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September 26, 2016

241577

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20006

ENTERED
Office of Proceedings
September 26, 2016
Part of
Public Record

Re: **Docket No. FD 33888**
Tri-City Railroad Company LLC. – Motion to Amend Notice
of Exemption – Changes in Circumstance and Operator

Dear Ms. Brown:

The Port of Benton, Washington (the “Port”), established as a special purpose district under State of Washington law in 1958 and the owner of the railroad line over which Tri-City Railroad Company LLC (“TCRY”) operates,¹ hereby replies to TCRY’s so-called “Verified Notice to Amend Exemption” (the “Notice”) filed in the above-referenced docket on September 16, 2016. TCRY’s Notice presents nothing more than transactions already authorized or exempted by the agency, and it should be rejected.

The Port acquired the subject rail line (the “Line”) from the U.S. Department of Energy in 1998 pursuant to contemporaneous authority from the Board. See Port of Benton – Acquisition and Operation Exemption – U.S. Department of Energy Rail Line in Richland, WA, Docket No. FD 33653 (STB served Oct. 6, 1998) (attached hereto as Exhibit A). The Port is a non-operating railroad common carrier subject to the Board’s jurisdiction.

The Port acquired the Line subject to the common carrier rights and obligations of BNSF Railway Company (“BNSF”) and Union Pacific Railroad Company (“UP”), whose rights were established and authorized in the 1940s, shortly before much of the Line was constructed. See Northern Pacific Railway Company, et al. – Trackage Rights, etc., Finance Docket No. 15925 (ICC served Sep. 28, 1948) (“Northern Pacific”) (attached hereto as Exhibit B). The

¹ For detailed information about the Port, its multi-faceted function, and its goals and mission, see, generally, www.portofbenton.com.

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agreement that to this day governs BNSF's and UP's rights to operate over the Line dates to 1947 and 1948 (the "1947-48 Agreement"), and its terms were presented to and authorized by the Interstate Commerce Commission ("ICC"), subject to ICC-ordered modification.² See Northern Pacific.

In 2002, the Port entered into an agreement with TCRY (the "2002 Lease" – attached hereto as Exhibit C) under which TCRY acquired a leasehold interest in, and the right (and obligation) to provide common carrier service over, the Line. The Board authorized that lease arrangement in Tri-City Railroad Company, L.L.C. – Lease and Operation Exemption – Rail Line of the Port of Benton in Richland, WA, Docket No. FD 33888 (STB served Jun. 23, 2000) ("TCRY-Lease") (attached hereto as Exhibit D). The 2002 Lease acknowledges the existence of BNSF's and UP's longstanding, ICC-authorized rights to operate on the Line. Accordingly, the 2002 Lease does not and could not extend to TCRY an exclusive right to serve customers located on the Line. In turn, the TCRY-Lease class exemption does not ascribe to TCRY an exclusive right of use of or access to the Line.

TCRY's current Notice refers to prior federal court litigation – BNSF Ry. Co. v. Tri-City & Olympia R.R. Co., 835 F.Supp.2d 1056 (E.D. Wash. 2011) ("BNSF v. Tri-City") – in which, among other things, the court confirmed BNSF's and UP's joint rights of access to the Line alongside TCRY. Although BNSF had, for a time in the early 2000s, relied upon TCRY's service, BNSF resumed direct operations over the Line in 2009 and continues such operations, notwithstanding TCRY's objections and past attempts to erect physical and economic barriers to BNSF access. UP, on the other hand, has for the past several years engaged TCRY under a handling carrier arrangement that preserves UP's access to the Line's shippers.

At the behest of the BNSF v. Tri-City court, the Port participated in the negotiation of an "Operating Plan" governing joint BNSF-TCRY operations over the Line, and was designated to resolve disputes in the first instance if BNSF and TCRY could not reach terms voluntarily. Also, the Port is entitled under the 2002 Lease to oversee TCRY's provision of service, including, among other things, the right to review and approve TCRY's transportation rates. Such prerogatives are consistent with the Port's status as a common carrier owner of a railroad line subject to Board jurisdiction.

² Among other things the ICC required BNSF's corporate predecessor and UP to reimburse the Atomic Energy Commission (the original owner and builder of the Line) for the construction cost of the Line under a prescribed 25-year schedule.

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The Port is unsure of the purpose behind the Notice, and was not consulted or informed in advance of its filing. TCRY apparently has attempted to invoke the Board's class exemption procedures under alleged "changes in circumstance." But there have been no relevant material changes in circumstances warranting Board action, and certainly none requiring invocation of a class exemption. Since the effective date of the TCRY-Lease exemption in 2000, there have been no amendments to the 1947-48 Agreement or the 2002 Lease – the two agreements governing the provision of railroad common carrier service on the Line. TCRY's common carrier rights remain as set forth in the 2002 Lease. TCRY has not been granted rights over other lines not included in the 2002 Lease, and the term of that lease has not been abbreviated or extended. The common carrier rights of BNSF and UP in the Line remain as authorized nearly 70 years ago. TCRY's unsuccessful effort in the BNSF v. Tri-City litigation to defeat those rights is not a material change in regulatory circumstances.

There is simply no cognizable "transaction" requiring Board authorization here. As such, TCRY's Notice should be rejected as unnecessary and unwarranted. TCRY has not pointed to any precedent, and the Port is aware of none, where, under comparable circumstances, the Board has accepted and processed an exemption (presented as an "amendment" to a 16-year-old exemption or otherwise) in the absence of material changes to the route mileage under operation or to the terms or duration of the governing agreement.

The Notice incorrectly purports to involve a "change in operator." The array of BNSF, UP, TCRY, and Port common carrier rights and obligations attached to the Line have not changed since TCRY-Lease, even though the precise form of operations each carrier arranges to provide on the line may have been adjusted over the years. That is true on any jointly-operated rail line. A "change of operators" class exemption contemplates the formal transfer of common carrier obligations over a given rail line from one entity to another, resulting in the termination of the incumbent carrier's common carrier status on the line.³ That has not happened here, and

³ Compare TCRY's purported "change of operators" with proceedings appropriately invoking the Board's change of operator procedures, such as South Carolina Division of Public Railways d/b/a Palmetto Railways – Change in Operators Exemption – North Charleston Terminal Company, Docket No. FD 35881 (STB served Jan. 30, 2015); Brownsville & Rio Grande International Railway, LLC – Change In Operator Exemption Including Interchange Commitment – Brownsville & Rio Grande International Railroad, Docket No. 35836 (STB served Jul. 25, 2014); and Buckingham Branch Railroad Company – Change in Operator Exemption – Rail Line in Nottoway, Lunenburg, Charlotte and Mecklenberg Counties, VA, Docket No. 35226 (STB served May 7, 2009).

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there is no pending proposal pursuant to which any of the three incumbent carriers would be replaced.⁴ Accordingly, the references to a change of operator are false and misleading, and thus would warrant rejection of the Notice as void ab initio.

The Port is admittedly baffled by TCRY's Notice. The origins of and motivations behind the filing remain a mystery, and the Port suspects that TCRY's filing suggests an ulterior motive. The Port has requested that TCRY withdraw the Notice, but it is not sure that TCRY will. This episode continues an unfortunate pattern of TCRY conduct that ignores or degrades the public interest in effective rail service over the Line. It is the Port's mandate and objective to promote industry and local economic development. Under the Port's stewardship, the Line has proven critical to past and future local growth, and the Port will continue to take all necessary steps to protect and advance that mission.

As the Board doubtlessly has discerned, the Port does not condone, much less endorse, TCRY's initiation of this or any of the other of the numerous matters that TCRY has brought before this agency and before the courts. Over the past several years, and to its dismay, the Port has observed TCRY – (1) frustrate the very shippers upon which the railroad depends for business; (2) alienate its class I counterparts (with which TCRY otherwise could have cultivated lasting, mutually beneficial relationships) to the extent that one would-be “partner” (BNSF) no longer does business with TCRY, though it could; and (3) antagonize local government leadership through its inflexibility and litigiousness, intransigence, and documented unwillingness to work with those communities to accommodate important public works projects (rather than endeavor to be a responsible, reasonable and constructive community presence).

For all of the foregoing reasons, TCRY's Notice must be rejected. But unlike in other situations where a class exemption notice has been rejected, the Port does not believe that the re-submission of TCRY's “transaction” under the more exacting individual petition for exemption or formal application procedures would resolve the inherent problems with the current filing. The Port anticipates opposing any such future submissions as well.

⁴ Even if the Notice presented a legitimate change in operator transaction, TCRY failed to comply with applicable Board regulations by not serving notice of the change on all affected shippers. See 49 U.S.C. §§ 1150.32(b) and 1150.42(b). Also, TCRY's Notice invokes 49 C.F.R. § 1150.31, governing transactions involving non-carriers, although TCRY clearly is a carrier.

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I certify that a copy of this filing has been served on counsel for TCRY.

Respectfully submitted,



Robert A. Wimbish
Attorney for Port of Benton

RAW:tjl

cc: Scott Keller, Thomas Cowan

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 33888

TRI-CITY RAILROAD COMPANY, LLC
– MOTION TO AMEND NOTICE OF EXEMPTION –
CHANGES IN CIRCUMSTANCE AND OPERATOR

EXHIBIT A

29637

SERVICE DATE - OCTOBER 6, 1998

DO

FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33653]

Port of Benton--Acquisition and Operation Exemption--U.S. Department of Energy Rail
Line in Richland, WA

The Port of Benton, a noncarrier, of Richland, WA, has filed a notice of exemption under 49 CFR 1150.31 to acquire the rail line assets of the U.S. Department of Energy (DOE) to operate a rail line approximately 17 miles long known as the Hanford Site Rail System, Southern Connection, extending from milepost 46, at the junction with Union Pacific rail line in Kennewick, WA, to milepost 29, at the DOE Hanford Site, connecting with the Hanford Site Rail System, Northern Connection (north of the City of Richland).

The transaction is expected to be consummated on October 1, 1998.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to reopen the proceeding to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33653, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Thomas A. Cowan, Esq., COWAN WALKER, P.S., P. O. Box 927 Richland, WA 99352.

STB Finance Docket No. 33653

Board decisions and notices are available on our website at

“WWW.STB.DOT.GOV.”

Decided: September 29, 1998.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO: FD 33888

TRI-CITY RAILROAD COMPANY, LLC
– MOTION TO AMEND NOTICE OF EXEMPTION –
CHANGES IN CIRCUMSTANCE AND OPERATOR

EXHIBIT B

CERTIFICATE AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D.C., on the 28th day of September, A.D. 1948.

Finance Docket No. 15925

NORTHERN PACIFIC RAILWAY COMPANY, ET AL. TRackage RIGHTS ETC.

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, subject to the conditions with respect to the protection of employees indicated in said report, acquisition by the Northern Pacific Railway Company of trackage rights over that portion of the Yakima branch line of railroad of the Oregon-Washington Railroad & Navigation Company, Union Pacific Railroad Company, lessee, between Kennewick and a connection with tracks to be constructed by the United States of America, in Benton County, Wash., described in the aforesaid report, upon the terms and conditions in said report found just and reasonable, be, and it is hereby, approved and authorized.

