

OPERATING AGREEMENT

Between State of Florida Department of Transportation, an agency of the State of Florida, and  
Florida Central Railroad Company, Inc., a Florida corporation

Pertaining to a Portion of the Central Florida Rail Corridor, More Particularly, a Line of Railroad  
Between Robinson Street, Milepost A 790.1, and Stanton Spur, Milepost A799.7

Dated: July 11, 2011

TABLE OF CONTENTS

	Page
	RECITALS
	ARTICLE I
Definitions	
	ARTICLE II
Description of the Property	
	ARTICLE III
Description of the FCEN Corridor	
	ARTICLE IV
The Services	
Section 4.1	Right to Services
4.2	Operations During Transition Period
4.3	Modification of the Services
4.4	Standards of Performance
4.5	State Control and Supervision
4.6	Operating Windows
4.7	Train Priorities
4.8	Entering and Exiting the FCEN Corridor
4.9	Non-Interference
	ARTICLE V
FCEN Corridor	
Section 5.1	FCEN Corridor
5.2	Level of Utility
5.3	Additional Maintenance and Improvements
5.4	Clearing of Wrecks
5.5	Maintenance
	ARTICLE VI
Compensation and Payments	
Section 6.1	Compensation

- 6.2 Modified or Additional Service
- 6.3 Termination of Services
- 6.4 Payment of Monthly Billing
- 6.5 Payments by State to FCEN
- 6.6 Records
- 6.7 Audit Adjustments
- 6.8 Contract Advance

## ARTICLE VII

### Dispute Resolution

- Section 7.1 Dispute Resolution
- 7.2 Enforcement

## ARTICLE VIII

### Risk of Liability

- Section 8.1 Risk of Liability

## ARTICLE IX

### Insurance

- Section 9.1 Insurance

## ARTICLE X

### General

- Section 10.1 Information
- 10.2 Contract Administration
- 10.3 Force Majeure
- 10.4 Successors and Assigns
- 10.5 Interpretation of Agreement
- 10.6 Severability
- 10.7 Notices
- 10.8 Counterparts
- 10.9 Term
- 10.10 Rights reserved
- 10.11 Relationship of Parties
- 10.12 Compliance with Laws
- 10.13 Incorporation of Recitals
- 10.14 Acknowledgement by FCEN

THIS OPERATING AGREEMENT (this "Agreement"), made and entered into this 19<sup>th</sup> day of July, 2011, between Florida Central Railroad Company, Inc., a Florida corporation, whose address is \_\_\_\_\_ (hereinafter referred to as "FCEN"), and State of Florida Department of Transportation, whose address is Haydon Burns Building, 605 Suwannee Street, Tallahassee, FL 32399-0450, (hereinafter referred to as "State").

WHEREAS, State entered into that certain Contract For Sale and Purchase dated November 30, 2007, as amended (hereinafter collectively referred to as the "Contract"), with CSX Transportation, Inc., a Virginia corporation (hereinafter referred to as "CSXT"), whereby State agreed to acquire and CSXT agreed to sell certain properties therein described (comprising a portion of CSXT's A-Line, hereinafter referred to as the "Property") upon which railroad freight, commuter and other passenger rail services are to be conducted; and

WHEREAS, under such Contract, CSXT retained, and did not transfer to State, those certain perpetual easements (the "CSXT Easement" and the "Reserved Easement") over the properties acquired by State as each such perpetual easement is described in the Deed; and

WHEREAS, FCEN entered into that certain Agreement with CSXT dated September 26, 1990, as amended (the "FCEN CSXT Interchange Agreement"), with respect to the interchange of railroad cars, loaded and empty, on a portion of CSXT's A Line by FCEN (the "FCEN Corridor"); and

WHEREAS, in addition to the Contract, State and CSXT entered into that certain Transition Agreement dated November 30, 2007, as amended (herein collectively referred to as the "Transition Agreement"), whereby State and CSXT agreed to meet with FCEN prior to State's ownership of the Property in order to set forth an agreement between State and FCEN

pertaining to FCEN's operations on the FCEN Corridor subsequent to State's receipt of the Property; and

WHEREAS, in addition to the Contract and the Transition Agreement, State and CSXT entered into that certain Central Florida Operating and Management Agreement dated November 30, 2007, as amended (hereinafter collectively referred to as the "CFOMA"), whereby State and CSXT agreed to the terms and conditions governing the conduct of CSXT's railroad operations over the Property; and

WHEREAS, State intends to operate commuter rail passenger service on the Property (hereinafter referred to as "Commuter Rail Service"); and

WHEREAS, the parties acknowledge that, for the "Transition Period" following the closing of the purchase and sale between State and CSXT (as defined in Section 1.12), State will be engaging in infrastructure improvements on the Property; and

WHEREAS, the parties further acknowledge that, during the Transition Period, there will be delays in train operations as well as cancellations of FCEN service; and

WHEREAS, State may assign and transfer any or all of its interests, rights, duties, and obligations under this Agreement or the FCEN Corridor to the Central Florida Commuter Rail Commission pursuant to that certain Interlocal Operating Agreement for Operation of the Central Florida Commuter Rail System dated August 29, 2007 between State and Central Florida Commuter Rail Commission, as amended (herein collectively referred to as the "Interlocal Operating Agreement"); and

WHEREAS, the parties have negotiated this Agreement to provide for FCEN operation of service on the FCEN Corridor.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants hereinafter set forth, the parties hereto, intending to be legally bound and effective upon State's ownership of the Property (the "Closing Date"), agree as follows:

## ARTICLE I

### DEFINITIONS

- 1.1 **Closing Date.** "Closing Date" means the time at which State assumes ownership of the Property.
- 1.2 **Commission.** "Commission" means the Central Florida Commuter Rail Commission created pursuant to Section 163.01, Florida Statutes.
- 1.3 **Commuter Rail Service.** "Commuter Rail Service" means commuter rail service operated by State on the Property.
- 1.4 **CSXT.** "CSXT" means CSX Transportation, Inc., a Virginia corporation, and its successors and/or assigns.
- 1.5 **FCEN.** "FCEN" means the Florida Central Railroad Company, Inc., a Florida corporation, and its successors and/or assigns.
- 1.6 **FCEN Corridor.** "FCEN Corridor" means the rail line and related facilities on that portion of the Property as described in Article III below, upon which the FCEN Trains will operate.
- 1.7 **FCEN Train.** "FCEN Train" means a freight train operated over the FCEN Corridor by or for the account of FCEN.
- 1.8 **Freight Service.** "Freight Service" means rail freight service operated by CSXT, FCEN, or any other railroad on the Property.

