

## COOPERATIVE AGREEMENT NO. L-9-0002

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BETWEEN

LOS ANGELES – SAN DIEGO – SAN LUIS OBISPO RAIL CORRIDOR AGENCY

AND

NORTH COUNTY TRANSIT DISTRICT

FOR

INCREASED SERVICE FREQUENCIES INCLUDING ON-TIME PERFORMANCE PAYMENT

**THIS COOPERATIVE AGREEMENT** (“Agreement”), is effective this \_\_\_\_ day of \_\_\_\_\_, 2019 (“Effective Date”), by and between the Los Angeles – San Diego – San Luis Obispo Rail Corridor Agency (“LOSSAN Agency”), a joint powers authority as amended pursuant to Senate Bill 1225 (Chapter 802, Statutes of 2012) and the North County Transit District (“NCTD”) a public agency existing under the laws of the State of California, pursuant to California Public Utility Code Sections 125000, et seq., (LOSSAN Agency and NCTD are each sometimes referred to herein as a “Party” and collectively referred to as “Parties”).

**RECITALS**

**WHEREAS**, pursuant to 49 U.S.C. §24308 and the Operating Agreement between NCTD and the National Railroad Passenger Corporation (“Amtrak”) dated October 1, 1994 (the “Operating Agreement”), Amtrak operates intercity passenger trains over the tracks which are owned and or controlled by NCTD (railroad reporting mark NCTC); and

**WHEREAS**, the LOSSAN Agency is a joint powers authority as amended pursuant to Senate Bill 1225 (Chapter 802, Statutes of 2012) enabling regional governance of the state-supported Amtrak Pacific Surfliner service by the LOSSAN Agency, with the goal of transforming the Pacific Surfliner into a service under local management; and

1           **WHEREAS**, consistent with LOSSAN Agency Business Plan for Fiscal Years 2017-18 and 2018-  
2 19, the California State Rail Plan and associated supporting planning documents, and subject to funding  
3 availability, the LOSSAN Agency desires to provide additional Amtrak operated intercity passenger rail  
4 service, enhanced service reliability and to support improved on-time performance for the Pacific Surfliner  
5 that meets and or exceeds specified goals; and

6           **WHEREAS**, Amtrak provides a track access fee to NCTD for the use of NCTD owned or  
7 controlled tracks as specified in the Operating Agreement; and Amtrak is expected to continue to operate  
8 the state-supported Pacific Surfliner service managed by the LOSSAN Agency over NCTD right of way  
9 under the terms and conditions of the Operating Agreement; and

10           **WHEREAS**, NCTD and the LOSSAN Agency acknowledge the addition of one roundtrip  
11 operating on the NCTC, effective November 2015, and the planned increase of frequencies in Pacific  
12 Surfliner service to accommodate hourly operations beginning with up to two additional frequencies by  
13 October 2019 and continuing to increase thereafter to achieve hourly service (the "Frequency  
14 Improvement"); and

15           **WHEREAS**, the parties agree that the Operating Agreement provides the legally required  
16 reimbursement for Amtrak to operate on the NCTC, and that this provides an incremental reimbursement  
17 to NCTD for the costs associated with maintenance of the right of way and dispatch operations; and

18           **WHEREAS**, the parties agree that without respect to federal requirements which limits  
19 reimbursement from Amtrak to NCTD for use of tracks for the provision of intercity passenger rail service,  
20 that it is in the best interest of both LOSSAN Agency and NCTD to increase the funding provided by the  
21 LOSSAN Agency through a separate agreement between the LOSSAN Agency and the State of  
22 California to aid in offsetting the NCTD costs associated with maintenance of NCTC and to promote  
23 greater on-time performance in a manner more commensurate with the significant levels of current and  
24 future operations of the Pacific Surfliner;

**WHEREAS**, the parties wish to establish a performance-based incentive payment, whereby NCTD would be paid for the on-time performance of the Pacific Surfliner service, the methodology for which is outlined in Attachment B; and

