

LICENSE TO USE
RAIL RIGHT OF WAY
(Government Entity)

This License Agreement (“Agreement”), is made by and between Capital Metropolitan Transportation Authority (“Licensor”), a political subdivision of the State of Texas organized and existing under Chapter 451, Texas Transportation Code, whose address is 2910 E. 5th Street, Austin, Texas 78702 and State of Texas, acting through the Texas Department of Transportation, (“Licensee”), whose address is 125 E 11th Street, Austin, Tx 78701 (each a “Party”, and collectively, the “Parties”).

I. General Terms and Conditions

In consideration of the mutual promises, covenants, obligations, and benefits contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree to the terms and conditions stated herein as evidenced by the signatures of their respective duly authorized representatives below.

A. Premises

Licensor purchased from the City of Austin approximately 162 miles of railroad right-of-way including the track, track support structures, and the real property in the counties of Bastrop, Burnet, Lee, Llano, Travis, and Williamson, Texas by Deed dated May 20, 1998 recorded in Volume 13187, Page 3118 of the Real Property Records of Travis County, Texas, as more particularly described therein (“Deed”). The track, track support structures and the real property are collectively referred to herein as the “Giddings-Llano Line”.

B. License Grant & Use

1. Licensor, subject to the conditions, limitations, and reservations hereinafter set forth, hereby grants to Licensee the right to use that portion of the Giddings-Llano Line in Austin, Travis County, Texas, located approximately 56-feet southwest of the centerline of the northbound IH-35 service road, at Latitude 30°17'58.48"N, Longitude 97°42'59.87"W and Mile Post 59.810 (“Licensed Property”).
2. Licensee is permitted to install and maintain one precast concrete drainage tunnel, being 22-feet in diameter, buried 67-feet below base of Licensor’s railroad right-of-way (“Facility”).
3. Licensee shall use the Licensed Property solely for installing, operating, and maintaining the Facility in strict compliance with all federal, state, municipality and other governmental regulations and no other purpose.
4. Licensee shall install the Facility within the Licensed Property, at its sole expense, in a manner and at such times which are satisfactory to Licensor. Licensee agrees that the Facility will be designed and constructed in accordance with the submitted plans and profile more fully described in the attached and incorporated herein as **Exhibit “A”**. Licensee shall not locate any new ground facilities or subterranean facilities within the Licensed Property other than what is shown on Exhibit A. No equipment, vehicles, material or supplies will be stored on the Licensed Property or on any portion of the Giddings-Llano Line overnight or on weekends.
5. With respect to the Facility, Licensee shall not perform any installation or other work on the Giddings-Llano Line or the property of Licensor without: (i) submitting the required applications,

(ii) paying the application fee described in Subsection D.1 below, (iii) obtaining a permit issued by Licensor to commence construction of the Facility, and (iv) where necessary, pay to have present at the time of construction, Licensor personnel or contractors designated by Licensor to oversee the construction activities (“RWIC”) at the rates set at the time of construction.

6. All improvements contemplated under this Agreement shall be at Licensee's sole expense and Licensee shall maintain the Licensed Property and the Facility in a good and safe condition at all times. All licenses, permits or other fees payable to a governmental authority shall be the sole responsibility of Licensee.
7. Licensee shall furnish, install, and maintain, at its sole expense, in a manner satisfactory to Licensor, any signs as are recommended and approved by Licensor to adequately mark the location of Licensee's use of the property of Licensor.
8. In the event Licensee fails to install or maintain the Facility, including all required signage, in a good and safe condition, Licensor reserves the right to perform the required work at Licensee's expense.
9. Licensee shall obtain and maintain all of the certificates, permits and other approvals, including, without limitation, those relating to health, safety, noise, environmental protection, waste disposal, and water and air quality (collectively, the “Governmental Approvals”) which may be required by any federal, state or local authorities for the location, installation, maintenance or operation of the Facility on the Licensed Property. Licensee shall furnish satisfactory evidence of compliance upon request by Licensor.
10. If an emergency situation arises during construction or any maintenance of the Facility, Licensee shall immediately notify Licensor's Railroad Department by telephone at (512) 997-0010, and then proceed to take only those actions necessary to return the property of Licensor to a safe condition, unless otherwise directed by Licensor.

