



Issues that Emerge When Public Entities Acquire a Real Property Interest in Rail Lines

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AUTHORS

Spitulnik, Charles A.; Fultz, Allison I.; and Alexander, Christian L.

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Legal Research Digest 3

ISSUES THAT EMERGE WHEN PUBLIC ENTITIES ACQUIRE A REAL PROPERTY INTEREST IN RAIL LINES

This report was prepared under NCRRP Project 12-01, Topic 02, "Legal Aspects of Rail Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Charles A. Spitulnik, Allison I. Fultz, and Christian L. Alexander, Kaplan Kirsch and Rockwell, LLP, Washington, DC.

Background

The nation's freight, intercity passenger, and commuter rail operators need a comprehensive source of information that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to rail transportation. The complex interaction among operators, institutional entities at all levels of government, and private and public sectors creates a multi-level institutional configuration affecting rail system planning and operation.

To meet similar needs in the highway area, the Transportation Research Board of the National Academies of Sciences, Engineering, and Medicine inaugurated a legal research project in 1969 under the National Cooperative Highway Research Program. The highway legal project has been funded continuously since that time, eliciting strong support and approval from the constituency it serves. Similarly, a transit legal research project was implemented in 1992 under the Transit Cooperative Research Program and that project has continued since its inception. Finally, an airport legal research project was implemented in 2006 under the Airport Cooperative Research Program and continues today.

Each year, numerous attorneys nationwide are involved in rail-related work, yet there is no centralized repository of legal resources on which they can depend. In response, the National Cooperative Rail Research Program's (NCRRP) *Legal Research Digest* series has been initiated to provide rail-related research on a wide variety of legal topics.

Applications

This legal research digest presents potential issues and solutions that may emerge when state and local governments seek to acquire real property interests from an operating railroad in active rail corridors. The discussion is presented in two parts:

1. An exposition of the issues and rationale that might arise in the planning for and implementation of a transaction that involves acquisition of real property in an active rail corridor.
2. An annotated term sheet template for pursuit of the transaction.

The desire for acquisition usually grows out of recognition of the need to create a new or improved transit system along a fixed guideway designed to alleviate increasing traffic congestion and improve deteriorating environmental conditions in the local and broader community. These real estate transactions, although they might appear to be routine, are not and involve dealing with complexities unique to property owned and used by operating railroads. The term sheet offers options for a variety of approaches to facilitate application in response to specific project characteristics. It also provides references and examples to illustrate real-world applications.

It is important to recognize that case law is continuously evolving, and any application building on the material contained in this digest should also examine experiences that occur after publication. Case law also varies by jurisdiction, and possible variations should always be researched and considered when using this resource.

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By Charles A. Spitulnik, Allison I. Fultz, and Christian L. Alexander, Kaplan Kirsch and Rockwell, LLP

I. INTRODUCTION

State and local governments around the country continue to look at rail corridors that, in their view, would be perfect locations for creation of new fixed-guideway transit systems. Traffic congestion and its impacts on the environment, the community at large, and the people who must suffer its consequences are, in too many places, only getting worse. Although often an expensive alternative, the possibility of using these corridors for the benefit of the public often seems to present a logical solution. In many ways similar to routine real estate transactions, these rail line acquisitions also present a host of issues that are significantly different. In this digest, the researchers discuss the key elements that distinguish these transactions and present approaches to the issues that either have been used successfully in other rail corridor acquisitions or may present fodder for further discussion in the local, state, and federal legislative arenas. The accompanying annotated transaction term sheet sets out the range of issues a public entity is likely to need to consider when pursuing the acquisition of a rail corridor. The term sheet presents options for specific language, as well as references to transactions or cases in which particular issues have been addressed.

II. PRELIMINARY MATTERS

A. The Decision to Acquire

Agencies often find themselves making public statements about proposed rail corridor acquisitions for the purpose of starting or expanding transit systems even before they have begun to have a discussion with the railroad that owns the corridor to determine whether there is any interest in selling. This can be a risky approach. Before publicly identifying target corridors, agencies should not only identify routes that serve the communities and routes where congestion mitigation is desired, but also take time to observe those corridors over a several-month period to observe freight utilization patterns and to determine whether Amtrak also exercises its right

to use the property.¹ An additional caveat is that observers should not make assumptions about the regulatory status of a rail line based on the apparent condition of the tracks or other casual observations of the property. Railroads often preserve lightly used corridors for potential detours or to allow for future capitalization on potential increases in commercial activity on adjacent properties (sometimes also owned by the railroad).

Approaching the carriers with such an informed perspective could make the discussions more productive. Railroads already have substantial bargaining power in negotiations with local agencies about the sale or use of a corridor. If an agency approaches a rail carrier with the perspective that the two parties are attempting to make a mutually beneficial arrangement, then the railroad may be more willing to engage in productive discussion. When a community makes an announcement before talking to the carrier, however, this advance notice may provide leverage to the railroad if the public has already lined up in support of a particular project on the identified corridor.

B. Limits on the Use of Eminent Domain

Public agencies are accustomed to being able to force the sale of properties they need for legitimate public purposes, and transit and roadways are well recognized as such legitimate public purposes.² Public bodies may be best served, however, by relinquishing this assumption when considering how to approach negotiations with a railroad. With respect to rail corridors and facilities, state and local governments cannot exercise eminent domain powers if taking the property interest will interfere with the railroad's ability to fulfill its common carrier obligation.³

¹ Amtrak's right to use property owned by rail carriers is comprehensive and extends as well to properties owned by public agencies. 49 U.S.C. § 24308.

² See 2A NICHOLS ON EMINENT DOMAIN § 7.05 (Julius L. Sackman ed., 3d. ed. 2012).

³ The railroads' common carrier obligation with respect to their transportation corridors is established by 49 U.S.C. § 11101. The Surface Transportation Board and courts have demonstrated repeatedly their willingness to prevent a state or local government from exercising their powers of eminent domain if the result will be a limitation on the railroad's ability to fulfill that obligation. *See, e.g.*, 14500 Ltd v. CSX Transp. Inc., Case No. 1:12 CV 1810, 2013 U.S. Dist. LEXIS 39806 *10 (N.D. Ohio 2013).

*The authors wish to express their appreciation to W. Cory Haller, who provided invaluable research assistance during the preparation of this digest.

III. THE TRANSACTION

A. Type of Interest to Acquire

The first issue to address in any real estate transaction is to determine the type of interest the railroad will be willing to convey. The analysis begins with determining the nature of the railroad's interest. Does it have fee simple title? An easement? A mix of interests that varies from parcel to parcel throughout the corridor? Potential buyers should not rely solely on the language of the deed to ascertain the scope of the railroad's real property interest. Language that appears to convey a fee simple interest could, nonetheless, be construed under state law as granting only an easement.⁴ Similarly, the agency should confirm whether the land to be conveyed includes a federally granted right-of-way. Some of the statutes relating to such right-of-way restrict the rail carriers' ability to transfer the property or an interest in it to third parties.⁵

The next question is whether the railroad plans to continue operating freight service. If it does not, then to avoid the possibility of entanglement with the federal rail regulatory structure administered by the Surface Transportation Board (STB),⁶ the transaction should require completion of "abandonment" proceedings at STB⁷ prior to closing on the sale.⁸ If the railroad does plan to continue operation, the parties should negotiate an arrangement by which the freight carrier retains a freight easement and the accompanying common carrier obligation. At the same time, the parties should determine the extent of the rights that each party will retain with respect to the conduct of rail operations on the line. As discussed in the annotations to the Annotated Term Sheet at the end of this digest, the extent of the acquiring agency's involvement with the federal regulatory process will be determined by the extent of the rights it acquires.⁹ In addition, and as discussed more fully in the following section, if the agency plans

⁴ See discussion at note 8 in attached Annotated Term Sheet.

⁵ See, e.g., The General Right of Way Act of 1875, 43 U.S.C. § 934; 43 U.S.C. § 912. See also *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257 (2014) for discussion of the federal government's retention of interests in rights-of-way that were granted under the 1875 Act and that have been abandoned by the rail carrier.

⁶ 49 U.S.C. § 10101, et seq.

⁷ 49 U.S.C. § 10903.

⁸ Abandonment of an active rail line may trigger the exercise of reversionary interests under state law, so agencies contemplating a transaction that involves abandonment should carefully analyze potential state law implications, as discussed in more detail in this digest.

⁹ See Annotated Term Sheet notes 7 and 9, and accompanying text.

to remain outside the purview of the federal rail regulatory scheme, the transaction documents should first ensure that the freight railroad *retains* the easement at the outset rather than having the agency transfer the easement after it has acquired the entire interest in the right-of-way.¹⁰ Second, the transaction documents must reflect with specificity the rights and obligations that the acquiring agency is receiving and those that will remain with the railroad.

In the early stages of planning a transaction, if the railroad wishes to retain the option to operate in the corridor that the public agency wishes to acquire, the parties should also pause to examine whether there might be existing alternative routes available in the vicinity that the railroad could use. Although not always an option—financially or operationally—the parties could benefit from taking the time to conduct the analysis of the comparative cost of improving a nearby rail line to permit the freight carrier to conduct its operations, while giving the passenger operator the ability to serve the population centers that are the target of its initial routing determination. In some circumstances, the improvements to another line may be less expensive than the capacity enhancements on the line the railroad is currently using. In large metropolitan centers, where duplicative infrastructure is more common than not due to the complicated commercial history of those cities and the complex chain of rail mergers over time, this analysis could present a solution to some obstacles that the railroad may perceive to the implementation of the transaction as initially proposed.

B. Taking Amtrak into Account

Amtrak's use of a line that is under consideration changes the dynamic of the discussion about the line's acquisition, although the degree of impact on the proposed new operation depends initially on the extent of Amtrak's operation there. The statute that gives Amtrak the right to use rail lines in the United States applies to lines owned by freight railroads as well as by public agencies.¹¹ Although Amtrak's right to use the line for its intercity rail passenger service¹² does not preclude the operation of commuter service on the line, Amtrak's statutory right to use the facilities and to have priority in dispatching¹³ might impact the value of the line to the agency;

¹⁰ See Annotated Term Sheet notes 2 and 5, and accompanying text.

¹¹ 49 U.S.C. § 24308.

¹² 49 U.S.C. § 24102(4).

¹³ 49 U.S.C. § 24308(c) gives "intercity and commuter rail passenger service operated by Amtrak" priority over freight transportation. The statute does not specifically address the priority as between intercity and commuter service.

that is, the presence of Amtrak's intercity operations has an impact on the capacity of the corridor. If Amtrak is present, the agency will be required to accommodate Amtrak's operation on the line. As the agency acquires the real property interests in the line, it can either receive an assignment of Amtrak's agreement with the railroad or enter into a new agreement to address Amtrak's operations.

C. What to Acquire—If Freight Service Will Continue

Bearing these questions in mind, the agency must next determine the property interest that will satisfy its needs for the operations it proposes and, at the same time, allow the railroad to satisfy its continuing objectives (if any) in that market. As noted previously, because agencies cannot exercise their accustomed eminent domain power over the lines, unless they can make a case for adverse abandonment (as discussed more fully in the following section), an acquiring agency will generally have to accept the type and scope of interest the railroad is willing to give. Negotiation is possible, and sufficient compensation may overcome substantial objections. The bargaining leverage may not be equal, however, because of the bar against the exercise of eminent domain, and the agencies may find themselves in a position of accepting the interest the railroad is willing to give.

One option that is available to agencies wishing to pursue acquisition of a line that remains part of a railroad's network and subject to STB jurisdiction is to pursue so-called "adverse abandonment" pursuant to 49 U.S.C. § 10903 and 49 C.F.R. Part 1152. Typically, a railroad that owns a line but no longer wishes to provide service on it proposes the abandonment, and the STB can approve it upon a showing that the public convenience and necessity no longer justify or require the railroad's continued authority to operate common carrier service on the line.¹⁴ When a third party, such as a local government, however, believes that a rail line has fallen into disuse, and the public interest would justify termination of STB's jurisdiction over the line in order to permit the exercise of eminent domain authority, STB may grant an "adverse abandonment," that is, an abandonment that is "adverse" to the interests of the owning railroad.¹⁵

¹⁴ 49 U.S.C. § 10903. Note that the statute also provides for "discontinuance" of rail operations, relief that is appropriate for a rail carrier that has lease or operating rights on a segment of track but is not the owner of the line on which it operates. As is the case with the owner, however, these rights remain in place until extinguished by STB. *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 145 (1946).

¹⁵ *Thompson*, 328 U.S. at 145 (1946); *Consolidated Rail Corp. v. Interstate Commerce Comm'n*, 29 F.3d 706, 708–09 (D.C. Cir. 1994); *New York Cross Harbor R.R. v. STB*, 374 F.3d 1177, 1185–86 (D.C. Cir. 2004).

The public agency's interest, however, in claiming a corridor that appears underutilized for the purpose of benefiting the community is not always a sufficient determinant of the "public convenience and necessity." STB is reluctant to grant adverse abandonment when there is a rail carrier that claims it is ready, willing, and able to provide service, and there is a shipper that claims to want service.¹⁶ If successful, though, the adverse abandonment proceeding removes STB jurisdiction from the line, facilities, or other rail property, and the public agency is then free to exercise its traditional eminent domain authority.

If the transaction is properly structured, an agency can acquire a fee simple interest in an active freight line and the selling railroad can continue its freight operations. For example, the Florida Department of Transportation (FDOT), in one of the earliest transactions in commuter rail development in the country, acquired a fee simple interest in 1988 from CSX Transportation, Inc., on CSX's coastal corridor from a point north of West Palm Beach to Miami.¹⁷ In that transaction, CSX retained an easement that gave it the exclusive right and authority to provide freight service on the corridor. These transactions are structured to allow the selling freight railroad to retain the essential rights and obligations necessary to continue its freight operations. As noted previously, in order to be successful in regulatory proceedings that seek a ruling that the public agency remains outside the scope of the jurisdiction of STB, the selling railroad must retain an operating easement in the initial conveyance to the agency, rather than having the agency acquire the railroad's entire interest in the line and then transfer an easement back to the railroad.

