

MOTION:

SECOND:

RE: AUTHORIZE THE VIRGINIA RAILWAY EXPRESS CHIEF EXECUTIVE OFFICER TO EXECUTE A PASSENGER RAIL IMPROVEMENTS AND FUNDING AGREEMENT WITH THE VIRGINIA PASSENGER RAIL AUTHORITY

ACTION:

WHEREAS, in December 2019 the Commonwealth of Virginia announced the Virginia Rail Improvement Plan, which includes the acquisition of CSX Transportation right-of-way in the Commonwealth; and

WHEREAS, during the 2020 Virginia General Assembly session the Virginia Passenger Rail Authority (Rail Authority) was established; and

WHEREAS, once the right-of-way is acquired by the Commonwealth, the Rail Authority will work collaboratively with CSX Transportation to construct planned improvements, in part, for the benefit of additional VRE service; and

WHEREAS, the Potomac and Rappahannock Transportation Commission and the Northern Virginia Transportation Commission (Commissions) will provide a funding contribution to the Rail Authority to fund a portion of the Supported Program Elements and the purchase of real property; and

WHEREAS, the Commissions will commit annual Commuter Rail Operating and Capital (CROC) funds for a CROC backed debit issuance as well as pay-as-you-go contributions; and

WHEREAS, the VRE Operations Board recommends this action.

NOW, THEREFORE, BE IT RESOLVED that the Potomac and Rappahannock Transportation Commission authorizes the Chief Executive Officer to execute an agreement with the Virginia Passenger Rail Authority, or alternatively the Virginia Department of Rail and Public Transportation for later assignment to the Virginia Passenger Rail Authority, for Passenger Rail Improvements and Funding subject to approval as to form by legal counsel.

Votes:

Ayes:

Abstain:

Nays:

Absent from Vote:

Alternate Present Not Voting:

Absent from Meeting



VIRGINIA RAILWAY EXPRESS
OPERATIONS BOARD

Agenda Item 9-C
Action Item

To: Chairman Skinner and the VRE Operations Board

From: Rich Dalton

Date: November 20, 2020

**Re: Recommend Authorization to Execute a Passenger Rail
Improvements and Funding Agreement**

Recommendation:

The VRE Operations Board is asked to recommend the Commissions authorize the Chief Executive Officer to execute an agreement with the Virginia Passenger Rail Authority, or alternatively the Department of Rail and Public Transportation for later assignment to the Virginia Passenger Rail Authority, for Passenger Rail Improvements and Funding.

Summary:

The Passenger Rail Improvements and Funding Agreement ("Funding Agreement") includes provisions for the Commissions to fund a portion of the Planned Improvements and the purchase of real property for right-of-way acquired by the Commonwealth from CSX Transportation (CSXT). The Commissions will utilize Commuter Rail Operating and Capital (CROC) funds for both a debt issuance and on a pay-as-you-go (PAYGO) basis as the source of the funding commitment. Once complete, the Planned Improvements will allow a significant increase in VRE service in accordance with the term of a separate Operating and Access Agreement with the Virginia Passenger Rail Authority ("Rail Authority"). Finally, it is anticipated the Agreement will be executed with the Department of Rail and Public Transportation (DRPT) and later assigned to the Rail Authority when practical.

Background:

Since 1992, the Commissions have been engaged in operating and planning the expansion of service for the Virginia Railway Express (VRE). In 2002, the Commissions and CSX



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2300 Wilson Blvd., Suite 230
Arlington, VA 22201
703-524-3322



Virginia Railway Express
1500 King Street, Suite 202
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703-684-1001
VRE.org



Potomac and Rappahannock
Transportation Commission
14700 Potomac Mills Road
Woodbridge, VA 22192
703-580-6121

Transportation (CSXT) established a corridor improvement program overseen by a corridor task force which included representatives of the Commonwealth of Virginia. The purpose of the corridor task force was to identify and fund capital improvement projects in the RF&P corridor to expand passenger rail. The Commonwealth of Virginia, acting through the Department of Rail and Public Transportation (DRPT), has worked collaboratively with the Commissions to advance commuter rail service, and beginning in 2009, began sponsoring the additional inter-city passenger rail service through the 'Amtrak Virginia' program.