**AGREEMENT**

**NOW, THEREFORE**, in accordance with the foregoing Recitals, which are incorporated into this Agreement by reference, and for and in consideration of the mutual covenants and agreements hereafter set forth, the mutual benefits to the parties to be derived herein, and for other valuable consideration, the receipt and sufficiency of which the parties acknowledge, it is hereby agreed as follows:

Upon execution of this Agreement and any additional Agreements that may be required, and any necessary Agreements between the parties and Amtrak, the parties agree to implement the Frequency Improvements by cooperatively working with Amtrak to develop an operating plan that provides for complimentary service advancing the goal of hourly intercity passenger rail service between Los Angeles and the San Diego Santa Fe Depot.

The parties agree that the Amtrak Operating Agreement provides the legally required reimbursement for Amtrak to operate on the NCTC and that this provides an incremental reimbursement of the actual costs associated with the operations maintenance of the right of way and dispatch operations. The parties agree to initial payments of \$2,299,000 for the remainder of the fiscal year ending June 30, 2019 (FY 2018-19) and of \$2,183,500 for the fiscal year ending June 30, 2020

(FY 2019-20). Subsequently, the parties agree to increase the incremental reimbursement amount to NCTD for operation of the Pacific Surfliner along the San Diego subdivision beginning fiscal year ending June 30, 2021 (FY 2020-21) to an annual amount commensurate to the number of Pacific Surfliner trains operating on the San Diego subdivision as defined in Attachment "B". Additionally, the parties agree to an annual maximum incentive performance payment beginning in FY 2019-20 as defined in Attachment "B", that is commensurate to the number of Pacific Surfliner trains operating on the San Diego subdivision. The maximum annual payment for the cost reimbursement and the incentive performance payment can be adjusted upon mutual agreement of the parties through amendments to this Agreement or a new agreement and is also subject to the availability of funding.

### **ARTICLE 3. PERFORMANCE PAYMENT**

1. Quantification of On-Time Performance Incentive Payment. NCTD shall be paid incentives for the operation of Pacific Surfliner trains based on the number of minutes of railroad delay Pacific Surfliner trains incur. The data contained in Amtrak's on-time performance Monitor Report System ("MRS") shall be used as the official data source for all information required for measuring performance under this Agreement and shall be considered the definitive delay data for audit purposes, except to the extent that NCTD provides data that both parties agree is more accurate. The data in the MRS is derived from Amtrak's delay reporting process. Following the end of each calendar month, prior to the LOSSAN Agency preparing a report for NCTD's review and concurrence, Amtrak and NCTD shall identify and agree to correct any errors found in the MRS by comparing with reports provided by NCTD and to work jointly to resolve any disputes that may exist concerning the clarity or accuracy of all delay reports before NCTD receives any incentive payment.

2. Attachment "A" of this Agreement presents the current, as of October 8, 2018, origin and destination times for Pacific Surfliner trains on NCTD territory. The scheduled departure and arrival times are to be equivalent to the published Amtrak public timetable effective as of the date the parties have executed this Agreement. To the extent that the parties agree to change the schedule times in Amtrak's public timetable, the parties shall amend Attachment "A" to reflect the updated schedule.

1           3. If the minutes of delay between the origin and destination on NCTD's territory (including  
2 delays attributed to NCTD that delay a train from entering or departing its territory) are equal to or less  
3 than the delay tolerance for the Pacific Surfliner trip, the LOSSAN Agency shall pay NCTD the  
4 maximum incentive payment per train as specified in Attachment "B".

5           4. If the minutes of delay between the origin and destination on NCTD's territory (including  
6 delays attributed to NCTD that delay a train from entering or departing its territory) are greater than  
7 the delay tolerance for the Pacific Surfliner trip, the LOSSAN Agency shall reduce the incentive  
8 payment, at the incentive rate per minute presented in Attachment "B", for each minute the delay is  
9 greater than the delay tolerance and up to a delay threshold of 15 minutes beyond the delay tolerance.  
10 No on-time performance incentive will be paid to NCTD for trains delayed greater than 15 minutes,  
11 plus the accepted delay tolerance, except as otherwise stated in Article 5 of this Agreement.

