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August 19, 2013 234689

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, D. C. 20423

ENTERED  
Office of Proceedings  
August 19, 2013  
Part of the Public  
Record

Re: Docket No. FD 35752, Grafton & Upton Railroad Company--  
Petition for Declaratory Order

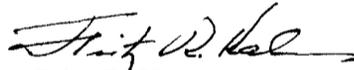
Dear Ms. Brown:

Attached for filing in the subject proceeding is the Reply of the Town of Grafton, Massachusetts, and Robert S. Berger, Zoning Enforcement Officer, to the Petition for Declaratory Order filed by the Grafton & Upton Railroad Company on July 23, 2013.

Copies of this letter and its attachment have been served by e-mail upon counsel for the Grafton & Upton Railroad Company and the American Short Line and Regional Railroad Association.

If you have any question concerning this filing or if I otherwise can be of assistance, please get back to me.

Sincerely yours,

  
Fritz R. Kahn

att.

cc: James E. Howard, Esq.  
Keith T. Borman, Esq.

**SURFACE TRANSPORTATION BOARD**

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**Docket No. 35752**

**GRAFTON & UPTON RAILROAD COMPANY--  
PETITION FOR DECLARATORY ORDER**

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**REPLY OF  
THE TOWN OF GRAFTON, MASSACHUSETTS, and  
ROBERT S. BERGER, ZONING ENFORCEMENT OFFICER**

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**TOWN OF GRAFTON and  
ROBERT S. BERGER, ZONING  
ENFORCEMENT OFFICER**

Due and dated: August 19, 2013

**SURFACE TRANSPORTATION BOARD**

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**Docket No. FD 35752**

**Grafton & Upton Railroad Company--  
Petition for Declaratory Order**

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**REPLY OF  
THE TOWN OF GRAFTON, MASSACHUSETTS, and  
ROBERT S. BERGER, ZONING ENFORCEMENT OFFICER**

Respondents, the Town of Grafton, Massachusetts, and Robert S. Berger, its Zoning Enforcement Officer (together "Grafton"), pursuant to 49 C.F.R. § 1104.13(a) and the Board's Decision, served August 2, 2013, reply to the Petition for Declaratory Order of the Grafton & Upton Railroad Company ("G&U"). filed July 23, 2013.

The Petition for Declaratory Order was not filed by G&U of its own volition. Rather, the railroad was directed to file it within 45 days' time by Order of the Superior Court for Worcester County, Massachusetts, entered June 12, 2013. The Court has stayed its proceedings pending receipt of the Board's Decision. Grafton concurs in the need for a declaratory order proceeding by the Board to resolve the long simmering dispute between the parties. Grafton, however, respectfully asks that the Board deny G&U's request for expedited handling and an expedited decision<sup>1</sup> because of the lack of credibility of the G&U's new "plan" for financing and operating the propane transloading facility in North Grafton, and because of the paucity of information

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<sup>1</sup> It is with some temerity that G&U requests that the Board to process the case "expeditiously" when G&U itself waited nearly the entire 45 days allotted by the Court to file its Petition for Declaratory Order.

G&U has thus far provided concerning that "plan". For the reasons set forth below, Grafton respectfully requests that the Board institute a declaratory proceedings, deny G&U's plea that it receive expedited handling and an expedited decision and establish a reasonable procedural schedule.

### **PROCEDURAL BACKGROUND**

This case arrives before the Board by a rather circuitous route. Grafton originally sought to file a petition with this Board nearly eight months ago in December of 2012, just weeks after first learning about G&U's imminent plan to construct what would be the largest liquefied petroleum gas ("LPG") facility in the Commonwealth of Massachusetts. Having learned of the plan only in its very late stages, Grafton applied for and received an emergency injunction from the Worcester Superior Court, enjoining the delivery of the propane storage tanks and other construction, while it petitioned this Board for review. G&U, however, immediately removed the case to Federal Court and strenuously objected to Grafton's motion to refer the matter to the Board under the doctrine of primary jurisdiction. The Federal Court denied Grafton's motion and held an expedited trial on the merits of the preemption issue in January of 2013. Several months after the close of evidence, the Federal Court remanded the matter to Worcester Superior Court for lack of federal jurisdiction.

The Worcester Superior Court issued its Order of Reference to this Board on June 12, 2013. G&U filed its petition on July 23, 2013. In his Verified Statement attached to the Petition, Mr. Jon Delli Priscoli, owner, CEO and President of the G&U, declares: "From the outset of the planning for the propane transloading facility, G&U intended to structure the operations so that federal preemption would apply and so that it would be unnecessary to obtain approvals or preclearances for the construction and operation of the facility from the Town of Grafton (the

'Town' or 'Grafton') and other state or local agencies. In particular, the transloading subcontract and other agreements established that the transloading would be under the direction and control of G&U.” Verified Statement of Jon Delli Priscoli (“Priscoli V.S.”), attached to G&U’s Petition, at p. 5, ¶ 12. Yet when it came time to comply with the Order of the Superior Court for Worcester County, approximately one week before filing its Petition for Declaratory Order with the Board, G&U suddenly discarded the structure of the planned operation, purporting to unilaterally terminate the transloading and other agreements it had negotiated with third parties over the past several years for the financing, constructing, and operating of the facility because clearly G&U did not wish the Board to see those agreements. And in direct contradiction to the very recent sworn testimony of G&U's executives, G&U now claims before the Board that it is fully able to finance, construct, and operate the propane transloading facility all by itself

## **STATEMENT OF THE FACTS**

### **A. The Parties**

The Town of Grafton is a semi-rural town of approximately 18,000 people, situated 40 miles west of Boston. Like most New England towns, its Chief Executive is a volunteer Board of Selectmen (BOS), made up of five elected town residents. Affidavit of Tim McInerney, ¶ 1.

G&U is a 16.5-mile railroad extending between connections with CSX Transportation, Inc. ("CSX"), at both the Towns of Grafton and Milford, Massachusetts. Mr. Priscoli is the President and Treasurer of a real estate development company, First Colony Development, and is a real estate developer who has been in the commercial real estate development business for thirty years. Board of Selectmen of Grafton v. Grafton & Upton Railroad, U.S.D.C. No. 4:12-CV-40164, (hereafter referred to as “Grafton v. GURR, U.S.D.C. proceedings,”) Docket # 50,

Defendant, Grafton & Upton Railroad Company's Proposed Findings of Fact ¶ 3. In 2008, Mr. Priscoli acquired the G&U. Priscoli V.S. ¶ 3.

B. The Propane Transloading Facility Plan

In or around 2010, G&U began to explore the development of a propane transloading facility. G&U's Proposed Findings of Fact, ¶ 5. As a result of an introduction by CSX, G&U began negotiations with representatives of Spicer Advanced Gas ("Spicer"), a propane dealer based in Groton, Connecticut, with experience and expertise in connection with transloading operations. Petition, p. 7; Priscoli V.S., ¶ 7; Moffett V.S. ¶ 6. In addition, LPG Ventures ("LPG"), a design and construction firm that constructs propane transloading facilities, was retained by G&U to prepare the plans for the propane transloading facility. Priscoli V.S., ¶ 8.

LPG estimated the total cost of the North Grafton propane transloading facility at approximately \$5 million. G&U did not have the funds from any "internally generated source" and could not obtain the funds "in any traditional form on reasonable terms and conditions from commercial lenders." Petition at 7; Priscoli V.S. at ¶ 10. In fact, in Mr. Priscoli's "greatly experienced" opinion, "this project would be unfinanceable conventionally today until—until it had a proven three to four year track record of business and P and L statements and all that." Grafton v. GURR, U.S.D.C. proceedings, Testimony of Jon Delli Priscoli, 1/16/13, pp. 34. G&U also did not have the propane rail cars or other specialized propane equipment and felt it needed a volume supply commitment. Id. at 34-35. Thus, to secure the additional financing, equipment, and propane supply, G&U entered into negotiations with Spicer and NGL Terminals Co. ("NGL"), a Canadian propane supplier and wholesaler. Petition at 7; Priscoli V.S. at ¶ 10.

C. The Contract Documents

The negotiations resulted in the execution of a Letter of Intent dated April 6, 2012, see Priscoli V.S. at ¶ 10,<sup>2</sup> a Memorandum of Understanding (“MOU”) dated August of 2012, and three agreements negotiated in September and October of 2012: Terminal Transloading Agreement (“Transloading Agreement”), Confidential Rail Transportation Contract (“Supply Contract”), and Financing, Development, and Construction Agreement (“Finance Agreement”).<sup>3</sup> These contracts were executed by and between G&U and three new entities that Spicer and NGL had recently jointly created: the financing entity, GRT Financing, LLC (“GRT”); the transloader, All American Terminals, LLC (“AAT”); and the supplier, Patriot Gas, LLC; referred to collectively by G&U as “the Propane Companies.” Petition, pp. 7-8; Priscoli V.S., ¶ 10.

The MOU set forth the negotiated arrangements and the respective roles of the entities “to plan, finance, construct, and operate a liquid petroleum gas distribution and terminal facility” at 42 Westboro Road. Exh. B at 1. Although the Transloading Agreement dutifully recites that AAT shall provide transloading and other services “for and under the auspices and control of the Railway,” Exh. C at §1(A)(i), the actual provisions of the contract documents demonstrate that G&U would not retain control of the facility. To the contrary, in numerous ways, the contracts disclose a structure that runs afoul of the Board’s long-standing prohibition of transloading operations that are mere pretexts for the operations of non-railroad controlled entities.<sup>4</sup>

#### D. The Fire Safety Analysis

In October of 2012, a Fire Safety Analysis (“FSA”) authored by a consultant on behalf of G&U was submitted to the State Fire Marshall’s Office, which was charged with reviewing the

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<sup>2</sup> Despite an order by the Federal Court to disclose all agreements between G&U and the other parties involved in the facility, the Letter of Intent referenced in G&U’s petition has never been produced by G&U, and G&U has chosen not to attach it to its Petition.

<sup>3</sup> These Contracts are attached hereto as Exhibits B through E.

<sup>4</sup> See Exh. F, Grafton v. GURR, U.S.D.C. proceedings, Docket # 52, Plaintiff’s Requests for Findings of Fact and Rulings of Law, at pp. 15-29.

FSA. Petition, p. 9; Godfrey V.S., ¶ 4. The review raised serious concerns. Affidavit of Timothy McInerney, ¶ 17. Specifically, the conceptual drawing submitted with the FSA was several months out of date; the FSA significantly overstated the number of first responders available to respond to any incident at the propane facility; there was reliance in the FSA on safety measures that were not included in the actual plan; and the FSA referenced a different version of the National Fire Protection Association Standard 58 Liquefied Petroleum Gas Code (“NFPA-58”) than the one Massachusetts used. Grafton v. GURR, U.S.D.C. proceedings, Testimony of Jacob Nunnemacher, 1/16/13. Accordingly, the State Fire Marshall’s Office requested that Mr. Godfrey address the issues identified and resubmit the FSA.. Id.<sup>5</sup>

### **ARGUMENT**

#### **G&U HAS NOT PRESENTED ANY EVIDENCE TO MEET ITS BURDEN OF ESTABLISHING THAT ITS PROPOSED TRANSLOADING OPERATION IS ENTITLED TO FEDERAL PREEMPTION.**

In order to qualify for federal preemption under section 10501(b), the railroad must demonstrate that the activities at issue constitute transportation and will be performed by, or under the auspices of, a rail carrier. The City of Alexandria, Virginia, STB Finance Docket No. 35157, Decision dated 2/17/09, at 2; Grafton & Upton Railroad v. Town of Milford, 417 F.Supp.2d 171, 176 (D. Mass. 2006); Texas Central Business Lines Corp. v. City of Midlothian, 669 F. 3d 525, 530 (5<sup>th</sup> Cir. 2012). There has been no dispute that G&U is a rail carrier.

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<sup>5</sup> G&U states that “The plans for the configuration, construction and safety features of the facility are the same plans that have been provided to and shared with the Town and other state and local regulatory agencies.” Petition, p. 15. In fact, Grafton has received multiple (at least three) versions of drawings that conflict and show equipment and structures in several locations. Affidavit of Tim McInerney at ¶ 21. These drawings are general site plans, not the detailed drawings, narrative, specifications, and cut-sheets on all the mechanical operations of the facility that would inform Town and fire safety personnel what they would need to respond to an emergency at the facility. Id.

However, Congress intended the transportation and related activities undertaken only by rail carriers to benefit from federal preemption; it “did not mean such preemption to extend to activity related to rail activity undertaken by non-rail carriers.” Grafton & Upton, 417 F. Supp. at 176-77 (affirming the Board’s determination that G&U’s rail/truck transloading activities would not be conducted by the railroad, noting that G&U “has changed the legal dynamic of its relationship with [the third party] the suit the circumstances.”).

In the federal trial, it was the second criterion of the preemption analysis that Grafton challenged because the Transloading Agreement and other contracts established that the transloading facility would not be run by, or under the auspices of, G&U, but rather by Spicer, NGL, and the entities they had created, *see Alexandria*, at 2. Grafton argued that the propane transloading activity was not entitled to federal preemption. Presumably recognizing that its plan could never pass muster before the Board, G&U now submits that it simply has shredded those contracts and that it will finance, complete the facility's construction and run the facility all on its own. However, G&U’s own testimony at the Federal Court trial and its maneuvers relative to the planning of the facility bring into serious doubt the feasibility of this declaration as well as its veracity.

**a. A “Fact Intensive Inquiry” Relies on the Presentation of Facts.**

When examining this case in light of the Board’s precedents, it immediately becomes clear that the “case by case, fact intensive inquiry” used to determine the existence and extent of the Board’s jurisdiction requires something not present here, namely, facts. When making determinations regarding preemption, and the far reaching, real-world consequences of those determinations, the Board carefully has considered the relationships between railroads and their contractors, shippers and suppliers of product, truckers and other customers, and the many terms

of the proffered financing documents, construction agreements, transloading agreements, operating agreements, leasehold interests, equipment leases and liability arrangements. *See, e.g., Town of Babylon and Pinelawn Cemetery*, STB Finance Docket No. 35057, 2008 WL 275697, \*3 (February 1, 2008); *Alexandria*. The Board and the courts facing this question have not hesitated to look behind mere recitations to the actual terms of the agreements involved.

For example, in *Town of Babylon*, the railroad made representations concerning its plan, which it had revised in response to prior Board decisions determining that preemption did not apply. *Id.* at p. 4. The Board, however, found that the railroad's representations were not supported by the actual terms of the Amended Agreement. *Id.* at 5. Here, we have *only* the railroad's representations. Its mere labeling of its *intentions* to run the facility as a "plain vanilla" propane transloading operation, however--supported by nothing whatsoever that reveals any actual terms of the new plan--is simply insufficient. As the court stated in a case concerning this very railroad, "Grafton has offered nothing more than its word . . . ." *Grafton & Upton Railroad*, 417 F.Supp.2d at 178; *see also Grafton & Upton Railroad*, STB Finance Docket, Decision dated 8/11/04. In that case, both the court and the Board found that G&U's word was not enough.

Moreover, the Petition itself does not make clear that the participants in the deal have actually changed. Rather, G&U states that it will have no further involvement with "the Propane Companies," suggesting that Spicer's and NGL's financial and other contributions were all for naught, and that those entities will have no further involvement with the propane transloading facility in North Grafton. Petition at 2. However, the petition carefully defines "the Propane Companies" as the "entities that were jointly owned by NGL and Spicer," a definition that does not include the parent companies themselves. Petition at 7. Thus, the representation that the

“effect of the Termination Agreements is to eliminate any participation by or role of the Propane Companies,” Petition at 12, does not necessarily mean that NGL, Spicer, and the officers that have thus far collaborated with G&U will have no future involvement with this propane facility.<sup>6</sup> Given the lack of information provided by G&U concerning its 5 week old “plan,” the Board should reject G&U’s request to decide this matter expeditiously.

**b. The Requested Relief is Contrary to the Court Order Referring this Matter to the Board and any Harm to G&U from Delay is Self-Visited.**

The Worcester Superior Court’s Order of Reference to this Board, which was authored by G&U’s own attorney, states in relevant part that by agreement of the parties, G&U will file a Petition for a Declaratory Order with the Board seeking a determination of whether the provisions of the ICCTA apply to the construction and operation of G&U’s proposed propane transloading facility in North Grafton. Petition, Exh. C. Nowhere in that Order of Reference did the parties agree, or the Court suggest, that the declaratory proceedings should be expedited or abbreviated in any way. *Id.* Grafton objects to any expedited review and instead respectfully requests that the Board institute a declaratory order proceeding that is broad, comprehensive, and unrestricted and that requires G&U to divulge the details of its suddenly arrived at new plan. Grafton sought over eight months ago to bring this matter before the Board, and G&U chose strenuously to object and instead take this matter through a trial at Federal Court. And, most recently, G&U changed its transloading plan wholesale. Despite all of this G&U has the audacity to suggest that delay has been caused by the Town.

As it has from the inception of this case, G&U complains loudly that the delays are causing them to lose business opportunities. However, based on the conduct of G&U and Mr.

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<sup>6</sup> It is telling that not one of the July 15, 2013, letters terminating the prior agreements was sent to NGL. See V.S. Priscoli, attachments B through E.

Priscoli in particular, any hardship G&U experiences is completely a problem of its own making.<sup>7</sup> Grafton vigorously disputes G&U's claims that it kept the Town informed and apprised of the proposed plans for the propane facility. See Affidavit of Tim McInerney, ¶¶ 2-20; Grafton v. GURR, U.S.D.C. proceedings, Testimony of Kevin Mizikar and Fire Chief Michael Gauthier, 1/15-16/13. Likewise, the record reveals that even after the FSA was submitted to the State Fire Marshall's Office in late October of 2012, G&U stonewalled the Town's efforts to assess its claim to preemption by refusing to provide even a redacted version of the Transloading Agreement without a promise of confidentiality, instead proffering James Howard's "summary" of the terms thereof, which bear almost no relationship to the actual terms of the Transloading Agreement finally produced during the Federal Court proceedings. Affidavit of Tim McInerney, ¶¶ 2-20 and attachment 1. Additionally, on several occasions during the brief time period that the BOS had to assess the situation and determine the most responsible course of action, Mr. Priscoli suggested that, if the BOS objected to his plans, he would simply transload the propane using "mobile carts," which he suggested had safety issues but were somehow not amenable to a preemption challenge. Id., ¶ 14. This was a clear attempt to bully the BOS from looking further into the matter. The true character of Mr. Priscoli and his propensity to threaten Town officials was demonstrated clearly the day that the Cease and Desist

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<sup>7</sup> Additionally, contrary to current suggestions that an expedited decision is necessary for the crucial Fall period, Mr. Moffett actually states that the "fall and winter months are the busiest time for delivery of propane, but the process . . . begins much earlier in the year. Retailers and wholesalers must make commitments to provide and purchase propane beginning in April of every year to be sure they will have adequate supplies for their customers." Petition, Moffett V.S. at 5, ¶ 12; see also Grafton v. GURR, U.S.D.C. proceedings,, G&U's Motion for Order on Request for Preliminary Injunction, filed 3/29/12 (strenuously arguing that the Court should allow construction to proceed immediately due to the impending critical "April contracting period"). Therefore, based on G&U's own evidence, there is certainly time for more than a cursory review by this Board.

Order was issued when he went to the Town Hall, stating that the Town had started a “nuclear war” that he “intended to win,” and that he would “bury” towns that work against him. Exh. G, Affidavit of Kevin Mizikar, ¶¶ 16, 17.

In its Petition, G&U stretches the facts to the absolute limit and hurls the accusation that the Town—public officials sworn to uphold the law—is simply acting in a “purely pretextual” manner with the “ultimate intention . . . to preclude such transloading by any means available.” Petition at 23, n. 7. But attempting to display this record in even the most flattering light conceivable cannot obscure the truth: Grafton did not know what G&U’s plans were until the last possible minute, and that was no accident. As a direct result of the fact that it has not been kept apprised of the G&U’s plans, Grafton responsibly sought more information, as well as injunctive relief maintaining the status quo since construction of the propane transloading facility was imminent, so that the validity of the railroad’s preemption claim could be properly assessed. G&U strenuously objected to the Board’s review, however, liking its chances better before a Federal Court that had admittedly never dealt with the issue of federal preemption under the ICCTA. Now that it lost its gamble and ended up in front of the Board despite its strategic maneuvering, it claims to have torn up the documents on which this entire venture was based, offering no substance in their place. On this record, it is astonishing that G&U would complain about delay.

**c. The G&U’s Course of Conduct in this Matter Requires that the Board Carefully Scrutinize all Representations Made by the Railroad.**

Instead of giving expedited and abbreviated examination of this matter as G&U asks the Board carefully should scrutinize the new “plan” in light of the history of this case, which suggests strongly that there may again be more going on than the railroad is currently choosing to reveal. The Board should recognize the lack of credibility of G&U, both because of the lack

of forthrightness with which it has operated thus far, and also because its new “plan” just does not comport with common sense.

Specifically, the statement that “G&U intends to proceed with the completion of the construction and operation of the transloading facility with its own resources and employees,” Petition, p. 12; Priscoli V.S., p. 9; Moffet V.S. p. 6, strains credulity in light of the statements and testimony given just months ago by G&U's executives that it could not finance the facility using any traditional method without several years of a proven track record. At page 10 of his Verified Statement, Mr. Priscoli acknowledges that it would take approximately \$3 million to acquire the four 80,000-gallon propane storage tanks and related equipment and to complete construction of the propane transloading facility, including completion of the track work in the yard. G&U states that it will be able to bear these expenses from a combination of (a) current cash flow from other operations . . . (b) by placing new financing on the railroad, which currently does not have any third-party financing, or (c) by financing on reasonable terms and conditions from other business entities that I control.” Priscoli V.S. at ¶ 20. G&U's Petition for Declaratory Order, however, includes no tax returns, balance sheets, or income statements from any company owned or controlled by G&U or Mr. Priscoli which would support Mr. Priscoli's optimistic projections that he can suddenly raise over \$3 million to construct and operate this facility. In fact, G&U itself doesn't own all that much unencumbered property. G&U doesn't own the 33-acre transloading terminal in Upton; it merely leases it. Moreover, G&U is busily engaged in upgrading its line to Milford where it hopes to service a large warehouse. What other properties Mr. Priscoli controls he does not say, and whether any bank would grant a loan secured by those properties is altogether uncertain in these unsettled times. It was only a little over a year ago that G&U had to turn to NGL and Spicer to secure the financing of the \$3.2 million required to

acquire and install the four propane storage tanks and related equipment and to otherwise ready the North Grafton propane transloading facility because, by Mr. Priscoli's own "greatly experienced" opinion, the project "would be unfinanceable conventionally." For all we know, Mr. Priscoli may turn to NGL again; nothing he has proffered prevents him from doing so.

In short, this new financing "plan" is not credible. Simply stating that it will rely on "financing sources that will not involve the Propane Companies" is hardly the presentation of a plan replacing the GRT Financing Agreement to finance the largest LNG facility in Massachusetts.

Likewise, G&U also stated during the Federal Court proceedings that it required the expertise of Spicer to run the facility, since Spicer has been involved in handling propane "for over a hundred years." Grafton v. GURR, U.S.D.C. proceedings, Testimony of Priscoli, 1/16/13, transcript at 25; GURR's Requests for Findings and Rulings, ¶ 8 ("Spicer is a retail propane company that has been in the propane business since the 1960's. Holstein oversees certain aspects of the Spicer business, including safety and regulatory compliance"); Grafton v. GURR, U.S.D.C. proceedings, Motion Hearing, 12/21/12 ("Spicer Gas has a lot of experience. They're a big company. So they are involved for the purpose of lending their expertise in making sure that the gas gets pumped properly, which I would assume is in the Town's best interests having someone who knows what they're doing actually pumping the gas."). G&U now attempts to replace the 26 page Transloading Agreement with its "belief" that it "can identify and retain qualified employees who will be knowledgeable and experienced with respect to the operation of such facilities." Petition at 13.

This is a rather stunning belief in light of Mr. Priscoli's testimony just a few months ago: in response to his counsel's question "why did the railroad elect to do the transloading through a

subcontractor?" Mr. Priscoli stated, "Because we don't have that experience." Grafton v. GURR, U.S.D.C. proceedings, Priscoli Testimony 1/16/13, Transcript at 46. Motion Hearing, 12/21/12 This "belief" is also surprising that the fact that, in another proceeding currently pending before the Board involving G&U's operations in the neighboring Town of Upton, Mr. Priscoli stated that G&U hired a transloading company because it lacked the experience and personnel to handle the transloading of chemicals classified as hazardous materials. See STB Finance Docket No. 35652, Reply of GURR 2/25/13, Priscoli Supplemental V.S. at p. 2 ("I understood that companies owned by Mr. Dana had extensive experience transloading bulk commodities, including both hazardous and nonhazardous liquids, from railcars to trucks. I also recognized that at that time G&U did not have experience in such transloading operations.").

At page 6 of his Verified Statement, Mr. Eric Moffett, Vice President of Business Development for the G&U, states, "G&U will assume direct responsibility for the invoicing and collection of payments for the transloading services in accordance with Tariff 5000-A and any other arrangements made with propane customers." Significantly, G&U's Petition for Declaratory Order does not have attached to it a copy of Tariff 5000-A. See Exh. H, Tariff 5000-A. The tariff contemplates the use of a Terminal Operator. Id. Indeed, Item 115 C. Unloading of Rail Cars, specifically provides, in part, "Charges for unloading railcars to trucks . . . will be billed and collected by the Terminal Operator, as agent for and on behalf of GU . . ." The tariff is simply irrelevant to the operations which G&U now contends it will be conducting at the North Grafton propane transloading facility.

Moreover, propane is classified as a hazardous material, a flammable gas. The regulations of the Pipeline and Hazardous Materials Administration of the U.S. Department of Transportation comprehensively regulate how propane is to be handled when transported in tank

cars, with particular emphasis on its transloading. There is nothing in Mr. Priscoli's background and experience that would enable him to train the employees to transload the propane at the North Grafton facility, and he identifies no one in G&U's employ who would be able to do so. G&U has presented nothing to support its "belief" that it could do this job in-house.

Finally, G&U also made various statements and representations during prior proceedings that it needed NGL, an international propane company, to supply the gas and necessary rail cars and other equipment. See, e.g., Grafton v. GURR, U.S.D.C. proceedings, Priscoli Testimony 1/16/13, Transcript at Motion Hearing, 12/21/12, Transcript at 34-35; Docket #50, GURR's Proposed Findings of Facts, ¶ 32 (Patriot is "owned by NGL and Spicer and it has promised sufficient shipments of railcars into the facility to ensure that the Railroad's basic financial obligation for the installation of the leased equipment [the tanks and other equipment owned by Spicer and NGL] can be met."). It now replaces the commitment from NGL/Patriot to supply a minimum of 800 rail cars per year with "conversations with propane suppliers that have expressed the intention to use the facility to ship propane by rail from the producing areas as well as with propane wholesalers in the New England area that would purchase the propane for further distribution and sale." Petition at 14. This is 100% of the information G&U has given to the Board concerning its suppliers. The Board should require much more.

**d. The Board Should Institute Broad Proceedings to Gather Information about G&U's Planned Facility.**

The new "plan" raises more questions than it answers. Why would G&U terminate the supply agreement under which Spicer and NGL committed to deliver a minimum of 800 railcars full of propane? Where will it get the propane railcars that it recently stated it would require, if not from NGL? Who are these new suppliers? From whom did G&U suddenly already acquire the "portable equipment" it plans to use on an "interim basis" immediately upon the Board's

decision finding preemption? And what exactly does that “portable equipment” consist of? Will it submit a new FSA on the portable equipment before it “proceeds immediately,” so that fire officials know what they will be dealing with in case of an emergency? Also, who paid NGL’s bills to design the facility? Apparently not G&U, since Mr. Priscoli testified that its investment was limited to site work. Grafton v. GURR, U.S.D.C. proceedings, Priscoli Testimony 1/16/13, Transcript at 29-30; GURR’s Proposed Findings of Facts, ¶¶ 17, 21, 22. Who currently owns the tanks? As of the date of the Federal Court trial, Spicer, Plus, Inc. was the owner. Grafton v. GURR, U.S.D.C. proceedings, GURR’s Proposed Findings of Facts, ¶¶ 26, 27. If G&U now has the money to purchase the tanks, will Spicer and NGL be selling them or leasing them to G&U? G&U clearly would have to buy Spicer and NGL out of this deal, but with what funds? And why would Spicer and NGL simply walk away from such a lucrative business deal after all of the time and money they invested?