It is hereby certified, That the present and future public convenience and necessity require operation by the Northern Pacific Railway Company and the Union Pacific Railroad Company over that portion of a line of railroad, constructed and to be constructed by the United States of America, extending from a connection with the Yakima branch line of the Oregon-Washington Railroad & Navigation Company to and into an exchange yard which the United States will construct near the north bank of the Yakima River, in Benton County, Wash., described in the report aforesaid: Provided, however, and this certificate is issued upon the express condition that the agreement between the applicants and the Atomic Energy Commission, insofar as it pertains to payment for the bridge and a part of the tracks over which operation herein is authorized, shall be modified in conformity with the suggestions set forth in said report.

It is further ordered, That this certificate and order shall take effect and be in force from and after 40 days from its date. Tariffs applicable to the lines herein involved may be established upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

And it is further ordered, That the Northern Pacific Railway Company and the Union Pacific Railroad Company, when filing schedules establishing rates and charges applicable on said lines of railroad, shall in such schedules refer to this certificate and order by title, date, and docket number.

By the Commission, division 4.

Secretary.

We find that, subject to the conditions for the protection of applicants' employees referred to above, acquisition by the Northern Pacific Railway Company of trackage rights over that portion of the Yakima branch line of railroad of the Oregon-Washington Railroad & Navigation Company, Union Pacific Railroad Company, lessee, between Kennewick and a connection with tracks to be constructed by the United States of America, in Benton County, Wash., described herein, is a transaction within the scope of section 5(2) of the Interstate Commerce Act, as amended, that the terms and conditions proposed are just and reasonable, and that the transaction will be consistent with the public interest.

We further find that the present and future public convenience and necessity require operation by the Northern Pacific Railway Company and the Union Pacific Railroad Company over that portion of a line of railroad, constructed and to be constructed by the United States of America, extending from a connection with the Yakima branch of the Oregon-Washington Railroad & Navigation Company to and into an exchange yard which the United States will construct near the north bank of the Yakima River, in Benton County, Wash., described herein, upon the express condition that the agreement between the applicants and the Atomic Energy Commission, insofar as it pertains to payment for the tracks over which operation herein is authorized, shall be modified in conformity with the suggestions set forth above.

An appropriate certificate and order will be issued.

CONFIDENTIAL--SUBJECT TO INSPECTION ONLY BY PARTIES TO THE RECORD

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

RECEIVED

INTERSTATE COMMERCE COMMISSION

1948

Finance Docket No. 15925 **REPT. OF PROCEEDINGS**

NORTHERN PACIFIC RAILWAY COMPANY, ET AL. TRackage RIGHTS ETC.

Submitted July 15, 1948.

Decided September 28, 1948.

- (1) Acquisition by the Northern Pacific Railway Company of trackage rights over that portion of the Yakima branch line of railroad of the Oregon-Washington Railroad & Navigation Company, Union Pacific Railroad Company, lessee, between Kennewick and a connection with tracks to be constructed by the United States of America, in Benton County, Wash., approved and authorized. Conditions prescribed.
- (2) Certificate issued authorizing operation by the Northern Pacific Railway Company and the Union Pacific Railroad Company over that portion of a line of railroad, constructed and to be constructed by the United States of America, extending from a connection with the Yakima branch of the Oregon-Washington Railroad & Navigation Company to and into an exchange yard which the United States will construct near the north bank of the Yakima River, in Benton County, Wash. Conditions prescribed.

L. E. dePonte, Conrad Olson, and F. J. Melia for applicants.
Roger I. Harris and F. A. Allan for Atomic Energy

Commission.

A. N. Whitlock, Thomas H. Maguire, and Larry H. Dugan for Chicago, Milwaukee, St. Paul and Pacific Railroad Company, intervener.

J. B. Daubenspeck, H. F. Love, L. A. Borden, A. R. Tong,
and G. A. Robinson for employees of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

P. K. Byers and G. W. Stevens for other railway employees.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS LEE, MAHAFFIE, AND MILLER

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed and the case was argued orally. Our conclusions differ somewhat from those recommended by him.

The Northern Pacific Railway Company, hereinafter sometimes called the Northern Pacific, and Oregon-Washington Railroad & Navigation Company, Union Pacific Railroad Company, lessee, hereinafter referred to jointly as the Union Pacific, by application filed November 25, 1947, applied for permission, under section 1(18) of the Interstate Commerce Act, to extend their operations by trackage rights and joint use over that portion of a line of railroad, constructed and to be constructed by the United States of America, from a connection with the Yakima branch of the Oregon-Washington Railroad & Navigation Company to and into an interchange yard which the

P. D. No. 15925 - Sheet 2

United States will construct near the north bank of the Yakima River, approximately 6.67 miles, in connection with which proposed operation the Northern Pacific Railway Company proposes to acquire, under section 5(2) of the act, trackage rights over the said Yakima branch from the point of connection with the proposed railroad to be constructed by the United States to Kennewick, approximately 4.92 miles, all in Benton County, Wash. The Atomic Energy Commission, hereinafter referred to as AEC, intervened in support of the application, and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, hereinafter referred to as the Milwaukee, intervened in opposition thereto. A hearing was held and briefs were filed. At the hearing railway employees of the Milwaukee, lines west, were represented and opposed the granting of the application. Representatives of other railway employees also entered appearances at the hearing but introduced no evidence. No representations have been made by any State authority. Unless otherwise indicated, all points hereinafter mentioned are in the State of Washington.

The sole purpose of the instant application is to provide additional rail transportation service from the south to the Hanford Engineering Works, also known as the Hanford Project, a vast area located in Benton, Grant, and Franklin Counties, comprising 640 square miles, or more than 400,000 acres. Hanford Works is used by the Government in the production of plutonium, an element which is not only vital in connection with the development of military weapons, but which also has important and far reaching peacetime applications. It is the only large-scale plutonium producing plant in the United States. Tremendous inbound tonnages of coal, chemicals and other commodities are received at the project, making continued rail service thereto essential.

Construction of Hanford Works was commenced in March 1943, and completed in February 1945. The original construction and operation was conducted by E. I. du Pont de Nemours and Company, under the supervision of the War Department, in accordance with the provisions of a "pure cost contract" under which the Government agreed to reimburse the contractor for all expenditures and losses, including transportation costs. By appropriate Congressional legislation approved August 1, 1946, and an Executive Order issued December 31, 1946, the project was transferred from the War Department to AEC. As of September 1, 1946, the General Electric Company has been operating Hanford Works pursuant to a pure cost contract substantially the same as the original duPont contract. Since the inception of Hanford Works, the contracts under which operations are conducted have been classified as "secret" by the authorities charged with the duty of its administration. The nature of the project requires that the greatest degree of security be exercised at all times because the interruption of plant production for any reason would be critical.

In connection with the original construction, the Government built a standard-gage, single track railroad line to serve the residential and operational areas. This Government-owned and operated railroad system is made up of approximately 180 miles of main line, industrial spurs, and classification yards, a portion of which formerly belonged to the Milwaukee. In

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Finance Docket No. 14330, Chicago, M. St. P. & P. R. Co., Trustees Abandonment, 254 I.C.C. 831, decided October 15, 1943, we permitted abandonment of that portion of the Milwaukee's Hanford branch extending from a point near Vernita to Hanford, approximately 25.105 miles. Subsequently that segment was acquired by the Government for \$375,000, and it now forms a part of the Government railroad within the restricted area.

At present, the only rail service to Hanford Works is provided from the north by the Milwaukee's Hanford branch extending from Beverly Junction to a connection with the Government-owned railroad, approximately 20.79 miles. Interchange is effected at Riverland, a point approximately 1.75 miles inside the Government confine, but in the Milwaukee's tariffs the station designation is shown as Hanford. The history of the Milwaukee's line and its operational function into the project will be described below.

Richland is the residential section and the main administration area of Hanford Works. It is located in the extreme southeastern section of the reservation, about 5 miles north of the proposed connection with the Union Pacific, and approximately 43 miles by rail from the connection with the Milwaukee on the north. Richland is to be developed into a normal American community. It is a modern and permanent city with standard school facilities, stores, service establishments, theaters, churches, recreational facilities, a post office, and a bank. This community grew from approximately 250 inhabitants before the project was undertaken until now it contains sufficient housing to accommodate approximately 18,000 individuals whose family heads are engaged in the operation of Hanford Works. In addition, another community of about 5,000 construction workers is located at North Richland, approximately 2 miles north of the existing city limits of Richland. The industrial area of the project extends north, east, and west of Richland and contains several main production plants, 1 of which is not more than 4 miles from Richland. Other processing plants are located farther north, and are closer to the Milwaukee than to the proposed interchange with the applicants. Because of a current expansion program, it is anticipated that the permanent population of Richland will ultimately increase to 25,000 citizens, and that the temporary population of North Richland, during the period of the new construction, will approximate 20,000 inhabitants. The work already assigned in connection with the expansion program is sufficient to last 4 or 5 years.

In order to expedite completion of the expansion program and in the interest of economy, the authorities at Hanford Works recently have obtained the use of a major portion of the Government-owned Pasco General Depot, hereinafter sometimes referred to as the depot, located southeast of Pasco near the confluence of the Snake and Columbia Rivers. The depot is approximately 15 miles from Richland, and consists of 8 permanent type modern warehouses, each containing approximately 166,000 square feet of floor space. In addition, various other shops and service buildings, which are appurtenant to an establishment of this nature, are available. The depot area comprises 715 acres and is provided with adequate outside storage yards, roadways, unloading docks, a railroad system to meet the requirements

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of the operation, and is fenced and patrolled in accordance with security regulations. It is considered a permanent facility in connection with future operations of Hanford Works. The original cost to the Government for construction of the warehouse buildings alone in 1942 was approximately \$2,535,000, and it is estimated that to duplicate these warehouses on the Hanford Project at present prices would cost the Government more than \$5,000,000, exclusive of necessary appurtenances. The depot is switched by the Northern Pacific, but the tracks of the Spokane, Portland & Seattle Railway are adjacent thereto. It is utilized for storage of various materials and equipment which must be protected from the weather, and which are now arriving for the current expansion program at Hanford works. Between June 19, 1947, and January 26, 1948, a total of 167 carloads, or 9,384,246 pounds, of freight was received and placed in storage at the depot for ultimate use at Richland. Much of this property was received by rail, and consists principally of building materials and certain chemicals. The volume is expected to increase greatly. Storage space for chemicals shipped in tank-car lots is limited in the restricted area so that provision must be made to hold chemicals at the depot until needed. Some plumbing supplies stored at the depot were trucked in from Portland, Oreg., and other nearby points.

Negotiations for a southern rail connection to serve the project were commenced in June 1943, when the applicants were invited by army officials in charge of construction at Hanford Works to build, at the railroads' expense, a line to connect near Richland with the Government's railroad then under construction within the reservation. This the railroads refused to do. Subsequent discussions involving alternative proposals were had between the parties, culminating in an agreement reached during the first week of August 1943, under which the railroads were to contribute \$75,000 and to pay an allowance of \$2 for each loaded car handled in line-haul movement into or out of the project. Because of higher construction costs in 1947 as compared to 1943, these amounts were increased to \$100,000 and \$4 per car, respectively, in the final contract. The lump-sum contribution by the railroads was to be in lieu of the cost to them of constructing interchange tracks at the point of connection. The project authorities insisted that for security reasons the interchange yards be located within the reservation. Contracts covering the proposed construction by the Government and operation by the applicants of the southern gateway were prepared and completed in September 1943, but because of failure to obtain requisite approval of the Office of Defense Transportation such construction and operation into the project were not consummated at that time. Thereafter the matter lay dormant until the middle of 1947 when the then commanding officer of the project contacted the applicants and again broached the proposition that the railroads build a southern connection at their own expense. The applicants rejected the idea of building into the project but stated that they were willing to resume negotiations on bases similar to those existing in 1943, when the original proposal was blocked. Further discussions were had which finally resulted in execution of the two contracts covering the proposed construction and operation of the southern connection for which authority is sought in the instant application.

