ALTERNATIVE TRANSPORTATION CORRIDOR LEASE AGREEMENT

BY AND BETWEEN THE

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

AND

COMMONWEALTH OF MASSACHUSETTS BY AND THROUGH ITS DEPARTMENT OF CONSERVATION AND RECREATION

DECEMBER 30, 2010

[ONLY FOR RIGHTS-OF-WAY NOT IN ACTIVE USE]

ALTERNATIVE TRANSPORTATION CORRIDOR

LEASE AGREEMENT BETWEEN

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

AND

COMMONWEALTH OF MASSACHUSETTS

This Lease Agreement (hereinafter referred to as the "Lease" or the "Agreement") entered into as of the 30th day of December 2010 by and between the Massachusetts Bay Transportation Authority, a body politic and corporate and a political subdivision of the Commonwealth of Massachusetts, having its usual place of business at Ten Park Plaza, Boston, Massachusetts 02116 (hereinafter referred to as the "MBTA") and the Commonwealth of Massachusetts, acting by through its Department of Conservation and Recreation, having its usual place of business at 251 Causeway Street, Suite 600, Boston, Massachusetts 02114 (hereinafter referred to as the "DCR").

WITNESSETH THAT:

1. Agreement

In consideration of the mutual covenants and agreements herein contained, and subject to appropriation or availability of funds to DCR, the parties hereto agree as follows:

2. Premises

The Premises consist of the parcel or parcels of land described in Exhibit A attached hereto, consisting generally of that certain railroad right of way known as the portion of the Central Massachusetts Branch extending from Waltham to Berlin starting at or about the Belmont/Waltham/Weston town line (Right-of-Way Track Map, Boston and Maine R.R. V-5, 4/30 dated June 30, 1914) running approximately twenty-six miles ending at or about Station 1478+40 in Berlin (Right-of-Way Track Map, Boston and Maine R.R. V-5, 30/30 dated June 30, 1914).

MBTA acquired the portion of the Premises located in Worcester County on or about February 1977 pursuant to an Order of Taking recorded in the Worcester South District Registry of Deeds in Book 6145, Page 377; and the portion of the Premises located in Middlesex County on or about December 1979 pursuant to an Order of Taking recorded in the Middlesex South District Registry of Deeds in Book 13156, Page 34. Under both Orders of Taking, the Boston and Maine Corporation ("B&M") retained freight service rights pursuant to an agreement between the MBTA and Robert W. Meserve and Benjamin H. Lacey, Trustees of the B&M, dated December 27, 1976, and recorded in the Worcester South District Registry of Deeds in Book 6096, Page 140, and in the Middlesex South District Registry of Deeds in Book 13117, Page 113. B&M filed an application in August 1979 for a certificate of public necessity and convenience to permit the abandonment of the line. Following a report from the Interstate Commerce Commission, dated March 26, 1980, recommending approval of B&M's discontinuance application (I.C.C. Docket No. AB-32 (Sub-No. 7F)), approval of discontinuance was

granted by the United States District Court, as found in the Memorandum and Order of Senior District Judge Frank J. Murray, In the Matter of Boston and Maine Corporation, Debtor, No. 70-250-M (D. Mass., Oct. 3, 1980). (A copy attached hereto as Exhibit B). The parties agree that, with that action, B&M no longer retains any right or interest in this line.

Within the Premises there shall exist a contiguous corridor ("Corridor") to be designated by DCR, with the consent of the MBTA, said Corridor shall generally consist of a path that is 15' wide with 2' shoulders on either side. Said corridor shall not interfere in any way with the MBTA's ability to lease, license or otherwise encumber the Premises for revenue purposes consistent with the right of the MBTA's authority detailed in Section 9. Infra. The MBTA will notify with DCR of its revenue plans, but any portion of the Corridor so utilized in connection with any third party transactions will continue to provide for continuity of the Rail Trail Corridor and DCR shall work cooperatively with the MBTA and any third party grantees, lessees or licensees for this purpose. The MBTA shall be consulted on the construction of the Corridor and be provided with as-built plans of said Corridor.

