with Section 1.1 (On Time Performance) of this **Schedule 6.1** (Performance Evaluation) and Appendix 2 (Calculation of Performance Failure Payments: On Time Performance) to this **Schedule 6.1** (Performance Evaluation), and (b) the amount set forth in Column 6 of Appendix 1 (Operator Available Profit and Allocation) to this **Schedule 6.1** (Performance Evaluation) for the applicable Agreement Year.
- 6.1.2 The total of all other Performance Failure Payments and Special Assessments shall equal the lesser of (a)(i) the Performance Failure Payment for Seat Availability/Consist Compliance calculated in accordance with Section 1.2 (Seat Availability/Consist Compliance) of this **Schedule 6.1** (Performance Evaluation) and Appendix 3 (Performance Failure Payment Calculations - Seat Availability/Consist Compliance) to this **Schedule 6.1** (Performance Evaluation), plus (ii) the Performance Failure Payment for Fleet Maintenance calculated in accordance with Section 1.3 (Fleet Maintenance) of this **Schedule 6.1** (Performance Evaluation) and Appendix 4 (Performance Failure Payment Calculations - Fleet Maintenance) to this **Schedule 6.1** (Performance Evaluation), plus (iii) the Performance Failure Payment for Passenger Comfort and Service Amenities calculated in accordance with Section 1.4 (Passenger Comfort and Service Amenities) of this **Schedule 6.1** (Performance Evaluation) and Appendix 5 (Performance Failure Payment Calculations - Passenger Comfort and Service Amenities) to this **Schedule 6.1** (Performance Evaluation), plus (v) all Special Assessments, and (b) the amount set forth in Column 7 of Appendix 1 (Operator Available Profit and Allocation) to this **Schedule 6.1** (Performance Evaluation) for the applicable Agreement Year.
- 6.2 Performance calculations shall be rounded to two decimal places, with the midpoint rounded upwards. The annual escalation of Performance Failure Payments shall be rounded to the nearest whole dollar, with the midpoint rounded upwards.
- 6.3 As soon as reasonably practicable after the end of each Reporting Period, the MBTA shall notify the Operator of the results of the calculations performed pursuant to Section 6.1 of this **Schedule 6.1** (Performance Evaluation).
- 6.4 Without limiting any of the MBTA's other rights or remedies, the MBTA may audit any report filed with it by the Operator, pursuant to **Part 1**, Section 12 (Examination and Audit), and if it determines that any such report is inaccurate, in any respect, may recalculate the Performance Failure Payments and Special Assessments for the applicable Reporting Period.
- 6.4.1 If any such recalculation results in additional Performance Failure Payments or Special Assessments being due from the Operator to the MBTA, such additional payments shall be paid, at the MBTA's option, within 10 days of demand by the MBTA, or, through an adjustment to the next Monthly Fee, in accordance with the provisions of **Schedule 7** (Payments).

- 6.4.2 The Operator shall reimburse the MBTA for the costs of conducting any audit that results in additional Performance Failure Payments or Special Assessments being due to the MBTA.
- 6.4.3 An Event of Default shall exist under **Schedule 12.3** (Events of Default and Termination Events), Section 1.13, if the MBTA determines, through an audit described in this Section 6.4 of this **Schedule 6.1** (Performance Evaluation) or otherwise, that in any period of 24 Reporting Periods two or more of the reports filed by the Operator and relied upon by the MBTA in calculating Performance Failure Payments or Special Assessments pursuant to this **Schedule 6.1** (Performance Evaluation) are inaccurate, false or misleading in any material respect.

**APPENDIX 1  
OPERATOR AVAILABLE PROFIT AND ALLOCATION**

The following table illustrates how the Operator’s available profit will be calculated and allocated for each Agreement Year and for each monthly period within an Agreement Year. The actual amounts of Annual Available Profit, Monthly Available Profit, and the amounts allocable to OTP and all other Performance Failure Payments (“PFPs”) and Special Assessments (“SAs”) (collectively, “Non-OTP”) will be inserted in the final Agreement prior to execution, based on the successful Proposal, with a constant assumed profit margin of 5%.

<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>	<b>Column 4</b>	<b>Column 5</b>	<b>Column 6</b>	<b>Column 7</b>
<b>Agreement Year</b>	<b>Start Date</b>	<b>End Date</b>	<b>Annual Available Profit ("AAP")</b>	<b>Monthly Available Profit ("MAP")</b>	<b>"MAP" Allocable to OTP</b>	<b>"MAP" Allocable to Non-OTP</b>
			(See notes 1, 2, 3, 4)	(See note 5)	(See note 6)	(See notes 6, 7)
Year 1 (first 3 months)	7/1/2014	9/30/2014	No Penalties Assessed	No Penalties Assessed	No Penalties Assessed	No Penalties Assessed
Year 1 (last 9 months)	10/1/2014	6/30/2015	\$10,426,192	\$868,849	\$434,425	\$434,425
Year 2	7/1/2015	6/30/2016	\$13,176,481	\$1,098,040	\$549,020	\$549,020
Year 3	7/1/2016	6/30/2017	\$13,489,893	\$1,124,158	\$562,079	\$562,079
Year 4	7/1/2017	6/30/2018	\$13,735,888	\$1,144,657	\$572,329	\$572,329
Year 5	7/1/2018	6/30/2019	\$14,027,959	\$1,168,997	\$584,498	\$584,498
Year 6	7/1/2019	6/30/2020	\$14,363,630	\$1,196,969	\$598,485	\$598,485
Year 7	7/1/2020	6/30/2021	\$14,653,807	\$1,221,151	\$610,575	\$610,575
Year 8	7/1/2021	6/30/2022	\$14,968,229	\$1,247,352	\$623,676	\$623,676
Year 9 (Option Year)	7/1/2022	6/30/2023	\$15,488,675	\$1,290,723	\$645,361	\$645,361
Year 10 (Option Year)	7/1/2023	6/30/2024	\$16,027,216	\$1,335,601	\$667,801	\$667,801
Year 11 (Option Year)	7/1/2024	6/30/2025	\$16,584,482	\$1,382,040	\$691,020	\$691,020
Year 12 (Option Year)	7/1/2025	6/30/2026	\$17,161,125	\$1,430,094	\$715,047	\$715,047

Notes:

1. "NAF" refers to the "Net Annual Fee" for each Agreement Year, as referenced in **Schedule 7.1** (Fees), Section 2 (Fixed Fee).
2. "AAP" (Annual Available Profit) is the "annual cap" on Performance Failure Payments and Special Assessments.
3. The "AAP" for Agreement Year 1 is based on 75% of the Operator's annual profit (assuming a 5% profit margin).
4. The "AAP" for Agreement Years 2-12 is based on 90% of the Operator's annual profit (assuming a 5% profit margin).
5. "MAP" (Monthly Available Profit) is the "monthly cap" on Performance Failure Payments and Special Assessments.
6. Each month, the "MAP" (or "monthly cap") is allocated equally between OTP (50%) and Non-OTP (50%) (see Note 7, below).
7. Non-OTP includes: Seat Availability/Consist Compliance Performance Failure Payments, Fleet Maintenance Performance Failure Payments, Passenger Comfort and Service Amenities Performance Failure Payments, and Special Assessments.

**APPENDIX 2  
CALCULATION OF PERFORMANCE FAILURE PAYMENTS  
ON TIME PERFORMANCE**

The monthly OTP Performance Failure Payment shall be calculated as described below, based on the fee structure set forth in the following table.

Train Status (Based on "Adjusted Arrival Time")	Minutes Late ("Adjusted")	Train Category / Code		Performance Failure Payment	
		Peak	Off-Peak	Peak Fee	Off-Peak Fee
<b>On-Time Train</b>	0:00 - 4:59	"On Time"	"On Time"	\$0	\$0
<b>Late Train:</b>					
Level 1 (5-10 minutes late)	5:00 - 9:59	"L1P Train"	"L1O Train"	\$500	\$250
Level 2 (10-20 minutes late)	10:00 - 19:59	"L2P Train"	"L2O Train"	\$1,000	\$500
Level 3 (20-40 minutes late)	20:00 - 39:59	"L3P Train"	"L3O Train"	\$1,500	\$750
<b>Terminated Train:</b>					
40+ minutes late/terminated (not fuel)	40:00 +	"T1P Train"	"T1O Train"	\$5,000	\$2,500
Terminated (due to lack of fuel)	40:00 +	"T2P Train"	"T2O Train"	\$10,000	\$5,000
<b>Canceled Train</b>	N/A	"CP Train"	"CO Train"	\$5,000	\$2,500

Note:

The "Performance Failure Payment" fees shown in the table above, and otherwise within this Appendix 2, are for Agreement Year 1.

The amount of each fee will escalate in each Agreement Year, commencing in the first month in Agreement Year 2 and in the first month in each Agreement Year thereafter, at a rate equal to the percentage increase in the Net Annual Fee for the current Agreement Year over the Net Annual Fee for the prior Agreement Year.

1. (a) Each Late Train (as determined in accordance with Section 1.1 (On Time Performance) of this **Schedule 6.1** (Performance Evaluation)) shall be categorized as an L1P Train, an L1O Train, an L2P Train, an L2O Train, an L3P Train or an L3O Train, as follows:

“L1P Train”: A Late Train operating during Peak Commuter Periods with an Adjusted Arrival Time of at least five minutes but less than 10 minutes after its Scheduled Arrival Time.

“L1O Train”: A Late Train operating during Off-Peak Commuter Periods with an Adjusted Arrival Time of at least five minutes but less than 10 minutes after its Scheduled Arrival Time.

“L2P Train”: A Late Train operating during Peak Commuter Periods with an Adjusted Arrival Time of at least 10 minutes but less than 20 minutes after its Scheduled Arrival Time.

“L2O Train”: A Late Train running operating during Off-Peak Commuter Periods with an Adjusted Arrival Time of at least 10 minutes but less than 20 minutes after its Scheduled Arrival Time.

“L3P Train”: A Late Train operating during Peak Commuter Periods with an Adjusted Arrival Time of at least 20 minutes but less than 40 minutes after its Scheduled Arrival Time.

“L3O Train”: A Late Train operating during Off-Peak Commuter Periods with an Adjusted Arrival Time of at least 20 minutes but less than 40 minutes after its Scheduled Arrival Time.

- (b) Each Terminated Train (as determined in accordance with Section 1.1 (On Time Performance) of this **Schedule 6.1** (Performance Evaluation)) shall be categorized as a T1P Train, a T1O Train, a T2P Train or a T2O Train as follows:

“T1P Train”: A Terminated Train (as defined in **Schedule 1** (Definitions)) operating during Peak Commuter Periods that is not terminated due to insufficient fuel.

“T1O Train”: A Terminated Train (as defined in **Schedule 1** (Definitions)) operating during Off-Peak Commuter Periods that is not terminated due to insufficient fuel.

“T2P Train”: A Terminated Train (as defined in **Schedule 1** (Definitions)) operating during Peak Commuter Periods that is terminated due to insufficient fuel.

“T2O Train”: A Terminated Train (as defined in **Schedule 1** (Definitions)) operating during Off-Peak Commuter Periods that is terminated due to insufficient fuel.

- (c) Each Canceled Train (as determined in accordance with Section 1.1 (On Time Performance) of this **Schedule 6.1** (Performance Evaluation)) shall be categorized as a CP Train or a CO Train as follows:

“CP Train”: A Canceled Train (as defined in **Schedule 1** (Definitions)) scheduled during Peak Commuter Periods.

“CO Train”: A Canceled Train (as defined in **Schedule 1** (Definitions)) scheduled during Off-Peak Commuter Periods.

2. (a) The Performance Failure Payment shall be based on all Late, Terminated and Canceled Trains operated or scheduled for the applicable month calculated as follows:

[(Number of L1P Trains x L1P Fee) + (Number of L1O Trains x L1O Fee) + (Number of L2P Trains x L2P Fee) + (Number of L2O Trains x L2O Fee) +(Number of L3P Trains x L3P Fee) + (Number of L3O Trains x L3O Fee) + (Number of T1P Trains x T1P Fee) + (Number of T1O Trains x T1O Fee) + (Number of T2P Trains x T2P Fee) + (Number of T2O Trains x T2O Fee) + (Number of CP Trains x CP Fee) + (Number of CO Trains x CO Fee)] x OTP Factor = OTP Performance Failure Payment

(b) Where:

L1P Fee	=	\$500 <sup>1</sup>
L1O Fee	=	\$250 <sup>1</sup>
L2P Fee	=	\$1,000 <sup>1</sup>
L2O Fee	=	\$500 <sup>1</sup>
L3P Fee	=	\$1,500 <sup>1</sup>
L3O Fee	=	\$750 <sup>1</sup>
T1P Fee	=	\$5,000 <sup>1</sup>
T1O Fee	=	\$2,500 <sup>1</sup>
T2P Fee	=	\$10,000 <sup>1</sup>
T2O Fee	=	\$5,000 <sup>1</sup>
CP Fee	=	\$5,000 <sup>1</sup>
CO Fee	=	\$2,500 <sup>1</sup>

And where

<b>OTP Factor<sup>2</sup></b>	
<b>Adjusted Performance<sup>3</sup></b>	<b>OTP Factor</b>
99.00% - 99.99%	60.00%
98.00% - 98.99%	65.00%
97.00% - 97.99%	70.00%
96.00% - 96.99%	75.00%
95.00% - 95.99%	80.00%
94.00% - 94.99%	85.00%
93.00% - 93.99%	90.00%
92.00% - 92.99%	95.00%
Less than 92.00%	100.00%

<sup>1</sup> The amount of the applicable fee will escalate in each Agreement Year, commencing in the first month in Agreement Year 2 and in the first month in each Agreement Year thereafter, at a rate equal to the percentage increase in the Net Annual Fee for the current Agreement Year over the Net Annual Fee for the prior Agreement Year.

<sup>2</sup> The “OTP Factor” used in the OTP Performance Failure Payment calculation is the percentage applicable to “Adjusted Performance” for the month (see Note 3, below). For example, if “Adjusted Performance” for the month is 97.50%, then an “OTP Factor” of 70.00% is applied in calculating the OTP Performance Failure Payment.

<sup>3</sup> “Adjusted Performance” is calculated as the total number of On Time Trains (determined in accordance with **Schedule 6.1**, Section 1.1.4) divided by the total number of scheduled trains in the applicable month.

**APPENDIX 3**  
**CALCULATION OF PERFORMANCE FAILURE PAYMENTS**  
**SEAT AVAILABILITY/CONSIST COMPLIANCE**

Failure to Meet Consist Requirement	\$500 per failure*
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\* The amount of the Performance Failure Payment will escalate in each Agreement Year, commencing in the first month in Agreement Year 2 and in the first month in each Agreement Year thereafter, at a rate equal to the percentage increase in the Net Annual Fee for the current Agreement Year over the Net Annual Fee for the prior Agreement Year.

**APPENDIX 4  
CALCULATION OF PERFORMANCE FAILURE PAYMENTS  
FLEET INSPECTIONS**

<b>Inspection Pass Rate Percentage/Month</b>	<b>Monthly Performance Failure Payment</b>		
	<b>Locomotive*</b>	<b>Coach (CTC)*</b>	<b>Coach (BTC)*</b>
100.0%	\$0	\$0	\$0
95.0% - 99.9%	\$7,500	\$7,500	\$6,750
90.0% - 94.9%	\$15,000	\$15,000	\$13,500
85.0% - 89.9%	\$22,500	\$22,500	\$20,250
80.0% - 84.9%	\$37,500	\$37,500	\$30,375
Below 80.0%	\$100,000	\$100,000	\$90,000

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\* The amount of the monthly Performance Failure Payment in each category (*i.e.*, Locomotive, CTC and BTC) will escalate in each Agreement Year, commencing in the first month of Agreement Year 2 and in the first month of each Agreement Year thereafter, at a rate equal to the percentage increase in the Net Annual Fee for the current Agreement Year over the Net Annual Fee for the prior Agreement Year.

**APPENDIX 5**  
**CALCULATION OF PERFORMANCE FAILURE PAYMENTS**  
**PASSENGER COMFORT AND SERVICE AMENITIES**

<b>Failure</b>	<b>Performance Failure Payment* (per failure)</b>
HVAC	\$2,000
Door System	\$500
Lighting System	\$500
Toilet System	\$750
Vehicle Cleanliness	\$1,000
Communication System	\$500
Train Staffing	\$750
Station Maintenance	\$2,000
Snow and Ice Removal	\$1,000
Fare Collection	\$500

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\* The amount of the Performance Failure Payment in each category (*e.g.*, HVAC, Door System, Lighting System, etc.) will escalate in each Agreement Year, commencing in the first month of Agreement Year 2 and in the first month of each Agreement Year thereafter, at a rate equal to the percentage increase in the Net Annual Fee for the current Agreement Year over the Net Annual Fee for the prior Agreement Year.

**APPENDIX 6  
VEHICLE CLEANLINESS MATRIX**

<b>Passenger Coach Condition*</b>	<b>Points</b>	<b>√</b>	<b>Total</b>
Bathrooms – Litter (as defined below), grime and liquids on floor and surfaces, generally unclean	7		
Bathrooms – odor	7		
Cabin – dust on HVAC grills	1		
Cabin – odor	2		
Floor – dried footprints, dried salt and sand	1		
Interior ledges – dust or grime	1		
Litter – dried gum	2		
Litter – ticket stubs, paper punches, newspaper, other passenger trash	2		
Misc. – bodily fluids	7		
Misc. – dried beverage spills	2		
Misc. – dirty joints, seat pedestals, and other interior crevices	1		
Misc. – food or beverages	2		
Seats – spilled liquids and grime	2		
Seats – torn or damaged over 12 in.	2		
Seats – torn or damaged under 12 in. (can temporarily use fabric tape)	2		
Vandalism and graffiti – paint, ink, and other removable substances	2		
Vandalism and graffiti – window and panel etchings	2		
Vandalism and graffiti – offensive (must be removed immediately)	7		
Vertical Surfaces – torn advertisements, damaged notices, old flyers	2		
Vertical Surfaces – unauthorized posters, signs, stickers	2		
Windows – dust or grime	2		
Windows – hair or hand prints	2		

Total\*

\* A failure shall exist, for purposes of imposing a Performance Failure Payment, if the Total is seven points or more.

**APPENDIX 7  
REMEDIAL PERFORMANCE STANDARDS**

**On Time Performance**

<b>Performance Area</b>	<b>Remedial Performance Level</b>
Adjusted OTP - North Division	92.0%
Adjusted OTP - South Division	92.0%

**Seat Availability/Consist Compliance**

<b>Performance Area</b>	<b>Remedial Performance Level</b>
Seat Availability/Consist Compliance - North Division	94.0% <sup>4</sup>
Seat Availability/Consist Compliance - South Division	94.0% <sup>1</sup>

**Fleet Maintenance**

<b>Performance Area</b>	<b>Remedial Performance Level</b>
Inspection Pass Rate - Locomotive	80.0%
Inspection Pass Rate - CTC	80.0%
Inspection Pass Rate - BTC	80.0%

**Train Staffing**

<b>Performance Area</b>	<b>Remedial Performance Level</b>
Train Staffing - North Division	99.0% <sup>5</sup>
Train Staffing - South Division	99.0% <sup>2</sup>

**Passenger Comfort and Service Amenities  
(excluding Train Staffing)**

<b>Performance Area</b>	<b>Remedial Performance Level</b>
Total Monthly Performance Failures	99 Failures

<sup>4</sup> Calculated based on the number of trains operated meeting the mandated consist requirements in the Reporting Period divided by the total number of trains operated in the Reporting Period.

<sup>5</sup> Calculated based on the number of trains operated with the mandated staffing requirements in the Reporting Period divided by the total number of trains operated in the Reporting Period.

**APPENDIX 8  
FLEET INSPECTION PROCEDURES**

**Steps/Example for Calculating Monthly Sample Size**

**Table 1 - Anticipated Number of 92-Day and 184-Day Maintenance Inspections by Operator**

Fleet Type	Fleet Size (for illustrative purposes only; subject to change)	Number of 92-day Inspections per Agreement Year	Number of 184-Day Inspections per Agreement Year	Total Number of Inspections per Agreement Year	Average Number of Inspections per Month
	(a)	(b = a x 4) Locomotive & CTC	(c = a x 2) BTC	(d = b + c)	(e = d / 12)
Locomotives	80	320		320	27
CTCs	110	440		440	37
BTCs	300		600	600	50
				<b>1360</b>	<b>114</b>

**Table 2 - Monthly Sample Population Size for MBTA Inspections**

Fleet Type	Number of Actual 92 Day Inspections in Month	Number of Actual 184-Day Inspections in Month	Total Number of Inspections in Month	MBTA Inspection Sample Population for Month
Locomotives	27		27	Confidence level: 99% Confidence interval: 10 Population: 114 <b>68</b>
CTCs	37		37	
BTCs		50	50	
			<b>114</b>	

*Step 1* → *Step 2*

<i>Step 3</i>	Total Number of Inspections in Month	Percent of Inspections by Fleet Type	MBTA Inspection Sample Apportioned by Fleet
Locomotives	27	24%	<b>16</b>
CTCs	37	32%	<b>22</b>
BTCs	50	44%	<b>30</b>
	<b>114</b>	<b>100%</b>	<b>68</b>

**Steps:**

- Step 1.** Determine how many total 92-Day and 184-Day Maintenance Inspections were actually performed by the Operator during the applicable month. In this example, there were 114 total maintenance inspections performed.
- Step 2.** Calculate the MBTA sample size based on confidence level of 99%, confidence interval of 10, and a population equal to the total number of actual maintenance inspections performed by the Operator during the month. In this example (population of 114), the resulting sample size is 68.
- Step 3.** The MBTA will apportion the sample size among the fleet by type (*i.e.*, locomotive, CTC, BTC) based on the percentage of actual maintenance inspections performed for each fleet type during the month. In this example, the MBTA sample would be 16 locomotives, 22 CTCs, and 30 BTCs.

**Note:** The number of vehicles per fleet type are for illustrative purposes only. The number of inspections, the inspection sample population, the apportionment by fleet type and other factors will be based on the actual fleet size and number of Operator inspections in each month, and may vary from month to month.

Sample size calculator: <http://www.surveysystem.com/sscalc.htm>.

**SCHEDULE 7  
PAYMENTS**

SCHEDULE 7.1 Fees

SCHEDULE 7.2 Miscellaneous Payment Provisions

**SCHEDULE 7.1  
FEES**

**1. MONTHLY FEE**

From the Agreement Services Commencement Date to the Termination Date, in consideration for the Operator providing the Agreement Services, the MBTA shall pay to the Operator a Monthly Fee as calculated below.

1.1 Each Monthly Fee shall be an amount equal to:

1.1.1 The Fixed Fee for the applicable Reporting Period, determined in accordance with the provisions of Section 2 (Fixed Fee) of this **Schedule 7.1** (Fees), minus

1.1.2 Performance Failure Payments, Special Assessments and Compliance Holdbacks, if any, due from the Operator, calculated in accordance with the provisions of **Schedule 6.1** (Performance Evaluation), Section 6.1, and any adjustments made pursuant to Section 6 (Damage to and Replacement of Commuter Rail Property) of this Schedule 7.1 (Fees).

**2. FIXED FEE**

The Fixed Fee payable in respect of any Reporting Period shall be equal to one-twelfth of the Net Annual Fee set forth below.

Agreement Year Commencing	Annual Fee	Less Allowance for Snow Operations	Less Allowance for MBTA Capital Support	Less Allowance for Maintenance of Unused Right Of Way	Less Allowance for IT Operations and Maintenance Costs	Equals Net Annual Fee
July 1, 2014	\$304,166,672	\$1,200,000	\$3,960,000	\$120,000	\$7,000,000	\$291,886,672
July 1, 2015	\$319,710,720	\$1,200,000	\$3,960,000	\$120,000	\$7,000,000	\$307,430,720
July 1, 2016	\$327,023,193	\$1,200,000	\$3,960,000	\$120,000	\$7,000,000	\$314,743,193
July 1, 2017	\$332,762,677	\$1,200,000	\$3,960,000	\$120,000	\$7,000,000	\$320,482,677
July 1, 2018	\$339,577,228	\$1,200,000	\$3,960,000	\$120,000	\$7,000,000	\$327,297,228
July 1, 2019	\$347,409,031	\$1,200,000	\$3,960,000	\$120,000	\$7,000,000	\$335,129,031
July 1, 2020	\$354,179,369	\$1,200,000	\$3,960,000	\$120,000	\$7,000,000	\$341,899,369
July 1, 2021	\$361,515,404	\$1,200,000	\$3,960,000	\$120,000	\$7,000,000	\$349,235,404

2.1 The Annual Fee may be adjusted, in accordance with the provisions of **Schedule 8** (Changes).

2.2 The Annual Fee may be adjusted in accordance with the provisions of **Schedule 7.2** (Miscellaneous Payment Provisions), Section 2.1.

2.3 The Net Annual Fee shall be adjusted if the Agreement is extended in accordance with the provisions of **Schedule 16** (Extension of Term), for each Agreement Year of the

extended Term as follows: the Net Annual Fee for Agreement Year 8 will be escalated, based on the Blended Inflation Rate.

### 3. ADJUSTMENT PAYMENTS

#### 3.1 Allowances

3.1.1 The Operator shall invoice the MBTA, not later than the second Reporting Period following the date in which the Operator incurred any costs for Snow Operations, MBTA Capital Support, Maintenance of Unused Right of Way, or IT Operations and Maintenance Costs (each, an “**Allowance Item**”), including in such invoice the following information and attaching to such invoice all Subcontractor invoices and other documentation of the costs incurred, as the MBTA shall reasonably require.

<b>Allowance Item</b>	<b>Annual Allowance Amount</b>	<b>Amount Paid by MBTA to Date in Agreement Year<sup>1</sup></b>	<b>Amount Invoiced to Date in Agreement Year</b>	<b>Available Balance</b>	<b>Amount Included in Invoice</b>
Snow Operations <sup>2</sup>	\$1,200,000				
MBTA Capital Support <sup>3</sup>	\$3,960,000				
Maintenance of Unused Right of Way <sup>4</sup>	\$120,000				
IT Operations and Maintenance Costs <sup>5</sup>	\$7,000,000				

#### 3.2 Special Trains

The Operator shall provide the following information to the MBTA no later than the first Reporting Period after the end of each Agreement Year. If the number of Special Trains operated by the Operator in any Agreement Year exceeds 60, the MBTA shall pay the Operator the amount specified for a Special Train in the FFP Form, for each Special Train in excess of 60 operated by the Operator in such Agreement Year. If the number of Special Trains operated by

<sup>1</sup> Any amount incurred by the Operator in excess of the Annual Allowance shall be invoiced as Supplemental Work in accordance with Section 5 of this **Schedule 7.1** (Fees) below and **Schedule 9** (Supplemental Work).

<sup>2</sup> Includes the costs of contractors (plowing), materials (sand/salt), and related overtime.

<sup>3</sup> Costs to be included shall be agreed to by the Parties prior to commencing the required services in accordance with **Schedule 9** (Supplemental Work).

<sup>4</sup> Includes, generally, the costs of brush and tree cutting, trash and debris removal and fencing as needed.

<sup>5</sup> See Section 1.2 (Operator Responsibility for Costs of Commuter Rail IT Environment) of **Schedule 3.16** (Information Technology Requirements) for additional information regarding the IT Operations and Maintenance Costs.

the Operator in any Agreement Year is less than 60, the Operator shall pay the MBTA the amount specified for a Special Train in the FFP Form, for each Special Train less than 60 operated by the Operator in such Agreement Year.

<b>Special Trains Operated during Agreement Year (Date and No.)</b>	<b>Cost Per Train (Per FFP Form)</b>	<b>Amount Included in Invoice</b>	<b>Amount to be Paid to MBTA</b>	<b>Amount to be Paid to Operator</b>
[1-59]	\$	\$0	\$	N/A
[60]	\$	\$0	-	-
[61 + ]	\$	\$	N/A	\$

### 3.3 Utilities

The MBTA shall pay the Operator, or the Operator shall pay the MBTA, as applicable, any amounts owing with respect to the costs of Utilities in each Agreement Year, no later than the third Reporting Period in the subsequent Agreement Year, in accordance with the provisions of **Schedule 7.2** (Miscellaneous Payment Provisions), Section 2 (Utilities).

## 4. PERFORMANCE FAILURE PAYMENTS AND SPECIAL ASSESSMENTS

The MBTA shall calculate the Performance Failure Payments and Special Assessments due from the Operator, if any, for the Reporting Period in accordance with **Schedule 6.1** (Performance Evaluation), Section 6.1 and shall subtract the total amount of such Performance Failure Payments and Special Assessments from the Fixed Fee in calculating the Monthly Fee due to the Operator. The MBTA shall not decrease the Monthly Fee by the amount of any Performance Failure Payments or Special Assessments until the fourth Reporting Period of the first Agreement Year.

## 5. SUPPLEMENTAL WORK

The MBTA shall, in addition to the Monthly Fee, pay to the Operator the fees and costs agreed to by the Parties for Supplemental Work in accordance with **Schedule 9** (Supplemental Work).

5.1 Any amount incurred by the Operator in an Agreement Year for an Allowance Item that is in excess of the applicable Annual Allowance shall be treated as Supplemental Work in accordance with the provisions of this Agreement and shall be calculated in accordance with the provisions of **Schedule 9** (Supplemental Work), and invoiced as agreed to by the Parties at the time of authorization of the Supplemental Work.

## 6. DAMAGE TO AND REPLACEMENT OF COMMUTER RAIL PROPERTY

The MBTA may deduct from the Monthly Fee, or may separately invoice the Operator, in the sole discretion of the MBTA, for the Operator's share of the cost of any repair work pursuant to **Schedule 4.1** (Obligations Concerning Commuter Rail Property), Sections 7.2 and 8.3.3.

7. **TERMINATION COSTS**

The Operator shall invoice the MBTA for any Termination Costs in accordance with the provisions of **Schedule 12.3** (Events of Default and Termination Events), Section 3 (Termination Events).

**SCHEDULE 7.2**  
**MISCELLANEOUS PAYMENT PROVISIONS**

**1. PREPARATION OF INVOICES AND PAYMENT**

1.1 The Operator shall submit invoices for the Agreement Services as follows:

1.1.1 On or after the first day of each month, the Operator shall submit an invoice (the “**Initial Monthly Invoice**”) for the performance of the Agreement Services during the immediately preceding month equal to 80% of the Fixed Fee due for such immediately preceding month, in accordance with Section 2 (Fixed Fee) of **Schedule 7.1** (Fees).

1.1.2 No later than the 10th day of each month, the Operator shall submit an invoice (the “**Final Monthly Invoice**”) (ODRL 13-002) for the performance of the Agreement Services during the immediately preceding month equal to the balance of the Fixed Fee due for such immediately preceding month not included in the Initial Monthly Invoice. In addition to the information required by **Schedule 7.1** (Fees), the Final Monthly Invoice shall include:

1.1.2.1 the Operator’s calculation of any Performance Failure Payments to be assessed for the invoiced month, along with the corresponding data (ODRL 7-001) pursuant to **Schedule 6.1** (Performance Evaluation) of this Agreement; and

1.1.2.2 the amount then due the Operator for any Supplemental Work and Allowances, if any, together with all required documentation as set forth below.

1.2 The Operator shall certify each invoice, in writing, to the effect that the information provided is factually accurate and verifiable.

1.3 Each Final Monthly Invoice shall be submitted in a clearly organized format accompanied by a table of contents and divider separating each clearly identified section along with supporting documentation at the back of the document.

1.4 The MBTA shall pay:

1.4.1 the Initial Monthly Invoice by the fifth Business Day following the day of receipt of such Initial Monthly Invoice; and

1.4.2 the Final Monthly Invoice by the 15th Business Day following receipt of the complete Final Monthly Invoice, except as provided herein.

1.5 The MBTA shall provide the Operator a detailed statement that reconciles the amount invoiced and the amount paid, no later than the payment date of the invoice.

- 1.6 In the event the MBTA does not agree with any item in an invoice submitted by the Operator, it shall promptly notify the Operator of the item with which it disagrees, along with a statement of the reason for its disagreement and its view as to the correct amount payable. Such notification shall occur as soon as reasonably practicable but in no event later than eight days after the day that the item came to the attention of the MBTA. The Operator shall immediately revise any invoice to correct errors identified by the MBTA.
- 1.7 The Parties shall promptly confer on any other items in an invoice to which the MBTA has taken exception. In the event the Parties are unable to reach agreement, the MBTA shall pay the undisputed portion of the invoice, but may withhold from the payment of the Final Monthly Invoice for the following month, the amount that the MBTA asserts is in excess of the amount that should have been paid in the prior month. Any amount withheld that is later determined to be due to the Operator shall bear interest at the Prime Rate as quoted in the "Money Rates" section of *The Wall Street Journal* in effect as of the 15<sup>th</sup> Business Day following the date of submission of the Final Monthly Invoice in question (but not to exceed 10% per annum), from the date of withholding of the payment to the date of payment. The MBTA shall not pay interest on withheld payments if the withholding resulted from the Operator's failure to provide sufficient documentation or invoices in accordance with the provisions of **Schedule 7** (Payments).
- 1.8 In the event the Operator does not agree with any item in a monthly payment made by the MBTA, it shall promptly notify the MBTA of the item with which it disagrees, along with a statement of the reason for its disagreement. The Parties shall meet promptly thereafter to attempt to resolve such disagreement.
- 1.9 The MBTA may withhold payment of a Final Monthly Invoice, in whole or in part, in the discretion of the MBTA, if any required report due from the Operator in accordance with this Agreement has not been submitted by the 10th day after the end of the Reporting Period in which it was due.
- 1.9.1 The MBTA shall notify the Operator of any missing report by the 20th day after the end of the Reporting Period in which it was due.
- 1.9.2 Subject to applicable Service Credits, following receipt by the MBTA of any missing report, the MBTA shall pay the amount withheld within 10 Business Days.
- 1.10 The MBTA shall withhold from the Initial Monthly Invoice or the Final Monthly Invoice, or both, as determined by the MBTA in its sole discretion, for the last Reporting Period prior to the Termination Date an amount which the MBTA believes, in good faith, to be sufficient to address any potential overpayments or payments due to the MBTA from the Operator that need to be reconciled in connection with the close-out of this Agreement. At the Termination Date, the Operator shall submit to the MBTA a final invoice setting forth the information required under **Schedule 7.1** (Fees), together with any other financial or accounting information needed for Agreement close-out. The MBTA shall pay all amounts in such invoice not in dispute within 30 days after the date of receipt of such invoice. The Parties shall meet promptly to attempt to resolve any remaining

disputed costs or charges or other outstanding issues. Any amount withheld that is later determined to be due to the Operator shall bear interest at the rate described in Section 1.4 from the date of withholding to the date of payment. The MBTA shall not pay interest on withheld payments if the withholding resulted from the Operator’s failure to provide sufficient documentation.

1.11 In the event of a failure to reach agreement on a disputed invoice or payment described in this Section 1 (Preparation of Invoices and Payment) of this Schedule 7.2 (Miscellaneous Payment Provisions), either Party may submit the matter to dispute resolution under **Schedule 11** (Settlement of Disputes).

**2. UTILITIES**

2.1 In the case of water, sewer, natural gas and electricity costs, the Operator shall pay such costs for each Agreement Year. If, during the Term of this Agreement, the actual average annual unit cost paid by the Operator (as shown on the respective bills) of any such utilities for any Agreement Year increases or decreases by more than the Utility Unit Cost Threshold:

- (a) The MBTA shall pay to the Operator an amount equal to the increase in the Operator’s actual utility costs resulting from that portion of the increase in the actual average unit cost that is in excess of the Utility Unit Cost Threshold (the “**Eligible Increase**”); and
- (b) The Operator shall pay to the MBTA an amount equal to the decrease in the Operator’s actual utility costs resulting from that portion of the decrease in the actual average unit cost that is in excess of the Utility Unit Cost Threshold (the “**Eligible Decrease**”).

2.1.1 The Utility Unit Cost Threshold is based on the table below. For any Agreement Year, the actual average annual unit cost for a utility (as shown on the respective bills) is compared to the actual average unit cost incurred during the MBTA’s Fiscal Year 2014 (for the billing period between July 1, 2013 and June 30, 2014). The Fiscal Year 2014 actual average unit costs for water, sewer, natural gas and electricity will be made available to the Operator as soon as they are available after the close of the fiscal year.

Agreement Year	Utility Unit Cost Threshold
FY 2014 (Base Year)	N/A
Agreement Year 1	7.50%
Agreement Year 2	15.00%
Agreement Year 3	22.50%
Agreement Year 4	30.00%
Agreement Year 5	37.50%
Agreement Year 6	45.00%

Agreement Year 7	52.50%
Agreement Year 8	60.00%
Agreement Year 9	67.50%
Agreement Year 10	75.00%
Agreement Year 11	82.50%
Agreement Year 12	90.00%

2.1.2 The amounts to be paid to the MBTA or the Operator, as applicable, pursuant to Section 2.1(a) and 2.1(b) of this Schedule 7.2 (Miscellaneous Payment Provisions), respectively, shall be calculated by multiplying the Eligible Increase, or the Eligible Decrease, as applicable, by the actual number of units consumed by the Operator in the performance of the Agreement Services in the applicable Agreement Year.

An example of the application of Section 2.1 of this Schedule 7.2 (Miscellaneous Payment Provisions) is shown below. For this example, the Fiscal Year 2014 actual average unit cost for electricity is assumed to be \$0.1200 per kWh, and actual costs for only Agreement Years 1 through 5 are shown. For illustrative purposes, the Utility Unit Cost Threshold is only exceeded in Years 2 and 5. The annual reconciliation calculation is explained below.

Agreement Year	Utility Unit Cost Threshold (compared to FY 2014)	Unit Cost Threshold Amount \$/kWh	Actual Annual Costs/Consumption			Actual Avg. Unit Cost \$/kWh (e = c / d)	Actual Unit Cost > Threshold \$/kWh (f = e - d)	Annual Consumption (Units) kWh (g = d)	Annual Utility Cost Price Adjust. \$ (h = f x g)
			Annual Utility Cost \$	Annual Consumption kWh	Actual Avg. Unit Cost \$/kWh				
FY 2014	N/A	\$0.1200	\$7,800,000	65,000,000	\$0.1200				
Year 1	7.50%	\$0.1290	\$8,125,000	64,800,000	\$0.1254	N/A			
Year 2	15.00%	\$0.1380	\$9,300,000	65,100,000	\$0.1429	\$0.0049	65,100,000	\$316,200	
Year 3	22.50%	\$0.1470	\$9,400,000	66,500,000	\$0.1414	N/A			
Year 4	30.00%	\$0.1560	\$9,750,000	65,700,000	\$0.1484	N/A			
Year 5	37.50%	\$0.1650	\$11,050,000	65,200,000	\$0.1695	\$0.0045	65,200,000	\$292,000	

**Annual Reconciliation Calculation:**

Step 1: Calculate the Unit Cost Threshold Amount for each Agreement Year, based on the FY 2014 Average Unit Cost and the Utility Unit Cost Threshold percentages. For example, for Year 2, the Unit Cost Threshold Amount is 15.00% greater than the FY 2014 actual unit cost, and is calculated as  $\$0.1200 \times 1.150 = \$0.1380$ . (If the Actual Average Unit Cost for electricity in Year 2 is greater than the  $\$0.1380$  Unit Cost Threshold Amount in Year 2, then a year-end cost adjustment will be calculated.)

Step 2: At the end of each Agreement Year, calculate the Actual Average Unit Cost for each utility, by taking the total Annual Utility Cost and dividing this by total Annual Consumption (for all accounts, based on billings). For example, in Year 2 the Actual Average Unit Cost is  $\$9,300,000 / 65,100,000 \text{ kWh} = \$0.1429$  per kWh.

Step 3: Determine if the Actual Average Unit Cost exceeds the Unit Cost Threshold Amount. For example, in Year 2 the Actual Average Unit Cost of  $\$0.1429$  per kWh exceeds the Unit Cost Threshold Amount of  $\$0.1380$  per kWh. The variance (an “eligible increase” in this case), is  $\$0.0049$ .

Step 4: Calculate the Annual Utility Cost Price Adjustment, for any year that there is an “eligible increase” or an “eligible decrease.” For example, in Year 2 the adjustment amount is calculated as  $\$0.0049$  per kWh  $\times$  65,100,000 kWh (annual consumption) to equal  $\$316,200$ . In this example, the MBTA would pay the Operator  $\$316,200$  at the end of Agreement Year 2.

2.2 The MBTA has negotiated favorable electricity rates and shall invoice the Operator for its electricity usage associated with the performance of the Agreement Services. In the event that the Operator determines that it can secure more favorable rates than those charged to the MBTA, the Operator may, after receiving MBTA approval, transfer utility service from the MBTA accounts to its own accounts and pay such charges directly. The MBTA will provide the Operator a copy of contracts, rates, bills, spot market and associated information to allow the Operator to determine whether more favorable rates may be secured or conservation measures can be implemented. The MBTA may reasonably require the Operator to enter into a Non-Disclosure Agreement prior to disclosing such information.

### 3. **OVERPAYMENT**

- 3.1 If the MBTA determines that an overpayment to the Operator was made, the MBTA shall notify the Operator of such overpayment. Any such overpayment amount shall, at the MBTA's election, be repaid to the MBTA upon demand, or deducted by the MBTA from future Monthly Fee payments, with interest at the rate described in Section 1.7 of this Schedule 7.2 (Miscellaneous Payment Provisions) from the date the overpayment occurred until the date of repayment.
- 3.2 In the event that a determination of overpayment is made after the Termination Date, an equitable adjustment shall be made and the Operator shall promptly refund any such overpayment amount to the MBTA, with interest at the rate described in Section 1.7 of this Schedule 7.2 (Miscellaneous Payment Provisions).
- 3.3 If any amount withheld by the MBTA pursuant to Section 4.1 of this Schedule 7.2 (Miscellaneous Payment Provisions) is later determined to be due to the Operator, such withheld payment shall bear interest at the rate described in Section 1.7 of this Schedule 7.2 (Miscellaneous Payment Provisions), from the date of withholding to the date of payment.
- 3.4 In the event the Parties are unable to reach agreement with respect to any dispute arising in connection with the audit or inspection of invoices or Records, either Party may invoke the dispute resolution procedures specified in **Schedule 11** (Settlement of Disputes).

### 4. **WAIVER**

- 4.1 The Operator hereby waives any claims for reimbursement for expenses incurred during an Agreement Year and not submitted to the MBTA within 90 days after the close of such Agreement Year.

**SCHEDULE 8  
CHANGES**

Schedule 8.1:	Changes
Schedule 8.2:	Implementation of Change
Schedule 8.3:	Certified Cost Information
Schedule 8.4	Services Fee Adjustment
	Appendix 1: Incentivizing Long-Term Investment
	Appendix 2: Services Fee Adjustment Form
	Appendix 3: Fleet Services Change Procedure

## SCHEDULE 8.1 CHANGES

### 1. PURPOSE

The Parties shall cooperate during the Term to implement Changes in order to continue to deliver the Agreement Services in a cost-effective, reliable and competent manner. Changes shall be implemented in accordance with the provisions of this **Schedule 8** (Changes).

### 2. SERVICE CHANGE NOTICE

2.1 The MBTA may, at any time during the Term direct the Operator to implement a Service Change.

2.1.1 The MBTA shall notify the Operator in writing of a Service Change (each, a “**Service Change Notice**”) and shall describe the Service Change in reasonable detail, including the date on which the Service Change shall commence (the “**Implementation Date**”). A Service Change may add to, augment or modify, or reduce the Agreement Services to be provided by the Operator under this Agreement.

2.1.1.1 In the case of a Service Change Notice relating to a Fleet Service Change, the Service Change Notice may specify any additional items that will be required to be submitted by the Operator in connection with the proposed Fleet Service Change, including the submission of updated maintenance plans, and any anticipated changes to the provisions of the Operating Agreement to reflect such Change.

2.1.2 Unless the MBTA determines that safety or budgetary constraints require a shorter notice, the MBTA shall provide the Operator with a Service Change Notice at least sixty (60) days prior to the applicable Implementation Date.

2.2 The Operator shall provide the MBTA with the following information within fifteen (15) days of its receipt of a Service Change Notice:

2.2.1 A written statement as to the anticipated impact of the Service Change on the performance of the Agreement Services, including a detailed description of any changes to this Agreement and the Annual Fee (if any), that the Operator reasonably considers necessary to implement the Service Change.

2.2.2 An auditable, itemized listing of those cost items that must be adjusted (both increases and decreases) to reflect the implementation of the Service Change, in accordance with **Schedule 8.4** (Services Fee Adjustment).

2.3 Notwithstanding the pendency of any negotiations or dispute resolution procedures, the Operator shall implement the Service Change and perform (or cease to perform) the activities set out in the Service Change pursuant to the schedule established by the

MBTA in the Service Change Notice, and the Operator shall be compensated in accordance with the provisions of **Schedule 8.2** (Implementation of Change).

### 3. **IMPROVEMENT PROPOSAL**

- 3.1 The Operator may submit Improvement Proposals in relation to the delivery of the Agreement Services. Without limiting the foregoing, Appendix 1 (Incentivizing Long-Term Investment) to this **Schedule 8** (Changes) sets out the MBTA's guidance on how it approaches incentivizing long term investment.
- 3.2 Improvement Proposals shall be in writing (each, an "**Improvement Proposal Notice**") and include: (i) a description of the proposed amendments to the Agreement Services and this Agreement; (ii) an itemized list of the financial benefits resulting from the Service Change based on the applicable Improvement Plan; (iii) a proposed timeline for those activities resulting from a Service Change based on the applicable Implementation Plan; and (iv) all other detail that the MBTA may request before or after its receipt of an Improvement Proposal Notice. Improvement Proposals shall be supported by such feasibility studies and implementation plans as the MBTA and the Operator consider necessary.
- 3.3 The Parties shall act in a reasonable and timely manner in reviewing the Improvement Proposal Notice. Adoption of any Improvement Proposal shall be at the MBTA's sole discretion.
- 3.4 Implementation (in whole or in part) of any Improvement Proposal accepted by the MBTA shall be effected by the MBTA's delivery of a Service Change Notice to the Operator in accordance with Section 2.1 of this **Schedule 8.1** (Changes).
- 3.5 Any Services Fee Adjustment resulting from the MBTA's acceptance and implementation of an Improvement Proposal shall be made in accordance with **Schedule 8.2** (Implementation of Change), provided, that, any cost savings resulting from an Improvement Proposal shall be reflected in such Services Fee Adjustment by allocating 60% of such cost savings to the MBTA and 40% of such cost savings to the Operator.

### 4. **CHANGE IN LAW NOTICE**

- 4.1 Subject to Section 22.3 (Laws to be Observed; Change in Law) of **Part 1**, either Party shall notify the other Party in writing of a proposed or actual implementation of a Change in Law (each, a "**Change in Law Notice**") and shall describe the proposed Change in Law in reasonable detail, including the date on which the Change in Law has become effective, or the date on which it is proposed to become effective. In addition, each Change in Law Notice shall also:
- 4.1.1 Detail the anticipated impact of the Change in Law on the performance of the Services, including a detailed description of any changes to this Agreement and the Annual Fee (if any), that the notifying Party reasonably considers necessary to implement the Change in Law; and

- 4.1.2 Include an auditable, itemized listing of those cost items that must be adjusted (both increases and decreases) to reflect the implementation of such Change in Law, in accordance with **Schedule 8.4** (Services Fee Adjustment).
- 4.2 Notwithstanding the pendency of any negotiations or dispute resolution procedures, the Operator shall perform the Services in accordance with the Change in Law and the schedule developed by the Operator and accepted by the MBTA. Any adjustment to the Annual Fee as a result of the Change in Law shall be made in accordance with **Schedule 8.2** (Implementation of Change).
- 4.3 In the event that a Change in Law impacts fees agreed upon between the Parties relating to Supplemental Work, the Parties shall negotiate in good faith to address any adjustments necessary to the agreed-upon fees due to the Change in Law.

**SCHEDULE 8.2  
IMPLEMENTATION OF CHANGE**

**1. IMPLEMENTATION OF A CHANGE**

- 1.1 Any Change that impacts the Annual Fee in excess of the Baseline Change Amount (as defined below), shall result in an adjustment to the Annual Fee (and corresponding change to the Net Annual Fee) specified for each Agreement Year in **Schedule 7.1** (Fees) as determined in accordance with **Schedule 8.4** (Services Fee Adjustment) (each, a “**Services Fee Adjustment**”).
- 1.2 Where a Services Fee Adjustment is required, an Estimated Services Fee Adjustment shall be determined in accordance with **Schedule 8.4** (Services Fee Adjustment):
- 1.2.1 where it is reasonably practicable to do so, at least thirty (30) days' prior to the effective date of the Change (which, in the case of a Service Change, is the Implementation Date); or
- 1.2.2 as soon as reasonably practicable thereafter.
- 1.3 The Services Fee Adjustment shall be effective as of the effective date of the Change (which, in the case of a Service Change, is the Implementation Date) or the date of the last Change pursuant to Section 2.1 of this **Schedule 8.2** (Implementation of Change) (as the case may be).
- 1.4 If the MBTA determines that a Service Change shall be effective on less than sixty (60) days' notice as provided in **Schedule 8.1** (Changes), Section 2 (Service Change Notice) and Section 3 (Notices) of this **Schedule 8.2** (Implementation of Change), the MBTA may stipulate before the date on which the MBTA approves an Estimated Services Fee Adjustment with respect to such Service Change, that the Annual Fee shall be adjusted for a limited period of time only, until such time as the MBTA approves an Estimated Services Fee Adjustment in accordance with the provisions of **Schedule 8.4** (Services Fee Adjustment), Section 1.2.
- 1.5 If the MBTA determines that it is appropriate or necessary to make an adjustment to the Annual Fee in accordance with Section 1.4 of this **Schedule 8.2** (Implementation of Change), the Annual Fee may be adjusted based on the MBTA's reasonable estimate of the change required to the Annual Fee as a result of the Change, taking into account information available to the MBTA at the time of determination, and the Annual Fee, as so adjusted, shall be paid in accordance with **Schedule 7** (Payments) until an Estimated Services Fee Adjustment with respect to such Change has been made.

**2. APPLICATION OF THE BASELINE CHANGE AMOUNT**

- 2.1 The term "**Baseline Change Amount**" means any individual Change that would result in a modification to the Annual Fee of less than five thousand dollars (\$5,000). The Parties acknowledge and agree that Services Fee Adjustments shall not apply to any Change that the MBTA reasonably believes would not exceed the Baseline Change Amount. If, in the

MBTA's reasonable judgment, a particular Change would not exceed the Baseline Change Amount, then the Parties shall negotiate in good faith to determine the value of the applicable Change and the cost difference shall be reflected in the Monthly Fee for the Reporting Period immediately following the Parties' agreement.

### 3. NOTICES

- 3.1 Subject to Section 2.1.2 of **Schedule 8.1** (Changes), the Party providing a Service Change Notice or Change in Law Notice shall use reasonable efforts to provide the applicable required notice at least sixty (60) days before it considers the applicable Change is likely to occur. Notice shall otherwise be provided as soon as reasonably practicable.
- 3.2 Either Party may require that a Services Fee Adjustment be calculated with respect to a Change provided that:
- (a) there is good cause for considering that a Change is likely to exceed the Baseline Change Amount, and
  - (b) the requesting Party notifies the other Party of its requirement within six (6) months of becoming aware, or of when it should have become aware, if earlier, of any such Change.
- 3.3 Unless otherwise agreed between the Parties, the Operator shall not be entitled to a Services Fee Adjustment unless it notifies the MBTA within the timeframe set out in Section 3.2 of this **Schedule 8.2** (Implementation of Change).

**SCHEDULE 8.3  
CERTIFIED COST INFORMATION**

**1. CERTIFIED COST INFORMATION**

Subject to the MBTA's election pursuant to Section 1.4 of Schedule 8.4 (Services Fee Adjustment), a Services Fee Adjustment relating to a Fleet Service Change shall be developed using the Maintenance Cost Schedules (the “MCS”) and the FFP Form and supporting documentation (collectively with the MCS, the “Cost Information”) submitted by the Operator with the Proposal.

- 1.1 The MBTA shall maintain the Cost Information and use all reasonable efforts to ensure that each copy of the Cost Information is at all times kept in a safe and secure environment.
- 1.2 If at any time during the Term any copy of the Cost Information or part thereof has been lost, damaged or destroyed, the MBTA shall be permitted to create a new copy of the Cost Information or part thereof from the other copy maintained by the MBTA, and shall within seven Business Days notify the Operator accordingly and afford it the right to make reasonable inspections in order to satisfy itself that a true and faithful copy has been made.
- 1.3 The MBTA shall have no obligation or responsibility to any Person whatsoever to determine the existence, relevance, completeness, accuracy, effectiveness or any other aspect of the Cost Information or be liable for any loss or damage caused to the Operator arising from any loss of, damage to or destruction of the Cost Information.

**SCHEDULE 8.4**  
**SERVICES FEE ADJUSTMENT**

**1. ADJUSTMENT OF ANNUAL FEE**

Changes that result in a Services Fee Adjustment pursuant to **Schedule 8.2** (Implementation of Change) shall be adjusted to achieve a pass through to the MBTA of the direct, actual costs that the Operator will incur or save as a result of the Change, subject to Section 1.1.1.2 of this **Schedule 8.4** (Services Fee Adjustment).

1.1 In accordance with Sections 2.2.2 and 4.2.2 of **Schedule 8.1** (Changes), the Operator, in the case of a Service Change Notice, or the notifying Party, in the case of a Change in Law Notice (the “**Providing Party**”), shall provide the following information (the “**Fee Adjustment Information**”) to the other Party within fifteen (15) days of receipt of the applicable notice:

1.1.1 an auditable, itemized listing of those cost items that must be adjusted (both increases and decreases) to reflect the implementation of the Change, based on the applicable line items included in the Services Fee Adjustment Form set forth in Appendix 2 (Services Fee Adjustment Form) to this **Schedule 8** (Changes). The Providing Party shall complete each line item of the Services Fee Adjustment Form to the extent necessary to reflect all relevant adjusted cost items, and shall deliver the same, together with an explanation of the assumptions (if any) used in completing such Form, provided that:

1.1.1.1 Fee Adjustment Information may include cost items not reflected in the line items of the Services Fee Adjustment Form, but only if the services to be provided through the Change are new categories or types of services.

1.1.1.2 The amount of Operator profit (whether as an increase or decrease) shall be included in the Services Fee Adjustment Form at 5.0%.

1.2 The Party receiving the Fee Adjustment Information pursuant to Section 1.1 of this **Schedule 8.4** (Services Fee Adjustment) shall notify the Providing Party in writing within ten (10) days of receipt of the same, that it either (i) agrees with such Fee Adjustment Information, or (ii) disagrees with the Fee Adjustment Information (and provides a detailed explanation supporting its disagreement).

1.2.1 If both Parties agree with the Fee Adjustment Information, then the MBTA shall certify the estimated restated amount of the Net Annual Fee for the current Agreement Year (the “**Estimated Services Fee Adjustment**”).

1.2.2 If a Party does not agree with the Fee Adjustment Information, upon receipt of the explanation described in Section 1.2 of this **Schedule 8.4** (Services Fee Adjustment), the Providing Party shall review such explanation, making any adjustments it believes appropriate, and resubmit the Fee Adjustment Information, adjusted as applicable, to the receiving Party.

- 1.2.2.1 If both Parties then agree with the Fee Adjustment Information, then MBTA shall certify the Estimated Services Fee Adjustment.
    - 1.2.2.2 If the Parties do not so agree, the MBTA shall determine the Estimated Services Fee Adjustment, if any.
  - 1.2.3 The Fixed Fee for the first three Reporting Periods during which the Change is in effect shall be adjusted (up or down) by an amount equal to 1/12 of the Estimated Services Fee Adjustment (provided, that if the Change is only in effect for a portion of the first Reporting Period, the adjustment to the Fixed Fee for such Reporting Period shall be pro rated appropriately).
- 1.3 Ninety (90) days following the implementation of the Change, the Operator shall provide to the MBTA a report, including a modified Services Fee Adjustment Form, if necessary, detailing the differences, if any, between the Fee Adjustment Information that resulted in the Estimated Services Fee Adjustment and the actual changes in cost items resulting from the Change (the “**Final Fee Adjustment Information**”).
  - 1.3.1 The MBTA may require that the Final Fee Adjustment Information be audited by the MBTA or a Third Party. If so required by the MBTA, the Parties shall evenly share the cost of any such audit.
  - 1.3.2 If both Parties agree with the Final Fee Adjustment Information, or following completion of the audit described in Section 1.3.1 of this **Schedule 8.4** (Services Fee Adjustment), the MBTA shall certify the final restated amount of the Net Annual Fee for each Agreement Year that the Change is in effect (the “**Final Services Fee Adjustment**”), provided that:
    - 1.3.2.1 If a Change is to be effective for only a portion of an Agreement Year, the amount of the Services Fee Adjustment to be included in the Annual Fee for such Agreement Year shall be pro rated accordingly to reflect only the portion of the Agreement Year for which the Change is in effect.
    - 1.3.2.2 If the Final Services Fee Adjustment differs from the Estimated Services Fee Adjustment, the Fixed Fee due to the Operator in the Reporting Period immediately following the determination of the Final Services Fee Adjustment shall be increased or decreased, as necessary, to appropriately reflect the difference between the Estimated Services Fee Adjustment and the Final Services Fee Adjustment.
    - 1.3.2.3 The escalation factor used in incorporating the Services Fee Adjustment in the Annual Fee in subsequent Agreement Years shall be determined based on the Blended Inflation Rate.
- 1.4 For purposes of this Agreement, each Services Fee Adjustment relating to any Service Change that is due to a change to all or a portion of the Rolling Stock Fleet, whether due

to the introduction of a new fleet or an overhauled fleet, or the removal of a portion of a fleet, or any combination of the foregoing is referred to herein as a **“Fleet Service Change.”** Notwithstanding anything to the contrary in this Agreement, at the time of any Fleet Service Change, the MBTA shall decide, in its sole discretion, whether to determine the Final Services Fee Adjustment on the basis of: (i) the Maintenance Cost Schedules, in accordance with Section 1.4.1 of this Schedule 8.4 (Services Fee Adjustment), or (ii) the Services Fee Adjustment process outlined in Sections 1.1 through 1.3 of this Schedule 8.4 (Services Fee Adjustment). The MBTA shall notify the Operator of the appropriate Services Fee Adjustment process in writing as part of its Service Change Notice, in accordance with Section 2 of Schedule 8.1 (Service Change Notice).

1.4.1 If the MBTA decides to determine the Final Services Fee Adjustment using the Maintenance Cost Schedules pursuant to Section 1.4 of this **Schedule 8.4** (Services Fee Adjustment), the Final Services Fee Adjustment shall be determined based on the unit costs included in the Maintenance Cost Schedules, as applied to the actual number of units included in the Fleet Service Change, and subject to the provisions of Section 1.3.2.1 of this **Schedule 8.4** (Services Fee Adjustment). For an example of the application of this Section 1.4.1 of this **Schedule 8.4** (Services Fee Adjustment) see Appendix 3 (Fleet Service Change Procedure) to this **Schedule 8** (Changes). No other provision of this **Schedule 8.4** (except Section 1.5 of this **Schedule 8.4** (Services Fee Adjustment) below) shall apply to a Fleet Service Change.

1.5 A Final Services Fee Adjustment shall be final and binding on the Parties, except in the case of manifest error and subject to the provisions of **Schedule 11** (Settlement of Disputes).

## APPENDIX 1 TO SCHEDULE 8 INCENTIVIZING LONG-TERM INVESTMENT

This Appendix sets out the MBTA's guidance on how it approaches incentivizing long term investment.

1. The MBTA wishes to encourage the Operator to: (i) improve the efficiency; (ii) reduce the cost; and (iii) enhance the revenue earning potential of the delivery of Commuter Rail Services, during the Term and thereafter.
2. It is recognized however, that the Term may be perceived to be a barrier to undertaking investment or change programs where: (i) the time period for implementation limits the benefit to the MBTA or the Operator, or both; or (ii) the business case for such investment or change has a payback or amortization period longer than the Term.
3. In this context investment or change may be considered to encompass: (i) capital investments undertaken solely by the Operator; (ii) capital investments undertaken in association with others; and (iii) changes in working practices of Operator Personnel.
4. Accordingly, the Operator is encouraged to make proposals for long term investments and capital improvements, and changes to working practices, that seek to achieve the objectives set out in Section 1 of this Appendix 1 (Incentivizing Long-Term Investment) to **Schedule 8** (Changes) for consideration by the MBTA during the Term. If the MBTA elects to adopt any such proposal, it shall issue a Notice of Service Change.
5. In considering the Operator's proposals for any investment or improvement proposed to be undertaken, the MBTA will consider, among other factors: (i) the capital cost and proposed payment schedule; (ii) the life of any capital assets and the duration of the benefits stream arising therefrom; (iii) the remaining Term and the projected payback period; (iv) the benefits associated with undertaking the investment during the Term; (v) a profit element for the Operator for undertaking the project commensurate with the risks of the proposed project; and (vi) any appropriate benefit sharing arrangements.

**APPENDIX 2 TO SCHEDULE 8  
SERVICES FEE ADJUSTMENT FORM**

**Services Fee Adjustment Form**

Service Change Number: Description:	Category	Direct Labor Costs					Non-Labor Costs	Annual Total \$ (12 months)
		Number of Staff ("0" if Not a Direct Labor Cost)	Number of Hours Worked in Year per Staff ("1" if Salary or Lump Cost)	Wage Rate / Salary	Overtime Cost (Including Taxes, Benefits)	Benefits Uplift % for Wages, Excluding Overtime ("0%" if n/a)	Service, Materials, or Utility Cost	
		select	#	#	\$ or \$/hr	\$	%	
Example 1 - a general manager (\$)	Direct Labor	1	1	\$ 100,000.00		30.0%		\$ 130,000
Example 2 - laborers (\$/hour)	Direct Labor	20	2080	\$ 21.93	\$ 100,000	30.0%		\$ 1,285,974
Example 3 - cleaning cost	Service	0	1			0.0%	\$ 1,000,000	\$ 1,000,000

**Admin/HR**

General Manager and Primary Direct Reports								
General Manager	Direct Labor							\$ -
Chief Engineer	Direct Labor							\$ -
Chief Transportation Officer	Direct Labor							\$ -
Customer Service Manager	Direct Labor							\$ -
Chief Mechanical Officer	Direct Labor							\$ -
Director - Finance, Accounting, and Administration	Direct Labor							\$ -
Manager - Safety	Direct Labor							\$ -
Manager - Quality	Direct Labor							\$ -
Legal and Compliance	Direct Labor							\$ -
Other Managers	Direct Labor							\$ -
Accounts/Payroll	Direct Labor							\$ -
IT, Data Analysis & Reporting	Direct Labor							\$ -
Planning and Performance Monitoring/Management	Direct Labor							\$ -
Sales/Marketing/Publicity	Direct Labor							\$ -
Labor Relations / Equal Op & Div	Direct Labor							\$ -
Human Resources and Training & Qualification	Direct Labor							\$ -
Safety and Security	Direct Labor							\$ -
Claims Management	Direct Labor							\$ -
Contracts and Procurement	Direct Labor							\$ -
Environmental Engineering	Direct Labor							\$ -
Materials Management	Direct Labor							\$ -
Accessibility	Direct Labor							\$ -
Clerical Support	Direct Labor							\$ -
Claims and Insurance	Service							\$ -
Legal & Professional Fees	Service							\$ -
Office Supplies & Services	Service							\$ -
Office Cleaning	Service							\$ -
Telcoms	Service							\$ -
Uniforms & Protective Clothing	Materials							\$ -
Spare	Spare							\$ -
Spare	Spare							\$ -
Spare	Spare							\$ -
<b>Sub Total - Admin/HR</b>								<b>\$ -</b>

### Services Fee Adjustment Form

Service Change Number: Description:	Category	Direct Labor Costs					Non-Labor Costs	Annual Total \$ (12 months)
		Number of Staff ("0" if Not a Direct Labor Cost)	Number of Hours Worked in Year per Staff ("1" if Salary or Lump Cost)	Wage Rate / Salary	Overtime Cost (Including Taxes, Benefits)	Benefits Uplift % for Wages, Excluding Overtime ("0%" if n/a)	Service, Materials, or Utility Cost	
		select	#	#	\$ or \$/hr	\$	%	
Example 1 - a general manager (\$)	Direct Labor	1	1	\$ 100,000.00		30.0%		\$ 130,000
Example 2 - laborers (\$/hour)	Direct Labor	20	2080	\$ 21.93	\$ 100,000	30.0%		\$ 1,285,974
Example 3 - cleaning cost	Service	0	1			0.0%	\$ 1,000,000	\$ 1,000,000

#### Stations, Retail and Public Information

Management	Direct Labor							\$ -
Customer Service / Help Desk	Direct Labor							\$ -
Announcements	Direct Labor							\$ -
Ticketing and Retail	Direct Labor							\$ -
Cashier	Direct Labor							\$ -
Revenue Protection	Direct Labor							\$ -
Cash Collection	Service							\$ -
Marketing & Timetables	Service							\$ -
Spare	Spare							\$ -
Spare	Spare							\$ -
Spare	Spare							\$ -
<b>Sub Total - Stations, Retail, Public Information</b>		-						<b>\$ -</b>

#### Transportation Services

Management	Direct Labor							\$ -
Superintendents & Chief Train Dispatcher	Direct Labor							\$ -
Rules Examiners	Direct Labor							\$ -
Engineers/Drivers	Direct Labor							\$ -
Conductors	Direct Labor							\$ -
Asst Conductors	Direct Labor							\$ -
Trainee Drivers	Direct Labor							\$ -
Crew Dispatcher	Direct Labor							\$ -
Train Dispatch / Trainmasters	Direct Labor							\$ -
Road Foremen / Block Operator	Direct Labor							\$ -
Train Crew Utilization/Rostering	Direct Labor							\$ -
Special Trains (60)	Direct Labor							\$ -
Spare	Spare							\$ -
Spare	Spare							\$ -
<b>Sub Total - Transportation Services</b>		-						<b>\$ -</b>

### Services Fee Adjustment Form

Service Change Number: Description:	Category	Direct Labor Costs					Non-Labor Costs	Annual Total \$ (12 months)
		Number of Staff ("0" if Not a Direct Labor Cost)	Number of Hours Worked in Year per Staff ("1" if Salary or Lump Cost)	Wage Rate / Salary	Overtime Cost (Including Taxes, Benefits)	Benefits Uplift % for Wages, Excluding Overtime ("0%" if n/a)	Service, Materials, or Utility Cost	
		select	#	#	\$ or \$/hr	\$	%	
Example 1 - a general manager (\$)	Direct Labor	1	1	\$ 100,000.00		30.0%		\$ 130,000
Example 2 - laborers (\$/hour)	Direct Labor	20	2080	\$ 21.93	\$ 100,000	30.0%		\$ 1,285,974
Example 3 - cleaning cost	Service	0	1			0.0%	\$ 1,000,000	\$ 1,000,000

#### Mechanical Services

Management incl Superintendents	Direct Labor							\$ -
Technical Services, Quality, Special Projects	Direct Labor							\$ -
Fitters/Mechanics	Direct Labor							\$ -
Electricians	Direct Labor							\$ -
Foremen	Direct Labor							\$ -
Laborer/Other	Direct Labor							\$ -
Cleaning	Direct Labor							\$ -
Locos	Materials							\$ -
Control Trailers	Materials							\$ -
Trailers	Materials							\$ -
Non-Revenue Fleet	Materials							\$ -
Mid-life Overhauls of Traction Motors	Service							\$ -
Corrective Work	Service							\$ -
Spare	Spare							\$ -
Spare	Spare							\$ -
Spare	Spare							\$ -
<b>Sub Total - Mechanical Services</b>		<b>-</b>						<b>\$ -</b>

#### Engineering Services

Management								\$ -
Senior / Asst Chief Engineers	Direct Labor							\$ -
Force Account - Construction, Project Management	Direct Labor							\$ -
Surveys, Track Geom, Plans & Docs	Direct Labor							\$ -
Track and Work Equipment	Direct Labor							\$ -
Communications & Signaling	Direct Labor							\$ -
Bridges, Buildings & Structures	Direct Labor							\$ -
Facilities	Direct Labor							\$ -
Administration	Direct Labor							\$ -
Trackman / Laborer	Direct Labor							\$ -
Asst Foreman Track	Direct Labor							\$ -
Foreman Track	Direct Labor							\$ -
Foreman II	Direct Labor							\$ -
Welding Foreman	Direct Labor							\$ -
Welders	Direct Labor							\$ -
Work Equipment Operator	Direct Labor							\$ -
Signal Inspector	Direct Labor							\$ -
Electrical/ Electronic Technician	Direct Labor							\$ -
Roadway Mechanic	Direct Labor							\$ -
Truck Driver	Direct Labor							\$ -

### Services Fee Adjustment Form

Service Change Number: Description:	Category	Direct Labor Costs					Non-Labor Costs	Annual Total \$ (12 months)
		Number of Staff ("0" if Not a Direct Labor Cost)	Number of Hours Worked in Year per Staff ("1" if Salary or Lump Cost)	Wage Rate / Salary	Overtime Cost (Including Taxes, Benefits)	Benefits Uplift % for Wages, Excluding Overtime ("0%" if n/a)	Service, Materials, or Utility Cost	
		select	#	#	\$ or \$/hr	\$	%	
Example 1 - a general manager (\$)	Direct Labor	1	1	\$ 100,000.00		30.0%		\$ 130,000
Example 2 - laborers (\$/hour)	Direct Labor	20	2080	\$ 21.93	\$ 100,000	30.0%		\$ 1,285,974
Example 3 - cleaning cost	Service	0	1			0.0%	\$ 1,000,000	\$ 1,000,000

B&B Mechanic	Direct Labor							\$ -
B&B Foreman	Direct Labor							\$ -
Watchman	Direct Labor							\$ -
Machinist	Direct Labor							\$ -
Electrician	Direct Labor							\$ -
Sheet Metal Worker	Direct Labor							\$ -
Asst Foreman NY	Direct Labor							\$ -
Night Test Foreman	Direct Labor							\$ -
Signal Maintainer	Direct Labor							\$ -
Signal Operations	Direct Labor							\$ -
Drawbridge Operations	Direct Labor							\$ -
Radio System Maintenance	Direct Labor							\$ -
Signaling Inspection	Service							\$ -
Signal Maintenance	Service							\$ -
Comms (PABX, Radio)	Service							\$ -
Structures Inspection (Bridges and Track Structures)	Service							\$ -
Station Cleaning and Maintenance	Service							\$ -
Depot Maintenance	Service							\$ -
Rolling stock support equipment replacement plan	Major maint/cap							\$ -
Track Inspection & Response	Service							\$ -
Maintenance of Way (Planned Work)	Major maint/cap							\$ -
Road Vehicles (equivalent lease rate)	Materials							\$ -
Positive Train Control	Materials							\$ -
Spare	Spare							\$ -
Spare	Spare							\$ -
Spare	Spare							\$ -
<b>Sub Total - Engineering Services</b>		-						<b>\$ -</b>

#### Environmental Services and Utilities

Electricity	Utilities							\$ -
Water/Sewerage	Utilities							\$ -
Waste/Trash Removal	Service							\$ -
Winterization	Service							\$ -
Spare	Spare							\$ -
Spare	Spare							\$ -
Spare	Spare							\$ -
<b>Sub Total - Environmental Services and Utilities</b>		-						<b>\$ -</b>

### Services Fee Adjustment Form

Service Change Number: Description:	Category	Direct Labor Costs					Non-Labor Costs	Annual Total \$ (12 months)
		Number of Staff ("0" if Not a Direct Labor Cost)	Number of Hours Worked in Year per Staff ("1" if Salary or Lump Cost)	Wage Rate / Salary	Overtime Cost (Including Taxes, Benefits)	Benefits Uplift % for Wages, Excluding Overtime ("0%" if n/a)	Service, Materials, or Utility Cost	
		select	#	#	\$ or \$/hr	\$	%	
Example 1 - a general manager (\$)	Direct Labor	1	1	\$ 100,000.00		30.0%		\$ 130,000
Example 2 - laborers (\$/hour)	Direct Labor	20	2080	\$ 21.93	\$ 100,000	30.0%		\$ 1,285,974
Example 3 - cleaning cost	Service	0	1			0.0%	\$ 1,000,000	\$ 1,000,000

**Station and Security - General**

Station Security	Service								\$ -
Depot Security	Service								\$ -
Spare	Spare								\$ -
Spare	Spare								\$ -
Spare	Spare								\$ -
<b>Sub Total - Station and Security - General</b>		<b>-</b>							<b>\$ -</b>

<b>Sub Total - Services Fee Adjustment (before Profit)</b>									<b>\$ -</b>
--	--	--	--	--	--	--	--	--	-------------

**Profit**

Profit - 5.00% for Service Changes	Profit								\$ -
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<b>Total - Services Fee Adjustment</b>								<b>Annual Services Fee Adjustment (12 Months):</b>	<b>\$ -</b>
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### Services Fee Adjustment Form

Service Change Number: Description:	Category	Direct Labor Costs					Non-Labor Costs	Annual Total \$ (12 months)
		Number of Staff ("0" if Not a Direct Labor Cost)	Number of Hours Worked in Year per Staff ("1" if Salary or Lump Cost)	Wage Rate / Salary	Overtime Cost (Including Taxes, Benefits)	Benefits Uplift % for Wages, Excluding Overtime ("0%" if n/a)	Service, Materials, or Utility Cost	
		select	#	#	\$ or \$/hr	\$	%	
Example 1 - a general manager (\$)	Direct Labor	1	1	\$ 100,000.00		30.0%		\$ 130,000
Example 2 - laborers (\$/hour)	Direct Labor	20	2080	\$ 21.93	\$ 100,000	30.0%		\$ 1,285,974
Example 3 - cleaning cost	Service	0	1			0.0%	\$ 1,000,000	\$ 1,000,000

**By Cost Category:**

Direct Labor	\$ -
Service	\$ -
Materials	\$ -
Utilities	\$ -
Major maint/cap	\$ -
Profit	\$ -
<b>Services Fee Adjustment (12 Months):</b>	<b>\$ -</b>

**Annual Service Change Cost:**

Agreement year:	
Service change effective date:	
# of remaining months in current year:	
Current year cost (prorated):	\$ -
Current year monthly cost:	\$ -

### Services Fee Adjustment Form

Service Change Number: Description:	Category	Direct Labor Costs					Non-Labor Costs	Annual Total \$ (12 months)	
		Number of Staff ("0" if Not a Direct Labor Cost)	Number of Hours Worked in Year per Staff ("1" if Salary or Lump Cost)	Wage Rate / Salary	Overtime Cost (Including Taxes, Benefits)	Benefits Uplift % for Wages, Excluding Overtime ("0%" if n/a)	Service, Materials, or Utility Cost		
		select	#	#	\$ or \$/hr	\$	%		\$
		#	#	\$	\$	%	\$		
Example 1 - a general manager (\$)	Direct Labor	1	1	\$ 100,000.00		30.0%		\$ 130,000	
Example 2 - laborers (\$/hour)	Direct Labor	20	2080	\$ 21.93	\$ 100,000	30.0%		\$ 1,285,974	
Example 3 - cleaning cost	Service	0	1			0.0%	\$ 1,000,000	\$ 1,000,000	

**Cost Calculation for Subsequent Years - Based on Blended Inflation Rate:**

Note: Subsequent year costs only calculated once Actual Costs for the Service Change have been agreed upon by the MBTA.

Index	Cost category	Service change	Index rate	Blended rate
US Department of Labor – Bureau of Labor Statistics, Employment Cost Index (All Workers)	Direct labor	\$ -		\$ -
US Department of Labor – Bureau of Labor Statistics, CPI-U (All Urban Consumers; U.S. city average)	Service	\$ -		\$ -
US Department of Labor – Bureau of Labor Statistics, CPI-U (All Urban Consumers; U.S. city average)	Materials	\$ -		\$ -
US Department of Labor – Bureau of Labor Statistics, CPI – Energy	Utilities	\$ -		\$ -
AAR Railroad Cost Recovery Index: Quarterly Index of Chargeout Prices and Wage Rates, East	Major maint/cap	\$ -		\$ -
US Dept of Labor – Bureau of Labor Statistics, (CPI-U) Boston-Brockton-Nashua, MA-NH-ME-CT (Northeast)	Profit	\$ -		\$ -
		<b>\$ -</b>	<b>0.00%</b>	<b>\$ -</b>

Note: Blended inflation rate calculation is based on the weighted average index rate for each cost category, for the previous 12-month period as of the Service Change effective date.

Current Yr.                      Blended Rate                      Subsequent Yr.

**Approved by:**

\_\_\_\_\_  
Operator

\_\_\_\_\_  
Date

\_\_\_\_\_  
Massachusetts Bay Transportation Authority

\_\_\_\_\_  
Date

Estimated Adjustment:   
Final Determination:

**Services Fee Adjustment - By Agreement Year:**

Year 1	\$ -
Year 2	\$ -
Year 3	\$ -
Year 4	\$ -
Year 5	\$ -
Year 6	\$ -
Year 7	\$ -
Year 8	\$ -

**Note:**

The "Profit" margin rate for Service Changes is 5.00%.

The escalation factor for future Agreement Years will be based on the "Blended Inflation Rate" as described in Schedule 16, based on the prior 12-month period prior to the implementation date for the Service Change.

The calculation of future year costs is performed once Actual Costs for the Service Change have been agreed upon by the MBTA (Final Determination).

**APPENDIX 3 TO SCHEDULE 8  
FLEET SERVICE CHANGE PROCEDURE**

Fleet Service Change - Example:

Two (2) new HSP46 locomotives are placed into service on 7/1/2015 (at the start of Agreement Year 2)  
They replace two (2) existing GP40MC locomotives, which are retired at the same time

Impact on Net Annual Fee - Example:

Annual Unit Maint. Cost - Existing Locomotive

Annual Unit Maint. Cost - New Locomotive

Annual Unit Maint. Cost Differential

Number of Existing Locomotives Retired

Number of New Locomotives in Service

Annual Cost Savings - Retired Locomotives

Annual Cost Increase - New Locomotives

Impact on Net Annual Fee

	Annual Unit Maint. Cost for Existing and New Fleet - by Agreement Year (per "MCS")							
	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8
Annual Unit Maint. Cost - Existing Locomotive	N/A	\$200,000	\$210,000	\$220,000	\$230,000	\$240,000	\$250,000	\$260,000
Annual Unit Maint. Cost - New Locomotive	N/A	\$150,000	\$155,000	\$160,000	\$165,000	\$170,000	\$175,000	\$180,000
Annual Unit Maint. Cost Differential	N/A	(\$50,000)	(\$55,000)	(\$60,000)	(\$65,000)	(\$70,000)	(\$75,000)	(\$80,000)
Number of Existing Locomotives Retired	N/A	(2)	(2)	(2)	(2)	(2)	(2)	(2)
Number of New Locomotives in Service	N/A	2	2	2	2	2	2	2
Annual Cost Savings - Retired Locomotives	N/A	(\$400,000)	(\$420,000)	(\$440,000)	(\$460,000)	(\$480,000)	(\$500,000)	(\$520,000)
Annual Cost Increase - New Locomotives	N/A	\$300,000	\$310,000	\$320,000	\$330,000	\$340,000	\$350,000	\$360,000
Impact on Net Annual Fee	N/A	(\$100,000)	(\$110,000)	(\$120,000)	(\$130,000)	(\$140,000)	(\$150,000)	(\$160,000)

Calculation - Example:

The "Annual Unit Maintenance Cost" for both existing and new locomotives are taken directly from the "Maintenance Cost Schedules" (MCS) for the respective fleets, as submitted with the Proposal.

The "Annual Unit Maintenance Cost Differential" (between the existing and new fleet vehicles) is calculated for each Agreement Year following the integration of the new fleet.

The "Annual Unit Maintenance Cost" is then multiplied by the number of retired/new fleet vehicles to calculate the "Annual Cost Savings" (for retired fleet) and the "Annual Cost Increase" (for new fleet).

The "Impact on Net Annual Fee" is the difference between the "Annual Cost Savings" (for retired fleet) and the "Annual Cost Increase" (for new fleet).

The "Net Annual Fee" for the current and all subsequent Agreement Years is adjusted accordingly.

In the event that existing fleet is retired, or new fleet is put in service, during an Agreement Year, the "Impact on Net Annual Fee" will be allocated based on the number of days in service during the year.

**SCHEDULE 9  
SUPPLEMENTAL WORK**

**1. GENERAL**

The Operator shall perform any Services not otherwise required in this Agreement, when and as directed in writing by the MBTA, subject to the provisions of Section 4 (Emergency Supplemental Work) of this **Schedule 9** (Supplemental Work), such written direction to contain particular reference to this **Schedule 9** (Supplemental Work) and to designate the work to be done as Supplemental Work. In addition, this **Schedule 9** (Supplemental Work) governs the process for payment for construction support services as described in **Schedule 3.11** (Construction Support Including PTC). The MBTA shall determine, in its sole discretion, reasonably exercised, the amount and value of Supplemental Work in accordance with the provisions of this **Schedule 9** (Supplemental Work).

**2. SUPPLEMENTAL WORK RELATED TO CONSTRUCTION**

2.1 The pricing, implementation, administration, subtraction, removal and payment of any Supplemental Work constituting construction work or Construction Support Services shall be governed by the *Project Initiation (PI) Agreement, Policies and Procedures*, including the management fee established in Exhibit 2.1 thereto, attached as Appendix 1 to this **Schedule 9** (Supplemental Work) and as time to time amended by the MBTA.

2.2 Supplemental Work incidental to construction that requires the purchase of equipment or materials but not labor, shall also be governed by Appendix 1 (Project Initiation (PI) Agreement, Policies and Procedures) of this **Schedule 9** (Supplemental Work), except that the management fee, if any, shall be established at the time this Supplemental Work is requested.

**3. SUPPLEMENTAL WORK RELATED TO VEHICLE ENGINEERING**

3.1 Notwithstanding any other provisions in this Agreement, any Supplemental Work relating to the Rolling Stock Fleet which affects the time for the performance of the Services or the Annual Fee (whether by an increase or decrease), or both, must receive the concurrence and written acceptance of the MBTA. The MBTA also shall be required to approve any substantial technical change to the Agreement Services required by the Supplemental Work to the Rolling Stock Fleet, even if there is no impact on the time for the performance of the Services or the Annual Fee.

3.1.1 No departure shall be made from this Agreement nor any change made in material, design or selection of equipment provided for hereunder without the written acceptance of the MBTA.

3.1.2 Any changes to Supplemental Work which are ordered or authorized during the progress of design or construction shall be made promptly by the Operator.

3.1.3 Where changes require the cooperation of one or more manufacturers, the Operator shall be responsible for such changes and shall inform the

manufacturers accordingly, and the changes shall be incorporated into the vehicles, unless otherwise agreed by the MBTA.

- 3.2 The Operator shall submit a cost proposal to the MBTA within twenty-one (21) days from the date that the MBTA requests Supplemental Work under this Section 3 (Supplemental Work Related to Vehicle Engineering). This cost proposal shall include a schedule that includes important milestones for completing the Supplemental Work. The costs of the preparation and production of such cost proposals and schedules are included in the Annual Fee. The Operator shall comply with the cost proposals and schedules, and shall notify the MBTA immediately after the Operator becomes aware that a deviation from such proposal or schedule is likely.

#### 4. **EMERGENCY SUPPLEMENTAL WORK**

- 4.1 In the event that the MBTA declares that an Emergency has occurred or when, in the sole discretion of the MBTA, an expeditious response is required, the MBTA may orally direct the Operator to undertake necessary Supplemental Work, and the Operator shall perform such work as directed by the MBTA. In the event of an Emergency that threatens an imminent impact to Customer Service, the Operator shall perform Supplemental Work that it reasonably determines necessary (“**Operator Emergency Supplemental Work**”) and the Operator will be reimbursed on a time and materials basis, so long as the Emergency is not due to any act or failure to act by the Operator in accordance with the provisions of this Agreement. The MBTA may audit all instances of Operator Emergency Supplemental Work to determine whether such instances properly constitute Operator Emergency Supplemental Work in accordance with Section 4 (Emergency Supplemental Work) of this **Schedule 9** (Supplemental Work).
- 4.2 The MBTA shall deliver to the Operator written confirmation of any Supplemental Work direction given pursuant to Section 4.1 of this **Schedule 9** (Supplemental Work) within 48 hours of issuing such oral directive or as soon as reasonably practicable thereafter. Administration and payment of such Supplemental Work, other than Operator Emergency Supplemental Work, shall be as provided for in Section 2 (Supplemental Work Related to Construction) or Section 3 (Supplemental Work Related to Vehicle Engineering) of this **Schedule 9** (Supplemental Work), as applicable.

#### 5. **WORK IN EXCESS OF ALLOWANCES**

- 5.1 To the extent the Operator is required to expend in excess of the Allowances for Snow Operations, Maintenance of Unused Right-of-Way, or IT Operations and Maintenance Costs, as set forth in **Schedule 7** (Payments), it shall be reimbursed for such excess expenditures as Supplemental Work, subject to the prior approval and authorization by the MBTA and otherwise in accordance with the provisions of this **Schedule 9** (Supplemental Work). The work to be undertaken by the Operator pursuant to the Allowance for MBTA Capital Support shall be undertaken as if such work were Supplemental Work, and shall be authorized, undertaken, and administered as described in this **Schedule 9** (Supplemental Work).

6. **USE OF PERSONNEL ALREADY EMPLOYED AS PART OF THE ANNUAL FEE**

- 6.1 In performing any Supplemental Work, the Operator shall not be reimbursed for any employee benefit costs, or “fringe” costs for employees already providing services as part of the Annual Fee. The Operator may only use “Annual Fee” personnel for Supplemental Work upon the MBTA's express prior written authorization. If the Operator uses Annual Fee personnel for Supplemental Work without the MBTA's prior written authorization, the MBTA shall have no obligation to compensate the Operator for such personnel.

**APPENDIX 1 TO SCHEDULE 9  
PROJECT INITIATION (PI) AGREEMENT, POLICES AND PROCEDURES**



*Massachusetts Bay Transportation Authority*


Project Initiation (PI) Agreement  
POLICIES & PROCEDURES

*01/23/2013*

# Commuter Rail Operator

## Project Initiation (PI) Agreement

### POLICIES & PROCEDURES

	<i>Massachusetts Bay Transportation Authority</i>
	Project Initiation (PI) Agreement POLICIES & PROCEDURES
	<i>01/23/2013</i>

## **SECTION 1     POLICY AND PROCEDURE**

The purpose of this Policy is to establish uniform procedures for the Massachusetts Bay Transportation Authority (MBTA) and the Operator to use in the:

- Initiation, approval, and execution of PI Agreements
- Prosecution of Work, Payment Processing and Progress Monitoring
- Close-out

The procedures must be followed by all user groups within the MBTA, including Railroad Operations (RRO), Design & Construction (D&C) and Engineering & Maintenance (E&M).

**No work may proceed without proper authority. See Section 2.4**

### **1.1     PRIMARY POINTS OF CONTACT (POC)**

The primary points of contact are listed below:

Sr. Director of Rail & Water Transp.	Brad Kesler (ext. 6536)
MBTA Primary POC	Mimi Lannin (ext. 6695)
MBTA RRO	Mimi Lannin (ext. 6695)
MBTA E&M	Michael Giordano (ext. 1470)
MBTA D&C	Pauline Bare (ext. 3378)
MBTA Security	Randy Clarke (ext. 5621)
MBTA Mechanical & Engineering	Steve Adkins (ext. 3434)


### **1.2     Project Initiation Agreement**

A Project Initiation (PI) Agreement is the vehicle by which the Operator is authorized to incur charges for work requested by the MBTA to enable the MBTA to provide the level of service required. A PI Agreement is a “Not to Exceed” estimate of work required on the Commuter Rail line that is performed by the Commuter Rail Operator, the Operator. The PI is treated as a change order to the Operating Agreement between MBTA and the Operator. The Operator submits invoices for work performed on a monthly basis. The MBTA pays for services on a monthly basis. In accordance with Federal Transit Administration Circular 4220.1F, Third Party Contracting, charges must be allowable, allocable and reasonable, and the MBTA may not process advance payments.

## **SECTION 2     INITIATION, APPROVAL, AND EXECUTION**

### **2.1     Initiation**

All PI Agreements must be initiated by the MBTA Project Manager (PM) with RRO coordination. The PM is responsible for developing the scope of work including the proposed schedule for each PI and providing initial coordination/negotiation with the

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Operator. Coordination and negotiation may be accomplished via email. If necessary, the PM may request a site visit with the Operator to clarify the scope of work. The Operator submits a cost proposal to MBTA PM after the scope of work has been agreed upon by the MBTA PM, RRO, the Operator and the design consultant (if applicable). The Operator cost proposal is reviewed by the appropriate MBTA PM, RRO and design consultant (if applicable) for concurrence. Upon concurrence of all parties on cost, scope and schedule, the MBTA PM generates the approval documentation according to proper authorization levels.

In the event the Operator sees the need to initiate a PI based on work that needs to be performed outside of the maintenance realm, the Operator shall contact the MBTA Senior Director of Rail and Water Transportation identified in Section 1.1. The MBTA POC shall notify the appropriate MBTA PM to work with the Operator to initiate a PI.

## 2.2 Preparation


MBTA Primary POC will assign a PI Agreement number in the top left corner of each PI Agreement Form. (See Exhibit 2.1) The number will contain six characters. The first two digits will identify the MBTA Directorate initiating the PI; the second two digits identify the fiscal year the PI is initiated; the last two digits identify sequentially the order in which the PI was drafted (example: 5<sup>th</sup> PI in the year 2012 from D&C should be numbered "DC1205"). This is essential for all parties to be able to track the actions through the approval, payment and close-out processes. In the event a PI is initiated but cancelled prior to execution, the PI shall be logged and tracked as "unused" and PI Number assignment shall continue sequentially. Directorates shall be identified in the following manner:

CR	Commuter Rail
DC	Design & Construction
EM	Engineering & Maintenance
SC	Security

The Operator will draft the PI based on the scope of work provided by the MBTA PM and previously coordinated with the Operator. Each PI shall include:

- PI Agreement Form
- PI Agreement Number
- MBTA Work Order Number
- Operator Work Order Number
- Scope of Work
- Cost for Labor, Materials, Fuel, Other Expenses, and if applicable, Leased Equipment
- Schedule
- List of Assumptions

Once a cost proposal is developed, the PI is circulated within the Operator for signature. Concurrently, the Operator provides a "courtesy draft" copy to the MBTA PM so that the cost may be used for the MBTA staff summary authorization documents. Once all

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signatures are obtained within the Operator, the PI (although addressed to the AGM for D&C/E&M/RRO/ Security) is sent to the PM to be processed through the MBTA approval process.

### **2.3 Funding**

MBTA shall assign one work order number to one PI Agreement to ensure effective tracking, monitoring, payment and progress reporting on individual PI Agreements. Numerous PI Agreements may not share work order numbers. The Operator will reference the MBTA work order number when invoices are submitted for payment.

When the PM receives the proposed PI from the Operator, the PM will consult his/her MBTA Budget Analyst to identify funding. The Budget Analyst will assign one MBTA work order to each PI Agreement. The PM shall promptly advise the Operator of the MBTA work order number so that the Operator can include it on the submittal of each PI.

Each PI Agreement must be approved according to the MBTA Board of Directors Regulations authorization levels as shown in Table 1 below.

Upon final execution of the PI by all parties and distribution of the executed PI to the MBTA PM and Director, the MBTA Administration & Finance or as applicable Department shall approve the linked work orders to enable payments to be made.

### **2.4 Approval**

All PI Agreements greater than \$1 million are required to have a Staff Summary package prepared by the Project Manager. The Staff Summary Guidelines are contained in the MBTA Project Manager's Manual. PI Agreements are processed as change orders in the lexicon of the MBTA. The MBTA change order authorization levels follow:


**Table 1  
MBTA Authorization Levels**

#### **PI Agreement**

Board of Directors	≥ \$15,000,000
Secretary	>\$5,000,000 - <\$15,000,000
General Manager	>\$250,000 - ≤ \$5,000,000
AGM for D&C, AGM for E&M, COO	>\$25,000 - ≤ \$250,000
Director	\$0 - ≤ \$25,000

As shown on Exhibit 2.1 all PI Agreements require the coordination and sign-off by the following representatives in accordance with proper authorization levels:

- MBTA Project Manager
- MBTA Departmental Director

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- MBTA Chief Financial Officer
- MBTA Departmental AGM or COO
- MBTA First Deputy General Counsel
- MBTA General Manager
- MBTA Board of Directors (BOD) (BOD requires staff summary approval).  
Please see MBTA Project Manager's Manual Section 3 for processing a staff summary)
  
- Operator Manager of Force Account
- Operator Departmental Chief
- Operator Chief Financial Officer
- Operator General Manager

## **2.5 Execution**

Once executed by the authorized MBTA representatives, the PI will be sent to the Senior Director of Railroad Operations. The Senior Director of Railroad Operations will send a letter to the contractor which notifies them that the PI has been fully executed and the contractor can commence work.

The primary POC shall scan, save, email, and distribute hard copies of the executed PI to:

- MBTA PM
- MBTA Director of Administration & Finance
- MBTA POC within RRO/D&C/E&M /Security
- MBTA Capital Budget Group
- Operator CFO with authorization to proceed with executed PI

the Operator will be responsible for the distribution of the fully executed PI to all appropriate parties within the Operator.


## **SECTION 3 Prosecution of Work, Payment Processing and Progress Monitoring**

### **3.1 Coordination**

The Operator should work with PM to clarify the work scope to be performed each month. The Operator shall assign a designated work force to ensure MBTA projects are not competing for resources and that schedules are maintained.

The Operator shall supply documentation of daily workforce to the MBTA ("2306 forms" or equivalent) to the MBTA Resident Engineer (RE) or PM on a daily basis.

The Operator shall provide daily schedules by noon the previous day to enable MBTA staff to locate and verify labor, material and equipment being used onsite.

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### **3.2 Submittal and Processing of Invoice for Review**

PI Agreements are “Not to Exceed” Estimates of the work to be completed. The MBTA representative or Resident Engineer as assigned shall maintain field logs identifying on-site personnel.

The Operator shall submit the invoice to the MBTA Primary POC. The invoice shall be clearly segregated according to each discrete project against which charges are incurred. This will enable the MBTA to expeditiously distribute invoices to the responsible MBTA PM for proper review and approval. The MBTA Primary POC shall as soon as practicable distribute the invoice according to responsible Directorate (RRO/D&C/E&M/Security) and forward backup to the assigned PM with a standard sign-off form (See Exhibit 2.2). Upon receipt, the MBTA PM shall review each payment voucher for actual cost expended. PMs and REs shall review and sign-off on all invoices per Exhibit 2.2 once the actual costs have been verified. The PM will confirm the proper MBTA work order is being charged.

The invoice shall contain detailed office and field back-up for labor, materials, fuel, other expenses and, if applicable, equipment for each project. In accordance with the Operating Agreement, the MBTA POC shall process Operator payments by the fifteenth (15<sup>th</sup>) business day of the month for which such installment of the Annual Fixed Price is due. Any required adjustments to the payment will be made to the invoice if time permits or to the subsequent month’s Operator invoice.


The MBTA shall promptly notify the Operator in the event an invoice submittal is improperly packaged. In the event the charges are not segregated by project, the MBTA may deduct the payment from the following invoice or refuse payment. Please refer to Section 3.4 Disputes below.

### **3.3 Unallowable Charges**

Unallowable charges include but are not limited to:

- Equipment – If owned by the MBTA. If equipment is leased, the charge may be allowable. D&C shall meet separately with RRO and the Operator, if needed, to discuss payment for equipment.
- Personal Use of Operator (railroad operator)-owned vehicles – railroad personnel may not charge the MBTA for commuting from their home to their assigned work site. Changes must be in accordance with the Operating Agreement and any amendments.
- In case of questions, the MBTA PM shall consult with the RRO POC.

### **3.4 Disputes**

	<i>Massachusetts Bay Transportation Authority</i>
	Project Initiation (PI) Agreement POLICIES & PROCEDURES
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In the event the MBTA takes exceptions to Operator charges, the Operator POC shall submit the exceptions in writing on the sign-off form included as Exhibit 2.2 to the MBTA Primary POC, with copies to the Operator and the Directorate POC. The Operator is encouraged to discuss and resolve each finding with the MBTA PM.

**Daily Field Submittal Disputes** – In the event the Operator submits daily 2306 forms or equivalent and the MBTA PM or Resident Engineer/Inspector disputes the values, then the MBTA Resident Engineer/Inspector shall contact the Operator PI Field POC as soon as possible. The Operator shall assign a PI Field POC upon execution of each PI.

**Level One Dispute Resolution** - If the MBTA PM and the Operator fail to agree, the issue is immediately elevated to the Operator Chief Financial Officer and/or designee and the responsible MBTA Director. If agreement is reached within Dispute Resolution Level One, the PM documents the agreement via memo and copies the Operator, MBTA POC and Directorate POC.

**Level Two Dispute Resolution** - If dispute is not resolved by level one, the dispute shall be tabled and the MBTA Senior Director of Railroad Operations will initiate discussion with the Operator General Manager on a regular basis to resolve the matter.

### **3.5 Deductions**


In the event the MBTA PM cannot support a charge, the MBTA PM may recommend that unsupported charges be deducted from payment. This recommendation shall be made on the sign-off form in Exhibit 2.2.

### **3.6 Progress Monitoring and Notification (80%)**

On a monthly basis the Operator shall submit its overall log spreadsheet to the MBTA POC, who shall share with the appropriate Directorates' POC. The purpose of this is to ensure MBTA and the Operator are current with PI numbers, approvals, and status of invoicing and payment. The Operator shall notify the MBTA POC when 80% of funds have been expended and an estimated cost to complete shall be provided by the Operator. In the event that the estimate to complete exceeds the available funds remaining in the PI, the Operator shall provide justification for these additional costs. A new PI will be required to provide any additional funding and the MBTA will not pay invoices exceeding the authorized amount of a PI. To support that estimate, the MBTA PM shall supply a projected schedule to the Operator. The Operator's 80% completion notification shall contain:

- Narrative description of the incomplete work
- Associated costs to complete work
- Schedule update
- Notice of unsafe conditions or impact on revenue service

## **SECTION 4 CLOSE-OUT**


	<i>Massachusetts Bay Transportation Authority</i>
	Project Initiation (PI) Agreement POLICIES & PROCEDURES
	<b>01/23/2013</b>

#### **4.1 Substantially Complete**

When underlying project meets Final Complete (FC) milestone, or as identified earlier by the MBTA PM, the MBTA PM shall first coordinate with MBTA Primary POC, then shall initiate closeout process. PM shall first discuss with the Operator and then ask them to assemble any outstanding costs. If no outstanding costs are forthcoming (after 30 days) the PM shall notify RRO and the MBTA Primary POC with a copy to the Operator. The Primary POC shall submit to the Operator for concurrence Exhibit 4.1 – Project Completion Order notifying the Operator that the PI is closed.

#### **4.2 Project Completion Order**

Closeouts shall be in accordance with operating agreement paragraph 18.8. “Project Completion Order”. When a PI is closed the MBTA Primary POC shall issue the Project Completion Form (Exhibit 4.1) for the Operator Chief Financial Officer’s concurrence. Once countersigned the MBTA Primary POC shall scan, file and copy the countersigned form to all interested parties. The form shall be in accordance with the format of Exhibit 4.1. In the event MBTA receives no notification of outstanding work or costs within 30 days, the MBTA will close the PI and stop payment. If MBTA receives notification after the 30 days and agrees additional work is required, the MBTA PM may initiate a new PI to address the additional work.

	<i>Massachusetts Bay Transportation Authority</i>
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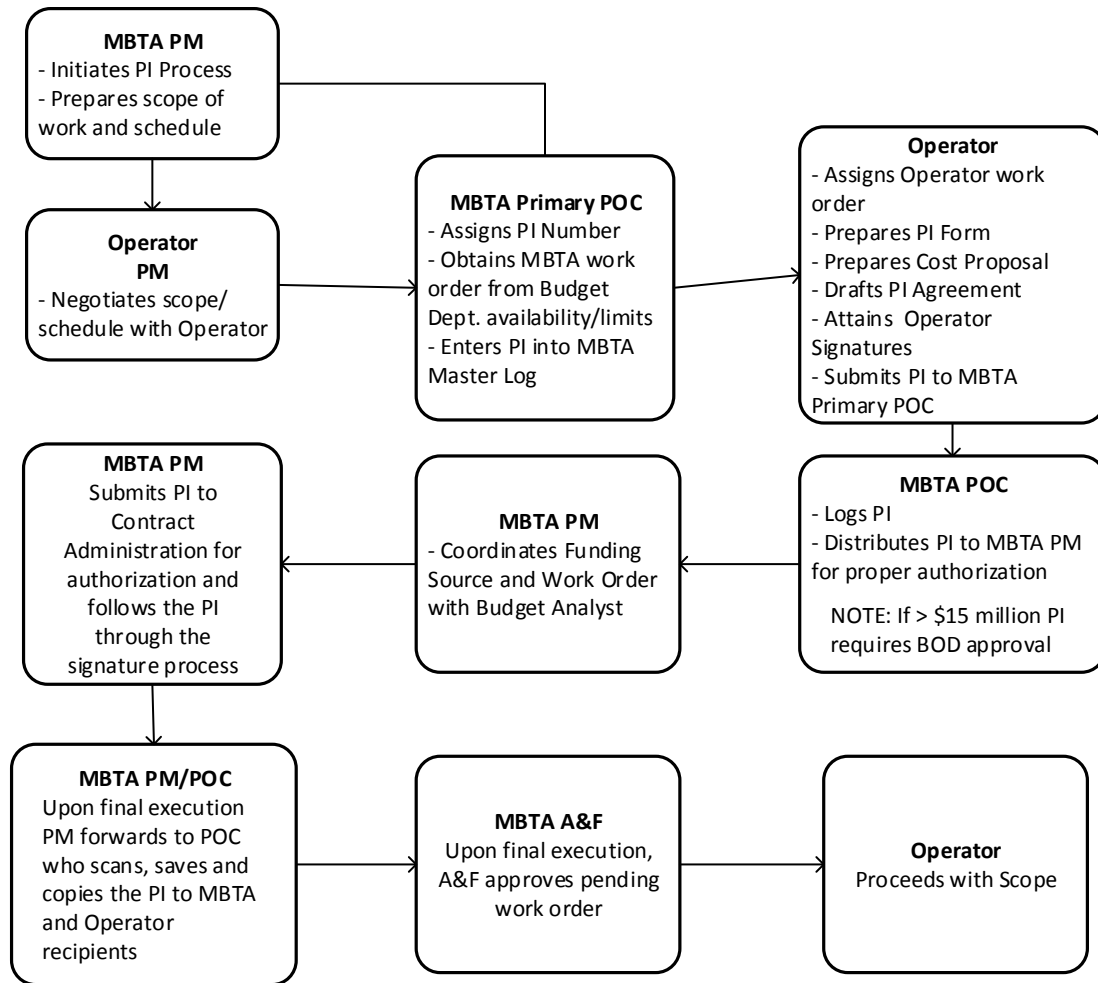
**Table 2  
LIST OF ACRONYMS**


AGM	Assistant General Manager
COO	Chief Operating Officer
D&C	MBTA Design & Construction Directorate
E&M	MBTA Engineering & Maintenance Directorate
MBTA	Massachusetts Bay Transportation Authority
PI	Project Initiation
PM	Project Manager
POC	Point of Contact
RE	Resident Engineer
RRO	MBTA Railroad Operations

**Table 3  
LIST OF EXHIBITS**

Exhibit 2.1	Sample PI Agreement Form
Exhibit 2.2	Invoice Sign-off Form
Exhibit 2.3	PI Agreement – Emergency Work Form
Exhibit 4.1	Project Completion Order Form

**Table 4**  
**PI Process**  
**Initiation/Approval/Execution**



	<i>Massachusetts Bay Transportation Authority</i>
	Project Initiation (PI) Agreement POLICIES & PROCEDURES
	<i>01/23/2013</i>

# Exhibit 2.1

## Sample PI Agreement Form

**EXTRA WORK**  
*Project Initiation / Change Order Form*  
**MBTA - Operator**


Project Initiation  
 Change Order

1. Project Initiation No.: \_\_\_\_\_  
 1a. Change Order No.: \_\_\_\_\_ Date: \_\_\_\_\_



2. Project Name: \_\_\_\_\_  
 3. Location: \_\_\_\_\_  
 4. Description: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_



5. Total Estimated Cost: \$ 0                      6. Funding Source: \_\_\_\_\_  
 7. Period of Work: FROM \_\_\_\_\_ TO: \_\_\_\_\_  
 8. Attachments: Engineering Estimate  
 9. Operator Work Order \_\_\_\_\_ 10. MBTA Work Order No.: \_\_\_\_\_



**PROJECT REPRESENTATIVES**

11. For Operator:                                      12. For MBTA:  
 Name    Name  
 Project Manager                                      Project Manager



**APPROVAL AND AUTHORIZATION**

13. For Operator: <table style="width: 100%; border-collapse: collapse; margin-top: 10px;"> <tr> <td style="width: 80%; border-top: 1px solid black;">Name</td> <td style="width: 20%; border-top: 1px solid black;">Date</td> </tr> <tr> <td>Chief of Engineering Operations</td> <td></td> </tr> <tr> <td style="border-top: 1px solid black;">Name</td> <td style="border-top: 1px solid black;">Date</td> </tr> <tr> <td>Chief Financial Officer</td> <td></td> </tr> <tr> <td style="border-top: 1px solid black;">Name</td> <td style="border-top: 1px solid black;">Date</td> </tr> <tr> <td>General Manager</td> <td></td> </tr> <tr> <td style="border-top: 1px solid black;">Gerald K. Kelley</td> <td style="border-top: 1px solid black;">Date</td> </tr> <tr> <td>MBTA First Deputy General Counsel</td> <td></td> </tr> </table>	Name	Date	Chief of Engineering Operations		Name	Date	Chief Financial Officer		Name	Date	General Manager		Gerald K. Kelley	Date	MBTA First Deputy General Counsel		14. For MBTA: <table style="width: 100%; border-collapse: collapse; margin-top: 10px;"> <tr> <td style="width: 80%; border-top: 1px solid black;">Name</td> <td style="width: 20%; border-top: 1px solid black;">Date</td> </tr> <tr> <td>Director of Design &amp; Construction</td> <td></td> </tr> <tr> <td style="border-top: 1px solid black;">Edmond F. Hunter</td> <td style="border-top: 1px solid black;">Date</td> </tr> <tr> <td>AGM - Design &amp; Construction</td> <td></td> </tr> <tr> <td style="border-top: 1px solid black;">Mary Runkel</td> <td style="border-top: 1px solid black;">Date</td> </tr> <tr> <td>for the Deputy General Manager / CFO</td> <td></td> </tr> <tr> <td style="border-top: 1px solid black;"></td> <td style="border-top: 1px solid black;">Date</td> </tr> <tr> <td>General Manager and Rail &amp; Transit Administrator</td> <td></td> </tr> </table>	Name	Date	Director of Design & Construction		Edmond F. Hunter	Date	AGM - Design & Construction		Mary Runkel	Date	for the Deputy General Manager / CFO			Date	General Manager and Rail & Transit Administrator	
Name	Date																																
Chief of Engineering Operations																																	
Name	Date																																
Chief Financial Officer																																	
Name	Date																																
General Manager																																	
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AGM - Design & Construction																																	
Mary Runkel	Date																																
for the Deputy General Manager / CFO																																	
	Date																																
General Manager and Rail & Transit Administrator																																	



**CLOSE OUT DATA**

15. Date Completed: \_\_\_\_\_ Final Cost: \$ \_\_\_\_\_

Copies: MBTA Signatories & M. Lannin / Operator Signatories

**Operator**

**MBTA Commuter Rail Additional Services and/or Extra Work Estimate**

**Project Name**

---

<b>A)</b>	<b>Labor:</b>		
	<b>Salaried</b>		<b>\$0</b>
	<b>Non Operating</b>	<b>FT - Straight Time</b>	<b>\$0</b>
		<b>FT - Overtime</b>	<b>\$0</b>
		<b>Other Labor Costs (Per Diem)</b>	<b><u>\$0</u></b>
		<b>Total (A)</b>	<b>\$0</b>
<b>B)</b>	<b>Fringe Benefits:</b>		<b>\$0</b>
<b>C)</b>	<b>Equipment:</b>		<b>\$0</b>
<b>D)</b>	<b>Materials:</b>		<b>\$0</b>
<b>E)</b>	<b>Outside Services:</b>		<b><u>\$0</u></b>
		<b>Sub-Total (A-E)</b>	<b>\$0</b>
<b>F)</b>	<b>Management Fee:</b>		<b><u>\$0</u></b>
	<b>Total:</b>		<b>\$0</b>

---



OPERATOR  
EXTRA WORK ESTIMATE - EQUIPMENT  
PROJECT NAME

NO.	ITEM DESCRIPTION	# REQ.	UNIT	#UNITS	\$/UNITS	TOTAL \$
1	3-Person Pick Up/SUV - Lease, Fuel & Phone	1	Hours	0	\$10.41	\$0
2	3-Person Pick Up/SUV - Lease, Fuel & Phone	1	Hours	0	\$10.41	\$0
3	3-Person Pick Up/SUV - Lease, Fuel & Phone	1	Hours	0	\$10.41	\$0
4	3-Person Pick Up/SUV - Lease, Fuel & Phone	1	Hours	0	\$10.41	\$0
5	3-Person Pick Up/SUV - Lease, Fuel & Phone	1	Hours	0	\$10.41	\$0
TOTALS						\$0

OPERATOR  
EXTRA WORK ESTIMATE - MATERIALS  
PROJECT NAME

NO.	ITEM DESCRIPTION	# UNITS	UNIT	\$/UNITS	TOTAL \$
1		1	Each	\$0.00	\$0
2		1	Each	\$0.00	\$0
3		1	Each	\$0.00	\$0
4		1	Each	\$0.00	\$0
5		1	Each	\$0.00	\$0
TOTALS					\$0

OPERATOR  
EXTRA WORK ESTIMATE - OUTSIDE SERVICES  
PROJECT NAME

NO.	ITEM DESCRIPTION	# UNITS	UNIT	\$/UNITS	TOTAL \$
1		1	LS	\$0.00	\$0
2		1	LS	\$0.00	\$0
3		1	LS	\$0.00	\$0
4		1	LS	\$0.00	\$0
5		1	LS	\$0.00	\$0
TOTALS					\$0



*Massachusetts Bay Transportation Authority*

Project Initiation (PI) Agreement  
POLICIES & PROCEDURES

*01/23/2013*

# Exhibit 2.2 Invoice Sign-off Form



Railroad Operations  
Operator Monthly Billing  
Invoice Approval/Payment Authorization

Comments & Deductions:

Charge to MBTA work order # \_\_\_\_\_

Approved Amount \_\_\_\_\_

Project Manager \_\_\_\_\_  
Signature & Date

MBTA Director \_\_\_\_\_  
Signature & Date



*Massachusetts Bay Transportation Authority*

Project Initiation (PI) Agreement  
POLICIES & PROCEDURES

*01/23/2013*

# Exhibit 2.3 Emergency Work Form

# PI AGREEMENT - EMERGENCY WORK FORM

PI AGREEMENT TITLE: \_\_\_\_\_

CONTRACT NO: \_\_\_\_\_ PI AGREEMENT NO: \_\_\_\_\_ DATE: \_\_\_\_\_

SCOPE OF WORK \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

REASON FOR EXTRA WORK \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

HAS THIS WORK STARTED: YES \_\_\_\_ NO \_\_\_\_

JUSTIFICATION FOR WHY THIS CANNOT WAIT FOR THE COMPLETED PI AGREEMENT:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

PERIOD OF WORK FROM: \_\_\_\_\_ TO: \_\_\_\_\_


TOTAL ESTIMATED COST: \$ \_\_\_\_\_ FUNDING SOURCE: \_\_\_\_\_

MBTA WORK ORDER NO.: \_\_\_\_\_

ATTACHMENTS (Check if attached):

\_\_\_\_ EXTRA WORK ORDER LETTER (FOR SIGNATURE)

PROJECT MANAGER: \_\_\_\_\_ DATE: \_\_\_\_\_

	<i>Massachusetts Bay Transportation Authority</i>
	Project Initiation (PI) Agreement POLICIES & PROCEDURES
	<i>01/23/2013</i>

# Exhibit 4.1

## Project Completion Order Form



*Massachusetts Bay Transportation Authority*

Project Initiation (PI) Agreement  
POLICIES & PROCEDURES

01/23/2013

**MBTA/Operator EXTRA WORK AGREEMENT**

**PROJECT COMPLETION ORDER**

Exhibit 4.1

MBTA Work Order # \_\_\_\_\_ Funding Source \_\_\_\_\_

Operator Work Order # \_\_\_\_\_ MBTA Project Initiation # \_\_\_\_\_

PROJECT NAME: \_\_\_\_\_

\_\_\_\_\_

Operator SCOPE OF WORK \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**STATEMENT OF COMPLETION:**

The project described above has been completed in accordance to the scope of work and/or plans, specifications and requirements submitted as part of the Project Initiation Form.

**Operator Project Representative:**

\_\_\_\_\_

Print Name

Signed: \_\_\_\_\_

DATE: \_\_\_\_\_

**Name**

**Chief Financial Officer**

Signed: \_\_\_\_\_

DATE: \_\_\_\_\_

**STATEMENT OF ACCEPTANCE:**

The project described above has been completed in accordance to the scope of work and/or plans, specifications and requirements submitted as part of the Project Initiation Form.

**MBTA Project Manager:**

\_\_\_\_\_

Print Name

Signed: \_\_\_\_\_

DATE: \_\_\_\_\_

**Mimi Lannin**

**Deputy Director of Finance Railroad Operations**

Signed: \_\_\_\_\_

DATE: \_\_\_\_\_

The Operator shall submit all invoices of bills required for compensation pursuant to the Operating Agreement. All claims for compensation made after the time set out in the Operating Agreement shall be waived by the Operator.

Operator Initial \_\_\_\_\_

MBTA Initial \_\_\_\_\_

**SCHEDULE 10  
INSURANCE**

**1. OPERATOR LIABILITY INSURANCE**

1.1 The Operator shall obtain and maintain in full force and effect, at its sole cost and expense, throughout the Term with financially sound and reputable insurance companies, policies of insurance, which shall include the following coverages:

1.1.1 FELA or worker's compensation insurance, as applicable, in accordance with Applicable Law.

1.1.2 Automobile liability insurance for bodily injury and property damage with a combined single limit of not less than \$5 million covering vehicles owned or leased by the Operator.

1.1.3 Pollution liability insurance of not less than \$25 million per occurrence.

1.2 In the case of FELA/workers' compensation insurance, the Operator may at any time during the Term submit to the MBTA for approval a proposal pursuant to which the Operator would self-insure in lieu of securing the insurance policy described in Section 1.1.1 of this **Schedule 10** (Insurance) above. The MBTA shall review such proposal, including information relevant to the Operator's financial stability and ability to discharge and satisfy any FELA or workers' compensation claims for which the Operator is responsible pursuant to this Agreement. The MBTA either shall approve such proposal, such approval not to be unreasonably withheld, delayed or conditioned, or reject such proposal and provide a written explanation of the reasons for such rejection. At no time during the Term shall the Operator fail to maintain either a FELA/workers' compensation insurance policy or an MBTA-approved self-insurance plan.

**1.3 Insurance Policies**

1.3.1 Except for instances in which the MBTA permits the Operator to self-insure, the Operator shall ensure that all insurance coverage it obtains pursuant to this Agreement is AM Best Rated at least A- throughout the Term of the Agreement. The insurance specified in this **Schedule 10** (Insurance) shall be secured through insurance companies authorized to do business in the Commonwealth or otherwise approved by the MBTA, and shall be in force on or before:

1.3.1.1 the issuance of the Notice to Proceed, with respect the coverages required by Sections 1.1.1 and 1.1.2 of this **Schedule 10** (Insurance) for the activities and Operator Personnel engaged during the Mobilization Period; and

1.3.1.2 the Agreement Services Commencement Date, with respect to the coverages required by Sections 1.1.1, 1.1.2 and 1.1.3 of this **Schedule 10** (Insurance) with respect to the full performance of the

Agreement Services, and kept in effect until the Termination Date, subject to the provisions of Section 1.4 of this **Schedule 10** (Insurance).

- 1.3.2 The Operator shall give, or cause to be given, to the MBTA a minimum of 30 days notice in the event of any change to or cancellation of any insurance required under this **Schedule 10** (Insurance).
- 1.3.3 The MBTA and its directors, officers, employees, agents and subcontractors shall be listed as an additional insured on the policies of insurance required under Sections 1.1.2 and 1.1.3 of this **Schedule 10** (Insurance), and worker's compensation policies shall include a waiver of subrogation against the MBTA.
- 1.3.4 All such insurance shall be primary to and non-contributory to any insurance or self-insurance maintained by the MBTA.
- 1.3.5 The FELA insurance policy referred to in Section 1.1.1 of this **Schedule 10** (Insurance) shall be subject to a self-insured retention of not more than \$250,000 per occurrence.
- 1.3.6 The Operator shall provide complete copies of the policies required to be maintained under this Agreement to the MBTA within 30 days of such request.
- 1.3.7 All such liability insurance required to be maintained by the Operator shall be required of and provided by or on behalf of all Subcontractors. The Operator shall be held responsible for any modifications, deviations or omissions in the compliance with these insurance requirements by any Subcontractor.

#### 1.4 Period of Coverage

The insurance required to be maintained by the Operator hereunder shall apply to any liability arising on or after the Commencement Date, and shall extend beyond the Termination Date with respect to any event occurring or liability arising during the Term.

#### 1.5 Certificates

The Operator shall furnish the MBTA with certificates of insurance (and, upon request, copies of all required insurance policies, including endorsements and declarations) evidencing compliance with the requirements set forth in this Schedule prior to the Commencement Date and the Agreement Services Commence Date, in accordance with the provisions of Section 1.3 (Insurance Policies) of this **Schedule 10** (Insurance), and annually thereafter.

#### 1.6 Replacement Policies

In the event any insurance policy required hereunder to be maintained by the Operator is canceled for any reason or has its aggregate limits impaired by 25% or more, the Operator shall replace such policy or reinstate the aggregate limits during the notification

period with another policy in like amount and coverage protection and that otherwise complies with the provisions of this **Schedule 10** (Insurance).

## 2. **MBTA LIABILITY INSURANCE/COST SHARING RE: SELF INSURANCE**

The MBTA shall procure and maintain in full force and effect throughout the Term, at its own cost and expense, liability insurance, which shall include the Operator as a named insured subject to the terms and conditions of the policy, and shall cover Third Party claims against and liabilities of the MBTA and the Operator for property damage, bodily injury, personal injury and death arising out of the Agreement Services, with a combined single limit of \$75 million per occurrence annually and \$75 million in the aggregate annually, including a self-insured retention of not less than \$7.5 million per occurrence. The MBTA may increase the self-insured retention to an amount not more than \$10 million per occurrence, and shall provide the Operator with written notice of any such increase. The MBTA shall compensate the Operator for its increased costs associated with any increase in the self-insured retention through a Service Change. Such insurance shall not cover liability for injury, damage to or death of any Operator Personnel. The Operator and the MBTA shall share equally on a “fifty/fifty” basis the cost of all liabilities falling within and paid from the self-insured retention, except for (1) any pre-or post-judgment interest assessed to as or identified in any action, and (2) any award of punitive damages against the MBTA, except that the MBTA will not be responsible for any liability arising out of the willful misconduct, gross negligence or criminal acts of any Operator Personnel.

### 2.1 Claims Filing

The MBTA and the Operator agree to cooperate fully with one another in the filing of claims with and recovering payments due from insurers in connection with the Agreement Services.

### 2.2 Property Insurance

The MBTA shall obtain and maintain in full force and effect during the Term, at its own cost and expense, property insurance (the “**MBTA Property Policy**”), which policy shall be subject to a limit of \$500 million, including various sublimits, and a \$100,000 per occurrence deductible (except for earthquake, flood and wind losses which are subject to a \$100,000 per location deductible and to a maximum of \$500,000 per occurrence). The MBTA Property Policy shall specifically exclude loss or damage caused by or resulting from any collision, upset, impact or derailment of any vehicle, including any of the Rolling Stock Fleet. The Operator shall bear full responsibility (except to the extent otherwise provided in **Schedule 4** (MBTA Assets and Third Party Agreements)) for all losses to Commuter Rail Property while in the Operator’s care, custody and/or control in the performance of the Services, to the extent that such losses are not recovered from the MBTA Property Policy for any reason, including but not limited to the application of coverage terms and conditions, deductibles, and exclusions. Copies of the MBTA Property Policy will be made available to the Operator upon request.

### 2.3 Terrorism Insurance

The MBTA currently maintains terrorism insurance coverage in response to the Terrorism and Risk Insurance Act of 2002, as amended. The Operator shall be named as an additional insured, subject to the terms and conditions of the policy, on such terrorism insurance coverage, provided, that the MBTA shall not be obligated to maintain any such coverage throughout the Term. The MBTA shall notify the Operator not less than 30 days before the termination of such terrorism insurance coverage. The MBTA shall make such terrorism insurance coverage documentation available to the Operator for review upon request.

### 3. **FELA LIABILITY/WORKERS' COMPENSATION**

3.1 The Operator shall have administrative and financial responsibility for preventing, processing, managing, defending, and discharging all FELA or any other state or federal workers' compensation claims of any Operator Personnel, arising during the Term and arising either directly or indirectly from the performance of the Services. The Operator's responsibility for such claims shall continue after the Termination Date if such claims arose out of an event occurring during the Term. The Operator agrees to indemnify, defend, and hold harmless the MBTA, its directors, officers, employees, agents and subcontractors without regard to negligence or fault, from any and all liability for all claims brought by Operator Personnel under FELA or any other workers' compensation statutes, and for all other related claims and actions arising from such Operator Personnel claims, subject to the provisions of Section 3.2 of this **Schedule 10** (Insurance).

3.2 The costs of the Operator's compliance with this Section 3 (FELA Liability/Workers' Compensation) of this **Schedule 10** (Insurance) shall be included in the Annual Fee; provided, however, that the aggregate amount paid by the Operator within the deductible or pursuant to a self-insurance plan for claims (including defense costs) with respect to a single occurrence shall not exceed \$4 million. To the extent that the aggregate amount paid by the Operator within the deductible or pursuant to a self-insurance plan for claims (including defense costs) arising out of a single occurrence exceeds \$4 million, the MBTA shall reimburse the Operator for such amounts in excess of \$4 million. The MBTA's obligation to reimburse the Operator for payments made by the Operator pursuant to this Section 3 (FELA Liability/Workers' Compensation) of this **Schedule 10** (Insurance) shall survive the termination or expiration of this Agreement.

### 4. **CLAIMS SERVICE**

4.1 The MBTA shall investigate, administer, settle and pay all claims for injury, death, or damage arising out of the performance of this Agreement, except for those claims for which the Operator (or any Subcontractor) is responsible for obtaining insurance under Section 1.1 of this **Schedule 10** (Insurance).

4.2 In the case of a claim asserted against both the Operator and the MBTA, either Party, in resolving the claim against itself, may in its agreement with the claimant release the other Party from all liability.

### 5. **CLAIMS PROCEDURE**

The MBTA and Contractor shall jointly determine, prior to the Agreement Services Commencement Date, practices and procedures for the handling and administering of insured claims, including the process of selection of counsel and authority to settle claims.

**6. COSTS INCLUDED**

A Party's obligation with respect to claims and indemnification pursuant to this Agreement shall include such Party's responsibility to pay all legal fees, medical costs, investigative expenses, expert witness fees, and other payments to Third Parties in connection with the handling or resolution of such claims.

**7. NOTICE TO MBTA**

The Operator shall notify the MBTA and the MBTA's General Counsel (c/o the MBTA Law Department Claims Attorney) in writing within 24 hours of learning of any claim to which the MBTA is a party. Such written notice shall describe the nature of the claim and shall itemize an estimate of any damages involved.

**SCHEDULE 11  
SETTLEMENT OF DISPUTES**

**1. SETTLEMENT OF DISPUTES**

The Parties shall resolve all disputes relating to the subject matter of this Agreement according to the procedures set forth in this **Schedule 11** (Settlement of Disputes).

1.1 Both Parties shall make every reasonable effort to settle any dispute concerning the interpretation, application or enforcement of this Agreement by prompt and diligent discussions and negotiations.

1.2 Informal Consideration by the Parties

Any dispute that cannot be resolved pursuant to Section 1.1 of this **Schedule 11** (Settlement of Disputes) within 30 days after it arises (or such other time as the Parties may agree in writing) may be submitted at the written request of either Party to the MBTA's Senior Director and the Operator General Manager. These individuals shall discuss and attempt to resolve the dispute. In the event that the dispute remains unresolved 20 Business Days after its submission (or such other time as the Parties may agree), the matter may be referred in writing by either Party to the MBTA's General Manager and the Operator's Chief Executive Officer for consideration. If the dispute still remains unresolved 30 days after its referral to the MBTA's General Manager and the Operator's Chief Executive Officer, the matter (a) may be submitted in writing to mediation under Section 1.3 (Mediation) of this **Schedule 11** (Settlement of Disputes), by agreement of the MBTA and the Operator, or (b) either Party may commence litigation by filing an action with the Superior Court for Suffolk County, Massachusetts.

1.3 Mediation

As an alternative to litigation, the MBTA and the Operator may jointly agree to submit any unresolved dispute to an independent mediator under this Section 1.3 (Mediation) of this **Schedule 11** (Settlement of Disputes).

1.3.1 The MBTA and the Operator shall jointly select an independent mediator within 21 days after the submittal of a dispute under this Section 1.3 (Mediation) of this **Schedule 11** (Settlement of Disputes). The independent mediator shall be properly qualified in the subject matter of the dispute. In the event the Parties are unable to agree upon a mediator, the mediator shall be selected by alternative strikes by each Party from a list of five mediators provided by the American Arbitration Association.

1.3.2 The independent mediator shall meet with the Parties within 21 days after his or her selection to attempt to mediate and resolve the dispute. If mediation efforts are unsuccessful after 60 days, the mediator shall, after consideration of the Parties' positions and written submittals (if so requested or permitted), issue written recommendations for resolution of the dispute. Any written submittals requested or permitted by the mediator shall be submitted to the mediator and

the other Party no later than the 15th day after the Parties' last meeting with the mediator. The recommendations of the mediator shall be issued within 30 days after the later of (a) the conclusion of mediation, or (b) the due date of any written submittals. All meetings and proceedings shall be held in Boston, Massachusetts, at a time and location acceptable to both Parties.

1.3.3 If a Party rejects the recommendations issued by the mediator, either Party may pursue all legal remedies available to it by filing an action with the Superior Court for Suffolk County, Massachusetts. All offers, documents and statements, whether oral or written, made or produced in the course of mediation by either of the Parties, their agents, experts or attorneys, or by the mediator, shall be treated as confidential and inadmissible for any purpose, including impeachment of witnesses, in any litigation or other proceeding involving the Parties, provided that evidence which is discovered by means other than documents and statements made or produced in the course of mediation shall not be rendered inadmissible or non-discoverable.

1.3.4 The costs and expenses of the independent mediator shall be shared equally by the MBTA and the Operator. The provisions of this Section 1.3 (Mediation) of this **Schedule 11** (Settlement of Disputes) may be enforced by any court of competent jurisdiction.

## 2. **DE NOVO REVIEW**

Notwithstanding any contrary provision of this Agreement, it is expressly agreed and understood that any court proceeding arising out of a dispute under this Agreement shall be heard by a court *de novo* and the court shall not be limited in such proceeding to the issue of whether the MBTA acted in an arbitrary, capricious or grossly erroneous manner.

## 3. **INJUNCTIVE RELIEF**

Notwithstanding any contrary provisions of this Agreement, if either Party believes that the other Party has failed to perform any covenant or obligation under this Agreement regarding a matter of substantial importance which, if not promptly corrected, will cause irreparable injury, the aggrieved Party may take such legal action as it deems appropriate and may file immediately any and all pleadings in any state or federal court located in Suffolk County, Massachusetts to secure an injunction of such action or inaction pending resolution of the matter pursuant to the dispute resolution procedures set forth in this **Schedule 11** (Settlement of Disputes). The Parties agree and acknowledge that (i) any conduct, action, or failure to act by the Operator that results in a Service Disruption for a period longer than 24 hours, or (ii) any conduct, action, or failure to act that in the sole judgment of the MBTA poses a real or potential threat to Customer or public safety shall be deemed to cause irreparable harm to the MBTA and be contrary to the public interest.

## 4. **INTEREST**

Where the time period during which interest accrues regarding a matter in dispute is specifically established elsewhere in this Agreement, that time period shall apply for purposes of disputes

under this **Schedule 11** (Settlement of Disputes). For any other dispute under this **Schedule 11** (Settlement of Disputes), interest shall accrue from the date of the filing of the claim. Any such interest shall be at the rate described in **Schedule 7** (Payments).

**SCHEDULE 12**  
**DEFAULTS, REMEDIES, AND TERMINATION**

- Schedule 12.1: Remedial Plans and Remedial Agreements
- Schedule 12.2: Termination
- Schedule 12.3: Events of Default and Termination Events
- Schedule 12.4: Force Majeure Events

**SCHEDULE 12.1**  
**REMEDIAL PLANS AND REMEDIAL AGREEMENTS**

**1. REMEDIES FOR BREACH OF THIS AGREEMENT**

- 1.1 If the MBTA determines that the Operator is in breach or is reasonably likely to be in breach of any of its obligations under this Agreement (a **“Breach”**), the MBTA may notify the Operator in writing, requiring the Operator to propose such steps as the Operator considers appropriate for the purpose of remedying such Breach (a **“Remedial Plan Notice”**).
- 1.2 Each Remedial Plan Notice shall specify the following:
- 1.2.1 the term or terms of this Agreement that the MBTA has determined that the Operator has breached or is reasonably likely to breach (each a **“Relevant Term”**); and
- 1.2.2 the time period within which the MBTA requires the Operator to provide an appropriate plan (a **“Remedial Plan”**) for the purpose of facilitating or securing compliance with any Relevant Term.
- 1.3 If the MBTA issues a Remedial Plan Notice, the Operator shall submit a Remedial Plan to the MBTA within the period specified in such Remedial Plan Notice.
- 1.4 Each Remedial Plan shall include:
- 1.4.1 a description of the Relevant Term that the Remedial Plan is intended to address;
- 1.4.2 an explanation of the reasons for the Breach of the Relevant Term;
- 1.4.3 the remedial steps proposed by the Operator for the purposes of securing or facilitating compliance with the Relevant Term; and
- 1.4.4 the time period within which the Operator proposes to implement such remedial steps.
- 1.5 If the MBTA is satisfied that the matters referred to in Sections 1.4.3 and 1.4.4 of this **Schedule 12.1** (Remedial Plans and Remedial Agreements) are appropriate and sufficient to address the Breach (with or without further modifications as described below), the MBTA and the Operator shall enter into an agreement (a **“Remedial Agreement”**) that details the remedial steps to be taken by the Operator and the time period for implementation of such remedial steps. If the MBTA determines that the matters referred to in Sections 1.4.3 and 1.4.4 of this **Schedule 12.1** (Remedial Plans and Remedial Agreements) are not appropriate and sufficient to address the Breach, the MBTA shall notify the Operator in writing within 10 Business Days’ of receipt of the Operator’s proposed Remedial Plan, specifying why the MBTA has determined that the proposed Remedial Plan is inappropriate or insufficient, and directing the Operator to provide a

revised Remedial Plan to address the MBTA's concerns. The Operator shall provide the MBTA with a revised Remedial Plan within 10 Business Days' of receipt of the MBTA's comments.

- 1.6 The Operator's obligations as contained in the Remedial Agreement shall be undertaken in accordance with its terms, at the sole cost and expense of the Operator and without any additional compensation to the Operator hereunder.
- 1.7 Without limiting the provisions of **Schedule 12.4** (Force Majeure Events), the following provisions shall apply in relation to Force Majeure Events affecting performance of a Remedial Agreement:
  - 1.7.1 the Operator shall give written notice to the MBTA promptly after it becomes aware (and in any event within 24 hours after becoming aware) of the occurrence or likely occurrence of a Force Majeure Event that will or is likely to affect the Operator's ability to comply with the Remedial Agreement within the period specified therein;
  - 1.7.2 each notice submitted in accordance with Section 1.7.1 of this **Schedule 12.1** (Remedial Plans and Remedial Agreements) shall state the extent or likely extent of the relevant Force Majeure Event and, in the case of a Force Majeure Event that has not yet occurred, the reasons why the Operator considers it likely to occur;
  - 1.7.3 the Operator shall use, and shall continue to use, all reasonable efforts to avoid or reduce the effect or likely effect of any Force Majeure Event on its ability to comply with any Remedial Agreement; and
  - 1.7.4 provided that the MBTA determines, in its reasonable discretion, that the Operator's explanation provided in accordance with Section 1.7.2 of this **Schedule 12.1** (Remedial Plans and Remedial Agreements) above is reasonable, the Operator shall be entitled to a reasonable extension of the remedial period contained in the Remedial Agreement in order to take into account the effect of the Force Majeure Event.
- 1.8 Without limiting its rights pursuant to **Part 1**, Section 12 (Examination and Audit), following a Breach, in addition to its rights pursuant to Section 1.1 of this **Schedule 12.1** (Remedial Plans and Remedial Agreements), the MBTA may (but shall not be obliged to) commence or increase the level and/or frequency of monitoring (whether by inspection, audit or otherwise) of the Operator's performance of any relevant obligation until such time as the Operator demonstrates, to the MBTA's reasonable satisfaction, that it is capable of performing and will perform such obligation as required by this Agreement.
- 1.9 The Operator shall cooperate fully with the MBTA in relation to any additional monitoring undertaken by the MBTA in accordance with Section 1.8 of this **Schedule 12.1** (Remedial Plans and Remedial Agreements).

- 1.10 The results of such monitoring will be reviewed at each meeting held pursuant to **Part 1, Section 19 (Administration)**.
- 1.11 The Operator shall compensate the MBTA for all reasonable costs incurred by the MBTA in carrying out such additional monitoring.
- 1.12 For purposes of clarification, and not limitation, the Operator acknowledges and agrees that the obligations set out in this **Schedule 12.1** (Remedial Plans and Remedial Agreements) apply to all of the Operator's obligations under this Agreement including, but not limited to, the Incorporated Proposal Provisions. By way of example, and not limitation, the MBTA shall have the right to issue a Remedial Plan Notice to the Operator if it fails to fulfill the following obligations contained in the Incorporated Proposal Provisions: (i) increasing revenue by 5% (*see* Operations and Management Proposal, page 6-6, Section IV (The Results We Will Deliver)); (ii) obtaining ISO 9001 certification within two years (*see* Operations and Management Proposal, page 9-13, Section (a)(6) (Standards and Best Practice Frameworks)); (iii) 28% reduction in total incidents by 2019, 74% reduction in passenger injuries by 2019, and 35% reduction of employee reportable injury rate per 200,000 hours worked by 2019 (*see* Operations and Management Proposal, page 2-5, Section IV (The Results We Will Deliver)); (iv) increasing customer satisfaction by 5% in the third year of the Operator's performance under the Agreement (*see* Operations and Management Proposal, page 7-2, Section I (Executive Summary)); and (v) implementing a comprehensive asset lifecycle management plan that relies on predictive maintenance rather than corrective maintenance (*see* Operations and Management Proposal, page 5-18, Section A (Comprehensive Asset Lifecycle and Maintenance Management: A New Maintenance Policy, Fully Dedicated to Prolong Assets Life)).

## 2. **ADDITIONAL REMEDIES FOR BREACH OF THIS AGREEMENT**

In addition to or as an alternative to issuing a Remedial Plan Notice as described in Section 1 (Remedies for Breach of this Agreement) of this **Schedule 12.1** (Remedial Plans and Remedial Agreements), the MBTA, in its sole discretion, may issue (i) a Service Change Notice, modifying or removing particular services (or portions thereof) from the Agreement Services, or (ii) a change order, modifying or removing particular services (or portions thereof) from Supplemental Work.

## **SCHEDULE 12.2 TERMINATION**

### **1. TERMINATION NOTICES**

1.1 The MBTA may, on and at any time after the occurrence of:

1.1.1 an Event of Default (subject to Sections 1.2 and 1.3 of this **Schedule 12.2** (Termination)), which has not been waived; or

1.1.2 a Termination Event,

terminate this Agreement by providing written notice of the same to the Operator (a **“Termination Notice”**). This Agreement shall terminate effective as of the date specified in any such Termination Notice, which in the case of a Termination Notice issued in respect of (i) an Event of Default shall not be less than 30 days following the date of such notice, (ii) a Termination Event described in **Schedule 12.3** (Events of Default and Termination Events), Section 3.1 shall not be less than 60 days following the date of such notice, and (iii) a Termination Event described in **Schedule 12.3** (Events of Default and Termination Events), Section 3.2 shall not be less than 90 days following the date of such notice.

1.2 The MBTA may not serve a Termination Notice in respect of an Event of Default in relation to which a Remedial Plan Notice has been issued, until the period has expired within which the Operator is required to deliver to the MBTA the Remedial Plan, as provided in **Schedule 12.1** (Remedial Plans and Remedial Agreements), Section 1 (Remedies for Breach of This Agreement) and the Operator has failed to so deliver the Remedial Plan.

1.3 The MBTA may not serve a Termination Notice in respect of an Event of Default for which the Operator is implementing a Remedial Agreement in accordance with its terms.

### **2. CONSEQUENCES OF TERMINATION**

2.1 Upon termination of this Agreement in accordance with the provisions of this **Schedule 12.2** (Termination), the obligations of the Parties shall cease except for:

2.1.1 any obligations arising as a result of any antecedent Breach;

2.1.2 any obligations that are expressly provided to survive the termination or expiration of this Agreement; and

2.1.3 any other obligations which give effect to such termination or to the consequences of such termination or which otherwise apply (expressly or impliedly) on or after such termination.

2.2 Nothing in this Section 2 (Consequences of Termination) of this **Schedule 12.2 (Termination)** shall prevent the MBTA from bringing an action against the Operator in connection with the termination of this Agreement in accordance with this **Schedule 12.2 (Termination)**.

**SCHEDULE 12.3**  
**EVENTS OF DEFAULT AND TERMINATION EVENTS**

**1. EVENTS OF DEFAULT**

The occurrence of any of the following shall constitute an “**Event of Default**” for purposes of this Agreement.

- 1.1 The Operator shall fail to provide the MBTA with a Remedial Plan, within 10 Business Days of the date specified for the delivery of such Remedial Plan in the applicable Remedial Plan Notice.
- 1.2 The Operator shall fail to perform its obligations under a Remedial Agreement, in any material respect, or shall fail to perform its obligations under a Remedial Agreement within the time period specified therein.
- 1.3 There shall occur a Breach of the same Relevant Term(s) due to the same or similar actions or inactions of the Operator that previously had been addressed in a completed Remedial Agreement.
- 1.4 The Operator shall fail to make any payment due to the MBTA hereunder, within 30 days of the due date thereof.
- 1.5 The revocation, denial or non-renewal of any Necessary Consent, after the expiration of any applicable appeal periods.
- 1.6 The Operator shall fail to comply in any material respect with any Applicable Law, which has or is reasonably likely to have a material adverse effect on the Commuter Rail Services, any of the Commuter Rail Property, the MBTA or MassDOT.
- 1.7 The occurrence of any of the following that is due to the negligence, misconduct or bad faith of the Operator, or otherwise due to the Operator’s failure to properly perform the Services in accordance with the provisions of this Agreement: (i) a derailment; (ii) a fatality or other incident resulting in a serious injury at a grade crossing; (iii) a Customer, Operator Personnel or MBTA employee fatality, or a serious illness or injury to any of the foregoing Persons requiring admission to a hospital; (iv) an evacuation of a passenger train; (v) a strike or work stoppage lasting more than three days; (vi) an oil spill or other release of Hazardous Materials that has a material adverse effect on the MBTA, Operator Personnel, Customers, or the general public; or (vii) acts of terrorism.
- 1.8 The Operator shall fail to maintain the insurance required to be maintained by it pursuant to the provisions of **Schedule 10** (Insurance).
- 1.9 The Operator fails to at least meet the same Remedial Performance Level for:
  - 1.9.1 any two consecutive Reporting Periods; or

- 1.9.2 any three Reporting Periods within a period of 12 consecutive Reporting Periods.
- 1.10 The Operator shall fail to comply with the provisions of Section 2 (Financial Ratios) of **Schedule 13** (Financial Obligations and Covenants).
- 1.11 (i) Any Performance Guarantee ceases to be a legal, valid and binding obligation of the applicable provider thereof, or it otherwise becomes unlawful or impossible for the provider to perform its obligations thereunder, and the Operator fails to deliver a substitute Performance Guarantee that meets the requirements of **Schedule 2** (Conditions Precedent), within 15 days of the occurrence of the same, (ii) any Guarantor breaches any obligation under its Guaranty or any representation or warranty of such Guarantor under such Guaranty proves to have been incorrect in any material respect as of the date thereof, or (iii) any obligation of any Guarantor under its Guaranty is limited or terminated or revoked by law or by such Guarantor, or such Guarantor shall contest the validity or enforceability thereof.
- 1.12 The Operator shall terminate a Key Contract without the approval of the MBTA, or fail to replace a Key Contract within 30 days of the termination of the same.
- 1.13 Any representation or warranty of the Operator contained in this Agreement proves to have been incorrect in any material respect as of the date thereof, or any representation, statement (including the Financial Statements), certificates or data furnished by the Operator to the MBTA in connection with the execution and delivery of this Agreement proves to have been untrue, incorrect or misleading in any material respect as of the date stated or certified.
- 1.14 The Operator is enjoined, restrained, or in any way prevented by a court order from performing any of its obligations under this Agreement or conducting all or a substantial part of its business affairs.
- 1.15 A Change of Control shall occur, without the prior written approval of the MBTA.
- 1.16 The Operator or any Person controlling the Operator or any Guarantor shall:
- 1.16.1 file a voluntary petition in bankruptcy or for arrangement, reorganization or other relief under any chapter of the federal bankruptcy code of any similar law, now or hereafter in effect;
- 1.16.2 file an answer or other pleading in any proceedings admitting insolvency, bankruptcy, or inability to pay its debts as they mature;
- 1.16.3 suffer the filing against it of any involuntary proceedings under the federal bankruptcy code or similar law, now or hereafter in effect, which proceedings are not vacated within 60 days;

- 1.16.4 have an order issued appointing a receiver, trustee or liquidator for it or for all or a substantial part of its property, which is not be vacated within 60 days following entry thereof;
  - 1.16.5 be adjudicated a bankrupt;
  - 1.16.6 make an assignment for the benefit of creditors or admit in writing its inability to pay its debts generally as they become due or consent to the appointment of a receiver or trustee or liquidator of all or a substantial part of its property; or
  - 1.16.7 for any reason cease to exist.
- 1.17 The Operator or any of its directors, members, officers or senior managers is convicted of manslaughter, fraud or any other indictable criminal offence in each case relating directly to the provision of the Services.
- 1.18 The Operator shall fail to comply with any other provision of this Agreement (other than described in Sections 1.1 through 1.17 of this **Schedule 12.3** (Events of Default and Termination Events) above) and does not cure such failure (i) within three days, if such failure involves any interruption in Commuter Rail Services, or (ii) within 30 days with respect to any other failure.

## 2. OPERATOR NOTICE

The Operator shall notify the MBTA as soon as reasonably practicable and in any event within 24 hours of it becoming aware of the occurrence of an Event of Default or an event which, with the passage of time, would likely to result in an Event of Default.

## 3. TERMINATION EVENTS

The occurrence of any of the following shall constitute a “**Termination Event**” for purposes of this Agreement:

- 3.1 Any Force Majeure Event shall continue with the effect of preventing the Operator from delivering, wholly or in substantial part, the Agreement Services for more than 60 consecutive days.
- 3.2 The MBTA shall determine, in its sole discretion, that it is in the best interests of the MBTA to terminate this Agreement.
  - 3.2.1 In the event of any termination of this Agreement pursuant to Section 3.2 of this **Schedule 12.3** (Events of Default and Termination Events), the MBTA shall pay the Operator the direct costs incurred by the Operator in closing out this Agreement, in accordance with the provisions of **Schedule 7** (Payments), and any other amounts that may otherwise be due to the Operator in accordance with the provisions of this Agreement as of the Termination Date.

3.3 The Parties shall mutually agree to terminate this Agreement, by a written agreement of the Parties. Unless so specified in such agreement, a termination pursuant to this Section 3.3 of this **Schedule 12.3** (Events of Default and Termination Events) shall not constitute a waiver by either Party of its rights to damages or other remedies in accordance with, or related to, this Agreement. In the event of any termination of this Agreement pursuant to this Section 3.3 of this **Schedule 12.3** (Events of Default and Termination Events), the MBTA shall pay to the Operator its Termination Costs, in accordance with the provisions of **Schedule 7** (Payments).

#### 4. **CONSEQUENCES OF EVENT OF DEFAULT OR TERMINATION EVENT**

4.1 Upon the occurrence of an Event of Default or a Termination Event, the MBTA may terminate this Agreement by providing the Operator a Termination Notice in accordance with the provisions of **Schedule 12.2** (Termination), Section 1 (Termination Notices).

4.2 In addition to making demand on any Performance Guarantee available to it, the MBTA may exercise any rights available to it in law or equity following an Event of Default.

4.3 The rights and remedies of the MBTA under this Agreement are cumulative and, unless expressly stated in this Agreement, no remedy is exclusive, and each right or remedy is in addition to any other rights and remedies provided by law or under this Agreement.

4.4 The waiver by the MBTA of any single remedy shall not constitute a waiver of the MBTA's right to assert all other legal remedies available to the MBTA under the circumstances. If the MBTA elects to waive in writing a remedy, such waiver will not be considered a waiver of any other right or remedy of the MBTA with respect to the breach or remedy at issue, including any termination rights set forth in this Agreement, unless otherwise expressly stated in such written waiver. For the avoidance of doubt, imposition of a Performance Failure Payment is not an exclusive remedy and shall not be considered a waiver of any rights including any termination rights under this Agreement.

**SCHEDULE 12.4**  
**FORCE MAJEURE EVENTS**

**1. FORCE MAJEURE EVENTS**

Except for payment obligations, and except for obligations of a Party which, by the specific terms of this Agreement, are obligations incurred in response to a Force Majeure Event, a Party shall be excused, subject to the provisions of this **Schedule 12.4** (Force Majeure Events), for failure or delay in performing its obligations under this Agreement by reason of a Force Majeure Event.

1.1 The following events shall constitute a **“Force Majeure Event”** for purposes of this Agreement, subject to the satisfaction of the conditions specified in Section 2 (Conditions to Force Majeure Events) of this **Schedule 12.4** (Force Majeure Events):

- 1.1.1 An act of God, lightning, severe weather, explosion, flood, landslide, or earthquake, but only where it causes material and unavoidable damage to all or any material part of any the Commuter Rail Property (including materials procured for use therein) or otherwise causes the Commuter Rail Property to be unusable or substantially unusable; or
- 1.1.2 An act of a public enemy, war (declared or undeclared), invasion, armed conflict, or act of a foreign enemy, but in each case involving, imminently threatened within, or directly affecting the United States of America, or an act of terrorism, sabotage, blockade, revolution, riot, insurrection, civil commotion, or epidemic where it causes material and unavoidable damage to all or any material part of any the Commuter Rail Property (including materials procured for use therein) or otherwise causes the Commuter Rail Property to be unusable or substantially unusable; or
- 1.1.3 A nuclear explosion, radioactive or chemical contamination, ionizing radiation, electromagnetic pulse, or biological contamination of any Service Property, unless the source or cause of the explosion, contamination, radiation, pulse or hazardous material is brought to or near such Service Property by the Operator or any Subcontractor or any of their employees, servants, agents or consultants; or
- 1.1.4 A legally imposed quarantine, against which the Party claiming relief could not reasonably have been expected to take precautions, and which prevents or delays the performance by such Party of its obligations under this Agreement; or
- 1.1.5 Strikes or other industrial actions, other than strikes or other industrial actions primarily involving some or all Operator Personnel or the employees of any Subcontractor; or
- 1.1.6 An embargo or any failure, shortage, or outage of power supplied by the local electricity distribution network; or

- 1.1.7 An action (including a Change in Law) taken by a Governmental Authority, including the Transportation Security Administration, the United States Department of Homeland Security, the FRA or the FTA (or any successor entity of the foregoing agencies) in response to a threat to, or event affecting, the public health, safety, security or the environment, in each case, the effect of which is to suspend, delay or disrupt the performance by the Party claiming relief of any of its obligations under this Agreement; or
- 1.1.8 Any other event (other than those described in Sections 1.1.1 through 1.1.7 of this **Schedule 12.4** (Force Majeure Events)) outside the reasonable control of the Party claiming relief, and which was not reasonably foreseeable by such Party, where such event materially and unavoidably prevents or delays such Party from performing any of its obligations under this Agreement, provided that the term “reasonably foreseeable” means any event or circumstance or category of events or circumstances specifically described in this Agreement or which the Party claiming relief knew, or should have known, may occur, and which is of a type that an owner, contractor or operator, as applicable, acting in accordance with Good Industry Practice and this Agreement, would have taken steps to avoid or protect itself against; and

provided that:

- (a) the relevant event is outside of the control of the Party claiming relief and did not or does not arise from and is not contributed to by any breach by such Party of its obligations under this Agreement or any other Contract Document or any other neglect, default, act or omission of such Party; and
- (b) the relevant event has arisen notwithstanding the Party claiming relief complying with its obligations under this Agreement; and
- (c) the Party claiming relief has at all times complied with its obligations described in Section 2 of this **Schedule 12.4** (Force Majeure Events) below.

## 2. **CONDITIONS TO FORCE MAJEURE EVENTS**

2.1 If a Party shall rely on the occurrence of an act, event or condition as a Force Majeure Event as a basis for not performing its obligations under this Agreement, then such Party shall:

2.1.1 promptly, but not later than two Business Days after becoming aware of the same, notify the other Party of the act, event or condition giving rise to its inability to perform (for purposes of this Section 2 (Conditions to Force Majeure Events) of this **Schedule 12.4** (Force Majeure Events), an “**event**”), including in such notice:

2.1.1.1 an estimate of its expected duration;

- 2.1.1.2 the effect or the anticipated effect of such event on such Party's obligations under this Agreement; and
- 2.1.1.3 a description of the steps taken and/or proposed to be taken by such Party to prevent the occurrence of, and/or to mitigate and minimize the effects of the event, and, in the case of the Operator claiming relief, to restore the provision of the Agreement Services;
- 2.1.2 exercise all reasonable efforts to continue to perform its obligations in accordance with the provisions of this Agreement to the maximum extent possible;
- 2.1.3 expeditiously take action to correct or cure the event to the extent practicable;
- 2.1.4 exercise all reasonable efforts to mitigate or limit damages or losses arising from the event or condition; and
- 2.1.5 promptly, but not later than two Business Days after, notify the other Party of the cessation of the event.

### 3. **CONSEQUENCES OF FORCE MAJEURE EVENTS**

- 3.1 The Party claiming relief shall not be responsible for any failure to perform any of its obligations under this Agreement, nor shall there be any breach of this Agreement, if and to the extent that such failure is caused by any Force Majeure Event.
- 3.2 Following the occurrence of a Force Majeure Event, the payment of the Annual Fee shall continue unaffected, unless the provisions of **Schedule 7** (Payments) otherwise apply.

**SCHEDULE 13**  
**FINANCIAL OBLIGATIONS AND COVENANTS**

**1. OBLIGATIONS**

- 1.1 Except to the extent that the MBTA may otherwise agree from time to time, the Operator shall not:
- 1.1.1 incur any liability or financial indebtedness except in the ordinary course of providing the Services;
  - 1.1.2 make any loan or grant any credit, or have or permit to exist any loan or any credit, to any Person (other than the deposit of cash with a bank or other financial institution as permitted under Section 1.1.4 of this **Schedule 13** (Financial Obligations and Covenants), or to Operator Personnel for customary purposes in the ordinary course of its business);
  - 1.1.3 create or permit to exist any security interest over any of its assets or property or give any guarantee or indemnity to or for the benefit of any person or otherwise assume liability or become obliged (actually or contingently) in respect of any obligation of any other person, in each case other than in the ordinary course of providing the Services; or
  - 1.1.4 create or acquire any subsidiary or make or have any investment in any other Person, except for the deposit of cash with a bank or financial institution.

**2. FINANCIAL RATIOS**

- 2.1 The Operator covenants that as at each testing date (as defined below) during the Term, the ratio of Operator Actual Revenue to Operator Actual Operating Costs shall at least equal 1.02:1.
- 2.2 The Operator shall demonstrate compliance with the provisions of Section 2.1 of this **Schedule 13** (Financial Obligations and Covenants) at the end of the Operator's second fiscal quarter and at the end of the Operator's fiscal year (each a "**testing date**") through the submission to the MBTA, (i) within 60 days following the end of the second fiscal quarter of the Operator, management-prepared financial statements for the first six-months of the Operator's fiscal year, prepared in accordance with Accounting Standards, such statements to be unaudited but complete and accurate as of the dates thereof and for the periods covered thereby and certified as accurate (subject to normal year-end audit adjustments) by the chief financial officer of the Operator, and (ii) within 120 days following the end of each fiscal year of the Operator, the Operator's Financial Statements.
- 2.3 If at any time the covenant set forth in Section 2.1 of this **Schedule 13** (Financial Obligations and Covenants) is not met, it shall not be an Event of Default under the terms of this Agreement if at the time of submission of the financial statements required pursuant to clause (i) or (ii) of Section 2.2 of this **Schedule 13** (Financial Obligations and

Covenants) above, the Operator demonstrates to the reasonable satisfaction of the MBTA that the Operator has received an equity or capital contribution such that, if such contribution had been made prior to the applicable testing date, the Operator would have been in compliance with the provisions of Section 2.1 of this **Schedule 13** (Financial Obligations and Covenants), and the Operator is in compliance with the provisions of Section 2.1 of this **Schedule 13** (Financial Obligations and Covenants) for the following two testing dates.

### 3. **BREACH OF FINANCIAL RATIOS**

3.1 The Operator shall not during any Lock-up Period, do any of the following without the MBTA's consent:

3.1.1 declare or pay any dividend (equity or preference) or make any other distribution, including surrendering any taxable losses to any of its Parents, Members or Affiliates, as applicable, or pay any of its Parents, Members or Affiliates, as applicable, in respect of taxable losses that they wish to surrender to the Operator;

3.1.2 make payment of any management charges to any of its Parents, Members or Affiliates, as applicable, in excess of those specified in the Profit line in the FFP Form; or

3.1.3 make payment under any intra-group borrowings.

### 4. **DEFINITIONS**

For Purposes of this **Schedule 13** (Financial Obligations and Covenants):

4.1 **“Lock-up Period”** means any period from when the ratio referred to in Section 2.1 of this **Schedule 13** (Financial Obligations and Covenants) falls below the ratio of 1.04:1 to the time at which the MBTA is satisfied that the relevant ratio is again above the ratio of 1.04:1.

4.2 **“Operator Actual Operating Costs”** means the actual operating costs identified in the applicable Financial Statement, the first of which is to be identified within sixty (60) days of the conclusion of the first Agreement Year.

4.3 **“Operator Actual Revenue”** means the actual operating revenue of the Operator plus any equity or capital contributions made to the Operator, all as identified in the applicable Financial Statements, the first of which is to be identified within sixty (60) days of the conclusion of the first Agreement Year.

**SCHEDULE 14  
PRESERVATION OF ASSETS**

- Schedule 14.1: Maintenance of Agreement
- Schedule 14.2: Key Contracts
- Schedule 14.3: Designation of Agreement Assets
- Schedule 14.4: Dealings with Agreement Assets

**SCHEDULE 14.1**  
**MAINTENANCE OF AGREEMENT**

1. The Operator shall maintain and manage the business of providing the Services so that, to the greatest extent possible and practicable:
  - 1.1 the Operator is able to perform its obligations under this Agreement; and
  - 1.2 a Successor Operator would be able to take over the Operator's rights and obligations under this Agreement with respect to the performance of the Services immediately at any time.
2. The Operator shall use all reasonable efforts to ensure that such Successor Operator would have immediate access to all Operator Personnel, Subcontractors, and Primary Agreement Assets for such purpose.
3. The Operator shall maintain and manage the business of providing the Services on the basis that the rights and obligations of the Operator under this Agreement will be transferred to a Successor Operator, in the manner contemplated under this Agreement, at the end of the Term, and so that the Commuter Rail Services can be taken over and operated as a going concern at the end of the Term by such Successor Operator.
4. The Operator shall use all reasonable efforts to ensure that an appropriate number of Operator Personnel (having sufficient skills, qualifications and experience) can be transferred to any Successor Operator immediately following the Termination Date.
5. The Operator shall comply with all reasonable requirements of the MBTA to obtain or maintain the Primary Agreement Assets in order that they can be transferred to any Successor Operator immediately following the Termination Date.

## **SCHEDULE 14.2 KEY CONTRACTS**

### **1. KEY CONTRACTS**

The provisions of this **Schedule 14.2** (Key Contracts) apply to all contracts designated as Key Contracts from time to time. The MBTA shall provide the Operator with the initial list of Key Contracts within a reasonable time prior to the Agreement Services Commencement Date so as to allow for an orderly transition.

### **2. DESIGNATION OF KEY CONTRACTS**

2.1 If the MBTA determines that a contract is reasonably necessary for securing the continued provision of the Services, or services similar to the Services, by a Successor Operator on terms substantially similar to those set forth in this Agreement, it may make a designation pursuant to Section 2.2 of this **Schedule 14.2** (Key Contracts).

2.2 The MBTA may at any time, upon notice to the Operator, designate as an additional Key Contract, effective as of the date specified in such notice:

2.2.1 any actual or prospective agreement, contract, subcontract, license, permit, approval or other arrangement (for the purposes of this **Schedule 14.2** (Key Contracts), a “**contract**”); and

2.2.2 any category of contract to which or under which the Operator is (or may become) a party or a beneficiary.

2.3 Key Contracts may include any contract, whether written or oral, whether formal or informal, and whether with an Affiliate of the Operator or any other Person.

### **3. DE-DESIGNATION OF KEY CONTRACTS**

The MBTA may at any time, upon notice to the Operator, de-designate any Key Contract from continuing to be a Key Contract, effective as of the date specified in such notice.

### **4. RE-DESIGNATION OF KEY CONTRACTS**

The MBTA may at any time, upon notice to the Operator, re-designate as a Key Contract any contract that had ceased to be designated as a Key Contract, in accordance with Section 3 (De-Designation of Key Contracts) of this **Schedule 14.2** (Key Contracts), effective as of the date specified in such notice.

### **5. DIRECT AGREEMENTS**

5.1 Unless the MBTA otherwise agrees, or unless required to do so by Applicable Law, the Operator shall not enter into any prospective Key Contract unless the counterparty to that prospective Key Contract has entered into an agreement directly with the MBTA with respect to that prospective Key Contract (a “**Direct Agreement**”), providing on a basis

acceptable to the MBTA, for the continued provision of the Services being provided under such Key Contract and any related matters, in the event of:

- 5.1.1.1 breach or termination of such Key Contract by the Operator; or
- 5.1.1.2 termination or expiration of this Agreement.

If the MBTA enters into any such Direct Agreement, it shall so notify the Operator and provide to the Operator a copy of the Direct Agreement.

5.2 If the MBTA designates or re-designates as a Key Contract:

- 5.2.1 any contract to which the Operator is already a party; or
- 5.2.2 any category of contract where the Operator is already a party to a contract, which, by virtue of the MBTA's designation or re-designation, is classified in such category,

the Operator shall use all reasonable efforts to assist the MBTA in entering into a Direct Agreement with the counterparty, as described in Section 5.1 of this **Schedule 14.2** (Key Contracts).

5.3 The Operator shall pay to the MBTA an amount equal to any losses, costs, liabilities, charges or expenses which may be suffered or incurred by the MBTA under the provisions of any Direct Agreement as a result of, or in connection with:

- 5.3.1 any breach by the Operator of the terms of the Key Contract to which the relevant Direct Agreement relates; or
- 5.3.2 any unsuccessful claim being brought by the Operator against the counterparty of any such Key Contract in relation to the termination of such Key Contract.

## 6. **EMERGENCIES**

Notwithstanding the provisions of this **Schedule 14.2** (Key Contracts), the Operator shall not be limited in entering into a contract in the event of an Emergency.

## 7. **NO AMENDMENT**

The Operator shall not, without the prior written consent of the MBTA (which consent shall not be unreasonably withheld, delayed or conditioned), vary, or purport to vary, the terms or conditions of any Key Contract.

## 8. **REPLACEMENT OF KEY CONTRACTS**

8.1 The Operator shall, prior to the scheduled expiration of any Key Contract (or, if earlier, such other date on which it is reasonably likely that such Key Contract will terminate), take all reasonable steps to enter an appropriate replacement contract (whether with the

counterparty to the existing Key Contract or otherwise), and shall comply with the reasonable instructions of the MBTA in relation to such replacement contract.

- 8.2 If a Key Contract is terminated by the counterparty prior to the expiration of such Key Contract, the Operator shall enter into a replacement contract within 30 days of such termination, and shall comply with the reasonable instructions of the MBTA in relation to such replacement contract.

9. **TERMINATION OF KEY CONTRACTS**

- 9.1 The Operator shall, if so requested by the MBTA, exercise its right to terminate any Key Contract on the Termination Date.

- 9.2 The Operator may, with the prior written approval of the MBTA, terminate a Key Contract if the Operator has demonstrated to the reasonable satisfaction of the MBTA that it is no longer necessary for the Operator to be a party to such Key Contract, or that the Operator has made adequate alternative arrangements in order to be able to continue to properly provide the Agreement Services without such Key Contract being in effect.

**SCHEDULE 14.3**  
**DESIGNATION OF AGREEMENT ASSETS**

**1. AGREEMENT ASSETS**

- 1.1 Subject to Section 1.2 of this **Schedule 14.3** (Designation of Agreement Assets), all property, rights and liabilities of the Operator from time to time used or useful in, or relating to the performance of the Services shall be designated as “**Agreement Assets**”.
- 1.2 The following items shall not be designated as Agreement Assets:
- 1.2.1 any contracts of employment with Operator Personnel;
  - 1.2.2 this Agreement;
  - 1.2.3 any sums placed on deposit with a bank or other financial institution; and
  - 1.2.4 such other property, rights and liabilities as the Operator and the MBTA may agree from time to time, or as the MBTA may de-designate as Agreement Assets from time to time under Section 9 (De-Designation of Agreement Assets and Primary Agreement Assets) of this **Schedule 14.3** (Designation of Agreement Assets).

**2. PRIMARY AGREEMENT ASSETS**

The following shall (to the extent that they constitute Agreement Assets) be designated as “**Primary Agreement Assets,**” effective as of the dates set forth below:

- 2.1 the property, rights and liabilities identified and agreed upon by the Parties prior to the Agreement Services Commencement Date, which constitute the Primary Agreement Assets;
- 2.2 any additional property, rights and liabilities of the Operator designated under Section 3 (Designation of Additional Primary Agreement Assets) of this **Schedule 14.3** (Designation of Agreement Assets) during the Term, on the date of such designation;
- 2.3 any property or right which is vested in the Operator and used for the purpose of maintaining, replacing, repairing or renewing any property designated as Primary Agreement Assets and which forms or replaces part or all of such designated Primary Agreement Asset on completion of such maintenance, replacement, repair or renewal, on the date of its use for such purpose; and
- 2.4 the rights and liabilities of the Operator under any Key Contract designated in accordance with **Schedule 14.2** (Key Contracts), on the date of such designation.

**3. DESIGNATION OF ADDITIONAL PRIMARY AGREEMENT ASSETS**

The MBTA may at any time, and from time to time, during the Term, upon notice to the Operator, designate any or all of the Agreement Assets as Primary Agreement Assets, effective as of the date specified in such notice. Such designation may refer to all or certain categories of Agreement Assets. Any such notice shall specify the reasons for such designation.

#### 4. DESIGNATION DURING LAST 12 MONTHS OF AGREEMENT PERIOD

If the MBTA designates an Agreement Asset as a Primary Agreement Asset under Section 3 (Designation of Additional Primary Agreement Assets) of this **Schedule 14.3** (Designation of Agreement Assets) at any time during the last 12 months of the Term, then, within 28 days of such designation, the MBTA may de-designate such Primary Agreement Asset upon notice to the Operator, effective as of the date specified in such notice.

#### 5. DESIGNATION OF KEY CONTRACTS AS PRIMARY AGREEMENT ASSETS

The MBTA shall, subject to Section 1.2 of this **Schedule 14.3** (Designation of Agreement Assets) and Section 7 (Disputes Over Designation) of this **Schedule 14.3** (Designation of Agreement Assets), be entitled to designate any Key Contract as a Primary Agreement Asset at any time during the Term, upon notice to the Operator, effective as of the date specified in such notice.

#### 6. RIGHTS AND LIABILITIES

The MBTA, in designating the rights and liabilities of the Operator (whether under a particular contract or other arrangement) as a Primary Agreement Asset may, in its discretion, elect to designate some but not all of the rights and liabilities under a particular contract or other arrangement, or to designate only those rights and liabilities arising after or otherwise relating to a period after a particular time (including the period after the Termination Date) or to those relating only to the Services or a particular part thereof.

#### 7. DISPUTES OVER DESIGNATION

7.1 The Operator may object in writing to the MBTA to any designation pursuant to Section 3 (Designation of Additional Primary Agreement Assets), 4 (Designation During Last 12 Months of Agreement Period) or 5 (Designation of Key Contracts As Primary Agreement Assets) of this **Schedule 14.3** (Designation of Agreement Assets).

7.2 Such objection may be made solely on the grounds that the designation of the relevant property, rights or liabilities as a Primary Agreement Asset is not, in the Operator's opinion, reasonably necessary to secure the continued provision of the Services by a Successor Operator at the end of the Term on a basis reasonably acceptable to the MBTA, or to facilitate the transfer to such Successor Operator of the right to provide the Services at such time.

7.3 Any such objection shall be made no later than (i) 28 days following any such designation under Sections 3 (Designation of Additional Primary Agreement Assets) or 5 (Designation of Key Contracts As Primary Agreement Assets) of this **Schedule 14.3** (Designation of Agreement Assets), or (ii) 14 days following any such designation under

Section 4 (Designation During Last 12 Months of Agreement Period) of this **Schedule 14.3** (Designation of Agreement Assets).

- 7.4 The MBTA shall respond to any such objection as soon as reasonably practicable and shall take account of any representations made by the Operator regarding the use of the relevant Primary Agreement Asset otherwise than in the provision of the Services.
- 7.5 If any dispute as to any designation pursuant to Section 3 (Designation of Additional Primary Agreement Assets), 4 (Designation During Last 12 Months of Agreement Period) or 5 (Designation of Key Contracts As Primary Agreement Assets) of this **Schedule 14.3** (Designation of Agreement Assets) remains outstanding on the Termination Date, then such dispute shall be deemed to cease immediately before the Termination Date and the relevant Agreement Assets shall continue to be designated as Primary Agreement Assets on and after the Termination Date.

## 8. **PROVISION OF INFORMATION TO MBTA**

- 8.1 The Operator shall provide such information as the MBTA may reasonably require in order to satisfy the MBTA that any Agreement Assets which are to be designated as Primary Agreement Assets after the Commencement Date will at the time of such designation be vested in the Operator. Such information may include details of any security interests in, or indebtedness incurred with respect to, such property, rights and liabilities.
- 8.2 The Operator shall further provide, in a timely manner but not later than the time reasonably specified by the MBTA, such information as to the property, rights and liabilities of the Operator as the MBTA may reasonably require in connection with the designation of Primary Agreement Assets.

## 9. **DE-DESIGNATION OF AGREEMENT ASSETS AND PRIMARY AGREEMENT ASSETS**

- 9.1 The MBTA and the Operator may agree, in writing, at any time during the Term that an Agreement Asset shall cease to be so designated as an Agreement Asset, or that a Primary Agreement Asset shall cease to be so designated as a Primary Agreement Asset, and the relevant Agreement Asset or Primary Agreement Asset shall cease to be so designated, effective as of the date agreed to between the Operator and the MBTA.
- 9.2 The MBTA may in addition at any time during the Term, upon notice to the Operator, cause an Agreement Asset which is not a Primary Agreement Asset to cease to be so designated as an Agreement Asset, effective as of the date specified in such notice.
- 9.3 The MBTA may in addition, at any time during the Term, upon notice to the Operator, cause a particular Primary Agreement Asset to cease to be designated as such, effective as of the date specified in such notice. Such right may be exercised at any time, but not later than one year prior to the Termination Date.

**SCHEDULE 14.4**  
**DEALING WITH AGREEMENT ASSETS**

**1. ASSETS NOT DESIGNATED AS PRIMARY AGREEMENT ASSETS**

1.1 The MBTA consents to the Operator:

1.1.1 transferring or agreeing to transfer any such Agreement Assets or any interests in, or right over, any such Agreement Assets; and

1.1.2 creating or extinguishing, or agreeing to create or extinguish, any interest in, or right over, any such Agreement Assets.

1.2 The MBTA consents to the Operator entering into any agreement under which any such liability with respect to an Agreement Asset is released or discharged, or transferred to another Person.

**2. PROHIBITION ON SECURITY INTERESTS**

The Operator shall not create, agree to create or permit to exist a security interest in any Primary Agreement Asset, without the prior written consent of the MBTA.

**SCHEDULE 15**  
**OBLIGATIONS ASSOCIATED WITH TERMINATION**

- Schedule 15.1: Re-Procurement Provisions
- Schedule 15.2: Last 12 Months of Agreement Period
- Schedule 15.3: Handover Package
- Appendix: Form of Handover Package
- Schedule 15.4: Provisions Applying On or After Termination

**SCHEDULE 15.1**  
**RE-PROCUREMENT PROVISIONS**

**1. RE-PROCUREMENT OF AGREEMENT**

- 1.1 The Operator acknowledges that the MBTA may determine, at or before the Termination Date, that it is in the best interests of the MBTA to invite Persons (including the Operator) (for purposes of this **Schedule 15.1** (Re-Procurement Provisions), **“Prospective Proposers”**) to submit proposals for the provisions of some or all of the Services at the Termination Date, pursuant to one or more agreements.
- 1.2 The Operator accordingly accepts and agrees to the restrictions and obligations imposed under this Agreement on the Operator with respect to the transfer to one or more Persons of the rights and obligations to provide some or all of the Services, including under this **Schedule 15** (Obligations Associated with Termination).

**2. PREPARATION FOR RE-PROCUREMENT**

- 2.1 Notwithstanding anything to the contrary in Section 16 (Confidential Information) of **Part 1** (including, but not limited to, assertions of confidentiality with respect to documents and other material), the Operator shall, if so requested by the MBTA, provide the MBTA and its duly authorized agents, representatives and advisers (for the purposes of this **Schedule 15** (Obligations Associated with Termination), its **“Representatives”**) access to Operator Personnel and all Records in connection with the Services for the purpose of assisting the MBTA and its Representatives:
- 2.1.1 to prepare reports and other documents in connection with the preparation of any request for proposals or similar document (for the purposes of this **Schedule 15** (Obligations Associated with Termination), an **“RFP”**) to be issued to potential Successor Operators with respect to the provision of any or all of the Services; or
- 2.1.2 to prepare an RFP to other potential operators with respect to any other railway passenger services or other additional railway asset.
- 2.2 The Operator shall immediately make available (including, but not limited to, providing copies) to the MBTA and its Representatives such information (including financial and operational information) as they shall request in connection with the matters referred to in Section 2.1 of this **Schedule 15.1** (Re-Procurement Provisions) (collectively, the **“Re-Procurement Information Package”**). The Re-Procurement Information Package shall include, at a minimum, a copy of all materials submitted to the MBTA pursuant to **Schedule 3.14** (Reporting and Submittals) for the three (3) year period immediately preceding the MBTA's request pursuant to Section 2 (Preparation for Re-Procurement) of this **Schedule 15.1** (Re-Procurement Provisions).
- 2.3 The Operator shall prepare and present such information in such manner (including in disaggregated form), and within the time requirements, as the MBTA or its

Representatives request, and shall provide all assistance requested by the MBTA and its Representatives in connection with the verification of such information.

- 2.4 The Operator acknowledges and agrees that any information, reports, data, Records or Confidential Information provided by the Operator to the MBTA or its Representatives may be made available by the MBTA to the Prospective Proposers (in the MBTA's sole discretion).
- 2.5 The Operator shall, when requested to do so, provide such confirmation in relation to the accuracy of the contents of the Records and other information (including, but not limited to, Operator Confidential Information) as the MBTA shall require from time to time.
- 2.6 The Operator shall, upon the written request of the MBTA, make available to Prospective Proposers access to the Commuter Rail Property and Commuter Rail IT Environment in connection with the RFP process for the purposes of inspecting the same so as to understand, without limitation, the operation, maintenance, repair and condition of the Commuter Rail Property.
- 2.7 The Operator shall permit Prospective Proposers to question Operator Personnel about the Commuter Rail Property.

### 3. **SUPPLEMENTAL INFORMATION AND SERVICES**

- 3.1 In connection with any proposal (whether or not yet finalized) to enter into separate agreements and/or other agreements with more than one Successor Operator, each relating to only some of the Services (whether or not together with other railway passenger services) (for the purposes of this **Schedule 15** (Obligations Associated with Termination), a “**Service Group**”) at or following the Termination Date, the Operator agrees and acknowledges that the MBTA may require:
  - 3.1.1 that the Operator provide the MBTA and its Representatives with additional information and reports and analysis in respect of such Service Groups as the MBTA specifies. This may include, but not be limited to:
    - 3.1.1.1 information relating to the operational and financial performance of the Operator in relation to such Service Groups; and/or
    - 3.1.1.2 identification of those Operator Personnel and Primary Agreement Assets and Commuter Rail Property that relate to such Service Groups, together with an indication of the extent to which the same are shared between the operation of different Service Groups; and
  - 3.1.2 that the Operator reorganizes the business of providing the Services in order to facilitate the transfer anticipated by this **Schedule 15.1** (Re-Procurement Provisions) on an ongoing basis in connection with providing the Services within each of such Service Groups to separate Successor Operators. This may include (but not be limited to), to the extent reasonably practicable:

- 3.1.2.1 the re-organization of Operator Personnel such that an appropriate number of Operator Personnel (having sufficient skills, qualifications and experience) can be transferred to each Successor Operator of each such Service Group; and/or
  - 3.1.2.2 entering into additional contracts or modifications to existing contracts and other arrangements, so that the Successor Operator of each such Service Group will have the necessary resources, assets and rights to operate the Agreement Services within that Service Group.
- 3.2 The MBTA reserves the right to direct the Operator to conduct site visits of the Service Property and the Support Property, and inspections of the Service Equipment, for Prospective Proposers.
- 3.3 The MBTA shall reimburse any reasonable out-of-pocket expenses that the Operator may incur in complying with its obligations under this Section 3 (Supplemental Information and Services) of this **Schedule 15.1** (Re-Procurement Provisions). Any other costs of the Operator incurred pursuant to this **Schedule 15** (Obligations Associated with Termination) shall be included in the Services Fee.
- 4. **TRANSITION**

The following obligations shall apply in the event that the Operator is not selected as the sole Successor Operator.

- 4.1 The Operator shall provide the Successor Operator full and complete access to the Commuter Rail Property at least six months prior to the Termination Date to permit the Successor Operator to commence its mobilization activities, including permitting the Successor Operator to have representatives on-site throughout the period, as directed by the MBTA.
- 4.2 The Operator shall provide to the MBTA and the Successor Operator at least six months prior to the Termination Date, or such earlier time as may be requested by the MBTA, a complete list of Operator Personnel and their qualifications, including resumes of all Management Employees.
- 4.3 The Operator shall allow the Successor Operator to interview any Operator Personnel for employment purposes.
  - 4.3.1 The Operator acknowledges and agrees that the Successor Operator has the right to offer employment to any Operator Personnel.
- 4.4 The Operator shall provide at least six months prior to the Termination Date, or at such earlier time as may be requested by the MBTA, the information required to be included in the Handover Package, pursuant to Section 3 (Handover Package Information) of **Schedule 15.3** (Handover Package).

## 5. NON-FRUSTRATION OF TRANSFER TO SUCCESSOR OPERATOR

- 5.1 The Operator shall take no action or steps which is or are designed, directly or indirectly:
- 5.1.1 to prevent, prejudice or frustrate the transfer as a going concern of the business of providing the Services at or following the Termination Date to a Successor Operator; or
  - 5.1.2 to avoid, frustrate or circumvent any provision of this Agreement (including, in particular, the provisions of **Schedule 14** (Preservation of Assets) and this **Schedule 15** (Obligations Associated with Termination)), which is included in whole or in part for the purpose of preventing any such preventive, prejudicial or frustrating action or steps.
- 5.2 Subject to the provisions of Section 4.1 of this **Schedule 15.1** (Re-Procurement Provisions) and the other provisions of this Agreement, the Operator may take such action as it may require for the purposes of proposing to become, or becoming, a Successor Operator.