Both agreements are dated November 6, 1947, and are conditioned upon our prior approval, if such approval is required. Pursuant to the terms of the first contract, the Union Pacific grants to the Northern Pacific the right to use in bridge movement that portion of the former's Yakima branch, extending from a connection at Kennewick to the junction of the Union Pacific's line with the track to be constructed by the Government, a distance of approximately 26,000 feet. As compensation for the rights granted, the Northern Pacific agrees to pay the sum of \$4,594.32 per annum, or one-half of 5 percent on an agreed book value of \$183,772.93, plus one-half of 5 percent upon the actual cost of all future additions and betterments chargeable to capital account. The Northern Pacific will also pay a per-car proportion of the actual costs incurred by the Union Pacific for maintenance and operation, including insurance and taxes. Following a test period the parties may agree upon a flat-rate per-car charge which will be subject to future changes from time to time as conditions warrant. Nothing herein is to be construed as permission to change the rent, or the basis thereof, without our prior authority. General control, management and administration of the joint trackage shall remain in the Union Pacific, but all rules, regulations, and train schedules shall be equal, just, and fair as between the parties using the line. The books and records of the Union Pacific bearing on the costs of improvements to the property, or of maintenance and operation thereof, shall be made available to the Northern Pacific for inspection at all times. Should the Northern Pacific default on any payment or fail to perform any of its covenants under the agreement, which default or failure shall continue for a period of 6 months after written notice by the Union Pacific, the latter may, at its election, terminate the agreement and exclude the former from all use of the property covered thereby. Other provisions pertaining to joint employees, damage claims for loss of property or injury to persons, negligence of workmen, clearing wrecks, and arbitration, usually embodied in instruments covering joint-facility arrangements between railroads are contained in the agreement. The contract, by its terms, is to become effective upon completion of construction of the Government track with which the Yakima branch is to connect, and continue in effect so long as the Northern Pacific shall have the right to operate over said Government track; provided that the Northern Pacific may terminate the agreement by 6 months' notice in writing at anytime after 2 years from such effective date.

The second agreement is by and between the United States of America, acting through the AEC, on the one hand, and the Northern Pacific and Union Pacific, on the other. It provides that the Government will at its sole cost and expense acquire the necessary right-of-way for, and construct a line of railroad extending from the point of connection with the existing Government line within the reservation at or near Richland to a connection with the Yakima branch of the Union Pacific, approximately 5.4 miles, including a bridge across the Yakima River; also the facilities at the interchange yard, and a wye track to be located at a point between said interchange yard and Richland. Upon completion of all such construction, the applicants shall each contribute one-half of the sum of \$100,000, which sum it is agreed fairly represents the cost to which the applicants would be subjected if they constructed interchange trackage at the point of connection with the Yakima branch. For the right to operate over the Government's line between the southern boundary

of Hanford Works, on the north bank of the Yakima River, to the connection with the Union Pacific's Yakima branch, approximately 3.4 miles, the applicants also will pay, as rental, until such time as the total of such payments made by them equals the initial actual cost to the Government of constructing that segment, the sum of \$4 for each loaded car moved in either direction over the segment, on which the haul of the Northern Pacific is beyond Pasco and that of the Union Pacific is beyond Kennewick. Stoppage in transit at Kennewick from points beyond shall not cause a shipment to lose the character of a line-haul movement. After such rental payments shall equal the cost of constructing the bridge and the segment from the bridge to the connection with the Yakima branch, the applicants shall continue to have the right, during the term of the agreement, to operate over the trackage without further rental payments. No rental or other charge is to be paid by the applicants for the right to operate over the segment extending from the north bank of the Yakima River to the interchange yard, for use of the facilities at the yard or the wye track. The applicants may, by mutual agreement, arrange for either of them to operate a joint train between Kennewick and the interchange yard in order to move the business of both railroads; the railroad operating such joint train shall be considered as the agent of the other company in such operation. The Government may terminate the agreement at any time upon 3 months' advance notice in writing to the applicants.

The estimated cost of the bridge and the trackage upon which the \$4-per-car allowance is applicable amounts to \$625,000. In addition, the Union Pacific will incur a capital expenditure of \$3,322 for construction of a connection between its Yakima branch and the Government's trackage serving the Hanford area. Construction of the Government's track will commence promptly upon our approval of the application herein. Traffic anticipated by the applicants to be handled through the southern connection during the first 5 years of operation commencing July 1, 1943, in order, is shown as 7,040, 9,940, 8,256, 8,256, and 8,256 carloads. The principal commodities expected to be handled, and the probable points of origin, are shown as follows: Cement from Lime, Oreg., Seattle and Spokane; coal from Castle Gate, Utah, and Kleenburn and Rock Springs, Wyo.; iron and steel from Seattle, Portland, Chicago, Ill., and Pittsburgh, Pa.; machinery from Chicago and Schenectady, N. Y.; and lumber and miscellaneous construction and operating materials from Portland and Tacoma. The annual average traffic for the succeeding years, after the fifth fiscal year ended June 30, 1953, is estimated at 7,266 carloads, consisting of 7,000 of coal and 266 carloads of miscellaneous materials. The foregoing estimates of traffic represent an arbitrary allocation for the combined operations of the applicants; no breakdown is made as to the respective individual business each of them anticipate handling into the project.

Coal is the bulk of the inbound tonnage to the Hanford Works, although considerable other traffic will be required in carrying out the expansion program. An estimated 40 percent of the traffic,

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except coal, is expected to move through the southern connection. The coal may be handled through either connection, depending upon the source of supply, the rates applicable thereon, and other factors. Contracts are made on a BTU basis in the spring of each year for the amount of coal estimated to be needed at the project during the coming year. At the time of the hearing, some coal was being obtained from mines local to the Milwaukee and no doubt would continue to be handled by that carrier through the northern connection so long as those sources remain available. It is the opinion of responsible officers of both AEC and the prime contractor that sufficient traffic will move inbound to the project to support profitable operations by the applicants as well as the Milwaukee. An equitable and fair distribution of all shipments is contemplated, because to divert traffic from the Milwaukee to an extent that operations through the northern connection no longer would be profitable and endanger discontinuance of that gateway by abandonment of the Hanford branch would defeat the primary purpose of the plan seeking additional rail service to the project. Because of the current expansion program, the transportation superintendent of the prime contractor estimated that even with construction of the southern connection, the Milwaukee's revenues from project traffic for the next 3 or 4 years will be comparable to those received by it during the past 2 or 3 years.

Financial results of operation for the first 5 years mentioned above are shown by the applicants as follows: Gross freight revenues \$2,703,500, \$3,299,700, \$2,118,000, \$2,118,000, and \$2,118,000; operating expenses, estimated at 50 percent of gross revenues, \$1,351,750, \$1,649,350, \$1,059,000, \$1,059,000 and \$1,059,000; joint-facility rents, representing rental payments at the rate of \$4 a car as provided in the contract, \$28,160, \$39,760, \$33,024, \$33,024, and \$33,024; and net railway operating income \$1,323,590, \$1,610,090, \$1,025,976, \$1,025,976, and \$1,025,976. Corresponding figures for the annual average succeeding years are \$1,536,700, \$768,350, \$29,064, and \$739,286.

Proponents of the southern connection rely primarily on the greater degree of security, and secondarily on the operating convenience and the large savings in transportation costs that will result if such connection is made available. Concern was expressed by the present manager of Hanford Works, who is charged with the responsibility of its security, as to the rail facilities now serving the project. It is his opinion that another railroad line to the area is needed as a matter of ordinary prudence, and in order to minimize the possibility of interruption of manufacturing operations that any discontinuance of rail service to the area would entail. In his judgment the proposed connection with the Union Pacific on the south would provide, at modest expense, the most effective and practical means of obtaining additional rail transportation service to the project. Such a connection, in addition to making available completely different transcontinental rail networks of the applicants, would also be over tracks physically located at a considerable distance from the existing Milwaukee outlet. He has no fault to find with the quality of service performed by the Milwaukee during the war, but insists that the significance of Hanford Works, at that time, was virtually unknown while now its military importance is common knowledge throughout the world, and plans must be formulated on the basis that in the event of future emergency the project will be at the top of any list of national defense targets.

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As to secondary reasons advocated, it is stated that the southern connection is essential for the efficient use of the Pasco storage facility. Under existing conditions, rail traffic stored at the depot must move via the Northern Pacific from Pasco to Easton, and thence over the Milwaukee for delivery to the Government railroad at Hanford, a distance of approximately 257 miles, as compared to a single line haul of 14 miles over the proposed connection to Richland. Excessive transportation costs also result. For example, a 30,000-pound carload of machinery moved over the longer rail route would result in freight charges amounting to \$360. The same shipment by common carrier truck from the depot to Hanford would cost \$99, and to Richland \$54. Cumbersome articles not readily susceptible to truck transportation now must be handled by rail over the circuitous route to Hanford. Then too, the trucking of materials between the depot and Richland is not desirable because of congested traffic conditions on the highway, and the bottleneck through the Yakima valley and over the Pasco bridge. If the southern connection is authorized, all materials requiring warehousing could be shipped by rail from the depot to Richland at a nominal transit charge. The Milwaukee contends that transit arrangements at the depot would be so complicated and expensive to administer that no economical rules or practicable plan of handling traffic in that manner could be devised. The southern connection would also reduce, by more than 300 miles, the distance between the Hanford project and the Los Alamos project of the AEC near Santa Fe, N. Mex., and conceivably could result in a reduction in transit time of from 2 to 5 days on carload shipments to the project from major shipping points in California, Colorado, New Mexico, Oregon, Idaho, Wyoming and points in southern and southwestern territories.

Considerable testimony was adduced at the hearing tending to show the effect the southern connection would have on freight rates to Hanford Works. The traffic supervisor for the prime contractor testified that such rates would be on the same basis as those applying to Pasco and Kennewick, and as a result the Milwaukee would be forced to meet those rates or lose competitive traffic on which a lower rate was applicable to Pasco or Kennewick than to Hanford. Present rates on coal from Synnyside and Wattis, Utah, to Kennewick are \$1.05 a ton lower than to Hanford; and from Kleenburn, Wyo., the differential on the same commodity via the southern connection is \$1.29 a ton lower than the Milwaukee rate to Hanford. The excess rail mileages from these points via the Milwaukee and its connections to Hanford as compared to the routes over the applicants' connections to Kennewick are as follows: Kleenburn 88 miles, Wattis 240 miles, and Synnyside 186 miles. The Union Pacific's route from Kennewick to Portland is also substantially shorter than that of the Milwaukee from Hanford through Tacoma. Other comparisons of distances favorable via the proposed connection and the applicants' lines are of record, but need not be detailed herein.