The agency can acquire some degree of control over the selling railroad's operations, so long as the agency does not acquire sufficient rights and obligations that would allow it to interfere with the railroad's ability to fulfill its common carrier obligations.¹⁸ Arrangements that STB may accept include:

¹⁶ *New York Cross Harbor R.R.*, 374 F.3d at 1183–86; *Salt Lake City Corp.—Adverse Abandonment—In Salt Lake City, UT*, STB Docket No. AB-33 (Sub-No. 183), slip op. at 5, 7–8 (Service Date Mar. 8, 2002).

¹⁷ *See Florida Dep't of Transp.—Acquisition Exemption—Certain Assets of CSX Transp., Inc.*, STB Finance Docket No. 35110 (Service Date Dec. 15, 2010) (decision provides historical background of original transaction while announcing a ruling on the transfer of maintenance and dispatching obligations from CSXT to FDOT and the South Florida Regional Transportation Authority).

¹⁸ STB and its predecessor the ICC have concluded, and subsequently elaborated on the conclusion, that public agencies can acquire interests in rail corridors without necessarily acquiring a common carrier obligation on that corridor. *See State of Maine, DOT—Acquisition and Operation Exemption—Maine Central R.R. Co.*, 8 I.C.C. 2d 835 (1991). See also cases cited in Annotated Term Sheet note 2.

1) establishing operating windows for freight and passenger traffic that limit the freight operations to specific times of day;¹⁹ 2) giving the agency authority to dispatch rail operations on the corridor as long as it does not have discretion to materially impede freight movement or operation;²⁰ and 3) providing right-of-way or signal maintenance by the public agency rather than the freight railroad.²¹ STB, however, will not grant a request for a determination that the public agency is not acquiring common carrier obligations if the agency has acquired the right to force the rail carrier to seek abandonment authority or to otherwise cease providing freight rail service on the corridor.²²

D. What to Acquire—If Freight Service Will Not Continue

If the railroad does not wish to continue to operate freight on the line, then the parties will need to agree on the approach to secure approval for abandonment of the freight service on the corridor. 49 U.S.C. § 10903 and the regulations at 49 C.F.R. Part 1152 set forth the procedures and approaches available for parties to follow when the carrier seeks to abandon its operating authority and attendant obligations. That said, the mere cessation of operations by the railroad is not sufficient. Until the railroad with operating authority secures and affirmatively exercises abandonment authority,²³ the line remains subject to STB's jurisdiction and to the common carrier obligation that accompanies the authority to operate a line.²⁴

When considering how to accomplish the termination of STB's jurisdiction over a line, the preferred approach is often to postpone closing on the acquisition until the railroad has secured abandonment authorization from STB and consummated the abandonment. This simplifies the regulatory process for

¹⁹ *Mass. Dep't of Transp.—Acquisition Exemption, Certain Assets of CSX Transp., Inc.*, STB Finance Docket No. 35312, slip op. at 12 (Service Date May 3, 2010).

²⁰ *State of Michigan Dept. of Transp.—Acquisition Exemption—Certain Assets of Norfolk S. Ry. Co.*, STB Finance Docket No. 35606, slip op. at 5 (Service Date May 8, 2012).

²¹ *Id.*; *Mass. Dep't of Transp.*, slip op. at 13.

²² *Southern Pacific Transp. Co.—Abandonment Exemption—Los Angeles County, CA*, 9 I.C.C. 2d 386 (1993).

²³ Section 10903 also contemplates “discontinuance” authority. A carrier that has trackage rights or other authority to operate on a line it does not own must secure “discontinuance” authority. If more than one carrier has the right to operate on a line that a public agency wishes to acquire, all must secure the requisite abandonment and/or discontinuance authority (depending on the nature of their interest in the line) in order for the freight common carrier obligation to be fully extinguished.

²⁴ 49 U.S.C. § 11101 describes the railroad's common carrier obligation.

the acquiring agency. One provision of the statute that relates to abandonments, however, presents a possible speed bump in the process. That is, 49 U.S.C. § 10904 permits a party that is a “financially responsible person” and wishes to “preserve freight rail service” to file an Offer of Financial Assistance (OFA). This process allows for the offeror, upon an expression of willingness to either provide a subsidy for the ongoing freight operations or to purchase the line outright (at a price that STB will establish if the potential offeror and the owning railroad cannot reach agreement), to potentially disrupt a proposed transfer of a line for use as a transit operation. To manage this risk, the railroad can seek waiver of the OFA process when submitting its request for abandonment authority, arguing that the public's interest in the proposed transit operation provides a valid reason for denying the offeror's request.²⁵

Agencies do have choices about how to approach a transaction where the railroad seeks to cease operations altogether. One involves closing the transaction but placing the deeds in escrow pending completion of the abandonment so that the agency will never fully have control of the property until STB has approved the abandonment. The agency will need to complete a two-step regulatory process: first, advising STB of its acquisition of a beneficial ownership interest in the property, even though ownership of the property has not yet been fully conveyed,²⁶ and second, securing authorization, in its capacity as beneficial owner, for abandonment of the common carrier obligation.²⁷

Another alternative approach involves closing the transaction, completing the conveyance, and securing the regulatory authorization that accompanies an acquisition of a line by a noncarrier.²⁸ Upon completion of that phase of the process, the agency then seeks abandonment authorization. The agency completes these steps sequentially, not simultaneously. Although the agency may include a statement in its acquisition pleadings of its intent to secure abandonment authority immediately upon completion of that § 10901 process, standard practice is for sequential pleadings. Although this sequence gives the agency control over

²⁵ *Union Pacific R.R. Co. Abandonment Exemption—In Kane County, IL*, STB Docket No. AB-33 (Sub-No. 105X) (Service Date Apr. 29, 1997) (OFA exemption granted in light of valid public purpose in plans for railbanking line).

²⁶ 49 U.S.C. § 10901; 49 C.F.R. pt. 1150.

²⁷ 49 U.S.C. § 10903; 49 C.F.R. pt. 1152.

²⁸ 49 C.F.R. pt. 1150, subpt. D. This discussion assumes that because the acquiring agency will not be conducting, or hiring a third party to conduct, freight operations on the line, the entity to be created will be a “Class III carrier” as defined in STB's regulations, a classification based on revenue of the railroad and not the quality of its track and infrastructure or any other operating characteristics. See 49 C.F.R. pt. 1201, subpt. A, General Instructions.

the abandonment process, an agency that pursues this approach may face the risk that the government will treat it as a rail carrier that provides transportation subject to the jurisdiction of STB, if even for a brief period of time. This characterization has implications for coverage under the Railroad Retirement Tax Act,²⁹ Railway Labor Act,³⁰ and the range of federal regulations affecting rail carriers. Undoing that status may be time-consuming and may cost the agency in administrative expenses, legal fees, and potentially higher personnel costs pending determination that the agency is not a rail carrier subject to the jurisdiction of the STB.

E. Due Diligence Issues

As with any transaction, the acquiring agency will need to conduct due diligence to confirm that the railroad has the ability and right to transfer the property interests the agency wishes to acquire and that the property does not come with burdens the buyer does not wish to bear.

1. Title

The first question relates to the quality of the title that the railroad is able to convey. State real property law varies from state to state with respect to the interpretation of the rights conveyed in the deed transferring the property to the railroad. Despite the pervasive federal regulation of railroads that is designed to ensure uniformity of rights and obligations across a railroad's operating system, state law governs matters of title to real property. Here, the issue does not arise during the period when the railroad is conducting operations on the corridor, because federal preemption precludes states and holders of reversionary property rights from exercising rights vis-à-vis the property so long as the railroad remains subject to STB's jurisdiction.³¹ If the line is removed from STB's jurisdiction as a result of an abandonment proceeding, however, and Section 10501 no longer applies, the state law determination of the rights originally conveyed will control. Particularly where the right-of-way was originally conveyed as a qualified fee simple interest such as "fee simple for railroad purposes," state courts may have interpreted the railroad's interest to be an easement rather than fee simple title.³² Accordingly, as is prudent in any real property transaction, the acquiring agency should obtain a title report as part of its due diligence

²⁹ 45 U.S.C. § 231, *et seq.*

³⁰ 45 U.S.C. § 151, *et seq.*

³¹ 49 U.S.C. § 10501.

³² The presence of the terms "fee" or "in fee simple" in the deed may not in fact determine that the right-of-way is granted in fee rather than as an easement. *Chevy Chase Land Co. v. United States*, 733 A.2d 1055, 1062, 1063 n.4 (Md. 1999) (citing *City of Port Isabel v. Missouri Pacific R.R. Co.*, 729 S.W.2d 939 (Tex. Ct. App. 1987)).

review in order to analyze the nature and quality of the selling railroad's title.

The acquiring agency that wishes to eliminate any deficiencies relating to title in the property it acquires may seek to perfect its title by commencing a quiet title action. If that does not resolve all outstanding questions because a person claiming rights in the property comes forward, the agency will then need to exercise its right of eminent domain to extinguish any reversionary or other residual interests and vest fee simple title in the agency.

2. Environmental

The ground beneath rail corridors is rarely clean. Public agencies, like any other buyer, will want to know whether the corridors they seek to acquire present any environmental degradation as a result of fuel spills, commodities that have been transported, or cleaning or other activities that the railroad or its shippers may have conducted. Not only will the buyer want to know what lies beneath the corridor it is buying, but a funding agency will require information about the condition of the property to ensure that its resources are not used to address an issue that a previous owner may have created.

A Phase I environmental report will reveal documents relating to reported environmental conditions. An acquiring agency will not likely be able to go further than a Phase I review, however, without committing to the railroad, prior to undertaking any invasive testing in the right-of-way, that it will fully indemnify the railroad for the cost of any mitigation or restoration that may be required even if the transaction does not go forward. Negotiation of the allocation of risk in the event of a release should involve the possibility of participation in a state voluntary clean-up program.³³

In addition, railroads will typically require any findings arising from environmental due diligence review to remain confidential. Agencies should evaluate the degree of confidentiality state open records laws will allow them to provide. A public purchaser can often only promise to preserve the confidentiality of the results of an environmental investigation "to the extent permitted by applicable law."³⁴

³³ *E.g.*, Maryland Department of the Environment Voluntary Clean Up Program. See http://www.mde.state.md.us/programs/Land/MarylandBrownfieldVCP/mapping/Documents/Revised_03_VCPdoc_Section_Overview.pdf.

³⁴ In some states, review of materials generated during the environmental review may be shielded from disclosure by keeping the materials in the hands of third-party consultants who conduct the review, prepare a report, and submit it to the funding agency. Because the consultant is an agent of the public agency for the purposes of conducting the analysis, however, state law most frequently regards information acquired by the consultant as being in the hands of the state and thus subject to public disclosure requirements.

3. Holders of Other Rights on Railroad Property

The railroad or its predecessors in interest are likely to have granted leases, licenses, or easements to such entities as utilities or billboard companies. The acquiring agency will typically desire all such encumbrances to be extinguished prior to taking title, but should evaluate whether there are advantages to assuming the railroad's interest in such arrangements. For example, though the encumbrances may place some limitation on the uses or ability to expand uses of the corridor, there may be financial benefit to the owner of the burdened property as well. In addition, the selling railroad may wish to retain its interest in certain encumbrances, such as utility licenses. The existence of such interests demands a case-by-case analysis and can provide a basis for negotiations.

A rail corridor that is burdened by trackage rights or other operating obligations held by a freight rail carrier other than the selling railroad will remain subject to that burden unless and until STB terminates those rights and obligations through the discontinuance process.³⁵ The nature of the operations, both of the other user and of the potential purchaser, will determine whether the burden on the corridor is one that the acquiring agency wishes to remain. If all freight rail carriers on the line are willing to structure their operations to permit the passenger service,³⁶ then the acquiring agency may well be content to allow that additional use to continue. In addition, the lease of trackage rights can provide a substantial revenue stream that the agency can apply to track maintenance or other operating costs.

F. Operations and Maintenance Following the Transaction

1. Commencement of Passenger Rail Operations

Passenger operations on a railroad line require maintaining the line to a higher standard than freight operations require because of both the higher speeds (in most cases) and the comfort of passengers. As a result, the purchasing agency will have the incentive to maintain the corridor to a level that is suitable for passenger operations. Although STB may have no jurisdiction over the line if it is dedicated exclusively to commuter passenger service, FRA's jurisdiction will remain

³⁵ See note 14, *supra*.

³⁶ Considerations relating to the shared use of the corridor by freight and passenger operations include whether the passenger equipment conforms to Federal Railroad Administration (FRA) requirements or whether temporal separation of operations or a waiver of FRA rules is required. See 49 C.F.R. pt. 209, app. A.

unless the line is part of an electric, interurban transit system that is not connected to the general freight network.³⁷

The absence of STB jurisdiction occurs because that agency has jurisdiction only over rail carrier (and some water carrier) transportation that is between states, between places within a state if the transportation is part of the interstate rail network, between a place in the District of Columbia and a state, or between a state and a foreign nation.³⁸ STB's statute states that the definition of "rail carrier" does not include "...street, suburban, or interurban electric railways not operated as part of the general system of rail transportation."³⁹

Even though STB will not assert jurisdiction, FRA will, unless the line falls within the "electric interurban—not connected to the general system of rail transportation" exception that is part of the definitions under both the Interstate Commerce Commission Termination Act (ICCTA) and the rail safety acts. As noted, FRA asserts jurisdiction over safety on fixed-guideway transportation systems. A complication may arise if there is any connection to the "general system of rail transportation." Even limited connections to the national rail network may provide the basis for FRA to assert jurisdiction, including a shared at-grade highway crossing; a location where tracks used for transit only cross over a freight line; or a shared corridor where the tracks do not intersect but the tracks are close together.