3. Use of Premises

Subject to the terms and conditions herein, the MBTA hereby leases the Premises to the DCR for use as follows:

(a) The Corridor is to be used for purposes of the installation, operation, maintenance and use of a rail-trail as defined M.G.L. C.82 §35A and in the definition of Owner or Operator in M.G.L.C. 21E§2, and as amended from time to time, and as further defined under M.G.L.C.21E§2(d)(1), as a property converted from a former use as a railroad right-of-way to a revitalized use as a publicly owned, improved and maintained corridor for bicycle, pedestrian and other non-motorized public transportation, recreation and associated purposes and

(b) The remainder of the Premises may further be used by the DCR, subject to MBTA approval, to access, construct and maintain the Corridor and maintain, including landscaping, the Premises, for ancillary uses which provide no revenue or other tangible benefit, for such other uses as MBTA may permit by prior written consent provided however that the MBTA shall maintain the right to utilize the Premises for revenue purposes consistent with the right of the MBTA's authority detailed in Section 9. *infra*. DCR acknowledges the MBTA's right to generate revenue in and on the Premises, but any portion of the Corridor so utilized in connection with any third party transactions will continue to provide for continuity of the Rail Trail Corridor and DCR shall work cooperatively with the MBTA and any third party grantees, lessees or licensees for this purpose. MBTA will notify DCR of its revenue plans in advance as necessary.

Notwithstanding the preceding, this Lease is not intended to transfer land or

easements to create a perpetual right to any use, or a right to use longer than the term of the lease or lesser term if terminated sooner, that may be subject to protection by Article XCVII (97), as amended, of the Amendments to the Constitution of the Commonwealth of Massachusetts or by legislation enacted to pursuant thereto.

The Premises shall be open to the public, and no fee or other consideration shall be charged for use of the Premises.

The DCR will diligently act to secure funds necessary to fulfill its obligations under the Lease for the design, bidding and the construction of the rail-trail project.
DCR also agrees that it will provide its plans for the use of the site sixty (60) days prior to the bidding to the MBTA for its approval, said approval which shall not be unreasonably withheld provided that the use is consistent with paragraph 3(a) and (3(b), above. If the plans for the site are not consistent with paragraph 3(a) and 3(b), above, the MBTA reserves the right, subject to the notice and cure provisions of paragraph 11, to terminate the lease and demand return of the property. Said use shall also comply with the current (as of the commencement of construction) MA DEP Best Management Practices:

The DCR shall be responsible for all costs associated with any soil testing. The MBTA will allow DCR to enter upon the Premises's for testing purposes provided DCR receives a License from the MBTA in the normal course prior to entry on the Premises.

4. Term

The Term of this Lease shall be for a period of ninety-nine (99) years beginning on the date hereof; except that the MBTA may terminate this Lease upon two (2) years' written notice to DCR for the greater public good. DCR acknowledges that that the Premises or a major portion thereof may be necessary for active railroad or other transportation purposes in the future. The MBTA may terminate this Agreement for the greater public good within the meaning of Federal Highway Administration requirements other than the Transportation Enhancement (the defined ATC) and the MBTA will not be required to provide any reimbursement whatsoever for said termination. MBTA does not impose a fee for the lease of this property. Additionally, The MBTA may terminate this Lease with respect to any part of the non-Corridor portion of the Premises with ninety - (90) days written notice for any reason or the balance of the Premises, consistent with the right of the MBTA's authority detailed in Section 9. *infra* and for the uses stated above. The MBTA may continue to utilize the Premises for revenue purposes but any portion of the Corridor so utilized in connection with any third party transactions will continue to provide for continuity of the Rail Trail Corridor and DCR shall work cooperatively with the MBTA and any third party grantees, lessees or licensees for this purpose.

5. Condition of the Premises

The DCR has inspected the Premises, accepts the Premises "as is", and agrees the Premises are suitable for DCR's intended use. The MBTA makes no warranty of any kind, express or implied, as to the condition of the Premises or its suitability for the above uses. The DCR assumes all risk of entry on the Premises for the intended

development and use of the Premises as a Rail Trail, including, but not limited to the presence of oil or hazardous material on the Premises, if any, as defined in M.G.L.C. 21E, as amended from time to time, but in accordance with Best Management Practice of the Department of Environmental Protection. DCR acknowledges that it will avail itself of the M.G.L.c. 21E§5J defense if necessary and appropriate.

6. Terms and Conditions of Lease

This Lease is subject to the following terms and conditions:

6.1 Liability for Personal Injury, Death, and Property Damage

All issues regarding liability for personal injury, death or property damage shall be governed by the provisions of Chapter 258 of the General Laws, as amended. The Parties acknowledge the intention that this Lease, and the recreational activities planned for the general public, are at no charge and are to be subject to the limited liability protections of G.L. c. 21, s. 17C (the, so called, "Recreational Use Statute").