In New England Transrail, LLC, STB Finance Docket No. 34797, Decision dated 6/29/07 (“NET”), the petitioner submitted an extensive amount of detailed information just to get a preliminary finding from the Board as to the scope of its jurisdiction. Id. The record submitted to get that preliminary determination included not only specific information from the petitioner concerning its proposed activities, but extensive information and input from state agencies and other interested parties. That was the result of the Board’s recognition that, “[p]articularly where commodities that have the potential to create health and safety concerns are involved, we are mindful of the consequences of our jurisdiction.” Id. at 1. Once it made its preliminary ruling that it did have jurisdiction over most of the proposed activities (from which one Board member strongly dissented), the Board set forth a schedule under which the parties would submit further evidence about the specifics of the proposal and other evidence concerning environmental

impacts; only then would the Board decide whether to authorize NET to provide the proposed rail service. Id. In light of all the questions raised by G&U's new plan, the Town urges the Board to require G&U to produce detailed information setting forth a factual basis to support its claim to section 10501(b) preemption.

It is imperative that the Board conduct a full investigation in order to prevent abuse to the preemption doctrine for the individual gain on one corporation. The Town believes the Board should require G&U to set forth the specifics of its proposed propane transloading facility, including specifics on financing, operation, and supply. The Town further suggests that the Board solicit information from the State agencies and/or other interested parties.<sup>8</sup> Only after this information is assembled can there be any ruling on the issue of the Board's jurisdiction.

### **CONCLUSION**

In its petition, G&U requests that the Board "enter an order declaring that the transloading of propane by G&U at its yard in North Grafton, either by means of portable equipment or by the construction and operation of a permanent facility . . . will be transportation subject to the Board's jurisdiction and may not be subjected to any zoning, permitting, approval or preclearance procedures by the Town or any other state or local regulatory agency." Petition at 23. This request for such a sweeping order would essentially protect any transloading operation that the G&U can conceive of --by mobile equipment, installation of massive tanks, or presumably any other arrangement it can dream up. In support of this stunning request, G&U submits only its intention to do this in a "plain vanilla" manner. In light of G&U's record of obfuscation and lack of any experience handling hazardous materials and the potentially disastrous consequences of mixing propane with human error, Grafton implores the Board to

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<sup>8</sup> It is unknown at this point whether the Massachusetts Department of Fire Services is satisfied with the updated FSA submitted by G&U in December 2012.

reject G&U's request for expedited handling and an expedited decision but rather to institute a full and complete declaratory order proceeding.

Respectfully submitted,

The Town of Grafton and  
Robert S. Berger, Zoning Enforcement Officer,

By their attorneys,

Ginny Sinkel Kremer  
Grafton Town Counsel  
Blatman, Bobrowski & Mead, LLC  
9 Damon Mill Square, Suite 4A4  
Concord, MA 01742  
Tel.: (978) 371-3930



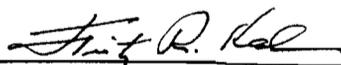
Fritz R. Kahn  
Fritz R. Kahn, P.C.  
1919 M Street, NW (7th fl.)  
Washington, DC 20036  
Tel.: (202) 263-4152

Due and dated: August 19, 2013

#### CERTIFICATE OF SERVICE

I certify that I this day have served a copy of the foregoing Reply upon the Grafton & Upton Railroad Company by e-mailing a copy to its counsel, James E. Howard, Esq., at jim@jehowardlaw.com, and upon ASLRRRA by e-mailing a copy to its counsel, Keith T. Borman, Esq., at aslrra@aslrrra.org.

Dated at Washington, DC, this 19th day of August 2013.



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Fritz R. Kahn

ATTACHMENT A

Affidavit of Tim McInerney, Gafton Town Administrator

*Affidavit of Tim McInerney, Grafton Town Administrator*

I, Tim McInerney, Grafton Town Administrator, state the following based upon my first-hand knowledge:

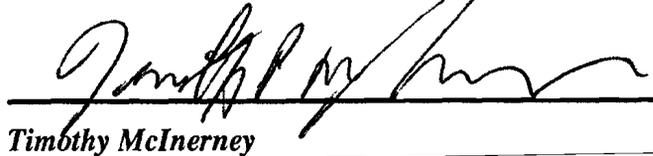
1. The Town of Grafton is a semi-rural town of approximately 18,000 people, situated 40 miles west of Boston. Like most New England towns, its Chief Executive is a volunteer Board of Selectmen (BOS), made up of five elected town residents.
2. Early in the spring of 2012, earth moving activity began at 42 Westboro Road.
3. At an open meeting in late March of 2012 at which I was present, the Board of Selectmen asked Mr. Priscoli what his plans were for the site. Mr. Priscoli responded that he did not know what he was going to locate at the site.
4. The Board requested that Mr. Priscoli keep them informed of his plans for the site and he stated he would do that.
5. Around that same time, I met with Mr. Priscoli the site. The purpose of the meeting was to inspect and discuss a collapsing culvert on Westboro Road abutting G&U's property, as well as the activities that were taking place on the parcel further to the south, causing concern among residents.
6. At that meeting, Mr. Priscoli did not tell me that he had solidified any plan for the site. I recall that Mr. Priscoli made an off-hand comment about a tank--which could have been a tank of any size or description—but Mr. Priscoli certainly did not make known to me that he was planning to site a massive propane operation at that location.
7. I recall that on that day, Mr. Priscoli repeated his oft-made statement that whatever he did with the land was not subject to any review by the Town due to the doctrine of federal preemption. However, being uninformed of Mr. Priscoli's plans, I simply acknowledged I understood Mr. Priscoli's position but took no position on behalf of the Town.
8. Mr. Priscoli appeared at two Board meetings during the summer of 2012 on other railroad related matters. He did not inform the Board of any plans for 42 Westboro Road at that meeting or at any other time.
9. In late October 2012, the Grafton Fire Department informed my office that it had received a Fire Safety Analysis ("FSA") submitted on behalf of the Grafton & Upton Railroad. The Fire Department forwarded a copy of that document to my office.

10. The FSA was the first document received by the Town concerning the proposed propane facility. It was also the first time my office or the Board of Selectmen were informed that Mr. Priscoli planned to site a large propane facility in the Town.
11. After receipt of the FSA, the Board held a series of emergency meetings in November and December of 2012 in order to gather facts from the railroad and determine its course of action, if any. I was present at all of those meetings.
12. Mr. Priscoli appeared at several of those meetings. At each meeting, Mr. Priscoli stated that his planned facility was not subject to any state or local review due to the doctrine of federal preemption.
13. Mr. Priscoli also stated that in lieu of the 80,000 gallon tanks, he could use "mobile carts," which were not as safe, suggesting that he would do so if the BOS objected to his plans.
1. Mr. Priscoli refused the Board's request that it provide the Town with even a redacted version of its Transloading Agreement without a written promise of confidentiality, which provided in relevant part that "The Town shall not use Confidential Information for any purpose, including, without limitation, any proceedings before any court or administrative agency . . . ."
14. In lieu of showing the Town even a redacted version of its transloading agreement, the G&U, through its attorney James Howard, presented the Town with his "summary" of the "terms" of the transloading agreement. See attachment 1 hereto.
15. Based on advice of its town counsel, the Board determined that it could not assess whether the doctrine of preemption was applicable based only on the railroad's attorney's summary of the transloading agreement, and determined that it required further information.
16. At that same time, the railroad informed the Board that delivery of the four 80,000 gallon tanks was imminent.
17. My office was informed by the State Fire Marshall's Office that upon review of the FSA, it had many serious concerns.
18. Additionally, when the Town obtained a copy of the Massachusetts Department of Transportation ("DOT") permit for the tank delivery, it was clear that the specific

Vehicular Route authorized therein was not the same route that the Mr. Priscoli had stated to the Board that the special permit vehicles would actually take.

19. Moreover, although the DOT permit “determined the structural capacity of the structures crossed” that are specified in the Permit, the DOT “did not verify the structural integrity of the pavement, slopes, utilities, or any other structures not specifically addressed in this memo.” There are two bridges in the Town of Grafton that were not specifically detailed in the memo, and the Town had no information that those bridges could withstand the load of the massive steel propane tanks.
20. Unable to get any further information from the railroad, and understanding that the dispute needed to be resolved by this Board, the Town directed its counsel to begin the process of filing a Petition for Declaratory Judgment, and to seek emergency injunctive relief from the Massachusetts Superior Court to preserve the status quo pending the outcome of the STB proceedings.
21. In its petition, G&U states that “The plans for the configuration, construction and safety features of the facility are the same plans that have been provided to and shared with the Town and other state and local regulatory agencies.” In fact, the Town has received multiple (at least three) versions of drawings that conflict and show equipment and structures in several locations. These drawings are general site plans, not the detailed drawings, narrative, specifications, and cut-sheets on all the mechanical operations of the facility that would inform Town and fire safety personnel what they would need to respond to an emergency at the facility.

*Signed Under the Pains and Penalties of Perjury this 16th day of August, 2013.*



\_\_\_\_\_

*Timothy McInerney*

ATTACHMENT B

Memorandum of Understanding

## MEMORANDUM OF UNDERSTANDING

Memorandum of Understanding dated as of August 24, 2012 ("MOU") by and between **GRT Financing, LLC**, of 12 Roosevelt Avenue, Mystic, CT 06355 (hereinafter referred to as "GRT") and **All American Transloading, LLC**, of 42 Westborough Road, North Grafton, MA (hereinafter referred to as "All American") and **Patriot Gas, LLC**, of 14 Indian Road Lane, Greenwich, CT (hereinafter referred to as "Patriot"), **Spicer Plus, Inc.** and **NGL Supply Terminals Company**, as guarantors, as set forth below, (and collectively with the foregoing parties, the "Operators") and **Grafton & Upton Railroad Company**, of 929 Boston Post Road, Marlborough, MA 01752 (hereinafter referred to as "Railroad").

WHEREAS, the parties have discussed and negotiated arrangements and their respective roles to plan, finance, construct, and operate a liquid petroleum gas distribution and terminal facility (the "Facility") on the property of the Railroad in Grafton, Massachusetts; and

WHEREAS, the parties have negotiated agreements in substantially final form to set forth the respective rights and obligations of the parties (the "Agreements") as referenced below; and

WHEREAS, each party has taken certain actions toward the construction of the facility such as site acquisition and site preparation work conducted by the Railroad and the purchase of storage tanks by the Operators in reliance on the good faith commitment of the other parties to finalize arrangements for the Facility; and

WHEREAS, the parties desire to enter into this MOU in order to confirm their agreement in principle, based on the form of agreements attached hereto and as otherwise clarified and set forth herein, so that each party may proceed to take certain actions that are required in order to proceed with work on the Facility in reliance on the other parties agreement to endeavor in good faith to finalize and execute the Agreements.

NOW, THEREFORE, the parties hereby agree as follows:

1. Financing, Development and Construction of the Facility. The agreements of the parties with respect to the financing, development and construction of the Facility are substantially set forth in the Financing, Development and Construction Agreement attached hereto as Exhibit A. The development plan referred to therein which shows the basic location and layout of the Facility has been completed less site engineering which shall include an existing condition survey and topographical survey. Upon execution of this MOU, the Operators will within two business days thereafter engage LPG Ventures in order to obtain the information and site preparation specifications such as but not limited to rail track lengths elevations for track area tank area and truck loading area, required for the Railroad to complete the grading required for construction of the facility.
2. Transportation and Switching Fees. The obligations of and compensation to the Railroad for switching railroad cars to the Facility and moving empty cars is substantially set forth in the Confidential Rail Transportation Contract attached hereto as Exhibit B. Patriot

REDACTED

shall use its best efforts to deliver a minimum of 800 cars a year to the Facility. Under this contract, Patriot shall pay the Railroad a base rate of \$ . per car for the first and second contract year and in the third and subsequent years the base rate per car shall be escalated as set forth in the contract. The base rate shall never exceed the lowest rate that the Railroad charges any other Shipper.

REDACTED

In addition, Patriot shall pay the Railroad:

- (a) an additional amount of \$ . per car up to a total of 12,000 cars with a credit of \$ . per car delivered by other customers. (At its option, the Railroad may shift \$ of this amount into the payments that will receive under the Terminal Transloading Agreement referred to in the next paragraph.) If Patriot and other shippers do not deliver at least 800 cars per year to the Facility (with a credit for any cars delivered by other shippers or cars in excess of 800 per year for preceding years), Patriot shall make a payment to the Railroad equal to \$ times the shortfall in cars. This payment, as well as 50% of the costs incurred in defending any preemption challenge to the Facility, shall be guaranteed by the members of Patriot, namely Spicer Plus, a Connecticut corporation and NGL Supply Terminals Company;
- (b) all sums that are payable under the equipment lease described in the Financing, Development and Construction Agreement, including property and liability insurance and all real and personal property taxes attributable to the Facility.

- 3. Transloading Arrangements. The obligations of the Railroad and All American Terminals with respect to transloading services are substantially set forth in a Terminal Transloading Agreement attached hereto as Exhibit C.

REDACTED

Contract Year and Partial Year Guaranty. Operations shall commence upon completion and operation of the Facility. The period between the commencement of terminal operations and April 30, 2013 shall be designated the construction year. During the construction year the Operator shall guarantee minimum fees to the Railroad of \$ .

Contract Year 1 under referenced agreements shall begin May 1, 2013.

- 4. Termination Due to Impracticability. If there is a measurable material adverse change in circumstances or conditions pertaining to the Facility which prevent a party from performing or make it commercially impractical for a party to perform its obligations under one or more of the Agreements then such party may terminate the Agreements. The parties agree to cooperate in the winddown of the Facility such as, but not limited to, removal of equipment owned by any party which comprises the Facility.
- 5. Agreement in Principle. The parties will acknowledge that they have an agreement in principle on the foregoing matters and agree that they will endeavor in good faith to finalize and execute the agreements in substantially the form attached hereto, with such clarifications and additions as may be required to incorporate and reflect their mutual intent on the matters set forth therein and in this MOU.

IN WITNESS WHEREOF, the parties hereto have executed this MOU as of the day and year first above written

GRT Financing, LLC

By: James L. Chubb  
Its member

All American Transloading, LLC

By: James L. Chubb  
Its member

Patriot Gas, LLC

By: James L. Chubb  
Its member

Grafton & Upton Railroad Company

By: [Signature]  
Its [Signature]

Spicer Plus and NGL Supply Terminals Company as to Paragraph 2(a) and 4

Spicer Plus, Inc.

By: James L. Chubb  
Its President

NGL Supply Terminals Company *see next page. L. Chubb*

By: \_\_\_\_\_

Its

Spicer Plus, Inc.

By: James Elchert  
Its President

NGL Supply Terminals Company

By: [Signature]  
Its President.

ATTACHMENT C

Terminal Transloading Agreement

REDACTED

EXECUTION COUNTERPART

TERMINAL TRANSLOADING AGREEMENT

This Terminal Transloading Agreement ("Agreement") made and entered into as of October 1, 2012, by and between Grafton & Upton Railroad Company, a Massachusetts corporation, having an address of 929 Boston Post Road East, Marlborough, Massachusetts 01752 ("Railway") and All American Terminals, a Delaware limited liability company having an address of 42 Westborough Road, Grafton, MA 01536 ("Contractor").

This Agreement includes the attached appendices to the same extent as if the provision of appendices were set forth verbatim herein, and the term "Agreement" as used herein shall include the appendices.

**WITNESSETH:**

WHEREAS, Railway holds itself out to the public as a common carrier by rail offering to provide line haul transportation, transloading, storage and other specified transportation services with regard to liquefied petroleum gas and other commodities; and

WHEREAS, Railway is in the process of constructing a liquefied petroleum gas transloading terminal at its yard in North Grafton, Massachusetts (the "Terminal"); and

WHEREAS, Contractor has experience and expertise with respect to transloading liquefied petroleum gas from rail cars to trucks; and

WHEREAS, Railway and Contractor desire to enter into an agreement, to be effective as of the Effective Date as defined in Section 5 below, for the performance by Contractor of certain services on behalf of Railway at the Terminal that are integral to Railway's transloading and transportation services, as set forth herein and under the terms and conditions hereinafter set forth below;

NOW, THEREFORE, for and in consideration of the mutual undertakings set forth below, the parties hereto agree as follows:

**SECTION 1. CONTRACTOR OBLIGATIONS.**

**A. Transload Services.**

(1) In accordance with the terms and conditions of this Agreement and consistently with the terms and conditions pertaining to services (but excluding terms and conditions pertaining to rates, which shall be governed by Section 1K below) of Railway's Tariff 5000, as it may be amended from time to time in the sole discretion of Railway upon 10 days' prior written notice to Contractor, Contractor shall provide transloading and other services related to the transloading of liquefied petroleum gas from rail cars and ultimately into trucks at the Terminal, for and under the auspices and control of Railway. This Agreement shall apply only to liquefied petroleum gas that is transported by rail by Railway to the Terminal and to

GURR0001

services provided by Contractor after or prior to such rail movements. In the event of any inconsistency between the terms and conditions of this Agreement and Tariff 5000, as it may be amended, the terms and conditions of this Agreement shall control.

(ii) Contractor shall handle and transload liquefied petroleum gas in full accordance with all applicable safety and environmental regulations, including without limitation applicable regulations of the Federal Railway Administration, the Environmental Protection Agency and the Occupational Safety and Health Administration, and other conditions Railway deems appropriate, and that Contractor's employees, agents and subcontractors shall have received the proper training and safety protective equipment to transload liquefied petroleum gas.

(iii) As requested or directed by Railway, Contractor shall perform all activities required to transload liquefied petroleum gas from rail cars ultimately to trucks at the Terminal (such activities called the "Transload Process"), including but not limited to the following:

- i. Ensuring shipper compliance with any applicable government regulations, as the same may be amended or replaced.
- ii. Establishing and conducting check in procedures for trucks showing up at the gate
- iii. Controlling the gate during open hours, which shall be at a minimum 7:00 a.m. to 6:00 p.m, five (5) days per week (Monday through Friday), but regular hours of service can be in addition to the minimum, if it is necessary to match the level of business at the terminal and the needs of the customers
- iv. Maintaining the Terminal site, including but not limited to the gates, fences, grounds, buildings, and other facilities at the Terminal in an orderly, clean state of good repair.
- v. Directing trucks within the loading site.
- vi. Completing paper work for truck drivers.
- vii. Attaching transload equipment to railcars.
- viii. Attaching transload equipment to trucks.
- ix. Providing security, which shall mean, at a minimum, that the facility is occupied at all times during open hours, and that the Terminal is secured with locked gates during periods when the facility is not open.
- x. In accordance with Section 2 herein, as agent for Railway, billing and collecting for services provided by Contractor to customers of Railway at the Terminal.
- xi. Arranging for motor carrier service for customers of Railway, if requested by such customers, or allowing such customers to arrange for their own motor carrier service.

(iv) Contractor shall supply the necessary staffing, including a Terminal Manager (as a single point of contact for Contractor), drivers and qualified loaders, portable

office, if necessary, and equipment, to provide the Transload Process on a timely basis for Railway's customers. Personnel will be properly and adequately trained by Contractor. The Transload Process will be supervised and staffed with the appropriate number of FRA, EPA, OSHA and DOT trained personnel in accordance with applicable regulations and standard industry procedures.

(v) Contractor shall ensure all transloading activities will be accurately metered or weighed and the volume transloaded recorded. Contractor shall, at its sole cost and at times that it determines in its sole discretion, have an independent party perform a meter calibration test on all meters and shall provide the results of said test to Railway.

(vi) If requested by Railway's customer, the quantity of liquefied petroleum gas handled hereunder shall be determined by Contractor, or at Railway's customer's option by an independent inspector mutually acceptable to Contractor and the customer. The charges for an independent inspection shall be borne by the customer. Either Contractor or the customer may dispute a determination under this section by delivering written notice thereof to the other promptly upon receipt of the determination. The parties shall resolve any disputes in good faith.

(a) The quantity of liquefied petroleum gas handled hereunder shall be determined as follows:

- (i) The quantity of the liquefied petroleum gas received from rail cars shall be determined by the rail car's bill of lading from the origin point.
- (ii) The quantity of the liquefied petroleum gas delivered to a tank truck shall be determined by a loading meter or calibration charts that utilize certified weights, or in the case of meter failure or absence of meters, tank truck calibrations shall be used in conjunction with certified weights. Contractor shall maintain seals on its meters and shall test and calibrate its meters at maximum intervals of six (6) months, or more often as found necessary by Contractor, in its sole discretion (or as required by federal, state or local authorities), in accordance with approved methods.
- (iii) For the purposes of the Agreement, a barrel shall consist of forty-two (42) U.S. gallons and a gallon shall contain two hundred thirty-one (231) cubic inches when corrected to 60° F. All measurements shall be in accordance with API standards. All quantities, however measured, shall be corrected to 60° F, using the applicable volume correction table for chemical products.

(vii) Contractor shall not permit any motor carrier to enter onto the Terminal unless such motor carrier has entered into an Indemnity and Hold Harmless Agreement with Railway and Contractor substantially in the form attached hereto as Appendix C. Contractor shall not permit any motor carrier to enter onto the Terminal, regardless of whether said motor carrier has entered into an Indemnity and Hold Harmless Agreement with Railway, if Railway, in its reasonable discretion, denies such motor carrier access to the Terminal.

**B. Accessorial Yard Services.**

Contractor shall also provide any additional services which are determined in Railway's sole but good faith judgment to be reasonably necessary for the efficient operation of the Terminal (hereinafter called "Accessorial Yard Services"), which shall include at a minimum those operating and administrative services specifically described in Appendix A; provided, however, that no language in Appendix A, or omission of language from Appendix A shall reduce or limit, in any manner, Contractor's obligation to provide all support and incidental services ordinarily and reasonably required in the operation of a rail-highway intermodal transload facility for liquefied petroleum gas.

**C Performance of Work.**

Contractor shall perform the Transload Process and its other duties and responsibilities pursuant to this Agreement under the supervision and control of Railway. Contractor shall be responsible for, and Railway shall not participate in, the employing of each person engaged in discharging Contractor's responsibilities under this Agreement. The Contractor shall pay all expenses and charges involved or incurred in any way in the performance of its obligations under this Agreement, including without limitation compensation of personnel, fringe benefits, Social Security, Worker's Compensation unemployment insurance and any other employment taxes as may be required by State or Federal law. Should Contractor engage the services of a subcontractor or agent to carry out any of Contractor's services or responsibilities under this Agreement, Contractor shall retain full responsibility and shall indemnify and hold harmless Railway from any consequences of the acts and omission of such subcontractor or agent. Contractor shall not use the Terminal other than for the purposes set forth in this Agreement, and shall not use the Terminal for purposes of engaging in any other activities or independent businesses, including without limitation manufacturing or processing of any kind, for its own account or for the account of any other person or entity other than Railway. Railway shall promote the services provided pursuant to this Agreement as part of the rail transportation services offered to line haul customers of Railway; provided, however, that Contractor may, as the agent and on behalf of Railway, solicit customers of Railway, including affiliates of Contractor that are customers of Railway, to use services provided by Contractor at the Terminal, but such services may be provided only after such customer ships liquid petroleum gas by rail over the line of Railway.

D. Protection of Persons and Railway Property

(i) Contractor shall require any person performing any obligation of Contractor under this Agreement, including, without limitation, Contractor's employees, prospective employees, agents, representatives, and subcontractors (the "Workers"), to comply while on or about property owned or leased by the Railway, with the Operating Rules of Railway attached as Appendix A and also to comply with any other applicable rules or regulations concerning operations or safety.

(ii) Contractor will provide any information reasonably required by Railway about any of Contractor's Workers who may come on Railway property or perform any work for Railway under this Agreement. Contractor represents and warrants that, as to each of Contractor's Workers who will come onto Railway's premises or who will perform work hereunder, Contractor has performed, and such Contractor's Worker has passed, the required background check and a drug screening test, each of which shall be reasonably acceptable to Railway and otherwise in compliance with applicable laws, including, but not limited to the Fair Credit Reporting Act as applicable to background checks.

(iii) Contractor represents and warrants that it is knowledgeable and experienced with respect to the handling of hazardous materials generally and liquefied petroleum gas specifically and any applicable federal, state and local laws and regulations relating to the transportation, including loading, unloading, and storage of hazardous materials, including liquefied petroleum gas. Contractor shall handle all hazardous materials, including liquefied petroleum gas, in compliance with all such applicable laws and regulations, including without limitation regulations of FRA, EPA and OSHA, and shall train its Workers and any employees or agents of Railway working in the Terminal so that they will be knowledgeable with respect to handling such hazardous materials and the applicable regulations.

(iv) Contractor shall ensure that appropriate spill containment measures are used.

(v) Contractor shall ensure that the Transload Process for liquefied petroleum gas will be performed: (a) only on grounded track; (b) isolated from other activities at the Terminal to the degree possible as track space allows; (c) only through a pumping system with a "closed loop" vapor recovery system, or its equivalent, if necessary; (d) using hoses secured with straps/seals; (e) under conditions where all transfer equipment, car and tank truck are grounded; (f) only using bonded tanks; and (g) inside the containment area for hazardous products.

(vi) Contractor shall ensure that all personnel involved in the transfer of hazardous materials will: (a) wear selected protective clothing, including goggles, work boots, PVC gloves, and long-sleeved uniforms, and (b) be trained, and receive regular and appropriate refresher training, regarding the hazards posed by liquefied petroleum gas (such hazards as are set forth in the Material Safety Data Sheets) and in the appropriate emergency response in the event of a release of liquefied petroleum gas (such appropriate responses are set forth in the emergency response plan identified in Section 1.D(viii) below).

(vii) Contractor shall ensure that all necessary safety equipment, including blue flags, rail chocks, spill kits, safety showers, fire extinguishers, and eyewashes, shall be in place and in good working order.

(viii) Contractor shall ensure that the following will be maintained in the office of the Terminal at all times: (a) all Material Safety Data Sheets (MSDS) covering the specific Commodity being transferred; (b) the proper Emergency Response Guide covering the specific Commodity being transferred; (c) a working emergency response plan, which will also be provided to the local emergency response agency; (d) a security plan; and (e) any other plans or documents required by any applicable regulations or the direction of any agency having jurisdiction.

(ix) Contractor shall implement the security plan identified in Section I.D(viii) above.

(x) Contractor shall promptly report any and all accidental releases of liquefied petroleum gas or other hazardous materials to Railway and to any agencies entitled to notice pursuant to applicable regulations and laws.

(xi) Contractor shall contain, dispose of and remediate any and all accidental releases of hazardous materials, including liquefied petroleum gas, in accordance with all applicable Federal, State and local requirements.

#### I. Other Investigations.

As to any Contractor's Workers who have to or may come into the Terminal or perform work hereunder, Contractor will perform any other investigation or procedure reasonably requested by Railway for the protection of Railway's property or operations, the protection of loading, and the protection of third parties, provided such investigation shall comply with and be limited by applicable federal and state laws, rules and regulations.

#### F. Waiver.

If Railway elects to waive the requirement of any background check, drug screen, or other investigation or procedure before permitting one of Contractor's Workers to perform work hereunder or to come into the Terminal, such waiver shall not constitute a waiver of Railway's right to subsequently require any such check, screen, investigation or procedure for that Worker after he or she has begun working under this Agreement.

#### G. Exclusion of Workers.

Without limiting the generality of the foregoing in any way, Contractor shall also comply with the following provisions, provided such investigation shall comply with and be limited by applicable federal and state laws, rules and regulations:

(i) Arrange a urinalysis screen for any substance specified by Railway in its reasonable discretion for each of Contractor's Workers who will perform work under this Agreement.

(ii) Before any Worker comes into the Terminal or performs any work hereunder, provide Railway with a certificate from the doctor, clinic, or hospital performing the urinalysis drug screen for that Worker certifying the results thereof.