C. This Agreement is subject and subordinate to:

1. Licensor's mass transit rights, obligations, duties, use, plans and operations;
2. The authority of the Federal Transit Administration and the requirements of any federal grants obtained by Licensor in connection with its acquisition of the Giddings-Llano Line;
3. The regulations and directives of the Federal Railroad Administration;
4. Any rail freight services contract, rail freight operations, and passenger rail operations; and
5. All easements, restrictions, covenants, licenses, encumbrances, leases, conditions, liens and claims of title affecting the Giddings-Llano Line, including the prior rights of the City of Austin set forth in the Deed.

Licensor, and its agents, successors, and assigns, consistent with the rights herein granted, reserve the right to use the Giddings-Llano Line for any and all purposes not inconsistent with the rights granted to Licensee in this Agreement.

D. Term and License Fees

1. Upon execution by the Parties, this Agreement will be in effect and continue thereafter for so long as the Licensor Premises shall be used for the purposes set forth herein; provided, however, if the State shall abandon the use of the Licensor Premises, or any part thereof, for such purposes, this License and the rights and privileges granted hereby as to the portion or portions so abandoned shall expire and terminate at the time each such portion shall be so abandoned; whereupon Licensor shall have the same complete title to the Licensor Premises so abandoned as though these presents had never been executed and the right to enter thereon and exclude therefrom the State, their successors, and assigns.

Upon execution by the Parties, a license processing fee of \$750 and no/100 Dollars is due within 30 days of execution.

2. Payment shall be made at the address on Page 1 to the attention of: Accounts Receivable. All moneys due and payable to Licensor under this Agreement that are not received by Licensor on or before thirty (30) days after the date the invoice was received, are subject to penalties in accordance with the Prompt Payment Act.
3. This Agreement may be terminated by Licensor at any time upon the occurrence of any of the following events, in its sole and absolute discretion:
 - a. The location, installation, and operation of the Facility is not commenced within thirty (30) months from the Effective Date of this Agreement;
 - b. The Facility is abandoned by Licensee within one hundred twenty (120) days of notification of abandonment by Licensee;
 - c. Licensee fails to perform or comply with any of the terms and provisions of this Agreement, after written notice to Licensee and the applicable cure period as provided in Paragraph H. Default;
4. This Agreement may be terminated by Licensee upon ninety (90) days' prior written notice from Licensee to Licensor.
5. Licensee and Licensor agree that Licensee's use of the Licensed Property as contemplated in this Agreement interferes with the right of Licensor to use the Licensed Property for its intended purpose including, without limitation, by imposing additional expenses and administrative, technical and safety burdens on Licensor. Licensee agrees that the License Fees, application fees, permitting fees, RWIC charges, administrative fees, and any other charges payable under this Agreement are intended to compensate Licensor for such additional expenses and administrative, technical and safety burdens on Licensor.

E. Removal of All Licensee Improvements

Upon termination of the rights hereby granted, Licensee agrees, upon receipt of a written request from Licensor, to remove the Facility, to restore the Licensed Property to the same state and condition in which it existed prior to location and installation of the Facility, and to bear all expense thereof. Should Licensee in such event fail, neglect or refuse to so remove the Facility and restore the Licensed Property, such removal and restoration may be performed by Licensor at the expense of Licensee, and Licensee

agrees to make full restitution and reimbursement to Licensor for such actual and reasonable sums in accordance with the Prompt Payment Act.

F. Licensee Responsibilities

1. Licensee shall pay, in full, all persons who perform labor. Licensee will not allow any mechanic or material liens to be filed or enforced against the Giddings-Llano Line, the Licensed Property, or the property of Licensor for work done or materials furnished at Licensee's instance or request. If any such liens are filed thereon, Licensee agrees to immediately remove the same at Licensee's own cost and expense, without regard to the legal enforceability of such liens. Should Licensee fail, neglect or refuse to do so, Licensor shall have the right to terminate this Agreement or at its option pay any amount required to release any such lien or liens, or to defend any action brought thereon, and to pay any judgment entered therein, and Licensee shall be liable to Licensor for all actual and reasonable costs, damages and attorney's fees, including amounts expended in defending any proceedings, or in the payment of any of such liens, or any judgment obtained against Licensor, upon demand with interest at the maximum rate allowed by law from demand until payment.
2. No Hazardous Materials shall be kept, stored, used or discharged on the Licensed Property. Licensee shall comply strictly with all applicable Federal, State and local laws, ordinances, rules and regulations regarding Hazardous Materials, and shall indemnify, defend and hold Licensor harmless from and against any and all liability arising from Licensee's use, storage or discharge of Hazardous Materials on the Licensed Property. For purposes of this Agreement, "Hazardous Materials", mean any substance that is now or hereafter defined or listed in, or otherwise classified pursuant to, any applicable federal or state law, as "hazardous substance," "hazardous waste," "acutely hazardous," extremely hazardous," "infectious waste," "toxic substance," "toxic pollutant," or any other formulation intended to define, list, or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, or toxicity, including any petroleum, natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas) or derivatives thereof. "Hazardous Materials" also include, without limitation, those substances listed in the United States Department of Transportation Table (49 CFR 172.101, as amended). The provisions of this paragraph shall survive termination of this Agreement.
3. Licensee shall be solely responsible for obtaining any and all Governmental Approvals and any other licenses, easements, permits, consents, or permissions necessary for Licensee's use of the Licensed Property including, without limitation, from any owner of an interest in the Licensed Property.

G. Insurance and Waiver of Subrogation

1. For construction work, the Licensor shall require Licensor's contractor to provide the insurance coverages as contained in Licensee's Permit to Be On Railroad Right-of-Way ("Permit") and Railroad Worker-in-Charge Request form ("RWIC Form") (both attached as Exhibit B of this Agreement). Licensor's contractor shall be required to execute the RWIC Form before commencing any work on Licensee's Premises.
2. For future maintenance work, Licensor's contractors shall provide the then-current Texas insurance coverages as required by the Permit and be required to execute the then-current Permit and RWIC Form before commencing any work on Licensee's Premises.
3. Licensor is self-insured for any Work performed by its employees.

H. Default

If Licensee defaults in the payment of the License Fees or any other amounts payable under this Agreement and the default continues for ten (10) days after Licensor's written notice specifying the default, or if Licensee defaults in the performance of any other covenant or agreement under this Agreement and the default continues for thirty (30) days after Licensor's written notice specifying the default, Licensor shall have any right or remedy provided herein or available at law or in equity, including, without limiting the foregoing, the right to immediately terminate this Agreement; provided however, if the default stated in such notice cannot be remedied within the applicable cure period, the cure period shall be extended so long as Licensee is diligently pursuing corrective action.

I. Responsibility for Liability

To the extent allowed by Texas law, the Parties agree that each Party is responsible to the exclusion of any such responsibility of the other Party for its own proportionate share of liability for its negligent acts and omissions for claims, suits, and causes of action, including claims for property damage, personal injury and death, arising out of or connected to this agreement and as determined by a court of competent jurisdiction, provided that the execution of this Agreement will not be deemed a negligent act.

J. Right to Eject

Licensor may eject or cause to be ejected from the Licensed Property Licensee or any person acting under Licensee's authority or direction that is engaging in conduct that is unlawful or unsafe. Licensor shall not be liable to Licensee for any damages that may be sustained by Licensee or the ejected person through Licensor's exercise of such right.

K. Force Majeure

Licensor shall not be liable to Licensee for events beyond the control of Licensor that prevents or restricts access to the Licensed Property ("Event of Force Majeure"). Events of Force Majeure shall include, without limitation: Acts of God; strikes, lockouts, or other industrial disputes; epidemics, civil disturbances, acts of domestic or foreign terrorism, riots or insurrections; landslides, lightning, earthquakes, fire, storms, floods or washouts; explosions; interruptions by government or court orders; declarations of emergencies by applicable federal, state or local authorities; and, present or future orders of any regulatory body having proper jurisdiction and authority. If the use of the Licensed Property is prevented in whole or in material part by an Event of Force Majeure that extends more than thirty (30) days, Licensor may terminate this Agreement upon written notice. Licensee agrees that its exclusive remedy in the event of termination under this paragraph shall be a refund of the unearned fees and charges paid by Licensee prior to the termination.

II. Miscellaneous

A. No Warranty and Assumption of Risk

LICENSOR MAKES NO REPRESENTATION OR WARRANTY AS TO THE NATURE OR EXTENT OF ITS RIGHT, TITLE, OR INTEREST IN OR TO THE LICENSED PROPERTY, AND ANY IMPLIED REPRESENTATION OR WARRANTY AS TO THE NATURE OR EXTENT OF LICENSOR'S RIGHT, TITLE, AND INTEREST IN OR TO THE LICENSED

PROPERTY IS HEREBY EXPRESSLY DISAVOWED BY LICENSOR. FURTHERMORE, LICENSEE ACKNOWLEDGES AND AGREES THAT IT ACCEPTS THE CONDITION OF THE LICENSED PROPERTY “AS-IS” WITH ANY AND ALL LATENT AND PATENT DEFECTS, AND LICENSEE ACKNOWLEDGES THAT LICENSOR HAS NOT MADE AND DOES NOT MAKE ANY WARRANTIES OF THE CONDITION OF THE LICENSED PROPERTY OR THAT THE LICENSED PROPERTY IS FIT FOR A PARTICULAR PURPOSE. WITHOUT LIMITING THE FOREGOING, LICENSEE ACKNOWLEDGES AND AGREES THAT IT WILL INSTALL ALL IMPROVEMENTS LICENSEE REQUIRES ON THE LICENSED PROPERTY, IS RESPONSIBLE FOR THEIR COMPLIANCE WITH ALL APPLICABLE LAWS, AND IS RESPONSIBLE FOR ALL LICENSES, EASEMENTS, PERMITS, CONSENTS, OR PERMISSIONS REQUIRED FOR LICENSEE’S USE OF THE LICENSED PROPERTY AND LICENSOR WILL HAVE NO LIABILITY OR RESPONSIBILITY THEREFORE.

B. Obligation to Report

If Licensee is aware any dangerous or defective condition exists on the Licensed Property that, under the normal course of business is the responsibility of the Licensor, and Licensee fails to report the problem to Licensor, Licensee continues to be responsible for its obligations established in this Agreement. Under these circumstances, Licensor will not be liable for any detrimental consequences.

C. No Waiver

The failure of Licensor to insist in any one or more cases upon the performance of any of the provisions, covenants, agreements or conditions of this Agreement or to exercise any option herein contained shall not be construed as a waiver or a relinquishment for the future of any such provision, covenant, agreement, condition or option. Receipt by Licensor of License Fees or of any other payment or the acceptance by Licensor of performance of anything required by this Agreement to be performed with knowledge of the breach of a covenant shall not be deemed a waiver of such breach. The failure to enforce or any delay in the enforcement of any privileges, rights, defenses, remedies, or immunities detailed in the Agreement or otherwise available to Licensor by law will not constitute a waiver of such privileges, rights, defenses, remedies, or immunities or be considered as a basis for estoppel. No waiver of any provision, covenant, agreement or condition of this Agreement shall be deemed to have been made unless expressed in writing and signed by the party against whom such waiver is charged. The express waiver by either Licensor or Licensee of any breach shall not operate to extinguish the covenant or condition, the breach of which has been waived.

D. Governmental Entity

Each Party is a governmental entity and nothing contained herein shall be deemed a waiver of any rights or privileges afforded governmental entities under the laws of the state of Texas law or the Texas Constitution.

E. Governing Law and Venue

This Agreement shall be governed by, construed, and enforced in accordance with the laws of the State of Texas, and venue shall be in the County where the Licensed Property is located.

F. Compliance with Laws

Licensee agrees not to use the Licensed Property for any unlawful purpose. If any amendment becomes necessary to incorporate any modifications required for Licensor's compliance with all applicable state and federal laws, regulations, requirements and guidelines, such amendment will be made pursuant to Paragraph P.

G. No Joint Venture

This Agreement does not intend to, and nothing contained in this Agreement shall, create any partnership, joint venture or other joint or equity type agreement between Licensor and Licensee.

H. No Third Party Beneficiaries

No term or provision of this Agreement is intended to be, or shall be, for the benefit of any person, firm, organization, or corporation not a party to this Agreement and no such other person, firm organization or corporation shall have any right or cause of action hereunder.

I. Severability

If any provisions of this Agreement are, for any reason, held by a court to be unenforceable, then the invalidity of such provision will not invalidate any other provisions, which other provisions will remain in full force and effect unless removal of such invalid provision destroys the legitimate purpose of the Agreement, in which event the Agreement will be terminated.

J. Recording

Licensee shall not record this Agreement.

K. Personal License

The rights and privileges herein given are personal to the Licensee. Licensee has no exclusive rights or benefits other than those set forth herein.

L. Right of Entry

At any time during the term hereof, Licensor or its representatives shall have the right, without disturbance of Licensee's use or possession, to enter the Licensed Property.

M. Dates of Performance

In the event that the date for performance by either party of any obligation under this Agreement required to be performed by such party falls on a Saturday, Sunday or national holiday, the time for performance of such obligation shall be deemed extended until the next business day following such date.

N. Exhibits

This Agreement incorporates by reference the following Exhibits:

1. Exhibit "A" (Plans)
2. Exhibit "B" (Licensee's Permit to Be On Railroad Right-of-Way and Railroad Worker-in-Charge Request form))

O. Entire Agreement

This Agreement embodies the entire agreement and understanding between the Parties relating to the transaction contemplated hereby and supersedes any and all prior or contemporaneous oral or written statements concerning the subject matter of this Agreement. In executing this Agreement, the Parties do not rely upon any statement, promise, or representation not expressed herein.

P. Modification

This Agreement may not be modified, changed or altered in any respect except by the mutual written agreement of the Parties.

Q. Notice

All notices required under this Agreement or by law by either party to the other shall be in writing and may be given or served by depositing same in the United States mail, postage paid, registered or certified and addressed to the party to be notified, with return receipt requested; by personally delivering same to such party, or an agent of such party; or by overnight courier service, postage paid and addressed to the party to be notified and sent to the address set forth below. Notice deposited in the U.S. mail in the manner hereinabove described shall be effective upon such deposit. Notice given in any other manner shall be effective only if and when received by the party to be notified. An address may be changed by written notice to the other party.

If to the Licensee: Texas Department of Transportation
Rail Division
125 E. 11th Street
Austin, Texas 70701

If to the Licensor: Capital Metropolitan Transportation Authority
624 N. Pleasant Valley Road
Austin, Texas 78702
Attn: Director of Real Estate and R-O-W

With copy to: Capital Metropolitan Transportation Authority
2910 E. 5th Street
Austin, Texas 78702
Attn: Chief Counsel

R. Condemnation

If all, or any, portion of the Licensed Property including, but not limited to, the air ways over and across the Licensed Property, is condemned by any authority with condemnation powers, the proceeds of such condemnation shall be the property of Licensor.

S. Time is of the Essence

Time is of the essence in this Agreement.

T. Signature

A copy or facsimile signature shall be deemed an original signature for all purposes. For purposes of this paragraph, the phrase “facsimile signature” includes without limitation, an image of an original signature in whatever means or form.

U. Counterparts

This Agreement may be executed simultaneously in counterparts, each of which shall be deemed an original, but all of which, together shall constitute one and the same instrument.

V. No Assignment or Subletting

Except as expressly set forth herein, Licensee may not assign or otherwise transfer this Agreement, whether by operation of law or otherwise, and may not sublet (or underlet), or permit, or suffer the Licensed Property, in whole or in part, to be used or occupied by any party other than Licensee and Licensee’s agents without Licensor’s prior written consent, which may be withheld in Licensor’s sole discretion. Any attempted assignment or subletting without Licensor’s consent is void ab initio.

W. Interpretation

Whenever used herein, the term “including” shall be deemed to be followed by the words “without limitation”. Words used in the singular number shall include the plural, and vice-versa, and any gender shall be deemed to include each other gender.

X. Survival

Termination of this Agreement shall not relieve Licensee’s liability or obligation set forth in this Agreement that is expressly stated to survive termination of this Agreement.

Y. Remedies

All rights and remedies in this Agreement are cumulative and not exclusive of any other rights or remedies that may be available to the Licensor, whether provided by law, equity, statute or otherwise. The election of any one or more remedies the Licensor will not constitute a waiver of the right to pursue other available remedies.

III. Federal Notices

A. Non Discrimination

Licensee shall not discriminate or permit discrimination against any person or organization because of race, color, age, religion, sex or national origin or for any other reason prohibited by law.

B. Compliance with Environmental Standards

Licensee shall comply with the provisions of the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended.

IV. Signatories

A. Effect Date of Execution

The Agreement will be executed and effective as of the date of the last party to sign (the “Effective Date”).

B. Signatories

This Agreement is hereby accepted and agreed to by the following individuals or officers who represent that they are duly authorized to bind the Parties as set forth above.

**Capital Metropolitan
Transportation Authority**

(Licensee's Name Here in Bold)

By: _____

By: _____

Ken Cartwright
Vice President
Facility Management & Capital Construction

Printed Name: _____

Title: _____

Date: _____

Date: _____

Concur for State to sign

Exhibit “A”
PLANS

SAMPLE

Exhibit “B”

CAPITAL METRO INSURANCE REQUIREMENTS

Licensee shall require its contractor, at no cost to Licensor, to procure the insurance set forth below. The insurance shall be kept in full force during the installation of the Facility and during any future maintenance of the Facility by a contractor.

The contractor's insurance shall be: primary and non-contributory with respect to any insurance which might be carried by the contractor and contain a contractual waiver of subrogation.

The contractor shall furnish to Licensor certificate(s) of insurance evidencing the required coverage and endorsement(s) and, upon request, a certified duplicate original of any of those policies.

The contractor shall notify Licensor in writing of any material alteration of such policies, including any change in the retroactive date in any “claims-made” policy or substantial reduction of aggregate limits, if such limits apply or cancellation thereof at least thirty (30) days prior thereto.

All insurance policies shall be written by reputable insurance company or companies acceptable to Licensor with a current Best's Insurance Guide Rating of A+ and Class XIII or better. All insurance companies shall be authorized to transact business in the State of Texas.

CAPITAL METRO MINIMUM COVERAGE REQUIREMENTS

Coverages shall be listed on front of the certificate, and listing the contractor as certificate holder and Licensor as an additional insured.

1. Commercial General Liability Insurance Coverage with limits of not less than One Million Dollars and No/100 Dollars (\$1,000,000) per occurrence and a combined Aggregate of Two Million Dollars and No/100 Dollars (\$2,000,000) with coverage that includes:
 - Premises/operations
 - Independent contractors
 - Personal Injury
 - Contractual Liability pertaining to the liabilities assumed in the agreement
 - Underground (when ground surface is disturbed)

Such insurance shall include a contractual endorsement pertaining to the liabilities assumed in the Agreement.

2. Comprehensive Automobile insurance coverage with minimum limits of not less than One Million Dollars and No/100 Dollars (\$1,000,000) with combined single limit of Two Million Dollars and No/100 Dollars (\$2,000,000).
3. Workers' Compensation with Statutory limits
4. Employer Liability Insurance with minimum limits of \$1,000,000

Such insurance shall include a contractual endorsement which acknowledges all indemnification requirements under the Agreement.

Note: Such policies of insurance and certificates provided by the contractor shall provide (i) that Licensor is named as an additional insured (except for workers' compensation insurance), (ii) that the named insured's insurance is primary and non-contributory with any insurance maintained by Capital Metro, (iii) a contractual waiver of subrogation where required by written contract or agreement, and (iv) that Capital Metro shall receive notice of any cancellation of the policy.