6.2 Remediation Obligation of the DCR

During the design, construction and operation of the rail trail, the DCR shall follow the provisions of BMP's for Controlling Exposure to Soil during the Development or Rail Trails promulgated by the Massachusetts Department of Environmental protection in March 2004.

Whenever the DCR is responsible for the remediation of Hazardous Materials on or below the Premises by law or pursuant to this Lease, the DCR, upon written demand of the MBTA, shall conduct at its sole cost and expense, all response actions required by Chapter 21E and the MCP with respect to the Hazardous Materials (including the hiring of a Licensed Site Professional).

Any such response action on the Premises, if performed by the DCR, shall be performed in accordance with Chapter 21E, the MCP, any other applicable statutes and regulations, and in accordance with plans and specifications approved by the MBTA, shall be completed in a timely manner to the reasonable satisfaction of the MBTA, and shall allow the MBTA to use the Premises, for its active railroad or other transportation purposes.

For purposes of this Section, the term "MBTA" shall include the MBTA, and its directors, officers, employees, agents and any legislatively approved entity that may succeed the MBTA. Additionally, for purposes of this Section the "MBTA" does not include easement holders, MBTA lessees, or licensees or successors to any real property of the MBTA through sale, assignment, pledge, mortgage, exchange or gift.

6.3 Insurance of Contractors

DCR shall cause its contractors and agents to maintain sufficient liability insurance, and general insurance, with coverage for bodily injury, wrongful death, and property damage, consistent with MBTA insurance requirements as enumerated below, naming the MBTA

as an additional insured, and indemnifying the Commonwealth of Massachusetts and the MBTA. DCR shall require its contractors and consultants to take out and maintain sufficient Commercial General Liability insurance (with coverage for bodily injury, wrongful death, and property damage to cover loss arising from all work whether above or below ground), Workers Compensation Insurance (with coverage in the amount required by DCR in such contract, but no less than the statutory minimum under G.L. c. 152, as amended), and Vehicle Liability Insurance under any Public Works contract under G.L. c. 30, vertical construction contract under G.L. c. 149, or Goods and Service contract under G.L. c.7, as applicable, for work performed by any consultant or contractor on the Premises. All insurance shall be provided at the contractor's expense and shall be in full force and effect for the full term of the contract or for such longer period as the contract would require. The MBTA insurance requirements are as follows:

(a) Commercial General Liability Insurance

For Public Works projects with a minimum liability coverage for personal injury, bodily injury and property damage with limits not less than One Million ($1,000,000.00) Dollars per occurrence and Three Million ($3,000,000.00) Dollars in aggregate. Umbrella liability coverage with limits of not less than Two Million ($2,000,000.00) Dollars covering all work performed must also be provided; and minimum liability coverages for goods and services contracts in accordance with DCR requirements. Such insurance shall be written on an occurrence basis (as opposed to a claims-made basis) and name the Commonwealth of Massachusetts, MBTA and others hereinafter designated as additional insureds as their interests may appear. Such insurance may be subject to standard exclusions found in property and general liability insurance policies.

(b) Worker's Compensation Insurance

(i) For all DCR contractors, insuring all persons employed by the DCR in connection with any work done on or about the Premises with respect to which claims for death or bodily injury could be asserted against the MBTA or the Premises with limits of liability of not less than those required by Massachusetts General Laws Chapter 152 as amended. The policy shall contain a clause waiving the company's right to subrogation against the MBTA if such a policy is commercial available, and

(ii) For all DCR contractors and agents by providing evidence of an active workmen's compensation program for DCR contractors agent funded by DCR, a copy of which is attached.

(c) Automobile Liability Insurance

Automobile liability insurance with limits of not less than One Million ($1,000,000.00) Dollars covering all owned, non-owned, hired, rented or leased vehicles of the contractors or agents of DCR.

The required insurance coverage's herein specified shall be placed with insurance companies licensed by the Massachusetts Division of Insurance to do business in the Commonwealth of Massachusetts and having a Best's rating of B+ or better;

The DCR shall be responsible for seeing that its contractors and consultants are properly covered by insurance. MBTA must be provided evidence of same.

Notwithstanding any other provision of this section 6.3, DCR reserves the right to propose to meet the requirement by adding such insurance coverage to existing policies subject to the terms and conditions of those existing policies or to obtain new policies containing terms and conditions generally included in policies provided to state agencies in Massachusetts.

6.4. Compliance with Laws

The DCR shall comply with, and shall cause all work performed to comply with, all applicable Federal and state governmental statutes, laws, rules, orders and regulations. The DCR shall also be responsible for obtaining any and all applicable permits and/or approvals under Federal or state law necessary to carry out the activities permitted hereunder.