The Commonwealth of Virginia, acting through the new Virginia Passenger Rail Authority ("Rail Authority"), will enter into a comprehensive rail agreement with CSXT for the purchase of approximately half of CSXT's interest in the railroad tracks and other railroad assets along the corridor. This agreement will effectively split the corridor longitudinally. The agreement includes a series of specific rail infrastructure improvement projects to facilitate the separation of freight and passenger rail services along the corridor, where feasible, so the two services may operate side-by-side on separate dedicated railroad tracks and other infrastructure and facilities. This separation will improve the reliability and capacity of both freight and passenger rail.

Recognizing the benefits to VRE of this agreement and the expected gains in reliability and capacity, VRE and DRPT began discussions last year on a VRE funding contribution. When VRE's FY 2021 budget was adopted by the Operations Board, staff were directed to continue discussions and develop an agreement with DRPT that would utilize a mix of debt proceeds and cash to contribute towards the Planned Improvements – identified below as Supported Program Elements.

Commuter Rail Operating and Capital (CROC) Fund

CROC was created by the General Assembly in 2018 for the benefit of commuter railroads in the Commonwealth of Virginia. CROC funds can be used for commuter rail operations, for capital projects on a cash or PAYGO basis, and as the backing for a debt issuance. By law, no more than 66 percent of annual CROC funding can be committed to debt service.

CROC is currently funded at \$15 million per year from fuel taxes collected in NVTC and PRTC regions. VRE and the Commissions have already committed the FY 2019-2021 CROC funds (3 years x \$15 million = \$45 million total) to the VRE Crystal City and L'Enfant Station capital projects on a PAYGO basis. No commitments have yet been made for CROC funds in FY 2022 and beyond.

CROC-Backed Debt

Under the proposed Funding Agreement, the Commissions will issue CROC-Backed Debt as permitted under Va. Code § 33.2-3502. The proceeds from the CROC-Backed Debt will be transferred to the Rail Authority and will be used to purchase real property within the VRE service area from CSXT. The Commissions will use best efforts to issue the CROC-Backed Debt no later than November 15, 2021, and shall issue the CROC-Backed Debt no later than November 15, 2022, provided the Commission and the Rail Authority both agree the

issuance of the CROC-Backed Debt will generate sufficient proceeds and otherwise reasonably satisfy the objectives of the Funding Agreement. Future action by the Commissions will be required before CROC-Backed Debt could be issued.

Financing structures for the CROC-Backed Debt may include public bonds, privately-placed bonds, bank financing, and financings under federal or state programs such as TIFIA, RRIF and the Virginia Resources Authority (VRA). The CROC-Backed Debt may be credit enhanced, supported by reserves, issued in one or more taxable or tax-exempt series, or otherwise structured and offered so as to achieve the objectives of the Funding Agreement. The Commissions shall be solely responsible for and make all debt service payments from appropriated CROC funds pursuant to the final financing agreements. The Commonwealth and the Rail Authority shall have no liability for any CROC-Backed Debt, nor will member jurisdictions of the Commissions.

CROC PAYGO Contributions

In addition to the one-time commitment of proceeds from the CROC-Backed Debt, VRE and the Commissions will also contribute CROC funds to the Rail Authority on an ongoing basis. Beginning in FY 2022 and continuing through FY 2031 (ten years total), any available CROC amounts not already committed to debt service will be transferred on a quarterly basis to the Rail Authority to support key elements of the rail improvement program (see below). The Commissions may substitute an alternative capital funding source in place of the CROC funds for all or part of any required CROC PAYGO Contribution to the Rail Authority, provided the total equivalent amount of the required CROC PAYGO Contribution is otherwise provided.

Supported Program Elements

CROC-Backed Debt Proceeds will be used by the Rail Authority to support acquisition costs of the Real Property within the VRE operating territory. However, if in the reasonable opinion of the Commissions' tax and bond counsel, such use of the CROC-Backed Debt Proceeds jeopardizes the tax-exempt status of the CROC-Backed Debt, then the Commissions and the Rail Authority may collaborate in good faith to agree on alternative uses of the CROC-Backed Debt Proceeds.