In many instances proposals for adjustment of commercial class and commodity rates to and from Hanford were acted upon favorably by the carriers so that the same bases of rates are now in effect to or from Kennewick as are applicable via the

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Milwaukee to or from Hanford. The traffic supervisor was told by officials of the Milwaukee that because of the geographical location of Hanford as compared to Kennewick, a complete equalization of rates could not be made, but that it was felt reductions could be effected in perhaps 90 percent of the cases upon the assurance that the southern connection would not materialize. Approval of an application under section 4 of the act may be necessary in order to effect some of the reductions contemplated. Since the filing of the instant application, however, the Milwaukee's efforts to reduce rates to the Kennewick basis have been going forward more rapidly, and at the time of the argument the program was practically completed.

Effective November 8, 1943, Milwaukee section 22 quotation No. A-4 was negotiated which afforded the same net cash land-grant rates, plus 10 cents per 100 pounds, as were applicable via the Northern Pacific between Kennewick and certain defined territories throughout the country on traffic moving to or from Hanford. It did not apply on coal from Wyoming; but did apply to United States property shipped on Government bills of lading for account of the War Department on which the War Department was entitled to reduction of rates over land-grant routes. The quotation afforded some measure of relief in payment of higher freight charges at Hanford compared with rates applicable to or from Kennewick. Nevertheless, it was estimated that from the start of the project in 1943 to October 1, 1946, the Government would have saved approximately \$1,500,000 in freight charges paid to the Milwaukee and its connections if there had been a physical connection with the applicants on the south, and land-grant rates had applied on the shipments moved into the project. Since such rates were repealed effective October 1, 1946, no savings with respect thereto would have accrued to the Government after that date. Consequently, this phase of the case need not be considered further.

For the period January 1 to December 31, 1947, savings in freight on coal shipments received at Hanford would have amounted to \$266,591, and on the actual carload movements of various other commodities to \$31,380, if a southern connection to the project had been available. The AEC believes that with the increase of future shipments as a result of the expansion program, the savings in freight charges correspondingly will be greater. The traffic supervisor for the prime contractor is concerned first of all with the rates the Government must pay on traffic to and from the project; the matter of distances the shipments must move is secondary.

Prior to 1943, the Milwaukee's rates to Hanford were not specifically designed for the traffic which developed to and from the project. However, starting in 1943, numerous and repeated requests for special rates were made by the army, the prime contractors, and others, and in those instances where concurrences with connecting carriers were obtained, favorable disposition was made with respect to practically every request. An exception would be in the case of coal to Kennewick from points in southern Wyoming local to the Union Pacific upon which that carrier now receives revenues of \$4.95 a ton. To acquiesce in a reduction of the Hanford rate to that basis would cause the Union Pacific to haul the traffic 67 miles farther to the Milwaukee connection at Marengo for \$1.24 a ton less revenue.

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Consequently, the Union Pacific refused to join in the Milwaukee's request to equalize rates on such traffic. A similar situation exists with respect to Roslyn and Ronald, local points on the Northern Pacific, and from mines in Utah from which coal is shipped to Hanford, and on which the Western Pacific Railroad is a participating carrier. The Milwaukee contends that request by the AEC for a general reduction of Hanford rates to the Kennewick bases was not officially made to it until October 30, 1947. Since the desires of AEC are now known, and because of the threatened potential competition from the applicants, the Milwaukee has embarked upon a policy of effecting rate reductions in all cases wherein the present Kennewick rate is lower than those applicable at Hanford. With the cooperation of its connections, it sees no reason why such equalization cannot be made.

The Milwaukee's Hanford branch was constructed in 1912 for the purpose of providing rail service to an irrigated area south of Vernita. It was maintained and operated at the usual branch-line standards and enjoyed very large earnings until 1933, when unfavorable market conditions caused a transition in the tributary territory from the growing of apples and pears to the production of soft fruits and early market vegetable crops. In 1938-39 the branch was operated at a deficit. Prior to 1943, train service was operated only when traffic was offered for shipment and averaged about one trip a week. The engine and crew operated out of Othello, and were also used to provide service on the Moses Lake and Marcellus branches of the Milwaukee.

That portion of the Hanford branch which produced the most traffic was requisitioned by the Government. During the 10-year period 1938-47, the total freight charges on traffic originating and terminating on the portion retained by the Milwaukee averaged only \$2,066 a year. In 1929 that portion had total freight revenues of only \$5,500 out of a total of \$219,000 produced on the entire branch. Various reports of responsible agencies unanimously conclude that the territory tributary to the Hanford branch now operated by the Milwaukee is not suitable for irrigation or other agricultural development. Studies were made by the Milwaukee in 1934, and again in 1938-39 to determine whether the Hanford branch should be abandoned.

The Hanford branch, as it now exists, follows the course of the Columbia River for a considerable distance and lies at the base of some precipitous slopes. Some raveling of banks has been experienced in the past, but no serious rock slides, causing interruption of service, have occurred during the 35 years the branch has been in operation. The branch traverses a sparsely settled area capable of being policed with a minimum of effort. It has 52 culverts, and 19 bridges consisting of 141 spans with a total length of 2,217 feet. The longest bridge has 23 spans and is 316 feet long; the highest is not over 12 or 15 feet above the water line. All bridges are of pile and timber construction and of a type that can be easily replaced in case of damage. No traffic delays have occurred because of the failure of any bridge on the branch since service to the project was instituted.

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Beginning with the development of Hanford Works, the Milwaukee started an extensive improvement and rehabilitation program on its retained portion of Hanford branch. Passing tracks were extended and set-out tracks constructed. Heavier rail was laid on the curves; over 7 miles of 100-pound being substituted for 65-pound rail. Hardwood ties and guard rails were placed on the curves, and the shoulders of the track were restored by additional filling. The entire branch from the connection with the Government-owned line near Riverland to Beverly Junction was ballasted, and a wye, costing \$55,000, was installed at the latter point to facilitate rail service to the project in the event the Milwaukee's bridge across the Columbia River was incapacitated. Additional facilities for employees were provided at Beverly, and new trackage was installed at that point to handle the greatly expanded traffic to the project. The additional expense at Beverly and on the branch directly attributable to service to the project is estimated by the Milwaukee at \$418,653.

After many of these improvements had been made, the commanding general in charge of the Manhattan project, which included Hanford Works, made a personal inspection trip over the branch. At the conclusion of the trip the general stated that if the Milwaukee officials would continue to feel a personal responsibility in handling the project's traffic, and would continue to maintain the branch as they were doing, and that if certain additional safeguards, at the time discussed, were completed, he "was not going to worry about the Milwaukee Road". This inspection by, and expression of, the general occurred in December 1943, after construction of the southern connection had been blocked by the adverse ruling of ODT.

Generous assistance in the form of adequate equipment and experienced operating personnel was extended by the Milwaukee to the army and the prime contractor in providing complete and efficient service within the project during the war. Many commendations were received by the Milwaukee for the services thus rendered. The Hanford branch is adequate to handle the traffic now moving over it, and is maintained to a standard capable of handling a great amount of additional traffic. No difficulties or complications of operations have been experienced at any time. The Milwaukee maintains a general agent at Hanford who keeps in close contact not only with the regular service, but also with respect to special service that may be required from time to time. It is the opinion of the Milwaukee that adequate service and security will continue to be had with single-line operation to the project, and it is willing to comply with any request of the Government, or the prime contractor, in the way of improvements, safeguards, and service. It is also willing to reinstall the west leg of the wye which was removed with the approval of the army at the close of hostilities, and which can be replaced in a few days as the grade is still intact.

Traffic for the account of Hanford Works commenced moving over the Milwaukee's branch on April 5, 1943. Carload shipments for the period April 5 to December 31, 1943, the years 1944-46, and the period January 1 to October 31, 1947, in order, are shown by the Milwaukee as follows: Inbound, 12,816, 23,719, 7,642, 7,602, and 6,654, total 58,433 cars; outbound 5,1673,

2,933, 759, and 69, total 5,439 cars; or a grand total, inbound and outbound, of 63,872 cars. The inbound traffic was consigned to 93 different consignees, 5 of which were classified by the Milwaukee as being either the Government or the prime contractor, and the remaining 88 were commercial firms which paid the freight bills. The outbound shipments, starting with January 1944, were made by 45 different consignors, of which 5 were Government agencies or the prime contractors, and the remaining 40 were commercial firms. In each case, the majority of commercial firms referred to received or forwarded freight on commercial bills of lading and constituted subcontractors working for the prime contractor on the project.

During the first 9 months of 1947, the average traffic moved each month into the project consisted of 578 cars of coal and 97 cars of other commodities. For the last 3 months of 1947, the expansion program has increased the movement of the other commodities to an average of 701 cars a month. Present freight-train service is operated from Beverly to the interchange yard at Riverland daily, except Sundays. Occasional special runs are made when requested. The traffic to the Hanford area also necessitates the operation of extra trains on the Milwaukee main line. For an average of 80 carloads moving west-bound each week, an extra train involving round trips for train and engine crews in each of 6 operating subdivisions between Harlowton, Mont. and Othello, approximately 660 miles, is required. An average of 30 carloads per day moving east-bound from Tacoma and other Pacific coast points requires 2 extra trains per week, involving round trips for a complete train and engine crew in each of 2 operating subdivisions between Tacoma and Othello.

The Milwaukee is apprehensive lest the construction of the southern connection will divert the traffic it now handles into the project to such an extent that its Hanford branch, of necessity, will have to be abandoned. It points out that the contract between AEC and the applicants provides for the cost of the new trackage, estimated at \$625,000, to be repaid by the applicants at the rate of \$4 for each loaded car handled in line-haul movement over the southern outlet. On this basis, the Milwaukee notes that it will take 156,250 revenue carloads of freight to repay the full amount, and that according to the traffic estimates submitted by the applicants in the return to questionnaire, a period of 21 years will be required to furnish that amount of traffic. The Milwaukee contends that it cannot look forward to any traffic from or to the project until the Government investment is liquidated because no employee of the Government or the prime contractor could justify routing traffic over the Hanford branch when such traffic could be handled by the applicants at a lower transportation cost as a result of the \$4-per car repayment to the Government.

Employees of the Milwaukee, lines west, which includes operation of trains over the Hanford branch, are opposed to the application on the ground that construction of the southern connection will cause them to lose seniority on the work that they now are, and have been, handling since the Hanford project was started in 1943. They contend that, already having lost rights

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on the 25 miles of track taken over by the Government, their right to serve the project should not be further curtailed, or taken over completely, by the employees of the applicants. They state that it would be difficult, because of age limits, for Milwaukee employees to obtain new jobs with other carriers, if granting of the application results in their services no longer being required. The employees contend that in view of the services heretofore performed, especially during the war period, and unless the welfare of the country is involved in the matter, the Milwaukee should be granted the exclusive privilege of continuing to serve the project. According to advice furnished by the Milwaukee to its employees, the shipments moving into the project furnishes regular employment to 24 men in engine and train service, for which annual wage earnings of approximately \$99,000 are paid. An additional \$30,000 in wages, making a total of approximately \$129,000 annually, would be lost to engine and train service employees in the event maintenance of the Hanford branch no longer is justified as a result of the shipments being diverted to other lines. A total of 5 clerical and station employees at Beverly, earning combined wages of \$15,827.76 a year, also would be affected if the Milwaukee traffic to the project is lost. The foregoing figures are predicated upon a loss of all Milwaukee business into the project; a partial loss of such business would result in a partial reduction in the annual wages now received.