Under the "limited connection" scenario, or in circumstances where a light rail transit system will use the same tracks as freight or traditional commuter or intercity passenger rail systems, FRA will consider granting waivers to its otherwise applicable rules. As a starting point, though, in the current operating environment, FRA will expect transit systems that use "noncompliant" vehicles, that is, vehicles that do not comply with FRA's rail equipment standards,⁴⁰ to adopt a

³⁷ See 49 U.S.C. § 20102(1)(B). In its policy statement explaining its exercise of jurisdiction over joint use of rail corridors by traditional railroads and light rail or other non-FRA-compliant forms of transportation, FRA stated:

...[W]ith the exception of self-contained urban rapid transit systems, FRA's statutory jurisdiction extends to all entities that can be construed as railroads by virtue of their providing non-highway ground transportation over rails or electromagnetic guideways, and will extend to future railroads using other technologies not yet in use.

49 C.F.R. pt. 209, app. A (emphasis supplied).

³⁸ 49 U.S.C. § 10501(a)(2).

³⁹ 9 U.S.C. § 10102(5).

⁴⁰ 49 C.F.R. pt. 238.

program of temporal separation between the non-compliant transit vehicles' use of the line and the freight or other passenger systems' use of the line.⁴¹ FRA's waivers, when granted, require both careful attention to the details of compliance with rules that FRA either elects not to waive, or cannot waive due to statutory requirements, and periodic renewals.

An agency purchasing a corridor from a rail carrier, however, should not assume that the selling railroad will allow noncompliant transit operations to coexist in the corridor just because FRA's rules contemplate shared use in some circumstances, and do not apply when transit and rail operations share the corridor but are sufficiently separated and share no grade crossings. Although there is no statutory or regulatory basis for a prohibition by the selling carrier, freight railroads have required purchasing agencies to commit that they will not use noncompliant vehicles on adjacent corridors without implementation of other safety measures, such as the use of crash walls, track-intrusion detection devices, and other means of maintaining physical separation of freight and passenger operations.

2. Post-Transaction Management of the Corridor

If the agency and the railroad will share use of the corridor following the transaction, the transaction documents will need to include allocation of responsibility for the following:⁴²

1. Maintenance of way, or the ongoing effort to keep the track in a consistent state of good repair.
2. Maintenance of signal and communications systems.
3. Dispatching (i.e., controlling the movement of rail traffic along the corridor).
4. System safety and security.
5. Shared facilities (other than tracks and corridor).
6. Clearing wrecks.

In addition, the parties will need to agree on allocation of responsibility for implementation

⁴¹ FRA has not yet addressed the question of whether it will ease its emphasis on temporal separation once Positive Train Control (PTC) technology is fully in place and operational. See 49 U.S.C. § 20157. FRA's regulations regarding implementation of PTC are located at 49 C.F.R. pt. 236 subpt. I.

⁴² The assumption of any of these responsibilities by themselves will not cause STB to conclude in a *State of Maine* proceeding, discussed at note 18 and accompanying text, and *infra* pp. 18–19, that the agency has assumed responsibility as a carrier providing transportation subject to the jurisdiction of STB.

and management of positive train control (PTC) on the corridor.⁴³

G. Other Legal and Regulatory Issues

These transactions have many unique attributes because of the rail regulatory overlay that must inform the broad array of issues previously discussed. Each one also presents all of the issues that arise in any real estate transaction. Some, such as liability allocation (discussed in the following section), demand special rules because of the rail environment, but are in other ways quite similar to the elements present in any real estate deal.

1. Consideration

No transaction is valid without the exchange of consideration. Parties agree on the adequacy of the consideration exchanged and, in a nonpublic agency transaction, that agreement may be sufficient. In a transaction that involves a public agency using public funds, however, a statement that the parties agree upon and acknowledge the adequacy of the consideration may not be sufficient. The purchasing agency must respond to requests from federal agencies that are providing funds, or local governing boards or constituents whose tax dollars will support the transaction, with confirmation that the payment for the transaction is reasonable. Even without individualized local or state rules prohibiting gifts of public funds, good government practices require careful valuation and confirmation that the payment to the railroad is reasonably related to the value of the property that the agency will receive.

Furthermore, the consideration need not be limited to a cash-for-property exchange. The value of improvements constructed or reimbursed by the agency is often a significant component of the agency's payment. The railroad's retention of operating rights, or right to priority of operations in some circumstances, could form a portion of the consideration, as could the agency's agreement to fund specified improvements to the infrastructure that will benefit the freight railroad operations. The parties' creativity

⁴³ PTC is a system of automatic train control mandated by Congress in the Rail Safety Act of 2008 (codified at 49 U.S.C. § 20157) for certain freight lines and all lines carrying intercity or passenger commuter rail traffic. As of the date of publication of this digest, all affected railroads are required to have completed installation and commissioning of PTC on their lines by Dec. 31, 2018, with a further extension to Dec. 31, 2020, in limited circumstances. A detailed discussion of PTC requirements and the range of issues they present is beyond the scope of this digest. Agencies should be aware that PTC may be required on the track or corridor they share with freight traffic, independent of the presence of passenger operations, and should seek to allocate costs attributable to PTC accordingly.

to identify alternatives to up-front cash payments by providing other benefits to the selling carrier is not limited, as long as the railroad understands that the agency will, in almost all circumstances, be restricted to providing benefits or improvements within that agency's jurisdiction that will benefit the taxpayers who are supporting the transaction.

2. Insurance and Indemnification

The negotiation of insurance and indemnification issues is likely to occupy a significant portion of the effort involved in a transaction to acquire freight railroad property. The freight railroads are concerned about the expensive liability associated with the injuries or death of people. The public agencies are concerned about placing public funds at risk by assuming liability when the freight carrier either has some measure of control over the circumstances that led to the incident that triggered the liability, or when one of the railroad's employees engages in dangerous conduct that causes an incident. The freight railroads may argue that "but for" the presence of the passenger operations (whether commuter rail or light rail), they would have no risk, and the entity that brings that risk should bear the cost of it fully. The agencies may argue in response that they are willing to accept that risk except for circumstances in which the rail carrier knew or should have known that its employees' actions would cause the damages, or where the employee acted with knowledge of the potentially dangerous consequences.

The federal statutory cap on liability to passengers, currently \$200 million and indexed to inflation,⁴⁴ should provide the agencies and the railroads with a basis for agreeing on liability limitations between them. In addition, the parties will need to account for payment for damages to third parties, the right-of-way, and the freight carrier's equipment and personnel. Because the Federal Employers' Liability Act⁴⁵ establishes the allocation of liability for injuries incurred by railroad employees in the course of their duties, and because the railroads may already have insurance or other arrangements in place to address that liability, the acquiring agency may reasonably request the railroads to apply that coverage to the injuries or death of its employees.

Subject to the rights delegated to that agency under state law, the public agency may be able to manage its risk by acquiring insurance. The cost of such insurance may fluctuate. Many commercial general liability policies include an exclusion for

activities within 50 ft of a railroad right-of-way. If the agency cannot secure an endorsement that removes that exclusion, then it will be required to secure railroad protective liability insurance, a product designed to address the risks associated with nonrailroad personnel who work in or near the right-of-way.

3. STB Proceedings

As discussed previously, STB reviews transactions in which a rail carrier sells a line of railroad, whether to a noncarrier⁴⁶ or to an existing carrier.⁴⁷ These so-called "*State of Maine*" proceedings allow for a public agency to acquire an active railroad right-of-way and associated physical assets but not the common carrier obligation for the line, which remains with the railroad that conveys the property to the public agency.⁴⁸ To approve a *State of Maine* transaction, STB must determine that: 1) the selling freight rail carrier would retain a permanent, exclusive freight rail operating easement, together with the common carrier obligation on the line; and 2) the terms of the sale would protect the carrier from undue interference with the provision of common carrier freight rail service.⁴⁹ The previous discussion enumerates the types of controls over the operations on the right-of-way that the agency can acquire without crossing the boundary set by STB for preserving the argument that the transaction is not subject to its jurisdiction.

Of course, a decision by the selling rail carrier to abandon the line (not just curtail or temporarily cease operations but to fully "abandon" in accordance with the applicable statute and regulations⁵⁰) prior to closing makes the STB regulatory process much simpler. As with adverse abandonment proceedings, abandonment proceedings remove STB jurisdiction from the line, facilities, or other rail property, easing the path forward for the transaction and otherwise allowing the public agency to exercise its traditional eminent domain authority.

4. Interim Trail Use

If the rail carrier has decided to abandon the line, the agency may decide to "railbank" it. In creating the Rails-to-Trails program,⁵¹ Congress envisioned a network of corridors on which freight service is suspended, pending reactivation in the event that the demand for freight service revives, rather than totally

⁴⁶ 49 U.S.C. § 10901.

⁴⁷ 49 U.S.C. § 11323(a).

⁴⁸ See *State of Maine*, 8 I.C.C. 2d 835.

⁴⁹ See, e.g., *Mass. Dep't of Transp.—Acquisition Exemption—Certain Assets of CSX Transp., Inc.*, Finance Docket No. 35312, slip op. at 5 (Service Date May 3, 2010).

⁵⁰ 49 U.S.C. § 10903; 49 C.F.R. pt. 1152.

⁵¹ 16 U.S.C. § 1247(d).

⁴⁴ 49 U.S.C. § 28103. Congress recently increased the cap, tying it to inflation. Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94, § 11415 (Dec. 4, 2015).

⁴⁵ 45 U.S.C. § 51, et seq.

removed from the interstate rail network via consummation of an STB-approved abandonment. Railbanked corridors can be used for trails, rail transit, or other public purposes, as long as the interim trail user acknowledges in a Statement of Willingness to Assume Financial Responsibility, which is required by STB regulations,⁵² that it will stand aside in the event that a bona fide proposal is made by a rail carrier to resume service on the line.⁵³ Congress's intent in adopting the Rails-to-Trails program was to permit interim use of rail corridors for these public purposes in the event of a decrease in demand for freight rail services. The effect of securing railbanking authorization is to prevent holders of residual property interests in the corridors from exercising them in a way that destroys the integrity of the rail corridor. The Rails-to-Trails provisions ensure that railbanking will forestall full abandonment of the corridor, so that a line that is railbanked remains under the jurisdiction of STB and is not abandoned under federal law.⁵⁴ An agency that is considering railbanking, however, should carefully evaluate the potential use of the corridor and whether such use would constitute continued rail use under state law. Each state's law is different on the subject of whether use of a rail corridor for transit purposes is sufficient to prevent the exercise of reversionary rights by successors to the original property owners. If an agency's state law permits that substitution, then the agency need not consider use of railbanking to forestall exercise of those rights by the property owners.

5. Environmental Review Requirements

If the selling railroad does not abandon the corridor and the transaction requires review by STB, then the parties must comply with STB's environmental review requirements. STB has published its rules governing the environmental process at 49 C.F.R. Part 1105. These regulations detail the environmental reporting requirements for various categories of actions, including acquisition and abandonment proceedings that will result in operational or environmental changes that exceed certain levels provided in the regulations. Parties should review the regulations carefully to determine the classification the rules provide for the transaction⁵⁵

⁵² 49 C.F.R. § 1152.29(f).

⁵³ STB, for example, has rejected a proposal to permit a company that proposed to operate service on a line acquired by a collection of public agencies in King County, Wash., for trail, transit and other uses because it concluded that the proponent did not present a bona fide proposal. *GNP Rly, Inc.-Acquisition and Operation Exemption-Redmond Spur and Redmond Subdivision*, STB Finance Docket No. 35407 (Service Date June 15, 2011).

⁵⁴ 16 U.S.C. § 1247(d).

⁵⁵ 49 C.F.R. § 1105.6.

and build the time for environmental review of the transaction into the implementation schedule.

In addition, if the acquisition uses federal funding or is occurring as part of a project that will receive federal assistance, then the environmental review requirements of the funding agency, most often the Federal Transit Administration (FTA), will also apply and will often determine the timing and sequence of various activities in connection with the property transfer.

6. The Use of Federal Funds for the Acquisition

Although each federal agency has its own rules governing the environmental review process that it will require all grantees to complete, anyone who acquires a corridor or facilities using federal funds will be required to complete an environmental review. All federal programs require an environmental review because the requirements of the National Environmental Policy Act (NEPA) are triggered by a "major federal action,"⁵⁶ and acquisition of a rail corridor and related facilities using federal funds is a "major federal action." It is beyond the scope of this research digest to catalogue the requirements of the different agencies, but it should be said that it is important to determine early in the process the scope and extent of environmental review that will be required by the federal funding partners.

Several aspects of the FTA requirements that relate to property acquisitions are as follows. First, FTA requires that an acquiring agency possess a sufficient interest in the property being acquired to permit FTA to determine that the buyer has control during the period required in the grant agreement. Second, the Uniform Relocation Assistance and Real Property Policies Act of 1970 (Uniform Act)⁵⁷ requirements that govern the purchase of properties for a federally funded project will likely apply and involve a unique two-step appraisal process. Analysis is required to determine whether a proposed transaction is subject to the Uniform Act.⁵⁸ The protections of the Uniform

⁵⁶ *Macht v. Skinner*, 916 F.2d 13, 15-16 (D.C. Cir. 1990).

⁵⁷ 42 U.S.C. §§ 4601 et seq. Implementing regulations for the Uniform Act are found at 49 C.F.R. pt. 24.

⁵⁸ FTA's guidance on the application and interpretation of 49 U.S.C. § 5324(c), which was included as Section 3024 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59 (Aug. 10, 2005), provides that

[i]f the railroad ROW is to be acquired with the use of FTA funds, or if the future project that will use the railroad ROW is to be Federally assisted, then the applicable requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act and its implementing regulation at 49 CFR Part 24 must be followed.

FTA Final Guidance on the Application of 49 U.S.C. § 5324(c) to Railroad Right-of-Way Acquisition, Apr. 30, 2009.