CROC PAYGO Contributions will be used to support the following Supported Program Elements, and this list of program elements supported by the CROC PAYGO Contributions may be amended in the future upon mutual agreement of the Commissions and the Rail Authority:

- a. New Long Bridge for Passenger Rail
- b. Alexandria Fourth Track
- c. Franconia Springfield Bypass

In accordance with Va. Code § 33.2-3501(B), the Commissions and the Rail Authority will collaborate to ensure those assets funded by the Commissions through this Funding

Agreement shall be subject to the continuing use of the Commissions for the useful life of such assets.

Assignment

This Agreement may be initially entered into with DRPT and later assigned by DRPT to the Rail Authority which would be responsible for all obligations and activities contemplated by this Agreement.

Fiscal Impact:

There is no immediate fiscal impact from recommending the Funding Agreement to the Commissions. The Funding Agreement only identifies the general structure of the funding contribution VRE will make to the Rail Authority in support of the Transforming Rail in Virginia Program. Once additional financial analysis and due diligence work is completed, the Operations Board and the Commissions will be asked to approve a more detailed financing structure for the CROC-Backed Debt Issuance.

However, the Funding Agreement does represent a significant step toward a major financial commitment by VRE and the Commissions to the Rail Authority and to improved passenger rail service in Virginia. In broad terms, VRE will be committing the entire \$15 million of its annual CROC funds for a ten year period (approximately FY 2022 to FY 2031), plus up to half of its annual CROC funds (\$7.5 million per year) for an additional twenty years after that as debt service. During the first ten years, CROC will be unavailable as a funding source to support existing or new services, unless a replacement source for the required PAYGO contribution can be identified. After the first ten years (i.e., once the PAYGO contributions are complete), a portion of the CROC funds will revert to VRE and be available to support new and expanded service.

**Virginia Railway Express
Operations Board**

**Resolution
9C-11-2020**

**Recommend Authorization to Execute a Passenger
Rail Improvements and Funding Agreement**

WHEREAS, in December of 2019, the Commonwealth of Virginia announced the Virginia Rail Improvement Plan which includes the acquisition of CSX Transportation right-of-way in the Commonwealth; and,

WHEREAS, during the 2020 Virginia General Assembly session, the Virginia Passenger Rail Authority (“Rail Authority”) was established; and,

WHEREAS, once the right-of-way is acquired by the Commonwealth, the Rail Authority will work collaboratively with CSX Transportation to construct Planned Improvements, in part, for the benefit of additional VRE service; and,

WHEREAS, the Commissions will provide a funding contribution to the Rail Authority to fund a portion of the Supported Program Elements and the purchase of real property; and,

WHEREAS, the Commissions will commit annual Commuter Rail Operating and Capital (CROC) funds for a CROC-Backed Debt issuance as well as pay-as-you-go contributions,

NOW, THEREFORE, BE IT RESOLVED THAT, the VRE Operations Board does hereby recommend the Commissions find that, in accordance with recently adopted amendments to budget bills HB 29 and 30, meeting by electronic means is authorized because the nature of the declared emergency makes it both impracticable and unsafe for the Operations Board to assemble in a single location on November 20, 2020, and that meeting by electronic means is authorized because the items on the November 20, 2020, Operations Board Meeting Agenda are statutorily required or necessary to continue operations of the Operations Board and the discharge of the Operations Board’s lawful purposes, duties, and responsibilities; and further find that meeting by electronic means is authorized because the items on the November 20, 2020, Operations Board Meeting Agenda are encompassed within the continuity of operations ordinances adopted by member localities of the Virginia Railway Express Operations Board to assure the continued operation of the government during the disaster posed by the public health emergency resulting from COVID-19; and,

BE IT FURTHER RESOLVED THAT, the VRE Operations Board is asked to recommend the Commissions authorize the Chief Executive Officer to execute an agreement with the Virginia Passenger Rail Authority, or alternatively the Department of Rail and Public

Transportation for later assignment to the Virginia Passenger Rail Authority, for Passenger Rail Improvements and Funding, subject to approval as to form by legal counsel.