7. Maintenance

During the Term hereof, the DCR shall keep, repair, manage, operate, and maintain the entire Premises in good and clean order, operation, condition and repair. Except for any claim of damage arising from the exercise by the MBTA of the rights reserved to it, the MBTA shall have no responsibility whatsoever for the maintenance, repair or the condition of the Premises.

8. Utilities

Except as reasonably necessary for the operation of the alternative transportation use of the Corridor, no utilities shall be installed on the Premises by the DCR without the written approval of the MBTA.

9. Reservation of Rights

9.1 Non-Exclusivity

(a) The MBTA makes no representations or warranty, express or implied, that the DCR shall have sole or exclusive use of the Premises. In the event other licenses, leases or easements have been or are granted or exist by reservations in deeds, the DCR shall be responsible for coordinating its work and activities with that of other licensees, grantees and other parties with interests in the Premises. The MBTA shall not be liable for delays, obstructions, or like occurrences affecting the DCR, arising out of the work of the MBTA or other licensees, grantees or parties in interest; provided, however, that the MBTA shall make reasonable efforts to mitigate impacts on the Use of the Premises. The MBTA will make a list available to the DCR of any and all leases or licenses along the Corridor designated under this Lease.

(b) The DCR'S rights herein are granted subject to existing, easements, and rights of record to the extent that such easements rights and takings are still in effect and applicable. The MBTA explicitly reserves the right to all uses of the Premises not herein granted to the DCR, including the right to lease, license, grant easements and reserve encroachments relative to portions of the Premises to third parties, except that the MBTA shall not (and shall not grant to others the right to) do anything on the Premises that shall materially impede the permitted Use of the Premises, as defined in Section 3 ,supra, except temporarily (e.g. while a pipe line is being installed or repaired) The MBTA may continue to utilize the Premises for revenue purposes but any portion of the Corridor so utilized in connection with any third party transactions will continue to provide for continuity of the Rail Trail Corridor and DCR shall work cooperatively with the MBTA and any third party grantees, lessees or licensees for this purpose. The MBTA agrees to minimize any potential impact to the DCR maintained Corridor including consultation with DCR on public safety, rail trail use and operations, and proposed mitigation measure considerations. The MBTA shall retain the right to authorize subsurface or bridge crossings, provided sufficient clearance is maintained to allow for passage of public safety vehicles along the Corridor. If the MBTA shall create after the date of this Agreement an "at grade" easement, right of way or allow a permitted crossing of the Corridor with a new third party, the new third-party recipient of said easement, right of way or permitted crossing shall be responsible for providing sufficient liability insurance, and general insurance, with coverage for bodily injury, wrongful death, and property damage, consistent with MBTA insurance requirements as enumerated below, naming the MBTA and the Commonwealth of Massachusetts as an additional insured, and indemnifying the Commonwealth of Massachusetts and the MBTA. Notwithstanding language in Section 6.1, 6.2, 6.3, and 7, DCR shall bear no responsibility for such easement, right of way or permitted crossing or for the acts or omissions of the said new third-party or the general public on such easement, right of way or permitted crossing.

The DCR's rights herein are granted subject to existing leases, licenses easements and encroachments, now existing or granted in the future, to the extent that such rights are still in effect and applicable. The MBTA hereby agrees to provide the DCR with copies of the documents that establish the location and term of existing licenses, leases, easements or encroachments, if any. Upon completing a 25% design of the proposed rail trail, the DCR may request that the MBTA exercise any rights it may have to modify or terminate an existing lease or license that would prevent the creation of a contiguous Corridor. The MBTA shall make all reasonable attempts to fulfill such requests to create a contiguous corridor.

(c) The DCR expressly agrees that any revenues obtained from the leasing, licensing, or the granting of rights for any use of the Premises to any utility or

other entity shall belong solely to the MBTA.

The DCR shall not be entitled to impose any fees, charges, requirements for betterments, linkage payments or other benefits to the DCR on any lessee, licensee or grantee of the MBTA or any other party either for installations on the Premises or on public way crossings along the Premises (except those fees normally charged by the DCR for engineering and environmental review, if any). If despite this section the DCR does receive some such benefit, then the MBTA shall be paid the fair market value of that benefit by the DCR.

(d) The DCR expressly agrees that if there is any encroachment onto the Premises by a third-party, the MBTA will have the sole right to cure said encroachment and to obtain revenue from such cure or to permit such encroachment, provided that such cure does not materially interfere with the DCR's use of the Corridor. Notwithstanding the preceding, to the extent that the encroachment is on the Corridor, then the DCR shall have the right to expel such encroacher.