(iii) Railway reserves the right to bar from the Terminal or other property owned or leased by the Railway any of Contractor's Workers who, in Railway's reasonable judgment, could create any risk or operating or administrative problems either because of the excluded person's refusal to comply with operating safety procedures, questions about his or her honesty, discipline problems he or she creates with Railway's own employees, or any other reason Railway has for reasonably believing that person might cause risk or disruption to Railway's operations or to the Transload Process at the Terminal. Upon request by Railway which in the reasonable judgment of Contractor is supported by cause, Contractor will exclude from the performance of any work under this Agreement and bar from the Terminal or other property owned or leased by Railway any of Contractor's Workers designated by Railway as excluded under this Agreement. Railway shall specify, in any such request or otherwise, either the basis for its decision or which of the foregoing objections it has to the excluded person. Railway shall indemnify, defend and hold harmless Contractor from and against any claims, suits, judgment or other damages, including, without limitation, reasonable attorneys fees, incurred by Contractor as a result of any such exclusion taken at the request of the Railway.

(iv) Railway's rights under this section to exclude any person from property owned or leased by the Railway or from work under this Agreement shall not be waived by its failure to require any background check, drug screen, or other investigation or procedure under the other provisions of this Section 1.1, by its prior failure to act upon any information that was, or should have been, included in such check, screen, investigation or procedure, by the successful passing by Contractor's Worker of the required or any other background check or by any other act of omission of Railway.

(vi) Before permitting any of its Workers to perform any service under this Agreement, Contractor shall inform him or her of all of Railway's rights under this Section 1.1.

#### 1.1. Conflict of Interest.

Contractor shall not permit any person, firm or corporation, or employees thereof, in any manner interested in the liquefied petroleum gas to be handled hereunder to perform any of Contractor's obligations under this Agreement or to become financially interested in Contractor's business. Contractor shall not employ, lease or rent any vehicle used in the usual course of business by such person, firm or corporation, and Contractor shall not permit any monies paid for services performed hereunder to be refunded, directly or indirectly, to any shipper, consignee or anyone interested in the liquefied petroleum gas so handled.

I. Damage and Injury Reports.

Contractor shall immediately notify the Railway employee specified on Appendix B of (i) any death of, or injury requiring medical treatment to, any person, including but not limited to employees of Contractor while at the Terminal or on property owned or leased by the Railway or performing services hereunder, and (ii) any loss or destruction of or damage to any property whatsoever, including but not limited to rail cars and the liquefied petroleum gas. Contractor agrees to furnish full details of any such accident or incident. Contractor acknowledges its knowledge of Railway's responsibility to report deaths or injuries to Federal agencies and its full knowledge of all penalties and damages to which Railway may be subjected if such reports are not made because of Contractor's failure to notify Railway.

J. Audit.

(i) Each party shall, during the existence of this Agreement and for six (6) calendar years thereafter, upon written request of the other party, furnish such other party, within sixty (60) days from the receipt of a written request, a detailed accounting of expenses of operation and charges pertaining to operations pursuant to this Agreement.

(ii) Each party shall also permit the other party full and complete access to such books and records (including those of any corporate parent, subsidiary, or affiliate) as may be required to conduct a proper audit, in accordance with generally accepted accounting principles, of operations, charges and accounting under this Agreement. Each party shall also permit the other party to copy any portion of those books and records that the other party is entitled to examine under the foregoing sentence.

K. Transloading Charges.

On behalf of Railway, Contractor shall send invoices bearing the name of Railway and directing customers to remit the amount of the invoiced charges to Railway. Contractor shall promptly invoice such customers at the rates for the various transloading services as set forth in Tariff 5000, as it may be amended from time to time. The current rates are as follows:

Railway shall not adjust or modify the rate set forth in Tariff 5000 for transloading liquefied petroleum gas without the prior written consent of Contractor, which consent shall not be unreasonably delayed, conditioned or withheld.

In the event that Contractor advises Railway that Contractor believes that a tariff rate or rates should be adjusted or modified, Railway shall promptly consider such advice and make such adjustment or modification if Railway determines that the adjustment or modification is reasonable and appropriate.

REDACTED

REDACTED

GURR0008

## SECTION 2. COMPENSATION.

Railway shall compensate Contractor as provided in this Section 2. Contractor's compensation for services provided hereunder by Contractor and all obligations assumed hereunder by Contractor pursuant to this Agreement shall be an amount equal to the entire amounts collected by or on behalf of Railway based upon the invoices sent by Contractor to Railway's customers in accordance with Section 1.K. above, minus the \$50 per car handling fee, which shall be retained by Railway. Within 5 business days after receipt of such charges by Railway, Railway shall pay Contractor the amount due to Contractor. Such amounts paid by Railway shall be the sole compensation of Contractor for such services, and Contractor shall have no additional claim or recourse against Railway and shall have no claim directly against customers of Railway for any such compensation. Contractor shall take steps to undertake collections on behalf of Railway from non-paying customers, if any.

## SECTION 3. LIABILITY, INDEMNITY AND INSURANCE.

### A Indemnity for Railway.

(i) Contractor shall indemnify and hold harmless Railway and the other Indemnified Parties listed in Subsection 3.B below from and against any and all liability, damages, claims, suits, judgments, costs, expenses (including, but not limited to, litigation costs and attorney fees) and losses resulting from:

- (a) Injury to or death of Contractor's agents, servants, or employees and loss or destruction of or damage to property or equipment of Contractor or its agents, servants or employees arising in connection with this Agreement or the presence at or about the Terminal, or any other property owned or leased by the Railway, of any Contractor's agents, servants or employees, except to the extent such injury, death, loss or damage is caused by the negligence or willful misconduct of Railway, its agents, servants, or employees, or otherwise;
- (b) Except as provided in Subsection 3.A(i)(a), injury to or death of any person whomsoever (including, but not limited to, employees of Railway) and loss or destruction of or damage to any property whatsoever (including, but not limited to, property owned by Railway) caused by the acts or omissions of Contractor, its agents, servants, or employees or arising in any manner from Contractor's performance or attempted performance of this Agreement (and regardless of whether any truck or other equipment involved in such loss or damages or injury is in Contractor's possession at the time of loss, damage or injury), unless such injury, death, loss, or damage is caused by the negligence or willful misconduct of Railway, its agents, servants or employees; or

- (c) Any failure by Contractor to comply with any covenant of this Agreement, including but not limited to Contractor's obligation to pay any applicable payroll, unemployment compensation, social security or other employment taxes arising in any manner from or in connection with the services performed by Contractor pursuant to this Agreement or with the assertion by any federal, state or local government of any such tax liability.
- (d) Contractor shall not be responsible for any environmental condition of the Terminal existing prior to the date of this Agreement or any problem or condition caused or created by any person other than Contractor or its contractors, employees or agents, and Railway shall indemnify and hold harmless Contractor from and against any costs, penalties, fines, claims, suits or damages incurred by Contractor as a result of such prior condition. In the event of any release of a hazardous substance or environmental condition occurring after the date of this Agreement at the Terminal, Contractor shall indemnify and hold harmless Railway and other Indemnified Parties from and against, and shall bear the cost of cleaning up, remediating or correcting, any such release, problem or condition, except to the extent that any such release, problem or condition was caused by Railway.

**B. Indemnified Parties.**

Contractor shall indemnify and hold harmless the following parties (herein the "Indemnified Party" or "Indemnified Parties") to the extent described in Subsection 3 A above: (i) the Railway; (ii) any direct or indirect subsidiary of the Railway; and (iii) any officer, director, employee or agent of the Railway or any of its direct or indirect subsidiaries.

**C. Insurance.**

(i) Contractor shall, at its expense, obtain and maintain during the period of this Agreement in a form and with companies reasonably satisfactory to Railway, the following insurance coverages:

- (a) Workers' Compensation Insurance to meet fully the requirement of any compensation act, plan or legislative enactment applicable in connection with the death, disability or injury of Contractor's officers, agents, servants or employees arising directly or indirectly out of the performance of the services herein undertaken;
- (b) Employers' Liability Insurance with limits of not less than \$1,000,000.00 each accident, \$1,000,000.00 policy limit for disease, and \$1,000,000.00 each employee for disease;

- (c) Commercial General Liability Insurance with a combined single limit of not less than \$5 million per occurrence and \$10 million in the aggregate, with a deductible (or self-insured retention) amount of not more than \$15,000, for injury to or death of persons and damage to or loss or destruction of property. Such policy shall be endorsed to provide coverage for loss and damage of lading, including liquefied petroleum gas, and contractual liability coverage for liability assumed under this Agreement. The contractual liability coverage shall be of a form that does not deny coverages for operations conducted within fifty (50) feet of any railroad track or facility or for pollution or releases of hazardous materials. In addition, said policy or policies shall be endorsed to name Railway as an additional insured and shall include a severability of interests (separation of insureds) provision.
- (d) Automobile Liability Insurance with combined single limit of not less than \$5,000,000.00 each occurrence for injury to or death of persons and damage to or loss or destruction of property. Said policy or policies shall be endorsed to name Railway as an additional insured and shall include a severability of interests (separation of insureds) provision.
- (e) In the event Contractor leases or otherwise uses equipment owned or leased by, or in the custody or control of, Railway in order to perform the services specified in this Agreement, Contractor shall maintain all risk property insurance at replacement cost value on said equipment.

(ii) Contractor shall furnish certificates of insurance to Railway certifying the existence of such insurance. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in coverage or limits without thirty (30) days advance written notice to Railway. Upon request, Contractor and its subcontractors, if any, shall furnish Railway with satisfactory evidence of such insurance. Contractor shall require all subcontractors who are not covered by the insurance carried by Contractor to maintain the insurance coverage described in this Section.

(iii) The insurance coverage required herein shall in no way limit the Contractor's liability under this Contract; provided, however, that Contractor shall be deemed to have met its liability obligation to the extent that Railway has received insurance proceeds.

(iv) Railway shall, at its expense, obtain and maintain during the period of this Agreement, in a form and with companies reasonably satisfactory to Contractor, Commercial General Liability insurance with a combined single limit of not less than \$5 million per occurrence and \$10 million in the aggregate, with a deductible (or self-insured retention) amount of not more than \$15,000, for injury to or death of persons and

damage to or loss or destruction of property. Such policy shall be endorsed to name Contractor as an additional insured and shall include a severability of interests provision. Railway shall furnish certificates of insurance to Contractor certifying the existence of such insurance, and such policy shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in coverage or limits without 30 days' advance written notice to Contractor.

#### SECTION 4 LIENS

Contractor shall not cause or permit any lien, claim or encumbrance to be placed against any property owned by the Railway as a result of any action or failure to act by Contractor. If any such lien, claim or encumbrance caused or permitted by Contractor shall be filed or placed against any property owned by the Railway or any part thereof, Contractor agrees to discharge the same within thirty (30) days after Contractor has notice thereof. If Contractor fails to do so, Railway shall have the right (but not the obligation) to pay or discharge any such liens, claims or encumbrances without inquiry as to their validity and any amounts so paid, including interest, fees, charges and expenses shall be paid by Contractor to Railway.

#### SECTION 5. TERM AND TERMINATION

A. This Agreement shall have an initial term (the "Initial Term") beginning on the first day that the Terminal is open and operational, which date shall be determined in writing by the Parties (the "Effective Date") and ending on the twentieth anniversary of the Effective Date (the "Termination Date"). Contractor shall have the right, so long as it is not in default under this Agreement and the Agreement has not been terminated as provided herein, (a) to extend the Agreement for 10 years after the Initial Term by providing written notice to Railway not later than 90 days prior to the expiration of the Initial Term and (b) to initiate negotiations with Railway for the extension of the Agreement, on terms and conditions satisfactory to both parties, beyond the expiration of any 10 year extension by providing written notice to Railway not later than 180 days prior to the expiration of the extension term (the extension term and the Initial Term collectively referred to herein as the "Agreement Term").

B. Notwithstanding anything in this Agreement to the contrary, if Contractor breaches any material provision of this Agreement, including, without limitation, any of its obligations under Section 1, 3, 6.B and 6.G (all of which provisions are considered material), or if any person or entity that is (1) related to Contractor and (2) a party to any other written agreement relating to the LPG Transfer Facility party other than Railway breaches any material covenant, representation, warranty, condition or obligation of those agreements, Railway shall have the right to terminate this Agreement with thirty (30) days' prior notice to Contractor. The Contractor shall have the right to remedy any such breach of this Agreement within said thirty (30) day period. In the event that such breach requires more than thirty (30) days to cure, the Contractor shall have such additional time as reasonably necessary to cure, provided that Contractor is using diligent efforts.

SECTION 6. RAILWAY ACCESS TO THE TERMINAL.

Railway shall have the right, at any and all times, as necessary or desirable in the sole discretion of Railway, to use any tracks and facilities at the Terminal for its rail transportation activities that may be in addition to the transloading and related activities performed by Contractor pursuant to this Agreement; provided, however, that any such use by Railway shall not unreasonably interfere with the activities or services of Contractor pursuant to this Agreement. In addition, Railway shall have the right to enter upon and inspect the Terminal and the operations of Contractor, among other reasons, to ensure that the Terminal is not being contaminated and Railway's employees are not at a health risk arising from Contractor's activities. If Railway detects any violation that results from such condition, including any contamination of the Terminal, Railway shall notify contractor of such violation; provided, however, that the giving of said notice, or the failure of the giving of said notice, shall in no way affect the allocation of any liability arising therefrom or in connection therewith.

SECTION 7. GENERAL CONTRACT PROVISIONS

A. (i) Any notice, report, demand, request or other instrument or communication authorized, required or desired to be given under this Agreement by the Contractor or the Railway shall be in writing and delivered by hand, by United States first class certified mail, postage prepaid, return receipt requested, by express mail or express courier service, or by facsimile transmission, if addressed to the party intended to receive the same or their attorney, to the address or facsimile number set forth below, provided that if any notice is sent to the party, all such notices shall be deemed to have been duly given on (i) the date of receipt if delivered by hand, if sent by express courier service or sent by facsimile transmission (with a confirmation copy sent by first class mail); or (ii) the earlier of the date of receipt and the of first attempted delivery by the U.S. Postal Service, if transmitted by mail as aforesaid, to the addressed or facsimile numbers set forth below:

Railway: Grafton & Upton Railroad Company  
929 Boston Post Road East  
Marlborough, Massachusetts 01752  
Attention: Jon Delli Priscoli, President

Contractor: All American Terminals  
42 Westboro Road  
North Grafton, MA 01536  
Attention: Jon Holstein, Manager

(ii) Either party may change the address to which any such notice, report, demand, request or other instrument or communication to such party is to be delivered or mailed, by giving written notice of such change to the other parties, but no such notice of change shall be effective unless and until received by such other parties. No such notice, report, demand, request or other instrument or communication given hereunder shall be invalidated or rendered ineffective due to any failure to give, or delay in giving, a copy of such notice, report, demand,

request or other instrument or communication to any party to whom such copy is to be given as provided above.

**B. Assignment.**

(i) Except as expressly set forth herein, neither this Agreement nor any of the services to be performed hereunder shall be assigned or sublet by Contractor without the prior written consent of Railway, which consent shall not be unreasonably withheld or delayed.

(ii) Contractor may collaterally assign this Agreement without consent of Railway to any lessor of, or lender that has provided purchase money financing for, the liquefied petroleum gas transfer equipment used at the Terminal. Contractor shall give Railway written notice of any such assignment, within five (5) business days of any such assignment.

(iii) Subject to the foregoing restrictions, this Agreement shall inure to the benefit of and be binding upon all successors and assigns of each of the parties hereto. Successors and assigns shall include any party to which Railway or Contractor sell all or substantially all of its assets. Each party hereto covenants and agrees that prior to any such transfer or transaction it shall provide notice of the survival of this Agreement to any successor or assign. Each party hereto shall be entitled to file a notice of this Agreement on the land records of the town in which the Railway is located.

**C. Amendment**

No terms or conditions, other than those stated herein, including any Appendix attached hereto and incorporated herein, and no agreement or understanding, oral or written, in any way purporting to modify this Agreement, shall be binding on either party unless hereafter made in writing stating that it is intended as a change to this Agreement and signed by an authorized representative of both parties.

**D. Integration.**

This Agreement constitutes the entire agreement between the Parties as to the subject matter hereof, and supersedes all previous oral or written understandings, agreements and commitments as to the subject matter hereof.

**E. Counterparts.**

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

F. Non-Waiver

The waiver of any breach of any of the terms and conditions hereof shall be limited to the act or acts constituting such breach and shall not be construed as a continuing or permanent waiver of any such terms and conditions, all of which shall be and remain in full force and effect as to future acts or happenings notwithstanding such waiver. The parties intend that none of the provisions of this Agreement shall be thought by the other to have been waived by any act or knowledge of the parties, but only by a written instrument signed by the party waiving a right hereunder.

G. Severability.

If any provision in this Agreement is found for any reason to be unlawful or unenforceable, the parties intend for such provision or provisions to be severed and deleted from this Agreement and for the balance of this Agreement to constitute a binding agreement, enforceable against both Railway and Contractor.

H. Remedies Cumulative.

Any rights or remedies under this Agreement are cumulative and in addition to all other rights and remedies hereunder or at law. Any cancellation or termination of this Agreement shall not relieve either party of any obligation or liability accruing under this Agreement prior to such cancellation or termination.

I. Disputes.

With respect to any claim, dispute or controversy arising out of or relating to this Agreement, the parties' relationship under this Agreement, or the breach of this Agreement, the Parties unconditionally and irrevocably agree and consent to the exclusive jurisdiction of the Courts located in Worcester County, Commonwealth of Massachusetts and waive any objection with respect thereto, and further agree not to commence any such claim except in any such Courts.

J. Governing Law.

The laws of the United States, to the extent applicable, and the Commonwealth of Massachusetts shall govern the construction and interpretation of this Agreement and all rights and obligations of the parties under it.

K. Captions.

The captions of the paragraphs and sections are inserted for convenience only and shall in no way expand, restrict, or modify any of the terms and provisions hereof.

L. Confidentiality

The terms and conditions of this Agreement shall be considered strictly confidential between the parties hereto and neither party shall disclose any such term, condition, or Railway customer information for any other purpose other than such disclosures as may be required by any government authority in order that it may discharge its regulatory functions, or to each parties' accountants, attorneys, agents and subcontractors who have a need to know the information, or as may otherwise be required by law.

**(The remainder of page left intentionally blank. Signature page to follow.)**

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed under seal, as of the day, month and year first above written.

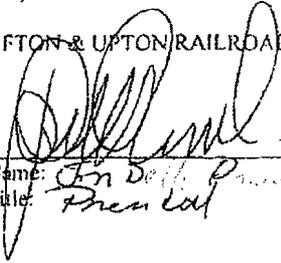
Railway:

Contractor:

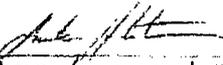
GRAFTON & UPTON RAILROAD

ALL AMERICAN TERMINALS

By:

  
Name: Jon DeLo  
Title: President

By:

  
Name: JONATHAN FEINSTEIN  
Title: Manager

**Signature Page to Terminal Transloading Agreement  
between Grafton & Upton Railroad Company and All American Terminals**

## APPENDIX A

(to Terminal Transloading Agreement between  
Grafton & Upton Railroad Company and All American Terminals)

In general, Contractor will perform the rail-highway intermodal transloading services at the Terminal, as described more fully in the Service Terms and the Tariff.

In performance of its duties, Contractor shall, without limiting the generality of the foregoing:

- (A) Obtain a copy of any and all applicable government regulations, including, without limitation, regulations of the Federal Railroad Administration and the Environmental Protection Agency and regulations governing the handling of liquefied petroleum gas and other hazardous materials, and review and become familiar with all such applicable regulations immediately. Contractor agrees to be governed by such rules applicable to the operation as Railway may publish from time to time, which prescribe certain responsibilities and authority concerning the operations and property of others, including those of the Railway, in Contractor's care, custody and control. A copy of the current editions of these publications is attached or will be given to contractor and incorporated by reference as part of this agreement.
- (B) Provide and maintain sufficient yard vehicles, operating yard tractors, and transloading equipment to meet service requirements and train schedules for all Commodities. Equipment and tools must be in operating condition at all times with inspections and upkeep provided.
- (C) Provide all yard vehicles with back-up alarms, speedometers, flashing strobe lights which are to be working at all times when vehicles are in motion. Provide fire extinguishers in all Contractor owned equipment, maintain in serviceable condition, and make monthly inspections as required by Railway policy.
- (D) Provide and maintain an appropriate and adequate communication system for personnel and all vehicles used.
- (E) Provide structured guidelines, documentation, and training for all personnel with emphasis on liquefied petroleum gas and other hazardous materials training. Provide noise monitoring and equipment to assure compliance with Railway/OSHA standards, and enforce hearing protection requirements, if any, for all transload operators at all times while performing duties.
- (F) Maintain sufficient personnel at all times to perform quality, safe, and sufficient service in accordance with Railway requirements and standard industry practice. This includes qualified supervisors to oversee and insure that duties are coordinated and performed in a safe, courteous, efficient manner. Contractor will provide sufficient manpower to support the operations of the Terminal in accordance with Railway's operating instructions, personnel and standard industry practice. Contractor shall provide any and all operating and administrative services ordinarily and reasonably required in the operation of a rail-highway intermodal facility for the

transloading of liquefied petroleum gas, including but not limited to, the performance of proper equipment inspections as reasonably requested by Railway management, the maintenance of records relating to such inspections, and any other paper work ordinarily and reasonably generated in the operation of such a facility.

(G) Perform joint safety audits with Railway's personnel from time to time

(H) Provide Railway with records of the kind and in the form specified by Railway that are legible, neat, and accurate. Documents must be sufficient to support the facts in the event of any dispute by litigation or otherwise. Contractor must maintain records consistent with the requirements of this Agreement.

(I) Be responsible for any portable office trailer, office mg service, cleaning of offices, restroom, and driver's room. Supply the cleaning material, toilet supplies, soap, paper towels, and any other items necessary for cleaning and daily use of the Terminal. Clean these areas daily or as needed to maintain clean healthy work environment.

(J) Keep Terminal and fence lines free of trash and debris, weeds, grass, brush, etc., and cut and/or trim vegetation a minimum of four (4) times during the growing season or as reasonably directed by Railway management, ensure that the loading and unloading tracks are kept free of all trash and other materials at all times. Failure to maintain these areas will result in Railway handling and billed back against the Contractor at the Railway's actual cost.

(K) Keep all work and maintenance areas clean and organized at all times, provide up-to-date MSDS information, and ensure compliance with all environmental regulations including disposal of used oil, filters, and lubricants. Ensure that all fuels, lubricants, and any other items used for maintenance are properly stored and labeled.

(L) Ensure that all inbound traffic is transloaded in a timely manner after placement, and that outbound traffic is loaded in accordance with cutoffs, pull times and other service standards. Ensure that all ground transfers are promptly notified and delivered per instructions.

(M) Be responsible for all damages or costs resulting from error of Contractor personnel and make immediate arrangements to correct or repair. Contractor shall be responsible, at its sole cost, for all normal maintenance, repair and replacement to and of the Terminal and its constituent parts, including but not limited to plumbing, lights, wash systems, compressors, wash facilities, scales, gates, meters, and lights, and for any required certification thereof.

(N) Prepare necessary summary reports, daily pull and place sheets, end of month recaps, computer updates

(O) Provide all backup paperwork for proof of proper notification and provide proper information.

(P) Supply all fuel for cranes, yard tractors, and will provide on site fuel tank, if necessary. Maintain on site fuel tank in compliance with all applicable laws regulating storage, use and

labeling requirements, and equipped with a spill over prevention basin capable of holding 110% of total capacity of above ground storage tank.

(Q) The Terminal will be in operation in conformance with Section 1(A) of the Agreement.

(Q) Comply with all applicable federal, state, and local laws, rules, regulations and ordinances controlling air, water, noise, solid wastes, and other pollution or relating to the storage, transport, release or disposal of hazardous materials, substances, or waste. Contractor shall, at its own expense, make all modifications, repairs or additions to its equipment used in the Transload Service and shall install and bear the expense of modifications or repairs to any devices or equipment affecting its operations which may be required under any such laws, rules, regulations or ordinances, or which is needed to safely conduct transloading operations. Contractor shall promptly advise Railway when any of Railway's equipment is in need of maintenance, repairs, or replacement. Contractor shall not dispose of any wastes of any kind, whether hazardous or not, at the Terminal.

**APPENDIX B**

**(to Terminal Transloading Agreement between  
Grafton & Upton Railroad Company and All American Terminals)**

The name and address of the Railway employee to be notified under Section 1.G for any death, injury or of any loss or damage to property is:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Phone:  
Fax:

APPENDIX C

(to Terminal Transloading Agreement between  
Grafton & Upton Railroad Company and All American Terminals)

INDEMNITY AND HOLD HARMLESS AGREEMENT

This Indemnity and Hold Harmless Agreement ("Agreement") is made by and among \_\_\_\_\_ with a business address at \_\_\_\_\_ (the "Indemnitor"), \_\_\_\_\_ a \_\_\_\_\_ having an address of \_\_\_\_\_ ("Contractor"), and Grafton & Upton Railroad Company, a Massachusetts corporation, having an address of 929 Boston Post Road East, Marlborough, Massachusetts 01752 ("Railway").

WITNESSETH:

WHEREAS, on behalf of Railway, Contractor performs various transloading services for Railway's shippers and customers using Railway's yard located in North Grafton, Massachusetts (the "Terminal"):

WHEREAS, Indemnitor is a motor carrier providing transportation service to and from the Terminal; and

WHEREAS, Railway is not willing to allow Indemnitor to perform such services on and using the Terminal unless Indemnitor enters into this Agreement agreeing to indemnify and hold harmless Railway and Contractor and certain related parties of each of them, as provided herein.

NOW, THEREFORE, in consideration of the premises and the agreements contained herein, the parties agree as follows:

SECTION 1. Access to Terminal. Railway, through Contractor, may from time to time permit Indemnitor to perform motor carrier transportation services for customers of Indemnitor utilizing the transloading services of Contractor at the Terminal. The provisions of this Agreement shall apply to any such services provided by Indemnitor at the Terminal and to any act(s) or omission(s) of Indemnitor at the Terminal.

Section 2. Indemnitor's Responsibility For Its Contractors and Agents. Should Indemnitor engage the services of a contractor or agent, Indemnitor assumes full responsibility and shall indemnify and hold harmless Railway and Contractor in accordance with the provisions of Section 4 from any consequences of the acts and/or omissions of such contractors and agents.

Section 3. Indemnitor's Obligations. In performing any services on or using the Terminal, Indemnitor will promptly clean up or cause the clean-up of any material, commodity or product spilled through the act or omission of Indemnitor or its contractors and/or agents. Indemnitor will comply with all federal, state and local laws, rules, regulations and ordinances

controlling air, water, noise, solid waste, and other pollution and relating to the storage, transport, release or disposal of hazardous materials, substances, or waste. Indemnitor shall not dispose of any wastes of any kind, whether hazardous or not, on the Terminal or any premises owned, leased or operated by Railway or Contractor or any affiliate of Contractor. Indemnitor shall immediately take steps to clean up and eliminate any violation of this Section 3 at the sole expense of Indemnitor. In addition, Indemnitor agrees to comply with and perform any duties imposed upon motor carriers in any applicable government regulation or any successor or reissued publications.

Section 4. Indemnification. Indemnitor will be responsible for, and will indemnify and hold harmless each of Contractor and Railway and each of their respective shareholders, directors, officers, agents, employees, successors and affiliates from and against, any and all liabilities, losses, damages, claims, suits, judgments, costs and expenses (including without limitation attorneys' fees) resulting from or in connection with injury to or death of any persons whomsoever (including without limitation, agents employees or representatives of Railway or Contractor or Contractor's affiliates), or damage to or loss of any property whatsoever, including commodity, caused directly or indirectly by any of its acts or omissions at the Terminal, provided, however, that Indemnitor's obligation to indemnify and hold harmless any party shall not apply to the extent that any such injury, death, damage or loss is caused by the negligence or wrongful act(s) or omission(s) of such indemnified party.