1.9 **Intercity Rail Passenger Service.** “Intercity Rail Passenger Service” means intercity rail passenger services operated by the National Railroad Passenger Corporation (“Amtrak”) or any other railroad on the Property.

1.10 **Property.** “Property” means the rail line and related facilities, described in Article II below, between DeLand, Florida and Poinciana, Florida.

1.11 **State.** “State” means the Florida Department of Transportation and/or State’s successor to which State has assigned responsibility to perform Commuter Rail Services on the Property. Successor, as used herein, includes the Commission.

1.12 **Transition Period.** “Transition Period” means the time from the Closing Date until the first day of operations of Phase II Commuter Rail Service on the Property.

## **ARTICLE II**

### **DESCRIPTION OF PROPERTY**

The Property consists of the rail line, structures, signals, signal systems, switches, crossovers, interlocking devices and related rail facilities extending between Milepost A749.61 at or near DeLand, Florida and Milepost A813.82 at or near Poinciana, Florida. As of the Closing, State will be responsible for dispatching, operating, and maintaining the Property. In the future, State intends to operate Commuter Rail Service over the Property. As of the Closing, CSXT will operate Freight Service over the Property pursuant to a perpetual easement from State, and FCEN will operate over the FCEN Corridor (as defined in Article III) pursuant to this Agreement and FCEN CSXT Interchange Agreement.

## **ARTICLE III**

### **DESCRIPTION OF FCEN CORRIDOR**

The FCEN Corridor consists of the rail line, structures, signals, signal systems, switches, crossovers, interlocking devices and related rail facilities on that portion of the Property extending between Robinson Street, Milepost A 790.1 and Stanton Spur, Milepost A 799.7, used by FCEN to operate Freight Service pursuant to this Agreement.

## **ARTICLE IV**

### **THE SERVICES**

#### **Section 4.1. Right to Services.**

Subject to and in accordance with the terms and conditions of this Agreement, State agrees to provide FCEN with access to the FCEN Corridor for and in connection with the operation of Freight Service. The schedules and train consists shall be compatible with the physical capabilities of the FCEN Corridor and the efficiencies of other freight, commuter, and intercity passenger rail services.

State may designate others to be responsible for performing any services it may be obligated to provide FCEN under the terms of this Agreement. Such designation does not relieve State of the responsibility to provide such services.

#### **Section 4.2. Operations During Transition Period.**

A. **Transition Period.** This Section 4.2 shall govern the conduct of the rail operations, maintenance, and dispatching of trains on the FCEN Corridor during the Transition Period.

B. **Use, Operation and Dispatch of the Property.** Following Closing, State shall be responsible for dispatching, operating and maintaining the Property.



1. Use of the FCEN Corridor. Any and all entries by FCEN Trains onto the FCEN Corridor will be covered by this Agreement. FCEN shall not use any portion of the FCEN Corridor for any purpose other than the conduct of Freight Service.

State shall, subject to the terms of this Section 4.2, furnish FCEN with facilities for the provision of Freight Train service in at least substantially the same condition and manner as provided prior to State's acquisition of the Property; provided, however, the parties acknowledge that FCEN Trains may be subject to reasonable delays in order to accommodate Property improvement construction for Commuter Rail Service. In the event FCEN's Trains are interrupted, delayed or cancelled at any time from any cause, FCEN shall not have any claim against State for liability on account of loss or damage of any kind from such interruption, delay or cancellation.

2. Operating Windows. Train operations shall be governed by the terms of Section 4.6, except that the operating windows specified therein may be modified during the Transition Period to accommodate the construction and related activities that may occur on the Property as set forth herein and State may cause rail operations on the Property to be delayed or cancelled during the Transition Period, as provided herein.

3. Transition Operations. State will be responsible for the construction work during the Transition Period.

a. Curfews. Daily and extended curfew periods established to facilitate construction will be scheduled in advance as set forth in Section 4.2.C. Daily curfews (each a "Daily Curfew") are those curfews that provide a continuous four (4) to six (6) hours of contractor track time within the daylight time period on all weekdays and weekends (generally from 7 a.m. (0700 hours) until 1 p.m. (1300 hours). Extended

curfews (each an "Extended Curfew") are those curfews that provide a continuous twelve (12) to fifty four (54) hours of contractor track time (generally from 9 p.m. (2100 hours) Friday to 3 a.m. (0300 hours) Monday). State will consult with FCEN regarding the establishment of, and provide FCEN at least sixty (60) days advance notice of, Extended Curfews, unless otherwise agreed. Extended Curfews will be implemented in such a way as to minimize the interruption of FCEN Freight Service, recognizing that all passenger rail service receives priority over freight rail service. The notice of Extended Curfew shall include:

- (i) Identification of the section of track that is to be out of service.
- (ii) Description of the work to be completed.
- (iii) An explanation as to why the work requires a curfew.
- (iv) The duration of the curfew.
- (v) The date and time the curfew will commence.

b. Operating Rules. During the Transition Period, State shall adopt CSXT's Operating Rules and Roadway Safety Rules and may supplement such Rules with Rules specific to the Property.

C. Construction during Transition Period.

1. State shall make a good faith effort to plan and implement its construction on the FCEN Corridor in a manner that is least disruptive to FCEN Trains. The Transition Period is estimated to be from December 31, 2010 to and through February, 2015 (i.e., when Phase II construction is completed). The parties acknowledge that the estimate of the Transition Period set forth above may be amended prior to actual commencement of construction and State will notify FCEN of such changes if they occur.

2. Prior to commencement of the Transition Period, State will provide to FCEN, for its review and approval, a proposed work schedule setting forth pre-scheduled curfew times agreed upon between CSXT and State during which State construction crews will be working on the track during Phase I construction. Such review and approval by FCEN shall be limited to the issue of whether the proposed work schedule will interfere with peak service periods on FCEN Trains. FCEN's approval shall not be unreasonably withheld or delayed in the instance of any such proposed interference. During the Transition Period, FCEN and State will communicate on a no less than monthly basis (or more frequently as may be needed) to update the work schedule. Likewise, prior to commencement of Phase II construction, State will provide to FCEN, for its review and approval, a proposed work schedule setting forth pre-scheduled curfew times during which State construction crews will be working on the track.