9.2 Utility and Communication Lines and Emergency Access

The MBTA expressly reserves all of its rights in the Premises for itself, its successors and assigns, to install, maintain, repair, replace and remove aerial, surface and subsurface utility and communication lines, wires, antennas and conduits in, on, under or above the Premises as well as the right to lease, license and/or grant easements for such utility and communication rights to third parties; except that the DCR shall have the rights specifically granted herein. The MBTA shall take all necessary safety measures including, but not by way of limitation, notification to the DCR of its intention to perform (or have performed) such installation and/or maintenance, the erection of barricades, as shall be reasonably required to protect persons performing such work and construction, as well as members of the public, from injury or damage caused by, or resulting from, any entry, work or construction performed by the MBTA or its contractors, licensees, lessees, grantees (and their contractors) pursuant to this Section. The MBTA shall, at its cost and expense, return the Premises to a condition in which the Premises can be used for the purposes for which they were used before the work pursuant to this paragraph, if its contractors, licensee, lessees, or grantees, as the case may be, fail to do so.

Prior to entry, the MBTA shall require that any contractor, licensee, lessee or grantees provide the DCR, during the Term thereof, insurance of the activities permitted by the MBTA, to the same extent and on the same terms that the MBTA is insured. The DCR shall be named as an additional insured on any general liability policy. All policies shall waive the right of subrogation for any claim that may be made against the DCR.

10. <u>Security and Operations</u>

The MBTA shall have no obligation to provide security services or lighting for the

Premises. DCR may implement public safety and emergency services for the Corridor under the DCR's usage, and may address providing public safety services through municipal public safety departments, as well as police services with the State Police and municipal police departments. DCR, its agents or assignees, may install lighting and adopt time of use and other restrictions applicable to the public. Provided such are not inconsistent with the provisions of this Lease, the Premises shall be subject to DCR regulations regarding the public's use and conduct of activities on DCR property. Any portion of the Corridor that is utilized by a third party shall not be subject to any DCR regulation which would interfere with the third party's ability to operate said portion of the Corridor.

11. Default

In the event the DCR shall have failed or refused to take a required action or to observe any covenant or undertaking herein on its part to be performed and/or observed and such failure or refusal has continued for at least thirty (30) days after written notice from the MBTA of the breach of such covenant(s) by the DCR, which notice shall specify the nature of the breach in reasonable detail, the MBTA may, immediately or at any time thereafter (notwithstanding any license or waiver of the benefit hereof, or consent in a former instance) and without any further demand or notice, in person or by agent or attorney, enter the Premises or any part thereof and block access to the Premises by the public; and/or the MBTA may terminate this Lease by written notice to the DCR and, in either event, expel the DCR and those claiming through or under it and remove their effects without being deemed guilty of any manner of trespass and without prejudice to any remedy which otherwise might be used for breach of covenant and upon entry or notice as aforesaid this Lease shall terminate.

12. Condition of the Premises at Termination

The DCR agrees to deliver up the Premises to the MBTA at the expiration of the Term or termination by the MBTA hereof in as good condition as the Premises were after the DCR installed improvements were made, reasonable wear and tear excepted. DCR shall have no obligation to remove or reimburse the MBTA for costs of removal of any of the DCR installed improvements; and such improvements shall not be considered a change to the grade existing at the commencement of this Lease.

13. Existing Utilities

The DCR acknowledges that there may be surface and subsurface utilities on and adjacent to the Premises and agrees to exercise extreme caution in performance of the scope of work. The DCR shall comply with Massachusetts General Laws, Chapter 82, Section 40 (said statute also known as the "Dig Safe" law) and the regulations promulgated pursuant thereto including but not limited to the Code of Massachusetts Regulations, more particularly, 220 CMR 99.00 et seq. To the extent the MBTA, or parties acting in behalf of the MBTA, locate and mark railroad utilities in the railroad rights of way and appurtenant thereto, the DCR shall be responsible for payment to such parties for such services which may include, but not be limited to, locating and

marking utilities, facilities and appurtenances thereto serving the railroad line(s) or used in connection with services or operations of the MBTA. Any damage to such utilities caused by the DCR shall be the sole responsibility of the DCR. If the DCR does not immediately repair any utilities it has damaged, the MBTA, without being under any obligation to do so and without waiving the DCR's obligation hereunder, may repair any utilities damaged by the DCR immediately and without notice in case of emergency. In the event the MBTA exercises such right, the DCR shall pay to the MBTA immediately upon demand all of the MBTA's cost of performing such repairs plus a fee equal to twenty-five percent of the MBTA's cost of performing such repairs to reimburse the MBTA for its administrative costs.

The MBTA reserves the right to remove the rail infrastructure and agrees that if it chooses to do so, said removal shall be within 180 days of the date the DCR notifies the MBTA to be the date of the trail construction commencement.The DCR shall be responsible for removal and disposal of all other rail infrastructure, after the said 180 days, and may retain any revenue from DCR's removal and disposal of such.

14. Notice of Project Completion and Record Drawings

Upon completion of its work, the DCR shall provide written notice ("Notice of Project Completion") to the MBTA Railroad Operations Department of the date of project completion. The DCR shall also provide the MBTA Railroad Operations Department with one reproducible "As-Built" copy of each approved construction drawing marked to indicate all changes and deviations from the original approved plans and recording the final conditions of the Premises ("Record Drawings") upon completion of the work authorized hereunder. All Record Drawings shall be received and accepted by the MBTA prior to final inspection. The Notice of Project Completion and the Record Drawings shall be delivered to:

Section Chief, Engineering and Maintenance
MBTA Railroad Operations Department
32 Cobble Hill Road
Somerville, MA 02143

15. Results

If the DCR conducts certain investigations on MBTA owned land, then the DCR agrees to provide to the MBTA, at no cost, a copy of the results of such investigations (including data and analysis) and all other work conducted under this Lease in both hard copy form and in a digital format specified by the MBTA regardless of whether the report was prepared by the DCR, its agent, consultant or contractor, or prepared on behalf of the DCR. All results and reports shall be provided to the MBTA within ten (10) days of receipt by the DCR. The DCR agrees to consult with the MBTA prior to contacting any governmental entity, regarding any information, results of analysis or reports regarding the Premises. The DCR shall give the MBTA a copy of any reports or notifications, including but not limited to release notifications, prior to submitting the same to any governmental entity.

16. Construction and Access Plan

The DCR shall submit a plan and detailed specifications (including the materials to be used) and the proposed methods of performing the work, or any part thereof (the "Plan") to the MBTA. The DCR shall not enter the Premises to undertake construction until the Plan has been approved by the MBTA, which approval shall not be unreasonably withheld. The scope of work for said construction, installation, and/or replacement will be more fully defined in the approved Plan, which approved Plan will automatically be incorporated herein by reference and made part of this Lease. The DCR shall also provide the MBTA with a detailed schedule of times when the DCR, its employees, contractors, subcontractors, or agents would like to be on the Premises to undertake the construction and installation of the rail trail improvements (the "Access Plan")..

17. Contracts for Improvements

All contracts for the construction or installation of the improvements at the Premises shall require:

(a) that all contractors and subcontractors provide labor that can work in harmony with other elements of labor employed or to be employed at or near the Premises.

(b) insurance coverage and suretyship reasonably satisfactory to the MBTA, provide that customary coverage's used by DCR in its public contracting shall be considered reasonably customary, provided said coverage's are in accord with the then current MBTA insurance requirements.

(c) that all contractors or subcontractors comply with all applicable provisions of this Lease; and

performance bonds and payment bonds in form and substance satisfactory to the MBTA, each of which shall name the MBTA, as an additional oblige, provide that customary coverage's used by DCR in its public contracting shall be considered reasonably customary, provided said coverage's are in accord with the then current MBTA insurance requirements.

18. Notices

All notices required or permitted to be given hereunder shall be in writing and addressed as follows:

In the case of the MBTA to:
Massachusetts Bay Transportation Authority
10 Park Plaza, Room 5750

Boston, Massachusetts 02116
Attn: Director of Real Estate

With a copy to:
MBTA Railroad Operations Directorate
Section Chief, Engineering and Maintenance
32 Cobble Hill Road
Somerville, Massachusetts 02143

With a copy to:
DESIGNATED REPRESENTATIVE
Transit Realty Associates, LLC
77 Franklin Street
Boston, Massachusetts 02110
Attn: General Counsel

And in the case of the DCR to:

Department of Conservation and Recreation
251 Causeway Street, Suite 600
Boston, MA 02114
Attn: General Counsel

All notices, demands, requests, consents, approvals and other instruments required or permitted to be given pursuant to the terms hereof (hereinafter "Notice"), shall be in writing and shall be deemed to have been properly given when deposited in registered or certified United States mail, postage prepaid, return receipt requested, addressed, as described above or when delivered by messenger or overnight mail service to the correct addressee. Notice shall be deemed received when actually received or when the proffered Notice has been refused by the Addressee. The signature of an employee, servant or agent of the Addressee shall be determinative on the issue of actual receipt.

The DCR and the MBTA shall, at any time and from time to time, have the right to specify as their proper addresses for purposes of this Lease any other address or addresses giving fifteen (15) days' written notice thereof to the other party.

19. Nondiscrimination

With respect to its exercise of all rights and privileges herein granted, the DCR shall undertake affirmative action as required by Federal and State laws, rules and regulations pertinent to Civil Rights and Equal Opportunity unless otherwise exempted therefrom. The DCR agrees that it shall comply with any and all required affirmative action plans submitted pursuant to the directives of any Federal agency and in accordance with applicable Federal law and applicable state laws, rules and regulations.

The DCR shall use reasonable efforts to contact, encourage and utilize minority and female business enterprises in the procurements of materials and services under this

Lease.

The DCR shall not discriminate against any person, employee or applicant for employment because of race, color, religion, creed, national origin, age, sex, sexual orientation, disability/handicap or veteran status in its activities at the Premises, including without limitation, the hiring and discharging of employees, the provision or use of services and the selection of suppliers, contractors or subcontractors.

20. Work In Harmony

The DCR agrees that in any work performed in or about the Premises, it will employ only labor which can work in harmony with all elements of labor being employed by the MBTA on or adjacent to the Premises.

21. Assignment

The DCR shall not, without the prior written consent of the MBTA, transfer or assign this Lease or any part hereof. Such consent may be withheld in the sole discretion of the MBTA.

22. Entire Agreement

This Lease contains the entire agreement of the parties hereto with respect to the subject matter hereof, and no representations, inducements, promises, or agreements, oral or otherwise, between the parties hereto with respect to the subject matter hereof not embodied herein shall be of any force or effect.

IN WITNESS WHEREOF, the parties hereto, each for itself, its successors and assigns, have caused these presents to be executed, as a sealed instrument, by its officers, thereunto duly authorized.

Approved as to Form:

William A. Mitchell, Jr.
General Counsel

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

BY: _____
Richard A. Davey
General Manager

DEPARTMENT OF CONSERVATION AND RECREATION

BY: _____
Richard K. Sullivan, Jr.
Commissioner

ed

EXHIBIT A

PLAN OF PROPERTY

RIGHT-OF-WAY AND TRACK MAP
BOSTON AND MAINE R.R.
SHEETS V-5/4 THROUGH V-5/30

EXHIBIT B

COPY OF ORDER OF MEMORANDUM AND ORDER OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In the Matter of

BOSTON AND MAINE CORPORATION, No. 70-250-M

Debtor

MEMORANDUM AND ORDER
on
Motion of Debtor's Trustees for Authority to Abandon the Central Massachusetts Branch Line and the Marlboro Branch Line of Railroad in Massachusetts

MURRAY, Senior District Judge

The motion of Debtor's Trustees for an order authorizing the Trustees, pursuant to Rule 8-512(b) of the Bankruptcy Rules, to abandon the Central Massachusetts Branch and the Marlboro Branch (the Branches) came on to be heard on September 17, 1980, after notice given by order of the court in accordance with 11 U.S.C. § 1170(c) (Supp. III 1979) of the time and the place of the hearing. The Trustees presented evidence to the court which was uncontroverted.

By Order No. 475 entered June 21, 1979, this court authorized the Trustees to initiate proceedings before the Interstate Commerce Commission (ICC) for a certificate of public convenience and necessity permitting the abandonment of the Branches. 49 U.S.C. § 10903 (Supp. II 1978); 49 C.F.R. § 1121 (1979). With the subsequent transfer of jurisdiction to the court over abandonments and discontinuance of service, 45 U.S.C. § 915(a), Pub.L. No. 96-101 § 17(a), 93 Stat. 744-45, the ICC, after reviewing documentary evidence and comments submitted to it, issued a report dated March 26, 1980. Before the ICC, the Trustees' petition to abandon the Branches was vigorously opposed. Several freight receivers[1] along the Central Massachusetts

1. The service provided by Debtor along the Branches is almost exclusively that of delivering goods to customers. During 1979, Debtor carried only two rail-car shipments outbound along this line.

Branch, together with various public figures, submitted evidence or comments attempting to persuade the ICC to refuse the Trustees' request. The Trustees had not such opposition in the proceedings before the court; their petition was uncontested.