Act apply to people who are displaced from homes, businesses, or farms as a result of a transaction for which federal funds are applied. Exceptions include transfers between public entities. In addition, if the railroad will continue operations on the corridor, then it will almost certainly not be eligible for Uniform Act assistance, even though property owners near the corridor may receive those benefits.

The purchase of real property to be used as part of a federally assisted project typically cannot occur until the completion of environmental review under NEPA. Acquisitions to preserve or create right-of-way that will be used in the project, however, may be permitted to proceed under abbreviated review procedures prior to the conclusion of the project's broader NEPA review.⁵⁹

7. Buy America Requirements

FTA and the Federal Highway Administration (FHWA) each has its own regulations for implementation of domestic procurement requirements under the Buy America program. The FTA regulations can be found at 49 C.F.R. Part 661 and the FHWA regulations at 23 C.F.R. § 635.410. FRA's Buy America requirements are found in each program's authorizing statutes.⁶⁰ A detailed discussion of relevant Buy America programs is presented in National Cooperative Rail Research Program Legal Research Digest 1, *Buy America Requirements for Federally Funded Rail Projects*, published in February 2015. This digest presents a high-level view of relevant domestic procurement issues.

Although the domestic procurement rules vary slightly for each unit of the U.S. Department of Transportation (USDOT), they generally require all steel and manufactured products used in a federally assisted project to have been produced in the United States using domestic materials. Waivers of these requirements may be granted at USDOT's discretion in limited circumstances.

If reimbursement of a railroad's cost to make improvements to its own facilities is a component of the consideration for the acquisition of rail property, the railroad's procurement must conform to the Buy America requirements. Accordingly, project proponents should include a discussion of the Buy America requirements in the negotiation of any construction reimbursement that is offered as part of the transaction. In addition, utility relocation work for which costs are reimbursed as part of the project will also be subject to Buy America. Many utilities will need to accommodate these requirements within their

⁵⁹ 49 U.S.C. § 5323(q); 23 C.F.R. § 771.118(d)(4).

⁶⁰ See, e.g., 49 U.S.C. chs. 244, 246; § 24405 (High Speed Rail Program).

established procurement programs, so early coordination with utilities is necessary to ensure that they provide materials and products that are compliant with the Buy America requirements. Project proponents may wish to consider seeking assistance from their FTA regional office or state FHWA office to educate utility companies about this requirement.

8. The Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (ADA),⁶¹ as amended by the ADA Amendments Act of 2008,⁶² which became effective on January 1, 2009, applies to the transit services provided by the acquiring agency, and its requirements could impact the construction of platforms and other facilities within or adjacent to the right-of-way. The Department of Justice has regulations regarding the implementation of the ADA,⁶³ and each governmental agency is responsible for ensuring compliance in all matters that come within its jurisdiction. USDOT has issued its own ADA regulations.⁶⁴ In 2011, USDOT issued rules regarding level boarding at commuter rail stations.⁶⁵ This rule acknowledges the potential conflict between ADA-compliant high-level passenger platforms, on the one hand, and freight operations that might involve dimensional equipment (i.e., equipment that would encroach into the area occupied by a high-level passenger platform) on tracks adjacent to platforms, on the other hand, by permitting commuter rail operators to use alternative means to provide disabled passengers with access to each car on a train.⁶⁶ FTA has issued guidance for public transportation providers to assist them in complying with the ADA, and an acquiring agency will need to address its obligations under the ADA in any negotiation with a freight railroad if the railroad's operations will continue.⁶⁷

9. Tax

Because most public agencies are not required to pay sales or other taxes associated with land sale transactions in their own jurisdictions, the tax implications of these transactions will not normally

⁶¹ Pub. L. No. 101-336, 104 Stat. 327 (1990), currently codified at 42 U.S.C. ch. 126 and 47 U.S.C. ch. 5.

⁶² Pub. L. No. 110-325.

⁶³ 42 U.S.C. § 12134; see 28 C.F.R. pt. 35.

⁶⁴ 42 U.S.C. § 12164; see 49 C.F.R. pts. 37 and 38.

⁶⁵ *Transportation for Individuals with Disabilities at Intercity, Commuter, and High Speed Passenger Railroad Station Platforms; Miscellaneous Amendments*, 76 Fed. Reg. 57924 (Sept. 19, 2011) (DOT Final Rule amending 49 C.F.R. pts. 37 and 38).

⁶⁶ 49 C.F.R. § 37.42(c).

⁶⁷ FTA Circular FTA C A710.1, Americans with Disabilities Act (ADA) Guidance, Nov. 4, 2015.

be front-of-mind for the acquiring agency. The selling railroads may look, however, for ways to mitigate their tax exposure for the sale of assets. To that end, railroads often request a statement in the agreement from the acquiring agency that the transfer of its property to the agency has occurred “under threat of condemnation.” Each agency should make its own determination as to whether it is willing to include that language in its agreement.

H. Other Related Agreements

Although a detailed discussion of ancillary agreements is beyond the scope of this digest, an agency entering into a transaction with a railroad should be aware that railroads will require agreements to address the following issues:

1. Design and Construction of Passenger Rail Facilities

The railroad may likely demand broad rights to review and approve the acquiring agency’s engineering designs if the passenger operations will occur on shared or adjacent track. The railroad will expect to have its standards apply and may require conditions in the context of the transfer agreement, such as setting conditions for passenger service operations (whether light rail or commuter rail) within proximity to its freight operations. In addition, when the railroad requires the opportunity to review and comment on design documents, it may want the acquiring agency to bear the costs associated with that review (wages, benefits, and indirect employee costs; other direct costs incurred in reviewing the documents).

2. Other Shared Facilities

When an agency acquires a corridor from a railroad, it will often need to also secure an interest in some adjacent property or the ability to use some of the railroad’s light-density track to reach a repair facility. The railroad and the acquiring agency can make various forms of agreements—whether leases, easements, trackage rights agreements, or other documents that will achieve the desired utilization on the part of the acquiring agency—to achieve the desired results. The nature of required regulatory approvals and environmental review, if any, will depend on the nature and scope of the property interest acquired, the status of the acquiring agency at the time of acquisition, the interests of federal or state funding partners in the transaction, and the factors previously described with respect to the main transaction.

3. Operating Agreements

Although beyond the scope of this digest, the parties will likely negotiate operating agreements to govern their respective rights and responsibilities with regard to ongoing operations on the

corridor in parallel with the design, construction, and property transfer agreements necessary to effect the transaction.

a. Rules and Standards.—In any transaction, the acquiring agency will need to take into account rules and standards that are specific to the rail industry. The selling railroad will often be specific about its expectations and requirements, and the agency facilitates the discussions with the railroads if it has reviewed and is familiar with the following requirements:

1. FRA rules that govern track standards,⁶⁸ signal systems, equipment, operating practices, and hazardous materials.

2. Other applicable FRA rules, such as workplace safety.

3. The engineering standards published by the American Railway Engineering and Maintenance of Way Association (AREMA). AREMA’s standards, along with the FRA rules, constitute the railway industry standards with which all participants in a transaction involving a rail corridor can expect, at a minimum, to comply.

4. If the railroad is retaining any interest in the line, and is planning for continued operations, it will require compliance with its existing standards due to concerns about safety and liability. The combination of FRA, AREMA, and the individual railroad’s standards will guide the construction and implementation of the proposed project development and related improvements in the corridor.

5. The agency should ensure that any consultants or other contractors that require access to the railroad’s right-of-way or other property carry their own insurance for such purposes and enter directly into any right-of-entry or other access agreements the railroad may require. The railroads will specify in the access agreement the level and types of insurance coverage the agency will need to require of its contractors.

6. Unless a federal law intervenes that preempts the application of state procurement laws, the acquiring agency will remain obligated to comply with those laws. Issues may arise if the selling railroad requires that it have approval rights over contractors or materials used in the construction. The agency can address these issues by giving the railroad the right to approve specifications for materials, designs for construction of improvements, and criteria for selection of contractors, coupled with a certification from the agency that it will not enter into a contract that does not meet those specifications or criteria.

⁶⁸ 49 C.F.R. pt. 213. The FRA’s regulations are collected at pts. 200–299.

IV. CONCLUSION

For many public agencies, the decision to approach a railroad with an offer to purchase a rail corridor for use in developing a new fixed-guideway transit system brings about a number of regulatory and other legal issues. Recognizing at the outset that some of the tools that are otherwise available to the public agency are not available in the context of railroad right-of-way acquisition, and recognizing the extent

of federal protection of the rail carrier's franchise, will allow the agency to approach the railroad with the requisite information to carry out the transaction. The increase in the number of fixed-guideway transit systems, and the growth of existing ones, likely shows that railroads can partake in property transfers that meet the objectives of both parties. Although negotiations with railroads may present challenges, public benefits from introducing new transit options to the community can also be realized.

Annotated Term Sheet Template for Acquisition of Real Property Interests from a Railroad by a Public Agency Seeking to Operate Passenger Rail Service

The following sample term sheet presents the various issues that public agencies may encounter when pursuing a transaction to acquire interests in real property used for railroad purposes from a freight railroad.

The term sheet contains Exhibit references as place-holders to illustrate the issues for which the parties would typically attach exhibits to a term sheet. We have not provided examples of exhibits themselves.

We have provided footnotes to expand on the transactional or statutory background of particular items. We have indicated comments on various provisions by *notes* in *italic font*. Where any of several items are addressed, the options are contained in [brackets].

Outline of Terms for Real Property Transfer and Related Agreements Between [RAILROAD] and [AGENCY]

The following outline of terms (this “**Term Sheet**”), dated as of _____ 20__, is an outline of the essential terms for a Real Property Transfer Agreement (the “**Agreement**”), as well as [ancillary easement], [license] and [other necessary agreements], to be negotiated between RAILROAD or its affiliates (“**RAILROAD**”) and [AGENCY]¹ (“**AGENCY**”) (each, individually, a “**Party**” and collectively, the “**Parties**”), to govern (a) the transfer of various interests in real property, (b) the grant of interests necessary for [rail transit operations] or [the development of a trail on such facilities], and [where appropriate] (c) the retention of such interests as may be necessary for RAILROAD to continue to fulfill its freight common carrier obligations,² all in connection with the construction and operation of the public transportation corridor/s [description] (the “**Line**”).

I. Agreement Generally: The Parties acknowledge that this Term Sheet is intended to (a) establish the terms under which RAILROAD will transfer certain interests in property to AGENCY and (b) address the design and construction of the passenger rail facilities on the Line.³ The Parties agree to negotiate in good faith the terms and conditions of the Agreement and any ancillary agreements

¹ In these agreements, the agency should be identified not only by name but by authorizing legislation, where applicable. *E.g.*, South Florida Regional Transportation Authority Act, ch. 343, pt. I, §§ 343.51–343.58, Florida Statutes; Southern California Regional Rail Authority (SCRRA), CAL. GOV'T CODE § 6500 *et seq.* and CAL. PUB. UTIL. CODE § 130255. By setting forth the statutory authorization in the opening paragraph that identifies the agency, it confirms that its statutory powers and authority define the extent of its ability to agree to the terms of the agreement. Although the agency may later in the agreement be required to represent or warrant that it has sufficient authority to execute the agreement, the initial statement of its statutory, organic authority establishes at the outset the extent and the limits of that power and authority.

² Rail carriers' common carrier obligations are specified in 49 U.S.C. § 11101. Agencies that wish to ensure that they do not acquire any freight common carrier obligation follow a procedure at the Surface Transportation Board (STB) referred to as the “*State of Maine*” process, so-called because the first transaction in which it was used was the one in *State of Maine, DOT—Acquisition and Operation Exemption—Maine Central R.R. Co.*, 8 I.C.C. 2d 835 (1991). In a typical *State of Maine* proceeding, the agency files the pleadings required by 49 U.S.C. § 10901 and 49 C.F.R. pt. 1150 to advise STB that it intends to acquire the line or other property or facilities, then files a Motion to Dismiss the proceeding, explaining that it will not acquire any of the rights or obligations from the transferring freight carrier that would translate into a transfer of any freight common carrier obligation to that agency. *See, e.g., Mass. Dep't of Transp.—Acquisition Exemption—Certain Assets of CSX Transp., Inc.*, STB Finance Docket No. 35312, slip op. at 9 (Service Date May 3, 2010), *aff'd sub nom. Bhd. of R.R. Signalmen v. STB*, 638 F.3d 807 (D.C. Cir. 2011); *The Port of Seattle—Acquisition Exemption—Certain Assets of BNSF Railway Company*, STB Finance Docket No. 35128, slip op. at 3 (Service Date Oct. 27, 2008); *Fla. Dep't of Transp.—Acquisition Exemption—Certain Assets of CSX Transp., Inc.*, STB Finance Docket No. 35110 (Service Date Dec. 15, 2010). Agencies should be aware that in some states (e.g., California) the state taxing authorities have determined that agencies that are subject to the jurisdiction of STB may be exempt from certain state-imposed sales, use, or other taxes. As a result, the agency may wish to balance the potential benefits (i.e., cost savings) of being exempt from certain state personal property or sales taxes against the potential risks and costs associated with becoming a carrier providing transportation subject to STB's jurisdiction.

