



THE STATE OF NEW HAMPSHIRE

DEPARTMENT OF TRANSPORTATION

15



William Cass, P.E.  
Commissioner

David Rodrigue, P.E.  
Assistant Commissioner

Her Excellency, Governor Kelly A. Ayotte  
and the Honorable Council  
State House  
Concord, NH 03301

Bureau of Rail & Transit  
June 19, 2025

**REQUESTED ACTION**

Authorize the Department of Transportation to enter into a **retroactive** contract with the Profile Mountain Holdings Corporation, d/b/a Conway Scenic Railroad (CSR), (Vendor # 289704), PO Box 1947, North Conway, NH, for the use of the state-owned Mountain Division Railroad Line from Conway, NH to Whitefield, NH for tourist excursion railroad service. This Agreement is effective from May 1, 2025 through December 31, 2034, with a provision for renewal for an additional 10-year period, subject to Governor and Council approval, through December 31, 2044.

Income from the agreement will be credited as follows:

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

**EXPLANATION**

This **retroactive** contract is for Profile Mountain Holdings Corporation, d/b/a Conway Scenic Railroad (CSR) to continue to provide tourist excursion railroad service on the state-owned Mountain Division Railroad Line from Conway to Whitefield for the period of May 1, 2025 through December 31, 2034. This request is **retroactive** as additional time was needed for the State (Department and Office of the Attorney General) to finalize negotiations on contract terms with CSR; these protracted negotiations were longer than originally anticipated and therefore outside the timeframe of a previous contract amendment for CSR's continued use of the state-owned Mountain Division Railroad Line for tourist excursion railroad service.

The Department owns the subject section of the Mountain Division Railroad Line and Conway Scenic Railroad has operated continuously on this state-owned section with Operating Agreements dating back to July 1994. More recently, on November 12, 2014, the Governor and Council approved an Operating Agreement (Item 21) between the Department and Conway Scenic to provide said tourist excursion railroad service for the period of January 1, 2015 through December 31, 2024. On December 18, 2024 Governor and Council approved an Amendment to the Operating Agreement (Item 5B) to extend the completion date to April 30, 2025. This subject Operating Agreement is requested to be retroactive to May 1, 2025, the day after the expiration of the Amendment, through December 31, 2034.

Also of note, on November 10, 2023, pursuant to Section 1.3 of the current Operating Agreement, CSR notified the Department that it wished to renew its Operating Agreement, and protracted negotiations yielded the Amendment and subject retroactive Operating Agreement request. Since the rail line remains active, this Operating Agreement permits CSR to continue operating tourist excursion trains, a significant draw and economic driver for both New Hampshire's North Country and the state at large.

In accordance with the proposed Agreement, Conway Scenic Railroad shall pay the Department 10% of its monthly gross operating revenue as a user fee to the State, and it shall be deposited into the Special Railroad Fund established by RSA 228:68. Conway Scenic Railroad is also required to expend no less than 10% of its annual gross operating revenue on maintenance of way activities to make improvements and repairs to the state-owned railroad line.

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

Your approval of this resolution is respectfully requested.

Sincerely,

A handwritten signature in cursive script, appearing to read "William J. Cass".

William J. Cass, P.E.  
Commissioner

Attachments

**OPERATING AGREEMENT**  
**ON THE**  
**STATE-OWNED PORTION OF THE MOUNTAIN DIVISION RAILROAD LINE**

**BETWEEN**

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

**AND**

**PROFILE MOUNTAIN HOLDINGS CORP.**

**d/b/a**

**CONWAY SCENIC RAILROAD**  
**NORTH CONWAY, NH**

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## OPERATING AGREEMENT

THIS OPERATING AGREEMENT ("Agreement") is made and entered into this 16<sup>th</sup> day of June, 2025, between the State of New Hampshire, through the New Hampshire Department of Transportation, 7 Hazen Drive, P.O. Box 483, Concord, NH 03302-0483 (the "State") and Profile Mountain Holdings Corporation, d/b/a Conway Scenic Railroad (CSRR), PO Box 1947, North Conway, NH 03860-1947 (the "Contractor"), collectively referred to as (the "Parties").

WHEREAS, the State owns the segment of the Mountain Division Railroad Line described in Section 2.1 of this Agreement; and

WHEREAS, the Contractor provides Service on another segment of the Mountain Division Railroad Line pursuant to that certain Operating Agreement by and between the State and Contractor, as assignee of Conway Scenic Railroad Corporation, dated January 1, 2015, as such Operating Agreement has been amended prior to the date of this Agreement (such Operating Agreement, as so amended, being defined and referred to as the "January 1, 2015 Operating Agreement");

WHEREAS, pursuant to Section 1.3 of the January 1, 2015 Operating Agreement, the State and the Contractor desire to enter into a new Operating Agreement, in accordance with the following terms and conditions:

### ARTICLE I - GENERAL CONDITIONS

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

- a. "Commencement Date" means May 1, 2025.
- b. "Completion Date" means December 31, 2034, unless this Agreement is otherwise extended or renewed in accordance with Section 1.3.1 of this Agreement.
- c. "Contracting Officer" means the Commissioner of the New Hampshire Department of Transportation (NHDOT), or her successor or her duly authorized representatives, having an address of 7 Hazen Drive, P.O. Box 483, Concord, NH 03302-0483. The Contracting Officer shall be the representative of the State hereunder.
- d. "Contractor" means Profile Mountain Holdings Corporation d/b/a Conway Scenic Railroad, PO Box 1947, North Conway, NH 03860-1947.

- e. **"Contractor's Representative"** means representative of the Contractor responsible for making contract decisions and will be the Contractor's contact for the Contracting Officer.
- f. **"Effective Date"** means the date this Agreement is approved by the Governor and Council of the State of New Hampshire.
- g. **"Facilities"** – collectively means the state-owned real estate, track, culverts, bridges, signals, switches, structures, buildings, and related railroad transportation property over which Service is to be provided.
- h. **"Final Report"** – means a report containing all information required by the various reporting provisions of the Agreement, from the date of the last such reports through and including the Completion Date.
- i. **"FRA"** means the Federal Railroad Administration of the United States Department of Transportation.
- j. **"Line"** means the state-owned Mountain Division Railroad Line beginning in Conway MP P55.37 (Station 2545+75) and heading Westerly to MP P 101.05 (Station 4946+15) in Whitefield, New Hampshire, as more particularly described in Section 2.1 below.
- k. **"Major Maintenance Expenditure"** means any expenditure to address a condition on the Line that interrupts or is likely to lead to the interruption of Service or a condition that results or could result in bridge weight capacity restrictions on the Line while the condition exists. Major Maintenance Expenditures include, but are not limited to, bridge failures/rehabilitation, slope failures, culvert failures, major washouts and bridge weight capacity upgrades.
- l. **"Gross Operating Revenue"** means those revenues derived by the Contractor from providing Service on the Line.
- m. **"Operations Manager"** means the Contractor's representative responsible for day-to-day operation and maintenance on the Line who will be the contact for the Bureau of Rail and Transit personnel.
- n. **"Operating Year"** means January 1 through December 31 of any calendar year.
- o. **"Service"** means Passenger Excursion Service, also referred to as Tourist Railroad Service, on the Line.
- p. **"STB"** means the Surface Transportation Board.

- q. "Subcontractor" means an individual, partnership, firm, corporation, or any combination thereof, or joint venture, to whom the Contractor subcontracts any part of this Agreement.
- r. "Termination Report" means a report containing all information required by the various reporting provisions of the Agreement, from the date of the last such reports through and including the date of termination.
- s. "User Fee" means the fee to be paid by the Contractor to the State for use of the Line to provide Service, as more particularly defined in Article IV of this Agreement.

## 1.2. EFFECTIVE DATE/COMPLETION OF SERVICES.

- 1.2.1 Notwithstanding any provision of this Agreement to the contrary, this Agreement, and all obligations of the Parties hereunder, are subject to the approval of the Governor and Council of the State of New Hampshire. This Agreement shall become effective on the date the Governor and Council approve this Agreement and upon this Agreement becoming effective, the term of this Agreement shall be the period from the Commencement Date through the Completion Date, unless this Agreement is otherwise extended or renewed in accordance with Section 1.3.1 of this Agreement
- 1.2.2 Any Service performed by the Contractor prior to the Effective Date shall be performed at the sole risk of the Contractor unless and until the Effective Date occurs, and in the event that this Agreement does not become effective, the State shall have no liability to the Contractor, including without limitation any obligation to pay the Contractor for any costs incurred or Service performed.
- 1.2.3 After termination of the Agreement the Parties shall be relieved of all obligations hereunder, except the Contractor shall at its own expense terminate its operations, relinquish the Facilities and submit the final User Fee payment and a Final Report in accordance with the format and schedule of reports described in Exhibit A attached hereto and incorporated herein by this reference (hereinafter "Report and Payment Schedule"). Further, the Contractor's continuing duty to maintain financial records per Section 4.5.1, the Contractor's duty to defend, indemnify and hold harmless the State per Section 1.12.1, and the Contractor's hiring limitation in Section 1.6.2 shall survive termination of this Agreement.