The Central Massachusetts Branch is a line of railroad in Middlesex and Worcester Counties, Massachusetts extending approximately 21.68 miles. It runs from milepost B 10.50 at Waltham North through Weston, Wayland, South Sudbury and Hudson into Berlin ending at milepost B 32.18. The Marlboro Branch is essentially a spur leaving the Central Massachusetts Branch at milepost B 32.75 in Gleasondale and running south to Marlboro terminating at B 37.49. Debtor does not own the right of way, the track, structures or other materials on the lines, having sold them and the right to transport passengers over the right of way to the Massachusetts Bay Transportation Authority (MBTA) in December of 1976. The Debtor reserved an easement to haul freight on the lines, and has the burden of maintaining the track. Because MBTA now owns the property on the line the Trustees may not abandon the Branches but only discontinue service. See In the Matter of Boston and Maine Corporation, 596 F.2d 2, 6 (1st Cir. 1979).

The Trustees considered taking formal steps to abandon the Branches at their meeting on May 11, 1979. For a period of years there had been no customers on the Marlboro Branch and the customers in Berlin took delivery of their occasional shipments at a public delivery facility in Clinton. Debtor ceased serving its customers in Hudson after February 1980 although it did not place an embargo on the line until August. Despite lack of authority from the court, Debtor had ceased operating over the Marlboro Branch and the western end of the Central Massachusetts Branch some time ago. In effect, Debtor had de facto discontinued service on the line prior to the hearing on the Trustees' petition in this court and prior to the report from the ICC.

Before it discontinued service on the line, Debtor served several customers in South Sudbury, primarily Saxonville Wholesale Lumber Warehouse Company (Saxonville) and Mullen Lumber Company,

and Saxonville accounted for more rail traffic than all of Debtor's other customers on this line combined in the last full year of accounting. In addition, Debtor served Koro Corporation of Hudson which had relied on Debtor for the transportation of plastic pellets necessary to its business. Debtor also had several other customers in Hudson, but these receivers only accounted for limited traffic on an occasional basis.

The Trustees presented evidence to the court that the lumber companies in South Sudbury are currently receiving all their materials via Conrail. Conrail operates a line that intersects the Central Massachusetts Branch in South Sudbury. There was evidence before the court that Conrail will consider providing limited service along the Central Mass. Branch to the east of the junction in South Sudbury but will not serve customers to the west in Hudson. However, there was evidence that Koro Corporation is currently receiving its shipments of plastic pellets in Fitchburg and trucking the material from there to its plant in Hudson. The Trustees also presented evidence that while this method of transporting goods may be more expensive for Koro Corporation it is not an unreasonable cost increase.

The proposed discontinuance would seem to be in the best interests of the Debtor's estate. The number of customers and the amount of traffic on the line may be viewed, at best, as remaining stable. There is no indication that these gauges of economic viability will increase in the foreseeable future. On the other hand, there is considerable maintenance and rehabilitation needed on the line. Currently the line is deemed to be a Class I track under Federal Railroad Administration Track Safety Standards. See 49 C.F.R. § 213 (1979). However, there is evidence that the line has fallen below that level, the lowest category under these standards. The Trustees have deferred maintenance on the line in an attempt to limit expenses, and the burden to the estate of making the necessary improvements is not justified in light of the current and expected revenues.

There is little evidence that discontinuance of service over the lines would be inconsistent with the public interest. At the hearing

before the court no one appeared to oppose the Trustees' petition. The evidence that the Trustees presented showed that the adverse impact of discontinuance of service has dissipated over time. When the Trustees went before the ICC there was considerable agitation among the businesses and communities served by Debtor; however, most freight receivers seemed to have adjusted to the loss of service. Moreover, there was testimony that although the MBTA has ownership rights in the line it does not presently or within the near future intend to use the line for passenger transportation. There was nothing offered to show that the right of way would be suited for other public use purposes. The Executive Office of Transportation and Construction of the Commonwealth of Massachusetts would, in its role as consultant to MBTA, urge that the right of way of the Branches be preserved as a rail transportation corridor for the indefinite future.

Accordingly, it is hereby Ordered that:

> In the best interests of Debtor's estate and consistent with the public interest the Trustees are permitted to discontinue freight service over the Central Massachusetts Branch Line and the Marlboro Branch Line, as described in this Memorandum, between Waltham North and Berlin, and between Hudson and Marlboro, in the counties of Middlesex and Worcester, Massachusetts.

Dated October 3, 1980

Senior District Judge