

MX Draft: April 14, 2022

FIRST AMENDING AGREEMENT

METROLINX

- and -

THE CITY OF HAMILTON

- and -

THE REGIONAL MUNICIPALITY OF YORK

- and -

THE CORPORATION OF THE CITY OF MISSISSAUGA

- and -

THE CORPORATION OF THE CITY OF BURLINGTON

- and -

THE CORPORATION OF THE CITY OF BRAMPTON

- and -

THE CORPORATION OF THE TOWN OF OAKVILLE

- and -

THE REGIONAL MUNICIPALITY OF DURHAM

WHEREAS, Metrolinx ("**Metrolinx**"), on the one hand, and the Corporation of the City of Brampton, the Corporation of the City of Burlington, The Regional Municipality of Durham, the City of Hamilton, the Corporation of the City of Mississauga, the Corporation of the Town of Oakville, and The Regional Municipality of York, on the other hand (each a "**Transit Agency**", and collectively, the "**Transit Agencies**") entered into the Operating Agreement for PRESTO on the 10th day of January, 2018 (the "**Operating Agreement**");

AND WHEREAS the parties are desirous of amending the Operating Agreement to reflect a revised risk-sharing model and amend other terms of the Operating Agreement that require amendment since the entering into the Operating Agreement;

NOW THEREFORE, in consideration of the mutual covenants herein and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged by both Parties, the Parties hereby covenant and agree with each as follows

All references below that require amendment refers to the Operating Agreement sections and schedules attached thereto.

The following sections and schedules of the Operating Agreement are hereby amended and revised, and shall be effective upon the date of execution of this First Amending Agreement.

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1 SPECIFIC AGREEMENTS

1.1 Limitation of Liability

- (1) Section 12.2(h) "*Affect of Breach on Minimum Payment*" is amended and restated to read:

Metrolinx agrees that the aggregate Metrolinx Revenue Based Fee for purposes of Section 7.3(b) [*Minimum Payment Protection*] shall include the aggregate of the Fee Based on Lost Revenues for the Transit Agencies for that calendar year. Metrolinx further agrees that, with respect to Section 12.3(b), if the Actual Availability Percentage is greater than:

- (i) 98.00% for E-Purse Fare Payment (transaction type 14 and any future transaction code(s) used for the same purpose) OR
- (ii) 99.50% for Open Payment (transaction type 26 and any future transaction code(s) used for the same purpose),

But, in each case, less than 100.00%, the aggregate Metrolinx Revenue Based Fee for purposes of Section 7.3(b) [*Minimum Payment Protection*] shall also include the following amount on an aggregate basis, over that calendar year. The amount being equal to TLR X Metrolinx Revenue Based Fee. Each Transit Agency shall calculate all of the amounts it believes should be added to the Metrolinx Revenue Based Fee pursuant to this Section 12.2(h) and will provide such calculations to Metrolinx by February 1st of the succeeding year.

1.2 Payment Device Service Availability CSL

- (1) Section 12.3(b)(ii) is amended and restated to read:

calculate all of the missed E-Purse Fare Payment transactions identified in step (i) above (the "**Total Missed E-Purse Taps**") for that calendar quarter, and all of the missed Open Payment transactions identified in step (i) above for that calendar quarter (the "**Total Missed Open Payment Taps**").

- (2) Section 12.3(b)(iii) is amended and restated to read:

calculate and determine the total number of E-Purse Fare Payment transactions ("**Total Expected E-Purse Taps**") and the total number of Open Payment transactions ("**Total Expected Open Payment Taps**"), in each case, that would have occurred during that calendar quarter if the Payment Device Service Availability CSL was met at all times throughout the calendar quarter.

- (3) Section 12.3(b)(iv) is amended and restated to read:

Calculate the "Actual Availability Percentage", for:

- (i) **E-Purse Fare Payment transactions**, which is equal to: $[(\text{Total Expected E-Purse Taps} - \text{Total Missed E-Purse Taps}) / \text{Total Expected E-Purse Taps}] \times 100$.
- (ii) **Open Payments transactions**, which is equal to: $[(\text{Total Expected Open Payments Taps} - \text{Total Missed Open Payments Taps}) / \text{Total Expected Open Payments Taps}] \times 100$.

If the Actual Availability Percentage is:

- A. greater than 98.00% for E-Purse Fare Payment transaction or greater than 99.50% for Open Payments transaction, that Transit Agency shall not be entitled to recover any lost revenues arising from, related to, or in connection with the failure of the Payment Device Service Availability CSL to be met.
- B. less than 98.00% for E-Purse or less than 99.50% for Open Payments, that Transit Agency shall be entitled to recover lost revenues arising from, related to, or in connection with, the failure of the Payment Device Service Availability CSL to be met.