## 1.3. RENEWAL OF AGREEMENT.

- 1.3.1 The Contractor shall notify the State by **certified mail** no earlier than eighteen (18) months before, but no later than twelve (12) months prior to, the Completion Date, that the Contractor wishes to enter into renegotiations for a new agreement for an additional ten (10) year period beginning January 1, 2035. If the Contractor and the State cannot agree upon a new operating agreement by June 30, 2034, or the

State is not satisfied with the Contractor's level of service during the term of this Agreement, the State may at that time solicit new Requests for Proposals to operate the Line and have no further obligations for renewal of this Agreement with the Contractor.

**1.4. CONTRACTOR'S REPRESENTATION AND WARRANTIES.**

**1.4.1 The Contractor represents and warrants the following:**

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

David Swirk, President  
Conway Scenic Railroad  
PO Box 1947  
North Conway, NH 03860-1947  
www.conwayscenic.com  
dave@conwayscenic.com  
Cell 413-374-0078

- f. The Operation Manager/Trainmaster is:

Michael Lacey  
Conway Scenic Railroad  
PO Box 1947  
North Conway, NH 03251-0009  
www.conwayscenic.com  
m.lacey@conwayscenic.com  
603-356-5251

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

- 1.5.1 In connection with the performance of the Service, the Contractor shall comply with all statutes, laws, regulations, and orders of federal, state, county or municipal authorities with appropriate jurisdiction which impose any obligation or duty upon the Contractor, including, but not limited to, civil rights and equal opportunity laws. In addition, the Contractor shall comply with all applicable copyright laws.
- 1.5.2 During the term of this Agreement, the Contractor shall not discriminate against employees or applicants for employment because of race, color, religion, creed, age, sex, gender identity, disability, sexual orientation, national origin, or military status and will take affirmative action to prevent such discrimination.
- 1.5.3 If this Agreement is funded in any part by monies of the United States, the Contractor shall comply with all the provisions of Executive Order No. 11246 ("Equal Employment Opportunity"), as supplemented by the regulations of the United States Department of Labor (41 C.F.R. Part 60), and with any rules, regulations and guidelines as the State of New Hampshire or the United States issue to implement these regulations. The Contractor further agrees to permit the State or United States access to any of the Contractor's books, records and accounts for the purpose of ascertaining compliance with all rules, regulations and orders, and the covenants, terms and conditions of this Agreement.

**1.6. PERSONNEL.**

- 1.6.1 The Contractor shall at its own expense provide all personnel necessary to perform the Service. The Contractor warrants that all personnel engaged in the Service shall be qualified to perform the Service and shall be properly licensed and otherwise authorized to do so under all applicable laws.
- 1.6.2 Unless otherwise authorized in writing, during the term of this Agreement and for a period of six (6) months after the Completion Date, the Contractor shall not hire, and shall not permit any Subcontractor or other person, firm or corporation with whom it is engaged in a combined effort to perform the Service to hire, any person who is a State employee or official, who is materially involved in the procurement, administration or performance of this Agreement provided that the hiring of any such person as a result of a response to any general solicitation for employment through an untargeted advertisement made in the ordinary course of business shall not constitute a breach of this provision. This provision shall survive termination of this Agreement.

**1.7. EVENT OF DEFAULT/REMEDIES.**

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

- a. failure to perform the Service satisfactorily or on schedule as reasonably determined by the Contracting Officer; and
- b. failure to submit any report required hereunder; and
- c. failure of the Contractor to maintain the records required hereunder, or to permit access thereof; and
- d. failure to pay the User Fee to the State as required hereunder; and/or
- e. failure to perform any other covenant, term or condition of this Agreement.

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

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

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

### **1.8. TERMINATION OF AGREEMENT.**

1.8.1 In the event this Agreement is terminated for any reason prior to the Completion Date, the Contractor shall comply with Section 1.2.3 and deliver to the Contracting Officer, not later than fifteen (15) days after the date of termination, a Termination Report.

1.8.2 If at any time after the Effective Date the Contractor operates the Service fewer than sixty (60) days during any Operating Year, the State may terminate this Agreement.

1.8.3 In the event of a termination or expiration of this Agreement, the Contractor agrees that it shall, at its sole expense remove all non-state-owned equipment and materials from the Line and Facilities.

### **1.9. CONTRACTOR'S RELATION TO THE STATE.**

1.9.1 In the performance of this Agreement the Contractor is in all respects an independent contractor and is neither an agent nor an employee of the State. Neither the Contractor nor any of its officers, employees, agents or members shall have

authority to bind the State or receive any benefits, workers' compensation or other emoluments provided by the State to its employees.

**1.10. TAXES AND UTILITIES.**

1.10.1 All applicable railroad or corporate taxes assessed by the State of New Hampshire, including those specified in New Hampshire RSA 72 and RSA 82, or the Federal Government as a result of this Agreement are the responsibility of the Contractor.

1.10.2 The Contractor shall be responsible for arranging and paying for any and all utility services, including but not limited to water, gas, and electricity, required for the Facilities during the term of this Agreement.

1.10.3 The Contractor shall not deduct from the User Fee payments to the State any costs for taxes and/or utilities paid by the Contractor.

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

1.11.1 The Contractor shall not assign or otherwise transfer any interest in this Agreement without the prior written consent of the Contracting Officer. For purposes of this paragraph, a Change of Control shall constitute an assignment. "Change of Control" means (a) merger, consolidation, or a transaction or series of related transactions in which a third party, together with its affiliates, becomes the direct owner of fifty percent (50%) or more of the voting shares or similar equity interests, or combined voting power of the Contractor, or (b) the sale of all or substantially all the assets of the Contractor.

1.11.2 None of the Service shall be subcontracted by the Contractor without the prior written consent of the Contracting Officer. The State is entitled to copies of all subcontracts and assignment agreements and shall not be bound by any provisions contained in a subcontract or an assignment agreement to which the State is not a party.

**1.12. INDEMNIFICATION.**

1.12.1 Unless otherwise exempted by law, the Contractor shall defend, indemnify and hold harmless the State, its agencies, officers and employees, from and against any and all claims, demands, losses, liabilities, penalties, fines, judgments, awards, and costs for any personal injury or property damages, or other claims asserted against the State, its agencies, officers or employees, by or on behalf of any person, on account of, based or resulting from, arising out of (or which may be claimed to arise out of) the acts or omissions of the Contractor, its employees, lessees, or Subcontractors, including but not limited to negligence, reckless or intentional conduct. The State shall not be liable for any costs incurred by the Contractor arising under this Section 1.12.1. Notwithstanding the foregoing, nothing herein contained shall be deemed to constitute a waiver of the sovereign immunity of the

State, which immunity is hereby reserved to the State. This covenant shall survive the termination of this Agreement.

### 1.13. INSURANCE.

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

- A. The Contractor shall obtain and maintain in force, throughout the term of this Agreement, Specialized Passenger Risk Liability Insurance, including Contractual Liability, with a claims made basis, naming the State as an additional insured, in the amount of five million (\$5,000,000.00) dollars with aggregate coverage of not less than ten million (\$10,000,000.00) dollars.
- B. Commercial Automobile Liability Insurance covering all motor vehicles including owned, hired, borrowed, and non-owned vehicles. Limits of Liability: \$1,000,000 Combined Single Limit for Bodily Injury & Property Damage.
- C. In accordance with RSA 281-A, and subject to the exception for certain railroad employees described in RSA 281-A:2, VI(a), the Contractor shall maintain and require any Subcontractor or assignee to secure and maintain, payment of Workers' Compensation in connection with activities which the person proposes to undertake pursuant to this Agreement. The State shall not be responsible for payment of any Workers' Compensation premiums or for any other claim or benefit for Contractor, or any Subcontractor or employee of Contractor, which might arise under applicable State of New Hampshire Workers' Compensation laws in connection with the performance of this Agreement. Where applicable, Federal Employer Liability Act Coverage Endorsement shall be included.
- D. Pollution Liability Insurance issued to and covering the liability of the Contractor arising out of the pollution or impairment of the environment, including costs of investigation and clean-up, caused by or relating to the Contractor's performance of services under this Agreement. Coverage under this policy (or policies) shall have limits of liability not less than \$1,000,000 per occurrence.

1.13.2 The policies described in this Section 1.13 shall be on policy forms and endorsements approved for use in the State of New Hampshire by the New Hampshire Department of Insurance and issued by insurers licensed in the State of New Hampshire.