**D. Coordination of Activities During Transition Period.**

During the Transition Period, the parties agree to:

1. Designate the following person(s) to serve as a point of contact for coordination of day-to-day activities during the Transition Period:

For State:                    Todd Hammerle, SunRail Project Manager                    (386) 943-5707

For FCEN:                    Dennis Maples, Manager of Operations                    (407) 467-0162

                                      Bill Dusenbury, Supervisor of Train Operations                    (407) 509-1521

Notification of any change in the point of contact for either party shall be made in accordance with Section 10.7.

2. Hold monthly meetings or conference calls of such representatives, and other appropriate personnel as designated thereby, through completion of the Transition Period, unless such representatives agree otherwise. Regarding the Transition Period, the parties acknowledge that State and CSXT have agreed to monthly meetings and that FCEN has been invited to participate in those meetings, which will constitute fulfillment of the FCEN coordination agreement as set forth above.

3. Provide timely exchange of information and response to requests in order to ensure a better understanding of issues and problems and, thereby, assist in eliminating uncertainties and ambiguities during the Transition Period.

**Section 4.3. Modification of the Services.**

During the term of this Agreement, FCEN may request increases, reductions or modifications in the train services, schedules, consists, property or performance standards in connection with FCEN's freight services on the FCEN Corridor. FCEN will be reasonably entitled to implement changes that it requests under this section, subject to the physical capabilities of the FCEN Corridor and the efficiency of other operations which will include, but not be limited to, rail freight, commuter, and other passenger rail services not inconsistent with this Agreement. FCEN and State shall each appoint a representative who shall be responsible for the coordination of all changes contemplated by this Section.

**Section 4.4. Standards of Performance.**

A. State shall make every reasonable effort:

1. To permit FCEN Trains access to all scheduled stops on the FCEN Corridor by the scheduled time; and

2. To avoid excessive delays to FCEN Trains and, consistent with safety, to make up delays incurred on the FCEN Corridor.

3. To not require an FCEN Train to depart a station prior to completion of customary operations, freight services or emergency mechanical work.

B. State shall cooperate in good faith with FCEN in permitting the operation of FCEN Trains in a manner which will contribute to the success of FCEN's Freight Service.

**Section 4.5. State Authority.**

A. In the performance of services referred to in this Agreement, effective upon Closing, State will be responsible for dispatching, operating, and maintaining the Property. State shall have sole control of the dispatching of FCEN Trains while on the FCEN Corridor. All personnel rendering any services which involve responsibility for State's operating facilities or for the handling or movement of any FCEN Train shall be subject to the authority of State and such services shall be governed by and subject to all then current operating and safety rules, orders, procedures and standards applicable to the Property.

B. State's authority as to FCEN Trains on the FCEN Corridor is in no way intended to decrease or diminish FCEN's responsibility to provide qualified personnel capable of operating FCEN Trains in a manner compliant with the customary standard of operations and care. All equipment and employees utilized by FCEN on the FCEN Corridor shall be in compliance with all applicable laws and regulations. FCEN shall investigate and take disciplinary action for any reported incident, if warranted pursuant to FCEN's policies and procedures. Violations of State Operating Rules shall be treated in the same manner as violations of FCEN policies and procedures.

C. State shall endeavor to retain application of the CSXT Operating Rules, supplemented as required by Special Instructions specific to the Property, to avoid the need for FCEN crews to become trained and qualified in non-CSXT Operating Rules. However, State reserves the right to amend its Operating Rules. FCEN agrees to train and fully qualify all of its train crews operating on any portion of the FCEN Corridor on any applicable State Operating Rules. State will provide, at State's cost, State and/or State contractor personnel required to train FCEN crews and other personnel (including FCEN Rules Examiners, Transportation Supervisors and other non-Train and Engine personnel) in the State non-CSXT Operating Rules. FCEN employees who are currently qualified to operate on the FCEN Corridor under CSXT Operating Rules will not be required to be re-qualified unless and until there is a change in the existing Operating Rules. FCEN agrees to provide State with a list of FCEN personnel qualified in CSXT Operating Rules, including the most recent date of qualification. State agrees to provide FCEN with notice of any amendments to the State Operating Rules a minimum of ninety (90) days prior to their effective date.

D. It is further understood that the terms of this Agreement shall not be construed in any way to diminish the rights, duties and responsibilities of the Rail Safety Inspectors employed by State pursuant to Section 351.35, Florida Statutes.

**Section 4.6. Operating Windows.**

Subject to the terms and conditions of this Agreement, after the Transition Period, the trains, locomotives, cars and equipment of authorized users of the FCEN Corridor shall, in the absence of emergency situations, be operated without prejudice or partiality to any party and in such a manner as will afford the economical and efficient movement of all trains, locomotives, rail cars and rail equipment, within the following operating windows for seven (7) days a week:

A. 5:00 a.m. to 10:00 a.m. (0500 to 1000 hours) and 3:00 p.m. to 10:00 p.m. (1500 to 2200 hours) – exclusive passenger operation for Commuter Rail Service and Intercity Rail Passenger Service.

B. 10:00 a.m. to 3:00 p.m. (1000 to 1500 hours) and 10:00 p.m. to midnight (2200 to 2400 hours) - mixed Commuter Rail Service, Intercity Rail Passenger Service and Freight Service. All trains operated during this window shall be dispatched pursuant to the train priorities set forth in Section 4.7 below.

C. Midnight to 5:00 a.m. (2400 to 0500 hours the following day) - exclusive Freight Service with the exception of Amtrak trains that may run during this window.

D. Betterments and additions, curfew and program work, construction and signal suspension will be performed between the hours from 5:00 a.m. until midnight (0500 to 2400 hours), including weekends. Other than in case of emergency, bridge, track and signal inspection and maintenance work shall be fairly spread over all operating windows. The establishment of specific dates and times for the performance of such work shall reflect the need to minimize the potential for delay to Commuter Rail Service, Intercity Rail Passenger Service, and Freight Service consistent with the efficient execution of such betterments and additions, and also to give priority to on-time Intercity Rail Passenger Service.