The application herein was filed ^{to the contention} subject of the applicants that their operations over the Government's line of railroad come within the exemption provisions of section 1(18) to (22) of the act, as the proposal will not constitute an extension of the applicants' railroad but will be merely an arrangement for the joint possession and use of industrial spur and switching tracks. They state that no communities or industries other than the Government property will be served by this portion of the trackage, and that the territory is immediately tributary to the Yakima branch of the Union Pacific. Such contention is untenable. The record shows that service by the applicants over the Government line will be for the Government, the prime contractor, and subcontractors working on the development program. In addition, the applicants' common carrier services will be used by business establishments now located, or to be located, at Richland. Under the circumstances, the proposal of the applicants results in an extension of their lines of railroad for which a certificate of public convenience and necessity is required. Texas & Pacific Ry. Co. v. G. C. & S. F. Ry. Co., 270 U. S. 266, 277-9.

The magnitude and importance of Hanford Works require that rail services of the applicants through the southern connection be made available. Security alone is a sufficient ground upon which to predicate such finding but, contrary to the contention of the Milwaukee, this record contains ample additional evidence showing that operation by the applicants into the project will be in the public interest. Complete and efficient utilization of the storage depot at Pasco can be realized only by the rail service proposed by the applicants, and such service will result in benefits to the Government in providing more direct routes and lower transportation costs on shipments moving to and from Richland. The need for the southern connection has been recognized by those charged with the management of the project since its inception. Heretofore the Commission has recognized that the interests of a shipper are matters of substantial importance in determining the question of public convenience and necessity. See

Finance Docket No. 15665, Chesapeake & Ohio Railway Company Construction, 267 I.C.C. . Considering the fact that the principal shipper in the present case is the Government, and that the essential nature of the project to be served demands that every contingency capable of disrupting continuous rail operation be perpetually anticipated, the public interest is materially enhanced.

Although the Milwaukee's exclusive service to the project during the war was adequate, the record herein clearly demonstrates that some traffic, particularly that destined to Richland, can be handled more conveniently and expeditiously through the southern connection. Such a connection should be made available, but we are not convinced that the method of defraying the cost thereof should be approved. Conceivably the 14 allowance to the Government for every carload of traffic handled by the applicants may tend to divert traffic from the Milwaukee's northern connection to the extent that the Hanford branch eventually will have to be abandoned, thereby defeating the primary object which the instant application proposes to achieve, namely, the establishment of two rail lines to the project. Irrespective of the confidence expressed by counsel for the AEC at the argument that its judgment in routing traffic to and from the project will not be questioned by the General Accounting Office, no one at the hearing was willing to guarantee the Milwaukee sufficient traffic to warrant continued operation of the Hanford branch. Consequently, our approval of this phase of the transaction will be conditioned upon payment by the applicants for the bridge and the segment of the Government's line from the bridge to the connection with the Yakima branch, or for the use of the bridge and segment, being made in periodic and regular installments. The installments should be sufficient to liquidate the cost of the bridge and segment over a period of 15 to 25 years, as agreed upon by the AEC and the applicants, without interest, and when full payment has been made, the applicants should thereafter be permitted to operate over the line without further payments. The applicants should advise us, within 30 days from the date hereof, whether the conditions imposed are acceptable to them, and if so, undertake to file with us, when completed, a certified copy of the agreement in the form in which it is executed. Copy of the modified agreement also should be furnished all parties of record. Except for the fact that the Government is involved, it is questionable whether the applicants should contribute \$100,000 toward the cost of the interchange tracks to be constructed within the project.

Operation by the Northern Pacific over that portion of the Union Pacific's Yakima branch, for which authority under section 5(2) of the act is herein sought, will not affect adequate transportation service to the public. This phase of the proposal does not contemplate a guaranty or assumption of payment of dividends or fixed charges, and no increase in the applicants' total fixed charges will result. No other railroad has sought to be included. Employees of the applicants conceivably cannot be adversely affected by the action herein taken. However, we will include, by reference, conditions for their protection similar to those prescribed in Chicago & N. W. Ry. Co. Merger, 261 I.C.C. 672. Contentions of the parties as to either fact or law not specifically discussed herein have been given consideration and are found to be without material significance or not justified.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 33888

TRI-CITY RAILROAD COMPANY, LLC
– MOTION TO AMEND NOTICE OF EXEMPTION –
CHANGES IN CIRCUMSTANCE AND OPERATOR

EXHIBIT C

RAILROAD LEASE
Port of Benton-Tri-City Railroad Company

PARTIES:

LESSOR: PORT OF BENTON, a municipal corporation of the State of Washington, hereafter "Port".

TENANT: TRI-CITY RAILROAD COMPANY, L.L.C., a Washington limited liability company hereafter "Tenant".

RECITALS:

WHEREAS, the Port acquired the Southern Connection of the Hanford Railroad from the United States Department of Energy (hereafter "DOE") to prevent the closure of the railroad and to maintain railroad operations for economic development purposes.

WHEREAS, DOE conveyed the former 1100 Area to the Port to enable the Port to generate revenues to pay the costs of operation and maintenance of the railroad.

WHEREAS, the Port entered into an Operations and Maintenance Agreement with Livingston Rebuild Company dated October 1, 1998 which has been assigned to the Tenant and this agreement requires the Port to pay certain expenses related to the railroad, including insurance premiums, in excess of \$100,000.00 per year and the Port has the responsibility for the inspection, maintenance and replacement of the bridges and overpasses.

WHEREAS, the Port has been required to pay for the replacement of a section of the railroad bridge which was destroyed by fire.

WHEREAS, the Port entered into a Building Lease with Livingston Rebuild Company for the railroad maintenance building in the Port's Manufacturing Mall (formerly DOE's 1100 Area), which Lease has been assigned to the Tenant.

WHEREAS, the parties wish to transfer the costs associated with the operation of the railroad, including the insurance and the responsibility for the inspection and maintenance of the bridges and overpasses to the Tenant.

WHEREAS, the Port has been required to respond to an inquiry by the Railroad Retirement Board concerning the Port's liability for pension payments as an railroad operator and the Port wants to avoid classification as a railroad operator.

WHEREAS, the Port wishes to transfer the responsibility for rail operations and for negotiating with major carriers to the Tenant and to relieve the Port of the responsibility for such activities; now therefore it is hereby agreed among the parties as follows:

AGREEMENTS:

1. LEASE. Port hereby leases to Tenant upon the terms, covenants and conditions contained herein, the real and personal property known as the Port of Benton Railroad Southern Connection and the 1171 Building (hereafter the "Property"). The real property is described on Attachment 1.

1.1 The Property consists of approximately 16 miles of railroad trackage and right of way extending from the Richland Connection in Kennewick, Washington to the Port of Benton's Manufacturing Mall in Richland, Washington, and generally bordered by Horn Rapids Road on the north, formerly known as the 1100 Area, including the tracks, bridges, trestles, crossings and maintenance equipment. The equipment and fixtures are more particularly described on Attachment 2 to this Agreement.

1.2 The Tenant has been operating the Port of Benton railroad and has occupied the 1171 Building since October, 1998 and is fully familiar with the Property and agrees to take the Property in its present condition, and subject to the restrictions contained in the Indenture between the United States of America and the Port, the amendments thereto, and the Quit Claim Deed from the United States of America, copies of which has been provided to the Tenant. The Tenant agrees to take the Property in its present condition without warranties. The Tenant is relying upon its own inspections of the Property to determine whether to enter into this Lease, and the Tenant is not relying upon any representation made by the Port, its employees or agents, except as specifically set forth in this Lease.

1.3 The Port may acquire trackage rights to use additional railroad tracks owned by DOE serving the Hanford Project. To the extent that the Port acquires additional trackage rights from the DOE, the Port will attempt to negotiate an agreement with the Tenant to add the track rights to this agreement, if permitted by the terms of any agreements with the United States and to the extent the terms of the agreement for trackage rights are acceptable to the Tenant. An agreement to add additional track to this agreement, may require the Tenant to pay additional fees to the Port based upon volume of traffic over the tracks. Provided, that the Port may cancel any agreement with the United States for trackage rights without any further obligation to Tenant. Provided, further, in the event the Port terminates its agreement with the United States for trackage rights, the Tenant shall be free to negotiate with the United States for the trackage rights.

1.4 The Port of Benton currently has a Memorandum of Agreement with DOE to use the track north of Horn Rapids Road to the Energy Northwest Generating Station site, which the Port agrees to allow the Tenant to utilize under the terms of this Lease, provided that the Tenant maintains the track as herein required. DOE has proposed a Memorandum of Agreement with the Port of Benton for use of the Hanford Railroad north of the Energy Northwest Generating Station. After the execution of the MOA by the Port and DOE, the Port will permit the Tenant to utilize additional track which is covered by the MOA, provided that the Tenant complies with the terms and conditions of the MOA and subject to the provisions of this Lease.

2. TERM. This lease shall run for a period of ten years commencing on the 1st day of August, 2002 and terminating on the 31st day of March, 2012.

2.1 The Tenant shall have the option to extend this Lease for two additional terms of ten years each after the expiration of the initial term and after the expiration of the first renewal term.

2.2 The option to extend this Lease shall be deemed to have been exercised unless the Tenant shall give the Port written notice of its intent not to exercise an option at least one hundred eighty (180) days prior to termination of the initial term or the expiration of the first renewal term.

2.3 The Tenant may only exercise the right to extend the term of this Lease if the Tenant is not in material default in the performance of the terms of this Lease at the time the Tenant exercises the option or at the time an option is deemed to be exercised under Section 2.2.

2.4 In the event the Tenant elects not to exercise the Lease extension as provided in this Section, then this Lease shall terminate and the Tenant shall have no further rights under the terms of the Lease.

3. RENT. Tenant shall pay rent, in advance on the first day of each month during the term of this lease, in the following amounts:

3.1 During the initial term of the lease, the parties have agreed that the monthly rental for the real property, railroad trackage, right of way and building more particularly described in Attachment 1, shall be \$2,000.00, plus the applicable leasehold tax as hereafter provided.

3.2 In addition to the rent for the real property, the Tenant shall pay \$2,000.00 per month as rent for the railroad maintenance and operation equipment owned by the Port and more particularly described on Attachment 2. The Tenant shall be responsible for the payment of any sales tax which may be payable as a result of the lease of equipment.

3.3 Rent payments shall be made payable to the Port of Benton and shall be paid at the Port offices at 3100 George Washington Way, Richland, Washington, or at such other address as the Port shall direct in writing.

3.4 In addition to the rent provided for herein, the Tenant shall pay the Leasehold Tax as required by the Revised Code of Washington Chapter 82.29A, as the statute may be hereafter amended. The Leasehold Tax shall be paid with each monthly installment of rent. The current leasehold tax rate is 12.84%.

3.5 Commencing five (5) years from the commencement date of this lease, and on every anniversary thereafter, the minimum rent set forth in sections 3.1 and 3.2 shall be increased in order to reflect the proportionate increase, if any, occurring between the commencement date and such adjustment date in the cost of living as indicated by the Consumer Price Index for Urban Consumers -Western US Average - All Items, as published by the U.S. Department of Labor's Bureau of Labor Statistics (the "Index"). Such adjustment shall be accomplished by multiplying the numerator of which shall be the Index level as of the January preceding the date of adjustment, and the denominator of which shall be the Index level as of the January preceding the Lease commencement date. Any adjustment of rent shall become effective immediately. In no event shall the rent be less than that specified in sections 3.1 and 3.2. If the index is discontinued, Landlord shall substitute a similar index of consumer prices.