Section 5. Governing Law. Except as otherwise expressly provided in this contract, the laws of the Commonwealth of Massachusetts shall govern the interpretation and performance of this Agreement.

Section 6. Insurance. Indemnitor shall at its sole cost and expense obtain and maintain during the period of this Agreement in a form and with companies satisfactory to Railway and Contractor, the following insurance coverage:

- a) Workers' Compensation Insurance to meet fully the requirement of any compensation act, plan or legislative enactment applicable in connection with the death, disability or injury of Indemnitor's officers, agents, servants or employees.
- b) Employers' Liability Insurance with limits of not less than \$1,000,000.00 each accident, \$1,000,000.00 policy limit for disease, and \$1,000,000.00 each employee for disease.
- c) Commercial General Liability Insurance with a combined single limit of not less than (i) \$5,000,000.00 per occurrence if Indemnitor will handle hazardous materials at the Terminal, or (ii) \$1,000,000.00 per occurrence if Indemnitor will not be handling any hazardous materials at the Terminal, for injury to or death of persons and damage to or loss or destruction of property. Such policy shall be endorsed to provide products and completed operations coverage and contractual liability coverage for liability assumed under this Agreement, shall name Railway and Contractor as additional insureds and shall include a severability of interests provision. The contractual liability coverage shall be of a form that does not deny

coverage for operations conducted within fifty (50) feet of any railroad track or facility.

- d) Truckers Liability Insurance with a combined single limit of not less than \$5,000,000.00 per occurrence for injury to or death of persons and damage to or loss or destruction of property. Said policy shall be endorsed to provide contractual liability coverage for liability assumed under this Agreement, shall name Railway and Contractor as additional insureds and shall contain Endorsement Form MCS-90 for Motor Carrier Policies of Insurance for Public Liability under section 30 of the Motor Carrier Act of 1980, or Form MCS-82 motor carrier public liability bond must be obtained.

Prior to entering the Terminal, Indemnitor shall furnish certificates of insurance to Railway and Contractor certifying the existence of such insurance. Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled or reduced in coverage or limits without (30) days advance written notice to Railway and Contractor

The furnishing and acceptance of the policies or certificates of insurance and bond referred to above shall not in any way or degree alter or lessen the liability of Indemnitor under this Agreement.

Section 7. Assignment. No assignment of this Agreement is permitted without prior written consent of the other parties hereto, except to successors in interest to a party.

Section 8. Waiver. Waiver by any party of any breach of these provisions shall not be construed as a waiver of any breach.

Section 9. Headings. The section headings contained in this Agreement are for convenience of reference only and in no way shall modify any of the terms or provisions of this Agreement.

Section 10. Notices. Any notices, requests or other communications hereunder shall be in writing and shall be deemed to have duly given when made upon a party by personal service at any place where they may be found or by mailing such notices, requests, or internationally recognized courier, or by transmitting such a notice by facsimile, in each case to the following addresses or facsimile numbers, as the case may be:

INDEMNITOR

Facsimile:

RAILWAY

Grafton & Upton Railroad Company  
929 Boston Post Road East  
Marlborough, Massachusetts 01752  
Facsimile:

CONTRACTOR

\_\_\_\_\_  
Facsimile:

Or to such other addresses or facsimile numbers as such party may specify in a notice given to the other party as provided in this Section 10.

Section 11. Counterparts; Facsimile. This Agreement may be executed simultaneously in several counterparts, and by facsimile, and each of such counterpart and facsimile signature shall be deemed an original, but all of such counterparts and facsimile signatures together shall constitute one and the same instrument.

Section 12. Severability. In the event any provision of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, such invalidity or enforceability shall not affect any other provision of this Agreement.

**(The remainder of page left intentionally blank. Signature page to follow.)**

GURR0025

In WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives as of the date first above written.

INDEMNITOR:

CONTRACTOR:

\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_

Name:  
Title:

By: \_\_\_\_\_

Name:  
Title:

RAILWAY:

GRAFTON & UPTON RAILROAD  
COMPANY

By: \_\_\_\_\_

Name:  
Title:

ATTACHMENT D

Confidential Rail Transportation Contract

EXECUTION COUNTERPART

CONFIDENTIAL RAIL TRANSPORTATION CONTRACT

This Confidential Rail Transportation Contract (the "Contract") made as of October 1, 2012 by and among Grafton & Upton Railroad Co. ("G&U"), Patriot Gas Supply, LLC ("Patriot"), and, solely for purposes of providing certain guarantees as provided in this Contract, Spicer Plus, Inc. ("Spicer") and NGL Supply Terminals Co. ("NGL").

WHEREAS, G&U is a rail carrier that owns and operates a line between North Grafton, Massachusetts, where the line connects with a line of CSX Transportation, and Milford, Massachusetts;

WHEREAS, Patriot is a purchaser and wholesale seller of liquefied petroleum gas; and

WHEREAS, G&U has a yard located in North Grafton (the "Yard") with a facility comprised of approximately 8 acres of land and equipment (the "Facility") that is capable of transloading liquefied petroleum gas from rail cars to trucks; and

WHEREAS, the parties desire to enter into an arrangement pursuant to which Patriot will arrange for the shipment of liquefied petroleum gas by rail to the Yard for transloading by G&U; and

WHEREAS, it is in the interests of G&U and of Spicer and NGL, both of which are Patriot affiliates that will benefit from the performance of this Contract, for Spicer and NGL to provide assurances to G&U in the form of the guarantee obligations assumed by Spicer and NGL pursuant to this Contract; and

WHEREAS, the parties desire to establish the terms and conditions for such transportation services pursuant to this Contract in accordance with 49 U.S.C. 10709;

NOW, THEREFORE, in consideration of the foregoing premises and the covenants and provisions set forth below, and intending to be legally bound, the parties hereby agree as follows:

1. Term. This Contract shall become effective as of the date of the commencement of operations at the Facility and shall remain in effect, unless earlier terminated as provided in this Contract, for a term of twenty (20) years from the effective date. Patriot shall have the right, so long as it is not in default under this Contract and the Contract has not been terminated as provided herein, (a) to extend the Contract for 10 years after the initial 20 year term by providing written notice to G&U not later than 90 days prior to the expiration of the initial 20 year term and (b) to initiate negotiations with G&U for the extension of the Contract, on terms and conditions satisfactory to both parties, beyond the expiration of any 10 year extension by providing written notice to G&U not later than 180 days prior to the expiration of the extension term.

2. Services by G&U. For each loaded rail car of liquefied petroleum gas received by G&U for the account of Patriot in interchange with CSX at North Grafton, G&U shall provide all

transportation and transloading services necessary to move the car to the Yard and to transfer liquefied petroleum gas from the rail car to trucks. Such services by G&U shall include switching the cars in the Yard and moving empty cars back to the interchange with CSX. Except as otherwise provided in this Contract, the services provided by G&U shall be subject to the terms and conditions of the Uniform Straight Bill of Lading, all applicable tariffs of G&U and all applicable rules and regulations of any governmental agency or the Association of American Railroads.

3. Patriot Volume Commitment.

(a) During each Contract Year while this Contract is in effect, Patriot shall use commercially reasonable efforts to arrange for the delivery to G&U at North Grafton a minimum of 800 rail cars of liquefied petroleum gas. G&U shall have the right to take delivery of and transload rail cars of liquefied petroleum gas delivered to G&U at North Grafton by, for the account of or on behalf of customers other than Patriot, and, for purposes of calculating such minimum number of cars, Patriot shall be credited with any cars delivered by, for the account of or on behalf of any other such customers in any Contract Year.

4. Transportation Charges.

(a) In return for the services provided by G&U, as described above, Patriot shall pay G&U in accordance with the "Base Rate" that is in effect at the time of delivery of each railcar. The Base Rate for the first and second Contract Years after the effective date shall be \$\_\_\_\_\_ per car. The Base Rate for the third and subsequent Contract Years shall be \$\_\_\_\_\_ per car escalated as set forth in Section 5. In no event shall the Base Rate exceed the lowest rate that G&U charges any other shipper for handling a car of liquefied petroleum gas at the Facility.

(b) In addition, Patriot shall pay the Railroad:

(i) an additional amount of \$\_\_\_\_\_ per car up to a total of 12,000 cars with a credit of \$\_\_\_\_\_ per car of liquefied petroleum gas delivered by other customers. If Patriot and other shippers do not deliver at least 800 cars per year to the Facility (with a credit for any cars delivered by other shippers or cars in excess of 800 per year for preceding years), Patriot shall make a payment to G&U equal to \_\_\_\_\_ times the shortfall in cars (the "Shortfall Payment"). The Shortfall Payment, and the minimum payment set forth in Section 4(d) below, shall be guaranteed by Spicer Phos, Inc., a Connecticut corporation and NGL Supply Terminals Company; provided, however, this payment obligation and guaranty shall be suspended or terminate during or after any period the Facility is, respectively, temporarily or permanently legally prohibited from operating as a result of a preemption challenge referred to in Section 11 of this Agreement. The Parties do not intend the Shortfall Payment obligation and guaranty as liquidated damages and if Patriot discontinues its operation at the Facility G&U shall use commercially reasonable efforts to mitigate damages by re-using the Facility or yard where the Facility is located;

REDACTED

REDACTED

(ii) all sums that are payable under the equipment lease described in the Financing, Development and Construction Agreement, including property and liability insurance and all real and personal property taxes attributable to the Facility (the "Equipment Lease Payments"). Patriot shall receive a credit toward the Equipment Lease Payments equal to the total Equipment Lease Payments due in a Contract Year divided by total cars of liquefied petroleum gas delivered to the Facility by all customers, including Patriot and other customers, times the number of cars of liquefied petroleum gas delivered by other customers.

(c) G&U shall render invoices to Patriot based upon the number of cars received by G&U for the account of Patriot each calendar month, and Patriot shall pay such invoices within 15 days after receipt of such invoices

(d) Operations shall commence upon completion and operation of the Facility. The period between the commencement of terminal operations and April 30, 2013 shall be designated the construction year. During the construction year Patriot shall guarantee minimum fees to the Railroad in an aggregate amount of \$\_\_\_\_\_ from fees paid under Section 4(a) or (b) above. Contract Year 1 shall begin May 1, 2013 and end April 30, 2014 (and that and each such succeeding period is referred to herein as a "Contract Year").

**REDACTED**

5. Base Rate Escalation. The amount of the Base Rate shall increase annually effective as of July 1 of each Contract Year based upon the Annual Indexes of Charge-out Prices and Wage Rates issued by the Association of American Railroads. In making the determination of the increase, the final "Material prices, wage rates and supplements combined (excluding fuel)" index for the Eastern District shall be used, and the final index figure for the calendar year 2012 shall be taken as the base. The method of escalating the Base Rate shall be determined by calculating the percent of increase, or decrease, in the index of the year to be escalated as related to the base year, and applying that percent to the Base Rate; provided, however, that in no event shall the Base Rate be reduced to less than the initial Base Rate set forth in Section 4 above. No increases in excess of 3% per annum shall be instituted, unless the same are mutually agreed upon by G&U and Patriot. If unable to reach agreement upon the same, then, the parties agree to utilize binding mediation to resolve any increase(s) in excess of 3% per annum.

6. Car Supply. Patriot shall arrange for the provision of rail cars for the transportation of liquefied petroleum gas in accordance with this Contract. Such cars shall be in serviceable condition and in compliance with applicable regulations of the Federal Railroad Administration and the interchange rules of the American Association of Railroads. G&U shall have no responsibility to provide rail cars for the use or the account of Patriot.

7. Loss and Damage. G&U shall be liable to Patriot for loss of or damage to lading during the provision of services by G&U pursuant to this Contract; provided, however, that G&U shall not be liable (a) if any loss or damage is caused by an act of God, an act of a public enemy, an act of governmental or military authority or the negligence of Patriot (or any of its agents or customers) or (b) for any consequential, special, indirect or punitive damages, interest or any other claim other than for such loss or damage. Except as otherwise provided in this Contract.

all loss and damage claims shall be governed by and handled in accordance with the terms and conditions of the Uniform Straight Bill of Lading, 49 CFR 1005, and 49 U.S.C. 11706.

8. Force Majeure. If, due to a force majeure event, a party is unable to carry out any of its obligations under this Contract, in whole or in part, and if such party promptly, after discovery thereof, gives to the other party written notice of such force majeure event, then the obligations of the party suffering the force majeure event shall be suspended to the extent made necessary by such force majeure event during its continuance. The party claiming force majeure shall use reasonable efforts to resolve such force majeure in order to resume performance pursuant to this Contract. Force majeure shall mean any event beyond the reasonable control of the affected party, including without limitation acts of God, earthquake, lightning, fire, explosion, flood, acts of a public enemy, war, riot, civil disturbance, sabotage, or exercise of governmental or police power.

9. Confidentiality. The provisions of this Contract shall be deemed to be confidential and proprietary and shall not be divulged by either party to persons outside each party's respective organizations (except for attorneys, accountants and other agents subject to professional or written restrictions on further dissemination) without the prior written consent of the other party or except as may, in the reasonable opinion of the disclosing party, be required by law, rule or regulation.

10. Assignment.

(a) Except as expressly set forth herein, neither this Contract nor any of its rights or obligations shall be assigned or sublet by either party without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed.

(b) Patriot may make a collateral assignment of this Agreement without consent of G&U to any lessor of, or lender that has provided purchase money financing for, any liquefied petroleum gas transfer equipment provided for use at the Yard by Patriot or any affiliate of Patriot. An affiliate shall mean any person or entity controlled by or that controls Patriot, including any entity in which Patriot owns at least 50% of the outstanding equity. Patriot shall give G&U written notice of any such assignment within five (5) business days of making such assignment.

(c) Subject to the foregoing restrictions, this Contract shall inure to the benefit of and be binding upon all successors and assigns of each of the parties hereto. Successors and assigns shall include any party to which G&U or Patriot sell all or substantially all of its assets. Each party hereto covenants and agrees that prior to any such transfer or transaction it shall provide notice of the survival of this Contract to any successor or assign.

11. Preemption. Patriot acknowledges, understands and agrees that G&U may rely on federal preemption principles in order to construct and operate the Yard without complying with certain federal, state or local permitting or preclearance requirements, that Patriot has independently reviewed the scope and application of federal preemption principles and understands that such reliance may be challenged by legal action in courts or before the Surface

Transportation Board. Patriot hereby waives and releases any claims against G&U in the event that any such challenge is successful or in any way adversely affects the ability of the parties to implement or realize the benefits of this Contract. Patriot shall reimburse G&U, within 15 days after receiving invoices, for 50% of the legal and related expenses incurred by G&U in connection with any challenge to any reliance on federal preemption principles ("Preemption Defense Costs"). The obligation of Patriot to provide such reimbursement shall be guaranteed by Spieker Plus, Inc. and NGL Supply Terminals Company.

12. Default and Remedies. The following shall be considered events of default and shall be grounds for immediate termination upon written notice by the other Party ("Non-Defaulting Party"):

(a) If any Party to this Contract, or any person or entity that is related to such Party (the "Defaulting Party") shall breach any material covenant, representation, warranty, condition, or obligation of this Contract or of any other agreement relating to the Facility, and fail to remedy such breach within 30 days after written notice to do so from the Non-Defaulting Party; (b) any Party files a voluntary petition in bankruptcy or shall be adjudicated as bankrupt or insolvent, or shall seek or consent to the appointment of any trustee, receiver, conservator, or liquidator of such Party or of all or any substantial part of its properties; (c) any person shall file an involuntary petition in bankruptcy against a Party, and such petition is not dismissed, discharged, or otherwise terminated with prejudice within thirty (30) calendar days of the original filing thereof; (d) a court of competent jurisdiction shall enter an order, judgment, or decree approving a petition filed against a Party seeking a reorganization, arrangement, moratorium, composition, readjustment, liquidation, dissolution, or similar relief and such order, judgment, or decree shall remain unvacated and unstayed for an aggregate of thirty (30) calendar days (whether or not consecutive) from the date of entry thereof, or a trustee, receiver, conservator, or liquidator of such Party or of all or any substantial part of its properties shall be appointed and such Party shall acquiesce in such appointment or such appointment shall remain unvacated and unstayed for an aggregate of thirty (30) calendar days (whether or not consecutive); (e) a Party shall admit in writing its inability to pay its debts as they come due, its insolvency or pending insolvency, or a suspension or pending suspension of operations; (f) a Party shall make a general assignment for the benefit of creditors or take any other similar action for the protection or benefit of creditors; or (g) there occurs any event which, under applicable laws, has an effect similar to the events described herein.

In addition to the right to terminate in accordance with the foregoing paragraph, Patriot shall also have, at its option and as permitted by 49 U.S.C. 10709(c)(2), the right to seek any remedies available under Title 49, Subtitle IV, Part A (49 U.S.C. 10101--49 U.S.C. 11908) to the same extent to which such remedies would be available in connection with transportation services not provided pursuant to a confidential transportation contract pursuant to 49 U.S.C. 10709, including without limitation the right to seek relief pursuant to Section 20 below.

Termination or expiration of this Contract for any reason shall not release any Party from any obligations that may have accrued before such termination, nor shall it preclude any Party from exercising any remedies it might have to enforce such obligations. Termination of this Contract

by the Non-Defaulting Party shall not cause any prejudice to other rights and remedies of the Non-Defaulting Party.

13. No waiver. The failure of a Party to insist upon strict performance of any of the provisions of this Contract in one or more instances or the failure of a Party to exercise any of its rights hereunder in one or more instances shall not be construed as a waiver of any such provisions or the relinquishment of any such rights, but the same shall continue and remain in full force and effect.

14. Severability. If any part, term, or provision of this Contract is held by a court or other authority to be unenforceable, illegal, against public policy, or in conflict with any federal, state, provincial, or local laws, then such part, term, or provision shall be considered severable from the rest of the Contract. The remaining portions of the Contract shall not be affected and shall be interpreted so as best to effect the original intent of the Parties, and the rights and obligations of the Parties shall be construed as if this Contract did not contain the particular part, term, or provision found illegal, prohibited, or unenforceable.

15. Good standing and authority. Each Party represents and warrants that it is duly organized and validly existing in the state or province of its formation, in good standing in such state or province, and qualified to do business in the state or province in which it does business. The persons signing this Contract on behalf of the Parties warrant that they have the authority to bind the Parties to all the terms and conditions of the Contract.

16. Notice. Any notice or other correspondence required or permitted under this Contract shall be in writing and addressed to the respective parties at the following addresses, or at such other addresses as a Party may furnish in the future:

Patriot Gas Supply, LLC  
14 Indian Rock Lane  
Greenwich, CT 06830  
Attention: Austin P. Clark, Manager

Grafton & Upton Railroad Co.  
929 Boston Post Road East  
Marlborough, MA 01752  
Attention: Jon Delli Priscoli, President

Matters of an operating or emergency nature may be communicated by telephone, e-mail, fax, or other reasonable means.

17. Dispute Resolution.

(a) Whenever any dispute or issue of interpretation or application of this Agreement arises between the Parties, the Parties shall use good faith efforts to resolve the matter expeditiously and without resort to arbitration or litigation. Each Party shall appoint an officer having responsibility for and authority to resolve such disputes. If a dispute remains

unresolved for 60 days following the commencement of such good-faith efforts, then either Party may proceed to resolve the dispute in accordance with the procedures described below in Section 17(b).

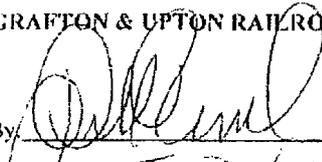
(b) All disputes arising in connection with or involving the interpretation, implementation, or application of this Agreement shall be resolved through arbitration. The Party initiating arbitration shall notify the other of the issues to be arbitrated and propose a process to select an arbitrator knowledgeable in railroad matters. If the Parties cannot reach mutual agreement on the selection of an arbitrator within thirty (30) days of the original notice, the Party initiating arbitration may petition the American Arbitration Association or the Surface Transportation Board or any successor agency ("STB") to designate an arbitrator. The arbitrator's decision shall be final and binding. Each Party shall bear one-half the costs of the arbitrator. From the time the arbitrator is chosen, evidence is to be presented and decision rendered within ninety (90) days.

18. Emergency Services. In the event that G&U is unable or unwilling to provide rail service as required by this Contract, Patriot shall be entitled to request emergency alternative rail service pursuant to 49 CFR 1146 or 1147, and G&U shall cooperate to the extent required or practicable with any such request by Patriot.

19. Counterparts. This Contract may be executed in any number of counterparts, each of which shall be deemed an original and all of which shall constitute one and the same Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Contract as of the day and year first above written.

GRAFTON & UPTON RAILROAD CO.

By: 

Printed Name: Jon Dept. Pincot

Title: President

PATRIOT GAS SUPPLY, LLC

By: 

Printed Name: AUSTIN P. CLARK

Title: MANAGER

The undersigned join this Confidential Rail Transportation Contract solely for the purpose of hereby guarantying the Shortfall Payment, minimum payment, and 50% of the Preemption Defense Costs that Patriot is obligated to pay pursuant to, respectively, Sections 4(b), 4(c) and 11 of this Agreement.

Spicer Plus, Inc.

NGL Supply Terminals Company

By: *Samuel Albrecht*  
Its *President*  
Duly Authorized

By: \_\_\_\_\_  
Its \_\_\_\_\_  
Duly Authorized

ATTACHMENT E

Financing Development and Construction Agreement

**EXECUTION COUNTERPART**

**FINANCING, DEVELOPMENT AND CONSTRUCTION AGREEMENT**

This Financing, Development and Construction Agreement is entered into as of October 1, 2012, by and between **GRT Financing LLC**, of 12 Roosevelt Ave, Mystic, CT 06355 (hereinafter referred to as "GRT ") and **All American Transloading, LLC** of 42 Westborough Rd, North Grafton, MA 01536 (hereinafter referred to as "All American") and **Patriot Gas, LLC**, of 14 Indian Rock Lane, Greenwich, CT 06830 (hereinafter referred to as "Patriot") and **Grafton & Upton Railroad Company**, of 929 Boston Post Road, Marlborough, MA 01752 (hereinafter referred to as "Railroad").

WHEREAS, Railroad is desirous of financing, developing and constructing a transfer facility for the transloading of liquified petroleum gas ("LPG") at the Railroad's rail yard located in North Grafton, MA (hereinafter referred to as the "LPG Transfer Facility"); and

WHEREAS, Railroad has created a site development plan showing the LPG Transfer Facility (the "Development Plan") and a copy of the Development Plan is attached hereto as Exhibit A; and

WHEREAS, GRT desires and is willing to finance and to facilitate certain aspects of the construction of the LPG Transfer Facility, to lease the LPG Equipment, as defined below, to the Railroad and to engage LPG Ventures, an experienced LPG facility consultant, to design and construct the LPG Transfer Facility in accordance with the Development Plan; and

WHEREAS, all Parties need to enter into a more detailed writing that enumerates the financing, construction and development and other business terms and conditions that the parties have agreed to.

NOW THEREFORE, in consideration of \$1.00, the foregoing, and other valuable consideration, the receipt of which is hereby acknowledged as being given and received, the undersigned parties hereby covenant, warrant and agree as follows:

1. All American and Railroad have agreed to the terms of a Terminal Transloading Agreement dated as of October 1, 2012 (hereinafter referred to as "Transloading Agreement"), the terms and conditions of which are incorporated herein, and
2. Patriot and Railroad have agreed to the terms of a Confidential Rail Transportation Contract dated as of October 1, 2012 (hereinafter referred to as "Rail Transportation Contract"), the terms and conditions of which are incorporated herein, and
3. GRT and Railroad have agreed upon a LPG build-out plan showing the location of and specifications for the LPG tanks and all related facilities (the "LPG Build Out Plan") based on the Development Plan and LPG Ventures' quotation dated July 27, 2012 and Master Plan and Process Flow Diagrams attached hereto as Exhibit B and incorporated herein by reference.
4. The Railroad shall complete and construct, at its sole cost and expense, the site preparation work shown on the Development Plan and listed in the Construction G&U RR

section of Exhibit C attached hereto substantially in accordance with the construction schedule set forth and attached hereto as Exhibit D in each case with such modifications as the parties may agree upon based upon the recommendations of LPG Ventures.

5. GRT shall engage LPG Ventures to complete and construct the LPG Transfer Facility in accordance with the LPG Build Out Plan and as set forth in the Construction GRT/LPG Ventures section of Exhibit C, pursuant to the design build contract (the "LPG Ventures Contract") and substantially in accordance with the construction schedule set forth and attached hereto as Exhibit D in each case with such modifications as the parties may agree upon based upon the recommendations of LPG Ventures. GRT shall provide the funds to complete and construct the LPG Transfer Facility, and to acquire and to lease the LPG Equipment to the Railroad pursuant to paragraph 6 herein.

6. Financing and Security. GRT and the Railroad have mutually agreed that for necessary business reasons including but not limited to the parties goal of expediting the development and construction of the LPG Transfer Facility, that the obligations of GRT set forth in paragraph 5 herein shall be provided/handled as follows:

a. All payments necessary for the completion and construction of the LPG Transfer Facility for which GRT is responsible shall be made by GRT to LPG Ventures, to the suppliers of the LPG Equipment and to all contractors, subcontractors, suppliers who work on the LPG Transfer Facility, as directed by GRT. Simultaneously with the execution of this Agreement, GRT has demonstrated to the commercially reasonable satisfaction of the Railroad that GRT has the funds on hand or access to funds in an amount including a reasonable contingency allowance that is sufficient to complete construction of the LPG Transfer Facility substantially in accordance with the LPG Ventures Contract and the budget attached hereto as Exhibit E. GRT shall pay LPG Ventures and all of the suppliers, contractors and subcontractors who work on construction of the LPG Transfer Facility in the ordinary course of business subject to prior review and approval of the Railroad for consistency with the budget, which shall not be unreasonably withheld or delayed and be deemed given if the Railroad does not object on or before the fifth day after receiving the proposed schedule of payments from GRT. GRT shall defend, indemnify and hold harmless Railroad from and against any mechanics liens or other liens or encumbrances that are filed on or burden Railroad property as a result of acts or omissions of GRT, LPG Ventures and any suppliers or contractors working on the LPG Transfer Facility and shall take all measures at its sole cost and expense required to release any such lien within thirty (30) days after any such lien is filed.

b. Title to the four (4) 80,000 gallon LP tanks, the rail tower piping system, tank headers, piping, pumps, compressors, water suppression system and all related equipment and structures thereto (the "LPG Equipment") shall be acquired by and held in the name of GRT. The Railroad shall have the exclusive right to use the LPG Equipment pursuant to a twenty (20) year equipment lease between GRT, as Lessor, and Railroad, as Lessee (the "Equipment Lease") as described in this paragraph 6, for purposes of operating the LPG Transfer Facility and performing its obligations pursuant to the Transloading Agreement and the Rail Transportation Contract and its obligations to any customers as a result of the Railroad's status as a common carrier. GRT at its option may extend the Equipment Lease for an additional term of

ten (10) years. The Equipment Lease shall be senior to any other financing arrangements of the Railroad and Railroad shall obtain consents and non-disturbance agreements from its other lenders to this effect. The Railroad shall defend, indemnify and hold harmless GRT from and against any liens that are filed on the equipment comprising the LPG Transfer Facility as a result of acts or omissions of the Railroad and shall take all measures required to release any such lien at its sole cost and expense, within 30 days after any such lien is filed.

c. Under the Equipment Lease, the Railroad shall make monthly payments in an amount that will amortize the costs of the LPG Transfer Facility over 20 years at 5% interest per annum, provided, however, such costs in the aggregate shall not exceed the total costs set forth in the budget attached hereto as Exhibit E. The Railroad shall make the payments to GRT on the LPG Equipment pursuant to the Equipment Lease solely from fees collected by the Railroad under the Rail Transportation Contract or Transloading Agreement. The Equipment Lease otherwise shall be without recourse against any other assets or revenues of the Railroad.

d. The Railroad will fully cooperate with GRT by signing a commercially reasonable Equipment Lease, which shall, among other things, include the events of default set forth in this Agreement, and other customary terms and all typical commercially reasonable related financing documents required in connection with the Equipment Lease, including but not limited to UCC Financing Statements, Collateral Assignments, Non-Disturbance Agreements, etc., (the "Financing Documents"), excepting any monetary recourse obligation documents, as the Railroad is to have no monetary obligations under the Financing Documents, other than the obligation to tender the payments required to be made to GRT from revenues from the Rail Transportation Contract or Transloading Agreement pursuant to Section c herein.

e. The Railroad represents and warrants that it has good title to its property on which the LPG Transfer Facility shall be constructed, free and clear of all liens, claims and encumbrances other than those set forth on Exhibit F attached hereto; that this Agreement and the Equipment Lease shall not violate or cause a default under any agreement, contract, financing document, decree or order to which the Railroad is a party or is subject; the Railroad has adequate funds or resources to carry out and complete the initial site preparation referenced in Paragraph 4 hereof; and the Railroad is solvent and is presently able, and reasonably expects to continue to be able, to pay all of its debts, expenses and liabilities in the ordinary course of business.