12           5. The performance payments contemplated in this section shall be in addition to costs  
13 attributable to passenger use which may be paid to NCTD by Amtrak under the Operating Agreement.

#### 14           **ARTICLE 4. DETERMINATION OF ON-TIME TRAINS**

15           Except as otherwise provided in this Agreement, a train trip will be determined to be on-time if  
16 the train completes a trip within its scheduled running time or less as defined in the schedule presented  
17 in Attachment "A" to this Agreement between Control Point Songs and Control Point Ash, plus any  
18 one or more of the following:

19           1. A delay tolerance of five (5) minutes.

20           2. The amount of time a train departs late from San Diego, except where the delay in  
21 departing the point of origin is due to the actions or inactions of NCTD.

22           3. The net amount of time by which the actual total station dwell times exceed the total allowed  
23 station dwell time for the trip, except where the delay in departing the point of origin is due to the  
24 actions or inactions of NCTD. The allowed station dwell time is the total time between arrival and  
25 departure for the currently approved schedule as submitted by Amtrak and approved by NCTD.  
26

1           4. The amount of time a train is delayed due to a sick or disruptive passenger at a location  
2 other than a scheduled station stop; COASTER passengers traveling via the Rail 2 Rail Program are  
3 not included in this provision.

4           5. The amount of time a train is delayed due to passenger train locomotive, car, or other  
5 equipment failure, breakdown, damage, destruction, replacement or inability to run at schedule  
6 speeds.

7           6. The amount of time a train is delayed due to the actions, inactions or incapacity of Amtrak  
8 crews or other Amtrak personnel.

9           7. The amount of time a train is delayed due to the actions or inactions of other railroads that  
10 cross or have joint use of any segment of the Line.

11           8. The amount of time a train is delayed due to: (1) scheduled construction, emergency  
12 maintenance or repair of the Line or Right-of-Way or adjacent railroad property affecting the Line as  
13 to which Amtrak has been advised under the Operating Agreement, (2) or the amount of time a train  
14 is delayed due to construction, repair or other activity of governmental bodies, entities, agencies,  
15 departments, public utility commission or their contractors or public utilities or their contractors of  
16 highways, bridges, utility lines and/or other facilities on, over, under or affecting the Line, and (3)  
17 construction, maintenance and repair of highways, bridges, utility lines and/or other facilities when  
18 such activity is ordered or is being performed in conjunction with a governmental body, entity, agency,  
19 department, public utility commission or similar entity or public utilities or any of their contractors.

20           **ARTICLE 5. TRAIN TRIPS EXCLUDED FROM ON-TIME PERFORMANCE CALCULATION**

21           Train trips encountering the following described situations shall not be considered in the on-  
22 time performance incentive calculations:

23           1. A train trip terminated, detoured, re-routed or annulled because of force majeure or other  
24 conditions which NCTD does not have the ability to control.

25           2. A train trip that is late due to the events described below provided that the train trip had not  
26 already been late, tolerances considered, due to reasons described below:

- a. A train has struck a pedestrian or vehicle or is blocked by a pedestrian or vehicle;
- b. A train is blocked by fire hoses, emergency vehicles or held by civil authorities;
- c. A train is delayed due to strikes or work stoppages, other accidents, extraordinary weather conditions, floods, earthquakes, high winds requiring special precautions, other acts of God or natural disasters, terrorist acts, criminal acts, acts of war or other events that significantly disrupt operations on the NCTC tracks and that are beyond the reasonable control of NCTD.
- d. A train is delayed by more than ten (10) minutes due to acts of vandalism on the NCTC tracks, which acts require the train to stop or to be operated at reduced speeds for a portion of the trip.
- e. The train is delayed due to an emergency, including the need for NCTD to perform emergency Right of Way repairs following accidents or unforeseen sudden damage due to weather or other unforeseen events.
- f. The train is delayed, terminated, detoured, re-routed or annulled by the laws, regulations, demands, warnings or orders of any federal, state or local governmental body, entity, agency, department, court, official or judge with jurisdiction or authority.

**ARTICLE 6. DATA FOR DETERMINING ON-TIME PERFORMANCE**

For purposes of this Agreement, delays will be identified, determined and calculated based on Amtrak's on-time performance Monitor Report System (MRS), and shall also be considered the definitive delay data for audit purposes, except to the extent that NCTD provides data that both parties agree is more accurate.

**ARTICLE 7. REPORTING, INVOICING AND REMITTANCE OF PAYMENTS**

1. The annual reimbursement payment will be submitted to NCTD within forty-five (45) calendar days following the approval of the LOSSAN Agency's annual fiscal year business plan and the associated Master Fund Transfer Agreement and its appropriate supplements by the State of California.

2. For the incentive performance payment, the LOSSAN Agency within 45 calendar days following the conclusion of each calendar month and following the reconciliation of any errors or disputes between Amtrak and NCTD in the cause of the delays as reported, shall submit a report to NCTD for review and concurrence reflecting on-time performance calculated pursuant to the terms and conditions of this Agreement. This report shall contain a statement of the amount due on account of on-time performance during the reported month and justification for any delay not included in the on-time performance calculation. This report shall be submitted to NCTD in the form and manner agreed to by the parties.

3. Upon agreement of the report, the LOSSAN Agency shall provide NCTD the performance incentive payment per this Agreement within thirty (30) days, including supporting documentation.

4. Payment of the incentive performance payments shall not be unreasonably withheld, conditioned or delayed.

5. The parties shall keep detailed and complete records verifying all performance-based payments pursuant to this Agreement. The parties agree to maintain such records for a period of three years following each submitted payment. The parties shall have the right, upon reasonable notice, to audit all records related to this Agreement.

#### **ARTICLE 8. MUTUAL RESPONSIBILITIES**

##### **1. Statement of Mutual Support; Independent Contractors; No Third-Party Beneficiaries.**

The parties to this Agreement are independent contractors. Neither party shall be considered the agent, partner or joint venture of the other party under this Agreement. The terms and provisions of this Agreement are intended for the sole and exclusive benefit of the parties. Nothing in this Agreement is intended to, or may be construed to, give any person, firm, corporation, or other person or entity, other than the parties hereto and their respective parents, subsidiaries, affiliates, successors, and assigns, and any of the officers, directors, employees or agents of any of them, any right pursuant to any provision or term of this Agreement.



2. Notices. All reports, invoices, notices and other communications under this Agreement shall be in writing and shall be deemed to have been duly given (i) on the date of delivery, if delivered personally to the party to whom notice is given, or if made by facsimile directed to the party to whom notice is to be given at the facsimile number listed below, or (ii) at the earlier of actual receipt or the third business day following deposit in the United States mail, postage prepaid. Notices and other communications shall be directed to the parties at the address shown below:

**For LOSSAN Agency:**

Jennifer L. Bergener  
LOSSAN Rail Corridor Agency  
600 S. Main Street  
Orange, CA 92863

**For NCTD:**

Matthew O. Tucker  
North County Transit District  
810 Mission Avenue  
Oceanside, CA 92054

3. Dispute Resolution. The Parties hereby consent to a dispute escalation as outlined below. Any disputes not resolved through the escalated dispute resolution process will be decided through a binding arbitration process. The Dispute Resolution process will be initiated by the project manager at NCTD and responded to by the LOSSAN Agency equivalent. If not resolved the issue will escalate to the Executive Director for NCTD and the Managing Director for the LOSSAN Agency. If not resolved the issue will then be submitted for formal binding arbitration.

4. Term of Agreement. The term of this Agreement shall be effective on February 1, 2019 and shall be in full force and effect through June 30, 2021, unless otherwise extended or modified through amendments to this agreement.

5. Amendments: This Agreement may be amended in writing at any time by the mutual consent of both Parties. No amendment shall have any force or effect unless executed in writing by both Parties.

6. Funding. The funding necessary to support this Agreement is anticipated to be provided through a variety of state funding sources. Payments are subject to the availability of the funding,

1 which the Parties believe to be reasonably anticipated and available to support this Agreement. Should  
2 this funding not be made available, the Parties mutually agree to work in coordination to identify  
3 alternative sources to further support this Agreement.

4 7. Default; No Punitive or Consequential Damages. (i) Either party shall be deemed in  
5 default with respect to this Agreement upon the failure of such party to observe or perform any  
6 covenant, condition or agreement on its part to be observed or performed hereunder, and the  
7 continuance of such failure for a period of thirty (30) days after the defaulting party has received written  
8 notice specifying such failure and demanding that it be remedied (provided, however, that with respect  
9 to any default not reasonably capable of cure within the 30-day period default shall not occur if the  
10 breaching party commences curative actions within 30 days and thereafter diligently prosecutes such  
11 curative actions to completion). In addition to any remedies that may be available at law, which  
12 remedies shall be cumulative, the non-defaulting party shall, at its option, have the right to terminate  
13 this Agreement for cause. (ii) No claim for punitive or exemplary damages shall be made nor shall  
14 any such damages be collected for or on behalf of any party to this Agreement from any other party  
15 to this Agreement under any term or provision of this Agreement or for the breach of or failure to  
16 perform any condition, requirement, duty or obligation required by any term or provision of this  
17 Agreement.

18 8. Governing Law. This Agreement shall be governed and interpreted under the laws of the  
19 State of California.

20 9. Counterparts. This Agreement may be executed in any number of counterparts, each of  
21 which when executed and delivered shall be an original, but all such counterparts shall constitute one  
22 and the same instrument.

1           **IN WITNESS WHEREOF**, the Parties hereto have caused this Agreement No. L-9-0002 to be  
2 executed as of the date of the last signature below.

3  
4           **NORTH COUNTY TRANSIT DISTRICT**

5           **LOSSAN RAIL CORRIDOR AGENCY**

6           By: \_\_\_\_\_

7           By: \_\_\_\_\_

8           Mathew O. Tucker  
9           Executive Officer

10          Jennifer Bergener  
11          Managing Director

12          Date: \_\_\_\_\_

13          Date: \_\_\_\_\_

14          Attest:

15          Approved as to Form:

16          By: \_\_\_\_\_

17          By: \_\_\_\_\_

18          Lori A. Winfree  
19          General Counsel

20          James M. Donich  
21          General Counsel

22          Date: \_\_\_\_\_

23          Date: \_\_\_\_\_

**Attachment A**

October 8, 2018 Pacific Surfliner Schedule

## **Attachment B**

### Incentive Payment Methodology

For the incentive payment, an incentive rate of \$11.66 per minute of delay will be used. This rate was calculated based on the maximum annual budget identified of \$2,298,500, that would be allocated for the incentive payment. The maximum budget was then divided by the number of days the agreement would be in effect each fiscal year, divided by the maximum number of Pacific Surfliner trains anticipated to be operating under an hourly schedule and dividing this number by the maximum delay threshold of 15 minutes (which is 20 percent of the average scheduled running time between County Line and Control Point Ash.

Example for FY2019-20:  $((\$2,298,500 / 365) / 36) / 15 = \$11.66$  per minute of delay

Using this rate per minute, the maximum annual reimbursement and incentive payments available by number of trains operating was calculated as follows:

<b>No. of Trains</b>	<b>Reimbursement Payment</b>	<b>Maximum Incentive Payment</b>	<b>Total Max Payment Possible</b>
26	\$1,659,801	\$1,659,801	\$3,319,602
28	\$1,787,478	\$1,787,478	\$3,574,956
30	\$1,915,155	\$1,915,155	\$3,830,310
32	\$2,042,832	\$2,042,832	\$4,085,664
34	\$2,170,509	\$2,170,509	\$4,341,018
36	\$2,298,500	\$2,298,500	\$4,597,000

The attached spreadsheet template will be used to calculate the minutes of delay based on the conditions and exceptions defined in this Agreement.