3.6 Any rent payment not paid within ten days of the date upon which the Tenant receives notice that a payment is past due shall accrue interest on the unpaid rent at the rate of one and one-half percent of the late payment for each month or portion of month by which the payment is delayed.

4. **CONDITION OF PROPERTY.** The Tenant shall take the Property in its present condition, without warranties or representations by the Port except as set forth in this Lease. The Tenant shall be responsible for the maintenance and repair of the railroad maintenance and operation equipment owned by the Port and used by the Tenant pursuant to this Lease. In the event any of the Port equipment becomes inoperable or unusable for any reason the Port shall not be required to provide replacement equipment. If the equipment becomes obsolete or inoperable through no fault of the Tenant, the unusable equipment shall be returned to the Port and the rent shall be adjusted to account for the equipment which is no longer being used by the Tenant. This provision shall not apply to the equipment that becomes inoperable due to the Tenant's failure to properly maintain the equipment.

5. **SECURITY.** The Tenant shall provide a rent security in accordance with RCW 53.08.085 in an amount equal to the rent and Leasehold Tax to be paid during the initial year of this Lease.

6. **TAXES AND ASSESSMENTS.** Tenant shall pay all taxes assessed against the buildings and improvements owned by the Tenant and the other property of Tenant located upon the Property, promptly as the same become due. Tenant shall pay all assessments hereafter levied against the Property, or a portion thereof, during the term of this Lease, including assessments coming due to any special purpose governmental district; provided, however, if the assessment is payable in installments, whether or not interest shall accrue on the unpaid installments, the Tenant may pay the assessments in installments as they become due, provided

that the Tenant's obligation to pay the assessments levied during the term of the Lease, even though paid in installments, shall survive the termination or expiration of this Lease.

6.1 Tenant may contest the legal validity or amount of any taxes, assessments or charges which Tenant is responsible for under this Lease, and may institute such proceedings as Tenant considers necessary. If Tenant contests any such tax, assessment or charge, Tenant may withhold or defer payment or pay under protest but shall protect Port and the Property from any lien. Port appoints Tenant as Port's attorney-in-fact for the purpose of making all payments to any taxing authorities and for the purpose of contesting any taxes, assessments or charges.

7. USE. The Tenant shall use the Property for the operation and maintenance of railroad transportation facilities, for uses in conjunction with or reasonably connected to the permitted uses and for no other purposes except those approved in writing by the Port.

7.1 The Tenant's use, operations, and maintenance of the tracks shall comply with the provisions of the Quit Claim Deed and Indenture from the United States of America through which the Port acquired title to the property. In addition, the Tenant shall comply with all laws, rules and regulations applicable to the Tenant's use, operation and maintenance of the property. Any tariffs imposed upon the use of the railroad by the Tenant shall be reasonable in light of the use of the railroad and shall be subject to the review and approval of the Port, to insure compliance with the Port's agreements with the United States.

7.2 In the event the Department of Energy, or any user of the railroad files a complaint with the Port concerning the Tenant's rates, tariffs or operations, the Port will notify the Tenant of the complaint and will attempt to resolve the complaint through negotiations with the Tenant and the complainant.

7.2.1 If the complaint involves matters which are within the purview of National Surface Transportation Board (NSTB), the Port will, to the extent applicable, utilize the rules of the NSTB to resolve the dispute.

7.2.2 If the Port is unable to resolve the complaint which is within the jurisdiction of the NSTB and which the NSTB will accept for resolution, the complaint shall be referred to the NSTB, if permitted by the terms and conditions of the Indenture and the Quit Claim Deed.

7.2.3 Complaints which can not be referred to the NSTB, shall be resolved pursuant to the terms and conditions of this Lease.

7.3 The Port acquired title to the Property by conveyances from the United States of America. The Tenant covenants that it will not use the Property in any manner which would subject the Property to forfeiture under the provisions of the above-described Indenture or quit claim deed.

7.4 The Tenant shall not take any actions which will amend, modify, terminate or invalidate any existing contracts which the Port has with any other railroad carrier, without the

Port's prior written consent. The Tenant shall continue to provide railroad access to areas currently served by the railroad unless the Port and Tenant mutually agree that such access is no longer practicable.

8. MAINTENANCE OF PROPERTY. Throughout the term of this Lease, Tenant, at its sole cost and expense, shall maintain the Property and all improvements and fixtures then existing thereon in good condition and repair, subject to reasonable wear and tear, and in accordance with all applicable covenants, laws, rules, ordinances, and regulations of governmental agencies applicable to the maintenance and operation of the railroad, provided, however, that the Port shall be responsible for the maintenance of the roof and the exterior walls of the 1171 Building. The Tenant will maintain the equipment described on Attachment 2 in good working condition and repair, ordinary and usual wear and tear excepted.

8.1 Tenant will provide for regular inspections of the railroad bridges, spans and overpasses by certified personnel. The inspections will comply with the requirements of CFR 49 and any other applicable laws and regulations to maintain the railroad as a Class 3 railroad. Tenant will promptly repair any conditions which require repair or replacement in order to comply with applicable rules and regulations. The obligation to maintain the railroad shall include the maintenance, repairs or replacements of the bridges, spans and overpasses and the maintenance, repair and replacement of the tracks which cross the bridges, spans and overpasses. In the event the Port assigns trackage rights to the Tenant pursuant to agreements with DOE, and the Tenant accepts the trackage rights, the Tenant agrees to assume the obligation to maintain the additional track in accordance with the terms and conditions of the agreement which the Port has entered into with DOE.

8.2 Any repairs or maintenance which is necessary for safety or the protection of life and property shall be done as soon as possible. Tenant shall promptly report any such conditions to the Port.

8.3 Tenant will provide for regular inspections and maintenance of the railroad crossings and the crossing signals by certified personnel. The inspections will comply with CFR 49 and any applicable law and regulations. The crossings and crossing signals shall be maintained in at least their present condition.

8.4 Tenant will provide all of the labor and materials necessary to maintain, repair or replace any of the railroad as required to meet the conditions of this contract.

8.5 Tenant shall be responsible for the maintenance of the equipment during the term of this agreement and shall insure the equipment against loss or damage. Upon the termination of this agreement or if Tenant determines that the equipment is no longer needed for maintenance of the railroad, Tenant shall return the equipment to the Port in its present condition, reasonable wear and tear excepted.

8.6 In the event the equipment becomes unavailable for use due to obsolescence or for any other reason, Tenant shall provide sufficient equipment to fulfill its obligations under the terms of this agreement.

8.7 The equipment shall be used only for the maintenance and operation of the railroad and for no other purpose without the prior written consent of the Port and an use agreement which provides for payment for the use of the equipment.

8.8 The Port shall retain title to the equipment and the Port may dispose of any of the equipment which is not needed for the maintenance of the railroad.

9. CONDITIONS OF CONSTRUCTION. Before any construction, reconstruction or alteration of the improvements on the Property, except for interior improvements or non-structural modifications is commenced and before any building materials have been delivered to the Property in connection with such construction, reconstruction or alteration by Tenant or under Tenant's authority, Tenant shall comply with all the following conditions or procure Port's written waiver of the following condition or conditions:

9.1 Tenant shall deliver to Port, for its approval, one set of preliminary construction plans and specifications prepared by an architect or engineer licensed to practice as such in the State of Washington including, but not limited to, preliminary grading utility connections, locations of ingress and egress to and from public thoroughfares, curbs, gutters, parkways, street lighting, designs and locations for outdoor signs, storage areas, and landscaping, all sufficient to enable Port to make an informed judgment about the design and quality of construction. All improvements shall be constructed within the exterior property lines of the Property provided that required work beyond the Property on utilities, access, and conditional use requirements will not violate this provision. Tenant shall permit Port to use the plans without payment for purposes relevant to and consistent with this Lease.

9.2 The Port shall examine the plans and specifications for the purpose of determining reasonable compliance with the terms and conditions of this Lease, the Protective Covenants and compatibility with the overall design and use. Approval will not be unreasonably withheld. Approval or disapproval shall be communicated to the Tenant, and disapproval shall be accompanied by specification in reasonable detail of the grounds for disapproval; provided that Port's failure to disapprove the initial construction plans within fourteen (14) days or subsequent construction plans within thirty (30) days after delivery to Port shall be considered to be approval.

9.3 Tenant shall prepare final working plans and specifications substantially conforming to preliminary plans previously approved by the Port, submit them to the appropriate governmental agencies for approval, and deliver to Port one complete set as approved by the governmental agencies.

9.4 Tenant shall notify Port of its intention to commence the initial construction at least fourteen days before commencement of any such work or delivery of any

materials. The notice shall specify the approximate location and nature of the intended improvements. During the course of construction, Port shall have the right to post and maintain on the Property any notices of non-responsibility provided for under the applicable law, and to inspect the Property at all reasonable times.

9.5 Except as specifically provided in this Lease, Port makes no covenant or warranties respecting the condition of the soil or subsoil or any other condition of the Property.

9.6 Once work is begun, Tenant shall, with reasonable diligence, complete all construction of improvements. Construction required at the inception of the Lease shall be completed and ready for use within eighteen (18) months after commencement of construction, provided that the time for completion shall be extended for so long as the Tenant is prevented from completing the construction due to delays beyond the Tenant's control; but failure, regardless of cause, to commence construction within eighteen (18) months from the commencement date of the Lease shall, at Port's election exercised by thirty days written notice, terminate this Lease. All work shall be performed in a workmanlike manner, substantially comply with the plans and specifications required by this Lease, and comply with all applicable governmental permits, laws, ordinances, and regulations.

9.7 Tenant shall pay the cost and expense of all Tenant's improvements constructed on the Property. Tenant shall not permit any mechanic's, or construction liens to attach to the Property. Tenant shall not permit any mechanics', materialmen's, contractors' or subcontractors' lien arising from any work of improvement performed by or for the Tenant to be enforced against the Property, however it may arise. Tenant may withhold payment of any claim in connection with a good faith dispute over the obligation to pay, so long as Port's Property interests are not jeopardized. Tenant shall defend and indemnify Port against all liability and loss of any type arising out of the construction of improvements on the Property by Tenant. Unless caused by the Port, its agents, contractors, and invitees, Tenant shall reimburse Port for all sums paid according to this paragraph, together with the Port's reasonable attorneys' fees and costs plus interest on those sums at the legal rate.

9.8 On completion of the construction of any improvements, additions or alterations, covered by this Section 9, Tenant shall give Port notice of all structural or material changes in plans or specifications made during the course of the work and shall at that time supply Port with drawings accurately reflecting all such changes. Changes which are non-structural or which do not substantially alter the plans and specifications as previously approved by the Port do not constitute a material change.

10. OWNERSHIP OF IMPROVEMENTS. All improvements constructed on the Property by Tenant as permitted by this Lease shall be owned by Tenant until termination of this Lease. Upon the termination of this Lease for any reason, any buildings, improvements or trade fixtures installed on the Property shall become the property of the Port. Provided, however, in the event, the Tenant has failed to maintain the Property as required by this Lease, or the Property is contaminated by toxic or hazardous materials as the result of the actions of the Tenant or its successors, such that in any event the value of the improvements is less than the cost of removal,

remediation or renovation to bring the Property into compliance, then the Port may require the Tenant to remove any improvements or trade fixtures installed by the Tenant. The Tenant shall repair, at Tenant's expense, any damage to the Property resulting from such removal.