7. Preemption. Each of the parties hereto acknowledges, understands and agrees that Railroad may rely on federal preemption principles in order to construct and operate the LPG Transfer Facility without obtaining certain federal, state or local permitting or preclearance approvals, that Patriot, All American and GRT have each independently reviewed the scope and application of federal preemption principles and that such reliance may be challenged by legal action in courts or before the Surface Transportation Board. Each of the parties hereto hereby waives and releases any claims against Railroad in the event that any such challenge is successful or in any way adversely affects the ability of the parties to implement or realize the benefits of this Agreement. Patriot shall reimburse Railroad, within 15 days after receiving invoices, for 50% of the legal and related expenses incurred by Railroad in connection with any legal or regulatory challenge to any reliance on federal preemption principles.

8. Default and Remedies. Each of the parties hereto acknowledges that the following shall be considered events of default and shall be grounds for immediate termination of this Agreement upon written notice by any other Party ("Non-Defaulting Party"):

(a) If any Party (the "Defaulting Party") shall breach any material covenant, representation, warranty, condition, or obligation of this Agreement, the Transloading Agreement or the Rail Transportation Contract, and fail to remedy such breach within 30 days after written notice to do so from the Non-Defaulting Party; (b) any Party files a voluntary petition in bankruptcy or shall be adjudicated as bankrupt or insolvent, or shall seek or consent to the appointment of any trustee, receiver, conservator, or liquidator of such Party or of all or any substantial part of its properties; (c) any person shall file an involuntary petition in bankruptcy against a Party, and such petition is not dismissed, discharged, or otherwise terminated with prejudice within thirty (30) calendar days of the original filing thereof; (d) a court of competent jurisdiction shall enter an order, judgment, or decree approving a petition filed against a Party seeking a reorganization, arrangement, moratorium, composition, readjustment, liquidation, dissolution, or similar relief and such order, judgment, or decree shall remain unvacated and unstayed for an aggregate of thirty (30) calendar days (whether or not consecutive) from the date of entry thereof, or a trustee, receiver, conservator, or liquidator of such Party or of all or any substantial part of its properties shall be appointed and such Party shall acquiesce in such appointment or such appointment shall remain unvacated and unstayed for an aggregate of thirty (30) calendar days (whether or not consecutive); (e) a Party shall admit in writing its inability to pay its debts as they come due, its insolvency or pending insolvency, or a suspension or pending suspension of operations; (f) a Party shall make a general assignment for the benefit of creditors or take any other similar action for the protection or benefit of creditors; or (g) there occurs any event which, under applicable laws, has an effect similar to the events described herein.

Termination or expiration of this Agreement for any reason shall not release any Party from any obligations that may have accrued before such termination, nor shall it preclude any Party from exercising any remedies it might have to enforce such obligations. Termination of this Agreement by the Non-Defaulting Party shall not cause any prejudice to other rights and remedies of the Non-Defaulting Party.

9. No waiver. The failure of a Party to insist upon strict performance of any of the provisions of this Agreement in one or more instances or the failure of a Party to exercise any of its rights hereunder in one or more instances shall not be construed as a waiver of any such provisions or the relinquishment of any such rights, but the same shall continue and remain in full force and effect.

10. Severability. If any part, term, or provision of this Agreement is held by a court or other authority to be unenforceable, illegal, against public policy, or in conflict with any federal, state, provincial, or local laws, then such part, term, or provision shall be considered severable from the rest of the Agreement. The remaining portions of the Agreement shall not be affected and shall be interpreted so as best to effect the original intent of the Parties, and the rights and obligations of the Parties shall be construed as if this Agreement did not contain the particular part, term, or provision found illegal, prohibited, or unenforceable.

11. Good standing and authority. Each Party represents and warrants that it is duly organized and validly existing in the state or province of its formation, in good standing in such state or province, and qualified to do business in the state or province in which it does business. The persons signing this Agreement on behalf of the Parties warrant that they have the authority to bind the Parties to all the terms and conditions of the Agreement.

12. Notice. Any notice or other correspondence required or permitted under this Agreement shall be in writing and addressed to the respective parties at the following addresses, or at such other addresses as a Party may furnish in the future:

GRT Financing, LLC  
12 Roosevelt Avenue  
Mystic, CT 06355

All American Transloading, LLC  
42 Westborough Road  
North Grafton, MA 01536

Patriot Gas, LLC  
14 Indian Rock Lane  
Greenwich, CT 06830

Grafton & Upton Railroad Company  
929 Boston Post Road  
Marlborough, MA 07152

Matters of an operating or emergency nature may be communicated by telephone, e-mail, fax, or other reasonable means.

13. Dispute Resolution.

(a) Whenever any dispute or issue of interpretation or application of this Agreement arises between the Parties, the Parties shall use good faith efforts to resolve the matter expeditiously and without resort to arbitration or litigation. Each Party shall appoint an officer having responsibility for and authority to resolve such disputes. If a dispute remains unresolved for 60 days following the commencement of such good-faith efforts, then either Party may proceed to resolve the dispute in accordance with the procedures described below in Section 15(b).

(b) All disputes arising in connection with or involving the interpretation, implementation, or application of this Agreement shall be resolved through arbitration. The Party initiating arbitration shall notify the other of the issues to be arbitrated and propose a process to select an arbitrator knowledgeable in railroad matters. If the Parties cannot reach mutual agreement on the selection of an arbitrator within thirty (30) days of the original notice, the Party initiating arbitration may petition the American Arbitration Association to designate an

arbitrator. The arbitrator's decision shall be final and binding. Each Party shall bear one-half the costs of the arbitrator. From the time the arbitrator is chosen, evidence is to be presented and decision rendered within ninety (90) days.

14. Governing Law. This Agreement shall be governed and interpreted under the laws of the Commonwealth of Massachusetts.

15. Confidentiality. This Agreement shall remain strictly confidential between the parties hereto, except that each of the undersigned parties may share the same with any bank or other debt or equity financing source for purposes of securing the financing anticipated hereunder and with its legal counsel.

16. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and all of which shall constitute one and the same Agreement.

Executed as an instrument under seal as of October <sup>5</sup> 1, 2012.

GRT Financing LLC

By: Lawrence C. Chesler  
Lawrence C. Chesler, President,  
and not individually

Grafton & Upton Railroad Company

By: John Delli Priscoli  
John Delli Priscoli, President & Treasurer,  
and not individually

All American Terminals, LLC

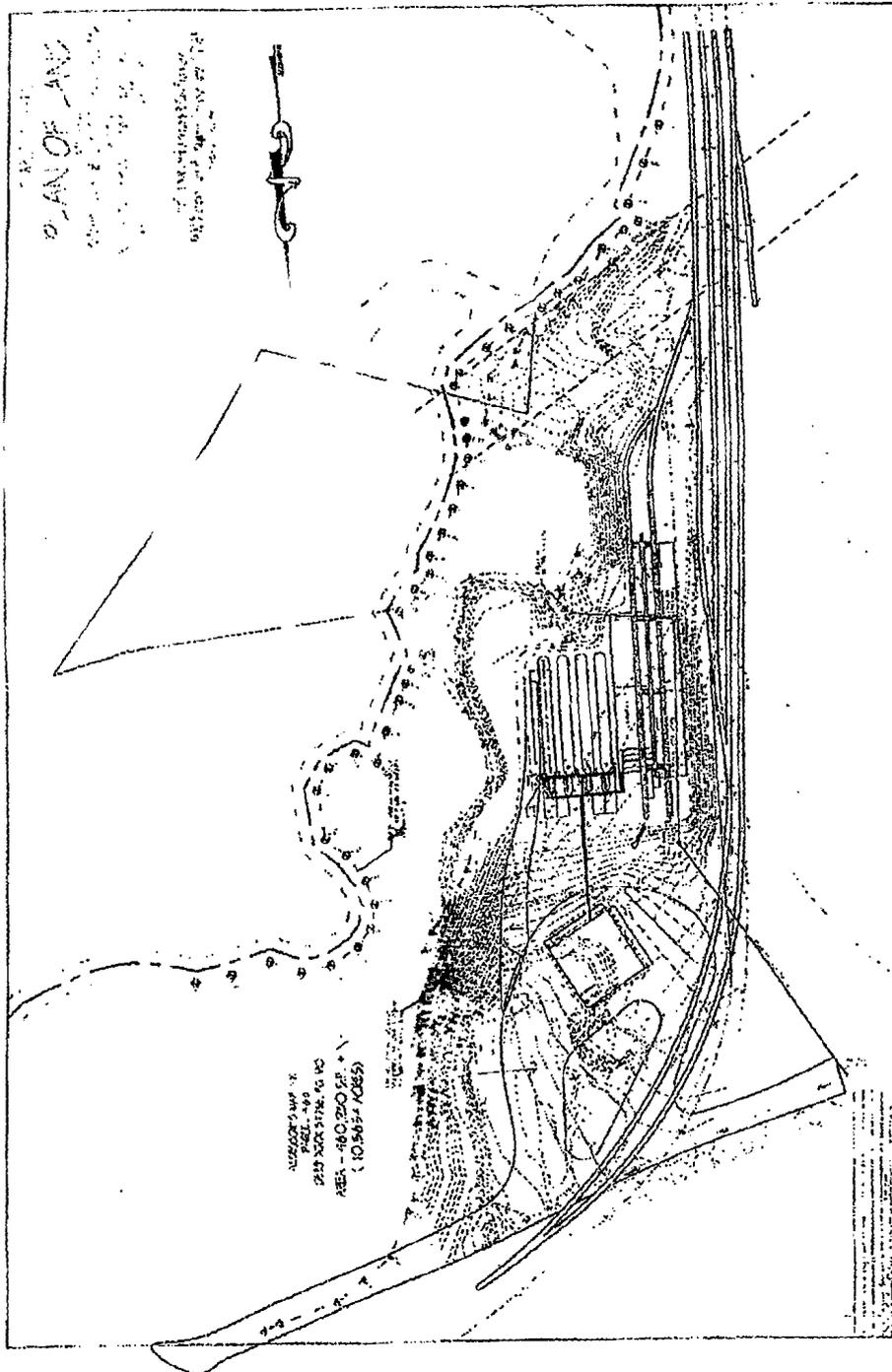
By: [Signature]

Patriot Gas, LLC

By: Quentin P. Clark

EXHIBIT A

Development Plan



4FG0013 - 143674

GURR0041

## EXHIBIT B

### Master Plan and Process Flow Diagrams



VENTURES

July 27, 2012

Mr. Jon Holstein  
36 Thames Street  
Proton, CT 06460

Mr. Holstein,

JG Ventures has pleased to submit the following quote for the construction and commissioning of your rail terminal in Proton, CT.

Our quote covers:

#### 5 Tanks

Excavate pits, footings and pour concrete per local code, install pre cast piers, and set tanks. This includes the excavation, concrete footers, pre cast piers, freight for piers, crane to unload piers and tanks and labor. **\$75,438**

#### Tank Trim

Provide engineering for tank opening alterations, install two 4" and two 3" openings in the bottom of the tank for liquid and vapor operations. Perform tank alterations and have the alterations inspected and approved by third party ASME Code inspectors. Install new 4" and 3" internal valves, new relief valves, thermometers, pressure gauges and replace manway gaskets and bolts. Parts and labor included. **\$102,519**

#### Piping: Tanks to Header Lines

Install new 3" vapor and 4" liquid lines from the bottom of each tank to the header lines. This includes new pipe, mechanical valves, flex connectors and labor. **\$63,488**

#### Piping: Header Lines

Install two 3" vapor lines, one cold vapor and one hot vapor, one 6" liquid in line, and one 12" liquid out lines. These lines will be fitted to the tank piping and will have connections for vapor to be used for railcar unloading, loading operations, and connections to the compressor bank. Parts and labor included. **\$73,682**

#### Pump Bank

Install 4 new Bladmer 4" pumps for transport loading. Connect pump bank to tank outlets and route piping to transport loading area. Install new mechanical valves, flex connectors, and strainers. Parts and labor included. **\$133,736**

#### Rail Towers and Catwalks

Install four rail towers with two gangways each and catwalks to connect each of the towers. Install stairs at each rail tower. Parts, labor, and freight included. **\$104,296**

#### Rail Tower Piping

Pipe each rail tower with four liquid lines and two vapor lines—piped to unload two rail cars per tower. Install new piping ESVs, articulating loading arms, hoses, mechanical valves, railcar ESVs, hoses and caps. Parts and labor included. **\$343,621**

*JG Ventures Tank Solutions, LLC, 1113 Plant Design & Construction, ASME & DOT Certified, Transportation Services, Pre-cast Tank Plants  
9611 E. 33rd St., Raytown, MO 64133 • 816.737.1306 • FAX 816.737.1590 • Toll Free 888.719.8761 • www.jgventures.com*

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GURR0042

**Rail System Piping**  
Install liquid and vapor piping from rail towers to compressor bank and to tank header lines. Parts and labor included. \$41,112

**Compressors**  
Install four new Corken 691 compressors with 30HP explosion proof motors. Parts and labor included. \$120,862

**Metering And Loading Systems**  
Pipe liquid from pump bank to metering system. Install one metering skid capable of loading two transports. Install piping from metering skid to loading bulkhead for two transports. Includes metering skid, mechanical valves, bulkheads, ESVs, and labor to install. \$343,807

**ESV System**  
Install pneumatic ESV system that will include master shut down operators at the entrance of the facility, the loading rack and at the rail towers. Install industrial air compressor with air drying system. Parts and labor included. \$12,613

**Electrical (Budgetary)**  
Provide labor, parts, and supplies to establish electrical service for pumps, motors, metering systems, and components related to product transfer from an existing onsite power source. We can provide a comprehensive electrical quote with more information concerning incoming power supply, lighting requirements and the number of structures onsite. Cost Plus

**Concrete Work**  
Provide all labor and supplies to form and pour pads for tank sub footers, pumps, compressors, rail towers, pipe supports and a 88' x 60' x 8" pad for transport loading. \$125,000

**Commissioning, Testing, And Other Construction Equipment And Supplies**  
Place all systems in operation and test for proper operation, rental equipment, crash post, steel pipe supports and construction supplies. Parts and labor included. \$70,026

Our quote for this terminal project is \$1,610,200.

**Notes and Exclusions**  
Not included in this quote is gas to pressurize the system, site improvements (roads, landscaping, grading, etc.) canopy for the loading rack, or tank and system painting.

**Construction Schedule**  
Once contracts and agreements are signed the shop fabrication work could start on major components that would be built in our shop. On-Site work could begin in August and complete the project in late November.

**Terms**  
30% of total project cost when contract is signed.  
30% with the delivery of major components—pumps, motors, metering system  
30% when terminal is commissioned  
10% Net 30 days after commissioning

Thank you for the opportunity to submit this quote for your consideration.

Best Regards,

*Carroll Jordan*  
Carroll Jordan  
LPG Ventures

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GURR0044



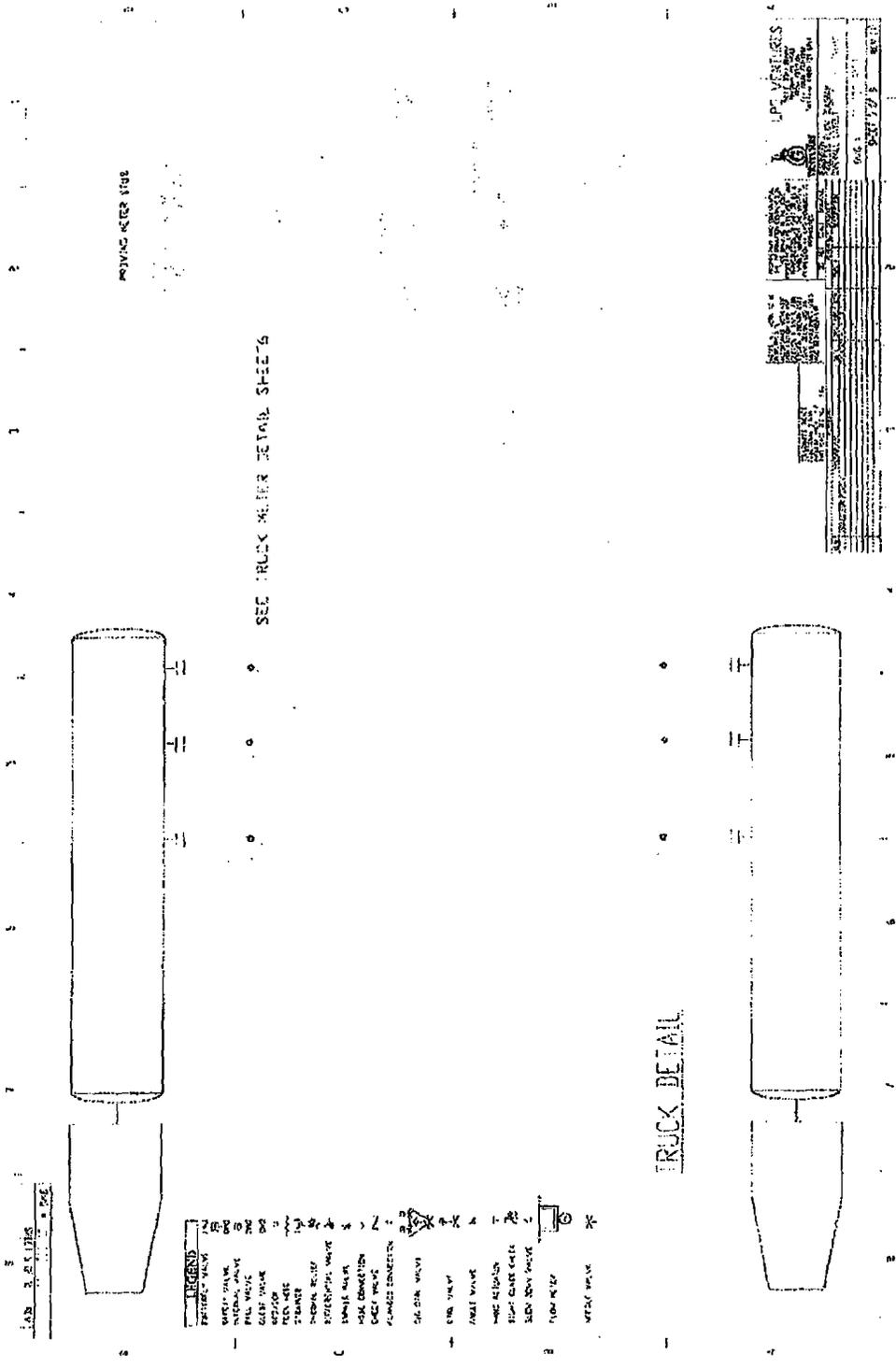


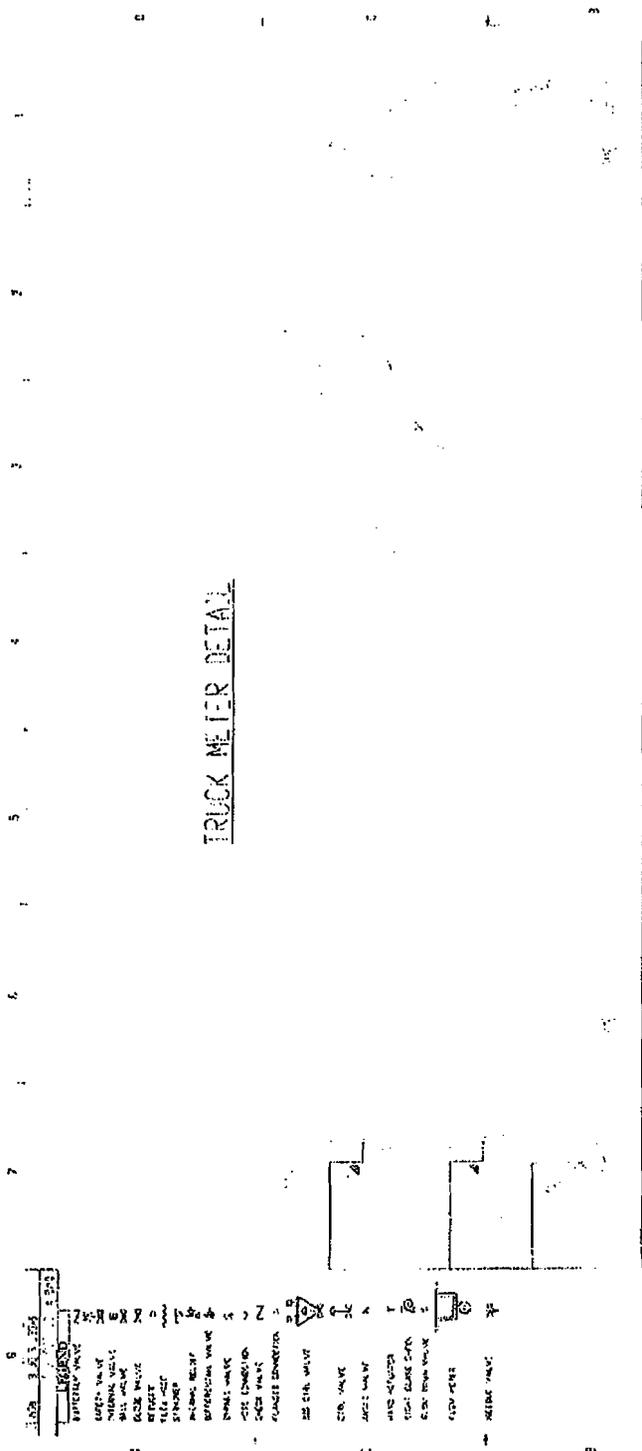




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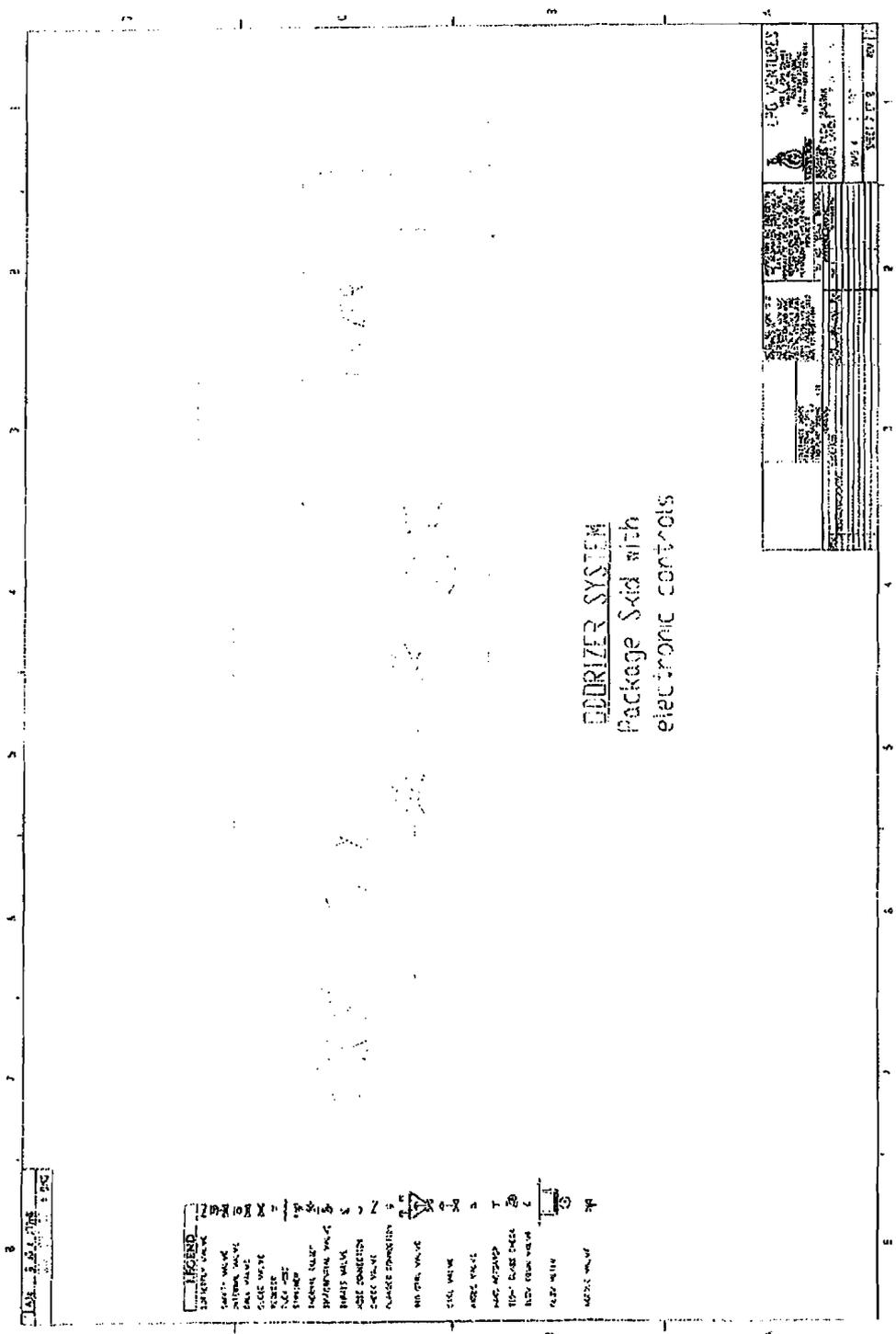




NO.	DESCRIPTION	QTY.	UNIT
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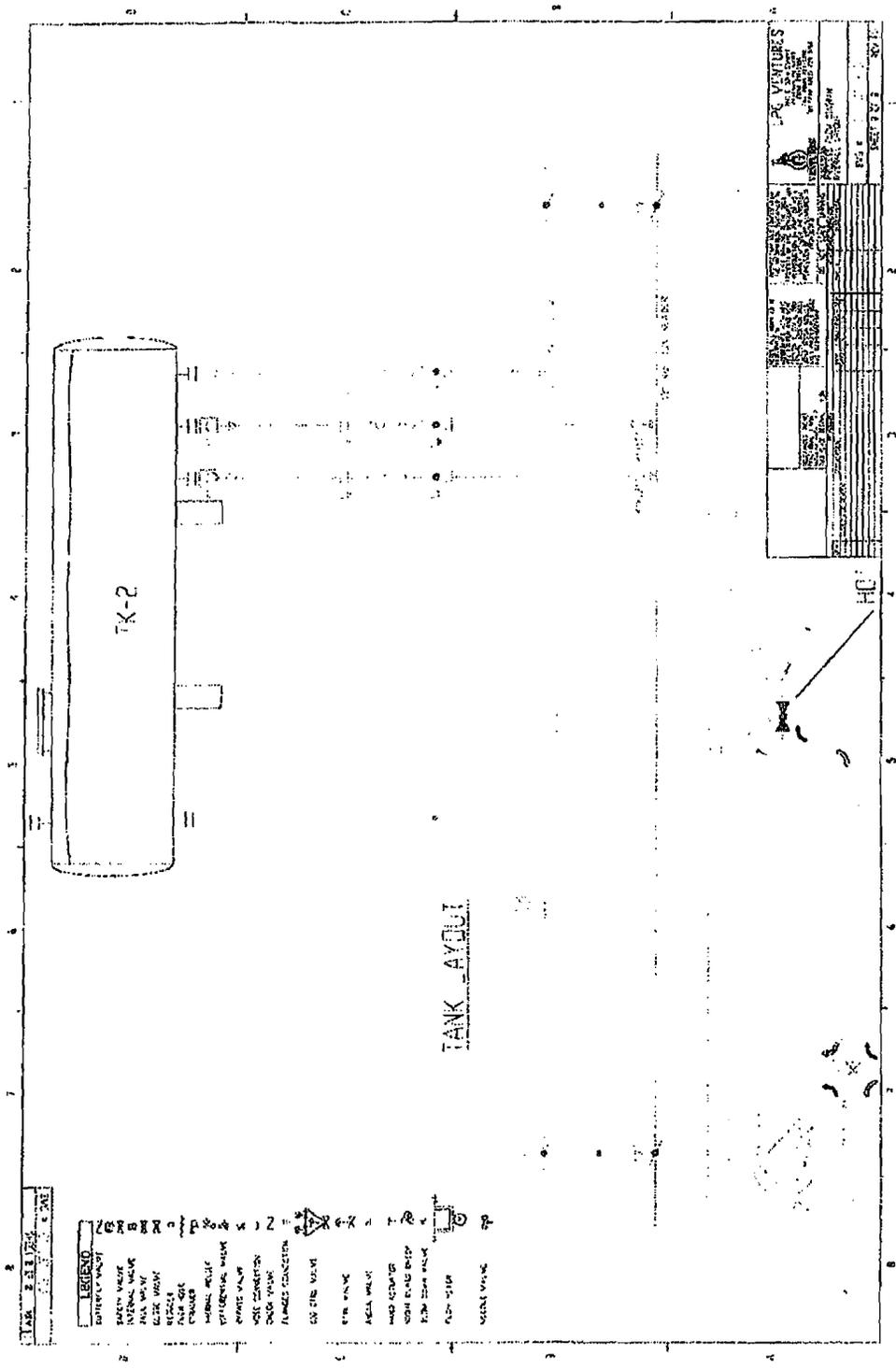
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GURR0050