**Section 4.7. Train Priorities.**

Within the parameters of the operating windows set forth above in Section 4.6, Commuter Rail Service and Intercity Rail Passenger Service shall have priority over Freight Service. On-time Intercity Rail Passenger Service and Commuter Rail Service shall be given priority. Should both or either of Intercity Rail Passenger Service and Commuter Rail Service be operating later than their respective published schedules, then dispatching will be handled to

provide that the Intercity Passenger Rail Service and Commuter Rail Service are moved prior to Freight Service being moved. In the event of an emergency where normal train operations are significantly disrupted, the dispatcher will use his or her professional judgment to move all passenger trains in the most expeditious manner possible.

**Section 4.8. Entering and Exiting the FCEN Corridor.**

Before FCEN Trains enter onto the FCEN Corridor, FCEN shall request permission from State's dispatcher. Further, FCEN shall await confirmation from said dispatcher that such permission has been issued to allow FCEN's movements on or over the FCEN Corridor. Upon completing its operations and clearing the FCEN Corridor, FCEN will notify the dispatcher that it has completed its operations and that its equipment has cleared the FCEN Corridor. Once FCEN has notified the dispatcher that it has cleared the FCEN Corridor, FCEN shall not re-enter the FCEN Corridor without again obtaining permission from the dispatcher.

FCEN shall provide and maintain at its expense all radio and/or telephone communication facilities needed as may be reasonably required by State to permit FCEN to use the FCEN Corridor.

The State agrees to support an exception from or waiver of the application of the positive train control ("PTC") requirements of the Federal Railroad Administration ("FRA") to FCEN locomotives operating on the FCEN Corridor. Such support shall include filing or amending such PTC plans as the State may be required to file under FRA regulations, and reasonably consider with FCEN such other actions as the FRA regulations might require for FCEN to qualify for such exception or waiver.

**Section 4.9. Non-Interference.**



Neither party shall use the FCEN Corridor so as to unreasonably interfere with the use thereof by the other party. Each party in placing or leaving cars on the FCEN Corridor shall place or leave same in such position as not to obstruct or interfere in any manner with the operation of any other trackage.

## **ARTICLE V**

### **FCEN CORRIDOR**

#### **Section 5.1. FCEN Corridor.**

State shall not voluntarily dispose of or abandon any portion of the FCEN Corridor used in the operation of FCEN Trains without first consulting with FCEN for as long as such FCEN use continues or for the term of this Agreement, whichever period is shorter, provided that seasonal changes or suspensions of Freight Service shall not be deemed discontinuance of use. Nothing herein shall prevent State from modifying, changing, or relocating any facility or any segment of the FCEN Corridor, provided that with respect to tracks covered by this paragraph, the continuity of the tracks is retained.

In accordance with the above paragraph, in the event State desires to dispose of facilities on the FCEN Corridor and which are then being used in connection with and necessary to the operation of Freight Service, State shall furnish, at State's sole cost and expense, substitute facilities reasonably equivalent in utility, provided FCEN can demonstrate that such facilities are essential to its operation of Freight Service.

Under no circumstances will assignments, conveyances, transfers, or other transactions specifically authorized by or contemplated under the Contract, the CFOMA, the Transition Agreement, that certain Interlocal Operating Agreement, that certain Interlocal Funding Agreement for Acquisition and Construction of the Central Florida Commuter Rail System dated

August 28, 2007 between Orange County, Florida, Osceola County, Florida, Seminole County, Florida, County of Volusia, Florida, City of Orlando, Florida, and State, as amended, be considered a voluntary disposition, an abandonment, or a disposal of fixed ancillary facilities that would require consultation, notice, or the furnishing of substitute facilities under this Section 5.1, provided that any such assignments, conveyances, transfers or other transactions so contemplated do not affect the rights of FCEN under this Agreement..

**Section 5.2. Level of Utility.**

Following the Transition Period, the FCEN Corridor shall be maintained at not less than the level of utility existing on the Closing. Level of utility is defined as a condition which permits the FCEN Train schedules to be operated with a reasonable degree of reliability. FCEN agrees that State may adjust speeds at various locations when conditions, maintenance requirements and production work require; provided that State will restore speeds as soon as possible. Notwithstanding the above, FCEN will be authorized to operate at speeds designated by the Federal Railroad Administration's Class IV track standards for freight trains, subject to temporary or permanent slow orders and speed restrictions imposed from time to time by State or the Federal Railroad Administration consistent with generally accepted industry standards.

**Section 5.3. Additional Improvements.**

FCEN may request reasonable improvements to the FCEN Corridor and/or modifications in FCEN Corridor maintenance. If State agrees to have work performed, the parties will amend this Agreement upon terms and conditions agreeable to both parties. FCEN will compensate State for all incremental costs incurred as a result of any FCEN Corridor maintenance change or improvements undertaken pursuant to FCEN's request.

**Section 5.4. Clearing of Wrecks.**

Whenever State's or FCEN's use of the FCEN Corridor requires re-railing, wrecking service or wrecking train service, State shall be responsible for the performance of such service, including, without limitation, the repair and restoration of roadbed, track and structures. FCEN shall assist State in the performance of such service to the extent reasonably requested by State. The liability, cost and expense of the foregoing, including, without limitation, loss of, damage to or destruction of any property whatsoever and injury to or death of any person or persons whomsoever resulting therefrom, shall be allocated and apportioned in accordance with the provisions of Article VIII hereof. All trains, locomotives, rail cars, and rail equipment and salvage from the same so picked up and removed which is owned by FCEN shall be promptly delivered to it. State shall perform the services under this Section in an expeditious manner in order to restore rail service on the line.

**Section 5.5. Maintenance.**

State shall maintain, repair, and renew its trackage at its own expense and with its own supervision and labor. The FCEN Corridor shall be kept and maintained in reasonably good condition for the use herein contemplated as set forth in Section 5.2, but no guarantees are made as to the condition of the trackage or as to uninterrupted operations thereover. FCEN shall not, by reason of failure or neglect on the part of State to maintain, repair or renew the trackage, have or make any claim or demand against State or its officers, agents, employees or contractors for any injury to or death of any person or persons whomsoever, or for any damages of any nature suffered as a result of such failure or neglect.