- (4) Section 12.3(c) is amended and restated to read:

If, pursuant to Section 12.3(b)(iv)(B), a Transit Agency is entitled to recover lost revenues arising from, related to, or in connection with, the failure of the Payment Device Service Availability CSL to be met, and it chooses to seek compensation, it shall provide a Non-Performance Notice to Metrolinx detailing its claim, which notice shall include all of the information, data, calculations, and assumptions used by that Transit Agency in calculating and determining the Total Missed E-Purse Taps, the Total Missed Open Payment Taps, and the Total Expected E-Purse Taps, the Total Expected Open Payments Taps figures. If Metrolinx rejects the Non-Performance Notice, or any aspect of it, the matter shall be referred to dispute resolution in accordance with Article 15 [Dispute Resolution].

- (5) Section 12.3 (d) is amended and restated to read:

The Non-Performance Notice shall also contain the dollar value of the lost revenues that a Transit Agency seeks to recover from Metrolinx (the "**Compensable Revenue Loss**"). The Parties agree that the Compensable Revenue Loss shall be calculated in the following manner for:

1. **E-Purse Fare Payment Transactions:**

- (i) the Transit Agency shall calculate the "**Total Lost Revenue**" or "**TLR**", which is equal to: $(\text{Total Missed E-Purse Taps} \times \text{Average E-Purse Fare})$;
- (ii) the Transit Agency shall calculate the "**Total Expected Revenue**" or "**TER**", which is equal to: $(\text{Total Expected E-Purse Taps} \times \text{Average E-Purse Fare})$

- (iii) Compensable Revenue Loss = $[\text{TLR} - (\text{TER} \times 2\%)] \times (100\% - \text{Metrolinx Revenue Based Fee})$, where:
 - A. Two percent (2%) is the amount of the expected revenue that the Transit Agency must lose before Metrolinx is liable (i.e., 100% – 98%)
 - B. The deduction relating to the Metrolinx Revenue Based Fee is based on Section 12.2(g) [Deduction of Metrolinx Revenue Based Fee]

2. Open Payments Transactions:

- (i) the Transit Agency shall calculate the “**Total Lost Revenue**” or “**TLR**”, which is equal to: (Total Missed Open Payments Taps X Average Open Payments Fare);
- (ii) the Transit Agency shall calculate the “**Total Expected Revenue**” or “**TER**”, which is equal to: (Total Expected Open Payments Taps X Average Open Payments Fare)
- (iii) Compensable Revenue Loss = $[\text{TLR} - (\text{TER} \times 0.50\%)] \times (100\% - \text{Metrolinx Revenue Based Fee})$, where:
 - A. One-half percent (0.50%) is the amount of the expected revenue that the Transit Agency must lose before Metrolinx is liable (i.e., 100% – 99.50%)
 - B. The deduction relating to the Metrolinx Revenue Based Fee is based on Section 12.2(g) [Deduction of Metrolinx Revenue Based Fee]

2 GENERAL

- 2.1 Time shall be deemed to be of the essence in this First Amending Agreement.
- 2.2 Each Party agrees that it shall at any time and from time to time, at its own expense, execute and deliver such further documents and do such further acts and things as the other Party may reasonably request for the purpose of giving effect to this First Amending Agreement or carrying out the intention or facilitating the performance of the terms of this First Amending Agreement.
- 2.3 All other provisions in the Operating Agreement shall remain unamended.
- 2.4 All capitalized terms used but not defined herein shall have the meaning ascribed thereto in the Operating Agreement.
- 2.5 This First Amending Agreement is to be construed in accordance with and governed by the laws of the Province of Ontario. Any controversy or claim arising out of or relating to this Agreement or any breach thereof shall be settled in accordance with Dispute Resolution provisions as set out in Section 15 of the Operating Agreement.
- 2.6 If any provision of this First Amending Agreement as applied to either party in any circumstance is adjudged by a court to be invalid or unenforceable, this shall not affect any other provision of this Second Amending Agreement, the application of such provision in any other circumstance, or the validity or enforceability of this First Amending Agreement.

- 2.7 This First Amending Agreement may be signed in counterparts, in which case each counterpart shall constitute an original document and such counterparts, taken together, shall constitute one and the same instrument. The parties adopt any signatures received via fax or "pdf" format as original signatures.

IN WITNESS WHEREOF the parties have executed this First Amending Agreement
as of _____, 2022.

METROLINX

Per: _____
Name:
Title:

Per: _____
Name:
Title:

THE CITY OF HAMILTON

Per: _____
Name:
Title:

Per: _____
Name:
Title:

THE REGIONAL MUNICIPALITY OF YORK

Per: _____
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Per: _____
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**THE CORPORATION OF THE CITY OF
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