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## EXHIBIT C

### Grafton & Upton LPG Transfer Facility Construction

#### Responsible Parties

#### Pre-Construction

##### G&U RR

- 1) Town Awareness-Conceptual Plan to be shown to Town Manager, and any follow-up thereafter that G&U determines to be necessary / There are no approvals from Town of Grafton when development/construction proceeds under preemption.
- 2) Site and Soil Engineering (with backup from LPG Ventures)
- 3) Rail Spur engineering

##### Spicer Group / LPG Ventures

- 1) Plant Engineering / Piping layout and design
- 2) Water Suppression requirements / engineering
- 3) Truck loading layout / engineering

#### Construction

##### G&U RR

- 1) Sitework -- clearing, leveling and compacted to specifications
- 2) Rail track spur / switches / trackage / d-rail / etc
- 3) Utilities provided to site -- sewer / water / electric
- 4) Drainage
- 5) Site provided for ready install of equipment

##### Spicer Group / LPG Ventures

- 1) Installation of 4 80,000 gallon L.P tanks and concrete piers to set on
- 2) Rail tower installation and piping to tank headers
- 3) Install of piping, pumps, compressors to design specifications
- 4) Water suppression system
- 5) Electrical work -- Tie in of pumps / compressors / metering system and site lighting
- 6) Truck loading racks
- 7) Concrete work / asphalt
- 8) Fencing of entire LPG Transfer facility

#### For Discussion

- 1) Final Sitework
- 2) Water Retention

**EXHIBIT D**

**Construction Schedule**

**Separately Distributed**

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RAIL TERMINAL Costs

UPDATED:			
NUMBER	ITEM DESCRIPTION	UNIT COST	TOTAL COST
1	LAND DEVELOPMENT PLANNING, ENGINEERING	\$25,000.00	\$25,000.00
1	ELECTRICAL SERVICE, HOOKUPS, LIGHTING, BREAKERS, PANELS	\$55,000.00	\$55,000.00
1	MCC ELECTRICAL BUILDING, PAD, HOOKUP		
1	MISC. CONCRETE: FOOTINGS, TOWER BASES, TRUCK RACK		
4	80,000 GALLON AG TANKS	\$125,000.00	\$125,000.00
4	TRANSPORT OF 80K TANKS FOB GRAFTON	\$180,000.00	\$640,000.00
8	CONCRETE SUPER PIERS - WITH XH FOOTERS:	\$15,000.00	\$60,000.00
	CRANES FOR UNLOAD AND SETTING	\$3,500.00	\$28,000.00
			\$10,000.00
4	PER TANK VALVES, GAUGES, INTERNALS, RELIEFS, ACTUATORS, FLEXES, STEEL, AND ALL FITTINGS	\$27,500.00	\$110,000.00
4	LABOR FOR SETTING, INSTALLING ALL TRIM FITTINGS	\$4,500.00	\$18,000.00
1	TANK INTERCONNECTION MATERIALS - HEADER SYSTEM (UNDERGROUND AND ABOVE GROUND)	\$98,000.00	\$98,000.00
1	TANK INTERCONNECTION LABOR - FOR INSTALLING HEADER PIPING AT TANKS	\$75,000.00	\$75,000.00
4	TWO SIDED GALVANIZED RAIL TOWERS WITH ALUMINUM EXTENDABLE GANGWAYS	\$22,750.00	\$91,000.00
4	RAIL TOWER PIPING, VALVES, ESVS, HOSES, GROUNDING, STEEL AND FITTINGS	\$70,500.00	\$282,000.00
4	RAIL TOWER LABOR TO SET TOWER, INSTALL GANGWAYS, CONNECT PIPING, WELDING, VALVING, ETC.	\$27,500.00	\$110,000.00
2	LB942K BLACKMER COMPRESSOR WITH 40 HP MOTOR	\$54,000.00	\$108,000.00
2	LB601B BLACKMER COMPRESSOR WITH 25 HP		
2	INSTALL OF COMPRESSORS, VALVING, FLEXES, INTERCONNECT PIPING, TIE IN COMPRESSOR, OTHER		
1	MATERIALS FOR RAIL HEADER, PIPING, VALVES, SUPPORTS, SLEEVES, ETC.	\$30,200.00	\$30,200.00
4	LABOR FOR INSTALL OF RAIL HEADERS, TIE IN AT TOWERS, COMPRESSOR SET TO TANK FARM	\$6,750.00	\$27,000.00
4	MATERIALS FOR TRUCK LOADING, (4) 4" PUMPS WITH 30HP MOTORS, PUMP TRIM, MASS FLOW METERS, PIPING FROM TANK FARM HEADER TO TRUCK RACKS (80-100' +/-), TRUCK RACK VALVES, HOSES, GROUNDING, ETC.	\$157,250.00	\$629,000.00
4	LABOR FOR INSTALL OF TRUCK LOADING RACKS, PUMPS- SUCTION, DISCHARGE, HEADERS, RETURN LINES.		
2	BYPASS, ASSOC. PIPING, ETC.	\$9,000.00	\$36,000.00
1	CANOPY TO COVER LOADING RACK AREA	N/A	
1	LABOR CRANE SERVICE, CANOPY INSTALLATION	N/A	
1	LABOR FOR SINGLE UNLOADING RACK- INSTALL OF ALL PIPING, VALVES, TIE INS AT TANK FILL HEADERS	\$49,000.00	\$49,000.00
1	TRANSPORT UNLOADING STANCHION, PIPING, VALVES ESVS	\$138,000.00	\$138,000.00
3100	5' COMMERCIAL CHAIN LINK FENCE WITH BARB WIRE AND EGRESS 15' GATE	\$85,000.00	\$85,000.00
1	OPERATING KEY CODED ENTRANCE GATE	\$10,000.00	\$10,000.00
1	TACS, SOFTWARE, MATERIALS, LABOR	\$34,000.00	\$34,000.00
1	SUPERVISION, PROJECT MANAGEMENT, ADMIN FOR LP TERMINAL CONSTRUCTION	\$75,000.00	\$75,000.00
1	LEGAL FEES	\$175,000.00	\$175,000.00
1	MISC. CONCRETE FOR CRASH POSTS AT RACKS, PUMP PAD CONCRETE	\$10,000.00	\$10,000.00
1	FIRE SUPPRESSION SYSTEM	\$167,500.00	\$167,500.00
			\$3,270,700.00
21	TOTAL Additional (BY OTHERS)		

LPG Ventures Contract and Budget

EXHIBIT E

GURR0055

**EXHIBIT F**

**Railroad Permitted Encumbrances**

**Chicago Title Insurance Company**

ALTA LOAN POLICY OF TITLE INSURANCE Policy No: **72307-86382997**

**SCHEDULE B PART I (ADDENDUM)**

**EXCEPTIONS FROM COVERAGE**

6. Easements, poles and wires granted to New England Power Company by Thornton M. Brinicombe in an instrument dated August 18, 1939 and recorded Book 2733, Page 527.
7. Permit issued by the Grafton Conservation Commission to Charles Aichue dated January 31, 2011 and recorded Book 4, Page 55, Permit No. 024.
8. Order of approval issued by the Grafton Conservation Commission to Charles Aichue, applicant and owner, dated January 31, 2011, Page 60, DEP File No. 164-0704.

HEIR (200)

ALTA Case Policy (C-05)

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GURR0056

ATTACHMENT F

Grafton's Requests for Findings/Rulings

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
CENTRAL DIVISION

WORCESTER, ss.

CIVIL ACTION No.  
USDC 4:12-CV-40164TSH

THE BOARD OF SELECTMEN OF THE  
TOWN OF GRAFTON and ROBERT S.  
BERGER, GRAFTON BUILDING  
INSPECTOR,

Plaintiffs,

v.

GRAFTON & UPTON RAILROAD  
COMPANY,

Defendant.

**PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW**

**I. PROPOSED FINDINGS OF FACT**

**A. Parties**

1. The Town of Grafton ("the Town"), is a municipal corporation located at 30 Providence Road, Grafton, Massachusetts, County of Worcester.
2. The Plaintiff Grafton Board of Selectmen is the chief executive officer of the Town, having all of the executive powers that it is possible for a Board of Selectmen to have (Grafton Charter § 3-2(b)) and is the entity that under duly enacted by-law that shall appear in the interest of the Town before any court and has full authority to institute and prosecute any and all necessary suits and proceedings in favor of the Town. Grafton By-Laws Art. 5, § 4.
3. The Plaintiff Robert S. Berger is the Town's duly appointed Building Inspector and is charged with the enforcement of Grafton's Zoning By-Law. Grafton Zoning By-Law § 1.3.1.

4. The Defendant, The Grafton and Upton Railroad Company (“GURR”) is a short line railroad company with a corporate address of 50 Westboro Road, Grafton, MA, 01519, and/or 929 Boston Post Road east, Marlborough, Massachusetts, 01748.

**B. Background**

5. GURR purchased the two parcels of land that make up 42 Westborough Road, Grafton (“the Site”), on or about January of 2012.
6. The Site is located in the R20 Residential District under Grafton’s Zoning By Law (“ZBL”) and is also located in the Water Supply Protection Overlay District. Exh. A.
7. The storage, transport, and sale of petroleum or other refined petroleum products in quantities greater than normally associated with house hold use is specifically prohibited in the Water Supply Protection Overlay District. Exh. D, ZBL § 7.4.C.9.
8. The use regulation schedule prohibits rail terminals, truck terminals, and freight yards in an area zoned as an R20 Residential District. Exh. D, ZBL § 3.2.3.1, Communications, Transportation and Public Utility Uses, subsections (3) and (4).
9. The use regulation schedule prohibits all industrial uses in an area zoned as R20 Residential District. Exh. D, ZBL § 3.2.3.1, Industrial and Warehouse Uses.
10. Grafton’s Zoning By-Law does not allow any use variances. Exh. D.
11. GURR has no construction permits on file with any Town board, committee or office. Testimony of Robert S. Berger, Kevin Mizikar.
12. Mr. Delli Priscoli, President of GURR, appeared before the Grafton Board of Selectmen on March 20, 2012, and told the Board that he did not know what he was going to locate at the Site. Testimony of John Delli Priscoli, Kevin Mizikar.
13. Mr. Delli Priscoli told the Board of Selectmen he would keep them apprised of any development plans. Testimony of John Delli Priscoli, Kevin Mizikar.
14. At or around the same time, heavy construction began at the site. Testimony of John Delli Priscoli, Kevin Mizikar.
15. Concerned residents called Town Hall, but Town Hall had no information. Testimony of Kevin Mizikar.

**C. The Fire Safety Analysis**

16. On or about October 29, 2012, GURR submitted a Fire Safety Analysis prepared by the Godfrey Group to the Grafton Fire Department “outlining the apparent risks, as well as existing and proposed risk mitigation measures, for the Grafton & Upton Railroad’s proposed [propane rail] terminal near Westboro Road in Grafton, Massachusetts.” Exh. B, Fire Safety Analysis at 1; Testimony of Chief Michael Gauthier.
17. During a June 2011 meeting between representatives of GURR and state and local fire officials, representatives of GURR were repeatedly told by Jacob Nunnemacher, Fire Protection Engineer of the State Fire Marshall’s Office, that the first step to siting a propane facility was to obtain a “land license” from the Town pursuant to G.L. c. 148, § 13. Testimony of Gauthier, Nunnemacher.
18. Mr. Nunnemacher and Chief Gauthier also advised GURR to share their plans with town officials and have a Fire Safety Analysis completed. Testimony of Gauthier, Nunnemacher.
19. Neither Chief Gauthier or Mr. Nunnemacher had any conversations with the Board of Selectmen or the Town Administrator’s Office concerning GURR’s proposal because it was vague and incomplete. Testimony of Gauthier, Nunnemacher.
20. In fact, at a June 2012 meeting between GURR representatives and fire safety officials, GURR representatives presented a drawing of the facility that they stated had already changed. Testimony of Gauthier, Nunnemacher.
21. No plans or drawings were submitted to fire safety officials during either meeting. Testimony of Gauthier, Nunnemacher.
22. The Fire Safety Analysis finally submitted in October of 2012 stated incorrectly that “The Grafton & Upton railroad propane terminal will consist of four (4) 80,000 gallon containers and truck loading rack located, all located within railroad property in a zoned industrial area.” Exh. B, Fire Safety Analysis at 1.
23. The propane tanks are each approximately 120 feet long, 15 feet high, and weigh approximately 225,000 pounds. Exh. B; Testimony of Kevin Mizikar.

24. In reviewing the Fire Safety Analysis, Mr. Nunnemacher had several concerns. Testimony of Nunnemacher.
25. Specifically, the plan submitted was the same one submitted at the June 2012 meeting, which GURR representatives had indicated at that time was already out of date. Testimony of Nunnemacher.
26. Mr. Nunnemacher also found the number of first responders relied on in the plan to be misleading. Testimony of Nunnemacher.
27. Grafton has a 100% call fire department which means that there are no fire fighters staffing any Grafton fire stations; fire fighters are on call, and any who are able to respond must first report to the station from wherever they are located, get into their equipment, man the response vehicles, and then report to the emergency. Testimony of Gauthier.
28. The average number of firefighters the Chief stated were available for response could vary from 6 to 46 depending on proximity and time of day. Exh. B, Appendix B p. 3, Form 8.1, item 5.
29. In fact, Chief Gauthier testified that due to the fact that all Grafton Firefighters are call only, in some cases as few as 1 or 2 might respond to a first alarm. Testimony of Gauthier.
30. Despite this, the Fire Safety Analysis, authored by Thomas Godfrey, states that the number of Grafton Fire Fighters who would respond to a first alarm at the facility would vary from 15 to 20. Exh. B, Appendix B p. 3, Form 8.1, item 7A.
31. Mr. Godfrey also stated in the Fire Safety Analysis that seven firefighters from Shrewsbury would respond to a first alarm at the facility, even though that would mean that the Shrewsbury Fire Chief was dispatching his entire on-duty force to a neighboring town. See Exh. B, Appendix B p. 5, Form 8.1, item 5 (average number of firefighters available for response in Shrewsbury is 7); Testimony of Nunnemacher.
32. Mr. Nunnemacher also saw a “red flag” in the hydrant flow report of the Fire Safety Analysis, since attachments to the document indicated that the hydrant flow test was restricted due to a concern that the hydrant would break if fully

opened, so the flow estimate was based on what the flow would have been had the hydrant been opened all the way. Testimony of Nunnemacher.

33. Additionally, there was reliance in the Fire Safety Analysis on safety measures that were not included in the actual plan, such as water cannons. Testimony of Nunnemacher.
34. Finally, the Fire Safety Analysis relied on a different version of the National Fire Protection Association Standard 58 Liquefied Petroleum Gas Code (“NFPA-58”) than the one Massachusetts uses. Testimony of Nunnemacher.
35. Accordingly, Mr. Nunnemacher requested that Mr. Godfrey address those short comings in the Fire Safety Analysis. Testimony of Nunnemacher.
36. A revised Fire Safety Analysis was not submitted by GURR until December 20, 2013. Testimony of Nunnemacher.

**D. The Cease and Desist Order**

37. The Board of Selectmen and Town Administrator’s Office first became aware of the Fire Safety Analysis and its contents after it was filed with the Grafton Fire Department, and the Town Administrator’s Office immediately requested that Mr. Delli Priscoli inform the Town of his plans for the site. Testimony of Kevin Mizikar.
38. On or about November 26 and December 4, 2012, Mr. Delli Priscoli informed the Board of Selectmen and other town officials and residents that he was constructing a major propane storage facility at the site, comprising four 80,000 tanks. Testimony of John Delli Priscoli, Kevin Mizikar.
39. Mr. Delli Priscoli further stated that he was not required to submit to any state or local permitting or inspection due to his claim to federal preemption over the activities in question. Testimony of John Delli Priscoli, Kevin Mizikar.
40. Mr. Delli Priscoli also stated at Town meetings on November 26 and December 4 that the propane tanks would be delivered in January or February of 2013. Testimony of Kevin Mizikar.
41. Based upon the information provided and its own factual and legal research, the Town developed questions concerning the validity of GURR’s claim to federal preemption. Testimony of Kevin Mizikar.

42. The Board of Selectmen through counsel requested more information concerning GURR's claim to federal preemption in order to evaluate the merits of that claim. Exh. H; Testimony of Kevin Mizikar.
43. GURR through counsel responded to some of the Town's questions, provided partial responses to other questions, and refused to respond to several of the Town's questions. Exh. H; Testimony of Kevin Mizikar.
44. GURR also refused to provide a copy of its agreement with the newly created transloader entity unless town counsel signed a three page "Confidentiality Agreement" which provided in part that "The Town shall not use Confidential Information for any purpose, including, without limitation, any proceedings before any court or administrative agency . . . ." Exh. F, Confidentiality Agreement, ¶ 3; Testimony of Kevin Mizikar.
45. While the Town was still attempting to evaluate GURR's federal preemption claim, on or about December 11, 2012, Mr. Delli Priscoli informed the Board of Selectmen that the first of the tanks would be arriving via tractor trailer on December 13, 2012. Testimony of John Delli Priscoli, Kevin Mizikar.
46. Mr. Delli Priscoli stated that the remaining three tanks would be delivered the following week, on December 18, 19, and 20, 2012. Testimony of John Delli Priscoli, Kevin Mizikar.
47. Mr. Delli Priscoli asserted that the Defendants had DOT permits for the delivery but did not provide same to the Town. Testimony of Kevin Mizikar.
48. Mr. Delli Priscoli refused the Town's requests to delay delivery of the tanks for any amount of time. Testimony of Kevin Mizikar.
49. Given the lack of time and information within which it could evaluate GURR's federal preemption claim, and the questions that existed regarding the merits of that claim, on December 11, 2012, the Board of Selectmen directed the Inspector of Buildings to issue a Cease and Desist Order. Testimony of Kevin Mizikar.
50. On December 12, 2012, the Grafton Building Inspector served in hand to Mr. Delli Priscoli a cease and desist order, ordering that all construction cease and that GURR turn over all DOT and other permits related to the transport of the propane tanks. Testimony of Robert Berger.

51. Mr. Delli Priscoli stated that he had no intention of complying with the Cease and Desist Order and would not delay delivery of the tanks. Testimony of Robert Berger.
52. On December 12, at approximately 12:30 pm, Mr. Delli Priscoli went to Town Hall and told the Assistant Town Administrator that in issuing the Cease and Desist Order, the Town had started a “nuclear war” that Mr. Delli Priscoli “intends to win.” Testimony of Kevin Mizikar.
53. Mr. Delli Priscoli stated that he intends to “bury” Towns that work against him. Testimony of Kevin Mizikar.
54. Later that afternoon, town officials went to the Site and observed that construction activity was continuing in violation of the Cease and Desist Order. Testimony of Kevin Mizikar.

**E. The Propane Facility Deal**

55. For several years before the Fire Safety Analysis was submitted to the Fire Department, GURR was engaged in talks and negotiations to construct a propane facility. Testimony of Moffett.
56. In or around 2010, Eric Moffett, who works for GURR in a marketing and sales capacity, had conversations with Jonathan Holstein, Vice President of Spicer Gas of Connecticut, about the potential of siting a Liquid Propane Gas (LPG) facility along the GURR. Testimony of Moffett, Holstein.
57. Spicer Gas (a/k/a Spicer Plus, Inc., hereafter “Spicer”) is a Connecticut company that since 1960 has been in the business of the retail installation, service, and delivery of propane and propane equipment. Testimony of Holstein.
58. Spicer is a retailer that delivers propane to the end user. Testimony of Holstein.
59. Mr. Holstein was interested on behalf of Spicer in the concept of a propane rail facility but believed that before making a significant investment in such a facility, it was necessary to find an entity at the other end of the supply chain. Testimony of Holstein.
60. More specifically, Mr. Holstein believed that what was needed was an entity that had a significant fleet of propane tanker cars, a large number of supply contracts

and thus an ability to deliver volume commitments. Testimony of Holstein, Delli Priscoli.

61. Mr. Holstein had discussions with representatives of NGL Canada (a/k/a NGL Supply Terminals, Co., hereafter “NGL”), a large propane supplier/shipper. Testimony of Holstein.
62. NGL had both the supply contracts and the fleet of tanker cars. Testimony of Holstein. Testimony of Holstein.
63. Sometime thereafter, Spicer and NGL decided to partner as investors in the propane rail facility at 42 Westboro Road. Testimony of Holstein, Delli Priscoli.
64. When Mr. Holstein first contacted the State Fire Marshall’s Office in the Spring of 2011, the plan was to construct the facility in Upton, but by June of 2011, the location had changed to 42 Westboro Road in North Grafton, which GURR did not yet own. Testimony of Nunnemacher, Delli Priscoli.
65. GURR marketing materials identified the North Grafton site as an “Approvals Not Required Site” in an “INDUSTRIAL zone” with “Adjacent Users [ ] Commercial and Industrial.” Exh. P, 4<sup>th</sup> page; Testimony of Delli Priscoli.
66. In or around February of 2012, Spicer Gas purchased the four 80,000 gallon propane tanks at a price of \$108,000 each, for a total of \$432,000. Testimony of Holstein.
67. Later that year, Spicer and NGL created a host of entities for the purpose of the development, construction, financing and operation of the proposed propane facility. Testimony of Delli Priscoli, Holstein.
68. Those entities and are as follows:
  - a. All American Terminals (a/k/a All American Transloading) (hereafter “AAT” or “the transloader”), a Delaware LLC with an address of 42 Westboro Road in Grafton, MA.
    - i. AAT is a wholly owned subsidiary of NE Transloading, Co., LLC. Testimony of Holstein.
    - ii. NE Transloading, Co., LLC, is owned 50% by Spicer and 50% by NGL. Testimony of Holstein.

- iii. The sole officer and employee is NE Transloading Co. LLC is Lawrence Chesler, President of Spicer. Testimony of Holstein.
  - b. Patriot Gas Supply, LLC, a Delaware LLC with an address of 14 Indian Rock Lane, Greenwich, CT (hereafter, "Patriot Gas"). Exh Q, Testimony of Holstein.
    - i. Patriot gas is owned 50% by Spicer and 50% by NGL. Testimony of Holstein.
    - ii. The manager of Patriot Gas is Austin P. Clark. Exh. S.
  - c. GRT Financing, LLC, a Delaware LLC with an address of 12 Roosevelt Avenue, Mystic CT (hereafter, "GRT Financing"). Exh Q, Testimony of Holstein.
    - i. GRT Financing is owned 50% by Spicer and 50% by NGL. Testimony of Holstein.
    - ii. Lawrence Chesler is the President of GRT Financing and Spicer.
69. To date, Spicer and NGL's investment in the facility has been approximately \$3.2 million. Testimony of Holstein.

**F. The Contracts**

70. On August 24, 2012, a Memorandum of Understanding ("MOU") was executed by and between GRT Financing, AAT, Patriot Gas, and GURR, with Spicer and NGL "as guarantors" and "Operators." Exh. Q.
71. The MOU sets forth the negotiated arrangements and the respective roles of the entities "to plan, finance, construct, and operate a liquid petroleum gas distribution and terminal facility" at 42 Westboro Road. Exh. Q.
72. The MOU states that the agreements of the parties with respect to the financing, development, and construction of the facility are set forth in a document titled Financing, Development and Construction Agreement. Exhs. Q, R.
73. The MOU sets forth Patriot's obligation to use best efforts "to deliver a minimum of 800 cars a year to the Facility." Exh. Q, ¶ 2.
74. The MOU sets forth--but in redacted form--the various payments that will be made by Patriot to GURR. Exh. Q, ¶ 2.

75. The MOU sets forth that the obligations of the railroad and AAT with respect to transloading services are substantially set forth in a separate agreement entitled Terminal Transloading Agreement. Exh. Q., ¶ 3.
76. The MOU makes provision for GURR to be paid “guaranteed minimum fees of [redacted]” by the “Operators” (i.e., Spicer Plus, Inc. and NGL) during what is defined as “the Construction Year.” Exh. Q., ¶ 3.
77. The MOU was signed as follows:
  - a. For GRT Financing, by Lawrence Chesler, President of Spicer Plus;
  - b. For AAT, by Lawrence Chesler, President of Spicer Plus;
  - c. For Patriot Gas, by Lawrence Chesler, President of Spicer Plus;
  - d. For Spicer Plus, Inc., by Lawrence Chesler, President;
  - e. For NGL Supply Terminals Co. by an unidentified individual.Exh. Q.
78. Thus, other than GURR, all of the entities involved in the propane facility deal are Spicer, NGL, or a combination of Spicer and NGL.
79. The Terminal Transloading Agreement referred to in the MOU was signed on October 1, 2012.<sup>1</sup>
80. On or about October 1, 2012, GURR and Patriot Gas entered into a Confidential Rail Transportation Contract, with Spicer Plus and NGL as guarantors. Exh. S.
81. The Confidential Rail Transportation Contract provided by GURR through discovery is signed by Mr. Delli Priscoli as President of GURR, by Austin P. Clark as manager of Patriot Gas, and by Lawrence Chesler as President of Spicer. There is no signature on the line designated for NGL. Exh. S.
82. The Confidential Rail Transportation Contract is a 20 year contract between GURR and Patriot, under which Patriot has the right to extend the contract for an additional 10 years and to negotiate for even further extensions, as long as Patriot is not in default and the contract has not been terminated. Exh. S, ¶ 1.

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<sup>1</sup> For organizational purposes and to prevent unnecessary repetition, specific provisions of the Transloading Agreement will be discussed in conjunction with the Plaintiff’s Requested Rulings of Law.

83. Under the Confidential Rail Transportation Contract, GURR agrees to receive rail cars for the account of Patriot in interchange with CSX at North Grafton, move them to the propane facility, and transload the propane to trucks (presumably after some period of storage in the propane tanks). Exh. S, ¶ 2.
84. In exchange, Patriot makes a volume commitment guarantee of the delivery of a minimum of 800 rail cars loaded with propane. Exh. S., ¶ 3.
85. Although GURR has the “right” to take delivery of rail cars on behalf of customers other than Patriot (wholly owned by Spicer and NGL), any such cars will count towards Patriot’s 800 car minimum obligation. Exh. S., ¶ 3.
86. Under the Confidential Rail Transportation Contract, Patriot also will make the following payments to GURR:
  - a. The “Base Rate” payment that is in effect at the time of delivery of each rail car. Exh. S, ¶¶ 4, 5; Testimony of Delli Priscoli.
    - i. The Base Rate is escalated after the second year, but all base rate amounts are redacted.
    - ii. The Base Rate cannot exceed the lowest rate that GURR charges any other shipper.
    - iii. Therefore, the Base rate will escalate every year unless GURR receives cars from other shippers at a lower rate, in which case the Base rate will be the lowest rate that GURR charges any other shipper.
  - b. An Additional Amount of \$[redacted] per car, up to a total of 12,000 cars. Exh. S ¶ 4(b)(i).
    - i. A credit of \$[redacted] per car of LPG delivered by other customers will be subtracted from the additional amount.
    - ii. Thus this payment will also be higher to the extent that no cars are accepted from suppliers other than Patriot (Spicer/NGL).
  - c. A Shortfall Payment which is guaranteed by Spicer and NGL. Exh. S ¶ 4(b)(i); Testimony of Delli Priscoli.