³ Issues will likely arise relating to the design and construction of passenger facilities following AGENCY's acquisition of the corridor. The (a) property transfer terms and conditions and (b) design, construction, and operation parameters ultimately negotiated by the parties will likely, but not necessarily, be addressed in separate documents.

necessary to effect the property transfers and construction of facilities described in this Term Sheet, which terms and conditions shall include, without limitation, the key business terms set forth herein (or, with respect to the financial terms herein, terms that offer equivalent value to each of the Parties) and such additional terms and conditions (including, without limitation, with respect to defaults, representations, warranties, indemnification and insurance) as are commercially reasonable and consistent with agreements AGENCY has executed with RAILROAD as well as other agreements AGENCY has executed in connection with similar transactions. The Agreement(s) described in this Term Sheet shall be subject to (a) mutual agreement between the Parties with respect to the final form and substance of such Agreement(s), (b) authorization for the execution and delivery of such Agreement(s), (c) confirmation by AGENCY that the terms and conditions of the Agreement(s) are fully consistent with and will not in any way contravene any of AGENCY's obligations under any federal grants related to the Project,⁴ and (d) the obtaining of all necessary regulatory,⁵ funding or other approvals for such Agreement(s) and/or the activities described therein. [AGENCY shall take the lead in seeking any state or federal funding needed to complete the work addressed in this Term

⁴ At the same time that an agency is stating here that it needs to confirm that the transaction does not contravene any obligations under applicable grants or other agreements with federal agencies (or for that matter, other state or local governments), the agency needs to be certain before signing even the term sheet that a public confirmation of its intent to acquire a piece of right-of-way or other facility will not be perceived by a granting agency that the project sponsor is making a premature statement of intent to acquire a particular property when the environmental process confirming the preferred alternative has not yet been issued. *E.g.*, 23 C.F.R. §§ 771.117(d)(12), 771.118(d)(4). Having said that, the Federal Transit Administration (FTA) and Federal Highway Administration (FHWA) have issued regulations that permit preemptive purchases of rail corridors in order to protect the right-of-way needed for a transit project from being lost entirely or sold piecemeal to other purchasers in a way that would frustrate the agency's ability to complete the project. *Id.*; *FTA Final Guidance on the Application of 49 U.S.C. § 5323 to Corridor Preservation for a Transit Project*, available at http://www.fta.dot.gov/documents/Final_Corr_Pres_Guidance_FINAL_10-27-2014.pdf (notice of publication in *Federal Register* at 79 Fed. Reg. 67238 (Nov. 12, 2014)). FRA has not yet authorized a categorical exclusion that would accomplish the same objective. *See Update to NEPA Implementation Procedures*, 78 Fed. Reg. 2713, 2715 (Jan. 14, 2013):

One commenter suggests expanding the list of CEs to include the purchase of existing railroad right-of-way and/or purchase of right-of-way for hardship or protective purposes. FRA notes that many acquisition activities typical of FRA projects are covered under FRA CE #17. FRA will reexamine CE #17 as part of the larger effort to reevaluate the FRA Environmental Procedures in the future.

⁵ The *State of Maine* proceedings at STB (*see note 2, supra*) are but one example of regulatory proceedings that may be required. Agencies should note that filing a *State of Maine* proceeding, if successful, will prevent the agency from asserting that STB's jurisdiction over its operations preempts the requirements of otherwise applicable state and local environmental and other permitting requirements. *See* 49 U.S.C. § 10501. That is, STB and courts have uniformly concluded that state and local governments' attempts to enforce permitting or other local regulatory requirements with respect to actions of a rail carrier that is providing transportation subject to the jurisdiction of STB are preempted to the extent that enforcement of such requirements would interfere with the ability of the railroad to fulfill its common carrier obligations. *See, e.g., City of Auburn, WA v. United States*, 154 F.3d 1025 (9th Cir. 1998). Agencies that elect to preserve STB's jurisdiction over their transactions may, on the other hand, elect to comply with state and local regulations and permitting requirements for political purposes. In addition, even when an acquiring agency secures an order confirming that STB has no jurisdiction over the agency, the agency may nonetheless assert that the presence of interstate freight operations on a corridor creates preemption of otherwise applicable state and local requirements.

Sheet.]⁶ The property that will be subject to the Agreement(s) and the work described herein is generally depicted on the Area Map attached to this Term Sheet at **Exhibit A**.

II. Transfer of Real Property Interests by RAILROAD to AGENCY: In consideration for a price to be negotiated by the Parties for each of the following, RAILROAD and AGENCY shall negotiate the Agreement for the conveyance of real property interests,⁷ along with any ancillary agreements necessary to carry out the terms and conditions thereof, for the following parcels or interests:

NOTE: The following list reflects the various interests that may be conveyed in connection with a transaction to transfer rail property for a public transportation project:

A. Passenger Parcels: RAILROAD to convey parcels identified and described in **Exhibit B** in [fee simple]⁸ OR [as a passenger rail easement]⁹ to AGENCY.

⁶ Acquisitions of right-of-way by public entities typically arise at the request of the public body in connection with a federally assisted infrastructure project. Funding for new or improvements to existing freight rail facilities often constitutes a component of the consideration offered for the acquisition.

⁷ Federal grants and loans typically require the grantee/borrower to demonstrate a long-term interest and control over the use of property on which the grantee/borrower proposes to construct federally assisted facilities. In practical terms, this requirement will influence an agency's choice of the scope and duration of the interest it seeks to acquire. A long-term lease is typically the minimum interest that an agency must obtain in order to remain eligible for federal assistance. *Grant Management Requirements*, FTA Circular 5010.1D ch. IV, § 3.e(1) (Nov. 1, 2008) ("The grantee agrees to use project property for appropriate project purposes for the direction of the useful life of that property, as required by FTA."); *Final FTA Guidance on the Application of 49 U.S.C. § 5323(q) to Corridor Preservation for a Transit Project* 9 (Question 14) (Oct. 27, 2014) (as announced in 79 Fed. Reg. 67239 (Nov. 12, 2014)):

The acquisition [of right-of-way ("ROW") for corridor preservation] may take the form of a fee-simple acquisition of the ROW, a long-term lease, the acquisition of a long-term easement within the ROW, or the long-term acquisition of trackage rights (i.e., the right to operate on the existing tracks). The term of any property right, short of a fee simple acquisition, should be of sufficient duration to cover the time needed to plan and build the proposed transit facility and the useful life of that transit facility.

⁸ An agency should not approach any transaction in which it will acquire a fee interest from the rail carrier with an expectation of receiving a warranty, as opposed to a quitclaim, deed. In many states, courts have ruled that rail carriers that received property "in fee simple for railroad purposes" (or similar language) did not in fact receive a fee simple interest but instead received only an easement that terminates when rail transportation authorization is abandoned. *E.g.*, *Chevy Chase Land Co. v. United States*, 355 Md. 110, 733 A.2d 1055 (Md. 1999); *City of Port Isabel v. Missouri Pacific R.R. Co.*, 729 S.W.2d 939 (Tex. Ct. App. 1987); *Hartman v. J. & A. Development Co.*, 672 S.W.2d 364 (Mo. Ct. App. 1984); *Pollnow v. Wis. Dep't of Natural Resources*, 88 Wis. 2d 350, 276 N.W.2d 738, 744 (1979); *Veach v. Culp*, 92 Wash. 2d 570, 599 P.2d 526 (1979). Unless a deed conveying the property interest to the railroad is quite specific that the conveyance is for freight rail purposes only (which would be unusual since it was quite common for railroads to have both passenger and freight operations until the creation of Amtrak in 1970 established a national passenger rail carrier, Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 327 (1970), as amended from time to time and now codified at 49 U.S.C. 24301, *et seq.*), the continuation of commuter rail and/or rail transit operations on a rail corridor is typically viewed as preserving rail operations in a way that avoids termination of the easement and reversion to the original grantor(s) or his/her/their heirs. In the event that there is a question as to whether the conveyance for commuter rail or rail transit purposes will preserve the corridor against the claims of those heirs in circumstances where the freight rail carrier is not preserving an easement for the purposes of continuing its freight service, agencies may wish to consider agreeing to use the corridor for trail use as well as transit. The Rails-to Trails Act, 16 U.S.C. 1247(d) and

B. Exchange Parcels. AGENCY to convey parcels identified and described in **Exhibit C** in [fee simple] or [as a freight rail easement]¹⁰ to RAILROAD.

C. Relocation Parcels. AGENCY to convey parcels identified and described in **Exhibit D** in [fee simple] or [as a freight rail easement]¹¹ to RAILROAD.

NOTE: If a project requires the relocation of a portion of RAILROAD's facilities, the property transfers necessary to accommodate such relocation will frequently be included as part of AGENCY's acquisition.

D. Temporary Easements for Construction Period: RAILROAD to convey temporary easements to be used during the period of construction for purposes that may include but are not limited to grading, installation and maintenance of sediment and erosion control measures, and construction access, as identified and described in **Exhibit E**.¹²

the implementing regulations at 49 C.F.R. § 1152.29, present a powerful tool for local agencies to preserve corridors against the claims of reversionary property holders. *Presault v. ICC*, 110 S. Ct. 914, 922 (1990).

⁹ Even when the agency is acquiring only an easement rather than a fee simple interest, with the freight rail seller retaining an easement for freight service purposes, the agency should utilize the *State of Maine* process described in note 2, *supra*, to confirm that it has not inadvertently acquired any rights or obligations that would tip the scales towards a determination that it has acquired STB-jurisdictional interests.

¹⁰ The selling railroad will often, although not in every circumstance, seek to reserve an exclusive easement for freight rail purposes. In order to satisfy the shared objective of ensuring that the railroad and not the agency has the common carrier obligation, the conveyance from the railroad should be constructed to involve a transfer of the fee subject to a retained easement rather than having the agency re-convey an easement back following its acquisition. If the railroad does not wish to retain an exclusive freight easement, it may retain an interest of lesser scope. When conveying an “exchange” parcel, if the railroad is acquiring only an easement rather than a fee, then pleadings at STB will need to confirm that the conveying agency does not have any common carrier obligation over property on which the railroad will conduct its freight operations.

¹¹ *See* note 10, *supra*. The Uniform Act requirements, 42 U.S.C. §§ 4601–4655, which typically apply to business relocations that are caused by a federal grant, are not triggered here. A railroad that relocates its operations from property being acquired by a public agency to another line will not likely qualify as a displaced person under the Uniform Act, since the railroad will continue its operations. In addition, since state and local governments have no condemnation power over a railroad, *see, e.g.*, *14500 Ltd v. CSX Transp. Inc.*, Case No. 1:12 CV 1810, 2013 U.S. Dist. LEXIS 39806 *10 (N.D. Oh. 2013), a railroad will have voluntarily entered into the sale. *Regional Transp. Dist. v. Outdoor Systems, Inc.*, 34 P.3d 408, 415–16 (Colo. 2001); *see also* *Isham v. Pierce*, 694 F.2d 1196, 1201 (9th Cir. 1982) (“The legislative history of the [Act] demonstrates that Congress was concerned with acquisitions accomplished through the power of condemnation by federal agencies and state and local public agencies receiving federal financial assistance.”), *Gomez v. Chody*, No. 86 C 6776, 1987 WL 9574, at *4 (N.D. Ill. Apr. 15, 1987), (“The [Act] was intended to benefit those displaced by public agencies with coercive acquisition power, such as eminent domain. It was intended to benefit individuals who were not willing sellers.”). However, the holders of other interests that may be displaced by a federally assisted project, such as the owners of billboards that must be removed, may be entitled to compensation under the Uniform Act. *Regional Transp. Dist.*, 34 P.3d at 418–21.

¹² The acquisition of temporary easements for construction purposes will not require STB authority because the rights granted under such easements do not involve the permanent conveyance of an interest in railroad property or a conveyance of a scope that would interfere materially with the railroad's ability to fulfill its common carrier obligation.

E. Aerial Easements: RAILROAD will grant AGENCY aerial easements to permit the construction, operation and maintenance of the Line over lines owned and/or used by RAILROAD, at locations described in Exhibit F.

F. Permanent Easement for [Subsurface Support] [Support Structure] [Crash Wall]. RAILROAD will grant AGENCY a perpetual easement for construction of [subsurface support structures] [footings, piers and related above-ground support structures] [crash walls] in [location relative to the RAILROAD right-of-way]. The location for the perpetual easement is more fully described in Exhibit G.

NOTE: Key design requirements for such structures should be included in the preceding paragraph.

G. Access/Maintenance Easement: Depending on the proposed configuration of future facilities, RAILROAD and/or AGENCY may grant one another permanent access easements over their respective properties to allow for inspection, maintenance, rehabilitation or reconstruction. The easement may allow solely for passage of certain persons and equipment, or may also allow for occupancy in order to conduct work. The location of the access easement is more fully described in Exhibit H.

H. Facilities License: RAILROAD and/or AGENCY may grant one another licenses on their respective properties to allow for the installation and occupancy of equipment and access to maintain such equipment. The location of the access easement is more fully described in Exhibit H.

I. Rights Reserved by RAILROAD: The conveyance of any real property interests by RAILROAD to AGENCY shall be subject to RAILROAD's reservation of [salvage rights and value of salvaged material] [freight operating easement—interim or permanent]¹³ [utility easement and rents]¹⁴ [parking easement] [building easement] [mineral or water rights] [drainage] [indicia of control and occupancy of real property].¹⁵

¹³ See note 10, *supra*.

¹⁴ Railroads will frequently reserve any fiber optics or related communications easements in their rights-of-way. Any such retained rights should be reflected in a reduction in the value of the property conveyance to the public body.

¹⁵ A railroad's desire to retain indicia of control over property being conveyed to an agency may conflict with the requirements of federal grants and loans that typically require the grantee/borrower to demonstrate a long-term interest and control over the use of property on which the grantee/borrower proposes to construct federally assisted facilities. 49 U.S.C. § 5307(c) ("A recipient may receive a grant in a fiscal year only if—(1) the recipient...submits...a certification for that fiscal year that the recipient...(C) has or will have satisfactory continuing control over the use of equipment and facilities"); 49 C.F.R. 18.31(b) ("*Use*. Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes [sic], and the grantee or subgrantee shall not dispose of or encumber its title or other interests."); *Master Agreement for Federal Transit Administration Agreements*, FTA MA(21) (Oct. 1, 2014) §§ 21(a) ("The Recipient agrees that: (1)...It will maintain continuing control of the use of Project property satisfactory to FTA"), (g) ("Absent the express consent of the Federal Government in writing, the Recipient agrees to preserve the Federal interest in its Project property and to maintain satisfactory continuing control of that Project property as follows..."). In practical terms, this requirement will influence an agency's choice of the scope and duration of

III. Condition of Property: *NOTE: In general, the Term Sheet should provide for a time certain within which AGENCY (and RAILROAD, if it is acquiring property) may conduct due diligence, including environmental and title investigations, and seek cure of any identified violations or defects.*

A. Right of Entry for Environmental and Geotechnical Investigations: Subject to authorization by RAILROAD and the execution of appropriate permits in the form attached as **Exhibit I**,¹⁶ AGENCY will have the right to enter upon RAILROAD's property to inspect and perform environmental due diligence or geotechnical investigations (including but not limited to borings or other invasive testing), or such other investigation as is required to complete the engineering and design of the Line on the properties AGENCY will acquire or occupy in connection with AGENCY's construction and operation of the Line.