1.13.3 The Contractor shall furnish to the Contracting Officer a certificate(s) of insurance for all insurance required under this Agreement. The Contractor shall also furnish to the Contracting Officer, or her successor, certificate(s) of insurance for all renewal(s) of insurance required under this Agreement no later than ten (10) days

prior to the expiration date of each insurance policy. The certificate(s) of insurance and any renewals thereof shall be attached and are incorporated herein by reference.

**1.14. WAIVER OF BREACH.**

1.14.1 No failure of either Party to enforce any provisions hereof after any Event of Default shall be deemed a waiver of its rights regarding that Event of Default, or any subsequent Event of Default. No express failure to enforce any Event of Default shall be deemed a waiver of the right of either Party to enforce each and all of the provisions hereof upon any further or other Event of Default on the part of either Party.

**1.15. NOTICE.**

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

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

To the Contractor:    David Swirk, President & General Manager  
Conway Scenic Railroad  
PO Box 1947  
North Conway, NH 03860-1947  
www.conwayscenic.com  
dave@conwayscenic.com  
Cell 413-374-0078

**1.16. AMENDMENT.**

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

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

1.17.1 This Agreement shall be governed, interpreted, and construed in accordance with the laws of the State of New Hampshire, and is binding upon and inures to the benefit of the Parties and their respective successors and assigns. The wording used

in this Agreement is the wording chosen by the Parties to express their mutual intent, and no rule of construction shall be applied against or in favor of any party. Any actions arising out of this Agreement shall be brought and maintained in New Hampshire Superior Court which shall have exclusive jurisdiction thereof.

**1.18. THIRD PARTIES.**

1.18.1 The Parties hereto do not intend to benefit any third parties other than the Profile Mountain Holdings Corporation and this Agreement shall not be construed to confer any such benefit to others.

**1.19. HEADINGS.**

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

**1.20. DISPUTE RESOLUTION.**

1.20.1 The Contracting Officer shall be the State's representative. In the event of any dispute concerning this Agreement, the interpretation of this Agreement and the resolution of any disputes by the Contracting Officer shall be final for the State.

**1.21. SEVERABILITY.**

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

**1.22. ENTIRE AGREEMENT.**

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

**ARTICLE II - PHYSICAL DESCRIPTION**

**2.1 PHYSICAL DESCRIPTION.**

2.1.1. The rail Facilities consist of the railroad corridor between Engineering Valuation Station 2545+75, MP P55.37 in Conway and Engineering Valuation Station 4946+15, MP P101.05 in Whitefield on the State-owned Mountain Division Railroad Corridor. The Facilities include but are not limited to all railroad infrastructure, signal systems, buildings, bridges, culverts, sidings, tracks, rights of way and adjacent land; provided, however, that the Facilities do not include the

following (collectively, the "Bartlett Roundhouse Building, Parking Lot, and Driveway"): (i) the building identified as the "Bartlett Roundhouse" on the Bartlett Yard Map attached hereto as Exhibit F; and (ii) the parking lot and shared access driveway with respect to such building. The Parties acknowledge and agree that the Bartlett Roundhouse Building, Parking Lot, and Driveway are managed and maintained by a third party and the Facilities shall not include the Bartlett Roundhouse Building, Parking Lot, and Driveway unless and until the Contracting Officer informs the Contractor that the Bartlett Roundhouse Building, Parking Lot, and Driveway are available for the Contractor's use in accordance with this Agreement and the Contractor agrees in writing to so use the Bartlett Roundhouse Building, Parking Lot, and Driveway.

- 2.1.2 The Contractor shall have the exclusive right to operate tourist excursion trains including special trains, work trains, and other operations approved by the Contracting Officer on the Facilities.
- 2.1.3 The Contractor and the State agree that there may be a demand for freight service on portions of this railroad corridor during the period this Agreement is in effect. Should that occur, the operating service area defined in Section 2.1 may, at the State's discretion, be revised to the railroad corridor between Engineering Valuation Station MP P 55.37 (Station 2545+75) in Conway and Engineering Station 4746+19 MP P 97.23 in Carroll.
- 2.1.4 The Contractor acknowledges the Track Usage Agreement between CSRR & NHCR for operations between MP P97.23 and MP P101.05. Said agreement is incorporated into this Agreement (Exhibit G).
- 2.1.5 Upon written agreement signed by the Contractor and the Contracting Officer, the Contracting Officer and the Contractor may at any time reduce the scope of Facilities subject to this Agreement.
- 2.1.6 As permitted by RSA 228:67 and other applicable state law, the State may sell portions of the Facilities, which, in the reasonable judgment of the Contracting Officer, are not needed for present or future railroad operations. If the State sells any portion of the Facilities during the term of this Agreement, such portion shall automatically be excluded from the Facilities described in Section 2.1 and shall not be subject to this Agreement.

## **2.2 FACILITIES**

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

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

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

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

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

2.2.5 If requested by the Contractor and at the Contracting Officer's option, the State may provide the Contractor with state-owned railroad equipment under the jurisdiction of the Bureau of Rail and Transit, which it may declare available to the Contractor. If accepted by the Contractor, said equipment shall be used solely for the provision of Service under this Agreement and shall be insured by the

Contractor to the Contracting Officer's satisfaction. Any such insurance shall comply with Section 1.13.2 and the Contractor shall provide proof of such insurance to the Contracting Officer in accordance with Section 1.13.3.

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

- 2.3.1 The Contractor, with prior written approval by the Contracting Officer, may lease portions of the Facilities to others, including shippers and receivers, for railroad-related purposes, including but not limited to the construction and operation of railroad sidings, loading platforms, transloading facilities, and other railroad-related facilities. The Contracting Officer shall not unreasonably withhold, delay, nor condition such approval. In no event shall the Contracting Officer approve a lease pursuant to Section 2.3 if the completion date of such lease is later than the Completion Date of this Agreement.
- 2.3.2 Leases pursuant to Section 2.3 shall be subject to appropriate local taxes, and revenues from such leases shall be included in the Contractor's Gross Operating Revenue.
- 2.3.3 To obtain the Contracting Officer's approval, the Contractor shall provide to the Contracting Officer written notice of its desire to lease a portion of the Facilities and shall submit a copy of the proposed terms of the lease between the Contractor and the Contractor's lessee. Leases under this Section 2.3 shall be subject to this Agreement and this Agreement shall be incorporated by reference into any such lease.
- 2.3.4 In the event the Contractor seeks to lease a portion of the Facilities pursuant to this Section 2.3, the Contractor agrees to require the lessee to agree to the following terms:
- a. **INSPECTION.** The State has the right to enter the leased premises in the case of emergency, or to inspect it or make necessary repairs, alterations, improvements, or to exhibit the leased premises to others, or whenever necessary to determine the condition of the leased premises.
  - b. **INDEMNIFICATION.** Unless otherwise exempted by law, the Contractor's lessee shall defend, indemnify and hold harmless the State, its officers and employees, from and against any and all claims, demands, losses, liabilities, penalties, fines, judgments, awards, and costs for any personal injury or property damages, or other claims asserted against the State, its officers or employees, by or on behalf of any person, on account of, based or resulting from, arising out of (or which may be claimed to arise out of) the acts or omissions of the lessee, its employees, or subcontractors, including but not limited to negligence, reckless or intentional conduct. Notwithstanding the foregoing, nothing herein contained shall be deemed to constitute a waiver of

the sovereign immunity of the State, which immunity is hereby reserved to the State. This covenant shall survive the termination of the lease between the Contractor and the Contractor's lessee.

- c. **MODIFICATIONS.** The Contractor's lessee shall submit to the Contracting Officer a plan showing any proposed changes to the leased premises and shall obtain approval and permission from the Contracting Office prior to performing any work or modifications to the leased premises or its operations. In the event the plan is approved by the Contracting Officer, the Contractor's lessee shall apply for and obtain all necessary State, federal, and local permits or approvals prior to performing any work or modifications to the leased premises.
- d. **INSURANCE.** The Contractor's lessee shall, at its sole expense, maintain the following minimum insurance requirements:
  - i. **Commercial General Liability:** \$1,000,000 each occurrence and \$2,000,000 general aggregate. The General Liability policy shall include Railroad Endorsement CG 2417 or its equivalent. The State of New Hampshire, its agencies, and its agents and employees shall be named as additional insureds.
  - ii. **Commercial Automobile Liability Insurance** covering all motor vehicles including owned, hired, borrowed, and non-owned vehicles. Limits of Liability: \$1,000,000 Combined Single Limit for bodily Injury & Property Damage.
  - iii. **Railroad Protective Public and Property Damage Liability:** \$1,000,000 each occurrence and \$2,000,000 in the aggregate.
  - iv. **Workers' Compensation Insurance** in the amount as required by N.H. RSA 281-A.

The policies described in this Section 2.3.4 herein shall be on policy forms and endorsements approved for use in the State of New Hampshire by the New Hampshire Department of Insurance and issued by insurers licensed in the State of New Hampshire.

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

- 2.3.5 The Contracting Officer reserves the right to require the Contractor and the Contractor's lessee to include additional terms beyond those set forth in Section 2.3.4 in any proposed lease if the Contracting Officer, in the Contracting Officer's sole discretion, determines that such terms are necessary after evaluating the nature of the lessee's proposed use of the Facilities.

### **ARTICLE III - OPERATIONS**

**3.1 SERVICE AREAS.**

- 3.1.1 The Contractor shall, between the Commencement Date and the Completion Date, manage and operate Service upon the property above-mentioned in Section 2.1. The Contractor shall be solely responsible for all phases and requirements of its operation, including, but not limited to, scheduling, workforce, equipment, advertising, and ticket sales.
- 3.1.2 Notwithstanding any other provisions of the Agreement, the Contractor agrees to allow provision of temporary Service by others in the event of its inability to provide Service. Notice of Service by others must be given to the Contractor in writing.
- 3.1.3 The Contractor warrants that all personnel engaged in the Services shall be qualified to perform such Services and shall be properly licensed and authorized to perform such Services under all applicable laws.
- 3.1.4 The Contractor acknowledges the Track Usage Agreement between CSRR & NHCR for operations between MP 97.23 and MP 101.05. Said agreement is incorporated into this Agreement (Exhibit G).
- 3.1.5 The Contractor will conform to the State's "Guidelines Governing the Operation of On-Track Equipment on State-owned Railroad Lines," and will incorporate these Guidelines into its current Timetable.
- 3.1.6 The Contractor shall immediately report all incidents as required by RSA 367:56 and the "Rail Safety Section Notification Requirements" attached hereto as Exhibit B and incorporated herein.

**3.2. MAINTENANCE.**

- 3.2.1 The Contractor shall at all times during the term of this Agreement keep and maintain all Facilities in a reasonably safe condition for the use intended.
- 3.2.2 **EQUIPMENT** – The Contractor shall be responsible for proper upkeep and maintenance of all equipment it uses, either supplied by the State or the Contractor, and shall ensure that equipment is in compliance with all applicable FRA regulations. State-owned equipment shall be returned to the State in as good condition as when received except for ordinary wear and tear.
- 3.2.3 **FACILITIES** – The Contractor shall be responsible for the proper upkeep and routine maintenance of Facilities ("Maintenance of Way"). Said Maintenance of Way shall include, but not be limited to:
  - a. Track maintenance, which shall include but not be limited to maintenance of rails, ties, and other track materials ("OTM"), track alignment, and all other

maintenance and repairs necessary to preserve integrity of track surface and structure

- b. Bridge maintenance, as further described in Section 3.2.4, and which shall include all maintenance and repairs necessary to preserve the integrity of railroad owned bridge structures (excludes overhead bridges (OH) and bridges maintained under separate agreements). Bridge list, Exhibit E attached.
- c. Brush, tree and vegetation control (debris may remain unless a threat to rail operations, drainage systems, adjacent properties, or is in violation of New Hampshire RSA 227-J:10; in these instances, the Contractor shall remove or chip).
- d. Drainage systems and drainage structures,
- e. All operating signals to be kept in good operating condition
- f. Crossing and switches to be kept in good operating condition. The Contractor shall provide a flagger during the passage of trains for the protection of any crossing protected by signals where the signal is not operating for any reason.
- g. Snow removal and winter maintenance when needed for Service.
- h. Railroad signage, including ENS Signs (all crossings) and roadway at grade crossing signage (excludes private crossings as identified by NHDOT) consistent with the latest edition of the MUTCD.
  - Said railroad signage shall be for the installation of new signage and/or the replacement of existing signage when damaged, missing or as otherwise required.
- i. All other maintenance requirements set forth in Section 3.2

3.2.3.1 The Contractor shall be responsible to perform all work and routine maintenance necessary to maintain the Line at FRA Class 1 Track Safety Standards or better. In any event, Contractor will expend no less than ten percent (10%) of Annual Gross Operating Revenue on Maintenance of Way, including but not limited to items listed in 3.4.3, exclusive of inspections, during each Operating Year of this Agreement. The Contractor shall include a report of maintenance expenses in accordance with the Report and Payment Schedule (Exhibit A). In the event the Contractor exceeds the Annual Maintenance Requirement for an Operating Year, maintenance expenditures may be carried forward, at the Contracting Officer's sole discretion, and applied to the next Operating Year's Annual Maintenance Requirement. The Contractor's performance shall satisfy all obligations required on the owner of a railroad, set forth in Part 213 of the FRA Track Safety Standards (49 C.F.R §§ 213-213.369). Along with the Part 213 and Part 237, emphasis shall also be placed on track system drainage, unblocking culverts and ditch line routine maintenance to maintain storm flows. In the event the Contractor does not meet the Annual Maintenance Requirement for an Operating Year, the Contractor shall pay the remaining unspent portion of the Annual Maintenance Requirement to the State within sixty (60) days after the end of the Operating Year. The payment shall be made payable to "Treasurer, State of New Hampshire" and shall be sent in accordance with Section 4.1.1. Any amounts paid to the State under this section

shall exclusively be deposited into the Special Railroad Fund established by RSA 228:68 and shall only be expended in accordance with RSA 228:69. Failure to make payments pursuant to this section shall constitute an Event of Default pursuant to Section 1.7. of the Agreement.

### 3.2.4 STRUCTURES (BRIDGES & CULVERTS)

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

3.2.4.2 The State as track and bridge owner and the Contractor as operator will be subject to the latest provisions of 49 CFR Part 237 - Bridge Safety Standards and incorporated herein by reference. If the State is not able to pay the cost of performing the inspections required under 49 CFR Part 237 due to insufficient funds in the Special Railroad Fund established by RSA 228:68, the State shall provide written notice to the Contractor, and upon receipt of such notice, Contractor shall pay the cost of such inspections in order to operate Service and meet the requirements of 49 CFR Part 237. The Contractor shall have no right to recover from the State the costs of performing any such inspections. Notwithstanding any language in Section 3.4.3.1 to the contrary, Contractor's cost for inspections under this Section 3.4.4.2 may be credited towards Contractor's Annual Maintenance Requirement and at the sole discretion of the Contracting Officer such credit may carry forward to be applied to the next Operating Year's Annual Maintenance Requirement. The Contractor shall comply with the State's Bridge Management Program incorporated herein by reference and made a part hereof.

3.2.5 In the event a Major Maintenance Expenditure is required the Contractor shall assist in all necessary repairs and shall be responsible for 10% of each occurrence defined as a Major Maintenance Expenditure but be limited in its direct financial contribution to ten thousand dollars (\$10,000.00) in the aggregate per Operating Year. However, the Contractor waives any claims to damages for any delays in repairing or reopening the Line after such an occurrence and the State reserves to itself the decision whether, when and how such repairs and reopening will be done, in the reasonable discretion of the Contracting Officer.

3.2.6 In the event a Major Maintenance Expenditure is required as a result of Contractor's failure to perform routine and proper maintenance as required in this Agreement, Contractor shall be responsible for the full cost of repairs.

3.2.7 If the Contractor fails to perform maintenance as required in Section 3.2, the State shall give written notice of such failure in accordance with Section 1.14. Failure to

perform maintenance in accordance with Section 3.2 constitutes a material breach of this Agreement.

- 3.2.8 If within thirty (30) days of receipt of such notice, Contractor has not completed or taken steps to Contracting Officer's satisfaction to perform the required maintenance work, the State reserves the right to perform such maintenance work at Contractor's sole cost and expense.

### **3.3. INSPECTION.**

- 3.3.1 The Contractor shall patrol the area of service and inspect the track per FRA Track Safety Standards Subpart F (49 CFR 213.233). Inspections are required only during periods in which Service is operating. Minimum frequency of inspections shall be as follows:

- Twice a week (during operating season): from MP (P 55.35 to P 89.95)
- The Contractor shall patrol the area between Notchland (MP P76.56) and Cherry Mountain Road (MP P89.95) daily prior to passage of a passenger/revenue train.
- Once a month (with at least three and no more than five calendar weeks interval between these inspections): from P 89.95 to P 101.05)
- Inspect prior to operating special events (trains) and during or after significant weather events

The Contractor shall submit an inspection report in a timely manner but no more than one (1) week after each inspection. Should any defects be found, the Contractor shall take the appropriate remedial action and notify the Contracting Officer in writing of said remedial action.

- 3.3.2 The Contracting Officer has the right to monitor the Contractor to ensure that the Contractor complies with the conditions of this Agreement and shall be granted reasonable access to the operations and the Facilities for this purpose. The Contracting Officer shall have the authority to direct the Contractor through its Operations Manager, or designee, to remedy deficiencies from the requirements of FRA Part 213 Track Safety Standards as they apply to those classifications established in this Agreement.

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

3.3.3.1 The purpose of such inspection shall be, but is not limited to:

- a. Ensure that work complies with the contract specifications.

- b. Verify quantitative measures of materials installed, such as tie counts.
- c. Verify labor and materials charges for contracts providing for payment on an actual cost basis ("Force Account Work").
- d. Verify the quantities of uninstalled state-owned materials and the security of same against damage, theft, or use other than for approved projects.
- e. Provide any other information requested by the Contracting Officer.

### **3.4. CONSTRUCTION AND MAINTENANCE PROJECTS.**

- 3.4.1 The Contracting Officer reserves the right to advertise and let construction rehabilitation projects within the confines of the Line, provided that such projects do not unreasonably interfere with the Contractor's ability to provide Service. The construction contractor to whom this work may be awarded shall have the right to perform the work so described in the construction contract. The Contracting Officer shall endeavor to work with the Contractor to minimize disruption to Service on the Line but shall have the right to adjust trips not published in the regular railroad schedule to accommodate the construction schedule.
- 3.4.2 The Contracting Officer will from time to time allow utility projects to be constructed within the railroad right-of-way. Construction contractors for these projects will be required to enter into a license with the State, which will require certain conditions such as liability insurance, and to cooperate with the Contractor in assuring that the work be performed in such a manner that the tracks, operations and appurtenances of the Facilities will be safeguarded. The Contractor may require a flagger and/or railroad inspector at a construction site if the Contractor deems it necessary, the cost of said services to be paid by the constructing entity to the Contractor.
- 3.4.3 The Contractor may be called upon to construct sidings to new shippers and receivers on the Line. The construction of sidings and appurtenances thereto may be billed to the shipper or receiver after the Contracting Officer reviews the proposed plans, including, but not limited to location, alignment, materials, safety appliances, and the Contracting Officer issues her approvals.
- 3.4.4 Any expenditures by the State pursuant to this Section 3.4 shall not diminish the obligation of the Contractor pursuant to Section 3.2.3.1 or any other provision of this Agreement.

### **3.5. FORCE MAJEURE.**

- 3.5.1 In no event shall any party be deemed in default of this Agreement for any loss, damage, injury, delay, failure or inability to meet all or any portion of its obligation caused by or arising from any event beyond its reasonable control, including, without limitation, any action of any federal, state or local agency or

instrumentality; by government authorities including compliance with environmental quality, energy conservation and occupational safety requirements adopted or effected after the Effective Date of this Agreement; by flood, natural disaster, or by acts of God; by strikes or other labor trouble; by explosions, fires, acts of war, terrorism, or vandalism until such events are remedied.

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

##### 4.1. PAYMENTS AND REPORTING.

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

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

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

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

4.2.1 Payments shall be paid monthly, based upon the level of operation, as explained below. Payments shall be made no later than thirty (30) days after the end of each calendar month that Gross Operating Revenue is earned and will include a breakdown of the number and type of tickets sold during the reporting period.

4.2.2 The Contractor shall be responsible for collecting revenues and for delivering traffic reports, for its Service and all other on-rail passenger service, marketing reports, revenue reports and maintenance cost (expenditure) reports in accordance with the Report and Payment Schedule (Exhibit A). The Contractor shall submit all reports required under this Agreement in a form and substance satisfactory to the Contracting Officer.

##### 4.3. USER FEE PAYMENT.

4.3.1 The Contractor shall pay ten (10%) percent of its Monthly Gross Operating Revenue as a User Fee to the State, payable to: "Treasurer, State of New Hampshire."

- 4.3.2 If combination tickets are sold, the rail fare portion of the ticket shall be stated and fairly represent the relative value of the rail fare in relation to the total value of the ticket.
- 4.3.3 The Contractor may, where directed in writing by the Contracting Officer, deduct from User Fee payments the cost of specific expenditures including but not limited to Major Maintenance Expenditures or repairs to state-owned infrastructure or equipment identified in Section 4.3.3 and 4.3.4.
- 4.3.4 Should any payment be received more than five (5) days after the due date, the State shall be entitled to a five (5%) percent late charge on that month's User Fee.

**4.4. ACCOUNTING AND AUDITS.**

- 4.4.1 The Contracting Officer shall have access, during regular working hours, for the purpose of audit and examination, to any books, documents, papers, and records of the Contractor that may be related or pertinent to this Agreement during the period of this Agreement and for a period of five (5) years after the termination of this Agreement. The Contractor shall impose this requirement of each of its Subcontractors. The State agrees that any information provided by the Contractor shall be considered confidential to the extent allowed under law, including NH RSA 91-A.
- 4.4.2 If, as a result of any audit, the Contracting Officer determines that the amount paid to the State is less than the amount owed, the Contractor shall pay the difference to State within thirty (30) days of the determination.
- 4.4.3 If, as a result of any audit, the Contracting Officer determines that the amount paid to the State is more than the amount owed, the State will make repayment or credit the Contractor accordingly, so far as appropriations allow, the overpayment to the State.

**ARTICLE V - MARKETING EFFORT**

- 5.1 The Contractor will make a commercially reasonable effort to market the Line in order to make Service profitable and to maintain good business and working relationships with local businesses, State and local government officials and/or employees, and other railroads, and will report on the marketing effort in accordance with the Report and Payment Schedule (Exhibit A).
- 5.2 All advertising devices including signs, banners, fixed and portable displays or anything else placed in the railroad right-of-way to attract attention to the railroad shall conform with local, State and Federal ordinances that apply to the abutting highway right-of-way or private property. All permanent advertising to be placed in the railroad right-of-way shall have prior written approval of the State. For the avoidance of doubt, railroad safety and operating signage shall not be considered permanent advertising.

## ARTICLE VI - OTHER OPERATORS

### 6.1 COOPERATION WITH OTHER OPERATIONS

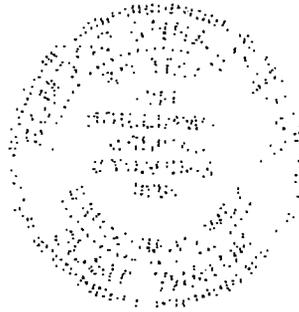
6.1.1 In all its operations and use of the Facilities indicated herein; the Contractor will cooperate with other potential operators in the use of the Facilities. Provided, however, that all other potential operators shall be required to enter into a mutually acceptable agreement with the Contractor regarding the terms and conditions relating to the use of the Facilities, including, without limitation, commercially reasonable terms and conditions relating to liability protection for the Contractor and compensation due to the Contractor relating to the use of the Facilities. Notwithstanding the foregoing, at all times Contractor's provision of Service shall have priority over all other users and Contractor shall retain dispatching control of the Line. Any compensation earned by the Contractor arising from other potential operators of the Line or the Facilities shall be included in the Contractor's monthly revenue reporting and user fee. If the Contractor and other potential operators cannot agree among themselves, the State retains the power to determine the terms and conditions of occupation or use for disputes and matters outside of jurisdiction of the Surface Transportation Board (STB); the decision of the State is final in those instances.

## ARTICLE VII - REQUEST TO PURCHASE

- 7.1 If the Contractor notifies the State by certified mail that the Contractor wishes to purchase the Facilities; and
- 7.2 If, within sixty (60) days following the State's receipt of notice from the Contractor pursuant to Section 7.1 above, the State determines, in its discretion, that the State wishes to sell the Facilities to the Contractor to be maintained as an active railroad line, and that such sale of the Facilities to the Contractor is permitted by State law; then
- 7.3 The State, without undue delay, shall notify the Contractor that the State is willing to proceed with the Contractor to negotiate mutually acceptable terms and conditions for sale of the Facilities to the Contractor pursuant to this Article VII, and, without undue delay following the Contractor's receipt of such notice from the State, the Contractor and the State shall proceed with such negotiations. In the event that the State and the Contractor enter into such an agreement for sale of the Facilities to the Contractor, then at the closing of the sale of the Facilities to the Contractor pursuant to the agreement, the actual out-of-pocket costs of Contractor for any capital improvements made by the Contractor to the Facilities (which shall not include any costs or expenses incurred by Contractor in performing upkeep and/or maintenance required of the Contractor under Article 3.2 of this Agreement) during the period from the effective date of the agreement through the closing shall be credited against the purchase price to be paid by the Contractor.

7.4 If, within one (1) year following the Contractor's receipt of notice from the State pursuant to Section 7.3 above (or such longer period of time as agreed by the State and the Contractor), the State and the Contractor have failed to agree upon mutually acceptable terms and conditions for sale of the Facilities to the Contractor pursuant to this Article VII, neither the State nor the Contractor shall have any further obligation to continue efforts to negotiate or otherwise pursue a sale of the Facilities to the Contractor pursuant to this Article VII.

*Signature Pages Follow*



STATE OF GEORGIA  
DEPARTMENT OF REVENUE  
COMMERCIAL TAX DIVISION  
1000 N. DECATUR ROAD  
DECATUR, GEORGIA 30030

IN WITNESS WHEREOF, we have hereunto set our hands on the 13 day of June, 2025.

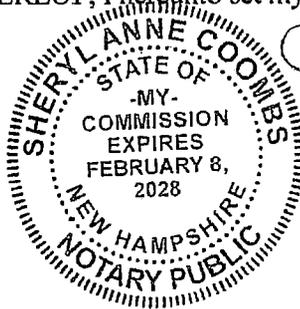
PROFILE MOUNTAIN HOLDINGS CORPORATION,  
dba CONWAY SCENIC RAILROAD.

BY: David A. Durb  
TITLE: DIRECTOR

THE STATE OF New Hampshire COUNTY OF Merrimack

On this 13 day of June, 2025, before me, Sheryl Coombs the undersigned officer, personally appeared David G. Durb known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that he has executed the same for the purposes therein contained.

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



Sheryl Coombs  
NOTARY PUBLIC

THE STATE OF NEW HAMPSHIRE

BY: William Carr  
TITLE: Commissioner

THE STATE OF NEW HAMPSHIRE, COUNTY OF MERRIMACK

On this 23<sup>rd</sup> day of June, 2025, before me, Natasha Field the undersigned officer, personally appeared William Carr known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that he has executed the same for the purposes therein contained.

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

NATASHA A FIELD  
NOTARY PUBLIC  
State of New Hampshire  
My Commission Expires  
April 10 2029

Natasha Field  
NOTARY PUBLIC

This is to certify that the Operating Agreement shown above has been reviewed by this office, and is approved as to form and execution on June 25, 2025.

OFFICE OF ATTORNEY GENERAL

BY:   
Attorney

APPROVED by Governor and Executive Council on \_\_\_\_\_, 2025, ITEM # \_\_\_\_\_.

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

EXHIBIT A			
CONWAY SCENIC RAILROAD 2025-2034			
REPORT AND PAYMENT DUE DATES			
JANUARY	FEBRUARY	MARCH	APRIL
1st - NOVEMBER PAYMENT, REVENUE REPORT & TRAFFIC REPORT	1st - DECEMBER PAYMENT, REVENUE & TRAFFIC REPORT	1st - JANUARY PAYMENT & REVENUE & TRAFFIC REPORT	1st - FEBRUARY PAYMENT, REVENUE & TRAFFIC REPORT
1st - MARKETING REPORT	1st - JULY - DECEMBER MAINTENANCE COST REPORT		
MAY	JUNE	JULY	AUGUST
1st - MARCH PAYMENT REVENUE & TRAFFIC REPORT	1st - APRIL PAYMENT, REVENUE & TRAFFIC REPORT	1st - MAY PAYMENT, REVENUE & TRAFFIC REPORT	1st - JUNE PAYMENT, REVENUE REPORT & TRAFFIC REPORT
			1st - JANUARY - JUNE MAINTENANCE COST REPORT
SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER
1st - JULY PAYMENT & REVENUE & TRAFFIC REPORT	1st - AUGUST PAYMENT & REVENUE & TRAFFIC REPORT	1st - SEPTEMBER PAYMENT & REVENUE REPORT REPORT	1st - OCTOBER PAYMENT REVENUE & TRAFFIC REPORT

*DM*

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

INCIDENTS INVOLVING RAILROADS (RSA 367:56)

NOTIFICATION BY THE RAILROAD IS REQUIRED FOR:

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

THE NOTIFICATION NUMBERS ARE:

Monday – Friday  
0730 - 1600 hours

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

Nights, weekends and holidays

NH Transportation Systems Management & Operations Systems (TSMO) 603-271-6862  
 • TSMO will contact the Railroad Inspector, Bureau Administrator, and State Police as necessary and in accordance with written work instructions that include after-hours procedures.

Note: The Railroad Inspector must be contacted and/or a voicemail message left for him. If staff is unable to speak directly with Railroad Inspector, after leaving a message for the Inspector, proceed with contacting the Bureau Administrator. Current staff (as of 5/01/2025: Railroad Inspector—William Stanfield & Bureau Administrator—Nicole Bryant)

THE INFORMATION NEEDED WILL BE:

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

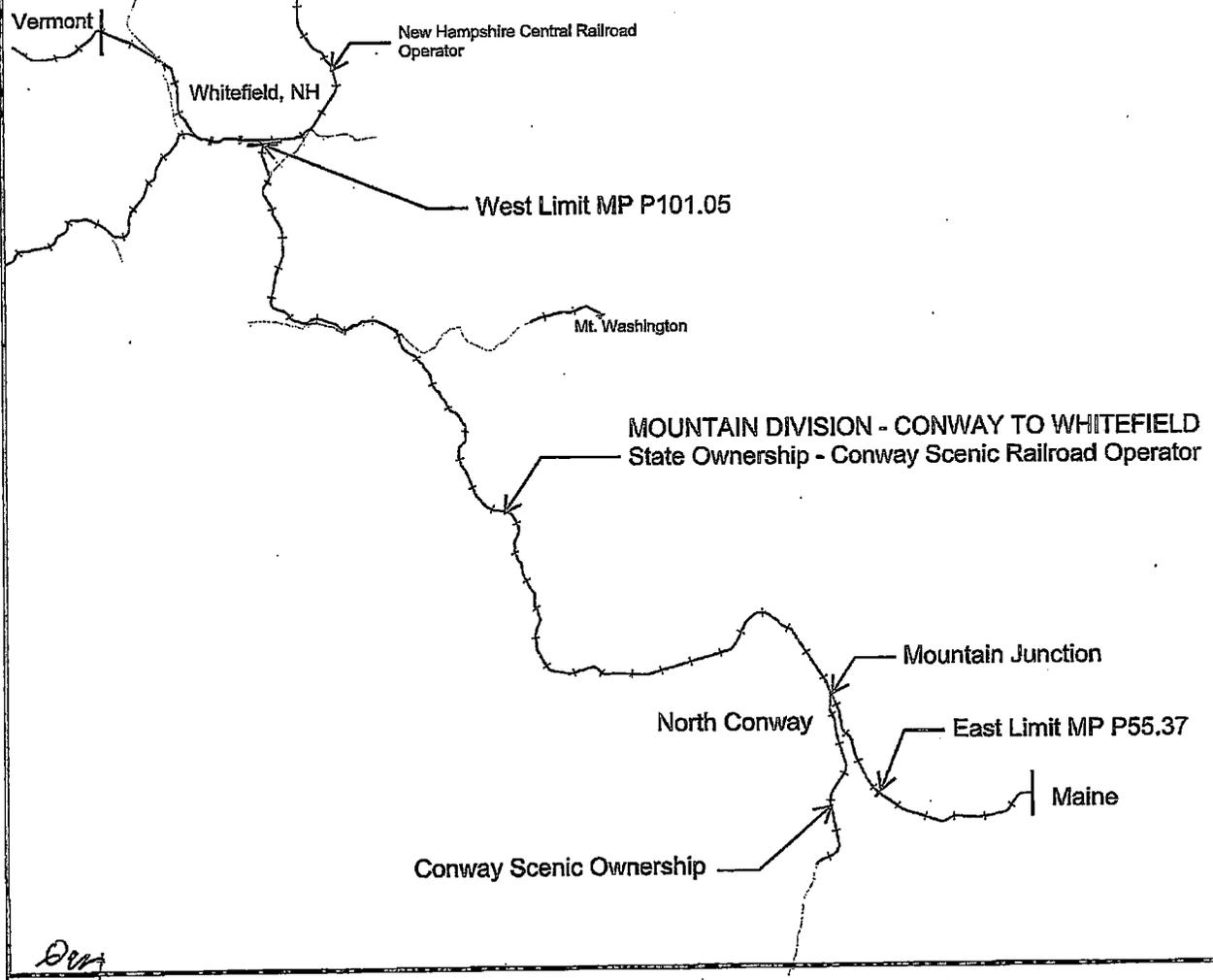
**INCIDENTS THAT INVOLVE HAZARDOUS MATERIALS, PLEASE NOTIFY THE LOCAL FIRE DEPARTMENT. YOU ARE ALSO REQUIRED TO NOTIFY THE HAZARDOUS MATERIALS UNIT AT 1-800-346-4009 AND THE N.H. STATE POLICE DISPATCH AT 603-271-3636.**

*Dls*

Date: 5/1/2025

Initial *Dls*

EXHIBIT C - MAP OF LINES  
CONWAY SCENIC RAILROAD - OPERATOR  
STATE OF NEW HAMPSHIRE - OWNER  
Date: May 2, 2025



Conway Scenic Railroad  
Exhibit D

Maintenance of Way (MOW)									
CONWAY SCENIC RR									
<b>Daily Report</b>									
Date:									
Supervisors Name:									
Identify equipment utilized and number of hours used.									
Equipment:	Hours	Rate	Total	Personnel Names	Hours	ST Rate	OT Rate	Total	
Locomotives									
MOW RR Cars									
Track Equipment									
Vehicles									
Pickup Truck									
HiRail Truck									
Dump Truck									
Other Equipment:	Hours	Rate	Total	Materials:	Qty	Rate	Total		
Rail Saw									
Chain Saws									
Rail Drill									
Misc. Equipment									
Work Undertaken:				Contractors:					Total
Location:	Description:								

*Dan*

Operating Agreement - EXHIBIT E

# Mountain Division Railroad Line Bridge Inspection Status Report

Val Map	Bridge Number	Val Station	Down	Nearby Road or Feature	Feature Crossed	Length	Type of Bridge	Plans on File	Notes
17/3	52.42	2381+80	Conway		BLACK CAT BROOK	8	STONE ARCH		
17/4	53.62	2447+45	Conway		WALKER'S BROOK	15	STONE ARCH		
17/6	55.37	2542+50	Conway		SACO RIVER	800	TIMBER PILE/THRU TRUSS		
17/9	59.26	2741+95	Conway		ARTIST BROOK	22	STONE ARCH		
17/14	63.34	2958+90	Bartlett		EAST BR SACO RIVER	125	THRU TRUSS		
17/15	64.81	3036+75	Bartlett		ELLIS RIVER	130	THRU TRUSS		
17/16	65.55	3077+00	Bartlett		SACO RIVER	330	PILE TRESTLE		
17/17	66.90	3148+42	Bartlett		UNNAMED BROOK	9	WOOD STRINGER		
17/19	68.30	3220+55	Bartlett	Attitash	STONE BROOK	23	PLATE GIRDER		
17/19	68.80	3246+40	Bartlett		ROGER'S UNDERPASS	18	PLATE GIRDER		
17/20	69.50	3283+95	Bartlett		FRENCH'S FARM	15	PLATE GIRDER		
17/21	70.44	3333+35	Bartlett		MILL BROOK	35	PILE TRESTLE		
17/22	71.40	3384+45	Bartlett	1st Iron	ALBANY BROOK	58	PLATE GIRDER		
17/22	72.20	3426+00	Harts Location	2nd Iron	SACO RIVER	160	THRU TRUSS		72.18
17/24	73.60	3500+00	Harts Location	3rd Iron	SACO RIVER	160	THRU TRUSS		73.58
17/25	74.27	3536+25	Harts Location	4th Iron	SAWYERS RIVER	150	THRU TRUSS		
17/26	75.66	3608+90	Harts Location		LIVERMORE BROOK	20	PLATE GIRDER		
17/26	76.28	3640+75	Harts Location		NANCY BROOK	25	PLATE GIRDER		
17/28	77.99	3732+05	Harts Location	Camp Onion Rd	DAVIS BROOK	18	PLATE GIRDER		
17/29	78.84	3777+00	Harts Location	Arethusa Falls	BEMIS BROOK	20	PLATE GIRDER		
17/30	79.42	3810+00	Harts Location	Frankenstein Trestle	TRAIL	520	PLATE GIRDER		
17/30	79.68	3818+73	Harts Location		DRY BROOK	6	WOOD STRINGER		
17/30	79.80	3826+04	Harts Location		DRY BROOK	10	WOOD STRINGER		
17/31	80.31	3853+04	Harts Location		UNNAMED BROOK	10			
17/31	80.84	3878+84	Harts Location		DRY BROOK	6	WOOD STRINGER		
17/31	80.86	3883+32	Harts Location	Ripley Falls Road	AVALANCHE BROOK	33	PLATE GIRDER		
17/32	81.42	3911+77	Harts Location		DRY STREAM	13			
17/32	81.64	3923+30	Harts Location		DRY STREAM	6	WOOD STRINGER		
17/32	81.80	3934+30	Harts Location		UNNAMED BROOK	12	STONE ARCH		
17/32	82.20	3953+79	Harts Location		MOORES BROOK	20	PLATE GIRDER		
17/34	83.52	4025+00	Harts Location		WILLEY BROOK	280	PLATE GIRDER		
17/34	84.05	4050+98	Harts Location		DRY STREAM	15			
17/35	84.33	4067+00	Harts Location			75			
17/36	85.29	4117+60	Carroll		BEECHER BROOK	25			

6/4/2025

*D. W.*

# Mountain Division Railroad Line Bridge Inspection Status Report

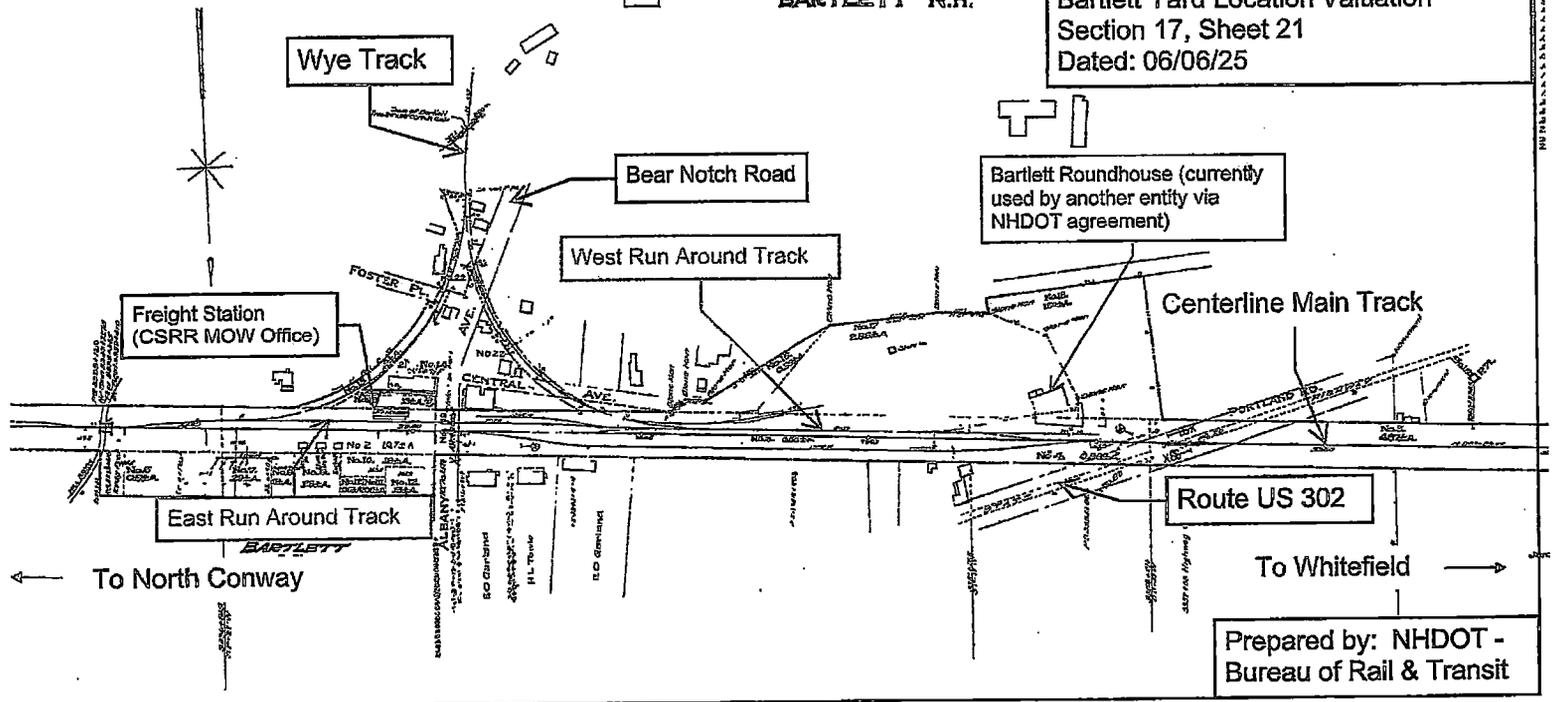
Map Sheet	Bridge Number	Val Station	Town	Nearby Road or Feature	Feature Crossed	Length	Type of Bridge	Plans on File	Notes
17/37	86.50	4180+00	Carroll		SMALL BROOK	6	WOOD STRINGER		
17/37	86.70	4190+39	Carroll		DRY STREAM	5	WOOD STRINGER		
17/37	86.80	4195+45	Carroll		DRY STREAM	5	WOOD STRINGER		
17/39	89.00	4313+80	Carroll	Fabyan	AMMONOOSUC RIVER	110	THRU TRUSS		
17/40	89.89	4360+68	Carroll		UNNAMED BROOK	23	PLATE GIRDER		
17/46	95.94	4677+45	Carroll		CATTLE PASS	4			
17/47	97.21	4775+16	Carroll		DRY BROOK	6			
17/50	100.27	4907+55	Carroll		CARROLL STREAM	20			

*Dur*

6/4/2025

BARTLETT N.H.

EXHIBIT F - Operating Agreement  
Bartlett Yard Location Valuation  
Section 17, Sheet 21  
Dated: 06/06/25



Prepared by: NHDOT -  
Bureau of Rail & Transit

*Don*

FILE - Mt.  
CONWAY  
SCENIC -  
RR  
DIVISION**Track Usage Agreement between CSRR & NHCR.**

On December 13, 2004 it was determined and agreed that the Conway Scenic Railroad (CSRR) would allow operation on a portion of the Crawford Notch Line formerly known as the Maine Central Railroad's Mountain Sub-Division, by the New Hampshire Central Railroad (NHCR) in order for NHCR to serve rail freight customers. This track segment is owned by the State of New Hampshire and is administered by the Department of Transportation, Bureau of Rail and Transit. CSRR is the State's contracted operator of this trackage.

By this agreement, The New Hampshire Central Railroad agrees to, at their sole expense, install and maintain a bi-directional, sliding derail @ 20' West of Airport Road located at MP 100.91. The derail will be controlled by a "high" style switch stand, with a red target clearly marked DERAIL. This derail will be locked in the applied position to effectively establishing a protective separation between the two operations. Additional protection of the NHCR will be provided by the lining and locking of the mainline switch at MP 97.23 to the reversed or diverting position with a CSRR lock. Sole operation of the switch will be by CSRR. With the exception of MOW and Inspection equipment, CSRR trains may not occupy the track west of the switch without receiving verbal authority from NHCR. Conversely, NHCR shall never operate East of the derail without obtaining a valid CSRR Track Occupancy Permit.

It is the responsibility of the NHCR to maintain the section of track between MP 101.05 (former B&M MP 128.15) and MP 100.91 to FRA class II safety standards. Inspection of track in these limits will be conducted by NHCR per the schedule prescribed in TSS part 213.233.

NHCR will, upon a minimum of 120 hours advance written notice from CSRR, clear the mainline of freight cars back to a point west of the switch at HAZEN to allow the passage of CSRR passenger trains to MP 101 at HAZEN. NHCR will within 24 hours after receipt of written notice from CSRR, contact CSRR via telephone or return fax to confirm receipt of the notice. Written notice will be via fax transmission to NHCR's office at 603-922-9058. NHCR shall notify CSRR of any change in the fax number.

*Dan*

When returning Eastward, CSRR train crews shall restore the derail. Upon clearing East of the switch at MP 97.23 CSRR shall verbally notify, as soon as practical, and then confirm in writing within 24 hours to NHCR the reversing and locking of the switch. In practice it is expected that CSRR would inform NHCR well in advance (weeks or months) of its planned excursions to MP 101, however CSRR retains the right to have NHCR clear said trackage with 120 hours advance written notice.

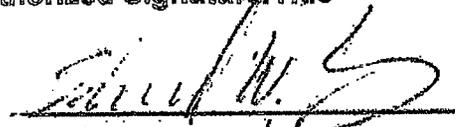
CONWAY SCENIC RAILROAD  
PO BOX 1947  
N. CONWAY, NH 03860

NEW HAMPSHIRE CENTRAL RR  
PO BOX 165  
N. STRATFORD, NH 03590

Authorized Signature/Title

Authorized Signature/Title

 OPERATIONS  
MANAGER



Date 7/27/07

Date 7/21/07

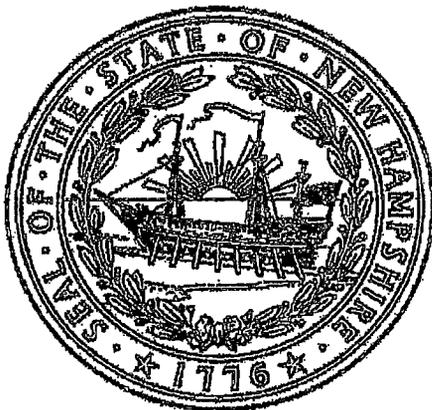
State of New Hampshire  
Department of State

CERTIFICATE

I, David M. Scanlan, Secretary of State of the State of New Hampshire, do hereby certify that PROFILE MOUNTAIN HOLDINGS CORP. is a New Hampshire Profit Corporation registered to transact business in New Hampshire on January 10, 2017. I further certify that all fees and documents required by the Secretary of State's office have been received and is in good standing as far as this office is concerned; and the attached is a true copy of the list of documents on file in this office.

Business ID: 762629

Certificate Number: 0007197611



IN TESTIMONY WHEREOF,  
I hereto set my hand and cause to be affixed  
the Seal of the State of New Hampshire,  
this 11th day of June A.D. 2025.

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

David M. Scanlan  
Secretary of State

**UNANIMOUS CONSENT  
OF  
THE SHAREHOLDERS AND THE BOARD OF DIRECTORS  
OF  
PROFILE MOUNTAIN HOLDINGS CORP.**

**Effective Date: As of May 1, 2025**

The undersigned, being all of the Shareholders and members of the Board of Directors of PROFILE MOUNTAIN HOLDINGS CORP. d/b/a Conway Scenic Railroad, a New Hampshire corporation (the "Corporation"), hereby take the following actions by written consent and without a meeting pursuant to Section 293-A:8.21 and Section 293-A:7.04 of the New Hampshire Business Corporation Act, and direct that this consent (this "Consent") shall be filed with the records of the meetings of the Directors and Shareholders of the Corporation. Capitalized terms used and not otherwise defined herein shall have the meanings set forth in the Operating Agreement (as defined below).

**WHEREAS**, the New Hampshire Department of Transportation, Bureau of Rail and Transit (the "State") and Conway Scenic Railroad Incorporated were parties to the Tourist Excursion Agreement on the Mountain Division Railroad Line Between Conway and Whitefield (the "Previous Operating Agreement") dated January 1, 2015, and the Corporation was subsequently made a party to the Previous Operating Agreement following an Assignment dated January 19, 2018;

**WHEREAS**, pursuant to Section 1.1(d) of the Previous Operating Agreement, the Completion Date of the Previous Operating Agreement was December 31, 2024, unless otherwise extended or renewed;

**WHEREAS**, the Parties agreed to extend the Completion Date of the Previous Operating Agreement for four (4) months, from December 31, 2024, to April 30, 2025, to allow for additional time to finalize a new Operating Agreement and seek approval from the Governor and Council of New Hampshire;

**WHEREAS**, the Parties have agreed to enter into a new operating agreement (the "Operating Agreement") with a commencement date of May 1, 2025; and

**WHEREAS**, the undersigned wish to approve and adopt the Operating Agreement.

**NOW THEREFORE, BE IT:**

**VOTED:** That any and all notice requirements are hereby waived.

**VOTED:** That the Corporation hereby approves and adopts the Operating Agreement in the form attached hereto as Exhibit A.

**VOTED:** That David Swirk, the President of the Corporation, is hereby duly authorized to enter into contracts or agreements (including the Operating Agreement) on behalf of the Corporation with the State of New Hampshire and any of its agencies or departments and further is authorized to execute

any documents which may in her judgment be desirable or necessary to effect the purpose of this vote.

**VOTED:** That all lawful actions taken by the Corporation and its officers, employees and agents in connection with the foregoing resolutions, be and are hereby ratified, confirmed, and approved in all respects, and that such actions shall be binding upon the Corporation to the same extent as if authorized by this Consent.

**VOTED:** That this Consent may be executed in counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

**VOTED:** That electronic or digital signatures in any form to this Consent shall be permitted and shall have the same force and effect as original, manual signatures.

*[Signature Page Follows]*

IN WITNESS WHEREOF, the undersigned Directors and Shareholders of the Corporation have executed this Consent as of the date first written above.

**SHAREHOLDERS:**

Dated: June 16, 2025

DocuSigned by:  
*DAVID SWIRK*  
OF21B336116846D...  
David Swirk

Dated: June 16, 2025

DocuSigned by:  
*William F. Sullivan, Jr.*  
A9BE6DC02EB544E...  
William F. Sullivan, Jr.

**DIRECTORS:**

Dated: June 16, 2025

DocuSigned by:  
*DAVID SWIRK*  
OF21B336116846D...  
David Swirk, Director

Dated: June 16, 2025

DocuSigned by:  
*William F. Sullivan, Jr.*  
A9BE6DC02EB544E...  
William F. Sullivan, Jr., Director

Dated: June 16, 2025

DocuSigned by:  
*Rhonda Swirk*  
26894D1C31582A7...  
Rhonda Swirk, Director

***Signature Page to Unanimous Written Consent of the Shareholders and Board of Directors of  
PROFILE MOUNTAIN HOLDINGS CORP. d/b/a Conway Scenic Railroad***