- i. The Shortfall Payment is a multiplier (which is redacted) of the number of cars under 800 delivered by Patriot, with a credit for any cars delivered by any other supplier.
  - ii. So the Shortfall Payment (SP) calculation is as follows:  
$$SP = W \times (800 - YZ)$$
where W is the redacted multiplier, Y is the number of cars delivered by Patriot (if under 800) and Z is the number of cars delivered by any other supplier.
  - iii. Therefore, the Shortfall Payment increases to the extent that no cars are accepted from suppliers other than Patriot (Spicer/NGL).
- d. All sums that are payable under the equipment lease, including property and liability insurance and all real and personal property taxes attributable to the facility (hereafter, "Equipment Lease repayment"). Exh. S ¶4(b)(ii); Testimony of Delli Priscoli.
- i. Under this provision, for every dollar GURR pays to GRT (which is co-owned by Spicer and NGL) to "lease" the tanks and transloading equipment under the Financing, Development and Construction Agreement (Exh. R, ¶ 6(c)), it is *repaid* that dollar by Patriot (also co-owned by Spicer and NGL), *plus* it is paid for money expended on insurance and taxes.
  - ii. As a result of this provision, GURR's outlay for leasing the equipment is effectively zero.
  - iii. That is *unless* GURR takes shipment of LPG from suppliers/shippers other than Patriot (Spicer/NGL), in which case its Equipment Lease Repayment will be reduced by a redacted amount.
  - iv. So Patriot receives a credit in the amount of the total annual equipment lease payment (K) divided by the total number of cars of LPG delivered from all sources (L) times the number of cars from shippers other than Patriot (M).
  - v. Therefore, GURR's recoupment of lease costs (R) is reduced by an amount equal to  $K/L \times M$ .

$$R = K/L \times M$$

- vi. All amounts are redacted, but for purposes of illustration, if K = \$100,000, L = 950 and M = 200, instead of recouping the full \$100,000 for its outlay for lease payments plus insurance and taxes, GURR would recoup \$78,948.
- vii. This also serves to incentivize GURR to not take shipment of LPG from suppliers other than Patriot (Spicer/NGL).

## II. PROPOSED RULINGS OF LAW

### A. ICCTA Background

1. The preemptive effect of the ICCTA is a question of law. Texas Central Business Lines Corp. v. City of Midlothian, 669 F.3d 525, 529 (5<sup>th</sup> Cir. 2012).
2. Because of the presumption against preemption, the party contending that preemption applies has the burden of persuasion, although that presumption may have “less force” in a field with a significant federal presence. Texas Central, 669 F.3d at 529; *but see* Florida East Coast Railway Co. v. City of West Palm Beach, 266 F.3d 1324, 1328-29 (11<sup>th</sup> Cir. 2001) (holding that the presumption of non-preemption places “a considerable burden” on the railroad since the municipality was acting under the traditionally local police power of zoning and health and safety regulation, and thus the alleged encroachment upon federal jurisdiction does not occur by the municipality’s legislating in a field of historic federal presence).
3. In 1995, Congress enacted the ICCTA, which terminated the Interstate Commerce Act and the Interstate Commerce Commission and replaced it with the Surface Transportation Board.
4. The Surface Transportation Board (“STB”) has exclusive jurisdiction over “transportation by rail carriers.” 49 U.S.C. § 10501(b)(1); Grafton & Upton Railroad v. Town of Milford, 417 F. Supp.2d 171, 176 (D. Mass. 2006); Norfolk Southern Railway Company v. City of Alexandria, 608 F. 3d 150 (4<sup>th</sup> Cir. 2010); Texas Central, 669 F. 3d at 530.
5. Thus, to qualify for federal preemption under section 10501(b), the activities at issue must: (1) constitute “transportation;” and (2) be performed by, or under the

auspices of, a “rail carrier.” Alexandria, STB decision at 2; Grafton & Upton, 417 F. Supp. at 176; Texas Central, 669 F. 3d at 530.

6. “While a locality cannot require permits prior to construction, the Courts have found that a railroad can be required to notify the local government when it is undertaking an activity for which another entity would require a permit and to furnish its site plan to the local government.” Boston and Maine Corporation and Town of Ayer, Joint Petition for Declaratory Order, STB Finance Docket No. 33971 (May 1, 2001), 2001 WL 458658 at 5, *citing* Village of Ridgefield Park v. New York Susquehanna & Western Railway, 750 A.2d 57 (N.J. 2000) (internal quotation omitted).
7. There is no dispute that GURR is a rail carrier, defined by the ICCTA as an entity providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5).
8. Despite GURR’s status as a “rail carrier,” the activity/facility is not entitled to preemption where the relationship between the rail carrier and the third-party is not sufficient to establish that the activities of the third party are being conducted under the auspices of the rail road. Alexandria, STB Finance Docket No. 35157, 2/17/09 decision at 2.
9. “Congress intended the transportation and related activities undertaken by rail carriers to benefit from federal preemption but did not mean such preemption to extend to activity related to rail activity undertaken by non-rail carriers.” Grafton & Upton, 417 F. Supp. at 176.
10. In this case, the Town challenges GURR’s assertion that it is the entity undertaking the activity in question, propane transloading. Alexandria, STB Finance Docket No. 35157, 2/17/09 decision at 2.
11. Whether a particular activity constitutes transportation by rail carrier under section 10501(b) is a case-by-case, fact-specific determination. Texas Central, 669 F.3d at 530, *quoting* Town of Babylon and Pinelawn Cemetery, Petition for Declaratory Order, STB Finance Docket No. 35057, 2008 WL 275697, \*3 (February 1, 2008).

12. In determining whether transloading activities come within the Board's jurisdiction where a third party is involved, the STB and courts have used various multi-factor tests. See., e.g., Alexandria, STB decision at 2.

**B. Multi-Factor Tests**

13. Although the exact contours of the tests and factors used by the STB and Courts vary, the inquiries are all designed to determine whether it is the *rail road* or the *third party* that is actually in control of the facility or operation at issue.
14. For example, in order to determine whether an ethanol transloading facility was part of the railroad's rail operations or was in reality an independent business conducted by the third party transloader on railroad property, the STB looked at the following ("the Alexandria Test"):
- a. Whether the railroad holds out transloading as part of its service;
  - b. Whether the railroad is contractually liable for damage to the shipment during loading or unloading;
  - c. Whether the railroad owns the transloading facility;
  - d. Whether the third party is compensated by the railroad or the shipper;
  - e. The degree of control retained by the railroad over the third party;
  - f. Other terms of the contract between the railroad and the third party;
15. Here, the contracts forcefully demonstrate that it is a third party—a collaboration between NGL, which is primarily a supplier/shipper of propane, and Spicer, which is a wholesale and retail distributor of propane--acting through their collection of jointly owned businesses, and *not* GURR, that in reality will be in control of the propane transloading facility under the Alexandria Test.
16. Alexandria factor #1: Whether the railroad holds out transloading as part of its service. Under this factor, the STB noted in Alexandria that there was no evidence that the third party transloader held itself out as providing transloading services at the facility, or that the transloader had any contractual relationships with any of the ethanol shippers. In fact, the STB noted that a provision of the operating agreement specifically provided that the transloader did *not* have the right to market the Facility.

- a. Here, the transloader AAT has much more than “contractual relationships” with the shipper, Patriot Supply; it is a corporate affiliate. Both ATT and Patriot are wholly owned in equal amounts by the same two entities, Spicer and NGL.
- b. Moreover, the Confidential Rail Transportation Agreement between GURR and Patriot (Spicer/NGL) incentivizes GURR to reject or minimize rail cars from suppliers other than Patriot (Spicer/NGL), owned by the same entities as the transloader, ATT (Spicer/NGL). See *Supra*, requested findings of fact.
- c. Additionally, there is no provision in the Terminal Transloading Agreement, Exh. 27, that prohibits the transloader AAT (Spicer/NGL) from marketing the facility.
- d. In fact, AAT (Spicer/NGL) is permitted to market its transloading services to railroad clients as well as Spicer’s and NGL’s own affiliates that are customers of GURR. Section 1(A)(iv)(C) of the Transloading Agreement (p. 4).

17. Alexandria Factor #2: Whether the railroad is contractually liable for damage to the shipment during loading or unloading. Although the STB listed this as a factor in Alexandria, it did not actually use this factor in evaluating the relationship between the railroad and the transloader in that case. In other cases, Courts and the STB have used this factor to determine which party is actually bearing the risk of loss, as that sheds light on which party is actually in control. Here, the liability provisions clearly demonstrate that GURR’s risk of operation of the transloading facility is minimized at every turn.

- a. Under Section 3 of the Transloading Agreement, the transloader AAT (Spicer/NGL) shall indemnify and hold the railroad harmless for:
  - i. any and all liability for and losses resulting from injury to any employee, agent, or subcontractor of AAT, or the destruction of property or equipment arising in connection with the Agreement or at the Terminal or any other property owned by GURR unless that

- injury or loss is caused by the negligence or willful misconduct of GURR; Exh. 28 at p. 9, Section 3(A)(i)(a);
- ii. injury or death of any person whatsoever and damage to any property whatsoever caused by AAT (Spicer/NGL); Exh. 28 at p. 9, Section 3(A)(i)(b);
  - iii. any failure by AAT (Spicer/NGL) to meet applicable payroll and other employment obligations; Exh. 28 at p. 10, Section 3(A)(i)(c);
  - iv. any release of any hazardous substance occurring after the date of the Agreement and the cost of remediation thereof. Exh. 28 at p. 10, Section 3(A)(i)(d).
- b. Under Section 3(B) of the Transloading Agreement, the transloader AAT (Spicer/NGL) indemnifies not only GURR, but all subsidiaries of GURR and all officers, directors and employees of GURR for the cost of workers' compensation insurance, employers' liability insurance, commercial general liability insurance, and all risk property insurance.
- c. Under Section 1(A)(iv)(C) of the Transloading Agreement (p. 4), the transloader AAT (Spicer/NGL) "shall retain full responsibility and shall indemnify and hold harmless Railway from any consequences of the acts and omission of" the AAT's subcontractors or agents.

18. Alexandria Factor #3: Whether the rail carrier owns the transloading facility.

This factor is relevant since ownership is an indicator of control.

- a. In Alexandria, the STB noted that the railroad owned the facility and constructed it with its own funds. Alexandria, STB decision at 3.
- b. In cases in which the STB found that the transloading facilities were not part of transportation by a rail carrier, Hi-Tech, Milford, and Babylon,<sup>2</sup> the third-party transloaders or contractors constructed or planned to construct the transloading facilities themselves.

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<sup>2</sup> Hi-Tech Trans LLC-- Petition for Declaratory Order, Newark NJ, STB Finance Docket No. 341092; Town of Milford, MA—Petition for Declaratory Order, STB Finance Docket No. 34444; and Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order, STB Finance Docket No. 35057.

- c. In this case, the financing arrangements for the facility can be found mostly in the Financing, Development, and Construction Agreement, Exh. R.<sup>3</sup>
- d. Under that agreement, GRT Financing (Spicer/NGL) is required to pay all costs for the completion and construction of the facility in accordance with Exhibit C of that contract, which includes: engineering activities in the preconstruction phase, installation of the four LPG tanks, the concrete piers, the rail towers, the piping, the pumps, compressors, and water suppression system, the electrical work, the truck loading racks, and the concrete and asphalt work. Exh. R, ¶ 6(a) and attachment C thereto.
- e. In contrast, GURR's construction obligations are limited to site work and track work. Exh. R, ¶ 6(a) and attachment C thereto.
- f. As far as ownership is concerned, "[t]itle to the four tanks, the rail tower piping system, tank headers, piping, pumps, compressors, water suppression system and all related equipment and structures thereto ('the LPG Equipment') shall be acquired by and held in the name of" GRT Financing (Spicer/NGL). Exh. R, ¶ 6(b).
- g. Therefore, rather than owning the facility, GURR will lease it from GRT (Spicer/NGL) under the terms of a lease agreement entitled the "Equipment Lease." Exh. R, ¶ 6(b).
- h. The Equipment Lease was not produced in discovery even though Spicer was prepared to deliver the propane tanks—for which it paid nearly half a million dollars--to the Site in mid-December of 2012. .
- i. According to the Financing, Development, and Construction Agreement, Exh. R, GURR will make monthly payments to GRT (Spicer/NGL) "in an amount that will amortize the costs of the LPG Transfer Facility" over 20 years at 5% interest per annum. Exh. R, ¶ 6(c).
- j. Since the Equipment Lease has not been produced, it cannot be determined whether "the costs of the LPG Transfer Facility" include the

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<sup>3</sup> Exhibit D to the Financing, Development, and Construction Agreement, which is referred to therein as the "construction schedule," was not produced. Exh. R.

- site and rail work already paid for by GURR, as that term is in no way limited to the cost for the completion and construction of the facility itself,<sup>4</sup> paid for by GRT Financing (Spicer/NGL) under paragraph 6(a).
- k. Under the Memorandum of Understanding, Exh. Q., ¶ 2(b), Patriot, also wholly owned by Spicer and NGL, shall pay GURR “all sums payable under the equipment lease described in the Financing, Development and Construction Agreement, including property and liability insurance and all real and personal property taxes attributable to the facility.”
  - l. Therefore, not only does GURR not *own* the propane facility, its lease thereof is a fiction since it will recoup every penny it pays to GRT (Spicer/NGL) from Patriot (Spicer/NGL), possibly including the only investment it has made (the site and track work) and also including all property and liability insurance and all real and personal property taxes attributable to the Facility.
  - m. Therefore, unlike Alexandria, the third party here, ATT (Spicer/NGL) both owns the facility and reimburses GURR for its “lease” thereof.
  - n. The fact that the third party paid for the construction of the facility and is reimbursing the railroad for its “lease” payments and all its equipment costs (e.g., taxes and insurance) makes this case factually distinct from Alexandria, where the railroad owned the facility and constructed it with its own funds.
  - o. Moreover, in contrast to the expert transloader in Alexandria, the third party “transloader” in this case is a limited liability company that was created in Delaware in June of 2012 and had exactly one employee – Jonathan Holstein, Vice President of Spicer. Testimony of Delli Priscoli, Holstein.

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<sup>4</sup> That term was so limited in paragraph 6(a): “All payments necessary for the completion and construction of the LPG Transfer Facility *for which GRT is responsible . . .*” so the fact that it was not similarly limited in 6(c) is of significance and may mean that GURR is recouping not only its lease payments--plus taxes and insurance--but also its only initial outlay for the site and rail work.

- p. Holstein has been employed by Spicer for 10 years, and was in the service and/or sales departments until 2009. Testimony of Holstein.
- q. In 2009, Holstein became VP of Operations in 2009, with the duties of overseeing sales and service, staffing, safety and regulatory compliance, logistics and supply, and overseeing operations including the rail transloading operation at Spicer's Connecticut rail facility. Testimony of Holstein.
- r. Therefore for three years or less, Holstein has had a host of duties which include "overseeing transloading operations," but Holstein himself testified to no direct transloading experience whatsoever. Testimony of Holstein.
- s. It was not until December of 2012 that AAT hired Robert Glasgow as the terminal manager. Testimony of Holstein.

19. Alexandria Factor #4: Whether the transloader is compensated by the railroad or the shipper. In contrast to Alexandria, the agreement in this case demonstrate that the transloader is compensated by the shipper/supplier and that the transloader effectively compensates GURR with a flat fee that does not escalate with inflation despite the fact that the contract has a 20 year term with an additional 10 year right to renew.

- a. The STB noted in Alexandria that the third party transloader receives a flat rate (presumably from the railroad) for each gallon of ethanol it transloads, regardless of the fee the railroad charged the shipper. Alexandria STB decision at 4.
- b. In this case, Section 2 of the Terminal Transloading Agreement (Exh. 27) governs payment to AAT (Spicer/NGL).
- c. Under Section 2, it is GURR that gets a flat fee regardless of the fee charged to the shipper. See Exh. 27, Section 2.
- d. GURR gets a \$50 per car "handling fee." See Exh. 27, Section 2.
- e. One railcar holds approximately 30,000 gallons of propane. Testimony of Delli Priscoli.

- f. The current rate for LPG transloading as stated in GURR's Tariff, which sets for the published rates for services provided by GURR, is 0.0575 per gallon. Exh. 28; Testimony of Delli Priscoli.
  - g. To determine what the third party transloader receives per car, based upon the Tariff, the capacity of gallons per rail car (30,000) is multiplied by the per gallon transloading fee of 0.0575, which equals approximately \$1,725 per tank car. Exhs. 27, 28; Testimony of Delli Priscoli.
  - h. After payment to GURR of \$50.00 per rail car, AAT nets \$1,675 per rail car. Exhs. 27, 28; Testimony of Delli Priscoli.
  - i. The per gallon transloading fee can be altered if GURR changes the LPG transloading rate in its Tariff. Testimony of Delli Priscoli.
  - j. Generally railroads can change their Tariffs at will. Testimony of Delli Priscoli.
  - k. In this case, GURR may only change its LPG transloading rate with the written consent of AAT (Spicer/NGL). Exh. 27, Section 1 K ("Railway shall not adjust or modify the rate set forth in Tariff 500 for transloading liquefied petroleum gas without the prior written consent of [All American Terminals], which shall not be unreasonably delayed, conditioned, or withheld.").
  - l. Generally rates increase over time with inflation. Testimony of Delli Priscoli.
  - m. There is no escalation of the \$50 per car "handling fee" that the railroad receives over the 20 to 30 year term of the contract. Exhs. 27, 28; Testimony of Delli Priscoli.
  - n. Even though ATT (Spicer/NGL) bills the shipper/supplier in the name of GURR, the flat, non-escalating fee payment to GURR in combination with the limitations of GURR to freely set the transloading rates reflects a scheme that enhances ATT's potential remuneration, not GURR's. a
20. Alexandria Factor #5: the degree of control retained by the railroad over the transloader. In this case, as set forth below, GURR retains very little, if any, control over ATT (Spicer/NGL).

- a. Although the Terminal Transloading Agreement states that ATT (Spicer/NGL) “shall provide transloading and other services . . . for and under the auspices and control of the Railway,” Exh. 27 at Section I(A)(i), many actual provisions of the contract demonstrate that GURR has not retained control.
- b. Specifically, in Alexandria, the STB noted that “the areas where [the transloader] plays a role in the operations of the Facility are directly related to the physical act of ethanol transloading;” here, the transloading agreement demonstrates that AAT (Spicer/NGL) will be running the propane facility in every significant respect.
- c. In Alexandria, the STB noted that the transloader “does not set, invoice for, or collect transloading fees charged to the shipper; [the railroad] retained these rights.” Alexandria, STB decision at 4.
- d. In this case, under the transloading agreement, AAT (Spicer/NGL), not GURR, invoices the shipper. Exh. 27, Section 1(K).
- e. Although Section 1(K) states that the invoices are to direct the customer to pay GURR, Section 1(A)(iii)(x), “*billing and collecting* for services provided by” AAT is AAT’s responsibility. (Emphasis supplied).
- f. Upon receipt of payment, GURR gets the \$50 per car “handling fee,” while AAT (Spicer/NGL) collects approximately \$1,675. *See* Request No. 19, *supra*.
- g. GURR cannot change its rates for LPG transloading without the prior written consent of AAT (Spicer/NGL), and if AAT advises GURR to modify the tariff rate, GURR “shall promptly consider such advice and make such modification or adjustment if Railway determines that the adjustment or modification is reasonable and appropriate.” Exh. 27, Section 1(K).
- h. Together, these provisions demonstrate that it is AAT (Spicer/NGL), not GURR, that will be setting, invoicing for, and collecting the transloading fees.

- i. In addition to billing obligations, in this case AAT (Spicer/NGL) also has many other obligations that, unlike the transloader in Alexandria, are in no way directly related to the physical act of transloading LPG.
- j. For example, in addition to its transloading duties, AAT (Spicer/NGL) is also required to: ensure shipper compliance with all applicable government regulations, Exh. 27, Section 1(A)(iii)(i); establish procedures for and conduct checks of trucks that arrive at the gate, Exh. 27, Section 1(A)(iii)(ii); control the gate during open hours, Exh. 27, Section 1(A)(iii)(iii); maintain the terminal site, including but not limited to the gates, fences, grounds, buildings, and other facilities, Exh. 27, Section 1(A)(iii)(iv); complete paperwork for truck drivers, Exh. 27, Section 1(A)(iii)(vi); provide security, Exh. 27, Section 1(A)(iii)(ix); bill for and collect payment, Exh. 27, Section 1(A)(iii)(x); arrange for motor carrier service for customers, Exh. 27, Section 1(A)(iii)(xi); supply and train necessary staff, Exh. 27, Section 1(A)(iv); supply a portable office, Exh. 27, Section 1(A)(iv); and meter and record the volume of LPG transloaded, Exh. 27, Section 1(A)(v).
- k. AAT (Spicer/NGL) is also responsible for a comprehensive host of other services, labeled “Accessorial Yard Services,” which *at a minimum* shall include: compliance with all applicable government regulations relating to the handling of propane; provision and maintenance of sufficient yard vehicles, tractors, and transloading equipment (with accessories, fire equipment, and communication equipment); provision of documentation and training for all personnel; provision of “any and all operating and administrative services,” including equipment inspections and maintenance of records; provision of office trailer with rug service, cleaning, and provision of toilet supplies, soap and paper towels; provision of yard work, including weeding and trimming of brush and vegetation; provision and storage of all fuels, lubricants, and other maintenance items; responsibility at transloader’s sole cost for “all normal maintenance to and of the Terminal and its constituent parts, including but not limited to

plumbing, lights, wash systems, compressors, wash facilities, scales, gates, meters, and lights, and for any required certification thereof;” responsibility for all damages or costs resulting from personnel error; provision of all fuel for cranes and yard tractors “with on-site fuel tank, if necessary,” and maintenance of said tank in compliance with all applicable laws; “compliance with all federal, state, and local laws, rules, regulations and ordinances controlling air, water, noise, solid wastes, and other pollution or relating to the storage, transport, release or disposal of hazardous materials, substances, or waste;” and responsibility at its sole expense “for any required modifications, repairs or additions to any devices or equipment affecting its operations.” Exh. 27, Appendix A (emphasis supplied).

1. Thus, AAT (Spicer/NGL) is responsible for virtually every activity at the propane facility, from transloading the propane to cleaning the toilets and pulling the weeds.

21. Alexandria Factor #6: other terms of the contract between the railroad and the transloader. Many other terms of the various contracts demonstrate that it is AAT (Spicer/NGL) that is actually in control of the propane transloading facility.

- a. In Alexandria, as in all of the STB cases, two key provisions of the contract for determining which party is in actual control are the term and termination provisions. Alexandria, STB at 4.
- b. In Alexandria, the STB stated: “the term of the [railroad/transloader] operating agreement is 2 years, and [the railroad] has the right to cancel *for any reason* on 60 days’ notice. In contrast, in Hi-Tech, Milford, and Babylon, the transloaders had, or contemplated having, leases or licensing agreements that were long terms agreements.” Alexandria, STB at 4 (emphasis supplied).
- c. In this case, the “initial term” of the Terminal Transloading Agreement is twenty years, and AAT (Spicer/NGL) has the right, so long as it is not in default, to extend the agreement for an additional ten years and even

- negotiate with GURR for additional extensions beyond thirty years. Exh. 27, Section 5(A).
- d. As to termination, GURR can only terminate for cause. Exh. 27, Section 5(B).
- e. "Cause" is a breach not only of the Terminal Transloading Agreement by AAT (Spicer/NGL), but also includes breach by any other "party to any other written agreement relating to the LPG Transfer Facility other than Railway," *i.e.*, all of the are parties to the various contracts--GRT Financing (Spicer/NGL), Patriot (Spicer/NGL), Spicer, and NGL. Exh. 27, Section 5(B).
- f. Thus, AAT is bound not only by the obligations set forth in the Transloading Agreement, but also by the obligations of parties that are to be contractually unconnected to it as the transloader, *to wit*, GRT Financing (the financing entity), Patriot Gas (the shipper), Spicer (the retailer), and NGL (the supplier), to the extent that those entities breach any of the various contracts. Exh. 27, Section 5(B); Testimony of Delli Priscoli.
- g. Not only is GURR limited to termination of the transloading contract for cause, AAT (Spicer/NGL) has the right to remedy any breach, however long that may take, as long as it uses undefined "diligent efforts." Exh. 27, Section 5(B).
- h. With respect to assignment of the contract, AAT (Spicer/NGL) "may collaterally assign this Agreement *without consent of Railway* to any lessor of, or lender that has provided purchase money financing for, the liquefied petroleum gas transfer equipment used at the Terminal." Exh. 27 Section 7(B)(ii).
- i. Thus, AAT (Spicer/NGL) may at any time and without GURR's consent, assign the agreement to GRT Financing (Spicer/NGL), Spicer, or NGL, an extreme demonstration of the fact that AAT (Spicer/NGL) are in control under the contract.

- j. With respect to access to the terminal, GURR has the “right” to use “any tracks and facilities at the terminal for its rail transportation activities that may be in addition to the transloading and related activities” of AAT (Spicer/NGL), *but only to the extent* that “such use by the Railway shall not unreasonably interfere with the activities or services of [the transloader] pursuant to this Agreement.” Exh. 27, Section 6 (emphasis supplied).
  - k. Again, this provision demonstrates that GURR is not the entity in control of the facility under the contract documents.
22. Since any number of factual scenarios can be presented, the STB and courts have evaluated the relationship between rail road and third party using slightly different tests and/or looking at different factors.
23. The one thing all of the tests have in common is that the inquiry is designed with reference to the facts presented to determine whether the rail road is actually in control of the facility or activity at issue.
24. In New York Susquehanna and Western Railway Corp. v. Jackson, 500 F. 3d 238 (3<sup>rd</sup> Cir. 2007), the Court held that the activities in question (the transloading of solid waste) were being conducted by a “rail carrier” based on the following facts:
- a. The rail carrier owned the land and built the transloading facility;
  - b. Shippers made payment directly to the rail carrier;
  - c. The rail carrier had liability during the loading process.
25. In this case, the contractual arrangements demonstrate that:
- a. GURR did not pay for the construction of the facility, and its “lease” thereof is a fiction because GURR is completely reimbursed by Patriot (Spicer/NGL)--which is owned in the same proportion by the same entities as the transloader AAT (Spicer/NGL)--for all lease payments (so long as GURR does not accept shipments from suppliers other than Patriot (Spicer/NGL));
  - b. Under the agreement, shippers are billed by, and make payment to, AAT (Spicer/NGL)
  - c. AAT (Spicer/NGL) has liability during the transloading process.