10.1 The equipment and fixtures on the property which belong to the Port shall remain the property of the Port and the Tenant shall be required to maintain the Port-owned equipment and fixtures during the term of this Agreement. The equipment and fixtures owned by the Port shall be returned to the Port upon the termination of this Agreement, reasonable wear and tear excepted.

11. ASSIGNMENT AND SUBLETTING. Tenant shall neither assign, sublet nor transfer its interest in this Lease, in whole or in part, to any person or entity, without Port's prior written consent. Each sublease for any portion of the premises in addition to the reference to Section 7 of this lease, shall specifically advise the subtenant that the sublease is subject to the reverter contained in the deed and indenture from the United States to the Port of Benton. No assignment or sublease of the Lease shall relieve the Tenant of its obligations under this Lease.

12. INSURANCE. Throughout the term, at Tenant's sole cost and expense, Tenant shall keep or cause to be kept in force, for the mutual benefit of Port and Tenant, comprehensive broad form railroad liability insurance (including a contractual liability endorsement) against claims and liability for personal injury, death or property damage arising from the use, operation, maintenance, occupancy, misuse, or condition of the Property and improvements, with limits of liability of at least \$5,000,000 and with deductibles in such amounts as may be reasonably acceptable to the Port. The Port shall be an additional insured on such policies.

12.1 RAILROAD PROPERTY INSURANCE. Throughout the term of the Lease, at Tenant's sole cost and expense, the Tenant shall keep or cause to be kept in force, for the mutual benefit of the Port and the Tenant, property insurance insuring all of the tracks, bridges, trestles, crossing and other improvements, fixtures, equipment and all of the railroad property subject to this lease against loss or damage from any cause, with the Port named as the owner of the insured property. The property shall be insured for its actual replacement value with such deductibles as are acceptable to the Port.

12.2 BUILDING PROPERTY INSURANCE. The Port shall maintain property insurance insuring the improvement known as the 1171 Building described in Attachment 1 against loss or damage from fire, flood, wind, or other natural disasters, with the Port named as the owner of the insured property. The property shall be insured for its actual replacement value with such deductibles as are acceptable to the Port. The Tenant shall maintain insurance coverage on the Tenant's property, fixtures and equipment located on the premises.

12.3 PROOF OF COMPLIANCE. The Tenant shall provide the Port with Certificates of Insurance showing the coverages and deductibles. All property insurance which the Tenant is required to maintain on the Port's property shall name the Port as the owner of the property and shall insure the Port's interest in the property. The Tenant shall deliver to Port, in the manner required for notices, a copy or certificate of all insurance policies required by this

Lease. Tenant shall include a provision in each of its insurance policies requiring the insurance carrier to give Port at least ninety (90) days prior written notice before such policy terminates. Tenant shall not substantially modify any of the insurance policies required by this Lease without giving at least ninety (90) days prior written notice to Port.

13. INDEMNIFICATION. The Tenant shall indemnify and hold the Port harmless from all liability, claims, damages, losses, or costs, including attorney fees, arising out of any claim, suit, action, or legal proceedings brought against the Port by any party alleged to have resulted from the Tenant's use, operation, maintenance or occupation of the railroad or any portion of the premises or any of Tenant's activities incidental thereto, or any breach or default in the performance of any of the terms or conditions of the Tenant's obligations under this lease agreement.

14. DEFAULT.

14.1 EVENTS OF DEFAULT. Each of the following events shall be a default by Tenant and a breach of this Lease.

14.1.1 The breach of any of the terms or conditions of the Lease Agreement

14.1.2 The failure or refusal to pay when due any installment of rent or other sum required by this Lease to be paid by Tenant, or the failure to perform as required or conditioned by any other covenant or condition of this Lease.

14.1.3 The appointment of a receiver to take possession of the Property or improvements, or of Tenant's interest in the leasehold estate or of Tenant's operations on the Property for any reason, unless such appointment is dismissed, vacated or otherwise permanently stayed or terminated within sixty days after the appointment.

14.1.4 An assignment by Tenant for the benefit of creditors or the filing of a voluntary or involuntary petition by or against Tenant under any law for the purpose of adjudicating Tenant a bankrupt; or for extending time for payment, adjustment or satisfaction of Tenant's liability; or for reorganization, dissolution, or arrangement on account of or to prevent bankruptcy or insolvency; unless the assignment or proceeding, and all consequent orders, adjudications, custodies, and supervision are dismissed, vacated, or otherwise permanently stayed or terminated within sixty days after the assignment, filing, or other initial event.

14.2 NOTICE. As a precondition to pursuing any remedy for an alleged default by Tenant, Port shall give written notice of default to Tenant, in the manner herein specified for the giving of notices. Each notice of default shall specify the alleged event of default and the intended remedy.

14.3 TENANT'S RIGHT TO CURE. If the alleged default is nonpayment of rent, taxes, or other sums to be paid by Tenant as provided in this Lease, Tenant shall have ten

(10) days after receipt of written notice to cure the default. For the cure of any other default, Tenant shall have thirty days after receipt of written notice to cure the default, provided, however, that if it takes more than thirty (30) days to cure a default, the Tenant shall not be in default if it promptly undertakes a cure and diligently pursues it.

14.4 TIME OF THE ESSENCE. Time is of the essence of this Lease, and for each and every covenant or condition which must be performed hereunder.

15. PORT'S REMEDIES. If any default by Tenant continues uncured after receipt of written notice of default and the period to cure as required by this Lease, for the period applicable to the default, subject to the provisions of Section 13, the Port has the following remedies in addition to all other rights and remedies provided by law or equity to which Port may resort cumulatively or in the alternative:

15.1 Without terminating this Lease, Port shall be entitled to recover from Tenant any amounts due hereunder, or any damages arising out of the violation or failure of Tenant to perform any covenant, condition or provision of this Lease.

15.2 Port may elect to terminate this Lease and any and all interest and claim of Tenant by virtue of such lease, whether such interest or claim is existing or prospective, and to terminate all interest of Tenant in the Property and any improvements or fixtures thereon (except trade fixtures). In the event this Lease is terminated, all obligations and indebtedness of Tenant to Port arising out of this Lease prior to the date of termination shall survive such termination. In the event of termination by Port, Port shall be entitled to recover immediately as damages the total of the following amounts:

15.2.1 The reasonable costs of re-entry and reletting, including, but not limited to, any expenses of cleaning, repairing, altering, remodeling, refurbishing, removing, Tenant's property or any other expenses incurred in recovering possession of the Property or reletting the Property, including, but not limited to, reasonable attorney's fees, court costs, broker's commissions and advertising expense.

15.2.2 The loss of rental on the Property accruing until the date when a new tenant has been or with the exercise of reasonable diligence could have been, obtained.

15.3 Port may re-enter the Property and take possession thereof and remove any persons and property by legal action or by self-help and without liability for damages, and Tenant shall indemnify and hold the Port harmless from any claim or demand arising out of such re-entry and removal of persons and property. Such re-entry by the Port shall not terminate the Lease or release the Tenant from any obligations under the Lease. In the event Port re-enters the Property for the purpose of reletting, Port may relet all or some portion of the Property, alone or in conjunction with other properties, for a term longer or shorter than the term of this Lease, upon any reasonable terms and conditions, including the granting of a period of rent-free occupancy or other rental concession, and Port may not be required to relet to any tenant which Port may reasonably consider objectionable.

15.4 In the event Port relets the Property as agent for Tenant, Port shall be entitled to recover immediately as damages the total of the following amounts.

15.4.1 An amount equal to the total rental coming due for the remainder of the term of this Lease, computed based upon the periodic rent provided for herein and without discount or reduction for the purpose of adjusting such amount to present value of anticipated future payments, less any payments thereafter applied against such total rent by virtue of the new lease.

15.4.2 The reasonable costs of re-entry and reletting, including but not limited to, any expense of cleaning, repairing, altering, remodeling, refurbishing, removing Tenant's property, or any other expenses incurred in recovering possession of the Property or reletting the Property, including, but not limited to, attorneys' fees, court costs, broker's commissions and advertising expense.

15.5 All payments received by Port from reletting shall be applied upon indebtedness and damages owing to Port from Tenant, if any, and the balance shall be remitted to Tenant.

16. WAIVER. No waiver of any default shall constitute a waiver of any other breach or default, whether of the same or any other covenant or condition. No waiver, benefit, privilege or service voluntarily given or performed by either party shall give the other any contractual right by custom, estoppel, or otherwise. The subsequent acceptance of rent pursuant to this Lease shall not constitute a waiver of any preceding default by Tenant other than default on the payment of that particular rental payment, regardless of Port's knowledge of the preceding breach at the time of accepting rent. Acceptance of rent or other payment after termination shall not constitute a reinstatement, extension or renewal of this Lease, or revocation of any notice or other act by Port.

17. ATTORNEYS' FEES. If either party brings any action or proceeding to enforce, protect or establish any right or remedy under this Lease, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs from the non-prevailing party. Arbitration is an action or proceeding for the purpose of this provision. The "prevailing party" means the party determined by the court or the arbitrator to most nearly have prevailed.

18. ACCESS BY PORT. Port, or Port's representatives and agents, shall have access to the Property at reasonable times and upon reasonable notice, for the purpose of inspecting the Property; provided that Port shall exercise all reasonable efforts not to unreasonably disturb the use and occupancy of the Property by Tenant.

19. RECORDING OF LEASE. Either party to this Lease may record the Lease with the Auditor of Benton County. In lieu of recording the entire Lease either party may record a memorandum of lease setting forth the legal description of the property, the parties and the term of the Lease, together with any additional information which the party deems to be relevant, and

as long as the information in the memorandum is accurate the other party agrees to sign the memorandum of lease.

20. **HOLDING OVER.** In the event Tenant shall hold over after the expiration or termination of this Lease, or at the expiration of any option term, such holding over shall be deemed to create a tenancy from month-to-month on the same terms and conditions of the lease except that the rental rate shall be adjusted as provided in Section 3 and the rent shall be prorated over a 365 day year and paid by Tenant each month in advance. The tenancy may be terminated by either party giving the other party thirty days written notice of the intent to terminate.

21. **SECURITY FOR TENANT'S OBLIGATIONS.** In addition to the security provided for in Section 5, in order to secure the prompt, full and complete performance of all of Tenant's obligations under this Lease, including but not limited to, Tenant's obligations to protect and indemnify Port from any liability subject to the lien, if any, of the holder of the first mortgage against the property, Tenant hereby grants to Port a security interest in and assigns to Port all of Tenant's right, title and interest in and to all rents and profits from the Property, all of the materials stored on the premises, and all permanent improvements constructed thereon, to secure the Tenant's obligations under this Lease. In the event Tenant defaults in any of its obligations hereunder, Port shall have the right at any time after the period for cure provided in paragraph 15.3, without notice or demand, to collect all rents and profits directly and apply all sums so collected to satisfy Tenant's obligations hereunder, including payment to Port of any sums due from Tenant. The assignment of rents to the Port shall be subordinate to any assignment of rents to a leasehold mortgagee for security purposes. Such remedy shall be in addition to all other remedies under this Lease. This security interest will not extend to the Tenant's business receivables other than rents and profits from the property, provided that this exception will not affect the enforcement or collection of any judgment obtained against the Tenant by the Port.