## 6. MBTA TO PROVIDE SERVICES

The Operator acknowledges and agrees that the obligation to provide Records, make available information, and otherwise cooperate with the MBTA and its Representatives in connection with a re-procurement or procurement of any or all of the Services as provided in this **Schedule 15** (Obligations Associated with Termination), also shall apply in the event that the MBTA determines to provide any or all of the Services directly, without contracting with another Person.

## 7. OPERATOR COMPLIANCE WITH OBLIGATIONS

In addition to all other rights and remedies available to the MBTA, the MBTA shall be entitled to withhold from each Monthly Fee an amount equal to five percent (5%) of the Fixed Fee for each Reporting Period in which the MBTA reasonably determines that the Operator is failing to timely comply with its obligations set out in this **Schedule 15.1** (Re-Procurement Provisions) (the "**Re-Procurement Non-Compliance Holdback**"). The MBTA shall pay the Operator the applicable Re-Procurement Non-Compliance Holdback within thirty (30) days of the MBTA's determination that the Operator has complied with its obligations set out in this **Schedule 15.1** (Re-Procurement Provisions). The Parties acknowledge and agree that the Operator's sole remedy for the Re-Procurement Non-Compliance Holdback shall be the MBTA's payment of the Re-Procurement Non-Compliance Holdback. For purposes of clarification, and not limitation, the Operator shall not be entitled to any interest on a Re-Procurement Non-Compliance Holdback or recovery of damages due to a Re-Procurement Non-Compliance Holdback.

**SCHEDULE 15.2**  
**LAST 12 MONTHS OF AGREEMENT PERIOD**

**1. LAST 12 MONTH PERIOD**

- 1.1 Where reference is made in this Agreement to the last 12 months of the Term, such period shall be deemed (except where the actual Termination Date is known) to commence on the earliest of the following dates:
- 1.1.1 the date which is 12 months, prior to the Expiration Date; or
  - 1.1.2 the date on which the MBTA notifies the Operator that such 12 month period shall be deemed to commence on the grounds that the MBTA reasonably considers that this Agreement will be terminated pursuant to **Schedule 12** (Defaults, Remedies, and Termination) within the following 12 months.
- 1.2 Any such period (which may be longer or shorter than 12 months) shall expire on the Expiration Date or, if earlier, in the case of a period commencing under Section 1.1.2 of this **Schedule 15.2** (Last 12 Months of Agreement Period), the date falling 12 months after the date of any Termination Notice given in accordance with **Schedule 12** (Defaults, Remedies, and Termination), or such earlier date as the MBTA may determine.
- 1.3 If the last 12 months of the Term has commenced (or has been deemed to have commenced) and or a Continuation Notice has been given in accordance with **Schedule 16** (Extension of Term), then the last 12 months of the Term shall terminate upon receipt of the Continuation Notice.

**2. OPERATOR PERSONNEL**

- 2.1 The Operator shall not, without the prior written consent of the MBTA (which consent shall not be unreasonably withheld, delayed or conditioned), vary or agree to or promise to vary the terms or conditions of employment of any Operator Personnel (in particular, the Operator shall not promise to make any additional payment or provide any additional benefit or vary any term or condition relating to holiday, leave or hours to be worked) where such variation or addition:
- 2.1.1 takes effect in the last 12 months of the Term unless it is in the ordinary course of business and, when aggregated with any other variation or addition which takes effect during such period, represents an increase in the remuneration of Operator Personnel of no more than the amount determined in accordance with the following formula:

$$MI + JI + SI + DI$$

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where:

- MI is the increase in the Index between March in the preceding 12 months and the corresponding March 1 year before, expressed as a percentage;
  - JI is the increase in the Index between June in the preceding 12 months and the corresponding June 1 year before, expressed as a percentage;
  - SI is the increase in the Index between September in the preceding 12 months and the corresponding September 1 year before, expressed as a percentage; and
  - DI is the increase in the Index between December in the preceding 12 months and the corresponding December 1 year before, expressed as a percentage;
- 2.1.2 wholly or partly first takes effect after the end of the Term;
  - 2.1.3 results in any such employment not being terminable by the Operator or other relevant employer within six months of the end of the Term;
  - 2.1.4 relates to a payment or the provision of a benefit triggered by termination of employment;
  - 2.1.5 relates to the provision of a benefit (excluding base salary) which any such employee will or may have a contractual right to receive after the end of the Term; or
  - 2.1.6 prevents, restricts or hinders any such employee from working for a Successor Operator or from performing the duties which such employee performed for the Operator.

For purposes of this Section 2.1 of this **Schedule 15.2** (Last 12 Months of Agreement Period), “**Index**” means the Index for Direct Labor included in **Schedule 16** (Extension of Term), Section 1.3.

2.2 Without limiting the foregoing, the Operator shall consult with the MBTA as soon as reasonably practicable in any circumstances in which the MBTA’s consent under Section 2.1 of this **Schedule 15.2** (Last 12 Months of Agreement Period) may be required. It shall always be deemed to be reasonable for the MBTA to withhold its consent to a variation or addition which is prohibited without such consent under Section 2.1 of this **Schedule 15.2** (Last 12 Months of Agreement Period) provided the MBTA:

- 2.2.1 makes an overall increase in the Annual Fee equal to the amount of the direct net losses suffered by the Operator on the days when the Agreement Services are affected by a Labor Dispute taken by Operator Personnel which is a consequence of a refusal by the MBTA to agree to the variation or addition; and
- 2.2.2 agrees that to the extent that the Operator would otherwise be in Breach as a consequence of the Labor Dispute referred to in this Section 2.2.1 of this

**Schedule 15.2** (Last 12 Months of Agreement Period) no such Breach shall have occurred, except where such Breach relates to safety requirements.

- 2.3 The Operator shall consult with the MBTA as soon as reasonably practicable in any circumstances in which the MBTA's consent under Section 2.1 of this **Schedule 15.2** (Last 12 Months of Agreement Period) may be required. The expression "**promise to vary**" when used in Section 2.1 of this **Schedule 15.2** (Last 12 Months of Agreement Period) includes any offer or indication of willingness to vary (whether or not such offer or willingness is made conditional upon obtaining the MBTA's consent).
- 2.4 The Operator shall not, without the prior written consent of the MBTA (which consent shall not be unreasonably withheld, delayed or conditioned), create or grant, or agree or promise to create or grant, terms or conditions of employment for any Operator Personnel where the employment of such Operator Personnel may commence on or after the Termination Date, if and to the extent that:
- 2.4.1 such terms or conditions are materially different from the terms or conditions of employment of equivalent or nearest equivalent Operator Personnel at the date on which such employment is scheduled to commence; and
- 2.4.2 if such terms or conditions were granted to such equivalent Operator Personnel already employed by the Operator by way of variation to their terms or conditions of employment, the Operator would be in Breach of Section 2.1 of this **Schedule 15.2** (Last 12 Months of Agreement Period).
- 2.5 Subject to and excluding any increase in the remuneration of Operator Personnel permitted under Section 2.1 of this **Schedule 15.2** (Last 12 Months of Agreement Period), the Operator shall not, without the prior written consent of the MBTA (which consent shall not be unreasonably withheld, delayed or conditioned) increase or decrease in the last 12 months of the Term the number of Operator Personnel such that:
- 2.5.1 the total number of Operator Personnel or the total cost per annum to the Operator of employing all Operator Personnel is increased; or
- 2.5.2 the total number of Operator Personnel is decreased,
- in each case, by more than five percent during such period of 12 months.

**SCHEDULE 15.3  
HANDOVER PACKAGE**

**1. HANDOVER PACKAGE STATUS**

1.1 The Operator shall:

1.1.1 maintain the Handover Package and conform its accuracy and completeness in writing to the MBTA on an annual basis, in accordance with Section 2 (General Manager's Certificate) of this **Schedule 15.3** (Handover Package);

1.1.2 update it at least every three Reporting Periods; and

1.1.3 make it available to the MBTA for inspection or audit by the MBTA in accordance with the provisions of **Part 1**, Section 12 (Examination and Audit), whenever requested.

1.2 The Operator shall ensure that any Successor Operator will have immediate access to the Handover Package on the Termination Date and shall agree with the MBTA from time to time on an appropriate location at which such Handover Package should be kept, which, unless otherwise agreed to by the Parties, shall be the offices of an attorney selected or approved by the MBTA.

**2. GENERAL MANAGER'S CERTIFICATE**

Once in each Agreement Year, the Operator shall provide to the MBTA a certificate signed by the Operator General Manager, addressed to the MBTA, which confirms that the Handover Package contains the information and objects specified in the Appendix 1 (Form of Handover Package) to this **Schedule 15.3** (Handover Package) and that such information is accurate as at the date of the certificate.

**3. HANDOVER PACKAGE INFORMATION**

Without limiting the foregoing provisions of this **Schedule 15.3** (Handover Package), the Operator shall provide to the MBTA the following information and letters on or prior to the Agreement Services Commencement Date, and shall supply revised information and/or letters to the MBTA as and when required in order to ensure that such information and letters remain accurate and up to date:

3.1 details of the location of the Handover Package, which details shall include the contact name(s), address(es) and telephone number(s) enabling contact during, and outside, normal office hours with persons authorized and able to release the Handover Package;

3.2 a letter in a form approved by the MBTA:

3.2.1 from the Operator to the MBTA confirming that an irrevocable instruction has been given to the attorney holding (or other persons authorized or approved by the MBTA for such purpose) the Handover Package that either the MBTA or a

Successor Operator, or their respective duly authorized agent, is entitled at any time to require access to and delivery of the Handover Package on demand, and confirming the MBTA's right to audit the Handover Package at any time; and

- 3.2.2 from the attorney holding the Handover Package (or other person authorized or approved by the MBTA for such purpose) to the MBTA confirming that he or she will release the Handover Package to either the MBTA or a Successor Operator, or their respective duly authorized agent, on demand, and confirming that the Handover Package will be made available for the purposes of auditing its contents when so required by the MBTA;
- 3.3 a list of all key contacts, as set out in Appendix 1 (Form of Handover Package) to this **Schedule 15.3** (Handover Package);
- 3.4 a letter in a form approved by and addressed to the MBTA confirming the details of any insurer providing insurance to the Operator, and authorizing the insurer (and any relevant broker) to release any insurance-related information to either the MBTA or a Successor Operator, or their respective duly authorized agent on demand; and
- 3.5 a complete and accurate inventory of all categories of documents related to the Agreement Services including, but not limited to, drawings, specifications, calculations, manuals, procedures, Records and Necessary Consents.

**APPENDIX 1 TO SCHEDULE 15.3  
FORM OF HANDOVER PACKAGE**

**1. KEY CONTACTS**

A list of key contacts to include all directors (statutory or otherwise) and all managers with responsibility for a department/function within the Operator's business. This must include operations, commercial, personnel and public affairs departments (or in each case their nearest equivalents). This list must include the name, address, home, office and mobile telephone numbers, and a brief description of the person's role and responsibilities in the business.

**2. PROPERTY**

A list of all property, including all offices, warehouses, storage locations and other property, including Primary Agreement Assets, owned, leased, operated or occupied by the Operator in the performance of the Services which shall include the address, telephone number and contact telephone number of each property. Where applicable, the list also will include the name, address and telephone number of the lessor and/or the Person which has granted authority or approval to use or occupy the property, and any relevant reference numbers applicable to that lease or agreement.

**3. CONTRACTS**

A printed or electronic list (in a format acceptable to the MBTA) of all contracts (sales, purchases or otherwise including leases and licenses), including Key Contracts, between the Operator and the counterparty or counterparties to each such contract, showing the name, address and telephone number of each counterparty; the contract reference number of the Operator and each counterparty (if any); and the contract price/value, term and expiration date (collectively, the "**Contract Information List**"). Contemporaneous with the provision of the Contract Information List, the Operator shall also provide full, unredacted copies of all agreements referenced in the Contract Information List.

**4. SYSTEMS**

A list of the electronic systems in use by the Operator, together with the name of the Operator's Information Technology Manager (or the holder of any equivalent post), office address and telephone number who is responsible for administration of each such system.

**5. DAILY OPERATIONS**

A printed or electronic list (in a format acceptable to the MBTA) of all assets owned or operated by the Operator in the performance of the Services, including Primary Agreement Assets, together with their location.

**6. INSURANCE**

A list of the names, addresses and telephone numbers of all insurers and any relevant broker providing insurance to the Operator, together with the relevant policy numbers and other references and details of any outstanding claims or unresolved disputes.

**SCHEDULE 15.4**  
**PROVISIONS APPLYING ON AND AFTER TERMINATION**

**1. ASSIGNMENT OF AGREEMENTS ON TERMINATION OF THIS AGREEMENT**

- 1.1 The Operator shall, to the extent requested by the MBTA on or before the Termination Date, assign all of its right, title and interest in any Key Contract and under any contract or agreement that the MBTA determines to be necessary or useful in the performance of the Agreement Services (an “**Assigned Contract**”) to the MBTA or a Successor Operator, or as the MBTA may otherwise direct (each, an “**Assignee**”). The MBTA may direct the Operator to assign the Assigned Contracts to different Assignees, including itself, as it determines in its sole discretion.
- 1.2 If any Assigned Contract does not provide for such an assignment, the assignment by the Operator shall be subject to the agreement of any counterparty to such Assigned Contract.
- 1.3 The Operator’s assignment shall be on such terms as the MBTA may reasonably require, including:
- 1.3.1 that the Operator shall not be released from any accrued but unperformed obligation under the Assigned Contract, or the consequences of any breach of the Assigned Contract which is the subject of arbitration or litigation between the parties, or any other liability in respect of any act or omission under or in relation to the Assigned Contract prior to, or as at the effective date of, the assignment (except to the extent that the MBTA or the Assignee (if not the MBTA) agrees to assume responsibility for such unperformed obligation, liability or the consequences of any such breach in connection with the assignment); and
- 1.3.2 that neither the MBTA nor the Assignee (if not the MBTA) shall be obligated to assume, nor be deemed to have assumed, responsibility for any unperformed obligation, liability or consequences of a breach referred to in Section 1.3.1 of this **Schedule 15.4** (Provisions Applying on and After Termination) as a consequence of any such assignment.

Notwithstanding the foregoing, no such assignment shall, unless the Operator otherwise agrees, be on terms which release any counterparty to the Assigned Contract from any liability to the Operator arising prior to the effective date of the assignment.

- 1.4 Without limiting the foregoing, the Operator shall provide such assistance to any Successor Operator as the MBTA may reasonably require in ensuring that, pursuant to any Direct Agreements, such Successor Operator may enter into (or enjoy the benefit of) a contract equivalent to the relevant Key Contracts (or parts thereof).
- 1.4.1 In satisfaction of its obligations under this Section 1.4 of this **Schedule 15.4** (Provisions Applying on and After Termination), the Operator shall terminate, surrender, cancel or undertake not to enforce its rights under any Key Contract

(or part thereof) provided that nothing in this Section 1.4 of this **Schedule 15.4** (Provisions Applying on and After Termination) shall require the Operator to undertake not to enforce its rights under a Key Contract relating to the period prior to the Termination Date.

- 1.5 The Operator shall notify the MBTA on becoming aware of any circumstances that might prevent the assignment of an Assigned Contract in accordance with the provisions of this Section 1 (Assignment of Agreements on Termination of This Agreement) of this **Schedule 15.4** (Provisions Applying on and After Termination).

## 2. COOPERATION WITH SUCCESSOR OPERATOR

In order to ensure the continuity of, and an orderly handover of control over, the Services, the Operator shall cooperate with any Successor Operator and the MBTA, and shall take all such steps as the MBTA may reasonably request in connection therewith.

## 3. TRANSFER OF PRIMARY ASSETS

The Operator shall, to the extent requested by the MBTA on or before the Termination Date, assign and transfer all of its right, title and interest in any Primary Agreement Asset to the MBTA or a Successor Operator, or as the MBTA may otherwise direct (a “**Subsequent Owner**”). The MBTA may direct the Operator to assign Primary Agreement Assets to different Subsequent Owners, including itself, as it determines in its sole discretion.

- 3.1 Without limiting the foregoing, the Operator and the Subsequent Owner shall enter into an agreement (the “**Handover Agreement**”), which shall provide for the determination of amounts to be paid with respect to the transfer of the applicable Primary Agreement Asset(s). The Operator shall enter into such Handover Agreement, at the request and direction of the MBTA, and shall comply with its obligations thereunder.
- 3.2 On the effective date of any such Handover Agreement, the Operator shall transfer to the Subsequent Owner possession of the Primary Agreement Assets that are subject to such Handover Agreement.
- 3.3 Any Agreement Asset also may be transferred to a Subsequent Owner, upon the agreement of the Operator and the Subsequent Owner, subject to the same provisions of Section 3.1 of this **Schedule 15.4** (Provisions Applying on and After Termination) applicable to Primary Agreement Assets.

## 4. ASSOCIATED OBLIGATIONS ON TERMINATION

- 4.1 In order to facilitate the continuity of the Services at the end of the Term, the Operator shall take such steps, both before and after the Termination Date, as the MBTA may reasonably require, to assist any Successor Operator or the MBTA directly, in providing the Services.
- 4.2 In particular, the Operator shall provide the MBTA and any Successor Operator with such Records and information relating to or connected with the Services, as the MBTA

requests (other than confidential financial information but including all Records relating to the Operator Personal), for use free of charge.

- 4.3 The Operator shall cease to use any trademarks or service marks that are licensed to the Operator by the MBTA immediately upon the termination of this Agreement and shall take all necessary steps to change any company name which incorporates any such marks as soon as practicable.
- 4.4 The Operator shall assign, to the extent permitted by Applicable Law, all Necessary Consents, effective as of the Termination Date, to the MBTA, or to a Successor Operator, or to another Person, as the MBTA may direct, to the extent and in the manner requested by the MBTA.

## 5. ACTIONS REQUIRED IMMEDIATELY ON HANDOVER

- 5.1 The Operator, on or prior to the Termination Date, as directed by the MBTA, shall make available to the MBTA:

- 5.1.1 information as to the status of each purchase order or contract relating to the provision of the Services, including its award date, anticipated delivery date, confirmation of receipt of goods or services and the payment records for each purchase order, together with any matters in dispute with the appointed subcontractor; and

- 5.1.2 information concerning any contract necessary for the uninterrupted continued provision of the Services where a procurement or bidding process has been initiated.

- 5.2 Prior to the Termination Date, the Operator shall move to the Service Property and store in a secure manner all Support Inventory that is not located and maintained on the Service Property. The Operator shall provide a list of repair and return items not located on MBTA-owned Service Property as of the Termination Date.

- 5.3 At the Termination Date, the Operator shall:

- 5.3.1 deliver to the MBTA all Support Inventory related to the Agreement Services. Such Support Inventory shall be in Good Working Condition, and at least in the condition required by **Schedule 3.2** (Engineering Services) and **Schedule 3.3** (Mechanical Services).

- 5.3.1.1 The MBTA shall accept the entire Support Inventory and reimburse the Operator for any reasonable increase, as determined by the MBTA, in the inventory relative to the inventory provided to the Operator by the MBTA at the Agreement Services Commencement Date, as the same may have been adjusted during the Term. Any increase in Support Inventory beyond a reasonable increase, as determined by the MBTA, shall become the property of the Operator and shall not be compensated by the MBTA.

- 5.3.1.2 The Operator shall compensate the MBTA for any decrease in the Support Inventory relative to the inventory provided to the Operator by the MBTA at the Agreement Services Commencement Date, as adjusted during the Term in accordance with the provisions of this Agreement.
- 5.3.2 deliver to the MBTA all office equipment and supplies maintained on the Service Property and used in performing the Agreement Services in a Good Working Condition.
- 5.3.3 transfer possession of, and if previously acquired in the name of the Operator, title to, the Commuter Rail Property to the MBTA in a Good Working Condition.
  - 5.3.3.1 The Support Property shall be equivalent in type, value, and condition to the Support Property provided to the Operator by the MBTA on the Agreement Services Commencement Date, as adjusted by sales or acquisitions pursuant to this Agreement during the Term.
  - 5.3.3.2 The Operator shall pay to the MBTA the fair market value, as determined by the MBTA, of any Support Property not returned to the MBTA in accordance with Section 5.3.3.1 of this **Schedule 15.4** (Provisions Applying on and After Termination).
- 5.4 The MBTA and the Operator shall conduct a joint audit of the Commuter Rail Property and the Support Inventory not less than 30 days prior to the Termination Date in order to determine compliance with and to effectuate the foregoing provisions (the "**Termination Joint Audit**"). The MBTA shall be responsible for all reasonable costs associated with the Operator's personnel participating in conducting the Termination Joint Audit.

## 6. INTELLECTUAL PROPERTY

All licenses of any intellectual property relating to the Agreement Services shall be transferred effective as of the Termination Date.

**SCHEDULE 16  
EXTENSION OF TERM**

**1. EXTENSION OF TERM**

The initial Term may be extended, at the option of the MBTA, subject to the following provisions.

- 1.1 The MBTA may give notice to the Operator (a “**Continuation Notice**”) not less than 12 months before the Expiration Date, of its intention to continue this Agreement after such Expiration Date on the terms set forth herein, for a period of not less than 24 months and not more than 48 months, subject to the provisions of Sections 1.3 and 1.5 of this **Schedule 16** (Extension of Term). The MBTA may extend the Term through the issuance of one or two Continuation Notices, at its option, so long as the aggregate of the extensions does not exceed 48 months, subject to the provisions of Section 1.2 of this **Schedule 16** (Extension of Term).
- 1.2 The MBTA may give a Continuation Notice to the Operator, extending the Term of this Agreement, as it previously may have been extended in accordance with the provisions of Section 1.1 of this **Schedule 16** (Extension of Term), for a period of not less than six months and not more than 12 months, in order to provide sufficient time for the transfer of the provision of the Agreement Services (or any part thereof as may be determined by the MBTA), in accordance with the provisions of **Schedule 15.1** (Re-Procurement Provisions).
- 1.3 If the MBTA delivers a Continuation Notice pursuant to Section 1.1 or 1.2 of this **Schedule 16** (Extension of Term), the Net Annual Fee for each Agreement Year (or portion thereof) of the extended Term shall be equal to the Net Annual Fee for the eighth Agreement Year (or the last full Agreement Year of any extended Term), whichever is later, adjusted by a factor equal to the Blended Inflation Rate, in accordance with the provisions of **Schedule 7** (Payments). For purposes of this **Schedule 16** (Extension of Term), the “**Blended Inflation Rate**” shall mean the weighted average of the Indices set forth in Table 1 below, using the percent change in each Index over the 12-month period ending three months prior to the start of each Agreement Year (*e.g.*, for the Agreement Year beginning on July 1, 2022, each Index will be calculated for the 12-month period ending March 31, 2022). Each Index rate will be weighted by the categories of costs identified in the Net Annual Fee for the eighth Agreement Year, as indicated in the FFP Form, including direct labor, service, materials, utilities, major maintenance/capital, and profit.

**Table 1: Indices**

<b>FFP Cost Categories</b>	<b>Index</b>	<b>Link</b>
Direct labor	US Department of Labor – Bureau of Labor Statistics, Employment Cost Index (All Workers)	<a href="ftp://ftp.bls.gov/pub/suppl/eci.ecicois.txt">ftp://ftp.bls.gov/pub/suppl/eci.ecicois.txt</a>
Service	US Department of Labor – Bureau of Labor Statistics, CPI-U (All Urban Consumers; U.S. city average)	<a href="ftp://ftp.bls.gov/pub/special.requests/cpi/cpiuai.txt">ftp://ftp.bls.gov/pub/special.requests/cpi/cpiuai.txt</a>
Materials	US Department of Labor – Bureau of Labor	<a href="ftp://ftp.bls.gov/pub/special.requests/cpi/cpiuai.txt">ftp://ftp.bls.gov/pub/special.requests/cpi/cpiuai.txt</a>

	Statistics, CPI-U (All Urban Consumers; U.S. city average)	
Utilities	US Department of Labor – Bureau of Labor Statistics, CPI – Energy	<a href="http://www.economagic.com/em-cgi/data.exe/blscu/CUSR0000SA0E">http://www.economagic.com/em-cgi/data.exe/blscu/CUSR0000SA0E</a>
Major maintenance / Capital	AAR Railroad Cost Recovery Index: Quarterly Index of Chargeout Prices and Wage Rates, East	<a href="https://www.aar.org/StatisticsAndPublications/Rail-Cost-Indexes/Pages/default.aspx">https://www.aar.org/StatisticsAndPublications/Rail-Cost-Indexes/Pages/default.aspx</a> Note that a subscription is necessary to access data
Profit	US Department of Labor – Bureau of Labor Statistics, (CPI-U) Boston-Brockton-Nashua, MA-NH-ME-CT (Northeast)	<a href="http://data.bls.gov/cgi-bin/surveymost?r1">http://data.bls.gov/cgi-bin/surveymost?r1</a>

1.4 If, within 14 days of receipt of a Continuation Notice from the MBTA pursuant to Section 1.1 of this **Schedule 16** (Extension of Term), the Operator notifies the MBTA that it does not wish to continue this Agreement beyond the Expiration Date, as then in effect, on the terms set forth in this Agreement, this Agreement shall terminate on the Expiration Date.

## 2. CONTINUATION OF THE SERVICES

The Operator shall enter into new, or extend existing, as applicable, any and all Key Contracts that are necessary for this Agreement to continue, as extended in accordance with this **Schedule 16** (Extension of Term).

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