NOTE: Railroads will likely grant a right of entry to permit visual inspections. However, railroads are not likely to permit invasive environmental testing unless the acquiring public body is willing to indemnify for or otherwise guarantee that it will bear responsibility for any remediation that may be required for any environmental degradation discovered during or caused by testing.

B. Existing Encumbrances: *NOTE: Typically, the acquiring agency will desire all encumbrances to be removed from the property prior to transfer. However, the acquiring agency must carefully analyze the facts and circumstances relevant to any given transaction to determine whether it wishes to assume any of RAILROAD's interest in such encumbrances.* RAILROAD will provide to AGENCY a list of all agreements, leases, licenses, permits, and other like encumbrances on the property to be transferred to AGENCY, and further, will provide information or documents as requested by AGENCY. RAILROAD will exercise all rights with regard to the termination, removal, or relocation of any utilities, encroachments, agreements, leases, licenses, permits, and other interests encumbering the right-of-way AGENCY will require for construction and operation of the Line and related facilities in a manner that will (a) provide AGENCY an unencumbered right-of-way prior to the transfer of property

the interest it seeks to acquire. A long-term lease is typically the minimum interest that an agency must obtain in order to remain eligible for federal assistance.

¹⁶ These are typically the railroad's standard "right of entry" or similar permits. Railroad's standard form agreements typically expect the other party to fully indemnify the railroad. State limitations on the ability of public agencies to provide unlimited indemnification or insurance, however, may require negotiation of these terms. *See, e.g.,* VA. CODE ANN. § 33.2-1726 (2014) (enumerating the powers of a local Transportation Board, but limiting that power insofar as "no liability or obligation shall be incurred pursuant to this chapter beyond the extent to which money has been provided under the authority of this chapter."); OKLA. CONST. art. X, §§ 23, 26; Okla. Op. Att'y Gen. No. 06-011 (2006), 2006 WL 1987826, at *4 ("A limitation of liability provision which releases a vendor from responsibility for damages caused by its own negligence or intentionally wrongful acts puts the vendor's interest above that of the public. Such a clause is, therefore, not only constitutionally suspect but void as against public policy."); N.M. Op. Att'y Gen. No. 00-04 (2000), 2000 WL 1833589, at *4 (finding that an indemnification provision created a debt under the state Constitution, which "preclude[s] a government from entering into an agreement subjecting it to contingent liability, the amount of which is uncertain at the time of the agreement"); Ohio Op. Atty. Gen. No. 96-060 (1996), 1996 WL 708356, at *9 (finding that limitation of liability provisions may be acceptable, but only when the liability does not exceed the life of the contract, the contract contains an express dollar amount cap, and the source for any potential payments has already been appropriated). *See note following text as well.*

interests to AGENCY and (b) require payment of no compensation by AGENCY to any holder of such right or interest.

NOTE: RAILROAD may elect to retain certain utility easement rights—see Rights Reserved by RAILROADS above.

C. Encumbrances Generally: Unless AGENCY expressly so consents in writing, RAILROAD shall not grant any new agreement, lease, license, or permit, or allow any encroachment or other encumbrance to arise on any parcel in which RAILROAD will grant an interest to AGENCY between the date on which the Parties enter into this Term Sheet and the [date certain as established by the Parties].¹⁷ RAILROAD shall cure any lien that attaches to the property after the date of execution of this Term Sheet within 30 days of the filing of such lien.

D. Title: AGENCY shall have the right to order a review of title to the property to be conveyed, and shall notify RAILROAD within [XX] days of Closing under the Agreement of any defects in title which RAILROAD will be responsible to cure. Alternatively, AGENCY may elect to terminate the Agreement upon [YY] days' notice to RAILROAD if AGENCY reasonably determines that such defects cannot be cured within a reasonable time.

IV. Design Reviews and Approvals:

A. RAILROAD has provided AGENCY with its design requirements pertaining to construction adjacent to RAILROAD's facilities and AGENCY will be guided by the requirements set forth therein to the extent that they apply to the construction and operation of the Line and related facilities.¹⁸ However, the Parties will work collaboratively to review and develop as appropriate any standards for design, engineering, operations, and maintenance where any of the standards set forth in RAILROAD's guidelines will unreasonably impede AGENCY's ability to construct and operate the Line safely, efficiently, and cost-effectively. In the event of review and discussion of revision of RAILROAD's guidelines, both AGENCY and RAILROAD will bear in mind the primary goal of preservation of safety and efficiency of both the RAILROAD's and the AGENCY's operations.

¹⁷ There are circumstances in which the conveying railroad may have no choice in the matter. STB has the authority to require a railroad: 1) to permit another carrier to use its tracks or facilities in or near a terminal area, 49 U.S.C. § 11102; or 2) as a condition of the approval of a transaction between two railroads to divest parallel tracks or grant trackage rights or access to other facilities pursuant to 49 U.S.C. § 11324(c). The proceedings at STB, however, typically extend over a sufficient period of time that the agency will have ample opportunities to evaluate the potential impact on the proposed transit operations.

¹⁸ Any new construction, any rehabilitation of existing track or facilities, or any other activity within any right-of-way that is shared with a freight railroad will be subject to FRA's Track Safety Standards, 49 C.F.R. pt. 213, and all applicable FRA regulations. Most freight railroads incorporate those standards into their own requirements and then layer on additional requirements. Even if the agency is proposing a light rail operation that would not otherwise trigger the application of FRA's rules, the FRA's Shared Use Policy, 49 C.F.R. pt. 209, app. A, confirms that FRA has jurisdiction over such operations and that the agency can only operate or conduct any construction or other activities that are inconsistent with FRA rules if it has secured a waiver pursuant to 49 C.F.R. pt. 211, subpt. C and app. A. Any request for waiver in a right-of-way shared with a freight railroad will require concurrence of that rail carrier.

NOTE: *Railroads are unlikely to deviate from their published standards for construction work or operations on track over which the railroad operates. The degree to which a railroad may agree to alternate approaches in connection with other facilities will be determined by the specific circumstances of each project.*

B. To the extent that they are not covered in RAILROAD's design guidelines, RAILROAD will provide AGENCY with any RAILROAD guidelines for [segmental bridge construction and drop-in] [highway bridge construction] [pedestrian bridge construction] [use of overhanging cranes and gantries along the RAILROAD main line right-of-way] and [retaining walls] [other facilities as required for the project]. AGENCY will review any such guidelines and provide questions or responses to RAILROAD within thirty calendar (30) days of receipt thereof and the Parties will discuss any variance from those requirements that AGENCY may require for the period of construction of the Line.

NOTE: *The facilities listed in the preceding paragraph are intended as illustrations; any given project will likely involve others.*

C. RAILROAD will provide information to AGENCY as necessary to allow AGENCY to design and install facilities (**NOTE:** *e.g., catenary, rail, signal towers*) on structures belonging to RAILROAD of which RAILROAD will retain ownership and control. RAILROAD's review of design drawings will include review of the design of such facilities as RAILROAD's interests may appear.

D. AGENCY will provide RAILROAD with all drawings and plans to the extent required by RAILROAD's design guidelines, and RAILROAD will use all commercially reasonable efforts to complete its reviews of such drawings and plans and provide responses thereto within thirty (30) calendar days of its receipt of such documents. RAILROAD's approval of such drawings and plans shall not be unreasonably withheld.

E. NOTE: *Items and issues typically included in RAILROAD's review of AGENCY's proposed design and construction efforts include:*

- Milestones and time frames for design review.
- Procedures for modifying designs.
- Access to right-of-way by AGENCY personnel or representatives.
- Funding and reimbursement procedures.
- Rights in event of delay.
- Insurance and indemnification.
- Notification procedures for field work.
- Procedures and allocation of responsibility for clearing debris, disabled equipment, and wrecks—
see sample provision below.
- Rights to as-built documentation.
- Post-construction inspection and acceptance.
- Grade crossings.
- Flyover easements and associated facilities.

V. Applicable Law:

A. NOTE: *The Term Sheet should require the Parties to comply with all federal, state, and local statutes, regulations, and directives relating to the transaction, the subsequent project, and any funding commitments. Such requirements typically arise from, but are by no means limited to, the sources listed below. Project participants should conduct regular reviews of the funding sources applicable to each project to ensure that the Parties remain in current compliance with all requirements resulting from such funding.*

- STB jurisdiction over rail transactions.¹⁹
- FTA grants.²⁰
- RRIF loans.²¹
- TIGER grants.²²
- Uniform Act requirements.²³
- NEPA.²⁴
- Federal and State public procurement laws.

° **NOTE:** *In transactions with Amtrak, AGENCY will have to address an additional overlay of federal law specific to Amtrak and federal court jurisdiction.*

- Buy America requirements.²⁵
- The Americans with Disabilities Act.²⁶

¹⁹ STB's jurisdiction is delineated in 49 U.S.C. § 10501, and the specific transactions and activities that are subject to its jurisdiction are spelled out in 49 U.S.C. Subtitle IV (§§ 10101, *et seq.*)

²⁰ FTA provides two types of grants: formula grants and discretionary grant programs. For an explanation by FTA of its programs and the process of applying for such grants, *see* http://www.fta.dot.gov/grants/12830_263.html.

²¹ Railroad Rehabilitation and Improvement Financing Program (RRIF), 45 U.S.C. § 821, *et seq.* The regulations governing the RRIF Program can be found at 49 C.F.R. pt. 260. Further information about the program is available at <http://www.fra.dot.gov/Page/P0128>.

²² This is the Transportation Investment Generating Economic Recovery (TIGER) Discretionary Grant program, created under the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115 (2009). Information about applying for TIGER grants can be found at the Web site created by USDOT for this purpose: <http://www.dot.gov/tiger>.

²³ This refers to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. No. 91-646, 84 Stat. 1894 (Jan. 2, 1971), codified at 42 U.S.C. 4601, *et seq.*

²⁴ The National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970), as amended from time to time, codified at 42 U.S.C. 4321, *et seq.*

²⁵ FTA and FHWA each has its own regulations for implementation of Buy America requirements. These regulations can be found for FTA at 49 C.F.R. pt. 661 and for FHWA at 23 C.F.R. § 635.410. FRA's Buy America requirements are found in each program's authorizing statutes. *See, e.g.*, 49 U.S.C. chs. 244, 246; § 24405 (High Speed Rail Program).

²⁶ The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990), as amended by the ADA Amendments Act of 2008 (Pub. L. No. 110-325), which became effective on Jan. 1, 2009, currently codified at 42 U.S.C. ch. 126 and 47 U.S.C. ch. 5 (ADA). The Department of Justice has regulations implementing the ADA, and each governmental agency is responsible for ensuring compliance as well in all matters that come within its jurisdiction. As a result, for example, USDOT issued rules regarding level boarding at commuter rail stations in 2011. *Transportation for Individuals with Disabilities at Intercity, Commuter, and High Speed Passenger Railroad Station Platforms; Miscellaneous Amendments*, 76 Fed. Reg. 57924 (Sept. 19, 2011) (DOT Final Rule

VI. Activities During Construction and Operation of the Line:

A. The Parties will agree upon processes, means, and mechanisms that will allow AGENCY's construction to proceed safely, efficiently, and cost-effectively within the constraints of engaging in construction activities on property near or adjacent to an active railroad right-of-way.

B. AGENCY will reimburse RAILROAD for the cost of any flagging protection that is required during AGENCY's construction. At least [days/weeks] in advance of the time that AGENCY will require flagging protection, AGENCY will provide RAILROAD with a schedule of when flaggers will be required, and RAILROAD will provide flagging support at times and with sufficient personnel to avoid delays to the construction project. Notwithstanding the foregoing, in the event of changes to AGENCY's work schedule, it will advise RAILROAD as soon as it learns of the need for flagging.²⁷

***NOTE:** An AGENCY may wish to consider asking RAILROAD for dedicated flagging teams to avoid delays that could arise if railroad exigencies develop that would otherwise trigger redeployment of personnel.*

C. RAILROAD will designate an individual as the Line Project Coordinator, who will be the RAILROAD representative who has authority to answer questions and resolve issues that arise during the design and construction process. AGENCY will pay RAILROAD ___% of that individual's compensation from the date of execution of the Agreement until AGENCY provides completion of the design and construction phases of the Line project that involve RAILROAD property.

D. During the construction phase, the Parties will agree upon a schedule of monthly meetings among representatives of RAILROAD, AGENCY, and their contractors to ensure that the Parties have regular opportunities for consultation and collaboration in order to allow for the expeditious completion of the construction process in accordance with the schedule agreed upon by the Parties.

E. RAILROAD acknowledges that AGENCY will enter into separate agreements related to operations and maintenance of the Line and ancillary facilities, as may be necessary, with [State, County or Municipal entities], and that nothing in such agreements will be inconsistent with or will cause AGENCY to violate any of the terms and conditions of the Agreement.

F. RAILROAD shall be fully responsible for clearing and removing any wrecks of its equipment from the Line and shall bear the full cost of such clearance and removal. In the event of occurrence of such a wreck that impacts the Line right-of-way directly, or that is on the RAILROAD right-of-way and will have an impact on Line operations, RAILROAD shall: (i) immediately notify AGENCY of the cargo

amending 49 C.F.R. pts. 37 and 38). This rule accounts for the potential conflict between high-level platforms, on the one hand, and freight operations that might involve dimensional equipment on tracks adjacent to platforms, on the other hand, by permitting commuter rail operators to use alternative means to enable disabled passengers to have access to each car on a train. 49 C.F.R. § 37.42(c).

²⁷ The Railroad Workplace Safety regulations, 49 C.F.R. pt. 214, establish the minimum requirements. These include the Roadway Worker Protection rules, 49 C.F.R. §§ 214.301–214.355, as well as other requirements. Rail carriers may establish their own rules that require more than the FRA mandates, as long as the additional rules are not inconsistent with the requirements established by FRA.

and any hazardous materials on the trains involved in the incident, such notification to consist of the information RAILROAD is required to provide in accordance with 49 C.F.R. §§ 171.15 and 171.16 (**NOTE: FRA is currently evaluating potential amendments to its hazardous materials shipment rules**); (ii) provide AGENCY with frequent, regular updates on the status of the wreck removal operations and of the resolution of any matters relating to the presence of hazardous materials; and (iii) fully reimburse AGENCY for any costs (including loss of revenue) incurred by AGENCY or its contractors or the Concessionaire to repair any Line equipment, track, catenary, or facilities that may have been impacted by a wreck as described in this paragraph.

G. NOTE: *If AGENCY contemplates transferring its interests to a concessionaire as part of a public-private partnership (P3), the Term Sheet should address construction by the concessionaire, for instance:*

AGENCY will select the Concessionaire to complete the design and implement construction and operation of the Line. Prior to issuance of any request for proposals for the Concessionaire, RAILROAD may comment upon the qualifications for the Concessionaire but AGENCY shall have the sole right and authority to establish qualifications and rights and obligations of the Concessionaire, and to select the Concessionaire. All operations of the Line, whether by the Concessionaire or by employees of AGENCY, shall be conducted in accordance with all applicable state and federal safety regulations. RAILROAD will consent to the assignment of AGENCY's rights and obligations to Concessionaire.

VII. Compensation: NOTE: *Compensation for the acquisition of rail property is likely to be addressed at least in part through cash compensation, similar to real estate transactions generally, but is determined by the parties. Other mechanisms may include an exchange of property, reimbursement to RAILROAD for the costs associated with changes to its facilities occasioned by AGENCY's project, and construction by AGENCY of new facilities on behalf of RAILROAD.*²⁸

VIII. Insurance and Indemnification: NOTE: *The examples of insurance provisions included below are most typical of a construction or joint use agreement involving AGENCY's activities on or near RAILROAD's right-of-way rather than terms and conditions that would typically appear in a purchase and sale agreement. However, the scope of insurance issues must be fully negotiated at the property acquisition phase so that AGENCY can obtain a full picture of the liabilities and obligations it will incur in connection with acquiring real property interests.*

²⁸ There is no statutory or regulatory mandate that establishes a valuation methodology for conveyances of interests in real estate from a rail carrier to a non-rail carrier. The values paid by public agencies for rail corridors or other ancillary facilities often reflect some component of approved valuation based on an across-the-fence (i.e., fair market value) approach, an "assembled corridor factor" that reflects the extra value of the cost of putting together a fully linked corridor. The statute that authorizes Amtrak to take property interests from railroads when the two parties cannot agree, *currently codified at* 49 U.S.C. § 24311(c), requires STB to require the carrier to convey the property to Amtrak "on reasonable terms, including just compensation" but does not define the standard to be used in establishing that compensation. In the first case to use that statutory condemnation authority, the ICC determined that the appropriate methodology for determining compensation in such cases is *either* Net Liquidation Value *or* Going Concern Value, whichever is higher. *National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vt. and NH, et al.* 4 I.C.C. 2d 761 (1988), *rev'd on other grounds*, *Boston and Maine Corp. v. I.C.C.*, 911 F.2d 743 (D.C. Cir. 1990), *rev'd and remanded*, *Nat'l R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992). The I.C.C. and STB jurisprudence is replete with decisions establishing fees for trackage rights compensation in the freight context. *See, e.g.*, *Ark. & Mo. R.R. Co. v. Mo. Pac. R.R. Co.*, 6 I.C.C. 2d 619 (1990); *CSX Corp. and CSX Transp., Inc., Norfolk S. Corp. and Norfolk S. Ry. Co.—Control and Operating Leases/Agreements—Contrail Inc. and Consolidated Rail Corp.*, STB Finance Docket No. 33388, and *Responsive Application—State of New York, by and through its Department of Transp., and the New York City Economic Development Corp.*, STB Finance Docket No. 33388 (Sub-No. 69) (Service Date Dec. 18, 1998); *South Plains Switching, Ltd. Co.—Compensation for Use of Facilities in Alternative Rail Service—West Texas and Lubbock Ry. Co.*, STB Finance Docket No. 35111 (Service Date Dec. 15, 2008). The formulas there could prove useful even though the dynamics and wear and tear of adding passenger trains to freight lines are not the same as adding freight trains. The compensation amounts for Amtrak's use of freight lines (as opposed to outright acquisition, as discussed above) are not particularly helpful here, either, because those are based on the avoidable cost methodology that was established when Amtrak was created in the early 1970s to relieve freight railroads of their passenger common carrier obligations. The requirement that Amtrak work out an allocated cost methodology with states that use its Northeast Corridor, Passenger Rail Investment and Improvement Act of 2008, Section 209, codified at 49 U.S.C. § 24101 note, may prove to be a useful methodology or formula for determining allocated costs. Even this methodology, however, will still have the disadvantage of assessing allocation of costs between passenger railroads (for the most part, although there are freight carriers operating on the Northeast corridor as well) and not taking into account the differences between freight and passenger operations. As a result, the negotiation of such compensation for acquisition or use will most often be based upon a methodology to be agreed upon by the parties. There is no standard methodology across the industry at this time.

A. Commercial General Liability Insurance. AGENCY maintains and shall continue to maintain a minimum of \$NNN,NNN,NNN.00 commercial general liability coverage.²⁹

B. Railroad Protective Liability Insurance. *NOTE: RAILROAD is likely to require railroad protective liability insurance or a railroad operations endorsement on AGENCY's CGL policy to cover activities on or near the right of way during due diligence and construction.* AGENCY shall secure RPL insurance naming RAILROAD as the sole named insured having a combined single limit of not less than XX Million Dollars (\$XX,XXX,XXX.00) each occurrence and YY Million Dollars (\$YY,YYY,YYY.00) in the aggregate applying separately to each annual period. Said policy shall provide coverage for all loss, damage, cost, or expense, including attorneys' and consultants' fees, arising from bodily injury and property damage liability, and physical damage to property, attributed to acts or omissions at any job site impacted by the Project. The policy shall be issued using Insurance Services Offices forms CG 00 35 10 01, or their equivalents.

C. NOTE: the following is a particularly detailed Workers' Compensation provision: Workers' Compensation and Employers Liability Insurance: Coverage must include but not be limited to: AGENCY's statutory liability under the workers' compensation laws of the state of [____], and Employers' Liability (Part B) with limits of at least \$X00,000 each accident, \$X00,000 each employee by disease and a policy limit of \$X00,000 by disease. If AGENCY is self-insured, evidence of state approval and excess workers' compensation coverage must be provided. Coverage must include liability arising out of the U.S. Longshoremen's and Harbor Workers' Act, the Jones Act, and the Outer Continental Shelf Land Act, if applicable. The policy must also contain the following endorsements (which must be shown on the certificate of insurance): Federal Employer Liability Act (FELA) ISO Form WC 00 01 04 A (or a substitute form providing equivalent coverage), and Alternate Employer endorsement ISO form WC 00 03 01 A (or a substitute form providing equivalent coverage) showing RAILROAD in the schedule as the alternate employer.³⁰

D. Pollution Liability Insurance: Pollution Liability coverage must be written on ISO Form "Pollution Liability Coverage Form Designated Sites" CG 00 39 12 04 (or a similar form providing equivalent coverage) with limits of at least \$X00,000,000 per occurrence and an aggregate limit of \$X00,000,000.

E. Umbrella or Excess Insurance: If AGENCY utilizes umbrella or excess policies to comply with limits of coverage required, these policies must "follow form" and afford no less coverage than the primary policy.

²⁹ 49 U.S.C. § 28103(a) limits the aggregate liability from a single accident or incident "arising from or in connection with the provision of rail passenger transportation, or from or in connection with any rail passenger transportation operations over or rail passenger transportation use of right-of-way or facilities owned, leased, or maintained by any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State," to \$200,000,000 (in 1997 dollars). This statutory cap was increased in the FAST Act enacted on Dec. 4, 2015. Accordingly, the federal statutory cap, as thus amended, is a reasonable limit for an agency's liability and the amount of insurance AGENCY must maintain.

³⁰ Although it is unlikely, some agencies may find themselves subject to the Federal Employer Liability Act, 45 U.S.C. § 51, *et seq.* (FELA). Any agency that finds itself subject to FELA will require substantially more insurance because the liability of the employer is set by a court rather than based on state statutory limits as is the case with state-based workers' compensation arrangements.

F. To the extent permitted by [State] law, each Party shall indemnify, and hold the other Party, including such other Party's contractors, agents, and employees, harmless from any and all payments, costs, and expenses in connection with or arising out of any claims, actions, or demands against such other Party or its respective officers, directors, agents, or employees arising from the work performed under the Agreement, to the extent of the indemnifying Party's negligence.

G. Allocation of Liability:

NOTE: State law may limit the extent to which a public entity may indemnify RAILROAD for RAILROAD's own negligence, and may also prohibit the imposition of unlimited liability on AGENCY without legislative appropriation.³¹ The following provisions are examples:

1. Notwithstanding the foregoing, the Parties specifically acknowledge and agree that AGENCY shall have no duty to indemnify or hold harmless RAILROAD from:

(a) Any claims, actions, or demands seeking damages, including bodily injury or death caused by the willful misconduct of RAILROAD, its agents, licensees, employees, officers, or directors.

(b) An award of punitive or exemplary damages caused by the conduct of RAILROAD, its officers, employees, agents, licensees, or subcontractors.

(c) Any claims, actions, or demands seeking damages, including bodily injury by employees of RAILROAD.³²

NOTE: Depending on the nature and extent of an agency's insured retention, the parties may wish to allocate responsibility for willful misconduct or punitive damages based on ability to lower those claims by insurance.

H. Each Party shall, in addition to any indemnities flowing to such Party, require each of its contractors (*NOTE:* including, for AGENCY, the Concessionaire, as applicable) and subcontractors at all tiers to agree to secure insurance and to indemnify, defend, and hold harmless the other Party from and against any and all liability, expense (including but not limited to defense costs and attorneys' fees), claims, causes of action, and lawsuits for damages of any nature whatsoever, including but not limited to bodily injury, death, personal injury, or property damage arising from or in connection with any alleged act and/or omission of the contractor (including, for AGENCY, the Concessionaire) or subcontractor arising from the work performed under the Agreement.

³¹ See note 16, *supra*. In some states, the public agencies have successfully sought changes to the otherwise applicable statutory or state constitutional limitations on their liability in order to satisfy the requirements of the freight carrier from which they are acquiring corridors. See COLO. REV. STAT. § 24-10-115 (2014); N.M. STAT. § 56-7-1 (2005); MINN. STAT. § 398.04 (2014).

³² Rail carrier employees will all be covered by FELA, as discussed in note 30, *supra*. Because the railroad will have insurance or reserves established to cover their employees' injuries, an agency should negotiate an arrangement that preserves the railroad's responsibility for its own employees.

I. AGENCY agrees to waive its right of recovery against RAILROAD (**NOTE:** and RAILROAD's indemnitees, as RAILROAD may specify) for all Liabilities (defined below) that could be insured against by the insurance required to be maintained hereby. In addition, its insurers, through the terms of the policy or policy endorsement, must waive their right of subrogation against RAILROAD for all claims and suits. AGENCY's certificate of insurance must reflect the waiver of subrogation endorsement. AGENCY further waives its right of recovery, and its insurers also waive their right of subrogation against RAILROAD for loss of its owned or leased property or property under AGENCY's care, custody, or control.

J. All policy(ies) required above (excluding Workers Compensation, as applicable) shall include a severability of interest endorsement and Railroad shall be named as an additional insured with respect to work performed under this agreement. Severability of interest and naming Railroad as additional insured shall be indicated on the certificate of insurance.

K. The fact that insurance (including, without limitation, self-insurance) is obtained by AGENCY [its contractors or Concessionaire] shall not be deemed to release or diminish the liability of AGENCY [its contractors or Concessionaire] including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by RAILROAD shall not be limited by the amount of the required insurance coverage. **NOTE:** *In some states, the Agency's inability to indemnify may require substitution of a provision that limits the Agency's liability to the amount of insurance that the Agency obtains. Inclusion of such a provision would likely cause the amount of the insurance required by Railroad to increase.*

L. Prior to entering property owned or controlled by RAILROAD or within ___ of the centerline of RAILROAD's active right-of-way, AGENCY [its contractors or Concessionaire] shall furnish to RAILROAD an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify RAILROAD in writing at least 30 days prior to any cancellation, non-renewal, substitution, or material alteration. This cancellation provision shall be indicated on the certificate of insurance. In the event of a claim or lawsuit involving RAILROAD arising out of this agreement, AGENCY [its contractors or Concessionaire] will make available any required policy covering such claim or lawsuit.