**ARTICLE VI**

**COMPENSATION AND PAYMENTS**

**Section 6.1. Compensation.**

The fees described below shall constitute full and complete consideration to be paid by FCEN to State for all of FCEN's rights and operations (including without limitation, FCEN's rights with respect to the provision of Freight Service on the FCEN Corridor, FCEN's rights to contract with CSXT, its successors and assigns with respect to the provision of Freight Service on the FCEN Corridor by same), and all of State's duties and obligations (including, without limitation, State's obligation to procure and maintain the insurance described in Article IX of this Agreement), under this Agreement with respect to the FCEN Corridor. The fees shall be computed as follows:

A. Beginning on \_\_\_\_\_ (the "Closing Date"), and continuing during the Transition Period only, no fees will be payable by FCEN.

B. Thereafter for the term of and subject to this Agreement, FCEN shall pay State a usage fee (the "Usage Fee") as follows:

1. FCEN shall pay State, on a quarterly basis, a Usage Fee of 39/100 Dollars (\$0.39) per car mile for each locomotive and each loaded rail car handled on the FCEN Corridor by FCEN.

2. Each locomotive unit, EOT Unit, business car, passenger car, ballast car, and work train car (but excluding hi-rail equipment and maintenance of way machinery moving on its own wheels), handled by FCEN on the FCEN Corridor, for the purpose of this Agreement, shall be counted as one car. With respect to articulated units, the number of cars shall be determined by the AAR Car Type Code as defined in the Uniform Machine Language Equipment Register ("UMLER") Specification Manual. The second numeric in the Car Type Code field covering codes "Q" and "S" shall be the factor in determining the car count

for an articulated unit. For example, AAR Car Type Code "S566" would equate to a five (5) car count as these type cars have five wells capable of handling 40' to 48' containers in each well. Car count data for articulated units is subject to change upon development of technology acceptable to both parties that would accurately separate units by Car Numbers.

C. The parties agree that the FCEN Corridor is a distance of approximately 9.6 miles.

D. With respect to the Usage Fee required under Section 6.1(B)(1), above, FCEN shall furnish to State, care of Secretary, District 5, Florida Department of Transportation, 719 Woodland Boulevard, DeLand, FL 32720, within thirty (30) days of the end of each calendar quarter a statement of the number of loaded rail cars as defined in Section 6.1(A)(2), above, handled by FCEN over the FCEN Corridor and the miles traveled by each such car over the FCEN Corridor during the quarter beginning the first calendar quarter following the Closing Date. FCEN shall pay the aforesaid Usage Fee for the immediately preceding quarter (subject to the Usage Fee waiver as set forth in Section 6.1(A)) within thirty (30) days of receipt of State's invoice following the end of such quarter.

E. The Usage Fee shall be revised upward or downward each year, effective upon each anniversary of the Closing Date, to compensate for the increase or decrease in the cost of labor and material, excluding fuel, as reflected in the Annual Indexes of Charge-Out Prices and Wage Rates (1977=100), included in "AAR Railroad Cost Indexes" and supplements thereto, issued by the Association of American Railroads ("AAR"). In making such determination, the final "Material prices, wage rates and supplements combined (excluding fuel)" indexes for the East District shall be used. The Usage Fee shall be revised by calculating the percent of increase or decrease in the index of the latest calendar year as related to the index for the previous

calendar year and applying that percent to the Usage Fee. For the initial annual adjustment following the Closing Date, the "latest calendar year" shall mean the calendar year following the Closing Date and the "previous calendar year" shall mean the calendar year in which the Closing Date occurs.

By way of example, assuming "A" to be the "Material prices, wage rates and supplements combined (excluding fuel)" final index figure for 2006; "B" to be the "Material prices, wage rates and supplements combined (excluding fuel)" final index figure for 2007; "C" to be the Variable Fee; and "D" to be the percent of increase or decrease; the revised Variable Fee stated herein would be revised by the following formula:

$$(1) \quad (B - A)/A \quad = \quad D$$

$$(2) \quad (D \times C) + C \quad = \quad \text{revised Variable Fee, effective upon the anniversary of the Closing Date of the year being revised.}$$

In the event the base for the Annual Indexes of Charge-Out Prices and Wage Rates issued by the AAR shall be changed from the year 1977, appropriate revision shall be made. If the AAR or any successor organization discontinues publication of the Annual Indexes of Charge-Out Prices and Wage Rates, an appropriate substitute for determining the percentage of increase or decrease shall be negotiated by the parties hereto. In the absence of agreement, the matter shall be resolved pursuant to the dispute resolution procedures of Article VII hereof.

**Section 6.2. Modified or Additional Service.**

FCEN will compensate State for all incremental costs associated with any modified or additional service that State provides to FCEN pursuant to this Agreement, unless such modified or additional service is a result of curfews or extended curfews during the Transition Period.. The provision of such modified or additional service and the compensation therefore shall be

specifically set forth in a written amendment to this Agreement. In the event of any dispute between the parties relative to said modified or additional service, said dispute shall be resolved pursuant to the procedures set forth in Article VII of this Agreement.

**Section 6.3. Termination of Services.**

FCEN may notify State by providing advance written notice, of not less than five (5) days, that it no longer desires State to perform or furnish specific services, activities, or facilities for which FCEN compensates State and State shall cease to perform or provide the same as of the date requested by FCEN. Such notice shall include a schedule of the services, activities, or facilities to be terminated. FCEN shall no longer be required to make payment to State once the service, activity or facility usage has been terminated. FCEN agrees, however, to reimburse State for all incremental costs, other than employee costs, incurred by State as a result of the termination of such services, activities and/or facilities usage. In the event of any dispute between the parties relative to the termination of services, activities or facilities usage, said dispute shall be resolved in accordance with the procedures in Article VII of this Agreement.

**Section 6.4. Payment of Quarterly Billing.**

Within thirty (30) days after the last day of each calendar quarter, FCEN shall make payment to State of the net amount due as calculated pursuant to Section 6.1 of this Agreement. FCEN shall transfer payment to State's Comptroller's Office either electronically or by wire transfer.