26. Therefore, the contractual relationship here would not pass muster under the test used by the Third Circuit in NYS & Western Rwy.
27. In Town of Babylon and Pinelawn Cemetery, Petition for Declaratory Order, STB Finance Docket No. 35057(October 15, 2009), despite the railroad's and transloader's attempts to "redefine" their relationship by executing a new transloading agreement, the STB found that the activity (transloading of construction and demolition debris) was not entitled to preemption because the transloader "continues to have the right to conduct an independent business on [the rail road's] property under a long-term (10 year) agreement for which it pays fees to" the Railroad. Babylon, STB decision at 4.
28. The factors the STB found decisive in that case were as follows:
- a. Who sets the transloading fee? Although the railroad asserted that it set the transloading fees, "the actual terms of the agreement do not support such claims." The contract stated that the railroad could "adjust the transloading fee," but could only do so with the transloader's consent, and the fee had to be "sufficient" in particular respects, and therefore the STB found that the railroad in reality had "only limited influence over transloading fees." Babylon, STB decision at 5.
  - b. Who controls the operation of the facility? The STB found that the railroad's control over operation of the facility was insufficient, despite the fact that the railroad had responsibility for inspection and maintenance of all tracks, because the transloader was solely responsible for repairs, maintenance, and upkeep of the facility.
  - c. Who provides the services and billing? The STB found that the transloader alone provided the transloading services, loaded and unloaded the commodities, and billed the customers.
29. In this case, all of the factors used in Babylon again support the finding that GURR is not on control. Specifically, as set forth in detail above:
- a. GURR can only alter the transloading fee with the prior written consent of the transloader;
  - b. AAT (Spicer/NGL) is in full control of the facility;

- c. AAT (Spicer/NGL) provides all of the services and does the billing.
30. Almost as significant in Babylon is what the STB did not find decisive: mere recitations of control in the contract documents.
  31. For example, the fact that the agreement required that documents produced by the transloader recite that it was the “agent” of the railroad was insignificant, since such a recitation did not divest the transloader from the actual powers vested in it by the agreement. Babylon, STB at 5.
  32. The recitation that the rail road “shall control all aspects of the Facility’s transload operations” met a similar finding—it did not divest the transloader of any power conferred, or confer any specific authority on the railroad. Id.
  33. Likewise, the Third Circuit has noted that “railroads and loaders may not change by contract what in practice is a substantively different relationship.” NYS & Western Rwy., 500 F. 3d at 250; *see also* Grafton and Upton, 417 F. Supp. at 176-77 (the fact that Grafton & Upton railroad “changed the legal dynamic of its relationship with [the transloader] to suit the circumstances,” including labeling the transloader its “agent,” did not serve to bring the transloader’s activities under the “auspices of the railroad” where the evidence did not support that characterization).
  34. The mere recitations in the transloading agreement in this case (*e.g.*, “Contractor shall provide transloading and other services . . . under the auspices and control of Railway” Exh. 27 at Section 1(A)) should be viewed in the same light, as they in no way change the key terms that confer control on AAT.
  35. In Grafton and Upton, when upholding the STB finding that the activity was not entitled to preemption, the Court noted that the railroad’s involvement would be limited to transporting rail cars to the facility for the transloader and returning empty cars the CSX interchange. 417 F. Supp. at 177. It noted further that it was the transloader that would control the remaining functions at the rail yard, and that there was no evidence that it would be doing so on behalf of the railroad. Id.
  36. In this case, there is likewise no function that GURR will perform other than transporting rail cars, and no evidence that AAT will control all remaining

functions, excluding the mere recitation that AAT (Spicer/NGL) is under the auspices and control of GURR.

37. In Florida East Coast Railway Co. v. City of West Palm Beach, 266 F. 3d 1234 (11<sup>th</sup> Cir. 2001), the Court rejected the rail road's claim that the transloading of aggregate at a yard located in a residential district was entitled to preemption. The Court noted that the rail road's involvement ended once it delivered the product to a portion of the yard owned by the rail road but leased by the third party, Rinker. Id. at 1327. Rinker or its agents then transloaded and dispatched the product to Rinker's external customers, an activity Rinker coordinated from the office on rail road property for which Rinker paid all expenses. Id. In upholding the District Court's decision that local zoning ordinances were not preempted, the Eleventh Circuit quoted the District's Court's finding that "Rinker effectively ran a Rinker operation on [rail road] property." Id. at 1336.
38. Likewise in this case, it is one and the same entity that will supply (Patriot (Spicer/NGL)), transload (AAT (Spicer/NGL)), and probably ultimately sell at retail to end users (Spicer) the propane.
39. Therefore, the evidence in this case establishes that Spicer/NGL will effectively run a Spicer/NGL operation on GURR property.
40. For all of these reasons, the proposed propane facility at 42 Westboro Road in Grafton is not entitled to preemption and therefore all local and state laws that would be otherwise applicable are in full force and effect.

The Town of Grafton  
By its Town Counsel,

/s/Ginny Kremer  
Ginny Sinkel Kremer, BBO#629147  
Bowman & Penski, Town Counsel  
29 Prospect Street  
Acton, MA 01720  
(617) 312-2323

CERTIFICATE OF SERVICE

I certify that this document(s) filed through the ECF system will be sent electronically on this 30<sup>th</sup> day of January 2013 to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this day.

/s/ Ginny S. Kremer  
Ginny Sinkel Kremer

ATTACHMENT G

Affidavit of Kevin Mizikar

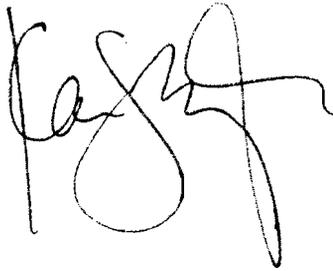
*Affidavit of Kevin Mizikar, Grafton Assistant Town Administrator*

I, Kevin Mizikar, am the Assistant Town Administrator and state the following based upon my first hand knowledge:

1. On or about November 26 and December 4, 2012, the Defendant Priscoli informed the Board of Selectmen and other town officials and residents that he was constructing a major propane storage facility at the site, comprising four 80,000 gallon tanks. I attending the meetings where these statements were made.
2. Priscoli further stated that he was not required to submit to any state or local permitting or inspection due to his claim to federal preemption over the activities in question.
3. Priscoli also stated that the propane tanks would be delivered in January or February of 2013.
4. On or about December 11, 2012, Priscoli informed the Board of Selectmen that the first of the tanks, which is approximately 120 feet long and 15 feet high, will be arriving via tractor trailer tomorrow, December 13, 2012.
5. Priscoli stated that the remainder of the tanks would be delivered on December 18, 19, and 20.
6. Priscoli asserts that they have DOT permits for the deliver but have not provided same to the Town.
7. The Town has had insufficient time to evaluate the Defendants' federal preemption claim and have asked for additional time and information in which to do so.
8. The Defendants have refused to delay delivery of the tanks for any amount of time.
9. On December 12, 2012, the Grafton Building Inspector served in hand to Priscoli a cease and desist order, ordering that all construction cease and that the defendants turn over all DOT or other permits related to the transport of the propane tanks.
10. Priscoli stated that he has no intention of complying with the Cease and Desist Order and will not delay delivery of the first tank, scheduled for tomorrow, December 13, 2012.
11. Priscoli came to the Grafton Municipal Center and stated to me that the Town started a nuclear war that he intends to win, that all bets are off, and that he intends on burying the Towns that are not working with him.

12. At approximately 2:20 today I went to 42 Westboro Road in Grafton, the property of the Grafton and Upton Railroad where they are installing propane storage tanks. I observed construction equipment actively working on the area where the tanks are being installed. This included both men working with hand tools and heavy equipment moving earth.
13. The Plaintiffs and residents of the Town of Grafton will suffer irreparable harm if the Defendants have the tanks delivered prior to the Town's ability to assess and respond to the Defendants' claim to federal preemption.

Signed Under the Pains and Penalties of Perjury this 12<sup>th</sup> day of December 2012.

A handwritten signature in black ink, appearing to be "K. J. [unclear]". The signature is written in a cursive style with a large, prominent loop at the end.

ATTACHMENT H

G&U Tariff 5000-A

**Grafton and Upton Railroad**

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**TARIFF 5000-A  
CANCELS  
TARIFF 5000**

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**BULK TRANSFER TARIFF  
PROVIDING SERVICE  
ON  
DRY AND LIQUID COMMODITIES  
AT STATIONS NAMED IN ITEM 110  
Located on**

**Grafton and Upton Railroad**

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**BULK RAIL-TRUCK TARIFF**

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**ISSUED: December 1, 2012**

**EFFECTIVE: January 1, 2013**

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**ISSUED BY:**

Grafton and Upton Railroad Company  
929 Boston Post Road East  
Marlborough, MA 01752

**TARIFF GU5000  
RULES AND OTHER GOVERNING PROVISIONS  
GENERAL RULES AND REGULATIONS**

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**ITEM 110**

**APPLICATION**

The provisions of this tariff will apply on Dry and Liquid commodities, in bulk, at designated GU Bulk Transfer (GUBT) facilities at the following locations:

Massachusetts	West Upton
Massachusetts	North Grafton (self unloading only)
Massachusetts	North Grafton LPG terminal
Massachusetts	Hopedale ( self unloading only)

Each GUBT listed above is operated by GU, in some cases through a subcontract with a terminal operator ( the "Terminal Operator") that will be performing transloading services for and under the auspices of GU. The purpose of this tariff is to advise GU shippers of the services they may expect when utilizing a GUBT and the services of a Terminal Operator. Upon request of the shipper, the terminal services named herein will be performed on carload shipments in bulk as described herein (See Note 1), which move in GU line haul service to or from the above terminals, subject to the charges, rules and regulations published herein.

To arrange for terminal services specified in Item 115 at locations specified above, Shipper must notify GU's Marketing Department at 860-627-8924 before actual shipment of product is made, advising the terminal of the commodity and the car number to be shipped.

**NOTE 1:** GUBT facilities will handle Dry and Liquid Commodities in bulk when appropriate infrastructure and equipment for handling such Commodities are available. The Terminals will require shipper to provide Material Safety Data Sheets (MSDS) and will keep same on file at the terminal; product Handling Protocol for hazardous materials and such other information as may be required, including the need for special transfer equipment, personal protective equipment (PPE), pollution control, etc., prior to shipment of the commodity. GU reserves the right to refuse any commodity at its GUBT facilities.

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**ITEM 112**

**MOTOR CARRIER ACCESS**

A shipper must retain a motor carrier to load or unload Commodity at GUBT. In order to load or unload Commodity at a GUBT, a motor carrier must execute an Indemnity and Hold Harmless Agreement among the motor carrier, GU and the Terminal Operator, covering the motor carrier's activities while at the GUBT. When this agreement is fully executed, a motor carrier is "preapproved". Carriers and their employees operating at GUBT site are required to conform to all such rules and procedures. A a motor carrier must execute a separate Indemnity and Hold Harmless Agreement for each GUBT location.

All pre-approved motor carriers may deliver to or pull loads from a Grafton and Upton Railroad Bulk Transfer Terminal. Motor carriers may be required to assist in the connection and loading or unloading of the trailer. The motor carrier will be responsible for its equipment at all times and the driver must remain with the vehicle while loading or unloading. The

motor carrier will comply with all required safety procedures, which will include the removal of vehicle keys while loading Hazmat products. Authorized terminal personnel, not drivers or personnel of any motor carrier,  

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will load or unload all hazardous materials.

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A motor carrier that is not pre-approved will not be allowed to enter a GUBT, and the motor carrier driver must have a valid CDL (Commercial Driver's License) in his/her possession while conducting activities at the GUBT. Motor Carrier driver must have a DOT hazardous materials endorsement if transporting hazardous materials.

If a shipper arranges for self-loading, an administration charge of \$75 per trailer will be assessed to the shipper. This charge applies to the self-loading of dry and non-hazardous liquid products. Self-loading of hazardous materials is prohibited. (See Note 1)

**NOTE 1:** For the purposes stated herein, "self loading" shall be defined as a motor carrier using equipment affixed to its equipment to perform the physical transfer of Commodity. Self-loaders must also supply all hoses, fittings, etc. in addition to Appropriate spill containment for the transfer of Commodity.

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## GENERAL RULES AND REGULATIONS

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### ITEM 115

#### A. BASIC SERVICES INCLUDED IN A TRANSFER

Unless otherwise agreed upon by GU and the customer, a transfer conducted at a GUBT will include the following at no additional cost:

1. Weigh empty trailer.
2. Inspection of terminal transfer equipment for cleanliness. This does not include self-load equipment.
3. Verification of motor carrier's shipment documentation.
4. Seal loaded trailer and railcar from which product was removed.
5. Weigh loaded trailer.
6. Provide driver with scale ticket and product sample only if requested by the shipper or beneficial owner.

The Shipper and GU may agree upon the performance of services in addition to those listed above, at rates to be negotiated.

#### B. APPLICATION OF TERMINAL SERVICES

1. Prior to acquiring terminal services at a GUBT facility listed in Item 110, shipper or beneficial owner must provide GU and the terminal operator a MSDS covering the commodity to be handled, and, for hazardous materials, a Handling Protocol outlining hazards and procedures for safe handling. All hazardous materials require pre-authorization by the terminal operator, on behalf of GU prior to billing any shipments to the terminal.
2. Grafton and Upton, through the Terminal Operator, will perform the services named herein on carload shipments of Commodity in bulk, subject to charges, rules and regulations published herein. Grafton and Upton reserves the right to refuse to handle any Commodity at its sole discretion.
3. All commodities must have MSDS sheet and on file at the terminal prior to arriving for terminal services. For shipments of hazardous materials a Handling Protocol must be on file at the terminal prior to arriving for terminal services, Commodity(s) arriving at a terminal before receipt of an MSDS and Handling Protocol (as applicable) will be held subject to Track Occupancy Charges as specified in Item 140 and no transfers will be accomplished until this information arrives.
4. Commodity(s) that Grafton and Upton declines to handle under the charges, rules and regulations published herein may, at Grafton and Upton's sole discretion, be handled under a separately negotiated contract.
5. Terminal services are restricted to carloads received or forwarded in Grafton and Upton line haul service. None of the facilities listed in Item 110 are open to any type of switching.

(Continued on next page)

**GENERAL RULES AND REGULATIONS**

ITEM 115 (Continued)

**C. UNLOADING OF RAIL CARS**

Charges for unloading of railcars to trucks and unloading trucks to railcars at a GUBT will be billed and collected by the Terminal Operator, as agent for and on behalf of GU, and will not, except as otherwise agreed upon by GU and the shipper, exceed the rates set forth in item 120.

The handling characteristics of the commodity, manpower requirements and the transfer equipment required will be taken into account in order to determine whether the actual rates charged will be lower than the rates set forth in Item 120. Any truck detention charges incurred during the loading or unloading process and any overtime charges (Item 150) will be the responsibility of the shipper. However, charges for the services listed below shall be no greater than that set forth below, except as otherwise agreed upon by GU and shipper..

For safety reasons, GUBT procedures require that at least two (2) qualified people be present during the transfer of any non-self load products. A truck driver on site qualifies as one of these people only if they have the necessary training and qualifications confirmed by their parent company. For self-load products only one (1) terminal operator employee, or one (1) qualified truck driver, will satisfy the safety requirement. Transfer rates may not be included or bundled with any charges for accessorial equipment or capital improvements that may be required in order to enable GU to handle the transfer of a commodity. GU retains sole discretion whether to make any such capital improvements or acquire any such accessorial equipment that may be requested by a shipper and, if GU does proceed, to establish charges and rates, in addition to the rates established by this Tariff for services related to the transfer of the commodity, for such improvements or equipment.

ITEM 120

**A. BULK TRANSFER CHARGES**

Applicable on shipments transferred from rail car to truck at the facilities listed in Item 110. On commodities transferred in bulk, the following charges, subject to a minimum weight of 45,000 pounds per truckload per transfer, will be assessed for transfer at all Grafton and Upton Bulk Transfer facilities.

**DRY BULK**

	<u>Per 100 pounds</u>
Mechanical Conveyor or Auger Transfers	\$0.35
Plastics ( STCC 28-211-XX )Transfers	\$0.40
Pressure Differential Transfers	\$0.35
Other dry Bulk Products	\$0.40
Hazardous Solids (Other than flammables)	\$0.47
Self- Loading [Non-hazardous products only]	\$75.00 per trailer

**LIQUID BULK (OTHER THAN LPG)**

	<u>Per 100 pounds</u>
Non-hazardous Liquids	\$0.38
Hazardous Liquids (Other than flammables)	\$0.47
Flammables	(Individually Priced)

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**SPECIAL SERVICES**

Additional scale weights	\$25.00 per weight
*first set of weights (inbound/outbound) included in transfer	
Tank Car Heating Charge	(Individually Priced)
Recirculation Charge	\$35.00 per hour
Inert Gas supplied by shipper or beneficial owner	\$60.00 per application
Replenishment Loading	\$500.00 per Trailer
Load Samples	\$18 per sample

**NOTE 1:** The 49 Code of Federal Regulations, Table 172.101 (Hazardous Material Table), as may be revised from time to time, will be used to determine if a product is hazardous. GU reserves the right to refuse to handle ANY commodity at a GUBT. Only authorized Terminal Operator personnel may transfer hazardous commodities. No fully or partially loaded tank trailers of hazardous materials are allowed on GUBT property while the facility is closed, unless authorized by Operator and GU in writing.

**NOTE 2:** Multiple commodities may be loaded in a compartmentalized trailer for a charge of \$60.00 for each additional commodity or compartment loaded.

**B. PELLET TRANSFER/BAGGING**

Applicable on dry products transferred from rail and bagged at the Grafton Upton transfer/bagging facility in West Upton, MA.

On commodities transferred in bulk and bagged, the following charges, subject to a minimum weight of 180,000 pounds per transfer, will be assessed for transfer:

Transfer and Bagging	\$30.00 per ton
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**NOTE 1:** Per Ton Charge includes product transfer from Railcar to transfer silos, product handling from silos to bagging, shipping pallets, bag stacking on pallets, plastic protective pallet storage cover, shipping shrink wrap, loading finished pallets onto trucks.

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Product holding for Loading:	
Inbound	\$3.50 per pallet
Outbound	\$3.50 per pallet
Shipping Dock Occupancy Charge	\$3.50 per pallet

**C. LPG**

	<u>Per gallon</u>
Transfer from railcar to truck	\$.0575

**D. BILLING OF CHARGES**

Unless arrangements to the contrary are made prior to shipment, charges for terminal services described herein will be billed to the shipper or beneficial owner by the Terminal Operator, as the agent for GU, except that Track Occupancy Charges (Item 140) will be charged, established and billed by GU through its third party billing agents.

If credit privileges are granted (a determination made on an individual basis), terms for the payment of Track Occupancy Charges will be 15 days from the invoice date.

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ITEM 125

**TERMINAL SERVICES**

**I. COMMODITY SAMPLING and INSPECTION**

Transfer charges in Item 115 include the visual inspection of the exterior of the railcar, and the exterior of the trailer.

GU reserves the right to take samples of any commodity transferred at GUBT facilities for its own purposes.

Top sampling of railcars must be agreed upon in advance. Sample containers must be provided by Shipper at its cost. If a sample is requested, it must be taken at time of transfer; any samples that are requested to be taken at another time will be performed at a charge of \$50 per car.

**II. SPECIAL SERVICES**

Services beyond the scope of those customarily provided by a terminal will be priced on an individual basis.

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ITEM 130

**TERMINAL LIABILITY**

**I. LOSS OF WEIGHT**

Allowable transfer losses will be one percent ( 1% ) of the weight of the commodity on a six-month (January-June, and July-December) cumulative basis per shipper, per GUBT, and such loss will be considered standard operating loss not assessable against GU ( See note )

NOTE 1: Greater loss allowances may be required as a condition of acceptance for specific products when handling characteristics preclude complete unloading of the trailer or the railcar.

**III. LIABILITY LIMITS**

The liability of GU with respect to activities and services at GUBTs shall be limited to the negligence of GU in the performance of the services described in this tariff. Furthermore, neither GU nor the Terminal Operator shall be liable for consequential, indirect, special or punitive damages, interest, attorneys fees, or any amount in excess of product or car owner's actual loss concerning the commodity shipped or the equipment utilized.

**IV. CLAIMS**

Only one claim for loss, damage and/or injury may be filed for each rail car handled under this tariff. No claim will be paid which is filed more than nine (9) months after product delivery or release of car from the terminal, whichever occurs first.

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ITEM 140

**TRACK OCCUPANCY CHARGES, DEMURRAGE, AND RELATED CHARGES**

**A. PRIVATE CAR TRACK OCCUPANCY CHARGES**

This item will apply on private cars (See Notes 1 and 2) constructively placed or actually placed at a GUBT in lieu of demurrage provisions in Tariff GU 3000- series. Track occupancy charges will be billed to and collected from shipper or beneficial owner of the Commodity on behalf of GU by the Terminal Operator.

Once a rail car is constructively or actually placed (See Note 2), "free time" (Including Saturdays, Sundays and Holidays) will be allowed as follows:

<u>Car Type</u>	<u>Free Days</u>	<u>Days 11 through 40</u>	<u>All Subsequent Days</u>
Covered Hopper Cars	10	\$50 per day	\$90 per day
Tank Cars	10	\$50 per day	\$90 per day

**B. RAILROAD CAR DEMURRAGE**

All railroad owned or controlled cars (See Notes 1 and 2) will be subject to demurrage under the provisions of Tariff GU 3000-Series. Demurrage charges will be billed to and collected from the shipper or beneficial owner of the Commodity.

**C. NOTES AND OTHER CHARGES**

**NOTE 1:** A private car is a railcar bearing other than railroad reporting marks

**NOTE 2:** Constructive placement is the date the railcar is available to be switched into the GUBT Terminal. Actual placement is the date the railcar was physically placed in the GUBT Terminal.

**NOTE 3:** When a railcar is constructively or actually placed at a GUBT and subsequently reshipped without any transfers having been made, a facility charge of \$500 will be assessed to the party issuing the reshipping instructions, in addition to all other applicable charges.

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ITEM 141 -

**GRAFTON & UPOTN RAIROAD BULK TERMINAL: LPG TERMINAL**

The Grafton and Upton Railroad Bulk Terminal LPG Terminal located in North Grafton, Massachusetts is not a self-unloading facility, All terminal handling will be performed by the Grafton and Upton Railroad by a Terminal Operator acting under the direction and control of GU. The following guidelines are applicable when shipping to the GUBT LPG Terminal:

**A. PRODUCT SPECIFICATIONS**

All railroad tank cars received by the Grafton & Upton Railroad's GUBT North Grafton LPG Transfer Terminal ( LPG Terminal ) shall meet GPA Publication # 2140 specifications for HD-5 propane. Additionally the vapor pressure at 60 degrees F shall be within the range of 50 psi to 80 psi for the product to be accepted at the Terminal. All product delivered to the LPG Terminal shall be ODORIZED and meet or exceed the minimum level of odorization as stated in the Department of Transportation Code of Federal Regulations, 49 CFR 173.315(b)(1).

**B. NON-COMPATIBLE PRODUCT**

Shipper will be responsible for any Product that is delivered to LPG Terminal that does not meet the Terminal specifications set forth in Item # 141. LPG Terminal will provide Shipper with one of two options to handle the non-compatible Product: (1) The Terminal will return the product to origin, freight collect or pre-paid by Shipper or (2) Shipper will pay the LPG Terminal the actual cost for disposal plus handling and maintenance charges associated with the disposal of the non-compatible Product.

**C. PROJECTED VOLUME REQUIREMENTS**

During the first week of each calendar month, shippers must advise GU and the Terminal Operator of their projected volume to be delivered to the Terminal during the following calendar month. A shipper may deliver volume in excess of any such projected volume only with the prior consent of GU and the Terminal Operator.

**D. TRANSFER CHARGES**

The Terminal Operator, as the agent for GU, shall invoice the Shipper at the time of the receipt of the Shipper's LPG tank cars on the GU railroad property. A transload fee (as listed in ITEM # 120) on a cents per gallon basis to perform the off-loading and transfer operations will be billed. Such fee will include the truck loading fee and operations performed by the Terminal operator.

**E. WINTER PERIOD CHARGES**

If, during a single calendar month in the period of November through February, the Terminal receives in excess of the average monthly volume delivered to the Terminal by the same Shipper during the preceding period of May through August , a charge of eight ( 8 ) cents per gallon in addition to all other charges shall apply to such excess volume.

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## **F. MEASUREMENT AND DEDUCTIONS**

All product received at the LPG Terminal is subject to a 1% loss allowance deducted from the listed gallons on the bill of lading. Should the measured gallons be less than the net gallons (bol gallons minus the 1 % shrink ) an adjustment in the Shipper's inventory will be made

## **G. PRODUCT AVAILABILITY AND OVER LIFT OF PRODUCT**

The Terminal Operator shall maintain records showing the volume of LPG delivered to and removed from the Terminal by each shipper so that at any given time the Terminal Operator and shipper will know the volume of LPG credited to each shipper's inventory account. Product shall be credited to Shippers Terminal account when Shippers tank cars arrive on the GU property after the interchange with the CSX Railroad. All LPG received at the Terminal from any shipper shall be commingled and treated as a fungible commodity for purposes of transfer operations at the Terminal. No truck shall be loaded from any Shipper's inventory account if the volume remaining in the Shipper's account is less than 8,500 gallons without prior approval of GU.

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### ITEM 150

#### **HOURS OF SERVICE & OVERTIME CHARGES**

Normal working hours at the GUBT Terminals are from 7:00 A.M. to 6:00 P.M., exclusive of Saturdays, Sundays and Holidays (See Item 185).

All loading, unloading, & service must be ordered before 5 p.m. the day prior to the day that loading, unloading, & service is needed. Every attempt will be made to accommodate emergencies and requested times, but loading spots and other circumstances may require occasional modifications of requested times.

When service is required prior to 7:00 A.M. or after 6:00 P.M., arrangements must be made with the Terminal Operator in advance. When loading, unloading, & services are to begin after 5 p.m., written authorization for overtime to complete the process (if required) must be submitted before the process begins. The charge for services before or after normal working hours will be at a rate of \$60 per person per hour or fraction thereof, in addition to all other applicable charges (See Exception).

When service is requested at the GUBT on Saturdays, Sundays or Holidays (See Item 185), or when terminal personnel are required to make an extra trip to the terminal rather than performing continuous service, arrangements must be made in advance with the Terminal Operator. The charge for this service will be \$60 per hour per person subject to a four (4) hour minimum per person, in addition to all other applicable charges for service provided.

Authorization for overtime must be received in writing from the party responsible for paying terminal service charges.

EXCEPTION: No additional charges will be assessed if the motor carrier is at the GUBT and ready for loading before 4:30 P.M., and the delay causing the overtime is the fault of the Terminal Operator.

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### **TARIFF GU5000 RULES AND OTHER GOVERNING PROVISIONS GENERAL RULES AND REGULATIONS**

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### ITEM 160

## ORDER PLACING

The shipper or beneficial owner will be responsible for providing GUBT with the name of the motor carrier authorized to transport the product, along with product transfer instructions. Such instructions may be initiated verbally but must be confirmed via facsimile, written communication, or through electronic means. Neither GU nor the Terminal Operator will be responsible for any problems concerning the shipment and performance of terminal services when the Terminal Operator has not received facsimile confirmation, or electronic communication covering each separate trailer from or to which Commodity is transferred.

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### ITEM 165

#### **RAIL CAR ARRIVING AT TERMINAL WITHOUT FULL WRITTEN DESCRIPTION OF LADING**

Any railcar arriving at a GUBT without full written description of lading will be held at shipper's expense awaiting adequate and proper description or further instructions on disposition of lading. If such written description shows that the commodity is not one approved for transfer, that railcar will be released to shipper for disposition, subject to all applicable terminal charges, along with any other charges to which GU might be entitled.

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### ITEM 185

#### **HOLIDAYS**

Wherever in this tariff reference is made to "Holidays" it means the following:

New Years Day Thanksgiving Day  
President's Day Thanksgiving Friday  
Good Friday Christmas Eve  
Memorial Day Christmas Day  
Independence Day New Years Eve  
Labor Day  
(See Note)

**NOTE:** In the event one of the above Holidays occurs on a Sunday, the following Monday will be considered as the Holiday for the purpose of this tariff.

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### ITEM 190

#### **EXPLANATION OF ABBREATIONS**

ABBREVIATION	EXPLANATION
BOE	Bureau of Explosives
CDL	Commercial Driver's License
GU	Grafton and Upton Railroad
MSDS	Material Safety Data Sheet
NSO	National Service Order
PPE	Personal Protective Equipment
RER	Railway Equipment Register
STB	Surface Transportation Board
STCC	Standard Transportation Commodity Code
GUBT	Grafton and Upton Bulk Transfer
UFC	Uniform Freight Classification Committee, Agent

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## THE END