Approved this 20th day of November 2020

Jeanine Lawson
Secretary

Gary Skinner
Chairman

PASSENGER RAIL IMPROVEMENTS AND FUNDING AGREEMENT

Dated [●], 2020

between

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

and

VIRGINIA DEPARTMENT OF RAIL AND PUBLIC TRANSPORTATION

12-1-2020 DRAFT

EXHIBIT TABLE

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

12-1-2020 DRAFT

PASSENGER RAIL IMPROVEMENTS AND FUNDING AGREEMENT

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

RECITALS

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

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

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

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

1. Program Objective; Effectiveness.

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

2. Program Funding Responsibilities.

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

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

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

3. Source of Commissions Funding Commitment.

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

4. CROC-Backed Debt.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. CROC Pay-Go Contributions.

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

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

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

6. Supported Program Elements; Quarterly Reports.

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

7. Acknowledgment of Commissions' Planned Station Improvements.

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

8. Continued Use Requirement.

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

9. Appropriation and Approvals.

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

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

10. Governing Law.

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

11. Compliance with Law.

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

12. Entire Agreement; Amendment and Modification.

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

13. Severability.

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

14. Sovereign Immunity.

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

15. Assignment.

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

16. Effective Date; Expiration.

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

17. Dispute Resolution.

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

18. Notices.

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

For the Commissions: Chief Financial Officer
Virginia Railway Express
1500 King Street, Suite 202
Alexandria, VA 22314

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

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

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

600 East Main Street, Suite 2102
Richmond, VA 23219

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

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

[SIGNATURE PAGE FOLLOWS]

12-1-2020 DRAFT

NORTHERN VIRGINIA TRANSPORTATION COMMISSION

By: _____

Witness: _____

POTOMAC AND RAPPAHANNOCK TRANSPORTATION COMMISSION

By: _____

Witness: _____

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF RAIL AND PUBLIC TRANSPORTATION

By: _____

Jennifer Mitchell
Director

Witness: _____

[SIGNATURE PAGE TO PASSENGER RAIL IMPROVEMENTS AND FUNDING AGREEMENT]

DEFINITIONS

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

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

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

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

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

“Commissions Funding Commitment” is defined in Section 2.1.

“Contributing Jurisdictions” means Alexandria and Arlington.

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

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

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

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

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

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

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

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

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

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

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

“Program” is defined in the third recitals.

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

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

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

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

“Reserve Displaced Amount” is defined in Section 4.5.

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

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

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

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

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

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

12-1-2020 DRAFT

PHASE 1 AND 2 OF PROGRAM OF PROJECTS

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

SUPPORTED PROGRAM ELEMENTS

- I. CROC-Backed Debt Proceeds shall be used by DRPT to support acquisition costs of the Real Property within the VRE operating territory. However, if in the reasonable opinion of the Commissions' tax and bond counsel, such use of the CROC-Backed Debt Proceeds jeopardizes the tax-exempt status of the CROC-Backed Debt, then the Parties may collaborate in good faith to agree on alternative uses of the CROC-Backed Debt Proceeds, which uses shall maximize the amount the CROC-Backed Debt Proceeds available to support the Program Costs or otherwise achieve the objectives of this Agreement.

- II. CROC Pay-Go Contributions shall be used to support the following Program Projects, and this list of Program Projects supported by the CROC Pay-Go Contributions may be amended in the future, as needed from time to time, upon mutual agreement of the Parties:
 - a. New Long Bridge for Passenger Rail;
 - b. Alexandria Fourth Track; and
 - c. Franconia Springfield Bypass.

AGENDA ITEM 6.5

VIRGINIA RAILWAY EXPRESS



December 3, 2020

By Rich Dalton
Virginia Railway Express
Chief Executive Officer

Action Item 9C

Proposed Passenger Rail Improvements and Funding Agreement

- Commuter Rail Operating and Capital (CROC) Fund
- CROC-Backed Debt
- CROC PAYGO Contribution
- Supported Program Elements
- Future Agreements

