

ADMINISTRATION, COORDINATION, AND LICENSE AGREEMENT

BP JCT
This administration, coordination, and license agreement (the "Agreement") is dated as of July 16, 2018, and is between the Santa Cruz County Regional Transportation Commission (the "Commission"), a public agency created under California law, and St. Paul & Pacific Railroad, LLC, a Minnesota limited liability company, a subsidiary of Progressive Rail Incorporated ("Railway").

The Commission purchased the Santa Cruz Branch railroad line (the "Property") from Union Pacific Railroad Company ("UP"), via an August 20, 2010, Purchase and Sale Agreement (the "Purchase and Sale Agreement");

UP reserved an easement to conduct common carrier freight railroad operations on and over the Property (the "Freight Easement"), which Freight Easement is set forth in the Quitclaim Deed by which UP, as grantor, quitclaimed all its right, title and interest in and to the Property to the Commission, as grantee;

UP quitclaimed all its right, title, and interest in and to the Freight Easement to a previous operator to act as the sole freight rail operator on the Freight Easement;

For the last few years, a previous operator operated on the Property pursuant to an agreement with the Commission;

The previous operator has agreed to cancel its current administration, coordination and license agreement to operate the Property and to convey the Freight Easement to the Railway;

The Commission has undertaken a study to help determine the best use of the Property by the Commission (the "Study");

Railway needs a long-term agreement of at least 10 years, covering all facets of railroad operations, to justify its investment of time and money needed to conduct railroad operations; and

Railway and the Commission desire to establish their respective rights and obligations with respect to the Property and the Freight Easement by entering into this Agreement.

The parties therefore agree as follows:

1. Definitions

- 1.1 The term "Commission" is defined in the introductory paragraphs of this Agreement and includes its directors, officers, employees, agents, parents, subsidiaries, affiliates, commonly controlled entities, and all others acting under its or their authority.
- 1.2 The term "Coordination Committee" is defined as the committee established by the parties pursuant to Section 11.
- 1.3 The term "FRA" is defined as the United States Federal Railroad Administration or its regulatory successor.

- 1.4 The term "Freight Easement" is defined in the introductory paragraphs of this Agreement.
- 1.5 The term "Freight Easement Property" is defined as the portion of the Property subject to the Freight Easement consisting of any and all real and personal property within 10 feet of the centerline of any track on the Property except where roadways, buildings, or Property boundary lines reduce such distance to less than 10 feet, and except for any retained rights and personal property described herein.
- 1.6 The term "Freight Service" is defined as any and all common carrier rail freight operations, rights, or obligations as to the Freight Easement Property including freight transportation, switching, temporary rail car storage (subject to the conditions of Section 2.5), transloading freight and dispatching.
- 1.7 The term "Hazardous Materials" is defined as any substance: (a) that now or in the future is regulated or governed by, requires investigation or remediation under, or is defined as any hazardous waste, hazardous substance, bio-hazard, medical waste, pollutant, or contaminant under any governmental statute, code, ordinance, regulation, rule, or order, or any amendment thereto, including the Hazardous Material Transportation Act 49 U.S.C. § 5101 *et seq.*, the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*, and the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, or (b) that is toxic, explosive, corrosive, flammable, radioactive, carcinogenic, dangerous, or otherwise hazardous, including gasoline, diesel, petroleum hydrocarbons, polychlorinated biphenyls (PCBs), asbestos, radon, and urea formaldehyde foam insulation.
- 1.8 The term "Hazardous Materials Laws" means all present and future governmental statutes, codes, ordinances, regulations, rules, orders, permits, licenses, approvals, authorizations, and other requirements of any kind applicable to Hazardous Materials.
- 1.9 The terms "include", "includes", and "including" are to be read as if they were followed by the phrase "without limitation."
- 1.10 The term "Loss" is defined as any loss, damage, claim, demand, action, cause of action, penalty, fine, payment, cost, liability, or expense of whatsoever nature, including court costs and reasonable attorneys' fees, resulting from or related to: (a) any injury to or death of any person, including officers, agents, and employees of the Commission or Railway; or (b) damage to or loss or destruction of any property, including the Property, any adjacent property, and the roadbed, tracks, equipment, other property of the Commission or Railway, and any property in the Commission's or Railway's care or custody.
- 1.11 The term "Property" is defined as the entire Santa Cruz Branch railroad line right-of-way purchased from UP by the Commission, including all improvements thereto, whether now existing or hereafter constructed.
- 1.12 The term "PUC" is defined as the California Public Utilities Commission.
- 1.13 The term "Railroad Facilities" is defined as all tracks and other railroad property and fixtures, including ties, switches, trackbeds, bridges, trestles, retaining walls, culverts,

railroad signs, switch mechanisms, signals, grade crossings, active and passive grade crossing warning devices and other appurtenances associated with the trackage described on Exhibit A and located on the Freight Easement Property.

- 1.14 The term "Railway" is defined in the introductory paragraphs of this Agreement and includes its directors, officers, employees, agents, parents, subsidiaries, affiliates, commonly controlled entities, any other related persons and entities, and all others acting under its or their authority.
- 1.15 The term "STB" is defined as the United States Surface Transportation Board or its regulatory successor.
- 1.16 The term "Study" is defined in the introductory paragraphs of this Agreement and refers to the Unified Corridor Investment Study anticipated to be completed by the end of calendar year 2018. For purposes of this Agreement, the Study shall be deemed to be "completed" on the date that it is presented, with a recommendation of Commission staff regarding the use of the Property, to the governing Board of the Commission.
- 1.17 The term "Transportation Service" is defined as the transportation of passengers by rail, including excursion trains. Transportation Service does not include regularly scheduled mass transit or commuter service.
- 1.18 The term "UP" is defined in the introductory paragraphs of this Agreement.

2. Commission Grants Rights

- 2.1. Freight Service (Phase I). Upon the effective date of this Agreement, the Commission grants Railway the exclusive right and obligation to provide Freight Service on the Freight Easement Property. Railway's rights and obligations to provide Freight Service under this Agreement are limited to those set forth in the Freight Easement or in this Agreement. The authorization to provide Freight Service under this Agreement shall be referred to as "Phase I" of this Agreement. Railway may not, in performing such Freight Service, exceed the maximum speeds authorized by applicable law for the existing track conditions or transport rail cars exceeding the applicable track and bridge weight limits.
- 2.2. Trackage License. The Commission grants Railway an exclusive license to use, maintain, repair, and operate all of the Railroad Facilities for all Freight Service purposes. Notwithstanding their location on the Freight Easement Property, buildings and other fixtures which are not appurtenances associated with the tracks and related railroad property are not included as part of this license.
- 2.3. No Material Interference with Freight Service. Notwithstanding the rights retained by the Commission under this Agreement, the exercise of such rights by the Commission may not materially interfere with Railway's Freight Service rights and obligations under federal law, or rights under the Freight Easement, unless first approved by the STB.

2.4. Transportation Service and Other Third-Party Licenses.

2.4.1. Railway Transportation Service (Phase II). If upon completion of the Study the Commission determines that all of the Freight Easement Property should be used for Transportation Service, the Commission immediately will grant Railway a non-exclusive license to use the Freight Easement Property and Railroad Facilities to provide Transportation Service on the Freight Easement Property; provided that prior to the commencement of operations (a) the Commission has approved in writing a detailed plan from Railway describing such Transportation Service, (b) the Transportation Service will not materially conflict with, and will be subject and subordinate to Freight Service, and (c) Railway has obtained any governmental authorizations required under applicable law for such Transportation Service. Within 12 months of the Commission determining that all of the Freight Easement Property should be used for Transportation Service, Railway will present a detailed plan describing the proposed Transportation Service, including a description of the proposed equipment to be used. The Commission shall have up to one hundred and twenty (120) days to review Railway's proposed plan, and in no case shall the Commission be required to complete its review of Railway's plan prior to the latest date it may grant a license to provide Transportation Service pursuant to Section 8.2.4. Failure to act on the proposed plan within such time period will result in the plan being considered approved by the Commission, provided, however, that any requirements of the California Environmental Quality Act applicable to the Transportation Service have been met. Railway agrees to act in good faith to incorporate the Commission's reasonable requests into its plan. The authorization to provide Transportation Service under this Agreement shall be referred to as "Phase II" of this Agreement.

2.4.1.1. Future Transportation Service. After the effective date of the grant of a license to Railway to provide Transportation Service (Phase II) pursuant to Section 2.4.1, subsequent changes to the plan for Transportation Service approved by the Commission shall be subject to the Commission's approval. The Commission shall have up to sixty (60) days to review such changes. Failure to act on the proposed amendment to the plan within such time period will result in the plan as amended being considered approved by the Commission provided, however, that any requirements of the California Environmental Quality Act applicable to the Transportation Service have been met. Railway agrees to act in good faith to incorporate the Commission's reasonable requests into its plan.

2.4.1.2. Third-Party Licenses. The Commission reserves the right to grant additional licenses over the Freight Easement Property and the Railroad Facilities (excluding licenses for temporary rail car storage or repairs on the Railroad Facilities), provided that any such licenses: (a) do not materially conflict with, and are subject and subordinate to, Railway's right to use, maintain, repair, and operate all of the Railroad Facilities for all Freight Service purposes, (b) do not materially conflict with, and are subject and subordinate to, any other license granted

Railway hereunder, (c) require the licensee to pay its proportionate share of Railway's prior (incurred within the preceding five years) and current costs (including labor costs, materials costs, equipment costs - using equivalent rental costs as a proxy for capital and maintenance and repair costs - travel, fuel, contract labor, and appropriate overhead) to maintain the portion of the Freight Easement Property and Railroad Facilities used by the licensee, and (d) require the licensee to (i) provide adequate insurance based on the scope and potential risks of operations of the licensee, as determined by the Commission and (ii) indemnify and hold harmless Railway and the Commission as to any Loss arising out of or related to licensee's operations.

2.4.1.3. After the effective date of the grant of a license to Railway to provide Transportation Service (Phase II) pursuant to Section 2.4.1, any new third-party license for Transportation Service on the Freight Easement Property, other than special events as described in Section 2.4.1.10, will be deemed to materially conflict with Railway's Transportation Service license. The limiting provisions of this Section 2.4.1.3 are conditioned on the Railway meeting the following conditions:

a. Levels of Service: Railway's Transportation Service shall carry the following numbers of revenue passengers beginning on the third anniversary of receipt of the license to begin Transportation Service (Phase II):

I. First Year of Service: 5,000 passengers.

II. Second Year of Service: 10,000 passengers.

III. Third Year of Service and Thereafter: 15,000 passengers.

2.4.1.4. If Railway or any third-party licensee ("Tourist Operator") fails to initiate and continue to operate Transportation Service substantially in accordance with its license and approved plan, then the applicable Tourist Operator's operations may, at the Commission's option, lose priority over any other operations, but only to the extent of such failure to operate.

2.4.1.5. If Railway constructs capital improvements to the portion of the Freight Easement Property and Railroad Facilities used by a third party licensee, the Commission shall promptly and reasonably determine (i) (a) the benefit of such improvements to such licensee or (b) the diminution of value to such improvements for Railway, (ii) the apportionment of benefit or loss for such improvements between Railway and such licensee, and (iii) the appropriate amortization period for such improvements (for capital improvements the Commission shall make such determination concurrently with its approval of such capital improvements pursuant to Section 6.2). The Commission's contract with such licensee will (i) require the licensee to pay amounts due within 30

days following receipt of written notice from Railway and (ii) name Railway as a third-party beneficiary with rights of enforcement. As used in this Agreement, the term "capital improvement" means any improvement or repair that is subject to the capital depreciation rules of the Internal Revenue Service.

- 2.4.1.6. Each third-party licensee's proportionate share of Railway's costs shall be calculated in advance by Railway (based on the prior year's maintenance and repair costs plus any reasonably anticipated extraordinary maintenance and repair costs, and the parties' relative need or usage during the licensee's operating season) on a car-mile basis as to the portion of the Freight Easement Property and Railroad Facilities used by such licensee. (As used in this subsection, "repair costs" refers to the cost of repairs that maintain property in good operating condition and not to repairs that are "capital improvements," which are dealt with in Subsection 2.4.1.5.) Such licensee shall pay its proportionate share of costs monthly in advance during the months of the licensee's operations. Railway shall at the end of each calendar year reconcile the amounts paid to the actual costs incurred. The Commission's contract with such licensee will (i) provide that if the actual costs exceed the amount charged to such licensee, such licensee will, within 30 days following receipt of written notice of such reconciliation from Railway pay the additional amount to Railway and (ii) name Railway as a third-party beneficiary with rights of enforcement. If the actual costs are less than the amount charged to such licensee, Railway will within 30 days following such reconciliation refund the balance to such licensee.
- 2.4.1.7. The Commission or its designee shall have the right to review, obtain, and copy all books, records, computer records, accounts, documentation and any other materials (collectively "Records") pertaining to Railway's costs that are subject to apportionment under this section, including any Records in the possession of any subcontractors, for monitoring, auditing, or otherwise verifying said costs. Railway agrees to provide the Commission or its designees with any Records requested for this purpose and shall permit the Commission or its designees access to its premises, upon reasonable notice, during normal business hours, for the purpose of inspecting and copying such Records. Railway further agrees to maintain such Records for a period of three years. The Commission acknowledges and agrees that these Records constitute Railway's confidential information and shall not be disclosed to any third-party without Railway's prior written approval, except as otherwise required by applicable law.
- 2.4.1.8. The Commission, may elect to require a lower level of liability insurance coverage for the licensee than the level of coverage then required of Railway under Section 9, provided that Railway reasonably concurs with the Commission that the level of operations of a licensee

providing a lower level of liability coverage than required of Railway under Section 9 justifies the reduced coverage.

2.4.1.9. Railway will reasonably cooperate with any third party holding rights to use the Property, including, without limitation, any third-party Transportation Service operator seeking to secure the necessary certification or qualification required by applicable law to operate on the Railroad Facilities, provided such cooperation does not require significant unreimbursed expense for Railway.

2.4.1.10. In addition to all other rights of Commission under this Agreement, and notwithstanding anything to the contrary in this Agreement, the Commission reserves the right to use the Freight Easement Property and Railroad Facilities for special events. Such special events shall be subject to the provisions of Sections 2.4.1.5 and 2.4.1.6, provided that such special events will only be deemed to materially conflict with another Transportation Service license if they operate during the same season, and on the same days and times of day, as Railway operations. The Commission will consult with Railway regarding Railway's willingness and ability to operate such special events.

Nothing in this paragraph shall preclude the Commission and Railway from negotiating arrangements for special events.

2.5. Temporary Rail Car Storage. Subject to the terms and conditions of this Agreement, Railway may undertake temporary rail car storage or repairs related to its own rail operations on the Railroad Facilities consistent with the provisions of Sections 2.5.1 and 2.5.2. For clarification, the staging of rail cars for unloading or loading in connection with transloading activities will not be considered rail car storage hereunder.

2.5.1. Unless otherwise expressly agreed by the Commission in writing, Railway will not (i) store more than 100 rail cars, or (ii) store rail cars in locations other than those approved by the Commission, or (iii) store any rail car for more than two (2) months. Absent the Commission's prior written consent, which consent may be withheld in the Commission's sole discretion, Railway may not store railcars that have been used to transport Hazardous Materials unless such railcars are empty or contain only residual amounts of Hazardous Materials.

2.5.2. Railway shall not exercise its right to use the Freight Easement Property or Railroad Facilities for temporary rail car storage or repair in a manner that materially affects the ability of any third party Transportation Service licensee to access the Railroad Facilities for the purpose of exercising its licensed rights.

2.6. Investigation.

2.6.1. Railway hereby acknowledges that (a) it has satisfied itself at the time of this Agreement with respect to the condition of the Freight Easement Property and Railroad Facilities and their suitability for Railway's intended use; (b) it has made such investigations as it deems necessary with respect to the Freight Easement

Property and Railroad Facilities, as they exist at the time of this Agreement, and assumes responsibility therefor as to its occupancy and use thereof; and (c) neither the Commission nor any of the Commission's agents has made any oral or written representations or warranties with respect to the Freight Easement Property or Railroad Facilities.

- 2.6.2. In the event that any public use of the Property, or illegal activities by third parties, including trespassing, cause any significant economic or operational problems for Railway, Railway may terminate this Agreement, provided Railway provides at least ninety (90) days' prior written notice to Commission of the specific problem(s) and cause thereof, cooperates in good faith with Commission throughout such period to resolve such problem(s), and complies with the provisions of Section 8.3.
- 2.7. Warranties on Freight Easement Property. Other than as set forth herein, Railway shall take the Freight Easement Property without any express or implied warranties, including, but not limited to, any warranties of merchantability, fitness for a particular purpose or volume or quality of traffic on the Freight Easement Property, and subject to: (i) encroachments or other existing conditions, (ii) all existing ways, alleys, privileges, rights, appurtenances and servitudes, howsoever created, and (iii) the Commission's rights hereunder.
- 2.8. Release. Railway, for itself, its successors and assigns, to the maximum extent permitted by law, hereby waives, releases, remises, acquits and forever discharges the Commission, its officers, employees, agents, successors and assigns, from any Loss of Railway in any way arising out of, or connected with, the known or unknown, existing or future physical or environmental condition of the Freight Easement Property and Railroad Facilities (including any Hazardous Materials contamination in, on, under, or adjacent to, the Freight Easement Property, or any clearance constraints on the Freight Easement Property), or any federal, state, or local law, ordinance, rule or regulation applicable thereto.
- 2.8.1. Railway hereby grants to Commission, on behalf of any insurer providing property, general liability, or automobile liability insurance to either Railway or Commission with respect to the operations of Railway, a waiver of any right to subrogation which any such insurer of Railway may acquire against Commission by virtue of the payment of any loss under such insurance.
- 2.8.2. If any Loss described in Section 2.8 is caused by a third party under contract with the Commission, the Commission shall, at its option, (i) pursue any claim it may have against the third-party contractor, or (ii) assign to Railway any such claim, provided that Railway shall not be obligated to pursue such claim. Any amounts recovered as a result of any such claim shall, to the extent they exceed any fees and costs incurred in pursuing such claim, be used to repair or replace any of the following that are damaged or destroyed in connection with the subject Loss:
- 2.8.2.1. First, Freight Easement Property and Railroad Facilities;
- 2.8.2.2. Then, railroad equipment.

If Railway commences abandonment proceedings for the subject portion of the Property under Section 8.3, the Commission will not assign any such claim to Railway and neither party will have any further responsibility under this Subsection 2.8.2 as to such claim. If Railway's abandonment application is withdrawn, or not approved by the STB, the Commission may assign such claim to Railway, as provided above.

2.8.3. The provisions of this Section 2.8 shall survive the termination or expiration of this Agreement.

2.9. The rights granted by the Commission under Sections 2.1- 2.5 are subject to all existing licenses, leases, easements, restrictions, conditions, covenants, encumbrances, liens and claims of title that may affect the Property and the word "grant" as used herein shall not be construed as a covenant against the existence of any thereof.

3. Limitation and Subordination of Rights Granted

3.1. Commission's Use of Property. The foregoing granted rights are subject and subordinate to the Commission's prior and continuing right to use and maintain the Property for any purpose that is not inconsistent with this Agreement. Without limiting the generality of the foregoing, the Commission may construct, maintain, repair, renew, use, operate, change, modify or relocate public projects of any kind (including but not limited to a trail consistent with the Monterey Bay Sanctuary Scenic Trail (MBSST) Network Final Master Plan), railroad tracks, signals, communication equipment, fiber optics, pipelines, or other facilities upon, along, or across any or all of the Property, all or any of which the Commission may freely do at any time or times without liability to Railway for compensation or damages; provided, however, that the Commission may not materially interfere with Railway's rights and operations under this Agreement or Railway's Freight Service rights and obligations under federal law or under the Freight Easement, unless first approved by the STB; and provided, further, that the Commission shall to the extent possible notify Railway as soon as practicable of any such planned or actual interference and provided that the Commission takes all practicable measures to minimize any such interference. Railway shall reasonably cooperate with the Commission in implementing the foregoing uses of the Property. If the Commission or its designee requests Railway's assistance to transport materials or to perform other transportation or construction services for public projects, Railway will provide such assistance at rates reasonably to be determined between the parties.

3.2. Commission's Inspection Access; Access for Maintenance. The Commission may, as reasonable and as coordinated in advance with Railway, (i) inspect the Freight Easement Property and the Railroad Facilities, including any facility used in connection with Freight Service or Transportation Service, and (ii) access the Freight Easement Property and Railroad Facilities (including access with Commission or third party rail vehicles) as necessary to maintain areas of the Property outside of the Freight Easement Property that are not otherwise reasonably accessible. The Commission shall defend, indemnify and hold Railway, its officers, directors, employees, and agents, harmless from and against Loss

arising from injuries to or death of the Commission's officers, directors, employees, agents, invitees, and contractors relating to such inspections, regardless of the cause of such injuries, death, or damage and regardless of the negligence of any person, except to the extent caused by the willful misconduct or gross negligence of Railway, its employees, or agents. The Commission shall ensure that any of its officers, directors, employees, agents, invitees, and contractors involved in such inspections are trained in all safety requirements and qualified for any operations related to work conducted on or near railroad operations.

- 3.3. Future At-Grade Crossings. The parties acknowledge that (i) local governments may desire to create future at-grade public crossings of the Freight Easement Property, and (ii) the Aptos Village Plan, dated February 23, 2010, specifically includes a future at-grade roadway crossing of the Freight Easement Property at approximately Milepost 12.55. Railway shall, at no cost or expense to itself, cooperate with the efforts of any applicable local governments to secure PUC approval of such crossings; provided, however, that Railway shall be entitled to raise any reasonable safety concerns related to such crossings. The fees and costs associated with the construction, maintenance, and repair of such crossings shall be set either by agreement between Railway and the applicable local government (which agreement shall become a Railway Agreement under Sections 4.2 and 4.3), or by the PUC pursuant to Public Utilities Code Section 1202, *et seq.*

4. Assignment of Certain Contracts and Agreements

- 4.1. Upon approval of Railway to operate the Freight Easement by the STB, the current operator will assign to Railway, certain agreements concerning the operation of the Railroad Facilities, including all track agreements, grade crossing agreements, and other operating agreements set forth in Exhibit C hereto (all such agreements hereinafter referred to as the "Railway Agreements"), and (ii) to the Commission, all other agreements relating to the Property, including all easements, licenses, and leases (all such agreements hereinafter referred to as the "Commission Agreements"). For any assigned Railway Agreements that grant third-party rights of access to, or use of, the Freight Easement or Railroad Facilities; Railway will instruct the holders of such agreements to name the Commission as an additional insured on their insurance policies.
- 4.2. Subject to the provisions of Section 2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law or under the Freight Easement, unless first approved by the STB, any new Railway Agreement granting third-party rights of access to, or use of, the Freight Easement or Railroad Facilities, or contemplating alterations thereto, is subject to the Commission's prior written consent. Such Railway Agreements will be documented by Railway using forms approved by the Commission, which forms shall, among other things, include provisions indemnifying the Commission and holding it harmless from any Loss in connection with the exercise of rights under such agreements, and the construction, maintenance, or operation, of any facilities constructed in connection with such agreements.
- 4.3. Railway is not, without the Commission's prior written consent (subject to the provisions of Section 2.3, which prohibit material interference with Railway's Freight

Service rights and obligations under federal law or under the Freight Easement, unless first approved by the STB), to execute any new Railway Agreements affecting the Freight Easement Property or Railroad Facilities for a term exceeding the term of this Agreement.

- 4.4. Railway is not, without the Commission's prior written consent, to terminate or modify any Railway Agreement granting third-party rights of access to, or use of, the Freight Easement or Railroad Facilities, or contemplating alterations thereto.

5. Maintenance and Operation of Railroad Facilities

- 5.1. Initial Rehabilitation and Repair Projects. During Phase I of this Agreement, the Commission agrees to pay for (or cause payment for) repairs to the Freight Easement Property, including all damaged bridges, overpasses, trestles, culverts, and track, necessary to allow Railroad to operate the Freight Easement to MP 7.0. During Phase II of this Agreement, the Commission will pay for (or cause payment for) repairs from MP 7.0 to MP 31.39 (up to Class 1 track classification) within the next three years following grant of the license to provide Transportation Service, provided that if the Commission fails to make the required repairs from MP 7.0 to MP 31.39 within the three years, the requirements for service provided by Section 2.4.1.3(a) will be extended accordingly. After these repairs are complete the Commission shall have no further obligation to maintain or repair the Freight Easement Property or Railroad Facilities.

5.2. Maintenance of Freight Easement Property and Railroad Facilities.

- 5.2.1. Freight Easement Property and Railroad Facilities. Railway, at its expense, shall keep the Freight Easement Property and Railroad Facilities used by Railway (including occasional use, or use for rail car storage or lay down space) in good repair and in a good and safe condition in conformity with applicable law or any Railway Agreement, and in substantially the same condition provided by the Commission. In the event Railway fails to meet this obligation, the Commission has the right but no obligation to correct or cause the correction of the deficiency, after no less than 10 days' written notice to Railway (except in an emergency, whereupon no notice is required) and, if Railway does not correct the deficiency within 10 days, the Commission may bill the Railway and the Railway shall pay the actual cost of the correction within 30 days.
- 5.2.2. Weeds, Trash, Drainage and Graffiti. The parties agree that Railway shall be responsible for: (i) drainage and culvert maintenance and clearance on the entire Property unless a third person or entity is contractually responsible for such maintenance and clearance, and (ii) weed abatement, vegetation management, and trash collection over the Freight Easement Property as required by applicable law and in substantially the same condition provided by the Commission. If the Commission observes a condition that requires maintenance under these requirements or applicable law, Commission will notify Railway through a maintenance request. Railway shall resolve maintenance

requests from the Commission within 30 days unless contested in good faith by the Railway. In the event Railway contests a maintenance request from the Commission, the request shall be submitted for resolution to the Coordination Committee pursuant to Section 11 and, if no resolution is met, the dispute may be submitted to mediation pursuant to Section 20. In the event Railway fails to meet an uncontested obligation, the Commission has the right but no obligation to correct or cause the correction of the deficiency, after no less than 10 days' written notice to Railway (except in an emergency, whereupon no notice is required) and, if Railway does not correct the deficiency within 10 days, the Commission may bill the Railway and the Railway shall pay the actual cost of the correction within 30 days. Railway's obligation to pay shall be secured by the security provided pursuant to Section 5.2.7. The Commission grants Railway a license to enter all portions of the Property as necessary to perform such maintenance; Railway shall be required to repair any damage caused as the result of Railway's performance of any such maintenance. Except as required by applicable law, Railway shall not be responsible for the prevention, removal, or abatement of graffiti wheresoever it may occur. Railway shall also not be responsible for drainage maintenance, weed abatement, vegetation management, or trash collection related to any construction by the Commission (except for Railroad Facilities that Railway is entitled to use), or necessitated by the actions of any third party authorized by the Commission to be on the Property, or caused by any actions, omissions, or situations off or outside of the Property, except to the extent caused by Railway.

- 5.2.3. Slopes, Trees and Other Conditions outside of Freight Easement Property. Railway may, at its option, enter portions of the Property outside the Freight Easement Property to maintain or repair slopes, clear fallen trees and branches, or address other conditions, as necessary to ensure the safety and efficiency of Railway's operations. The Commission grants Railway a license to enter all portions of the Property as necessary to perform such work; Railway shall be required to repair any damage caused as the result of Railway's performance of any such maintenance. The Commission shall have no liability to Railway for maintenance of portions of the Property outside of the Freight Easement Property and Railway's exclusive remedies for damage to the Freight Easement Property or Railroad Facilities shall be limited to those set forth in Sections 5.5.3 and 8.3. However, this section shall not apply to any claims to the extent they result from the negligence or willful misconduct of the Commission or its officers, directors, employees, agents, contractors, or a third party under contract with the Commission, in which case Railway's exclusive remedies are those set forth in Section 2.8.2, 8.3 and 14.2.
- 5.2.4. Scope of Maintenance. For purposes of this section 5.2, the maintenance and repairs to be performed by Railway include, (a) inspections, testing, track profiling, adjustments, lubricating, welding, re-spiking surfacing, tamping, and any other tasks constituting customary and routine maintenance of track structures; (b) repair, renewal, replacement, or other customary and routine work

required to ensure the safety of Railroad Facilities, including compliance with any applicable bridge safety management program regulations that may be promulgated by the Secretary of Transportation pursuant to Public Law 110-432, Section 417, including the regulations set forth in 49 CFR Part 237; (c) weed and brush control and drainage management; and (d) compliance with all mandated reporting. Railway shall not be in default under this Agreement if it does not perform tie replacement programs or upgrades of rail, switches, bridges, or other track material provided that (e) Railway's failure to perform such replacement programs or upgrades does not violate applicable law or Railway's specific maintenance obligations under this Agreement, and (f) Railway uses reasonable diligence to seek outside funding sources for such work. The Commission shall have no responsibility to maintain the trackage, structures, or any other Railroad Facilities except as otherwise specifically required herein.

5.2.5. Concurrently with the execution of this Agreement, the required parties shall execute and deliver to the FRA a written notice of the assignment of track inspection and maintenance responsibilities, and bridge safety management responsibilities, to Railway in accordance with 49 CFR § 213.5(c) and 49 CFR § 237.3. The notice of assignment shall attach a copy of this Agreement.

5.2.6. Limits of Commission Liability. Notwithstanding the limitations on the Commission's maintenance responsibilities set forth in Section 5.2, the Commission shall be responsible for the maintenance of any improvement it constructs on any portion of the Property after completion of its obligations under Section 5.1. As used in this subsection, the term "improvement" excludes improvements made to the Railroad Facilities, unless such improvement is made at the request of a third-party, in which case such third-party shall be responsible for the incremental increase in the maintenance cost thereof. Notwithstanding the foregoing, maintenance responsibility for improvements to public crossings shall be governed by the provisions of Section 3.3.

5.2.7. Security. Railway shall provide a performance bond or alternative security acceptable to the Commission guaranteeing its financial responsibility for the performance of its obligations to provide maintenance of the Freight Easement Property and Railroad Facilities under Section 5.2 and pay all License Fees due under Section 7, in an amount no less than \$160,000, granting the Commission rights as an obligee under the bond or alternative security to cause the performance of these obligations in the event of Railway's failure to do so, after any applicable notice and cure period under the express terms of this Agreement. The exercise of its rights under the bond or alternative security shall not in any way limit the rights of the Commission to terminate this Agreement or any other rights or remedies hereunder or under applicable law.

5.3. Ownership of Track Materials. All track materials installed by Railway as part of the Railroad Facilities shall be of equal or better quality than those track materials existing

at the time of execution of this Agreement, or after completion of rehabilitation and repair projects by the Commission, including the projects described in Section 5.1, and shall become the Commission's property. All materials removed by Railway from the Railroad Facilities and replaced as part of maintenance, repairs, or capital improvements shall, if the decision to remove them was Railway's, become the property of Railway. Railway shall not, without the prior written approval of Commission, remove track materials or other improvements from the Property unless they are replaced as provided in this section. Railway shall keep a written record of track materials and other improvements removed from, or installed upon, the Property and shall provide an updated copy of the record to the Commission on or before the end of each calendar quarter.

5.4. Clearing of Obstructions, Derailments, and Wrecks. Railway shall as soon as practicable clear any obstructions, derailments, and wrecks of railroad equipment on Railroad Facilities.

5.4.1. To the extent that any such obstruction, derailment, or wreck damages the Property, Railway shall as soon as practicable restore the Property to the condition it was in prior to the obstruction, derailment, or wreck.

5.4.2. If Railway fails to comply with the provisions of this section, the Commission may perform the required action and charge Railway the reasonable cost thereof. Notwithstanding the foregoing, the Commission shall not charge Railway for the restoration of any damage caused by any third party to any bridge if in the Commission's reasonable judgment, such damage does not expose the Commission to potential liability to the FRA, PUC, or any other third party, and either (A) such damage does not obstruct or interfere with any roadway or other property or facility used by the Commission or another third party, or (B) Railway abandons the subject portion of the Property under Section 8.3. In addition, the Commission shall not charge Railway for the restoration of any damage caused by the Commission's contractors, or any third party granted access to the Property by specific agreement with the Commission.

5.4.3. Nothing in this section is intended to preclude legal action by Railway or the Commission against any third party causing such obstruction, derailment, or wreck.

5.5. Responsibility for Repair or Replacement.

5.5.1. Damage Caused by Freight Operations. Except as otherwise set forth in this Agreement, Railway will be responsible to repair or replace any damage to the Freight Easement Property or Railroad Facilities caused by, or related to, Railway's operations.

5.5.2. Damage Caused by Commission. Railway will not be responsible to repair or replace any damage to the Freight Easement Property or Railroad Facilities

caused by the Commission, its officers, directors, employees, agents, or contractors.

- 5.5.3. Damage Caused by Acts of God or Other Factors beyond Railway's Control. If any portion of the Freight Easement Property or the Railroad Facilities are damaged or destroyed by flood, fire, civil disturbance, earthquake, earth movement, storm, sabotage, act of God, terrorism, accident or any other event beyond Railway's reasonable control, including damage or destruction caused by third parties, even if said damage or destruction originates outside of the Freight Easement Property, then Railway may (but, except to the extent covered by insurance required under this Agreement, shall not be required to) at no cost or expense to the Commission, (a) repair, or cause to be repaired, the damaged or destroyed portion of the Freight Easement Property or Railroad Facilities; or (b) replace, or cause to be replaced, such portion of the Freight Easement Property or the Railroad Facilities. In the event Railway does not elect to repair or replace the damaged or destroyed portion of the Freight Easement Property or Railroad Facilities, Railway shall reasonably cooperate, at its own cost, with the Commission to seek funding and cause the repair or replacement of the damaged or destroyed Railroad Facilities, or otherwise to suspend or abandon Transportation Service or Freight Service over such portion of the Property as the parties mutually agree is necessitated by the damage or destruction.

6. Construction, Relocation, or Removal of Railroad Facilities

6.1. By the Commission.

- 6.1.1. The license herein granted is subject to the Commission's needs and requirements to improve and use the Property. Subject to Railway's rights under this Agreement, the Commission, at its sole cost and expense, may add to or remove any portion of the Railroad Facilities, or change or relocate them to new locations as reasonably designated by the Commission, whenever, in the furtherance of the Commission's needs and requirements, the Commission finds such action to be necessary.
- 6.1.2. In the course of performing such work, the Commission may not materially reduce, or otherwise materially interfere with, Railway's rights and operations under this Agreement or Railway's Freight Service rights and obligations under federal law or rights under the Freight Easement, unless first approved by the STB. The Commission shall to the extent possible notify Railway as soon as practicable of any such planned or actual interference and take all practicable measures to minimize any such interference.
- 6.1.3. Railway shall in such cases provide the Commission with a fixed-price quote for performing any related work, and the Commission shall have the option of accepting Railway's quote and having Railway perform the work, performing the work itself, or having another qualified rail contractor perform such work. If the Commission selects a third-party contractor, the

contractor shall execute Railway's Right of Entry Agreement (a copy of which is attached as Exhibit D).

- 6.1.4. The Commission shall have the right to salvage, stockpile, or otherwise dispose of any Railroad Facilities removed pursuant to this section; provided, however, that if the removed Railroad Facilities are reusable elsewhere on the Freight Easement Property, then Railway shall have the right to so reuse them. Any Railroad Facilities not so reused on the Freight Easement Property shall be disposed of or otherwise removed at the Commission's expense.
- 6.1.5. All such work performed, and any installation of Railroad Facilities, shall be in conformance with all applicable laws. If the Commission relocates any portion of the tracks used for Freight Service, the centerline of the Freight Easement Property shall, upon completion of the relocation work, be deemed to have been modified to coincide with the centerline of the realigned tracks.
- 6.2. By Railway. Railway may, at its cost and expense, modify or improve the Freight Easement Property and Railroad Facilities as needed to accommodate its Freight Service or Transportation Service; provided, however, that Railway first obtains the Commission's written approval of Railway's plans for such modifications and improvements. Subject to the provisions of Section 2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law, or rights under the Freight Easement, unless first approved by the STB, Railway's modification or improvement of the Freight Easement Property and Railroad Facilities will be coordinated with existing or future legal public uses of the Property that the Commission may authorize. Railway may, upon the termination of this Agreement or upon the abandonment of any applicable section of the Freight Easement Property or portion of the Railroad Facilities, remove any modifications or improvements to such Freight Easement Property or Railroad Facilities that were paid for by Railway, that do not constitute any repair or replacement to such Freight Easement Property or Railroad Facilities, and that have not become fixtures to such Freight Easement Property or Railroad Facilities.
- 6.3. The Commission understands that Railway requires locations outside of the Freight Easement Property at which to store and maintain equipment and materials necessary for Railway's Freight Operations. The parties agree that Railway will need to identify and construct additional maintenance and storage locations on the Property, which Railway may do as needed, subject to applicable law and the Commission's prior written consent (subject to the provisions of Section 2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law, unless first approved by the STB).
- 6.4. The terms, conditions, and stipulations expressed in this Agreement as to the Freight Easement Property and Railroad Facilities shall apply to the Freight Easement Property and Railroad Facilities as they may at any time be expanded, added to, modified, changed, or relocated.

7. License Fees

- 7.1. For consideration of the rights granted under this Agreement, Railway shall pay the

Commission the following fees as calculated on a quarterly basis:

7.1.1. Freight Service:

- 7.1.1.1. First 750 carloads per quarter: 3% of Railway's handling revenue for such carloads.
- 7.1.1.2. Any additional carloads per quarter: 5% of Railway's handling revenue for such carloads.
- 7.1.1.3. Storage: Fifty percent (50%) of Railway's storage revenue in excess of \$2.00 per car per storage day per quarter.

7.1.2. Temporary Use of Laydown Space. Railway may from time to time make arrangements with a temporary shipper by rail for the use of otherwise unused laydown space (open space outside of the Freight Easement Property next to railroad track). The parties agree that Railway will need to identify such temporary laydown locations on the Property, which Railway may do as needed, subject to applicable law and the Commission's prior written consent. Railway shall also notify the Commission of the expected duration of each such use. If subsequently the Commission reasonably objects to any specific use of laydown space by Railway or its shipper, the Commission will make available an alternative laydown location reasonably acceptable to Railway and shipper, and Railway shall as soon as practicable discontinue that use of such laydown space and move to the alternative laydown location. Railway shall, in addition to the license fees set forth above, pay the Commission 20% of all revenue (if any) received by Railway by such shippers for such use of such laydown space.

7.1.3. Transportation Service: 3% of passenger ticket revenue on ticket revenue up to \$500,000 per quarter, plus 5% of passenger ticket revenue on ticket revenue over and above \$500,000 per quarter.

7.2. Railway shall, within 60 days following the end of each calendar quarter, determine the amounts payable to the Commission arising from the preceding calendar quarter and shall provide the Commission with a statement describing all amounts due the Commission during the quarter. Railway shall also, upon reasonable request from the Commission, make available for inspection and copying all documents and receipts upon which such fees are based.

7.3. Subject to Section 7.4, Railway shall, within 60 days following the end of each calendar quarter, pay the Commission all amounts due the Commission for the prior calendar quarter. Railway's obligation to pay license fees is specifically acknowledged to be secured by the security required under Section 5.2.7.

7.4. The requirement to pay the license fees for Freight Service as set forth in Section 7.1.1 will begin with the first quarter after the first anniversary of Phase I of this Agreement and the requirement to pay the license fees for Transportation Service as set forth in Section 7.1.3 will begin with the first quarter after the first anniversary of Phase II of this Agreement.

8. **Term and Termination**

8.1. This Agreement shall become effective when fully executed and delivered to the parties in accordance with Section 27.4 and shall continue in full force and effect for a period of 10 years unless otherwise terminated as provided herein.

8.2. Termination:

8.2.1. Default:

8.2.1.1. If Railway does not provide regular Freight Service, without the Commission's prior written approval, the Commission may forthwith terminate this Agreement by written notice. As used in this Section 8.2.1.1, the term "regular Freight Service" means revenue train operations for Freight Service consisting of a minimum of (i) 50 freight cars during the first full calendar year of service (beginning January 1); (ii) 150 freight cars during the second calendar year of service; (iii) 200 freight cars during the third calendar year of service; and (iv) 250 freight cars during the fourth calendar year of service and thereafter; or

8.2.1.2. If Railway does not provide regular Transportation Service during Phase II, without the Commission's prior written approval, the Commission may forthwith terminate this Agreement by written notice. As used in this Section 8.2.1.2, the term "regular Transportation Service" means revenue thematic excursion operation, consisting of a minimum of (i) one excursion during the first full calendar year of service after the third anniversary of the receipt of the license to begin Transportation Service (Phase II); (ii) two excursions during the second calendar year of service after the third anniversary of Phase II; and (iii) five excursions during the third year of service after the third anniversary of Phase II and each year thereafter during the term; provided, that if the Commission fails to make required repairs under Section 5.1 during the first three years of Phase II, the commencement date for "regular Transportation Service" as defined herein shall be extended accordingly. For the avoidance of doubt, the Commission may not terminate this Agreement pursuant to this Section 8.2.1.2 if it has not approved the non-exclusive license to Railway to use the Freight Easement Property and Railroad Facilities to provide Transportation Service on the Freight Easement Property (Phase II).

8.2.1.3. Railway remains in default in its performance of any covenant or agreement contained herein for a period of 30 days after written notice from the Commission to Railway specifying such default, the Commission may, at its option, (i) cure the default and, at its option, invoice Railway for the cost thereof, withhold the cost thereof from any amount otherwise due to Railway, or call any available bond or security for the payment thereof; or (ii) forthwith terminate this Agreement by written notice; provided however, that if such default cannot reasonably be cured within 30 days after such notice, the

Commission may not terminate this Agreement provided that Railway begins to cure the default within the 30-day notice period and proceeds diligently to complete such cure.

- 8.2.2. Upon termination of this Agreement, whether through the expiration of the term or by the Parties as contemplated herein, Railway shall cooperate, at its expense, with the transfer or abandonment of Freight Service as requested by the Commission; provided, that no termination shall be effective unless and until the STB has approved such transfer or abandonment.
- 8.2.3. The parties acknowledge that initiation of Freight Services by Railway will require Railway to invest substantial funds in anticipation of future revenues from both Phase I (Freight Service) and Phase II (Transportation Service) service. In recognition of Railway's investment, if after completion of the Study and prior to the grant of a license to provide Transportation Service (Phase II), the Commission determines that the Freight Easement Property should not be used for Freight Service from MP 7.0 to MP 0.0, the Commission may terminate this Agreement subject to the provisions of Section 8.2.2, and upon approval of the abandonment by the STB, pay Railway \$300,000.
- 8.2.4. The Railway can terminate this Agreement if by one hundred and twenty (120) days after completion of the Study, the Commission has not granted a license pursuant to Section 2.4.1 hereof to provide Phase II Transportation Service over all of the Freight Easement Property.
- 8.2.5. The Commission also agrees that it shall not terminate this Agreement due to Railway's failure to use the rights herein granted with respect to any segment of the Freight Easement Property or Railroad Facilities that is necessary to support any Freight Service over any regularly-used portion of the Freight Easement Property north of any unused segment.

8.3. Abandonment. Railway may at any time, in its sole and absolute discretion, immediately and without any liability to the Commission (except as expressly provided herein, including but not limited to Section 8.5): (a) abandon Transportation Service over all or such portion of the Property as Railway deems appropriate, and (b) seek STB approval to abandon Freight Service over all or such portion of the Property as Railway deems appropriate. In the event that Railway seeks to abandon Freight Service, Railway shall provide the Commission with 90 days advance notice of Railway's intention and shall, at its cost, cooperate with the Commission's efforts to take upon itself all Freight Service operations relating to the Property, to appoint another person or entity to do so, or to rail bank any portion of the Property as to which Railway intends to abandon Freight Service. Nothing in this Agreement is intended by the parties to limit these rights on the part of Railway and the Commission agrees that it will cooperate with Railway, at Railway's cost, in Railway's efforts to so abandon any Transportation Service or Freight Service. No such abandonment, transfer of Freight Service operations, or rail banking, shall be effective unless and until the STB has issued its approval thereof. In addition, this Agreement shall not terminate with respect to all or any portion of the Property unless and until the STB has issued such approval.

- 8.3.1. Any abandonment proceedings instituted by Railway shall comply with the

abandonment provisions set forth in the Freight Easement, including the railbanking/OFA provisions thereof.

8.3.2. To the extent the STB approves abandonment or transfer of Freight Service over all or any part of the Freight Easement Property or Railroad Facilities, this Agreement and any other rights and obligations of Railway to the Commission, shall, at the time of consummation of such abandonment or transfer, terminate with respect to any abandoned or transferred portions of the Freight Easement Property and Railroad Facilities. Upon the effective date of such abandonment, Railway shall (i) assign to the Commission or new operator, as applicable, any Railway Agreements affecting the abandoned or transferred portions of the Freight Easement Property and Railroad Facilities, (ii) quitclaim the abandoned portion of the Freight Easement to the Commission or new operator, as applicable, and (iii) execute any additional documents reasonably necessary to effectuate the purpose and intent of this Agreement.

8.4. Upon the effective date of termination of this Agreement, Railway shall, if so requested by the Commission, (i) assign to the Commission all Railway Agreements, (ii) quitclaim the Freight Easement to the Commission, and (iii) execute any additional documents reasonably necessary to effectuate the purpose and intent of this Agreement.

8.5. **LIQUIDATED DAMAGES.** The parties each acknowledge that, in the event Railway exercises its right to abandon Freight Service over the entirety of the Freight Easement and the Commission is unable, despite its reasonable efforts, to obtain a new operator to which Freight Service is transferred by the STB, then determining the resulting damages would be impracticable or extremely difficult, because the Commission has undertaken a commitment to operate Freight Service on the Freight Easement Property as a condition of receipt of funds for purchase of the Property and is incapable of acting as a common carrier itself. Therefore, the parties agree that, in the event Railway exercises its right to abandon Freight Service over the entirety of the Freight Easement and the Commission is unable, despite its reasonable efforts, to obtain a new operator to which Freight Service is transferred by the STB, Railway shall be liable to the Commission in the amount of \$300,000 in liquidated damages and not as a penalty. Notwithstanding the foregoing, Railway will not be liable for any liquidated damages in abandoning Freight Service in connection with (i) the expiration of the term of this Agreement, (ii) the termination of this Agreement by the Commission pursuant to Section 8.2.1 or 8.2.3, or (iii) the termination of this Agreement by Railway pursuant to Section 8.2.4. In the event the Railway exercises its right to abandon Freight Service and has paid the amount due to the Commission pursuant to this Section 8.5, Commission shall not be entitled to any further damages of any kind, whether direct, special or consequential.

9. **Insurance.** Railway and the Commission shall obtain the insurance set forth below, to be kept in force during the life of this Agreement. All insurance policies must be written by a reputable insurance company reasonably acceptable to the Commission, or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in California. The limits of insurance coverage required under this section shall be increased every five years during the term hereof and any extended term based on any increases or decreases in the Producer Price Index, or any successor index.

9.1. **Railway Insurance:** Railway shall, provide and procure at its own cost and expense Railroad

Liability insurance and Worker's Compensation insurance (to the extent required by law).

- 9.1.1. The liability insurance policy providing bodily injury, including death, personal injury and property damage coverage shall have a limit of not less than \$25 million each occurrence and an aggregate limit of not less than \$50 million. The self-insured retention may not exceed \$250,000 (as that value is periodically adjusted by the Consumer Price Index from and after the effective date of this Agreement.) Prior to the execution of this Agreement, Railway shall provide the Commission with a certificate of insurance on a standard ACORD form, or other form reasonably acceptable to the Commission, substantiating the required coverages and limits set forth herein. Upon request by the Commission, Railway shall immediately furnish a complete copy of any policy required hereunder, including all endorsements, with said copy certified by the insurance company to be a true and correct copy of the original policy.
- 9.1.2. The liability insurance policy must include the Commission as an "additional insured" and the property insurance policy shall name the Commission as a loss payee.
- 9.1.3. Required Provisions: The insurance policy shall contain, or be endorsed to contain, the following provisions:
 - 9.1.3.1. For any claims related to this Agreement, Railway's insurance coverage shall be primary insurance as respects the Commission, its directors, officers, employees, and agents and any insurance or self-insurance maintained by the Commission, its directors, officers, employees, or agents, shall be in excess of Railway's insurance and shall not contribute to it. However, this section shall not apply to any claims that result from the sole negligence or willful misconduct of the Commission or its officers, directors, employees, agents, or invitees; as to any such claim, the Commission's insurance shall be primary, and any insurance or self-insurance maintained by Railway, its directors, officers, employees, or agents, shall be in excess of Commission's insurance and shall not contribute to it.
 - 9.1.3.2. Railway shall comply with all reporting or other provisions of the policies, as necessary to maintain coverage required hereunder, including coverage to be provided to the Commission, its directors, officers, employees, or agents. Railway shall notify Commission in writing of any claims submitted relating to the Property under any policy required under this Agreement.
 - 9.1.3.3. Railway's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
 - 9.1.3.4. Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except after 30 days' prior written notice by

certified mail, return receipt requested, has been given to the Commission.

9.1.4. Workers' Compensation insurance shall cover any statutory liability as determined to be applicable by the compensation laws of the State of California with a limit of at least \$1 million. The Railway represents and the Commission understands that all railroad workers are subject to the FEOLA and are not covered by Worker's Compensation insurance.

9.1.5. The fact that insurance is obtained by Railway or by the Commission on behalf of Railway will not be deemed to release or diminish Railway's liability, including liability under the indemnity provisions of this Agreement. Damages recoverable by the Commission from Railway or any third party will not be limited by the amount of the required insurance coverage.

9.2. Commission Insurance: The Commission shall, at its own cost and expense, provide and procure such Commercial General Liability ("CGL") and Workers' Compensation insurance as it deems necessary to cover its obligations under this Agreement.

10. **Notices.** All correspondence, notices, and other papers shall be delivered either in person or by certified or registered mail, postage prepaid, to the parties hereto at the following addresses:

If to Railway:

St. Paul & Pacific Railroad, LLC
21778 Highview Avenue
Lakeville, MN 55044

If to Commission:

Executive Director
Santa Cruz County Regional Transportation Commission
1523 Pacific Avenue Santa Cruz, CA 95060 Fax: 831-460-3215

11. **Coordination Committee.**

11.1. In order to ensure the safety and efficiency of all operations on the Property, the parties shall establish a Coordination Committee. The Coordination Committee shall be composed of two representatives from each party (and any other persons or entities as the parties may mutually agree) and shall (a) serve as a forum to coordinate the parties' activities and resolve questions or disputes (but only to the extent the parties' representatives have been so authorized), and (b) be responsible to make recommendations to the parties. The Coordination Committee shall meet on a regular schedule to be determined by the parties, but may be convened for special meetings by either party upon 10 days' written notice to the other party. Following each meeting, the Coordination Committee shall deliver written minutes of such meeting to Railway and the Commission.

11.2. Railway shall comply with all reasonable requests of the Commission for representatives of Railway to attend public meetings organized by the Commission to provide non-confidential information about Railway's operations under this Agreement.

12. Claims and Liens for Labor and Material

- 12.1. Railway agrees to pay in full for all materials joined or affixed to the Property, to pay in full all persons who perform labor upon the Property, and not to permit or suffer any mechanic's or materialman's lien of any kind or nature to be enforced against the Property, as to any work done or materials furnished thereon by Railway or at Railway's request. Railway shall indemnify, hold harmless and defend Commission (with counsel reasonably acceptable to Commission) against and from any and all liens, claims, demands, costs and expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed, or materials furnished.

13. Property Taxes

- 13.1. So far as it lawfully may do so, the Commission shall assume, bear, and pay all property and other taxes and assessments of whatsoever nature or kind (whether general, local, or special) levied or assessed upon or against the Property, excepting taxes levied upon and against any Freight Easement Property or Railroad Facilities. Railway shall assume, bear, and pay all property and other taxes and assessments of whatsoever nature or kind (whether general, local, or special) levied or assessed upon or against any Freight Easement Property or Railroad Facilities for which it has a license to operate, including possessory interest taxes under California Revenue and Taxation Code section 107 *et seq.*, unless applicable law otherwise excuses payment of taxes due to the Commission's ownership of the Property, the Freight Easement Property, or the Railroad Facilities.

14. Indemnity

- 14.1. Railway shall indemnify, defend and hold harmless the Commission from any Loss which is due to or arises from: (a) Railway's operation, maintenance, repair, or use of the Freight Easement Property, Railroad Facilities, any appurtenances thereto, or any part thereof; (b) Railway's provision of Freight Service or Transportation Service; or (c) Railway's failure to comply with or perform any of the terms and conditions set forth in this Agreement; except to the extent that the Loss is caused by the negligence or willful misconduct of the Commission, its officers, agents, or employees, or a breach of an express material warranty of the Commission. The provisions of this section shall survive the termination or expiration of the term of this Agreement for a period of two years.
- 14.2. The Commission shall indemnify, defend and hold harmless Railway from any Loss to the extent caused by or arising from the negligence or willful misconduct of the Commission, its officers, agents, employees, and contractors. For purposes of this Section 14.2 only, the term "Loss" is limited to any loss, damage, claim, demand, action, cause of action, penalty, fine, payment, cost, liability, or expense of whatsoever nature, including court costs and reasonable attorneys' fees, resulting from or related to: (a) any injury to or death of any person, including officers, agents, and employees of the Commission or Railway; or (b) damage to or loss or destruction of Railway's equipment, rolling stock and any items being transported on behalf of Railway's customers. Any Loss related to damage to or destruction of the Freight Easement Property or Railroad Facilities is subject to the provisions of Section 2.8. The provisions of this section shall survive the termination or expiration of the term of this Agreement for a period of two years.

- 14.3. Each party's obligations to the other under Sections 14.1 and 14.2 respectively are subject to the following conditions: (a) the party seeking indemnification (the "Indemnified Party") shall, following Indemnified Party's discovery of a Loss for which Indemnified Party seeks indemnification, or of circumstances that may reasonably result in such a Loss, promptly deliver notice to the other party (the "Indemnifying Party") describing such Loss or circumstances, (b) the Indemnified Party shall make reasonable efforts to mitigate the effect of such Loss or circumstances, (c) the Indemnified Party shall give the Indemnifying Party the opportunity to control the defense against such Loss, and shall not compromise or settle such Loss without the Indemnifying Party's prior written consent, and (d) in no event shall either party be liable to the other for consequential, incidental, indirect or punitive damages, even if notified of the possibility of such damages, unless such damages are included in any third-party claim against the Indemnified Party.
15. **Removal of Railway Equipment, Personnel, and Property upon Termination of Agreement.** Prior to, or upon, the termination of this Agreement, Railway shall, at its sole expense, remove its equipment, personnel, and other property from the Freight Easement Property and Railroad Facilities and shall restore, to the Commission's reasonable satisfaction, such portions of the Freight Easement Property and Railroad Facilities used by Railway to as good a condition as they were after the completion of rehabilitation and repairs by the Commission, including the projects specified in Section 5.1, if completed (or, if the Commission does not complete rehabilitation and repairs, as good a condition as they were in at the beginning of this Agreement), excepting normal wear and tear. If Railway fails to do the foregoing, the Commission may do such work at the cost and expense of Railway. Railway may not remove any property, including the Railroad Facilities, that is or becomes the property of the Commission under this Agreement.
16. **Hazardous Substances and Wastes**
- 16.1. Railway shall not be liable or responsible for any Hazardous Materials present on, in, or under the Property, or other problems relating to the Property, prior to the commencement date of its operations on the Freight Easement Property, except to the extent Railway's activities exacerbate the contamination of any such pre-existing Hazardous Materials.
- 16.2. Railway shall comply with all applicable laws in its occupancy, operation, and maintenance of the Freight Easement Property and Railroad Facilities. Without first obtaining the Commission's written permission (which may be withheld in the Commission's sole reasonable discretion), Railway shall not treat or dispose of Hazardous Materials on the Freight Easement Property or Railroad Facilities. Railway shall not release any Hazardous Materials on or at the Freight Easement Property or Railroad Facilities, including through any drainage or sewer systems. Railway assumes all responsibility for the investigation and cleanup of any such release or exacerbation by Railway and shall indemnify, defend, and hold harmless the Commission and its property, its officers, agents, and employees, for all costs, including reasonable environmental consultant and reasonable attorneys' fees, and claims resulting from or associated with any such release or exacerbation by Railway. Railway shall assume all responsibility for and shall indemnify, defend, and hold harmless Commission against all costs and claims associated with a release or leak of Hazardous Materials, or exacerbation of pre-existing Hazardous Materials, occurring between the commencement date of its operations on the Freight Easement Property, and the expiration or sooner termination of this Agreement, and related to Railway's use of the

Freight Easement Property and Railroad Facilities, unless such event was caused by the sole negligence or willful misconduct of the Commission, its officers, employees, or agents.

- 16.3. Railway shall not install any above-ground or underground storage tanks without the Commission's prior written consent, which consent may be granted or withheld in Commission's sole and absolute discretion. If such consent is granted, Railway shall obtain any necessary permits, notify the proper authorities, and provide the Commission with copies of any such permits and notifications. Railway shall assume all responsibility for and shall indemnify, defend, and hold harmless the Commission against all costs and claims associated with a release or leak of the contents of any such tank occurring between the commencement date of its operations on the Freight Easement Property, and the expiration or termination of this Agreement, unless such event was caused by the sole negligence or willful misconduct of the Commission, its officers, employees, or agents.
- 16.4. The Commission understands and acknowledges that the regular operation and maintenance of railroad equipment and tracks involve the storage, use, and release of *de minimus* amounts of Hazardous Materials, including petroleum products, creosote, and chromated copper arsenate. The Commission agrees that Railway shall not be liable or responsible for the *de minimus* release of any such Hazardous Materials, unless (i) such release violates applicable law, or (ii) the Commission is otherwise entitled to defense and indemnity under Section 14.1.
- 16.5. If Railway knows, or has reasonable cause to believe, that any Hazardous Materials have come to be located under or about the Freight Easement Property or Railroad Facilities, other than as specifically provided herein or as previously consented to in writing by the Commission, Railway shall immediately give the Commission written notice thereof, together with a copy of any statement, report, notice, registration, application, permit, business plan, license, claim, action, or proceeding given to or received from any governmental authority or private party concerning the presence, spill, release, discharge of, or exposure to, such Hazardous Materials.
- 16.6. This Section 16 shall continue in full force and effect regardless of whether this Agreement is terminated pursuant to any other provision or the Freight Easement Property and Railroad Facilities are abandoned and vacated by Railway.
17. **Trespassers and Dangerous Conditions.** Railway shall not be required to take any action or incur any expense (including posting signage or warnings, providing fencing or other security) as to or against trespassers on the Property, or invitees of the Commission, other than to promptly notify local law enforcement and the Commission concerning any trespassers observed on the Property by Railway personnel. If Railway becomes aware of any dangerous conditions on or about the Property, Railway shall promptly notify the Commission of such conditions.
18. **Waivers.** The failure of either party hereto to enforce any of the provisions of this Agreement, or to enforce any right or option which is herein provided, shall in no way be construed to be a waiver of such provision(s) as to the future, nor in any way to affect the validity of this Agreement or any part hereof, or the right of either party to thereafter enforce each and every such provision and to exercise any such right or option. No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach.

19. **Consent.** Unless expressly provided to the contrary elsewhere in this Agreement, whenever the consent, approval, judgment, or determination (collectively, "consent") of a party is required or permitted under this Agreement, the consenting party shall exercise good faith and reasonable judgment in granting or withholding such consent. No party may unreasonably withhold or delay its consent; except as otherwise expressly provided herein, consent shall be deemed to have been withheld if a party fails to consent to the other party within 30 days of having been given written notice of the other party's intention to take any action as to which consent is required or permitted.
20. **Non-binding Mediation**
- 20.1. If at any time a question or controversy shall arise between the parties hereto in connection with this Agreement and upon which the parties cannot agree, such question or controversy shall be submitted to a single mediator within 20 days after written notice by one party to the other party of its desire for mediation. The parties shall in good faith consult to select a mutually acceptable mediator. The mediator so selected shall be a person with at least one-year of exposure to the concepts of railroad operations and maintenance.
- 20.2. Upon selection of the mediator, said mediator shall with reasonable diligence determine the questions as disclosed in said notice of demand for mediation and shall give both parties reasonable notice of the time and place of any mediation. Until the completion of mediation, performance under the Agreement shall continue in the manner and form existing prior to the rise of such question.
- 20.3. The compensation, cost, and expenses of the mediator shall be paid in equal shares by the parties.
21. **Entire Agreement.** This document, and the exhibits attached hereto, constitute the entire agreement between the parties, all oral agreements being merged herein, and supersedes all prior representations, agreements, arrangements, understandings, or undertakings, whether oral or written, between or among the parties relating to the subject matter of this Agreement that are not fully expressed herein.
22. **Modification to Agreement.** The provisions of this Agreement may be modified at any time by agreement of the parties hereto, provided such modification is in writing and signed by all parties to this Agreement. Any agreement made after the date of this Agreement and related to the subject matter contained herein shall be ineffective to modify this Agreement in any respect unless in writing and signed.
23. **No Assignment Absent Consent.** Except as specifically provided in this Agreement, Railway shall not assign this Agreement, in whole or in part, or any rights herein granted, without the Commission's prior written consent.
24. **Successors and Assigns.** Subject to the provisions of Section 23, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, and assigns.
25. **Venue and Choice of Law**

- 25.1. Any and all disputes, controversies, or claims arising out of, relating to, or in connection with this Agreement shall be instituted and maintained in a competent court in Santa Cruz County, California, with regard to claims arising under California law, and Santa Clara County, with regard to claims arising under Federal law, and the parties hereby consent to the jurisdiction of any such court and to service of process by any means authorized under California law.
- 25.2. This Agreement shall be governed, construed, and enforced in accordance with the laws of the State of California, without reference to its conflicts of laws provisions. The prevailing party in any claim or action arising out of or connected with this Agreement shall be entitled to recover all reasonable attorneys' fees and related costs, in addition to any other relief that may be awarded by any court or other tribunal of competent jurisdiction.
26. **Acts of God and Other Disruptions of Service.** Neither party shall be deemed to be in default of this Agreement if any failure to meet any condition or to perform any obligation or provision hereof is caused by, a result of, or due to, directly or indirectly, forces beyond its control, including, without limitation, acts of God, natural disasters, atmospheric disturbance, earthquake, fire, flood, tornado, typhoon, tide, tsunami, lightning, storms, soil subsidence, landslides, rock slides, volcanic activity, governmental action or inaction, change of law or regulation, nuclear or chemical contamination, pressure waves from devices travelling at supersonic speeds, strikes, boycotts or other labor disturbances, labor shortage, plague, epidemic, quarantine, riots, invasion, demonstrations or other civil disturbances, sabotage, explosions, insurrections, war (declared and undeclared), terrorism, or threats of terrorism; provided, however, that performance shall only be excused for as long as the disruption persists and any delay resulting therefrom.
27. **Miscellaneous**
- 27.1. In the event that any of the provisions of this Agreement are held by a court or other tribunal of competent jurisdiction to be invalid or unenforceable, the remaining portions hereof shall remain in full force and effect and any invalid or unenforceable provisions shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed to the extent necessary to make such provisions valid and enforceable. Without limiting the generality of the foregoing, if the requirement in Section 5.2 that Railway comply with applicable bridge safety management program regulations (under Public Law 110-432, Section 417) is held to be a non-delegable duty of the Commission, the Commission may, at its option, (i) undertake this obligation and charge Railway for the cost thereof, or (ii) terminate this Agreement.
- 27.2. Each party has participated in negotiating and drafting this Agreement so if an ambiguity or a question of intent or interpretation arises, this Agreement is to be construed as if the parties had drafted it jointly, as opposed to being construed against a party because it was responsible for drafting one or more provisions of this Agreement.
- 27.3. Each party acknowledges that the officer executing this Agreement has the authority to enter into this Agreement on behalf of the party and in so doing is authorized to bind the party on whose behalf he is signing, to the terms and conditions of this Agreement.

- 27.4. This Agreement may be executed in one or more counterparts and by facsimile signature, each of which shall be deemed an original, but all of which together constitute one and the same instrument.

In witness whereof, the parties hereto have caused this Agreement to be executed as of the date first herein written.

ST. PAUL & PACIFIC RAILROAD, LLC

By:

James L. Thornton
James L. Thornton, Managing Dir. - Legal; Secretary

SANTA CRUZ COUNTY REGIONAL
TRANSPORTATION COMMISSION

By:

George A. Dondero II
George Dondero, Executive Director

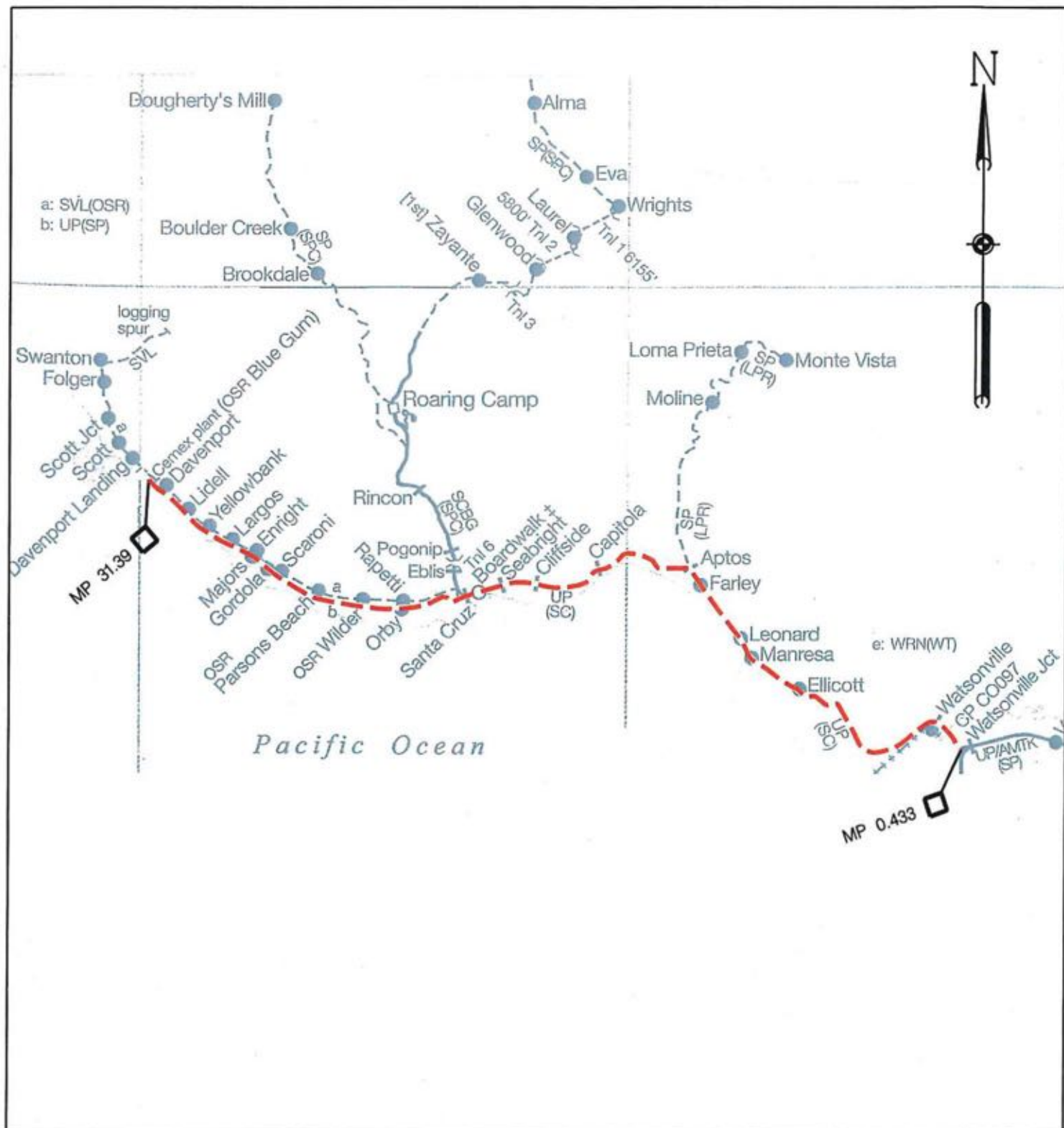
Approved as to form

By:

T. Brooke Miller
T. Brooke Miller, RTC Legal Counsel

EXHIBIT A

Map of Railroad Facilities



NOT TO SCALE

LEGEND

LINE TO BE LEASED SHOWN
MP 0.433 - 31.39



EXHIBIT "A"

UNION PACIFIC RAILROAD CO.

TO ACCOMPANY AGREEMENT WITH
SIERRA NORTHERN RAILWAY
WATSONVILLE JCT - DAVENPORT, CA.
M.P. 0.433 - 31.39+- SANTA CRUZ SUB.
SP CA V72 /1-6 & V89 /1-7
REAL ESTATE DEPARTMENT OMAHA NE.
FILE #1728-03 DATE: 11-2-2009 T.D.A.

EXHIBIT B

[RESERVED]

EXHIBIT C

Railway Agreements

Exhibit C: Railway Agreements																	
Assigned by U.P.R.R. REAL ESTATE DEPARTMENT																	
MILE POST NO. 0.433																	
FOLDER NO. 0172803																	
PROJECT	AUDIT	FOLDER	# of FNET	LEG STAT	PARTY NAME	PURPOSE	MANAGER	COUNTY	CITY	ST	SUBDV	MP START	ANNUAL AMT	DISPOSITION	CONTAINED		
186878	207416	158035	1	Active	CITY OF WATSONVILLE	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	WATSONVILLE	CA	Mojave	102.62	\$0	Assigned	Totally		
190837	202098	161195	1	Active	SANTA CRUZ CITY OF	Warning Devices - Public Roadway	Paul G. Farrell	Santa Cruz	SANTA CRUZ	CA	SANTA CRUZ BRANCH	119.4	\$0	Assigned	Totally		
200142	S155932		1	Active	APTOS SEASCAPE CORP	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	APTOS	CA	SP Route Code EC	111.04	\$0	Assigned	Totally		
200154	S157723		1	Active	SANTA CLARA COUNTY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	APTOS	CA	SP Route Code EC	111	\$0	Assigned	Totally		
200156	S156717		1	Active	SANTA CRUZ COUNTY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	APTOS	CA	SP Route Code EC	113.7	\$0	Assigned	Totally		
200157	S157786		1	Active	SANTA CRUZ COUNTY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	APTOS	CA	SP Route Code EC	108	\$0	Assigned	Totally		
203028	S158150		1	Active	SANTA CRUZ CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	ORBY	CA	SP Route Code EL	81.4	\$0	Assigned	Totally		
203789	S163007		1	Active	SANTA CRUZ PORT DISTRI	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	SEABRIGHT	CA	SP Route Code EC	119.09	\$0	Assigned	Totally		
206269	S032513	250763	1	Active	COUCH DISTRIBUTING CO INC	Track: Industry Track Agreement	John Herdzina	Santa Cruz	WATSONVILLE	CA	SP Route Code EC	103.1	\$0	Assigned	Totally		
210408	S189267		1	Active	SANTA CRUZ COUNTY OF	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	CLIFFSIDE	CA	SP Route Code EC	118.1	\$0	Assigned	Totally		
211518	S012360		1	Active	TOBEYS RASP SERVICE INC	Track	John Herdzina	Santa Cruz	SANTA CRUZ	CA	SP Route Code EL	80.7	\$0	Assigned	Totally		
231292	S194780		2	Active	RESETER, ANTHONY P / PILO, MARY	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	WATSONVILLE	CA	SP Route Code EC	102	\$0	Assigned	Totally		
235323	S191872		1	Active	TRESTLE BEACH ASSOCIATES	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	APTOS	CA	SP Route Code EC	109.6	\$0	Assigned	Totally		
238757	S182045		1	Active	CALIFORNIA UNIVERSITY REGENTS	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	ORBY	CA	SP Route Code EL	81.8	\$10	Assigned	Totally		
239770	S161499		1	Active	SULLIVAN, R. & A.	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	APTOS	CA	SP Route Code EC	109.07	\$10	Assigned	Totally		
245617	S171658		1	Active	GARCIA, R.L.	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	CAPITOLA	CA	SP Route Code EC	115.6	\$10	Assigned	Totally		
245622	S212398	206085	1	Active	HOLCOMB CORPORATION	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	APTOS	CA	SP Route Code EC	110.54	\$134.98	Assigned	Totally		
252817	S157272		1	Active	LORENZI, G,B,LO & ZEIH, K	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	MAJORS	CA	SP Route Code EL	86.51	\$10	Assigned	Totally		
253187	S184589		1	Active	SANDOVAL SALVADOR	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	ORBY	CA	SP Route Code EL	80.2	\$0	Assigned	Totally		
256900	S181065		1	Active	SANTA CRUZ COUNTY CA	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	CLIFFSIDE	CA	SP Route Code EC	117.1	\$0	Assigned	Totally		
256902	S192311		1	Active	SANTA CRUZ COUNTY CA	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	APTOS	CA	SP Route Code EC	112.81	\$0	Assigned	Totally		
257860	S211909	181663	1	Active	SANTA CRUZ CITY OF	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	SANTA CRUZ	CA	SP Route Code EC	120.41	\$80	Assigned	Totally		
260304	S708852	195115	3	Active	CASCADE REFRIGERATED NORTHERN CALIF., INC.	Track: Track Lease (Non-Haz)	John Herdzina	Santa Cruz	WATSONVILLE	CA	SP Route Code EC	102.01	\$2,160	Assigned	Totally		
367101	207254	58589	1	Active	MARTINELLI & COMPANY	Crossing - Private Roadway	John S. Hertzler		SYSTEM	CA		0	\$130.48	Assigned	Totally		
410634	S015548	250762	2	Active	DEL MAR FOOD PRODUCTS CORPORATION	Track: Industry Track Agreement	John Herdzina	Santa Cruz	WATSONVILLE	CA		103.1	\$0	Assigned	Totally		
412823	S000771		2	Active	PISTA, B.	Track	John Herdzina	Santa Cruz	WATSONVILLE	CA			\$0	Assigned	Totally		
446570	S017462		2	Active	SANTA CRUZ COUNTY OF	Crossing Public Roadway Grade Separation	Paul G. Farrell	Monterey	APTOS	CA			\$	Assigned	Totally		
455863	S080717		3	Active	COUNTY OF SANTA CRUZ	Crossing - Public Roadway	Paul G. Farrell	Monterey	APTOS	CA			\$	Assigned	Totally		
457023	S087624		1	Active	CAPITOLA, CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	CAPITOLA	CA			\$	Assigned	Totally		
457497	S091557		1	Active	CAPITOLA, CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	CAPITOLA	CA			\$	Assigned	Totally		
459511	S108176		1	Active	COAST DAIRIE & LAND CO.	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	DAVENPORT	CA			\$	Assigned	Totally		
465104	SPA7491		1	Active	SANTA CRUZ COUNTY OF	Warning Devices - Public Roadway	Paul G. Farrell	Monterey	APTOS	CA		112.8	\$	Assigned	Totally		
514595	211721	76287	1	Active	SANTA CRUZ, CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	SANTA CRUZ	CA			\$	Assigned	Totally		
655249	227449	211468	2	Active	SANTA CRUZ, CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	SANTA CRUZ	CA	Santa Cruz Sub.	20.78	\$	Assigned	Totally		
655250	227485	211469	3	Active	SANTA CRUZ, CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	SANTA CRUZ	CA	Santa Cruz Sub.	20.75	\$0	Assigned	Totally		
655251	228377	211470	1	Active	SANTA CRUZ, CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	SANTA CRUZ	CA	Santa Cruz Sub.	19.02	\$	Assigned	Totally		
690096	242123	232126	1	Active	SANTA CRUZ, CITY OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	SANTA CRUZ	CA	Santa Cruz Lead	22.09	\$	Assigned	Totally		
702125	253471	252215	1	Active	SILVER CREEK YUBA I, LLC	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	WATSONVILLE	CA	Santa Cruz	9.4	\$0	Assigned	Totally		
702128	253472	252218	1	Active	SILVER CREEK YUBA I, LLC.	Crossing - Private Roadway	Kylan Crawford	Santa Cruz	WATSONVILLE	CA	Santa Cruz	9.57	\$0	Assigned	Totally		
716300	259047	267911	5	Active	CALIFORNIA, STATE OF	Crossing - Public Roadway	Paul G. Farrell	Santa Cruz	DAVENPORT	CA	Santa Cruz Lead	31.28	\$0	Assigned	Totally		
719596	261655	271611		Active	SANTA CRUZ, BIG TREES & PACIFIC RAILWAY	Trackage Rights & Interchange Agreement	Melissa Grosz	Santa Cruz	SANTA CRUZ	CA			\$0	Assigned	Totally		

EXHIBIT D

Form of Railway Right of Entry Agreement

[To be provided by operator]

RIGHT OF ENTRY AGREEMENT

THIS RIGHT OF ENTRY AGREEMENT (the "Agreement") is made and entered into as of this ____ day of _____, 20__ by and between _____ (hereinafter called "Contractor"), and **ST. PAUL AND PACIFIC RAILWAY, LLC** (hereinafter called "Railroad"). Contractor and Railroad are each at times referred to herein as a "Party" and collectively as the "Parties".

The Parties hereto agree as follows:

Section 1. NOTICE OF COMMENCEMENT OF WORK-FLAGGING

Contractor agrees to notify the Railroad at least 72 hours in advance of Contractor commencing its work. Flagging services by Railroad will be required for any work by Contractor in which any person or equipment will be within 25 feet of any track, or will be near enough to any track that any equipment extension (such as, but not limited to, a crane boom) will reach to within 25 feet of any track. Upon receipt of notice the Railroad will determine and inform Contractor whether Contractor will need to implement any special protective or safety measures. If the Railroad provides any flagging or other services Contractor shall not be relieved of any of its responsibilities or liabilities set forth herein.

Section 2. NO INTERFERENCE WITH RAILROAD'S OPERATION

No work performed by Contractor shall cause any interference with the constant, continuous and uninterrupted use of the tracks, property and facilities of the Railroad its lessees, licensees or others, unless specifically permitted under this Agreement, or specifically authorized in advance by the Railroad. Nothing shall be done or suffered to be done by Contractor at any time that would in any manner impair the safety thereof. When not in use, Contractor's machinery and materials shall be kept at least 50 feet from the centerline of Railroad's nearest track, and there shall be no vehicular crossings of Railroad's tracks except at existing open public crossings.

Section 3. MECHANIC'S LIENS

Contractor shall pay in full all persons who perform labor or provide materials for the work to be performed by Contractor. Contractor shall not create, permit or suffer any mechanic's or materialmen's liens of any kind or nature to be created or enforced against any property of the Railroad for any such work performed.

Section 4. COMPLIANCE WITH LAWS

In the progression of work covered by this Agreement, Contractor shall secure any and all necessary permits and shall comply with all applicable federal, state and local laws, regulations and enactments affecting the work. Contractor shall use only such methods as are consistent with safety, both as concerns Contractor, Contractor's agents and employees, the officers, agents and employees, and property of the Railroad and the public in general. Contractor (without limiting the generality of the foregoing) shall comply with all applicable state and federal occupational safety and health acts and regulations. All Federal Railroad Administration ("FRA") regulations shall be followed when work is performed on the Railroad's property. If any failure by Contractor to comply with any such laws, regulations, and enactments, shall result in any fine, penalty, cost or charge being assessed, imposed or charged against the Railroad, Contractor shall reimburse and indemnify the Railroad for any such fine, penalty, cost, or charge, including without limitation attorney's fees, court costs and expenses. Contractor further agrees in the event of any

such action, upon notice thereof being provided by the Railroad, to defend such action free of cost, charge, or expense to the Railroad.

Section 5. SAFETY INSTRUCTIONS

Safety of personnel, property, rail operations and the public is of paramount importance in the progression of the work pursuant to this Agreement. As reinforcement and in furtherance of overall safety measures to be observed by Contractor (and not by way of limitation), the following special safety rules shall be followed:

- a). Contractor shall keep the job site free from safety and health hazards and ensure that its employees are competent and adequately trained in all safety and health aspects of the job. Contractor shall have proper first aid supplies available on the job site so that prompt first aid services can be provided to any person that may be injured on the job site. Contractor shall promptly notify the Railroad of any U.S. Occupational Safety and Health Administration (“OSHA”) reportable injuries occurring to any person that may arise during the work performed on the job site. Contractor shall have a non-delegable duty to control its employees, while they are on the job site or any other property of the Railroad to be certain they do not use, be under the influence of, or have in their possession any alcoholic beverage, drug, narcotic or other substance that may inhibit the safe performance of work by the employee.
- b). The employees of Contractor shall be suitably dressed to perform their duties safely and in a manner that will not interfere with their vision, hearing or free use of their hands or feet. Only waist length shirts with sleeves and trousers that cover the entire leg are to be worn. If flare-legged trousers are worn, the trouser bottoms must be tied to prevent catching. The employees should wear sturdy and protective work boots and at least the following protective equipment:
 - (1) Protective headgear that meets American National Standard-Z89.1-latest revision. It is suggested that all hardhats be affixed with Contractor’s or subcontractor’s company logo or name;
 - (2) Eye protection that meets American National Standard for occupational and educational eye and face protection, Z87.1-latest revision. Additional eye protection must be provided to meet specific job situations such as welding, grinding, burning, etc.; and
 - (3) Hearing protection which affords enough attenuation to give protection from noise levels that will be occurring on the job site.
- c). All heavy equipment provided or leased by Contractor shall be equipped with audible back-up warning devices. If in the opinion of the Railroad Representative any of Contractor’s or any of its subcontractor’s equipment is unsafe for use on the Railroad’s right-of-way, Contractor, at the request of the Railroad Representative, shall remove such equipment from the Railroad’s right-of-way.

Section 6. INDEMNITY

- a). As used in this Section, “Railroad” includes its owner, its operator and all of their respective officers, agents, and employees; “Loss” includes loss, damage, claims, demands, actions, causes of action, penalties, costs, and expenses of whatsoever nature, including court costs and attorneys’ fees, which may result from: (a) injury to or death of persons whomsoever (including the Railroad’s officers, agents, and employees, Contractor’s officers, agents, and employees, as well as

any other person); and/or (b) damage to or loss or destruction of property whatsoever (including Contractor's property, damage to the roadbed, tracks, equipment, or other property of the Railroad, or property in its care or custody).

- b). As a major inducement and in consideration of the license and permission herein granted, Contractor agrees to indemnify and hold harmless the Railroad from any Loss which is due to or arises from Contractor's work performed under this Agreement, its breach of the agreement or its failure to observe the health and safety provisions herein, or any activity, omission or negligence arising out of its performance or nonperformance of this Agreement, except to the extent such Loss is caused by Railroad's gross negligence or willful misconduct.

Section 7. INSURANCE

Contractor shall at all times during its entry, use and occupancy of the right-of-way keep and maintain in full force and effect (a) commercial general liability insurance coverage of \$2,000,000 on ISO form CG 00 01, or equivalent, for (i) bodily injury and death, property damage and personal injury; and (ii) contractual liability; (b) business automobile and/or trucker's liability insurance coverage, including coverage for owned, hired and non-owned automobile liability, on ISO form CA 00 01, or equivalent, with an inclusive limit of not less than \$2,000,000 for any one occurrence in respect of the use or operation of motor vehicles owned, leased or controlled by Contractor; and (c) worker's compensation insurance coverage meeting the statutory requirements of the State of California covering all of Contractor's employees. This insurance shall name Railroad as an additional insured, and include a waiver of subrogation by insurer as to Railroad. Evidence of such insurance coverage on an ACCORD form has been or will be provided to Railroad prior to or upon entry.

Section 8. RESTORATION OF PROPERTY

In the event the Railroad authorizes Contractor to take down any fence of the Railroad or in any manner move or disturb any of the other property of the Railroad in connection with the work to be performed by Contractor, then in that event Contractor shall, as soon as possible and at Contractor's sole expense, restore such fence and other property to the same condition as the same were in before such fence was taken down or such other property was moved or disturbed.

Section 9. MISCELLANEOUS

- a). Each provision, paragraph, sentence, clause, phrase, and word of this Agreement shall apply to the extent permitted by applicable law and is intended to be severable. If any provision, paragraph, sentence, clause, phrase or word of this lease is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the legality or validity of the remainder of the Agreement.
- b). This Agreement shall be governed by and construed in accordance with the laws of the State of California, excluding its conflicts of law principles. Any cause of action ensuing out of the enforcement of these provisions shall be litigated in courts located in Santa Cruz County California.
- c). This Agreement may be modified or amended only by means of a written amendment executed by the Parties hereto.
- d). This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements, whether written or oral, with

respect to such subject matter.

- e). This Agreement may be executed in several counterparts, each of which shall constitute an original and all of which, when taken together, shall constitute one agreement. A facsimile or email transmission of a signed copy of this Agreement shall be deemed an original.
- f). The waiver by either Party of the breach of any condition, covenant or agreement herein contained to be kept, observed and performed by the other Party shall in no way impair the right of the waiving Party to avail itself of any remedy for any subsequent breach thereof.

The Parties hereto have executed this Agreement in duplicate as the date first herein written.

RAILROAD NAME

CONTRACTOR

Printed Name, Title

Printed Name, Title

Signature

Signature

Date

Date