**Section 6.5. Payments by State to FCEN.**

Whenever under this Agreement, State is obligated to make payments to FCEN, State will have five (5) working days to approve any services or work performed. State will have twenty (20) days to deliver a request for payment (voucher) to the State of Florida's Department

of Financial Services (hereafter referred to as "Department of Financial Services") measured from the later of the date the invoice is received from FCEN or the services are approved. If a payment is not available for forwarding to FCEN within forty (40) days, a separate interest penalty at a rate as established pursuant to *Section 55.03(1), F.S.*, will be due and payable, in addition to the invoice amount. Interest penalties of less than one dollar (\$1.00) will not be enforced unless FCEN requests payment. Invoices that have to be returned to FCEN because of FCEN's preparation errors will result in a delay in the payment. The invoice payment requirements do not start until a properly completed invoice is provided to State.

A Vendor Ombudsman has been established within the Department of Financial Services. The duties of this individual include acting as an advocate for Participants, such as FCEN, who may be experiencing problems in obtaining timely payment(s) from a state agency. The Vendor Ombudsman may be contacted at (850) 413-5516 or by calling the Department of Financial Services Hotline at 1-877-693-5236.

The provisions of *Section 339.135(6)(a), F.S.*, are hereby incorporated in this Agreement as follows:

State, during any fiscal year, shall not expend money, incur any liability, or enter into any contract which, by its terms, involves the expenditure of money in excess of the amounts budgeted as available for expenditure during such fiscal year. Any contract, verbal or written, made in violation of this subsection is null and void, and no money may be paid on such contract. State shall require a statement from the Comptroller that such funds are available prior to entering into any such contract or other binding commitment of funds. Nothing herein contained shall prevent the making of contracts for periods exceeding 1 year, but any contract so made shall be executory only for the value of the services to be rendered or agreed to be paid for in succeeding fiscal years; and this paragraph shall be incorporated verbatim in all contracts of State which are for an amount in excess of \$25,000.00 and which have a term for a period of more than 1 year.

State's obligation to pay is contingent upon an annual appropriation by the Florida Legislature.



**Section 6.6. Records.**

FCEN records of costs incurred under the terms of this Agreement shall be maintained and made available upon request to State at all times during the period of this Agreement and for five (5) years after final payment is made. FCEN shall furnish copies of requested documents and records to State. Records of costs incurred include FCEN's general accounting records and the project records, together with supporting documents and records of any contractor and/or subcontractors performing work, and all other records of FCEN and any contractor and/or subcontractors considered necessary by State for a proper audit of costs.

FCEN and State shall maintain supporting accounting records and any other related data which may reasonably concern the performance of services for FCEN pursuant to this Agreement, and such documents shall be available for review and audit at points where such records are ordinarily kept. Where pertinent, such records shall include the designated train number and/or locomotive number and/or car numbers, and shall be maintained and accumulated on a location-by-location basis. Such records shall be retained for not less than sixty (60) months (five (5) years) and shall be available for inspection and copying during the regular business hours of the location where the record is retained. Specification of such minimum retention period shall not limit the right of review and audit of any records that exist beyond such period. Notwithstanding the foregoing, the parties agree that, to the extent any documents described in Section 5 constitute public records under Florida Law, the Florida Public Records Law will control the inspection, copying, and retention of those records.

**Section 6.7. Audit Adjustments.**

In the event either party believes it has made a payment which exceeds (or has received a payment which is less than) the amount required by the provisions of this Agreement or a

settlement between the parties of a matter covered by this Agreement, such party shall formally submit its claim in writing in reasonable detail to the other party. Within thirty (30) days of receipt of a claim, the party receiving the claim shall respond in writing to the party submitting the claim indicating whether it agrees or disagrees with the claim. The reason for disputed audit adjustments shall be explained in detail. Undisputed audit adjustments shall be paid promptly by the other party. In the event that a party disagrees with the proposed adjustment, such party shall provide a written statement of the basis of its disagreement and the facts supporting that basis in a form which will permit the claiming party to evaluate the merits of the other party's position. Any adjustment which is unresolved ninety (90) days after having been formally presented shall, at the request of either party, be submitted to arbitration for resolution in accordance with Article VII. Interest shall be paid in accordance with Sections 215.422 and 55.03(1), Florida Statutes.

## **ARTICLE VII**

### **DISPUTE RESOLUTION**

#### **Section 7.1. Dispute Resolution.**

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation for a period of ninety (90) days prior to bringing any suit. If the parties cannot resolve the dispute through negotiations, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to both parties. The parties shall each pay fifty percent (50%) of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement. Any decisions

or awards issued through this non-binding dispute resolution process may not be admitted into evidence for any civil action arising out of, through or under this Agreement.

**Section 7.2. Enforcement.**

Upon failure of a party to comply with a dispute resolution award issued pursuant to this Article, or the failure to reach resolution under Section 7.1, the other party may refer the matter to a court of competent jurisdiction for a de novo determination at law.

**ARTICLE VIII**

**RISK OF LIABILITY**

**Section 8.1. Risk of Liability.**

Except as provided in the last sentence of this paragraph, to the extent permitted by law, State shall be responsible for any damage or liability arising from the Commuter Rail Service. Except as provided in the next sentence, FCEN shall be responsible for any damage or liability arising from the FCEN operations on the FCEN Corridor. In the event of an accident involving operations of both parties, each party (i.e. FCEN on the one hand and State on the other hand) shall bear the share of damage or liability caused by its negligence as determined by a court of appropriate jurisdiction. The parties recognize that the insurance and fund referenced in Section 9.1.A of this Agreement shall be the extent and sole source upon which State's liability under this Agreement rests beyond that provided under the limited waiver of sovereign immunity for tort contained in Section 768.28, Florida Statutes.

**Section 8.2. Transition Period; Contractor Insurance.**

During the Transition Period, FDOT shall require its contractor, subcontractor or other third party ("Contractor") who may have access to the FCEN Corridor to cause FCEN to be

named as an additional insured on all Contractor's liability insurance policies which Contractor is otherwise required to maintain.

**Section 8.3. Future No-Fault Legislation.**

During the Term of this Agreement, should the Florida Legislature subsequently amend the Florida Statutes to extend the statutory no-fault liability and insurance provisions currently available only to CSXT and authorize similar statutory no-fault liability and insurance provisions in favor of FCEN (the "Amended Liability Provisions"), then the Parties shall negotiate in good faith to amend the liability provisions of this Agreement to provide FCEN with the full liability protections afforded by the Amended Liability Provisions.

**ARTICLE IX**

**INSURANCE**

**Section 9.1. Insurance.**

It is understood by the parties hereto that the provisions of this Article IX are designed to establish parity between the parties and are based upon their financial ability to meet various obligations for which each of them is responsible under the various liability provisions of this Agreement. Toward this end, the parties shall review, on an annual basis, the provisions of this Article IX and use their reasonable best efforts to agree upon any modifications thereto that may be appropriate due to changed circumstances. In the absence of any such agreement, the provisions of this Article IX shall remain in full force and effect.

A. In accordance with Section 341.302, Florida Statutes, State may purchase insurance and may establish and maintain an adequate, segregated self-insurance retention fund which will cover claims and liabilities for loss, damage, injury or death arising out of or connected with this Agreement, in the amounts and as provided for in Subsection 9.1(B) hereof.

The parties hereto recognize that said insurance and fund shall be the extent and sole source upon which State's liability under this Agreement rests beyond that provided under the limited waiver of sovereign immunity for tort contained in Section 768.28, Florida Statutes.

B. State, at its sole cost and expense, may procure and may maintain during the entire term of this Agreement, liability insurance as agreed and provided in the terms and conditions of Section 9.1(A) hereof. The said liability insurance shall have a limit of not less than Thirty Million and 00/100 Dollars (\$30,000,000.00) combined single limit for personal injury and property damage per occurrence, with deductibles or self-assumed amounts not in excess of Ten Million and 00/100 Dollars (\$10,000,000.00).

C. As of the date hereof, and during the Transition Period, FCEN shall maintain system-wide insurance (which covers, inter alia, its Freight Service on the FCEN Corridor) with a limit in excess of Ten Million and 00/100 Dollars (\$10,000,000.00). After the Transition Period, FCEN shall maintain system-wide insurance (which covers, inter alia, its Freight Service on the FCEN Corridor) with a limit in excess of Thirty Million and 00/100 Dollars (\$30,000,000.00). The obtaining of such policies of insurance by FCEN is a condition precedent to the commencement of this Agreement and the commencement of Freight Service on the FCEN Corridor, and obtaining and maintenance of said insurance and fund in full force and effect shall thereafter throughout the term of this Agreement be considered a condition subsequent to the continuation of Freight Service on the FCEN Corridor. In the event that the obligations of FCEN set forth in Article IX of this Agreement become ineffective for any reason, or the insurance policy is canceled for any reason, in the opinion of State, then FCEN shall immediately cease operation of any and all Freight Service on the FCEN Corridor until such time, if any, that the obligations of FCEN under Article IX of this Agreement become fully

effective again and/or FCEN shall obtain and thereafter maintain insurance in like amount and coverage protection to that described in this Article IX.

## ARTICLE X

### GENERAL

#### **Section 10.1. Information.**

Either party to this Agreement shall have the right to inspect the books and records of the other party pertaining to the performance of this Agreement in accordance with Section 6.6 hereof. FCEN shall have the right upon reasonable conditions and notice to examine all or any part of the FCEN Corridor at its own expense. FCEN and State shall make available any existing reports pertaining to the operation and maintenance of the FCEN Corridor that are necessary for the administration and application of the provisions of this Agreement.

#### **Section 10.2. Contract Administration.**

The following individuals are appointed by State and FCEN as Contract Administrators. The Contract Administrators will be responsible for coordinating activities between State and FCEN and for ensuring the performance by State and FCEN, respectively, of their obligations under this Agreement:

For State:                    Todd Hammerle  
  
                                      SunRail Project Manager  
  
                                      719 S. Woodland Blvd.  
  
                                      DeLand, FL 32720

For FCEN:                    Pete Petree  
  
                                      Vice President/General Manager  
  
                                      PO Box 967  
  
                                      Plymouth, FL 32768

Notification of any change in the Contract Administrator for either party shall be made in accordance with Section 10.7.

**Section 10.3. Force Majeure.**

Whenever a period of time is provided in this Agreement for either party to do or perform any act or thing, said party shall not be liable or responsible for any delays due to strike, embargo, derailment, lockout, casualty, fire, flood, weather condition, earthquake, act of God, war, terrorism or threatened acts of terrorism, court order, work stoppage, nuclear incident, riot, civil disturbance, public disorder, criminal act of other entities, governmental regulation or control, governmental or judicial restraint or other such causes beyond the reasonable control of said party (collectively, "Force Majeure"); and in any such event of Force Majeure, said time period shall be extended for the amount of time said party is so delayed, provided that in this Section 10.3 shall not be construed to affect the responsibilities of said party hereunder to do or perform such act or thing once such event of Force Majeure has been removed.

**Section 10.4. Successors and Assigns.**

A. This Agreement and all of its terms, conditions, covenants, rights and obligations herein contained shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, subject to the following: at any time during the term of this Agreement:

1. FCEN shall not assign any interest in the FCEN Corridor to any person, firm, partnership, corporation or governmental entity unless FCEN has first obtained the prior written consent of State. Subject to State's prior written approval, which shall not be unreasonably withheld, FCEN may assign the Agreement to a common carrier freight operator authorized by the STB to operate the lines of FCEN.

2. State may assign and transfer any or all of its interests, rights, duties, and obligations under this Agreement or the FCEN Corridor, without any notice requirements to or consent necessary from FCEN, to the Central Florida Commuter Rail Commission pursuant to that certain Interlocal Operating Agreement.

B. The provisions of this Agreement pertaining to State's prior consent to any assignment by FCEN shall not apply to any assignment by FCEN of this Agreement, in whole or in part, or any of FCEN's rights, interests or obligations hereunder to any person, firm, partnership or corporation now or hereafter affiliated with FCEN; provided, however, that such affiliated entity, its successors and assigns, shall take such assignment subject to the aforesaid provisions pertaining to State's right of consent to any subsequent assignment; and, provided, further, that FCEN unconditionally guarantees to State the performance of all obligations of FCEN under this Agreement by any such affiliate.

C. Except as is otherwise provided in Subsection B and D hereof, any assignment of this Agreement, in whole or in part, by FCEN, its successors or assigns, shall forever release and discharge FCEN:

1. From the performance of its obligations and covenants under this Agreement, or with respect to the part hereof so assigned, as the case may be, from and after the date of such assignment; and

2. From any liability, cost and expense arising out of or connected with this Agreement, or with respect to the part thereof so assigned, as the case may be, from and after the date of such assignment; provided, however, that any such assignment shall be made in strict accordance with and subject to the provisions set forth in this Section 10.4 relating to the assignment of this Agreement, including, without limitation, the provisions governing the State's



right to consent to such assignment.

D. Assignment of this Agreement, in whole or in part, shall not relieve or release either party hereto from any obligation assumed or from any liability which may have arisen or been incurred by such party under the terms of this Agreement prior to the assignment hereof. The foregoing provision shall apply whether or not it is so expressly stated elsewhere in this Agreement where a right of assignment, in whole or in part, is expressly accorded either or both parties.

**Section 10.5. Interpretation of Agreement.**

The Article and Section headings herein and the Table of Contents are for convenience only and shall not affect the construction hereof. This Agreement shall be construed in accordance with and governed by the laws of the State of Florida. All appendices attached hereto are integral parts of this Agreement and the provisions set forth in the appendices shall bind the parties hereto to the same extent as if such provisions had been set forth in their entirety in the main body of this Agreement. Nothing expressed or implied herein shall give or be construed to give to any person, firm or corporation other than FCEN or State any legal or equitable right, remedy or claim under or in respect of this Agreement. Neither this Agreement nor any of the terms hereof may be terminated, amended, supplemented, waived or modified orally, but only by an instrument in writing signed by FCEN and State.

**Section 10.6. Severability.**

If any part of this Agreement is determined to be invalid, illegal or unenforceable, such determination shall not affect the validity, legality, or enforceability of any other part of this Agreement, and the remaining parts of this Agreement shall be enforced as if such invalid, illegal, or unenforceable part were not contained herein.

**Section 10.7. Notices.**

Any request, demand, authorization, direction, notice, consent, waiver, or other document provided for or permitted by this Agreement to be made upon, given or furnished to, or filed with one party by the other party, shall be in writing and shall be deemed given on the date so delivered or received if: (1) delivered personally, (2) sent by certified mail, return receipt requested or registered mail sent via the United States Postal Service, postage prepaid, or (3) delivered by facsimile telephone transmission or other electronic transmission (provided an original of such electronically transmitted document is delivered within five days after transmission). Delivery shall be made as follows:

If to FCEN, to the address, facsimile or electronic mail as follows:

Florida Central Railroad Company, Inc.  
PO Box 967  
Plymouth, FL 32768  
Fax: (407) 880-7748  
E-mail: ppetree@fcrr.com  
Attention: Pete Petree, Vice President/General Manager

If to State, to the address, facsimile or electronic mail as follows:

Florida Department of Transportation  
719 S. Woodland Blvd.  
DeLand, FL 32720  
Fax: (386)740-2675  
E-mail: todd.hammerle@dot.state.fl.us  
Attention: Todd Hammerle, SunRail Project Manager

Each party may change the information at which it shall receive notification hereunder by notifying the other of such change, in writing.

**Section 10.8. Counterparts.**

This Agreement may be executed in any number of counterparts, each of which shall be an original.

**Section 10.9. Term.**

This Agreement shall become effective on the Closing and remain in effect for five (5) years, and shall continue in effect unless terminated by either party by providing twelve (12) months written notice.

**Section 10.10. Rights Reserved.**

Subject to the terms of this Agreement, State specifically reserves all powers and rights with respect to the FCEN Corridor as it would have if FCEN were not operating on the FCEN Corridor.

**Section 10.11. Relationship of Parties.**

In rendering any service or in furnishing any equipment, materials or supplies hereunder, State is acting solely pursuant to this Agreement with FCEN and not in any other capacity.

**Section 10.12. Compliance with Laws.**

A. During the term of this Agreement, State and FCEN shall comply, at their respective sole cost and expense, with all laws, orders, rules and regulations governing the maintenance and repair of the FCEN Corridor, including, without limitation, those pertaining to environmental matters, that are promulgated by any municipality, state or federal government, board, commission or agency having appropriate jurisdiction, to the extent such laws, orders, rules, or regulations apply to State or the FCEN Corridor. Either party shall have the right to contest by appropriate legal proceedings, at its sole cost and expense, the validity and applicability of any law, order, rule or regulation of a nature referred to above. To the extent permissible, compliance with such law, order, rule or regulation may be postponed until the final determination of any such proceedings, provided that all such proceedings shall be prosecuted with all due diligence and dispatch on the part of the party hereto contesting same, and, provided,

further, that the party contesting same shall be responsible for any and all liability, cost and expense arising out of or connected with any such contest.

B. Neither party hereto shall permit the FCEN Corridor to be used by the public without restriction or in such manner as might reasonably tend to impair State's title to the FCEN Corridor or FCEN's rights and interests therein as contemplated under this Agreement. The foregoing:

1. Shall not be construed to limit or restrict the rights and interests of the parties hereto as provided in this Agreement; and

2. Shall not in any way restrict the public use of the FCEN Corridor in the normal conduct of the operations contemplated under this Agreement.

C. Whenever State or FCEN enters into any new instrument referred to in Section 10.4 hereof that grants to others a right to occupy or use the FCEN Corridor, then the party hereto entering into such new instrument shall provide therein that the person so occupying or using the FCEN Corridor shall comply with all applicable federal, state and local laws, regulations and ordinances respecting such occupancy or use.

**Section 10.13. Incorporation of Recitals.**

The recitals to this Agreement are true and correct and are hereby incorporated herein.

**Section 10.14. Acknowledgement by FCEN.**

FCEN hereby acknowledges that nothing in any agreement between State and FCEN shall constitute any waiver by CSXT of its exclusive right to provide Freight Service on the FCEN Corridor; alter, modify, or amend any liability provision between CSXT and State; or alter, modify, or amend any agreement between CSXT and FCEN.

IN WITNESS WHEREOF, FCEN and State have caused this Agreement to be duly executed by their respective officers thereunto duly authorized.

Florida Central Railroad Company, Inc.,  
a Florida corporation

By J.P. Levine

Date 1/26/11

FCEN Approved as to Form:

By: J.P. Levine

NAME: J.P. LEVINE

TITLE: PRESIDENT

State of Florida, Department of Transportation

By Shadrach

Date 2/11/11

Legal Review:

By: E. Clay McMonagill, Jr.