M. NOTE: *If RAILROAD seeks a waiver of a punitive damages exclusion, AGENCY must determine whether it would be permitted to do so as a matter of state law, in addition to evaluating whether it wishes to accede to the request as a business decision.*

IX. Dispute Resolution:

A. The Parties should identify their proposed dispute resolution mechanism in the Term Sheet.

NOTE: *Good faith negotiation followed by mediation is typical, with resort either to binding arbitration or to litigation following. Some states have a mandatory dispute resolution process based on state procurement laws, and each agency will first need to determine whether that is an issue. If mandatory dispute resolution is not an issue, then each agency needs to consider its own preferred mechanisms for dispute resolution.*

X. Environmental Obligations:

A. The Parties agree that they shall share responsibility for the direct costs of the remediation for all parcels in total as required to comply with any environmental law, regulation, or other requirement, that is incurred from and after the date of transfer of an interest in any parcel to AGENCY ("Costs"), with respect to investigation, remediation, response to, or any other requirement to cure in accordance with applicable municipal, state, or federal environmental law, regulation, or other requirement, those conditions concerning a release of any hazardous substance on or affecting any parcel for which RAILROAD will convey an interest to AGENCY if such release occurred prior to the date on which any such interest is transferred to AGENCY, in accordance with the following allocation:

NOTE: The following allocation is based on the premise that RAILROAD would not incur Costs in the absence of AGENCY's project and on the reality that many states do not permit any agency of the state to assume unlimited liability. For that reason, AGENCY would bear the responsibility for initial Costs. The greater the Costs, the greater the likelihood any liability for such Costs derives from pre-existing conditions under RAILROAD's control. The circumstances of each transaction will affect how the parties perceive their exposure to potential Costs, so the provisions provided below are illustrative only of the premises outlined in this note.

(1) AGENCY shall pay the initial Costs that the Parties collectively incur up to a total amount of \$N,NNN,NNN, and RAILROAD shall have no responsibility to pay any such Costs until AGENCY has incurred a total of \$N,NNN,NNN.

(2) For Costs that the Parties collectively incur in an amount between \$N,NNN,NNN and \$ZZ,ZZZ,ZZZ, each Party shall pay fifty percent of such Costs, with each Party's share not to exceed a total amount of \$XX,XXX,XXX.

(3) RAILROAD shall pay any and all additional Costs that the Parties collectively incur in an amount exceeding a total of \$ ZZ,ZZZ,ZZZ and AGENCY shall have no responsibility to pay any such Costs after it has incurred a total of \$XX,XXX,XXX.

B. Notwithstanding the foregoing in paragraph A, above, RAILROAD shall not be responsible to cure any condition concerning a release of a hazardous substance caused by AGENCY in the course of due diligence or other activity performed by AGENCY prior to the date on which RAILROAD transfers its interest in the affected parcel to AGENCY.

C. For purposes of this Term Sheet, (i) the term "Hazardous Substances" means any material or substance (1) that is present in quantities and in a form that requires investigation, removal, cleanup, transportation, disposal, response or remedial action (as the terms "response" and "remedial action" are defined in Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9601 (23) and (24)) or under any Environmental Law; or (2) that is defined as a "hazardous waste," "hazardous substance," "pollutant," or "contaminant" under any Environmental Law; and (ii) the term "Environmental Law" means any and all laws, statutes, regulations, enforceable requirements, orders, decrees, agreements, judgments, or injunctions validly issued, promulgated, or entered by any court or governmental agency with jurisdiction, relating to the

environment, to preservation or reclamation of natural resources, or to the management, release, or threatened release of contaminants applicable to the Real Property, including without limitation the Hazardous Substances Transportation Act (49 U.S.C. § 1802 *et seq.*), the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9601 *et seq.*), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. § 6901 *et seq.*) and the Hazardous and Solid Waste Amendments of 1984, the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*), as amended by the Clean Water Act Amendments of 1977, the Clean Air Act of 1970 (42 U.S.C. § 7401 *et seq.*), as amended by the Clean Air Act Amendments of 1990, the Safe Drinking Water Act (42 U.S.C. § 300f *et seq.*), the Toxic Substances Control Act of 1976 (15 U.S.C. § 2601 *et seq.*), any similar or implementing state or local law, and all amendments thereto and regulations or rules promulgated thereunder.

D. RAILROAD shall remain responsible for the removal of any hazardous substances on the Line to the extent required by, and pursuant to, any applicable voluntary cleanup plan existing as of the effective date of this Term Sheet.

E. RAILROAD shall complete and return the Questionnaire attached as **Exhibit J** hereto, and provide copies of all documents requested in the Questionnaire, to AGENCY within ___ days after the effective date of the Purchase and Sale Agreement to be negotiated between the Parties. AGENCY may elect to terminate this Agreement without further obligation to RAILROAD in the RAILROAD fails to fully complete and return the Questionnaire or provide copies of the documents requested in the Questionnaire in a timely fashion.

F. Except to the extent otherwise required by authorities having jurisdiction over the Line, AGENCY shall not disclose to any third parties any information AGENCY discovers or obtains concerning the Line as a result of any inspections, surveys, tests, or other activities conducted with respect to the Line ("Confidential Information") including, but not limited to, any oral, electronic, or written information provided by RAILROAD or on RAILROAD's behalf. Notwithstanding the foregoing, AGENCY may disclose Confidential Information to those of AGENCY's agents directly involved with AGENCY with respect to the acquisition of the Line, provided such individuals and firms have agreed to maintain the confidentiality of Confidential Information and provided further that AGENCY shall be liable hereunder for any breach by such parties of such obligation. Confidential Information shall not include information that is or becomes in the public domain other than as a result of a breach by AGENCY or its agents. If AGENCY or any of its agents receive a request to disclose any part of the Confidential Information, AGENCY shall (a) notify RAILROAD immediately of the existence, terms, and circumstances of such request, (b) consult with RAILROAD on the advisability of taking legally available steps to resist or narrow such requests, and (c) if disclosure of such Confidential Information is required to prevent AGENCY being held in contempt or subject to other penalty, shall (i) furnish only such information as is legally required to be so disclosed, and (ii) use its best efforts to obtain an order or other reliable assurance that confidential treatment will be afforded to the disclosed Confidential Information. If the transaction contemplated in this Term Sheet does not close for any reason then AGENCY shall, promptly upon RAILROAD's request, forward to RAILROAD all Confidential Information without keeping any copies thereof.

XI. Positive Train Control:³³

A. The Parties agree that if positive train control ("PTC") is required by law to be used by either Party's Trains operating in the corridor:

a. RAILROAD shall approve the PTC system to be used by both Parties (*NOTE: if Amtrak operates in the corridor, its requirements must be addressed as well:* which system will be compatible with both RAILROAD and Amtrak PTC systems), based on the design standards acceptable to RAILROAD in its sole and absolute discretion; and

b. The costs related to the installation and maintenance of the PTC systems shall be allocated as follows: (i) AGENCY shall pay all costs for the PTC system on its Line, and AGENCY shall pay for or reimburse all RAILROAD costs that arise out of and/or would not have been incurred but for AGENCY's ownership of, or passenger rail operations on, the Line. Without limiting the generality of the foregoing, in the event that RAILROAD would have been required under federal law, due solely to its freight rail operations, to install PTC on the Line, then AGENCY shall be responsible only for any incremental costs incurred by RAILROAD to accommodate AGENCY's operations.

NOTE: Elements of the PTC system whose cost may be at issue include, but are not limited to:

- *Software.*
- *Hardware.*
- *Wayside Equipment.*
- *Locomotive Equipment.*
- *Central Control Equipment.*
- *Access to radio frequency bandwidth.*
- *Costs of permitting and constructing PTC control towers.*

XII. Force Majeure: No Party shall be considered in breach or default of its obligations under the Agreement in the event that performance is prevented or materially delayed by an event of Force Majeure, which for purposes of the Agreement, shall mean a cause beyond the reasonable control of the affected Party, which it shall be unable to avoid by due diligence, including without limitation, damage or destruction by fire or casualty; strike directly involving workers where work is being conducted at locations as contemplated in this Term Sheet; lockout; civil disorder; war; or acts of God; including AGENCY's inability to obtain an appropriation of funds; provided that the affected Party (i) notifies the other in writing of the extent and nature of the Force Majeure event within five (5) days after the affected Party knows or has reason to know of any such condition or event, (ii) limits delay or suspension of performance to that required by the event, and (iii) takes all reasonable steps to minimize delays or suspension of performance.

³³ PTC requirements are found in 49 U.S.C. § 20157; 49 C.F.R. pt. 236. The following provisions assume that the freight and passenger operations will share track following an agency's acquisition and construction of its passenger rail facilities in a corridor in which the existing freight service (and/or Amtrak) is already required to employ PTC. In this example, each Party is responsible for its own PTC costs, with costs allocated according to how/whether the Federal PTC requirements applicable to a railroad's Line may change due to the addition of passenger operations. The total costs of PTC implementation, operation, and maintenance will differ in each circumstance.

XIII. Subject to Approvals: The Agreement will be subject to all applicable governmental and other public approvals including, as applicable, without limitation, approval by federal, state, and local regulatory bodies, the [State] Board of Public Works, and of the Board of Directors of RAILROAD as necessary.

XIV. No Binding Effect: It is hereby agreed that this Term Sheet does not create or give rise to any contractual or other legally enforceable rights, obligations, or liabilities of any kind on the part of either party; it being the intent of the Parties that only a subsequently formalized Agreement or Agreements, if executed and delivered, shall so obligate a Party on the matters set forth herein. The Parties nevertheless intend to proceed in good faith to negotiate expeditiously the Agreement(s) described in this Term Sheet, consistent with the terms and conditions set forth herein, and will complete negotiation and execution of any such agreements by no later than [DATE].

NOTE: The Parties may wish to exclude from this “no binding effect” section, which would have the effect of making the promise binding, the promise of the RAILROAD not to undertake or permit any additional liens or other encumbrances on the Property without providing notice and the opportunity to object to the AGENCY.

XV. Assignment: Neither Party may assign all or any portion of its rights under this Term Sheet without 30 days’ prior written notice to the other Party; provided, however, that AGENCY may assign its rights, title, and interest to [other party] without further approval of RAILROAD. Such notice shall identify the proposed assignee and the Party proposing the assignment shall certify that its proposed assignee acknowledges this Term Sheet and agrees to negotiate in good faith as set forth herein.

NOTE: Although detailed discussion of P3 project delivery approaches are beyond the scope of this Term Sheet, if AGENCY anticipates that it will seek a concessionaire to perform any of the design, construction, maintenance, or operation of its planned facilities, the assignment of AGENCY’s interests should be addressed as early as possible in negotiations with RAILROAD. An example provision follows:

In the event that rights transferred in accordance with the Agreements to be executed pursuant to this Term Sheet, or any work to be completed pursuant to such Agreements, remain incomplete at the time a contract is made between AGENCY and the Concessionaire, the Parties may amend this Term Sheet (as appropriate) in writing to add the Concessionaire as a party-in-interest to this Term Sheet and to assign to the Concessionaire the necessary authority to act for and on behalf of AGENCY to complete the work or to accept the property transfer contemplated under this Term Sheet.

XVI. Miscellaneous: *NOTE: In addition to the terms and conditions described above, the following terms and conditions typically addressed in real estate transactions generally also apply to the acquisition of railroad property:*

- Pre-Closing Requirements.
- Condemnation (not applicable to property necessary and directly used for RAILROAD’s fulfillment of its common carrier obligation).
 - Allocation of Liability.
 - Closing.
 - Payment.

- Adjustments.
- Escrow.
- Liens.
- Timing.
- Delivery of Documents.
- Recording.
- Conditions Precedent to and Requirements for Closing.
- Transfer of Utilities.
- Closing Costs.
- Post-Closing.
 - Billing.
 - Document/Record Inspection.
 - Reconciliation of Property Taxes.
- Condition of the Property/Disclaimer—As Is, Where Is/With All Faults.
- Representations and Warranties.
 - Legal Entity.
 - Authority.
 - Title Warranty.
 - Enforceability.
 - General Compliance with Laws.
- Covenants.
- Broker's Fees.
- Covenants Run with the Land.
- Conflicts of Interest.
- Conditions Precedent.
 - Seller's Right of First Refusal for Repurchase.
 - Condemnation.
 - Title Exceptions.
 - Due Diligence.
 - Environmental.
 - Permitting/Regulatory.
 - Additional Property.
 - Funding.
 - Trackage Rights Agreement.
 - Insurance.
 - Third-Party Agreements.
 - Third-Party Purchase.
- Agreement Interpretation.
- Third-Party Beneficiaries.
- Agreement Term/Termination.
- Agreement Amendment.
- Default.
- Merger/Survival.
- Severability.
- Choice of Law and Venue.
- Attorneys Fees.
- Waiver of Right to Trial by Jury.

- Counterparts.
- Notice to Parties.
- Binding Effect.
- Relationship to Other Agreements.
- Relationship to Third Parties.
- Entire Agreement/Scope of Agreement.
- Good Faith.
- General Compliance with Laws/No Pending Litigation.
- Confidentiality.
- Time Is of the Essence.
- Closing/Delivery of Documents.
- Term/Termination.
- Amendment.

[Signatures appear on the following page]

IN WITNESS WHEREOF, the parties have caused this Term Sheet to be executed in duplicate, each by its duly authorized officers, as of the date of this Agreement.

[AGENCY]

By: _____
[Name]
[Title]
[Organization]

[RAILROAD]

By: _____
[Name]
[Title]
[Organization]

ACKNOWLEDGMENTS

This study was performed under the overall guidance of the NCRRP Project Committee 12-01. The Committee is chaired by NATHANIEL M. ROSENBLATT, Farrell, Rosenblatt and Russell. Members are SEAN M. CRAIG, CSX Transportation, Inc.; SETH J. CUMMINS; CHRISTOPHER A. DUNSTER, Washington State Department of Transportation; TERESA J. MOORE, South Florida Regional Transportation Authority; and JARED I. ROBERTS, Amtrak.

DANIEL ORLASKEY provides liaison with the Federal Railroad Administration, SCOTT BABCOCK serves as liaison with the Transportation Research Board, and LAWRENCE D. GOLDSTEIN represents the NCRRP staff.

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