22. **HAZARDOUS MATERIALS.** Tenant shall not take or store upon the Property any hazardous or toxic materials, as defined by the law of the State of Washington or by federal law, except in strict compliance with all applicable rules, regulations, ordinances and statutes. Tenant shall comply with the Port's Hazardous Materials Communications Policy, but shall not be subject to the notice requirements thereof in connection with the installation, use, operation, or removal of usual office equipment including, without limitation, computers and photocopiers.

22.1 Tenant shall not permit any contamination of the Property. The Tenant shall immediately remove any contaminants or pollutants and shall promptly restore the Property, subject to any condition existing prior to the commencement of this Lease, which shall be the responsibility of the Port.

22.2 Tenant shall defend Port and hold it harmless from any cost, expense, claim or litigation arising from hazardous or toxic materials on the Property or resulting from the contamination of the Property, caused by the acts or omissions of the Tenant, its subtenants, employees, agents, invitees, or licensees, during the term of this Lease.

22.3 In the event of the termination of this Lease for any reason, the obligation of the Tenant to restore the Property and the obligation to indemnify the Port set forth above, shall survive the termination.

23. GENERAL CONDITIONS.

23.1 NOTICES. Any notices required or permitted to be given under the terms of this Lease, or by law, shall be in writing and may be given by personal delivery, or by registered or certified mail, return receipt requested, or by overnight courier, directed to the parties at the following addresses, or such other address as any party may designate in writing prior to the time of the giving of such notice, or in any other manner authorized by law:

Port: Port of Benton
3100 George Washington Way
Richland, Washington 99352

Tenant: Tri-City Railroad Company, L.L.C.
2355 Stevens Drive
P.O. Box 1700
Richland, WA 99352

Any notice given shall be effective when actually received, or if given by certified or registered mail, upon the recipient's receipt of a notice from the U. S. Postal Service that the mailed notice is available for pick up.

23.2 NONMERGER. If both Port's and Tenant's estates in the Property or the improvements or both become vested in the same owner, this Lease shall nevertheless not be destroyed by application of the doctrine of merger except by the express election of the owner and the consent of the mortgagee or mortgagees under all mortgages existing upon the Property.

23.3 CAPTIONS AND TABLE OF CONTENTS. The Table of Contents of this Lease and the captions of the various paragraphs are for convenience and ease of reference only, and do not define, limit, augment or describe the scope, content or intent of this Lease or of any part or parts of this Lease.

23.4 EXHIBITS AND ADDENDA. All exhibits and addenda to which reference is made in this Lease are incorporated in the Lease by the respective references to them. References to "this Lease" includes matters incorporated by reference.

23.5 SUCCESSORS. Subject to the provisions of this Lease on assignment and subletting, each and all of the covenants and conditions of this Lease shall be binding upon and inure to the benefit of the heirs, successors, executors, administrators, assigns, and personal representatives of the respective parties. The Port agrees that if the Property is sold, assigned, or

conveyed, except for any conveyance to the United States, the Port will place a provision in any conveyance making the conveyance subject to the terms and conditions of this Lease. The Port represents, that if this Lease is recorded, any subsequent conveyance of the Property by the Port will be subject to the terms of this Lease, with the exception of any conveyance to the United States.

23.6 NO BROKERS. Each party warrants and represents that it has not dealt with any real estate brokers or agents in connection with this Lease. Each party will indemnify and hold the other harmless from any cost, expense or liability (including costs of suit and reasonable attorney fees) for any compensation, commission, or fees claimed by any broker or agent in connection with this Lease.

23.7 WARRANTY OF AUTHORITY. The persons executing and delivering this Lease on behalf of Port and Tenant each represent and warrant that each of them is duly authorized to do so and that the execution of this Lease is the lawful and voluntary act of the person on whose behalf they purport to act.

23.8 QUIET POSSESSION. The Port agrees that upon compliance with the terms and conditions of this Lease, the Tenant shall at all times have the right to the quiet use and enjoyment of the Property for the term of the Lease and any extensions.

23.9 LEASE CERTIFICATION. Upon the request of the Tenant the Port agrees to provide a written certification of the status of the Lease, to the best knowledge of the Port at the time of the certification, setting forth the following: i) whether the Lease is in full force and effect; ii) whether there have been any amendments or modifications to the Lease; iii) whether the Tenant is current in the payment of the rent and other charges under the terms of the Lease; iv) whether the Port is aware of any default or breach on the part of the Tenant.

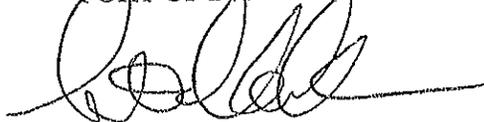
23.10 PARTIAL INVALIDITY. If any provision of this Lease is held to be invalid or unenforceable, all other provisions shall nevertheless continue in full force and effect.

23.11 CONSTRUCTION. The parties lease have reviewed this lease and have the opportunity to consult with their respective counsel. The lease shall not be deemed to be drafted by either party and the lease shall not be construed against either party as the drafter.

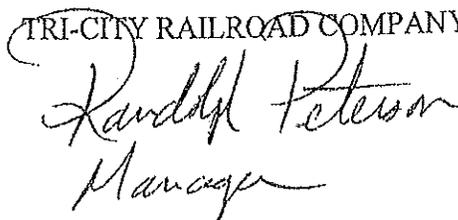
23.12 CONSENT. Whenever the consent or approval of a party to this Lease is required to be given by the terms of this Lease to the other party, such consent or approval shall not be unreasonably withheld or delayed.

DATED this 1st day of August, 2002.

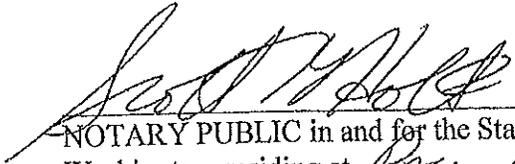
PORT OF BENTON



TRI-CITY RAILROAD COMPANY, L.L.C.



Manager


NOTARY PUBLIC in and for the State of
Washington, residing at Pasco, WA
My commission expires: Jan 25, 2003

RAILROAD LEASE

PORT OF BENTON/TRI-CITY RAILROAD COMPANY

ATTACHMENT 1

**REAL PROPERTY:
SOUTHERN CONNECTION, 1171 FACILITY,
OUTBUILDINGS AND LAND**

DEPARTMENT OF ENERGY RAILROAD, SOUTHERN CONNECTION

LEGAL DESCRIPTION

Beginning at the corner common to sections 29, 30, 31 and 32, Township 9 North, Range 29 East, Willamette Meridian, Benton County, State of Washington; Thence northerly, along the east line of said section 30, 813.0 feet to the centerline of the Union Pacific Railroad; thence S $89^{\circ}06'31''$ W, along said centerline, 1066.8 feet to union Pacific Railroad Engineer's Station 1286+27.6 and the TRUE POINT OF BEGINNING of a strip of land 100 feet wide, 50 feet right and left of the following described centerline;

Thence N $85^{\circ}10'00''$ W, 153.4 feet to the point of curvature of a 2292.01 foot radius curve, the radial bearing to center being N $04^{\circ}50'00''$ E. Thence along the arc of said curve, to the right, through a central angle of $28^{\circ}13'00''$, 1128.00 feet to the point of tangency; thence N $56^{\circ}57'00''$ W, 3268.4 feet to the point of curvature of a 2864.93 foot radius curve, the radial bearing to center being N $33^{\circ}03'00''$ E. Thence along the arc of said curve, to the right, through a central angle of $14^{\circ}59'21''$, 749.50 feet to a point on said curve, said point being the terminus of said 100 foot strip of land and the beginning of a 200 foot strip of land, 100 feet right and left of said centerline. Thence continuing along the arc of said curve, through a central angle of $13^{\circ}42'39''$, 685.57 feet, to the point of tangency. Thence N $28^{\circ}15'00''$ W, 5592.90 feet to a point; said point being the terminus of said 200 foot strip of land and the beginning of a strip of land of variable width, the right margin being common with the southwest right of way of the Richland-Kennewick Road, as it existed in October, 1948 and the left margin being 100 feet left, measured at right angles, from the following described line; from said point, thence continuing N $28^{\circ}15'00''$ W, 630.00 feet to the line of ordinary high water of the right bank of the Yakima River and the terminus of said strip of land.

ALSO, including a easement crossing the Yakima River granted by the State of Washington, Department of Public Lands by Order and Certificate of Right of Way, application No. 20674, executed September 22, 1955 described as follows; Beginning at the northwest corner of Section 24, Township 9 North, Range 28 East, W.M.; thence S $58^{\circ}21'00''$ E, 2405.68 feet; thence S $80^{\circ}00'00''$ W, 499.85 feet; thence N $28^{\circ}15'00''$ W, 165.99 feet to THE TRUE POINT OF BEGINNING. Thence S $55^{\circ}45'00''$ W, 100.55 feet; thence N $28^{\circ}16'30''$ W, 349.79 feet; thence N $75^{\circ}43'45''$ E, 103.05 feet; thence N $51^{\circ}42'30''$ E, 123.83 feet; thence S $32^{\circ}47'15''$ E, 336.98; thence S $61^{\circ}45'00''$ W, 148.58 feet to the True Point of Beginning.

ALSO, including all of Blocks 570 and 160, Plat of Richland, as recorded in Volumes 6 and 7 of Plats, records of Benton County, Washington, EXCEPT that portion quit claimed to the State of Washington in that certain deed recorded in Volume 482, page 192, records of Benton County, Washington, TOGETHER with all those portions of Sections 13, 14, 15, 23 and 24, Township 9 North, Range 28 East, W.M., shown hachured on Exhibit "A" of Quitclaim Deed recorded in Volume 470, page 690 (Auditor's file No. 86-1411, dated Jan. 31, 11:11AM '86).

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 33888

TRI-CITY RAILROAD COMPANY, LLC
- MOTION TO AMEND NOTICE OF EXEMPTION -
CHANGES IN CIRCUMSTANCE AND OPERATOR

EXHIBIT D

31116

SERVICE DATE - JUNE 23, 2000

DO

FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33888]

Tri-City Railroad Company, L.L.C.--Lease and Operation Exemption--Rail Line of the Port of Benton in Richland, WA

Tri-City Railroad Company, L.L.C. (Tri-City), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to lease from the Port of Benton (POB) and operate approximately 17 miles of rail line currently owned by the POB,¹ known as the Hanford Site Rail System, Southern Connection extending from milepost 46.6 at the junction with the Union Pacific rail line in Richland, WA, to milepost 28.3 at the border to the U.S. Department of Energy's Hanford Site, connecting with the Hanford Site Rail System, Northern Connection (north of the City of Richland). Tri-City will become a Class III rail carrier.²

Tri-City indicates that it has entered into a maintenance and operation contract with the POB, which provides for Tri-City's operation of the rail line on behalf of the POB.

The transaction is scheduled to be consummated on or after June 21, 2000.

¹ See Port of Benton--Acquisition and Operation Exemption--U.S. Department of Energy Rail Line in Richland, WA, STB Finance Docket No. 33653 (STB served Oct. 6, 1998).

² Tri-City states that its projected revenues will not exceed those that would qualify it as a Class III carrier.

If the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33888, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, one copy of each pleading must be served on John Hawkenson, 2579 Stevens Drive, Building 1171, P.O. Box 1700, Richland, WA 99352.

Board decisions and notices are available on our website at
“WWW.STB.DOT.GOV.”

Decided: June 16, 2000.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary