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July 14, 2016

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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 20423-0001

ENTERED
Office of Proceedings
July 14, 2016
Part of
Public Record

Re: **Docket No. FD 36037**
Tri-City Railroad Company, LLC -- Petition for Declaratory Order

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is the **Reply of the City of Richland, Washington to Tri-City Railroad Company, LLC's Petition for Declaratory Order**, dated July 14, 2016.

Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,



Robert A. Wimbish
Attorney for the City of Richland, Washington

RAW:ef

Attachment

cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36037

TRI-CITY RAILROAD COMPANY, LLC --
PETITION FOR DECLARATORY ORDER

**REPLY OF CITY OF RICHLAND, WASHINGTON
TO TRI-CITY RAILROAD COMPANY, LLC'S
PETITION FOR DECLARATORY ORDER**

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**ATTORNEYS FOR CITY OF
RICHLAND, WASHINGTON**

Dated: July 14, 2016

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36037

TRI-CITY RAILROAD COMPANY, LLC --
PETITION FOR DECLARATORY ORDER

**REPLY OF CITY OF RICHLAND, WASHINGTON
TO TRI-CITY RAILROAD COMPANY, LLC'S
PETITION FOR DECLARATORY ORDER**

The City of Richland, Washington (the “City” or “Richland”) hereby submits this reply (“Reply”) to the petition for declaratory order (“Petition”) filed on May 25, 2016, by the Tri-City Railroad Company, LLC (“TCRY”). There is no reason for the Board to move forward with a declaratory order proceeding, because no genuine case or controversy exists to warrant Board intervention. Even if a declaratory order were warranted – despite any clear indication as to what rights or interest of TCRY or any other party would be informed by such a declaration – the City does not hold itself out to the public to be a railroad common carrier, and the HRS is not a Board-regulated railroad line. In addition, the Board need not rule on the alleged section 10901(d) “crossing” and 49 C.F.R. § 1121.3(d) interchange commitment issues, because TCRY’s requests on both issues are premised upon fundamental misunderstandings of the applicable law and Board regulations.

BACKGROUND

TCRY’s Petition focuses on City-owned industrial trackage originally constructed in 1999 as part of Richland’s larger efforts to promote industrial development on municipally-held property well-suited for the development and promotion of a municipal logistics park. Richland sought at that time to bolster the local economy by taking advantage of available land,

a qualified local workforce, and access to nearby highways, waterways, and railroads. The trackage the City constructed as a component of its larger industrial park plans has been known since its construction as the Horn Rapids Spur [HRS].

The HRS consists of 10,322 feet of stub-ended track. It is part of the physical plant of the City's Horn Rapids Industrial Park. The HRS has no mileposts. It connects at its eastern end with an STB-regulated line of railroad known as the "Southern Connection," which is owned by the inland Port of Benton, Washington. Richland's trackage is maintained by City employees. The City has never provided or offered rail transportation services to industries located within the Horn Rapids Industrial Park. Indeed, the City has never had the ability to provide such services, and instead has allowed multiple railroad carriers to coordinate operations over the HRS.¹

Due to the interrelationship of the HRS and Southern Connection, the latter trackage warrants brief discussion here. As the record in this case already reflects, BNSF Railway Company ("BNSF" – by way of a predecessor company) and Union Pacific Railroad Company ("UP") long have enjoyed access to the Southern Connection by way of Interstate Commerce Commission-issued operating authority granted in 1948, in which decision the ICC also authorized construction of portions of the Southern Connection.² As of 2000, TCRY secured authority alongside BNSF and UP to operate over the Southern Connection.³

¹ See Verified Statement of Peter Rogalsky ("V.S. Rogalsky") at 1-2 and 4.

² Northern Pacific Railway Company, et al. – Trackage Rights etc., Docket No. FD 15925 (ICC served Sept. 28, 1948).

³ See 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 June 23, 2000). The Port of Benton acquired the Southern Connection in 1998 from the U.S. Department of Energy. 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).

BNSF, UP and TCRY are all contractually entitled to operate over the Southern Connection to serve directly any shipper located along, or accessed by private industrial trackage connected to, the Southern Connection. To the best of the City's knowledge, in about 2000, BNSF and UP voluntarily suspended direct operations over the Southern Connection in favor of relying upon TCRY's service as a connecting short line "handling carrier," transporting traffic over the Southern Connection (and to and from customers accessed via the Southern Connection) for the account of either line-haul carrier in exchange for an agreed-upon per-car allowance.

This joint handling carrier arrangement continued until roughly 2009, when BNSF elected to resume service over the Southern Connection in keeping with its rights dating back to the 1940s. TCRY sought aggressively and unjustifiably (as is its habit) to bar BNSF from resuming direct service. Such actions culminated in federal court litigation initiated by BNSF in response to TCRY's self-help efforts to physically block BNSF access to the Southern Connection and to impose fees for BNSF's use of the Port of Benton-owned railroad lines. Ultimately, the federal court confirmed BNSF's and UP's decades-old rights to operate over and serve customers accessed via the Southern Connection, and prohibited TCRY from taking any steps to block or impede BNSF service over the Port of Benton-owned railroad line going forward.⁴ Since about 2009, TCRY has, to the best of Richland's knowledge, operated on the Southern Connection largely, if not exclusively, as a handling carrier for UP, even though TCRY has independent operating authority on the Southern Connection pursuant to a lease agreement with the Port of Benton dating back to 2002.

⁴ BNSF Ry. Co. v. Tri-City & Olympia R. Co. LLC, 835 F.Supp.2d 1056 (E.D. Wash. 2011) ("BNSF v. Tri-City").

The City-owned HRS was constructed in 1999, subject to appropriate state and local permitting requirements.⁵ Given its status as private railroad track ancillary to the City's larger industrial park/economic development designs, the City in good faith did not invoke Board procedures to construct the HRS.⁶ In the first two years following construction of the HRS, no industries requiring railroad service located along the track. But, in 2001, due to emerging industry transportation needs, the City and TCRY entered into a Temporary Service Agreement (the "TSA").⁷ The TSA granted TCRY temporary access to the HRS and to industries located along the HRS pending execution by the City and TCRY of an "Industrial Track Agreement" to replace the temporary arrangement.⁸

Pursuant to its TSA contract rights, TCRY was the sole operator serving the HRS until 2010 in keeping with its then-existing short line relationship with BNSF and UP. During that 2001-2010 timeframe, TCRY transported carload traffic to and from industries located along the HRS and exchanged that traffic with TCRY's then line-haul partners, BNSF and UP, at a location known as Richland Junction at the southern end of the Southern Connection. Once BNSF moved to resume its own operations on the Southern Connection, the City recognized that it would be in the interest of all concerned for each carrier possessing common carrier status on the Southern Connection (BNSF, UP and TCRY) to have a separate industry track contract providing the carrier with the ability to utilize the HRS.⁹ Accordingly, in 2010, during the pendency of the BNSF vs. Tri-City case, the City had its transportation counsel prepare industry

⁵ V.S. Rogalsky at 1-2.

⁶ V.S. Rogalsky at 2.

⁷ V.S. Rogalsky at 5. A copy of the TSA, executed as of December 7, 2001, is attached as Exhibit B to V.S. Rogalsky.

⁸ V.S. Rogalsky, Exhibit B, TSA at par. 6.

⁹ V.S. Rogalsky at 6.

track agreements, entitled as Standard Form Track Use Agreements (“TUA”), and in turn extended such agreements to BNSF, UP, and TCRY.¹⁰

BNSF and the City entered into a TUA as of January 5, 2011. Likewise, UP entered into a nearly identical TUA with the City as of April 6, 2011. UP, however, elected not to conduct its own operations over the Southern Connection or on the HRS, preferring to date to rely on TCRY to act as UP’s agent in performing those operations.

Contrary to their original plans, the City and TCRY did not negotiate an agreement to replace the 2001 TSA. Rather, in 2010, the City offered TCRY continued access to the HRS on the same terms extended to BNSF and UP under the proffered TUAs. When TCRY refused to execute a TUA, TCRY’s temporary contract rights under the TSA were eventually terminated. However, because UP has opted not to conduct its own operations over the Southern Connection or the HRS, preferring to rely instead upon TCRY as its agent to do so, the City and UP have agreed that UP may designate TCRY to exercise UP’s operating rights on the HRS under UP’s TUA. Thus, TCRY no longer has independent rights to operate over the HRS as it once did, but TCRY continues to this day to operate on the HRS, albeit now strictly on behalf of UP. Even now, the City would be willing to negotiate independent access terms for TCRY over the HRS, provided TCRY accepted an industry track agreement format consistent with the City’s agreements with BNSF and UP.¹¹

Neither BNSF nor UP have ever filed for Board authority to operate on the HRS. Likewise, in the roughly 15 years that TCRY has operated on the HRS – first pursuant to its independent contract rights under the since-terminated TSA or later exclusively as UP’s handling carrier designee – TCRY never obtained or sought STB authority to operate as a rail common

¹⁰ V.S. Rogalsky at 6.

¹¹ V.S. Rogalsky at 7.

carrier over the HRS. TCRY has never previously questioned whether it should have secured “entry” authority from the Board to operate over the HRS.

The absence of STB filings by any party concerning the HRS is not a regulatory oversight. Rather, the City consistently has regarded the HRS as private industry track outside of the Board’s jurisdiction. Each involved railroad (at least until now in TCRY’s case) has been content to access the HRS under industry track agreements commonly used to govern a rail common carrier’s provision of ancillary service on private trackage. In fact, the operative TUAs contain language, as did the earlier City-TCRY TSA, reinforcing the dual proposition that the HRS is not a line of railroad and that neither BNSF nor UP was required to obtain authority from the Board to operate over the City’s private railroad track.

The City has now been in possession of the HRS as part of its larger Horn Rapids Industrial Park operation for over 16 years, and it has worked with rail-served industries to ensure that the HRS is operated in such a way as to meet the needs of those industries. Although third-party service on the HRS have changed some over the years – from an original operation exclusively by TCRY to handle traffic to and from a single industry to coordinated, multi-railroad access – the one hallmark of the City’s industrial park operation has been its success. The City has been successful at attracting industry and promoting local economic growth, and Richland believes that much of that success is due to its attentiveness to the transportation needs of businesses and the good relationships that the City has developed with BNSF and UP to assure that industrial park occupants have reliable access to railroad transportation. None of the rail-served businesses in the Horn Rapids Industrial Park have joined in or expressed support for TCRY’s Petition. Neither have BNSF or UP – the latter being particularly significant, given that TCRY acts solely as UP’s agent in conducting TCRY’s current operations on the HRS.

TCRY now seeks to dispute the prevailing and pervasive understanding of the HRS as private track, but it does not explain why or how the legal distinction is meaningful to TCry, the City or anyone else. No party with a legitimate interest in rail service suggests any controversy over the legal status of the track that the City has owned for over 15 years. Whatever the motivations for the TCry Petition, Board involvement in TCry's invented "dispute" is not necessary and would not be productive.

DISCUSSION

A. TCry's Petition lacks any clear purpose and points to no underlying dispute or controversy in need of resolution, and for these reasons the Board should decline to initiate a proceeding.

In 1989, the Board's predecessor agency, the Interstate Commerce Commission ("ICC"), delegated to the Director of the Office of Proceedings "the authority to institute or decline to institute declaratory order proceedings upon petition by any person."¹² In making such delegation, the ICC observed that the agency has "broad discretion" under 5 U.S.C. § 554(e) either "to grant or deny requests for declaratory order proceedings," adding that, in exercising its discretion, the agency "considers, among other things, the issue's significance to the industry and the ripeness of the controversy."¹³ In deciding whether or not to initiate a declaratory order proceeding, this agency has long been guided by Supreme Court rulings indicating that declaratory relief should not to be granted where, as is the case here, there is a "lack of 'a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality' to warrant the issuance of a declaratory order."¹⁴

¹² Delegation of Authority – Declaratory Order Proceedings, 5 I.C.C.2d 675, 675 (1989).

¹³ Id. at 675-76.

¹⁴ Bessemer and Lake Erie Railroad Company – Petition for Declaratory Order – Interchange Facilities and Trackage Rights, Docket No. NOR 40220, 1990 WL 288377, at *3 (ICC decided July 10, 1990) (citing Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122

In this case, the Director of the Office of Proceedings should exercise her discretionary authority and decline to institute a declaratory order proceeding that would unnecessarily consume agency resources. The Petition presents what amounts to an abstract question about the legal status of the City's industrial park trackage in the absence of any "substantial controversy." TCRY fails to explain why it or anyone else with an interest in the HRS needs or wants an answer to the legal status question that TCRY has decided to ask. Because there is no underlying dispute among any of the involved stakeholders that would be resolved by having the Board answer TCRY's question, the Director properly should find that there is no genuine case or controversy warranting the discretionary exercise of the Board's declaratory order authority.

TCRY has essentially presented half of a case – a theoretical legal question lacking an underlying dispute for which an answer to the legal question would provide some resolution. The City and TCRY are not engaged in some larger dispute or litigation involving "adverse legal interests" with respect to the status of the HRS. For that matter, neither are any other parties. No questions regarding abandonment or adequacy of service on the HRS are pending in any forum. No shipper or receiver of rail traffic in the Horn Rapids Industrial Park seeks STB intervention in any matter that raises a jurisdictional issue. Neither railroad with the contractual right to access the HRS has ever raised any issue about the regulatory status of the track. TCRY has, sua sponte, simply invented a supposed question about the HRS, presumably seeking some form of undisclosed leverage over the City. That does not create an issue "of

(1974) and quoting Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U.S. 220, 273 (1941)).

sufficient immediacy and reality” to warrant Board intervention. TCRY’s litigious disposition does not by itself constitute a case of controversy.¹⁵

TCRY’s Petition is particularly confounding given TCRY’s own longstanding operating history on the HRS. For roughly 15 years, TCRY has operated over the HRS as private trackage outside of the scope of the Board’s jurisdiction. TCRY did not seek, and has never previously questioned whether it needed to seek, Board authority to operate over the HRS. As BNSF and UP have done since 2010, TCRY has been content since 2001 to operate over the HRS pursuant to an industry track agreement – consistent with the non-jurisdictional legal status of the HRS, the City, and TCRY’s operations over the HRS. Now, without notice, consultation or explanation, TCRY has suddenly changed direction, insisting that the HRS is an STB-jurisdictional railroad line. What has changed? TCRY’s Petition provides no answer.

Although TCRY’s motives are not clear, it is not unreasonable to infer that TCRY is invoking the Board’s procedures in an attempt to disrupt the longstanding operational status quo on the HRS. As such, TCRY’s tactics constitute abuse of the Board’s processes, and, for that reason, TCRY’s Petition should be rejected. In fact, the Board has rejected a similar such invocation of the agency’s procedures under strikingly similar circumstances. In Union Pacific Railroad Company – Operating Exemption – In Yolo County, CA, Docket No. FD 34252 (STB served Dec. 5, 2002) (“UP/Yolo”), the Board rejected UP’s invocation of the Board’s class exemption procedures to provide common carrier service over several miles of track, much of which was owned by the Sacramento-Yolo Port District. The Board observed that the trackage

¹⁵ The Washington state legal landscape is littered with the remains of TCRY’s unsuccessful litigation strategies. E.g., BNSF v. Tri-City, *supra*; Tri-City R. Co., LLC v. State of Washington, Utilities & Transp. Comm’n, --- P.3d ---, 2016 WL 3448435 (Wash. App. 2016). The present case isn’t even the only declaratory order proceeding that TCRY has instituted at the Board. See Tri-City Railroad Company – Petition for Declaratory Order, Docket No. FD 35915.

over which UP sought operating authority “has historically been treated as excepted industrial track over which UP has performed, and continues to perform, switching service that is ancillary to its already authorized common carrier line-haul service on other tracks in the vicinity.”

UP/Yolo, slip op. at 4. Noting that UP’s historic switching operations over the trackage were not, and did not need to be regarded as, common carriage, and observing that UP had shown “no significant change in the operations it conducts on this trackage” to warrant a change in the regulatory status quo, the Board rejected UP’s exemption notice. In so doing, the Board also observed that allowing UP’s exemption to take effect would have frustrated the port’s plans to terminate UP’s switching agreement and replace UP with another service provider.

Ultimately, no public interest would be advanced if the Board were to entertain TCRY’s request for a declaratory order. TCRY points to no Board policy that would be undercut by the City’s continued good faith determination that the HRS is not, and should not be operated as, an STB-jurisdictional railroad line, particularly when all involved with the HRS have for years operated under this commonly-held understanding. Moreover, TCRY points to no confusion among any of the stakeholders concerning the legal status of the HRS, and no industry has joined TCRY in arguing that clarification of the legal status of the HRS or the City is critical to resolving that industry’s railroad service needs or concerns. Accordingly, Board action on the Petition would be a waste of limited Board resources.

In fact, Board action on TCRY’s Petition may thwart the public interest. For example, Board action favorable to TCRY would frustrate municipal economic development by imposing upon the City a federal regulatory regime that needlessly complicates Richland’s oversight of the ancillary rail transportation component of its industrial park facilities and operations. It could also undercut longstanding operating practices whereby BNSF, UP and

TCRY have all agreed that the operations each is permitted to conduct on the HRS are ancillary to its provision of common carrier service on the Southern Connection, and are thus properly governed by industry track agreements. And not least of all, Board action in accordance with TCRY's Petition may advance TCRY's vaguely-stated effort to restrain competition,¹⁶ which would be contrary to the Rail Transportation Policy of 49 U.S.C. § 10101 and an inappropriate basis for inviting Board intervention in the first place.¹⁷

Practically speaking, assuming TCRY were to obtain the jurisdictional declaration that it has requested regarding the HRS, the result would elevate form over substance. It is not clear that such a decision would do anything other than disrupt operating arrangements that have worked well for many years. The City, BNSF and UP would likely be forced to revisit the terms of the agreements governing operation of the HRS, and the City would do what it could to ensure that service to industries along the HRS is performed as much as possible as is done today.

Finally, the City has good reason to believe that there are many other entities throughout the nation – municipalities, economic development agencies, ports, and private logistics park owners, for example – that, like the City: (1) own trackage upon which multiple

¹⁶ TCRY couches its Petition in terms of presumed competition between TCRY and the City. See, e.g., Petition at 25 (contending that the City, under the unregistered trade name “City of Richland Railroad,” “is in direct market competition with TCRY”); Petition, Verified Statement of Randolph Peterson at 7 (describing the City of Richland’s HRS as “TCRY’s market competitor”). However, TCRY’s characterizations simply don’t add up. Even if the City, as owner of the HRS, and the Port of Benton, as owner of the Southern Connection, could be seen as “competing” for the siting of a particular rail-served industry, TCRY would serve such a customer in either event by virtue of pre-existing contractual arrangements affording TCRY operating access to industries on both the HRS and the Southern Connection.

¹⁷ See, e.g., Reading, Blue Mountain & Northern Railroad Company – Petition for Declaratory Order, Docket No. FD 35956 (STB served Jun. 6, 2016), slip op. at 9 (Commissioner Begeman dissenting) (the Board should exercise its discretion and not “entertain” a declaratory order proceeding in the face of “a carrier’s blatant attempt to use Board authority to remove a competitor from the rail network”).

customers are located; (2) do not provide rail services themselves (or do so strictly under contract); (3) do not hold themselves out to provide common carrier railroad service; and (4) currently understand that the trackage that they own is private railroad track outside of the scope of the Board's jurisdiction. If TCRY's naked assertion of a supposed ambiguity with respect to the HRS is sufficient to create a "case or controversy" warranting a declaratory order proceeding, that simply opens the door to potentially hundreds of other unnecessary cases that will consume the Board's resources and produce no identifiable benefit. There is no reason for proceeding down that path.

B. The City of Richland does not, and never has, held itself out to the public to provide common carriage, and this consideration is central to the legal status of both the Horn Rapids Spur and the City of Richland.

If the Board elects to commit its resources to a declaratory order proceeding, TCRY insists that it must find that the HRS is a line of railroad and the City is a rail common carrier, both subject to the Board's jurisdiction. Nothing in the history, character or operation of the HRS supports those contentions.

Ultimately, the questions of whether or not the HRS is a jurisdictional railroad line and, by extension, whether the City is a rail carrier turn on the City's ability and holding out to provide railroad service. Under agency precedent, for an entity to be deemed a rail common carrier, it must (1) hold itself out as a common carrier for hire, and (2) have the ability to carry for hire.¹⁸ The City has never so held itself out, and it has done nothing to cause the public any

¹⁸ See Hanson Natural Resources Company – Non-Common Carrier Status – Petition for Declaratory Order, Docket No. FD 32248, slip op. at 16 (ICC served Dec. 5, 1994) (“Hanson”), slip op. at 16 (“The principal test is whether there is a bona fide holding out coupled with the ability to carry for hire.”); Southern Pac. Transp. Co. – Aban. Exempt. – In Los Angeles Cty., CA, 8 I.C.C.2d 495, 506 (1992) (same); see also Ass’n of P&C Dock Longshoremen v. Pittsburgh & C. Dock Co., 8 I.C.C.2d 280, 290 (1992) (stating that to be a rail carrier, entity must both conduct rail operations and hold out that service to the

genuine confusion concerning the legal status of the HRS. Additionally, the City does not have, and never has had, the ability to provide common carrier rail service.¹⁹ The simple fact that the City owns industrial rail trackage operated over by others pursuant to contract does not confer regulated status on the HRS or common carrier status upon the City. Finally, the trivial point TCRY emphasizes that the City has in some contexts conveniently referred to the HRS as the “City of Richland Railroad” does not constitute a holding out or signify a change in the City’s legal opinion of itself and of the HRS.²⁰

As a general rule, the Board may find that an entity owning track is holding itself out to be and to operate as a railroad common carrier when that entity has manifested a clear intent to provide common carrier service.²¹ Such intent is commonly reflected in clear statements that the track owner wishes to be regarded as a railroad common carrier, reinforced by

public); H&M International Transportation, Inc. – Petition for Declaratory Order, Docket No. FD 34277, slip op. at 3 (STB served Nov. 12, 2003) (finding that company was not a rail carrier because, among other things, it provided no rail service to the public for compensation). Court decisions are consistent with Board precedent. Simmons v. ICC, 871 F.2d 702, 711 (7th Cir. 1989) (new company that acquired rail line became rail carrier when it commenced operations on the acquired track); see also Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc., 547 F.3d 351, 356-57, 363-64 (2nd Cir. 2008) (holding that freight forwarder that conducted no rail operations of its own was not a rail carrier); Nevada v. Department of Energy, 457 F.3d 78, 86 (D.C. Cir. 2006) (quoting Hanson test).

¹⁹ V.S. Rogalsky at 4.

²⁰ V.S. Rogalsky at 4-5.

²¹ See, e.g., Paulsboro Refining Company LLC – Adverse Abandonment – In Gloucester County, N.J., Docket No. AB 1095 (Sub-No. 1) (STB served Dec. 2, 2014) (vacated on other grounds Jun. 19, 2015), slip op. at 2, n. 5 (wherein the Board ruled that a non-carrier owner of industrial trackage used by multiple shippers and operated by a third party rail carrier could replace the incumbent operator with a new operator that would not necessarily have to be a common carrier itself; in so doing the Board determined that the replacement operator did not intend to offer “common carrier rates” and thus would not “hold itself out to provide service to the general public,” and noting that the replacement operator would need operating authority from the Board if that operator later intended to hold itself out); and Vincent v. United States, 58 A.2d 829, 831 (D.C. Mun. App., 1948) (a holding out to the general public to provide common carriage requires that there be a public offering; a communication that service is available to those members of the public who may wish to use it).

the track owner's contemporaneous invocation of the appropriate Board procedures to construct, acquire, and/or operate a line of railroad.²² It is also possible that the Board could conclude from a track owner's behavior that, despite the lack of an invocation of the Board's procedures, the track owner nevertheless should be regarded as a railroad common carrier, particularly where the track owner's conduct plausibly could cause genuine confusion concerning the track owner's legal status and the legal status of the trackage it owns.²³

Here, the City has never taken any affirmative steps to designate the HRS as a line of railroad or to designate itself as a common carrier intent on holding itself out to the public as a provider of railroad common carriage. The City did not invoke Board processes to build or own the HRS. The City believed that the trackage it planned to construct fell outside of the scope of the Board's jurisdiction, and it desired that the HRS be private trackage removed from the

²² See, e.g., Denver & Rio Grande Railway Historical Foundation – Petition for Declaratory Order, Docket No. 35496 (STB served Mar. 24, 2016), slip op. at 8 (a railroad need not point to extrinsic evidence of holding out to prove its status as a carrier where the record shows that it previously had obtained Board authority to become a rail common carrier by acquiring a line of railroad); and SMS Rail Service, Inc. – Petition for Declaratory Order, Docket No. FD 34483 (STB served Jan. 24, 2005), slip op. at 6 (Board-licensed short line railroad operator's deemed to be holding itself out by "offering common carrier rates for its services" to multiple customers, and by demonstrating that it is "capable and willing to provide common carrier service to all shippers that request it").

²³ C.f., American Orient Express Railway Company – Petition for Declaratory Order, Docket No. FD 34502 (STB served Dec. 29, 2005), slip op. at 4, affirmed sub nom. Am. Orient Express Ry. Co. v. Surface Transp. Bd., 484 F.3d 554 (D.C.Cir. 2007) ("[t]here is no statutory definition of the term 'common carrier.' However, as a general matter, the term 'common carrier' is a well-understood concept arising out of common law, and it refers to a person or entity that holds itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation. See Stimson Lumber v. Kuykendall, 275 U.S. 207, 211 (1927); Pennsylvania R. Co. – Merger – New York Central R. Co., 347 I.C.C. 536, 549 (1974) ("Penn. R. Co."); Status of Bush Universal, Inc., 342 I.C.C. 550, 564 (1973). In determining whether there has been a holding out, 'one must look to the character of the service of the party in relation to the public.' Penn. R. Co. at 549") (footnote omitted).

entanglements of Board regulation.²⁴ As such, the City's decision not to invoke the Board's regulatory processes was deliberate and made in good faith. The City has never taken affirmative steps to confer upon itself or the HRS Board-jurisdictional common carrier status,²⁵ and it has never conveyed any intent to provide for-hire railroad service.

The City has also never had the ability to provide railroad service. It does not own locomotives or railroad cars. It has no railroad operating employees or expertise. It has never published tariffs for service on the HRS, and would not know how to do so if it desired.²⁶ The City is a municipality that constructed industrial rail trackage in furtherance of its economic development function. No one could reasonably mistake the City for a rail carrier.

The City's course of conduct here is readily distinguishable from a case relied on by TCRY, where the Board concluded that the trackage over which an entity sought to operate appeared to be subject to Board regulation as a line of railroad "based on Suffolk's stated intention to provide for-hire service over it."²⁷ Again, the City has never stated an intention either to provide for-hire service over the HRS or to entitle any third party to seek authority to provide such service over the HRS on Richland's behalf. Even under the Board's "entire line" precedent, which has been employed to determine the jurisdictional status of spur trackage in

²⁴ V.S. Rogalsky at 2.

²⁵ TCRY has suggested that the City's conduct bespeaks a concerted, inappropriate attempt to evade Board jurisdiction. Petition at 32-33. As scurrilous as the suggestion is, it is also completely untrue. While the Board may be an appropriate arbiter of whether a given track segment falls within the scope of the Board's jurisdiction, contrary to TCRY's unsupported argument the City did not have, and therefore did not evade, any legal obligation to seek a formal Board determination on the jurisdictional issue in advance of construction.

²⁶ V.S. Rogalsky at 3.

²⁷ Suffolk & Southern Rail Road LLC – Lease and Operation Exemption – Sills Road Realty, LLC, Docket No. FD 35036 (STB served Nov. 16, 2007), slip op. at 5.

more recent times, the legal status of the at-issue track consistently turns on whether or not there is a discernable intent to hold out rail service to the public.²⁸

TCRY makes much of the City's recent use of the term "City of Richland Railroad" (a term that TCRY acknowledges is nothing more than a trade name), evidently suggesting that the mere use of the word "railroad" as part of an alternative descriptor of the HRS is of profound legal significance.²⁹ But TCRY does not offer any Board precedent, and the City is unaware of any, where the use of the word "railroad" to describe a segment of track was probative, much less determinative, of that track segment's legal and jurisdictional status. In fact, there is ample Board precedent to the effect that a name used to identify a segment of trackage is not by itself determinative of the track's legal status.³⁰

Perhaps if the City otherwise conducted itself in a manner consistent with a holding out, its use of the otherwise innocuous descriptor "City of Richland Railroad" would be telling, but the City does none of the things that might bring into question the status of the HRS.

²⁸ See Kansas City Transportation Company, LLC – Lease and Assignment of Lease Exemption – Kansas City Terminal Railway Company and Kaw River Railroad, Inc., Docket No. FD 34830 (STB served Feb. 28, 2006), slip op. at 2 ("merely characterizing the proposed operations as switching does not relieve a rail operator of the obligation to obtain a Board license if the operator is holding out common carrier service to the public and the transaction involves its entire line of railroad. See Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, IL, STB Finance Docket No. 41986 (STB served Sept. 12, 1997), aff'd sub nom. United Transportation Union-Illinois Legislative Board v. STB, 183 F.3d 606 (7th Cir. 1999)").

²⁹ V.S. Rogalsky at 4-5 (the City of Richland Railroad "sign that TCRY refers to was placed there by the City to conveniently mark the change-of-ownership point between the City's track and the Port's track . . . Some issues had arisen regarding the actual point of the change of ownership and, once resolved, the sign was placed to mark the spot").

³⁰ See, e.g., Burlington Northern & Santa Fe Ry. – Pet. for Declaration or Prescription, 6 S.T.B. 862, 873-874 (2003) (classification of track segment "turns on the intended use of the track segment, not on the label or cost of the segment."); CSX Transportation, Inc. – Abandonment Exemption – In Pike County, OH, Docket No. AB-55 (Sub-No. 622X) (STB served May 5, 2003), slip op. at 2 ("[I]t is the use, not the name, that determines whether a particular stretch of track is within the scope of 49 U.S.C. 10906").

The City does not issue or publish tariffs (it would not offer tariffs in any event, because it does not and cannot operate trains over the HRS); it has no railroad operating equipment or personnel capable of operating trains; it has no train dispatching capability; it has no interchange agreements with the railroads that operate over the HRS; it has never informed industries located along the HRS that the HRS is a line of railroad or that the City should be regarded as a railroad common carrier; and no industry located along the HRS has ever expressed confusion about, or questioned, whether or not the HRS is a Board-regulated railroad line.³¹

TCRY would have the Board rule that the HRS is a line of railroad because the City asserts “authority and control” over operations on the HRS. It is true that the City requires strict compliance with the terms of the governing track use agreements with BNSF and UP, but that is in keeping with the City’s prerogative to establish precise terms and conditions to govern third-party railroad access to the City’s private trackage, and to ensure that BNSF and TCRY (as UP’s designee) are subject to safe operating practices protecting the City’s ownership interest in the trackage and the businesses that have elected to locate within the Horn Rapids Industrial Park. TCRY cites to various cases in support of the proposition that the City’s “control” over third-party use of the HRS confers line of railroad status upon the trackage and common carrier status upon the City.³² But TCRY’s reliance on this line of cases is entirely misplaced.

Each of the “control” cases that TCRY mistakenly relies upon pertain to transactions involving the transfer of railroad assets under the Board’s longstanding “State of

³¹ V.S. Rogalsky at 4.

³² Yreka Western R. Co. v. Tavares, 2012 WL 2116500 (E.D.Ca. June 4, 2012); Brotherhood of R.R. Signalmen v. Surface Transp. Bd., 638 F.3d 807 (D.C. Cir. 2011); Santa Cruz Regional Transportation Commission – Petition for Declaratory Order, Docket No. FD 35491 (STB served Aug. 22, 2011); Orange Cnty. Transp. Auth. – Acquisition Exemption – The Atchison, Topeka & Santa Fe Ry. Co., 10 I.C.C.2d 78 (1994); and S. Pac. Transp. Co. – Abandonment Exemption – L.A. Cnty., 8 I.C.C.2d 495 (1992).

Maine” doctrine,³³ wherein the intended acquirer of railroad assets sought a Board determination that the selling railroad’s retention of an operating easement caused the transaction to fall short of a “railroad line” sale requiring advance Board authorization under 49 U.S.C. § 10901. As TCRY’s cases reflect, a railroad asset purchaser that exercises undue control over the seller-incumbent common carrier’s provision of service cannot pass the State of Maine test, as such undue control would confer upon the purchaser a common carrier status of its own. In each of the cited cases, the parties to the proposed asset transfer agreed, as did the Board or the involved court, that the transaction involved an existing, STB-regulated line of railroad (i.e., the legal status of the “line” was never questioned); the key issue was whether or not the asset purchaser was acquiring common carrier status in light of the amount of control it would possess over the incumbent carrier’s post-transaction operations. Here, there is no proposed transfer of an ownership interest in the HRS, and, more fundamentally, the HRS was constructed as private track. In analogous circumstances, the ICC held that a State of Maine analysis was inapplicable in the private track context.³⁴ TCRY’s circular State of Maine reasoning simply assumes the answer to the question it purports to address. That the City requires strict adherence with the terms and conditions set forth in its TUAs would be expected from any private track owner, but that factor is a legal red herring for purposes of this non-State of Maine proceeding.

Finally, the City’s dealings with the railroads operating over the HRS reflect a consistent, and uniformly accepted, effort to avoid inadvertent classification of the HRS as a line of railroad. In the early years of the HRS, the City had entered into a track use agreement with

³³ Me. Dep’t of Transp. – Acquis. & Operation Exemption – Me. Cent. R.R., 8 I.C.C. 2d 835 (1991).

³⁴ Hanson, supra at n.18, slip op. at 32 (“The State of Maine doctrine is applicable to a transaction that purports to separate the common carrier obligation of a common carrier railroad from the underlying property interests in a railroad line that is at the time of the transaction a section 10901(a) railroad line.”).

TCRY that was explicit – it granted TCRY “temporary” rights to operate over the HRS. That agreement neither mandated nor contemplated that TCRY would seek operating authority from the Board, and the parties agreed that the involved trackage was “industrial lead track” that each hoped would be operated in the future pursuant to a replacement “Industrial Track Agreement.” See Temporary Service Agreement (“TSA”) between Richland and TCRY dated December 7, 2001, attached as Exhibit B to the V.S. Rogalsky. TCRY did not seek, nor did it insist upon seeking, Board authority to operate under the terms of the TSA. Furthermore, as TCRY has acknowledged, the TSA ended under its terms without the successful negotiation of a replacement Industrial Track Agreement, and TCRY has ceased operations in its own right, having refused to accept the alternative terms of Richland’s TUA. See Petition, V.S. Peterson at 5; V.S. Rogalsky at 5 and 7.

It is unseemly, if characteristic, that TCRY should negotiate terms of operation of the HRS under the TSA, accepting without question that its operations over the HRS did not involve a Board-regulated line of railroad and did not require Board approval, only to argue much later that the HRS always should have been regarded as falling under the Board’s jurisdiction. TCRY cannot be heard now attempting to have it both ways.³⁵ Such tactics would be rejected in a civil court proceeding, where Richland would have raised the usual equitable defenses of laches and estoppel, to say nothing of questioning TCRY’s standing. In any event,

³⁵ Perhaps by claiming that the HRS should be regarded as a railroad line, TCRY is seeking here by indirection to have itself re-inserted onto the HRS by contending that its operations, in retrospect, should be regarded as trackage rights or similar such operating authority despite the clear language of the TSA. If so, such a bootstrapping tactic has been attempted before, unsuccessfully, and the result here should be the same. Rail Switching Services, Inc. – Operation Exemption – Pemiscot County Port Authority, Docket No. FD 35685 (STB served Jan. 8, 2013).

TCRY's past conduct and the terms of the since-terminated TSA compel the view that the HRS is not a railroad line. Such past conduct wholly discredits TCY's jurisdictional arguments.

The City's ongoing relationships with BNSF and UP similarly demonstrate a uniform understanding that BNSF's and UP's operations can and should properly be categorized as ancillary to each's respective line-haul service. The TUAs both provide that the HRS is not a line of railroad and that BNSF and UP (via UP's designee, TCY) operations over it do not constitute rail common carriage. Neither BNSF nor UP has ever questioned the legal status of the HRS, and each of these sophisticated Class I railroads have agreed with the City that its respective contract operating rights over the HRS do not require either to obtain prior Board authority.³⁶ Here, too, the evidence simply contradicts TCY's unsupported assertion that the City has through its actions held itself out to provide common carriage, or, for that matter, held out the HRS as a line of railroad.

Finally, TCY offers no evidence indicating that industries that the City has attracted to its industrial park site are confused, or even care, about the legal status of the HRS or the City of Richland itself. The absence of such evidence supports the conclusion that the Petition is artifice, a cooked-up and abstract legal argument devoid of any clear purpose or legitimate public interest considerations, and driven entirely by TCY's apparently anti-competitive self-interest. In all, there is no persuasive evidence that Richland has now or has ever held itself out as a rail common carrier.

³⁶ V.S. Rogalsky at 8.

C. *The Horn Rapids Spur is private track outside of the Board's jurisdiction.*

The absence of any ability or holding out by the City to perform common carrier rail service on the HRS compels the conclusion that the HRS is “private track” outside of the Board’s jurisdiction, rather than a “line of railroad” subject to that jurisdiction.

The Board has traditionally conceived of rail trackage as falling into one of three categories: (1) railroad lines that are part of the interstate rail network and for which advance STB authority is required to construct, operate, acquire or abandon; (2) ancillary track, such as spur track, over which, like railroad lines, the Board has exclusive jurisdiction, but over which the Board lacks regulatory authority for such purposes as construction, acquisition, and removal; and (3) private track which is beyond the scope of the Board’s jurisdiction.³⁷ The HRS is, and has always been, private track, and operations over the HRS are arranged for in keeping with a common understanding among those involved (including TCRY, until very recently, anyway) that the HRS is not a Board-regulated line of railroad.

TCRY’s Petition devotes much rather unfocused discussion to the question of whether the HRS is a spur or a line of railroad. Petition at 21-25. Such discussion is unnecessary and off-base. The HRS is not, and indeed by definition cannot be, spur track in the sense contemplated by 49 U.S.C. § 10906. The City historically has used the word “spur” in the generic sense to describe the trackage it owns as part of its industrial park operations. The City has never intended by calling its trackage the “Horn Rapids Spur” to indicate that this trackage

³⁷ A number of cases, including some very recent Board decisions, discuss the distinctions between these three categories of track. See, e.g., Allied Industrial Development Corporation – Petition for Declaratory Order, Docket No. FD 35477 (STB served Sept. 17, 2015); Pinelawn Cemetery – Petition for Declaratory Order, Docket No. FD 35468 (STB served Apr. 21, 2015); Suffolk & Southern Rail Road – Lease and Operation Exemption – Sills Road Realty, LLC, Docket No. FD 35036 (STB served Nov. 16, 2007); and Hanson.

somehow qualified as excepted ancillary track falling under Section 10906.³⁸ As the Board has recently explained, spur track under Section 10906 must be ancillary to a rail carrier's Board-regulated railroad line.³⁹ Because the City has no Board-regulated main line, the HRS cannot be ancillary to some other City-owned railroad line, and thus, at least with respect to the City, the HRS cannot fall under the rubric of excepted "section 10906" trackage. Consequently, either the HRS is private track operated in keeping with that classification,⁴⁰ or it is a railroad line.

³⁸ See Hanson, slip op. at 21, n.12 ("The private line exemption can easily be obscured by misleading terminology. Many private lines . . . , if they have any name at all, have "spur" in the name. It should be noted, however, that a private line, although it may be called a spur, is not a [section 10906] spur, because it is not, in the first place, a section 10901(a) railroad line."). The rather esoteric distinction between ancillary trackage under Section 10906 and private trackage that is entirely beyond the Board's jurisdiction can often be overlooked. See, e.g., Allied Erecting and Dismantling, Inc., et al. – Petition for Declaratory Order – Rail Easements in Mahoning County, OH, Docket No. FD 35316 (STB served Sept. 17, 2015), slip op. at 6 (petitioner claimed to have "conflated 'private track' (over which the Board has no jurisdiction) with ancillary 'excepted track' under 49 U.S.C. § 10906 (over which the Board has jurisdiction but no licensing authority)," and the Board acknowledged the petitioner's apparent "confusion" as to the legal distinction). Compare, for example, the City-UP TUA Section 9.2 (wherein UP and Richland memorialize their understanding that the HRS is private "industry" track) with the corresponding City-BNSF TUA Section 9.2 (stating that the HRS is "excepted trackage under 49 U.S.C. 10906"). Critically, both track use agreement provisions continue with common language stating that neither railroad will "seek or obtain any approval, authorization or exemption from the STB for its use or discontinuance of use of" the HRS. A fair reading of Section 9.2 of the City-BNSF TUA is that, with respect to BNSF's operations, the HRS is Section 10906 trackage. Even if so, that does not confer Section 10906 status upon the HRS with respect to the City.

³⁹ JGB Properties, LLC – Petition for Declaratory Order, Docket No. FD 35817 (STB served Dec. 10, 2015), slip op. at 8, n.12 ("track with multiple shippers can qualify as excepted track under § 10906 if it is ancillary to a main line. Excepted industrial track may serve multiple shippers. Great N. Ry. Aban., 247 I.C.C. 407, 408 (1941); See also S. Pac. Transp. Co. – Exemption – Aban. of Serv. in San Mateo Cty, Cal., AB 12 (Sub-No. 118X) (ICC served Feb. 20, 1991)").

⁴⁰ The City takes exception to TCRY's occasional statements in its Petition that the City "operates" the HRS. See, e.g., Petition at 20 ("Richland operates as the [City of Richland Railroad]"). The City has never provided railroad transportation services, nor has it ever offered to provide such service. Rather, the City has entered into private industry track agreements with BNSF, UP, and, in the past, TCRY, all of which have provided service over the HRS ancillary to their provision of common carrier railroad transportation service.

The City constructed the HRS in 1999, complying fully with the requirements of the State of Washington.⁴¹ At no point did the City invoke Board processes to construct the track, believing in good faith, then and now, that the trackage it has constructed and owns is outside of the scope of the Board's jurisdiction. Operations over the HRS have been consistently undertaken in keeping with the understanding that the HRS is not a line of railroad. The mere fact that TCRY, BNSF and UP – each one an STB-regulated railroad common carrier – all currently possess contracted-for operating rights over the HRS is neither unusual nor dispositive. Private track is not considered part of the national rail system even if a common carrier (such as BNSF, UP or TCRY) operates on the track, as long as the common carrier “operates on the private track exclusively to serve the owner of the track pursuant to a contractual arrangement with that owner”⁴² as is done in this case. BNSF and UP possess operating rights over the HRS (and TCRY operates over the HRS as UP's designee) pursuant to industrial track agreements that are beyond the scope of the Board's jurisdiction (like the HRS itself), and are subject to enforcement under applicable state law. These track use agreements successfully serve the needs of the track (and industrial park) owner, the City, and the industries the City has been able to attract to the City's industrial park facilities.

None of the three railroads with access to the HRS operate over that trackage pursuant to Board-issued authority, because no such authority is, or ever has been, required. Until TCRY abruptly filed its Petition with the Board, each of the three railroads with contractual ties to the HRS had never questioned the common understanding that the trackage did not constitute a line of railroad. In fact, the operative track use agreements with BNSF and UP

⁴¹ V.S. Rogalsky at 1-2. Thus, TCRY's clumsy suggestion that the City “acquired” a line of railroad (Petition at 25-26) is plainly wrong.

⁴² Devens Recycling Ctr., LLC – Petition for Declaratory Order, Docket No. FD 34952 (STB served Jan. 10, 2007), slip op. at 2.

memorialize this understanding, with each agreement (at Section 9.2) expressly confirming that the operations conducted over the HRS are not Board-jurisdictional common carriage.

TCRY argues that the City, BNSF and UP have, through the operative TUAs negotiated among the three, somehow conspired to commit a fraud on the Board by agreeing that the HRS is not a jurisdictional line of railroad.⁴³ TCRY's allegation is baseless. The contractual provisions TCRY points to as evidence of fraud are, to the contrary, standard in private industry track agreements and reflect the good faith determination of each party that operations over the HRS do not require advance Board authorization. The TUAs reflect reality: the HRS, and railroad carrier operations over it, *are* outside of the Board's jurisdiction.

D. TCRY's arguments regarding "crossings" and "interchange commitments" are based upon fundamental misunderstandings of the governing legal and regulatory constructs behind both terms, and, consequently, must be disregarded.

A determination from the Board that the HRS is not a railroad line under the agency's jurisdiction would moot TCRY's various other arguments, including specifically that – (1) the City has failed to get Board authority for the HRS to “cross” another railroad line; and (2) the City's agreements with BNSF and UP contain impermissible interchange commitments. Even if the Board were to find that the HRS is a Board-regulated railroad line, despite the overwhelming evidence to the contrary, TCRY's crossing and interchange commitment arguments are based upon a completely incorrect understanding of those legal concepts, and TCRY's requests for a declaration as to both issues must be denied.

Regarding the asserted issue under 49 U.S.C. § 10901(d), there is simply no crossing involved in this matter. The HRS connects with, but does not bisect (at-grade or otherwise), the Southern Connection railroad line owned by the Port of Benton, over which

⁴³ Petition at 32-33.

TCRY and BNSF currently operate.⁴⁴ Traffic originating and terminating on the stub-ended HRS necessarily traverses the Southern Connection in the furtherance of BNSF and UP line-haul service, which is evidently what TCRY means when it refers to a “crossing.”⁴⁵ Even if the HRS crossed the Southern Connection, the terms and conditions of such a crossing would be addressed as between the owners of both segments of track – the City and the Port of Benton, not TCRY. In that case, the provisions of Section 10901(d) are clear on their face – there is no need for a crossing proceeding absent a dispute between the STB regulated “crosser” and the railroad “crossee.” Here, there is no dispute of any kind between the City and the Port of Benton.

TCRY’s arguments concerning interchange commitments are as badly off-base as are its crossing allegations. All the City has ever done is to attempt to work with the rail carriers that access the HRS (including TCRY) to reach an accord on the relocation of certain interchange operations.⁴⁶ To that end, it has reached agreements with both UP and BNSF that would facilitate such relocation; TCRY, as is abundantly clear from its pending declaratory order petition in Docket No. FD 35915, has held out.

⁴⁴ TCRY suggests, incorrectly, that the Southern Connection is “TCRY’s railroad line.” It isn’t. The Southern Connection is owned by the Port of Benton, pursuant to duly-issued Board authority in STB Docket No. FD 33653; TCRY merely has operating authority over it pursuant to STB Docket No. FD 33888. See note 4, supra.

⁴⁵ TCRY’s Petition thus seems to suggest that Richland needs a stand-alone license from the Board in order for its track to connect with the tracks of an existing railroad line owned by the Port of Benton. TCRY has cited one of the more recent, definitive Board decisions concerning section 10901(d) – Holrail, LLC – Petition For Crossing Authority Under 49 U.S.C. 10901(d), Docket No. FD 34421 (Sub-No. 1) (STB served February 12, 2007), aff’d sub nom., Holrail, LLC v. Surface Transp. Bd., 515 F.3d 1313 (D.C. Cir. 2008). It is amazing that TCRY, despite knowledge of that proceeding, would take the ill-informed and patently incorrect position here that traffic flowing over an intermediate railroad line (the Southern Connection) between a connecting track and points in the other direction beyond the intermediate railroad line is a “crossing” under Section 10901(d).

⁴⁶ V.S. Rogalsky at 7.

But an “interchange commitment” has nothing to do with the location of an interchange or the facilities provided for such purposes. Rather, interchange commitments are “contractual provisions included with a sale or lease of a rail line that limit the incentive or the ability of the purchaser or tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad.”⁴⁷ None of the transactional predicates for an interchange commitment that would limit or forbid intra-modal (railroad-to-railroad) competition exist here. In fact, the City, as the owner of a logistics facility which desires to offer industries competitive transportation options, has absolutely no incentive to limit industry access to multiple line-haul carriers or otherwise artificially limit railroad competition.⁴⁸ The idea that the City, bent on promoting industrial development in the furtherance of the local public interest, would try to impose a true interchange commitment that would, for example, preclude or limit industry access to BNSF or UP line-haul service is absurd.

CONCLUSION

The City respectfully requests that the Board decline to initiate a proceeding due to TCRY’s failure to articulate a case or controversy. If the Board decides despite the arguments herein to rule on the legal status of the HRS, and, in turn, the City, then the City respectfully requests a declaration that the HRS is not a railroad line under STB jurisdiction and, consequently, that the City is not a rail common carrier.

⁴⁷ Information Required in Notices and Petitions Containing Interchange Commitments, Docket No. EP 714 (STB served Sept. 5, 2013).

⁴⁸ V.S. Rogalsky at 9.

Respectfully submitted,

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**ATTORNEYS FOR CITY OF
RICHLAND, WASHINGTON**

Dated: July 14, 2016

**VERIFIED STATEMENT
OF
PETER ROGALSKY**

My name is Peter Rogalsky. I am the Public Works Director for the City of Richland, Washington (the "City"), a position I have held for more than 11 years. As Public Works Director, I am responsible for overseeing the City's infrastructure for (1) transportation and streets, (2) water, (3) wastewater/sewer, (3) stormwater, and (4) solid waste. I hold a degree in Civil Engineering from the University of California, Los Angeles. I have been a licensed Civil Engineer in the State of Washington for over 20 years and previously worked for the City of Los Angeles and the City of Pasadena, California. I have been employed by the City of Richland in an engineering capacity since 1994.

I am personally familiar with the industry lead track (the "Track"), known locally as the "Horn Rapids Spur," owned by the City located in the Horn Rapids Industrial Park, having served as Project Manager at the time of its construction. I am also familiar with the "City of Richland Standard Form Railroad Track Use Agreement" that the City negotiated with BNSF Railway Company ("BNSF") and separately with Union Pacific Railroad Company ("UP"), and tried to negotiate with the Tri-City Railroad Company, LLC ("TCRY"), for use of the Track.

I have reviewed the Petition for Declaratory Order and the accompanying Verified Statement of Randolph Peterson filed by TCRY in this proceeding. TCRY's filing is so full of incomplete facts and mischaracterizations that it's difficult to know where to begin.

The "Horn Rapids Spur" is a 10,322 foot long stub-ended track constructed by the City in 1999 as part of the City's development of an area known as the Horn Rapids Industrial Park. The Track connects with the rail line owned by the Port of Benton (the "Port") at approximately Milepost B-37 on that line which, for historical reasons, is sometimes referred to

as the “Southern Connection” (to the Hanford Works). There are no mileposts on the Track. Its connection to the Port’s line is at the west end of a wye owned by the Port. A map depicting the Track is attached as Exhibit A. The City owns the Track, the majority of which is located on City-owned property within the Horn Rapids Industrial Park. The easterly 1,378 feet of the Track is located on an easement on land now owned by the Port. The City’s right to join its track to the wye on the Port’s line was secured by the granting of an easement from the United States Department of Energy, the property owner prior to the Department’s transfer of the property to the Port. Funding for the Track construction was from two primary sources, the State of Washington and the federal Economic Development Administration. In constructing the Track, the City fully complied with the requirements of the State of Washington and with the two funding partners, including the federal Economic Development Administration. At the time of construction of the Track, there were no industries in the Horn Rapids Industrial Park utilizing rail transportation services. The Track was constructed to fulfill an agreement with a recently recruited industry – a titanium plant—which located within the Horn Rapids Industrial Park on the condition that rail service be made available. The Track became generically referred to as the “Horn Rapids Spur,” not as a result of any intended legal distinction, but because it was to be located in the Horn Rapids Industrial Park and was a convenient way to identify this feature as part of the City’s marketing efforts for Industrial Park property. At the time of the Track’s construction, the City believed in good faith that construction of the Track was ancillary to development of the Horn Rapids Industrial Park and that no STB authority was needed to construct it.

From the 1940’s to the present, the economy of the City of Richland and the surrounding region has been dominated by the presence and operation of the federal Hanford

Works at Hanford, Washington. The Hanford Works was originally developed by the United States Government during World War II as part of the Manhattan Project. It was later expanded under the jurisdiction of the Atomic Energy Commission during the Cold War and nuclear arms race. Title was later transferred to the United States Department of Energy. As the federal nuclear weapons mission was reduced and awareness of the environmental impacts associated with Cold War era work were recognized, the mission at the Hanford site turned to environmental cleanup. The goal of the environmental cleanup mission was to remediate the site and reduce federal activities. As part of the new focus on environmental remediation the Department of Energy reevaluated its needs for certain real estate and infrastructure assets. In 1998 the Department conveyed the rail line on the Hanford Works property to the Port. As the Hanford mission was refocused, the City and surrounding Tri-Cities region looked for ways to diversify its economy and provide jobs and tax revenue. The idea of creating the Horn Rapids Industrial Park was born. The site for the industrial park (over 2,400 acres) was perceived by its planners as ideal. It offered large industrial sites on relatively flat undeveloped land with access to City water and sewer, near an arterial highway, and with rail access from both BNSF and UP. To encourage significant long-term investment, the City adopted a policy of being willing to sell a tract of land to a potential industry, not just lease it. The City's industrial development efforts have been very successful. There are now seven industries in the industrial park with industry track connections, some of which are used by multiple shippers. The lead track is owned and maintained by the City. Each industry owns and maintains its own track that connects to the lead track.

The City is solely responsible for maintaining the Track, which the City has committed to maintain to a minimum of FRA Class 2 track standards and 286,000 lbs. per car

gross weight on rail. None of the railroad users of the Track is responsible for or performs any maintenance. Maintenance work on the track and right of way is performed by City employees. The City uses a contractor retained by the City to maintain the grade crossing signals at the principal highway crossing (Kingsgate Way). Although the City maintains the lead track, it does not control entry to or exit from the Track or otherwise control operations on it. The railroads that use the Track coordinate operations among themselves. Though the City retains the right to assume control of operations on the Track (to assure impartiality) in the event that the railroads' "coordinated" approach should falter, that approach has worked and the City has never had to exercise that option.

At no time has the City ever desired, or held itself out, to provide transportation service on the Track. The City has never had the equipment or qualified personnel with which to provide rail service. It has never published any "tariff" and frankly wouldn't know how to do so. It has no train dispatching capability, it has no interchange agreements with the railroads that operate over the Track, it has never informed industries located along the Track that the Track is a line of railroad or that the City should be regarded as a railroad common carrier, and no industry located along the Track has ever expressed confusion about, or questioned, whether or not the Track is a Board-regulated railroad line. It was always contemplated that actual rail transportation service to industries on the Track would be provided by rail carriers that use the Track pursuant to an agreement with the City. Contrary to TCRY's assertion, there is no entity called the "City of Richland Railroad" or "CORR." There is no department or sub-department with that name. The Track is owned by the City and administered and maintained by the City's Department of Public Works. The sign along the right-of-way that TCRY refers to was placed there by the City to conveniently mark the change-of-ownership point between the City's track

and the Port's track and to advise any user of the Port's track that they are about to enter upon the City's track. Some issues had arisen regarding the actual point of the change of ownership and, once resolved, the sign was placed there to mark the spot.

Though construction of the Track was completed in 1999, demand for rail service did not immediately develop. By December, 2001 traffic was ready to move and the City entered into a two-page "Temporary Service Agreement" dated December 7, 2001 ("TSA") with TCRY, then the only railroad operating over the Port's line. The TSA (copy attached as Exhibit B) provided that TCRY could use the track "to provide rail service as required as soon as possible between customers located on the Horn Rapids Spur and the line haul carriers BNSF and UP." The Agreement was for "thirty (30) days and continuing thereafter until terminated upon ten (10) days written notice by either party." The TSA expressly contemplated that the TSA was temporary and that the parties would negotiate on a good faith basis a longer term agreement. At no time did TCRY indicate to the City that TCRY needed STB authority to operate on the City's Track.

No such longer term agreement was ever forthcoming because rail shipping from the industrial park remained rare and there was no demand for a change in service. Increased shipping activity and land development began in 2008 and the working relationship of the railroads changed in 2009. In 2009, TCRY sought to prevent BNSF from exercising the rights granted to BNSF's predecessor, dating back to the 1940's, to serve all local industries on the Port's line. In 2009 the dispute over BNSF track usage rights was brought to federal court. According to the United States District Court for the Eastern District of Washington, in 2009, BNSF informed TCRY that it intended to exercise its rights to operate on the Port's line. TCRY then erected a barrier which physical prevented a BNSF locomotive from reaching BNSF

customers along the Port's line. BNSF immediately initiated a court action. In August, 2009, the Court preliminarily enjoined, and in December, 2011, permanently enjoined, TCRY from blocking BNSF's (and UP's) access to the Port's line finding that the rights of BNSF and UP over the Port's line were still in effect. The Court affirmed that BNSF and UP had the right to directly serve all industries along the Port's line. Following the Court's decision, BNSF exercised its right to serve all of the industries on the Port's line itself with its own locomotives and crews. UP, while acknowledging it also had the right to do so, elected to use TCRY as its designee or "handling line" to serve all industries on the line. At the time that BNSF announced that it would conduct its own operations on the Port's line (and in anticipation that UP would soon follow), the City, faced with the possibility that two and possibly three railroads could potentially seek to operate on the City's Track, determined that new agreements were needed, one with each railroad, to reflect the potential presence of multiple users, assure fair and equal access to the Track, and provide for the safe coordination of operations. In July, 2010, the City served notice of termination of the "temporary" TSA and proffered a more comprehensive "City of Richland Standard Form Railroad Track Use Agreement" ("TUA") to each railroad. The City instructed its transportation counsel to prepare a form agreement incorporating terms commonly found in Industry Track Agreements between a railroad and a private industry for the railroad's use of the industry's private tracks and including provisions addressing matters pertinent to use of the Track by multiple railroads. For example, the TUA included provisions to protect the City's right to admit other railroads to use of the Track, prohibited any user from unreasonably interfering with the rights of another user, prohibited any user from using the Track to load, unload or store cars on the Track (which could interfere with another user's use of the Track), and provided that operations on the Track "shall be conducted without prejudice or partiality and

in such manner as will afford the safest and most economical movement of all traffic over the Track.” Since the City, unlike a private industry, has no independent source of income from the Track with which to cover the cost of maintaining the Track, each TUA provided for an “Annual Fee” of \$15,000 (escalated annually in accordance with an agreed methodology commonly used in the railroad industry). The TUA’s also reflected the agreement of BNSF and UP to voluntarily relocate each railroad’s interchange from Richland Junction to another location in the area in order to facilitate the City’s Center Parkway road project that would cross at grade the Port’s line at Richland Junction. In their respective TUA’s, BNSF and UP each agreed to make “reasonable efforts to minimize its operations over crossings on the Port’s line between the proposed Center Parkway and SR 240 (Vantage Highway) during peak highway traffic times Monday through Friday, recognizing that the Railroad’s compliance with its common carrier obligations may, from time to time, require operations over such crossings during peak highway traffic times.” At no time did the City in the TUA’s or otherwise condition its pursuit of the Center Parkway crossing on removal of any tracks at Richland Junction. Moreover, the TUA’s did not “demand” that BNSF and UP cease doing business with TCRY, only that the interchange be relocated to another location.

After negotiations, BNSF and UP each signed a TUA with the City. TCRY refused. (A copy of the TUA with BNSF is attached as Exhibit C and a copy of the TUA with UP is attached as Exhibit D. A copy of the form TUA proffered to TCRY is attached as Exhibit E.) That the BNSF and UP TUA’s as executed are not identically worded reflects the fact that each is the product of negotiation. At no time did the City proffer the form TUA as a non-negotiable take-it-or-leave-it proposition. To this day, the City remains willing to negotiate a TUA with TCRY.

It is a gross mischaracterization of the facts for TCRY to say that the City “barred” TCRY from the Track. TCRY’s lack of an agreement with the City to use the Track is a result of TCRY’s refusal to negotiate a TUA with the City, unlike BNSF and UP. TCRY’s mischaracterization is especially egregious in light of the fact that TCRY is operating on the Track today with access to all of the industries on the Track as UP’s designee or “handling line.” In other words, with BNSF handling its own traffic, TCRY is today physically handling all of the traffic available to it on the Track. And, it is UP, not TCRY, that is paying the Annual Fee. Indeed, TCRY has benefited from the additional rail traffic generated by the City’s industrial development success. Since the City receives an Annual Fee, the City has never received any additional revenue from the additional rail traffic generated by the industries along the Track, while TCRY has handled thousands of carloads that would not have existed but for the Horn Rapids Industrial Park.

Both TUA’s provide that the Track is not a line of railroad and that BNSF and UP (via UP’s designee, TCRY) operations over it do not constitute rail common carriage. Neither BNSF nor UP has ever questioned the legal status of the Track, and each has agreed that its respective contract operating rights over the Track do not require either to obtain prior Board authority.

Moreover, the TUA’s do not restrict or limit the railroads with whom TCRY or BNSF or UP can interchange traffic. Rather, in the TUA’s, UP and BNSF voluntarily agreed to relocate the interchange operations that were occurring at Richland Junction. In fact, UP stated in its TUA that it “has secured all agreements necessary with the Tri-City Railroad Company to permanently relocate the UP/Tri City Railroad interchange from Richland Junction and the path of the Center Parkway” and that it would relocate the interchange within thirty days of the

effective date of the TUA. Although TCRY refused to negotiate a TUA with the City that would include the interchange relocation provision, in fact, such relocation has occurred. To my knowledge BNSF, having elected to handle its own business itself, does not currently have an active interchange with TCRY anywhere, though I understand that there are locations in the area where such interchange could take place. I understand that by agreement between UP and TCRY UP interchanges cars with TCRY in Kennewick, WA to the east of Richland Junction. As contemplated in the TUA's, Richland Junction no longer serves as an interchange location. However, there is no restriction, charge or penalty whatsoever in the TUA's limiting which railroad TCRY, BNSF or UP can interchange with. Each remains free to interchange traffic with the others at locations agreeable to those railroads.

Finally, it is unclear to me what TCRY's real objective is here. Of what benefit to TCRY is having the Horn Rapids Spur declared a "line of railroad" or the City a "rail carrier"? Its petition seeks to have the TUA's between the City and BNSF and UP declared void. Having lost the court case seeking to oust BNSF and UP from serving local industries on the Port's line, is it TCRY's objective here to try to oust BNSF and UP from having the right to serve industries on the Horn Rapids Spur?

The City of Richland has never provided or held itself out as providing rail service on the Horn Rapids Spur. It conducts no operations. It has published no tariffs. It doesn't even dispatch the Track. Rather, it is the owner and maintainer of a 10,322 foot lead track in an industrial park. It has voluntarily negotiated non-exclusive TUA's with BNSF and UP for the use of the Track and continues to be willing to negotiate a comparable TUA with TCRY. The City's objective has always been to have industries that choose to locate on the Horn Rapids Spur have access to as many rail routing options as possible. Right now, they have access to BNSF and,

through TCRY, UP. Such access enhances the City's ability to attract industries to the Horn Rapids Industrial Park. It would be counterproductive for the City to do otherwise.

The present arrangements, which all parties except TCRY have agreed to, are working well. The Track is being maintained, all industries on the Track have access to both BNSF and UP, and the City continues to be able to attract new industries to the Industrial Park. TCRY seeks to have the Board dismantle these arrangements. I urge the Board to deny TCRY's petition.

REC'D DEC 17 2001

Temporary Service Agreement

This Agreement ("Agreement") made this 12 day of December, 2001, between the **TRI-CITY RAILROAD COMPANY**, a Washington corporation ("Railroad"), and the **CITY OF RICHLAND**, a municipality of the State of Washington ("City").

WHEREAS, City is owner of the Horn Rapids Spur ("HRS"), an industrial lead track designed to offer the opportunity of rail service to a number of current and potential users, which connects to trackage (Station Number 00400) owned by the Port of Benton County ("POB"); and

WHEREAS, City desires to enter into a Temporary Service Agreement ("TSA") with Railroad, the operator of POB's trackage, to provide rail service as required as soon as possible between customers located on HRS and the line haul carriers, The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP"); and

WHEREAS, Railroad desires to provide such service, subject to the terms of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties agree to be governed by the following terms and conditions:

1. The purpose of this TSA is to permit rail service to begin for City's HRS customers on or before December 20, 2001. This Agreement shall be for thirty (30) days and continuing thereafter until terminated upon ten (10) days written notice by either party.
2. Railroad shall inspect the trackage to be utilized during the term of this Agreement prior to operating over same to ensure that it is in a safe operating condition. This inspection shall include the grade crossing signal system to the extent it is to be utilized. This inspection shall be done within two business days of the effective date of this Agreement so that there will be time to correct any deficiencies prior to December 20, 2001. Railroad shall immediately advise City with respect to any repairs required prior to operation, including an estimate of time and expense to make said repairs. During the term of this Agreement, Railroad shall make any additional inspection(s) required by the Federal Railroad Administration ("FRA"), the State of Washington, other competent authority or prudent judgment. Railroad shall bear the expense of all inspections.
3. City may ask Railroad to make any required repairs based on Railroad's estimate of time and expense. City shall pay for any repairs it requests Railroad to make.
4. City shall permit Railroad to operate over the HRS to serve City's customers requesting rail service by Railroad for any cars between said customers and BNSF and/or UP. Railroad's service shall be prompt and efficient as well as essentially

equivalent as between BNSF and UP. Railroad's current tariff (Supplement 1 to Freight Tariff TCRY 8000, Effective December 1, 2001) charges shall provide its compensation for this service. The tariff charge for Railroad's service to the HRS will be as provided for in Supplemental 1 to Freight Tariff TCRY 8000 for rail service to Station Number 00400, the City of Richland Lead, described in item 5 of applicable charges and in Section 3, Station Names and Numbers. Railroad shall not assess any additional charges to the City or customers located on the HRS who utilize Railroad's services except as provided for in paragraph 3 above.

5. Each party hereto shall release, indemnify, defend and hold the other harmless from all claims, liabilities, costs or damages arising out of this Agreement to the extent caused by said party.
6. City and Railroad shall negotiate on a good faith basis to agree on an Industrial Track Agreement ("ITA") to replace this TSA.

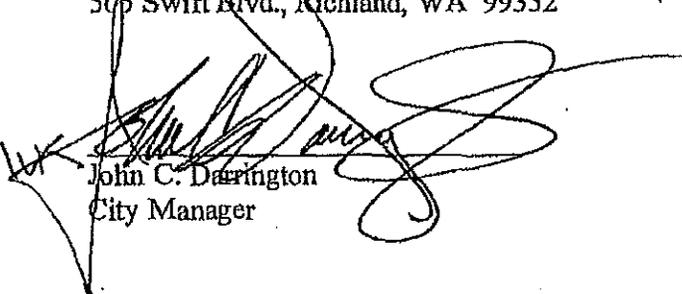
IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and effective in duplicate the day and year first herein above written.

THE TRI-CITY RAILROAD COMPANY
2579 Stevens Drive, Richland, WA 99352.



Randolph Peterson
CEO & Managing Partner

CITY OF RICHLAND
505 Swift Blvd., Richland, WA 99352



John C. Darrington
City Manager

Contract No. 22-11

CITY OF RICHLAND
STANDARD FORM RAILROAD TRACK USE AGREEMENT

THIS RAILROAD TRACK USE AGREEMENT (hereinafter referred to as "Agreement") is made and entered into as of this 2 day of January, 2011 (hereinafter referred to as the "Effective Date") by and between the **CITY OF RICHLAND**, a municipal corporation in the State of Washington (hereinafter referred to as "City") and **BNSF RAILWAY COMPANY**, a Delaware corporation and a duly licensed corporation in the State of Washington (hereinafter referred to as "Railroad").

WITNESSETH

WHEREAS, City is the owner of a railroad industrial spur track, commonly known as the Horn Rapids Rail Spur, located at the Horn Rapids Industrial Park in the City of Richland and connected to the Southern Connection of the Hanford Railroad (owned by the Port of Benton, Washington (hereinafter referred to as the "Port"), successor in interest to the United States Department of Energy), as shown on Exhibit A attached hereto (hereinafter referred to as the "Track");

WHEREAS, Railroad operates pursuant to separate agreement(s) over tracks owned by the Port which tracks connect with the Track near Milepost B 37 on the Port's trackage and a portion of which tracks have been used for the interchange of traffic between rail carriers at or near Richland Junction, Washington (hereinafter referred to as "Richland Junction");

WHEREAS, Railroad desires to use the Track for the purpose of providing railroad freight service thereon and thereover to industries located on or adjacent to the Track (hereinafter referred to individually as "Industry" and collectively as "Industries");

WHEREAS, City desires that all railroad interchange operations at Richland Junction be permanently eliminated to facilitate commercial development and improve vehicular traffic movement in the area; and

WHEREAS, City is willing to allow Railroad to use the Track on a non-exclusive basis but only on the terms and conditions set forth herein;

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the parties, intending to be bound, do hereby agree as follows:

SECTION 1
GRANT OF USE

Section 1.1. City hereby grants to Railroad non-exclusive permission to operate its trains, locomotives, cars and equipment with its own crews over the Track for the purposes set forth herein. Railroad's use of the Track shall be in common with such other user or users of the Track as City has heretofore admitted, or may at any time in the future admit, to use of all or any

portion of the Track, provided that City shall require such user or users to comply with all Legal Requirements (as defined in Section 9.1) applicable to such user's or users' use of the Track. Subject to the foregoing, City shall retain the exclusive right to grant to other persons the right to use all or any portion of the Track, provided that such use does not unreasonably interfere with the rights granted to Railroad herein.

Section 1.2. The Track shall include, without limitation, the right-of-way, tracks, rails, ties, ballast, other track materials, switches, bridges, grade crossings and any and all other improvements or fixtures affixed to the right-of-way.

Section 1.3. Railroad shall take the Track in an "AS IS, WHERE IS" condition subject to all rights, interests and estates of third parties in and to the Track.

Section 1.4. City represents that it owns or controls the land underlying the Track and that there are no existing easements or encumbrances affecting such land that would interfere with Railroad's rights under this Agreement.

SECTION 2 **PERMITTED USE**

Section 2.1. Railroad's use of the Track shall be limited to the movement of goods by rail to and from an Industry via tracks of such Industry that connect to the Track.

Section 2.2. Railroad shall not knowingly and intentionally permit the loading or unloading of railcars on the Track by any party within its control, and shall not enter into agreements or arrangements with any person for the storage of empty or loaded railcars on the Track or any portion thereof, without the prior written consent of City.

Section 2.3. Neither party shall use the Track or any portion thereof, for the storage, transload or disposal of any hazardous substances, as defined by the Comprehensive Environmental Response, Compensation and Liability Act, as amended (hereinafter referred to as "CERCLA"), or petroleum or oil as defined by CERCLA, the Resource Conservation and Recovery Act, as amended (hereinafter referred to as "RCRA"), the Clean Water Act, the Oil Pollution Act, and the Hazardous Materials Transportation Act (hereinafter collectively referred to herein as the "Environmental Laws"), provided however, that nothing herein shall preclude Railroad or any other admittee of City from using the Track for the movement of hazardous substances in railcars in the normal course of providing rail transportation service to or from an Industry.

Section 2.4. Neither party shall use nor allow the use of the Track for the transportation of passengers thereon or thereover, provided however, that nothing herein shall preclude Railroad or any other admittee of City from operating a hi-rail vehicle over the Track for the purpose of inspecting the Track.

Section 2.5. Railroad shall not cause to be filed or knowingly and intentionally permit persons within its control to file any liens against the Track. In the event any such liens are filed, Railroad shall cause such liens to be released within fifteen (15) days.

Section 2.6. Railroad shall not create or store any waste or nuisance on the Track. Railroad shall neither use nor occupy the Track or any part thereof in violation of Legal Requirements (as defined in Section 9.1). City shall not cause or allow the Track to be blocked, obstructed or used in any manner that would impair or diminish Railroad's ability to use the Track for the purposes set forth in this Agreement, provided however, that use of the Track by any user in the ordinary course of providing rail service to any industry on the Track, shall not be deemed a violation of the requirements of this sentence.

SECTION 3 **MAINTENANCE**

Section 3.1. City, at its cost and expense, shall be solely responsible for, and shall have exclusive direction and control over, the maintenance of the Track which shall include, but not be limited to, maintenance of tracks, subgrade, track drainage, grade crossings, grade crossing warning signs and devices, signal boxes, bridges and abutments, culverts, drainage ditches, retaining walls and any fences or barriers that City may erect. City shall also be solely responsible for litter and vegetation control and for keeping the Track sufficiently free and clear of snow and ice to permit railroad operations thereover.

Section 3.2. City shall maintain the Track to not less than Federal Railroad Administration (hereinafter referred to as "FRA") Class 2 track safety standards with a maximum gross weight limitation of not less than 286,000 lbs. per car and City shall maintain the Track in such condition and in compliance with all Legal Requirements (as hereinafter defined below). City shall also maintain all grade crossing signal equipment on the Track in accordance with all applicable Legal Requirements (as defined in Section 9.1).

Section 3.3. City, in its sole discretion, may contract with a third party to perform City's maintenance obligations hereunder, provided, however, City shall remain responsible for any obligations of City under this Agreement that may be performed by any such contractor.

Section 3.4. Railroad shall notify City in writing of any deficiencies in City's maintenance of the Track when such deficiencies are reasonably discovered by Railroad, and City shall, as soon as practicable, but in any event not more than thirty (30) days after its receipt of such notice, or in the case of an imminent safety hazard and/or condition which renders the Track impassable, within forty-eight (48) hours, commence necessary repairs and maintenance and shall proceed to complete same with reasonable diligence.

Section 3.5. If the use of the Track is at any time interrupted or traffic thereover is delayed for any cause whatsoever, City shall, with reasonable diligence, restore the Track for the passage of trains. Railroad shall not have nor make any claim against City for loss, damage, loss of business or expenses of any kind resulting from such interruption or delay.

Section 3.6. City shall be bound to use only reasonable and customary care, skill and diligence in the maintenance, repair and renewal of the Track and, subject to the provisions of Section 4.1 of this Agreement, Railroad shall not, by reason of City's performing

or failing, or neglecting to perform any maintenance, repair or renewal of the Track, have or make against City, its officers, agents or employees, any claim or demand for loss, damage, destruction, injury or death whatsoever resulting from any defect in the Track or City's performance, failure or neglect, except as provided otherwise in Section 11 herein.

Section 3.7. Subject to the provisions of Section 8.1 herein, Railroad shall have the right to enter upon the Track and make inspections to determine compliance with the terms of this Agreement. In no event shall Railroad be obligated to make any such inspections, and Railroad shall not be liable for any failure to make any such inspections or failure to identify any matters that are not in compliance with this Agreement. In no event shall Railroad's conducting of inspections be deemed to result in a waiver of City's compliance with any terms of this Agreement.

Section 3.8. City shall be responsible for reporting of grade crossings and structures inventory and any other similar information as may be required by the FRA or any other governmental body having jurisdiction over such matters.

SECTION 4 COMPENSATION

Section 4.1. For so long as City permits Railroad reasonable use of the Track, as compensation for Railroad's use of the Track, Railroad shall pay to City annually at the beginning of each calendar year a fee of Fifteen Thousand Dollars (\$15,000) (hereinafter referred to as the "Annual Fee") which shall be payable regardless of Railroad's use of the Track during that year.

Section 4.2.

A. The Annual Fee shall be subject to adjustment on January 1 of each year beginning January 1, 2011 in accordance with changes in the Consumer Price Index for Wage Earners and Clerical Workers, series CWUR0000SA0 (hereinafter referred to as "CPI-W"). The Annual Fee set forth in Section 4.1 shall be revised by calculating the percentage of increase or decrease for the year to be revised based on the final index of the most recent July as related to the final index of the previous July and applying this percentage of increase or decrease to the current Annual Fee to be revised. The resulting adjusted Annual Fee shall hereinafter be referred to as "the Revised Annual Fee."

By way of example, assuming "A" to be the CPI-W final index figure for July 1, 2009; "B" to be the CPI-W final index figure for July, 2010; and "C" to be the current Annual Fee to be escalated; the Revised Annual Fee effective January 1, 2011 would be determined by the following formula:

$$B/A \times C = \text{Revised Annual Fee, Rounded to Nearest Whole Cent}$$

B. In the event that publication of the CPI-W is discontinued, an appropriate substitute for determining the percentage of increase or decrease shall be negotiated by the

parties hereto. In the absence of agreement, the matter shall be submitted to arbitration in accordance with Section 16 herein.

C. Under no circumstances shall the Revised Annual Fee paid by Railroad to City be less than the Annual Fee in effect on the date of this Agreement.

Section 4.3.

A. Railroad agrees that as part of the consideration for obtaining City's permission to use the Track herein, Railroad shall, subject to Legal Requirements, as of the Effective Date and during the term of this Agreement, permanently relocate any interchange receipt operations between Railroad and another rail carrier at Richland Junction to an alternate interchange location except that Railroad may, in emergency situations only, interchange cars at Richland Junction. For purposes of this provision, an emergency situation includes, but is not limited to, the following: Force Majeure events or other Acts of God; movement of High or Wide loads; movement or handling of rail security-sensitive materials (as such term is defined in 49 CFR Part 1580, as amended, supplemented or replaced) in compliance with Legal Requirements or other safety requirements; track or other mechanical conditions necessitating a change in interchange location. Except as required by law or as provided in this Section 4.3.A, Railroad shall not, during the term of this Agreement, enter any agreement to deliver cars in interchange to any other railroad at Richland Jct.

B. Railroad further agrees that if the design of Center Parkway requires an at-grade crossing of a track owned or used by Railroad, Railroad shall not oppose installation of a crossing designed in compliance with the current version of the Manual on Uniform Traffic Control Devices or any other applicable Legal Requirements, with the appropriate traffic control system to be used at the crossing to be determined by an engineering study involving both the City and Railroad representatives. In the event that both City and Railroad representatives jointly agree as to the appropriate traffic control system to be used at the crossing, Railroad shall execute a waiver of hearing document to the Washington State Utilities and Transportation Commission regarding the proposed crossing.

Section 4.4. City acknowledges that the compensation provided for in this Section 4 shall be the sole consideration for the right to use the Track, and in no event shall City impose any additional charges tariffs, or surcharges on Railroad or any customer or receiver of Railroad as a condition of use of the Track for the provision of rail transportation service except to the extent expressly set forth below. Notwithstanding the foregoing, City may assess additional charges, tariffs, or surcharges for maintenance, operating and dispatching costs associated with the Track if all of the following conditions are satisfied: (i) City provides Railroad with advance written notice of the proposed charges, tariffs or surcharges and detailed information concerning City's costs, including the deficit not covered by the then current Annual Fee; and (ii) City, Railroad and any other users of the Track are not able to negotiate, within 60 days of City providing notice in (i) above, an updated Annual Fee in lieu of the proposed charges to the mutual satisfaction of the parties.

SECTION 5
BILLING AND PAYMENT

Section 5.1. City shall render to Railroad a bill for the Annual Fee.

Section 5.2. Upon reasonable request by City, Railroad shall furnish to City, within sixty (60) days of receiving such request, a statement of the number of loaded and empty cars handled by Railroad over all or any portion of the Track during the previous twelve (12) months. Notwithstanding the foregoing, City shall only be entitled to make one request for such car information each calendar year during the term of this Agreement.

Section 5.3. All payments called for under this Agreement shall be made by Railroad within thirty (30) days after receipt of a bill therefor except for any claims or demands for payment pursuant to Section 11 of this Agreement. No payment shall be withheld because of any dispute as to the correctness of items in any bill rendered and any discrepancies reconciled between the parties hereto shall be adjusted in the accounts of a subsequent month. In the event that Railroad shall fail to pay any monies due to City within thirty (30) days after the invoice date, Railroad shall pay interest on such unpaid sum of twelve percent (12%), or the maximum rate permitted by law, whichever is less.

Section 5.4. The records of Railroad, insofar as they pertain to matters covered by this Agreement, shall be open at all reasonable times to inspection by City for a period of two (2) years from the date of billing.

Section 5.5. For purposes of this Agreement, the terms "cost," "costs," "expense" and "expenses" shall include actual labor and material costs together with the surcharges, overhead percentages and equipment rentals as specified by City at the time any work is performed for Railroad, which surcharges, overhead percentages and equipment rentals shall be reasonable and consistent with City's then-current standard billing practice, procedures, rates and schedules.

SECTION 6
ADDITIONS, RETIREMENTS AND ALTERATIONS

Section 6.1. City, from time to time, and at its sole cost and expense, may make such changes in, additions and improvements to, and retirements from the Track as shall, in its judgment, be necessary or desirable for the economical or safe operation thereof, or as shall be required by any law, rule, regulation or ordinance promulgated by any governmental body having jurisdiction. Such additions and improvements shall become part of the Track and such retirements shall be excluded from the Track.

Section 6.2. If Railroad requests City to make changes in or additions or improvements to the Track required to accommodate Railroad's operations thereover, and Railroad agrees to reimburse City therefor, City shall make such changes, additions or improvements to the Track and Railroad shall pay to City the cost thereof, including the annual expense, if any, of maintaining, repairing and renewing such additional or altered facilities.

SECTION 7
TERM

Section 7.1. This Agreement shall take effect on the date hereof and shall continue in full force and effect for three (3) years from the date hereof (hereinafter referred to as the "Initial Term") and shall automatically renew for successive one (1) year periods thereafter, absent written notice of termination by either party made at least one hundred eighty (180) days prior to expiration of the Initial Term or prior to any expiration of any such one-year renewal term unless earlier terminated pursuant to the terms of this Agreement.

SECTION 8
OPERATIONS

Section 8.1. Railroad agrees that entry to and exit from the Track shall be controlled by City or any contractor or admittee designated by City. City shall require that any entity allowed by City to control operations thereover shall be required to ensure that the trains, locomotives and cars of all users of the Track shall be operated thereon and thereover without prejudice or partiality and in such manner as will afford the safest and the most economical and efficient movement of all traffic over the Track. City reserves the right at any time by written notice to Railroad and any other user or users of the Track to assume management and control of all operations over the Track consistent with the terms of this Section 8.1.

Section 8.2. Railroad shall provide, at its sole cost and expense, all locomotives, railcars, other rolling stock and transportation equipment, personnel, fuel and train supplies necessary for Railroad to provide safe and adequate rail transportation to the Industries. Railroad shall also provide, at its sole cost and expense, all radios and other communication facilities as necessary to comply with the regulations of the FRA. Railroad shall be solely responsible for all car hire charges and mileage allowances on cars in Railroad's account handled over the Track.

Section 8.3. City, at its sole cost and expense, shall provide all necessary switchlocks for use in the operation of the Track. City shall provide at no charge a reasonable number of keys for such switchlocks to Railroad and any other user or users of the Track.

Section 8.4. Railroad, at its sole cost and expense, shall perform or cause to be performed any repairs required to make locomotives, cars or other equipment in the custody or control of Railroad on the Track comply with Legal Requirements (as defined in Section 9.1).

Section 8.5. City shall not place, permit to be placed or allow to remain, any permanent or temporary material, structure, pole, or other obstruction within eight and one-half (8-1/2) feet laterally from the centerline of straight track (nine and one-half (9-1/2) feet on either side of the centerline of curved track) or within twenty-three (23) feet vertically from the top of the rail of any track (hereinafter referred to as "Minimal Clearances"), provided that if any Legal Requirements (as defined in Section 9.1) require greater clearances than those provided for in this Section 8.5, City shall comply with such Legal Requirements. However, vertical or lateral clearances which are less than the Minimal Clearances but are in compliance with Legal

Requirements shall not be a violation of this Section, so long as City complies with the terms of any such Legal Requirements.

Section 8.6. Railroad shall not place or allow to be placed any rail car within two hundred fifty (250) feet of either side of any at-grade crossing on the Track. Railroad shall not place or permit to be placed on the City's right-of-way any permanent or temporary structure of any kind whatsoever without the prior written consent of City, which consent may be withheld at City's sole discretion. City shall require any other user or users of the Track to comply with the requirements of this Section 8.6.

Section 8.7. Railroad and City agree that with respect to the at-grade road crossings on the Port of Benton County's track between the proposed Center Parkway crossing at Richland Junction and SR 240 (Vantage Highway) inclusive, Railroad shall use reasonable efforts to minimize its operations over such crossings during peak highway traffic times Monday through Friday. City acknowledges and understands that Railroad's compliance with its common carrier obligations may, from time to time, require operations over such crossings during peak highway traffic times. Railroad agrees to use reasonable efforts to meet its obligations under this Section 8.7.

Section 8.8. In the event that any user of the Track, including Railroad, provides notice to the City of any violation of Legal Requirements by any user of the Track, including Railroad, or any violation of the terms of this Agreement or the applicable agreement between such user and City (including without limitation, any applicable obligation to control entry to and exit from the Track or operations thereon or thereover without prejudice or partiality and in such manner as will afford the safest and the most economical and efficient movement of all traffic over the Track), City shall conduct an investigation into such alleged violation, and if, in the reasonable judgment of City, Railroad or such user shall be in violation of applicable Legal Requirements or the terms of this Agreement or such user's agreement with the City, City shall require Railroad or such user as the case may be to cure such conduct in accordance with this Agreement or the applicable agreement, and unless and until same shall be cured in compliance with this Agreement or the applicable agreement, City shall bar Railroad or such user as the case may be from use of the Track.

SECTION 9

COMPLIANCE WITH LAWS

Section 9.1. The parties agree to comply with all applicable provisions of law, statutes, regulations, ordinances, orders, covenants, restrictions and decisions of any governmental body or court having jurisdiction (hereinafter collectively referred to as "Legal Requirements") relating to this Agreement or use of the Track. Each party hereto shall indemnify, protect, defend and hold harmless the other party and its officers, agents and employees from and against all fines, penalties, and liabilities imposed on the other party under such laws, rules and regulations by any such public authority or court having jurisdiction when attributable to the failure of the first party to comply with its obligations in this regard.

Section 9.2. City and Railroad agree that the Track is excepted trackage under 49 U.S.C. Section 10906 and that no approval, authorization or exemption from the Surface

Transportation Board (hereinafter referred to as the "STB") is required for Railroad to use the Track or to discontinue its use of the Track. Railroad agrees that it will not seek or obtain any approval, authorization or exemption from the STB for its use or discontinuance of use of the Track.

SECTION 10 **CLEARING OF WRECKS**

Section 10.1. If trains, locomotives, cars or equipment of Railroad are wrecked or derailed on the Track and require rerailling, wrecking service or wrecking train service, Railroad shall be responsible for the performance of such service, including the repair and restoration of roadbed, track and structures, provided however, that if Railroad fails to restore the Track to service within a reasonable period of time, not to exceed forty-eight (48) hours, after such wreck or derailment, City, at its option, may arrange for the performance of such service, including repair and restoration of roadbed, track and structures, and Railroad shall reimburse City for the cost and expense thereof in accordance with Section 5 herein. Any other cost, liability and expense, including without limitation loss of, damage to, and destruction of any property whatsoever and injury to or death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting from such wreck or derailment, shall be apportioned in accordance with the provisions of Section 11 hereof. All locomotives, cars and equipment and salvage from the same so picked up and removed which are owned by or under the management and control of or used by Railroad at the time of such wreck shall be promptly delivered to Railroad.

Section 10.2. If trains, locomotives, cars or equipment of any admittee of City, other than Railroad, are wrecked or derailed on the Track and require rerailling, wrecking service or wrecking train service, City shall ensure the performance of such service, including the repair and restoration of roadbed, track and structures, provided however, that if City fails to have the Track restored to service within a reasonable period of time, not to exceed seventy-two (72) hours, after such wreck or derailment, Railroad, at its option, may arrange for the performance of such service, including repair and restoration of roadbed, track and structures, and City shall reimburse Railroad for the cost and expense thereof in accordance with Section 5 herein. Any other cost, liability and expense, including without limitation loss of, damage to, and destruction of any property whatsoever and injury to or death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting from such wreck or derailment, shall be apportioned in accordance with the provision of Section 11 hereof. All locomotives, cars and equipment and salvage from the same so picked up and removed which are owned by or under the management and control of or used by City or its admittee at the time of such wreck shall be promptly delivered to City or its admittee, as the case may be.

SECTION 11
LIABILITY

Section 11.1

A. TO THE FULLEST EXTENT PERMITTED BY LAW, RAILROAD SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS CITY AND CITY'S OFFICERS, EMPLOYEES, AGENTS, CONTRACTORS AND INVITEES (HEREINAFTER COLLECTIVELY REFERRED TO AS "CITY INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS AND LIABILITIES OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON OR ENTITY, INCLUDING, WITHOUT LIMITATION, PERSONAL INJURIES, DEATHS, DAMAGE OR DESTRUCTION OF PROPERTY AND DAMAGE TO OR DESTRUCTION OF THE ENVIRONMENT WHATSOEVER, INCLUDING WITHOUT LIMITATION LAND, AIR, WATER, WILDLIFE, AND VEGETATION (HEREINAFTER COLLECTIVELY REFERRED TO AS "CLAIMS"), TO THE EXTENT SUCH CLAIMS ARE PROXIMATELY CAUSED BY (I) THE BREACH OF THE TERMS OF THIS AGREEMENT BY RAILROAD AND/OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES, OR (II) THE NEGLIGENCE, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF RAILROAD OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES.

B. TO THE FULLEST EXTENT PERMITTED BY LAW, CITY SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS RAILROAD AND RAILROAD'S OFFICERS, EMPLOYEES, AGENTS, CONTRACTORS AND INVITEES (HEREINAFTER COLLECTIVELY REFERRED TO AS "RAILROAD INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON OR ENTITY, TO THE EXTENT SUCH CLAIMS ARE PROXIMATELY CAUSED BY (I) THE BREACH OF THE TERMS OF THIS AGREEMENT BY CITY AND/OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES, OR (II) THE NEGLIGENCE, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF CITY OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES.

C. UPON WRITTEN NOTICE FROM RAILROAD OR CITY, THE OTHER PARTY AGREES TO ASSUME THE DEFENSE OF CLAIMS OR ANY LAWSUIT OR OTHER PROCEEDING BROUGHT AGAINST ANY INDEMNITEE OF THE OTHER PARTY BY ANY ENTITY, RELATING TO ANY MATTER COVERED IN THIS AGREEMENT FOR WHICH THE OTHER PARTY HAS AN OBLIGATION TO ASSUME LIABILITY FOR AND/OR SAVE AND HOLD HARMLESS SUCH INDEMNITEE. THE OTHER PARTY SHALL PAY ALL COSTS INCIDENT TO SUCH DEFENSE, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES, INVESTIGATOR'S FEES, LITIGATION AND APPEAL EXPENSES, SETTLEMENT PAYMENTS, AND AMOUNTS PAID IN SATISFACTION OF JUDGMENTS.

D. NOTWITHSTANDING ANY PROVISION TO THE CONTRARY HEREIN, NEITHER PARTY SHALL BE LIABLE FOR ANY PUNITIVE OR EXEMPLARY DAMAGES ARISING OUT OF THE CONDUCT OF AN INDEMNIFIED PARTY OR THE EMPLOYEES, AGENTS, OFFICERS, OR CONTRACTORS OF AN INDEMNIFIED PARTY.

SECTION 12
INSURANCE

Section 12.1.

A. Railroad shall, at its sole cost and expense, procure and maintain during the term of this Agreement the following insurance coverage:

1. Commercial General Liability insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$2,000,000 each occurrence and an aggregate limit of at least \$4,000,000. Coverage must be purchased on a post-1998 ISO occurrence form or equivalent and include coverage for, but not limited to:
 - Bodily Injury and Property Damage
 - Personal Injury and Advertising Injury
 - Fire legal liability
 - Products and completed operations

This policy shall also contain the following endorsements, which shall be indicated on the certificate of insurance:

- The employee and workers compensation-related exclusions in the above policy shall not apply with respect to claims related to railroad employees.
- The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within fifty (50) feet of the Track.
- Any exclusion related to explosion, collapse and underground hazards shall be removed.

No other endorsements limiting coverage may be included on the policy with regard to Railroad's use of the Track under this Agreement.

2. Business Automobile Insurance. This insurance shall contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to:
 - Bodily injury and property damage
 - Any and all vehicles owned, used or hired
3. Workers' Compensation and Employers Liability insurance including coverage for, but not limited to:

- Railroad's statutory liability under the worker's compensation laws of the State of Washington. If optional under State law, the insurance must cover all employees anyway.
- Employers' liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

4. Excess Liability insurance in an amount not less than \$10,000,000 each occurrence and \$10,000,000 aggregate limit.

B. Railroad shall also comply with the following requirements:

1. Where allowable by law, all policies (applying to coverage listed above) shall contain no exclusion for punitive damages and certificates of insurance shall reflect that no exclusion exists.
2. Railroad agrees to waive its right of recovery against City and Indemnitees under its Commercial General Liability, Automobile Liability, and Workers' Compensation/Employers Liability insurance coverages.
3. Railroad's insurance policies through policy endorsement must include wording which states that the policy shall be primary and non-contributing with respect to any insurance carried by City. The certificate of insurance must reflect that the above wording is included in evidenced policies.
4. All policy(ies) required above (excluding Workers' Compensation) shall include a severability of interest endorsement and shall name City as an additional insured by endorsement using additional insured form CG 26 07 04 with respect to Railroad's use of the Track under this Agreement. Severability of interest and naming City as an additional insured shall be indicated on the certificate of insurance.
5. Except if Railroad is a Class I rail carrier as defined under the regulations of the STB, Railroad is not allowed to self-insure without the prior written consent of City. If granted by City, any deductible, self insured retention or other financial responsibility for claims shall be paid directly by Railroad. Any and all City liabilities that would otherwise, in accordance with the provisions of this Agreement, be covered by Railroad's insurance shall be paid by Railroad as if Railroad elected not to include a deductible, self-insured retention or other financial responsibility for claims.

6. Prior to entering upon the Track, Railroad shall furnish to City an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify City in writing at least thirty (30) days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision shall be indicated on the certificate of insurance. In the event of a claim or lawsuit involving City arising out of this Agreement, Railroad will make available any required policy covering such claim or lawsuit.
7. Any insurance policy shall be written by a reputable insurance company acceptable to City or with a current Best's Guide Rating of A and Class VII or better, and authorized to do business in the State of Washington.
8. Railroad represents that this Agreement has been thoroughly reviewed by Railroad's insurance agent(s)/broker(s), who have been instructed by Railroad to procure the insurance coverage required by this Agreement. Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above.
9. Not more frequently than once every five (5) years, City may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.
10. Failure to provide evidence as required by this section shall entitle, but not require, City to terminate this Agreement immediately. Acceptance of a certificate that does not comply with this section shall not operate as a waiver of Railroad's obligations hereunder.
11. The fact that insurance (including, without limitation, self-insurance) is obtained by Railroad shall not be deemed to release or diminish the liability of Railroad including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by City shall not be limited by the amount of the required insurance coverage.

C. City shall waive in writing the above insurance requirements if Railroad is a Class I rail carrier as defined in the regulations of the STB.

SECTION 13
ENVIRONMENTAL

Section 13.1

A. Railroad shall strictly comply with all federal, state and local environmental laws and regulations in its use of the Track, including, but not limited to Environmental Laws. Railroad shall not maintain a treatment, storage, transfer or disposal facility, or underground storage tank, as defined by Environmental Laws, anywhere on the Track. Railroad shall not release or suffer the release of oil or hazardous substances, as defined by Environmental Laws, anywhere on the Track.

B. Railroad shall provide immediate notice to City's Contract Officer at (509) 942-7327 of any release of hazardous substances on or from the Track, violation of Environmental Laws, or inspection or inquiry by government authorities charged with enforcing Environmental Laws with respect to Railroad's use of the Track. Railroad shall use reasonable efforts to promptly respond to any release on or about the Track. Railroad also shall give City immediate notice of all measures undertaken on behalf of Railroad to investigate, remediate, respond to or otherwise cure such release or violation.

C. In the event that City receives notice from Railroad or otherwise learns of a release or violation of Environmental Laws on the Track which occurred or may occur during the term of this Agreement for which Railroad is responsible pursuant to this Agreement, City may require Railroad, at Railroad's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure or prevent such release or violation affecting the Track.

D. Railroad shall promptly report to City in writing any known conditions or activities on the Track which create a risk of harm to persons, property or the environment and shall take whatever action is necessary to prevent injury to persons or property arising out of such conditions or activities; provided, however, that Railroad's reporting to City shall not relieve Railroad of any obligation whatsoever imposed on it by this Agreement. Railroad shall promptly respond to City's request for information regarding said conditions or activities.

SECTION 14
TERMINATION

Section 14.1. Railroad may terminate this Agreement at any time after one year from the Effective Date, by giving City not less than six (6) months' written notice of termination. Upon expiration or termination of this Agreement consistent with the terms herein, all rights of Railroad to use the Track shall cease.

Section 14.2. Notwithstanding any other provision of this Agreement except Section 14.3, at any time after the Effective Date, City may terminate this Agreement if Railroad shall default on or breach any of its obligations hereunder, including but not limited to timely payment of compensation to City pursuant to Section 4.1, and Railroad fails to cure such default or breach within twenty (20) days of receipt of written notice from City specifying such default or breach.

Section 14.3. Notwithstanding any other provision of this Agreement, at any time after the Effective Date, City may terminate this Agreement if Railroad fails to comply with its obligations under Section 4.3 herein and Railroad does not cure such failure within thirty (30) days of receipt of written notice from City specifying such failure.

Section 14.4. Termination of this Agreement shall not relieve or release either party hereto from any obligation assumed or from any liability which may have arisen or been incurred by either party under the terms of this Agreement prior to the termination hereof. The Annual Fee paid by Railroad to City pursuant to Section 4.1 shall be non-refundable if termination of this Agreement becomes effective after June 1 of the year to which the Annual Fee applies.

SECTION 15 **NOTICES**

Section 15. Any notice required or permitted to be given hereunder by one party to the other shall be in writing and the same shall be given and shall be deemed to have been served and given if (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address for such party specified below, or to such other address as the party to be notified may designate by giving the other party no less than thirty (30) days' advance written notice for such change in address:

If to City: Community Development Services
Attn: Horn Rapids Rail Spur
City of Richland
975 George Washington Way
P.O. Box 190, MS #18
Richland, WA 99352
(509) 942-7593

If to Railroad: AYP Contracts and Joint Facilities
2600 Lou Menk Drive
P.O. Box 961034
Fort Worth, TX 76161-0034
(817) 352-2354

SECTION 16 **ARBITRATION**

Section 16.1. Any dispute arising between the parties hereto with respect to any of the provisions of this Agreement which cannot be settled by the parties themselves shall be resolved in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as such rules may be amended from time to time, and as shall be applied with reference to the customs and practices of the railroad industry. Any such arbitration shall be held in Richland, Washington or at such other location as may be mutually acceptable to the parties

hereto. The decision of the arbitrator or arbitration panel shall be final and conclusive upon the parties hereto. A final decision and award of the arbitration panel shall be enforceable in any court of competent jurisdiction in the United States of America. Each party to the arbitration shall pay the compensation, costs, fees and expenses of its own witnesses, exhibits and counsel. The compensation, costs and expenses of the arbitrator or panel, if any, shall be borne equally by the parties hereto. The arbitration panel shall not have the power to (a) award punitive or consequential damages, (b) determine violations of antitrust or criminal laws, or (c) reform the terms of this Agreement, in whole or in part.

SECTION 17 MISCELLANEOUS

Section 17.1. This Agreement expresses the entire agreement between the parties and supersedes all prior oral or written agreements, commitments, or understandings with respect to the matters provided for herein, provided however, no modification of this Agreement shall be binding upon the party affected unless set forth in writing and duly executed by the affected party.

Section 17.2. This Agreement shall be binding upon and inure to the benefit of City and Railroad, and shall be binding upon the successors and assigns of Railroad, subject to the limitations hereinafter set forth. Railroad may not assign its rights under this Agreement or any interest therein, or attempt to have any other person assume its obligations in whole or in part under this Agreement, without the prior written consent of City, which consent may be withheld in City's sole discretion; provided, however, no such consent shall be required where assignment occurs as a result of a sale or transfer of all or substantially all of the assets of Railroad pursuant to merger, sale, consolidation, combination, or order or decree of governmental authority.

Section 17.3. If fulfillment of any provision hereof shall be declared invalid or unenforceable under applicable law, such provision shall be ineffective only to the extent of such invalidity or unenforceability, without invalidating or rendering unenforceable the remainder of such provision or the remaining provisions of this Agreement, which shall remain in full force and effect.

Section 17.4. Section headings used in this Agreement are inserted for convenience of reference only and shall not be deemed to be a part of this Agreement for any purpose.

Section 17.5. This Agreement shall be governed and construed in accordance with the laws of the State of Washington. It is expressly agreed that no party may sue or commence any litigation against the other party unless such legal proceeding is brought in state court in Washington.

Section 17.6. No modification, addition or amendment to this Agreement shall be effective unless and until such modification, addition or amendment is in writing and signed by the parties hereto. This Agreement is made and intended for the benefit of the parties hereto and their respective successors and permitted assigns and for no other parties.

Section 17.7. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

Section 17.8. The parties each represent and warrant to each other that neither has employed a broker in connection with this transaction. In the event there is a claim against either party hereto with respect to any broker whatsoever other than as set forth in this Section 17.9, the party whose action gives rise to the claim for commission shall indemnify the other party against any liability, damage, cost or fee in connection with such claim, including, without limitation, attorneys' fees and costs.

Section 17.9. The failure of either of the parties hereto in one or more instances to insist upon strict performance or observation of one or more of the covenants or conditions hereof, or to exercise any remedy, privilege, or option herein conferred upon or reserved to such party, shall not operate and shall not be construed as a relinquishment or waiver for the future of such covenant or condition or of the right to enforce the same or to exercise such privilege, option, or remedy, but the same shall continue in full force and effect.

Section 17.10. Railroad shall, on the last day of the term, or upon any earlier termination of this Agreement, peaceably and in an orderly manner vacate the Track free of any property of Railroad or third parties placed by Railroad thereon. Railroad shall, if not in default hereunder, remove its equipment, goods, trade fixtures and effects and those of all persons claiming by, through or under it, provided that such removal does not cause irreparable damage to the Track. Any personal property not used in connection with the operation of the Track and belonging to Railroad, if not removed at the termination hereof, and if City shall so elect, shall be deemed abandoned and become the property of City without any payment or offset therefor. City may remove such property from the Track and store it at the risk and expense of Railroad if City shall not so elect. Railroad shall repair and restore all damage to the Track caused by the removal of any of Railroad's equipment and personal property. Railroad, if requested by City, shall remove all signs placed on the Track by Railroad and restore the portion of the Track on which they were placed substantially to the same condition as immediately prior to installation thereof.

Section 17.11. The failure of Railroad to vacate the Track on the expiration or termination of this Agreement as required pursuant to the terms of this Agreement and the subsequent holding over by Railroad, with or without the consent of City, shall result in the creation of a tenancy at will at a monthly fee equal to one hundred fifty percent (150%) of the then-applicable Annual Fee divided by twelve (12), for each month or portion thereof in which the Railroad holds over, payable on the tenth (10th) day of the following month. This provision does not give Railroad any right to hold over at termination of this Agreement, and all other terms and conditions of this Agreement shall remain in force during any tenancy at will created by any holding over by Railroad.

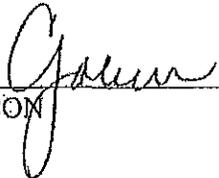
Section 17.12. The parties expressly agree that this Agreement and any rights and obligations under this Agreement shall not be deemed an "interchange commitment" as such

term is defined in Bill No. S-2889 dated December 9, 2009 entitled "the Surface Transportation Board Reauthorization Act of 2009."

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate the day and year first herein above written.

CITY OF RICHLAND, WASHINGTON

BNSF RAILWAY COMPANY



CYNTHIA D. JOHNSON
City Manager



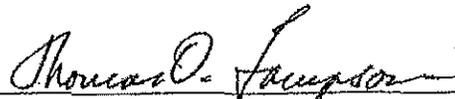
AVP CONTRACTS & JOINT FACILITIES

ATTEST:

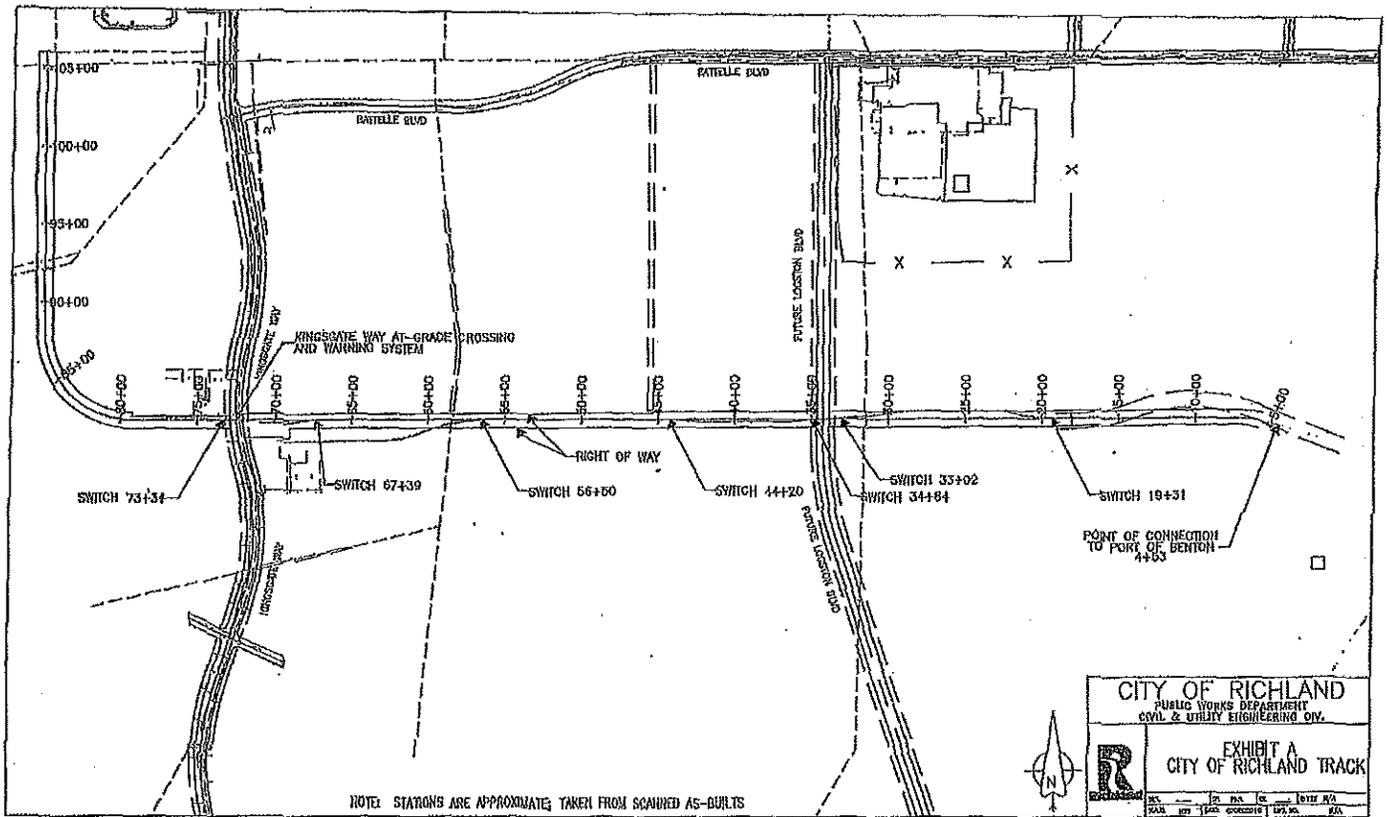
APPROVED AS TO FORM:



DEBRA C. BARHAM
Deputy City Clerk



THOMAS O. LAMPSON
City Attorney



Contract No. 42-11

CITY OF RICHLAND
STANDARD FORM RAILROAD TRACK USE AGREEMENT

THIS RAILROAD TRACK USE AGREEMENT (hereinafter referred to as "Agreement") is made and entered into as of this 6th day of April, 2011 (hereinafter referred to as the "Effective Date") by and between the **CITY OF RICHLAND**, a municipal corporation in the State of Washington (hereinafter referred to as "City") and **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation and a duly licensed corporation in the State of Washington (hereinafter referred to as "Railroad").

WITNESSETH

WHEREAS, City is the owner of a railroad industrial spur track, commonly known as the Horn Rapids Rail Spur, located at the Horn Rapids Industrial Park in the City of Richland and connected to the Southern Connection of the Hanford Railroad (owned by the Port of Benton, Washington (hereinafter referred to as the "Port"), successor in interest to the United States Department of Energy), as shown on Exhibit A attached hereto (hereinafter referred to as the "Track"); and

WHEREAS, Railroad operates pursuant to separate agreement(s) over tracks owned by the Port which tracks connect with the Track near Milepost B 37 on the Port's trackage and a portion of which tracks have been used for the interchange of traffic between rail carriers at or near Richland Junction, Washington (hereinafter referred to as "Richland Junction"); and

WHEREAS, Railroad desires to use the Track for the purpose of providing railroad freight service thereon and thereover to industries located on or adjacent to the Track (hereinafter referred to individually as "Industry" and collectively as "Industries"); and

WHEREAS, City desires that all railroad interchange operations at Richland Junction be permanently eliminated to facilitate commercial development and improve vehicular traffic movement in the area; and

WHEREAS, City is willing to allow Railroad to use the Track on a non-exclusive basis but only on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the parties, intending to be bound, do hereby agree as follows:

SECTION 1
GRANT OF USE

Section 1.1. City hereby grants to Railroad non-exclusive permission to operate its trains, locomotives, cars and equipment with its own crews over the Track for the purposes set forth herein. Railroad's use of the Track shall be in common with such other user or users of the Track as City has heretofore admitted, or may at any time in the future admit, to use of all or any

portion of the Track, provided that City shall require such user or users to comply with all Legal Requirements (as defined in Section 9.1) applicable to such user's or users' use of the Track. Subject to the foregoing, City shall retain the exclusive right to grant to other persons the right to use all or any portion of the Track, provided that such use does not unreasonably interfere with the rights granted to Railroad herein.

Section 1.2. The Track shall include, without limitation, the right-of-way, tracks, rails, ties, ballast, other track materials, switches, bridges, grade crossings and any and all other improvements or fixtures affixed to the right-of-way.

Section 1.3. Railroad shall take the Track in an "AS IS, WHERE IS" condition subject to all rights, interests and estates of third parties in and to the Track.

Section 1.4. City represents that it owns or controls the land underlying the Track and that there are no existing easements or encumbrances affecting such land that would interfere with Railroad's rights under this Agreement.

SECTION 2 **PERMITTED USE**

Section 2.1. Railroad's use of the Track shall be limited to the movement of goods by rail to and from an Industry via tracks of such Industry that connect to the Track.

Section 2.2. Railroad shall not knowingly and intentionally permit the loading or unloading of railcars on the Track by any party within its control, and shall not enter into agreements or arrangements with any person for the storage of empty or loaded railcars on the Track or any portion thereof, without the prior written consent of City.

Section 2.3. Neither party shall use the Track or any portion thereof, for the storage, transload or disposal of any hazardous substances, as defined by the Comprehensive Environmental Response, Compensation and Liability Act, as amended (hereinafter referred to as "CERCLA"), or petroleum or oil as defined by CERCLA, the Resource Conservation and Recovery Act, as amended (hereinafter referred to as "RCRA"), the Clean Water Act, the Oil Pollution Act, and the Hazardous Materials Transportation Act (hereinafter collectively referred to herein as the "Environmental Laws"), provided however, that nothing herein shall preclude Railroad or any other admittee of City from using the Track for the movement of hazardous substances in railcars in the normal course of providing rail transportation service to or from an Industry.

Section 2.4. Neither party shall use nor allow the use of the Track for the transportation of passengers thereon or thereover, provided however, that nothing herein shall preclude Railroad or any other admittee of City from operating a hi-rail vehicle over the Track for the purpose of inspecting the Track.

Section 2.5. Railroad shall not cause to be filed or knowingly and intentionally permit persons within its control to file any liens against the Track. In the event any such liens

are filed, Railroad shall cause such liens to be released within thirty (30) days of Railroad's receipt of notice of any such lien.

Section 2.6. Railroad shall not create or store any waste or nuisance on the Track. Railroad shall neither use nor occupy the Track or any part thereof in violation of Legal Requirements (as defined in Section 9.1). City shall not cause or allow the Track to be blocked, obstructed or used in any manner that would impair or diminish Railroad's ability to use the Track for the purposes set forth in this Agreement, provided however, that use of the Track by any user in the ordinary course of providing rail service to any Industry on the Track, shall not be deemed a violation of the requirements of this sentence.

SECTION 3 **MAINTENANCE**

Section 3.1. City, at its cost and expense, shall be solely responsible for, and shall have exclusive direction and control over, the maintenance of the Track which shall include, but not be limited to, maintenance of tracks, subgrade, track drainage, grade crossings, grade crossing warning signs and devices, signal boxes, bridges and abutments, culverts, drainage ditches, retaining walls and any fences or barriers that City may erect. City shall also be solely responsible for litter and vegetation control and for keeping the Track sufficiently free and clear of snow and ice to permit railroad operations thereover.

Section 3.2. City shall maintain the Track to not less than Federal Railroad Administration (hereinafter referred to as "FRA") Class 2 track safety standards with a maximum gross weight limitation of not less than 286,000 lbs. per car and City shall maintain the Track in such condition and in compliance with all Legal Requirements (as hereinafter defined below). City shall also maintain all grade crossing signal equipment on the Track in accordance with all applicable Legal Requirements (as defined in Section 9.1).

Section 3.3. City, in its sole discretion, may contract with a third party to perform City's maintenance obligations hereunder, provided, however, City shall remain responsible for any obligations of City under this Agreement that may be performed by any such contractor.

Section 3.4. Railroad shall notify City in writing of any deficiencies in City's maintenance of the Track when such deficiencies are reasonably discovered by Railroad, and City shall, as soon as practicable, but in any event not more than thirty (30) days after its receipt of such notice, or in the case of an imminent safety hazard and/or condition which renders the Track impassable, within forty-eight (48) hours, commence necessary repairs and maintenance and shall proceed to complete same with reasonable diligence.

Section 3.5. If the use of the Track is at any time interrupted or traffic thereover is delayed for any cause whatsoever, City shall, with reasonable diligence, restore the Track for the passage of trains. Railroad shall not have nor make any claim against City for loss, damage, loss of business or expenses of any kind resulting from such interruption or delay.

Section 3.6. City shall be bound to use only reasonable and customary care, skill and diligence in the maintenance, repair and renewal of the Track and, Railroad shall not, by reason of City's performing or failing, or neglecting to perform any maintenance, repair or renewal of the Track, have or make against City, its officers, agents or employees, any claim or demand for loss, damage, destruction, injury or death whatsoever resulting from any defect in the Track or City's performance, failure or neglect, except as provided otherwise in Section 11 herein.

Section 3.7. Subject to the provisions of Section 8.1 herein, Railroad shall have the right to enter upon the Track and make inspections to determine compliance with the terms of this Agreement. In no event shall Railroad be obligated to make any such inspections, and Railroad shall not be liable for any failure to make any such inspections or failure to identify any matters that are not in compliance with this Agreement. In no event shall Railroad's conducting of inspections be deemed to result in a waiver of City's compliance with any terms of this Agreement.

Section 3.8. City shall be responsible for reporting of grade crossings and structures inventory and any other similar information as may be required by the FRA or any other governmental body having jurisdiction over such matters.

SECTION 4 **COMPENSATION**

Section 4.1. For so long as City permits Railroad reasonable use of the Track, as compensation for Railroad's use of the Track, Railroad shall pay to City annually at the beginning of each calendar year a fee of Fifteen Thousand Dollars (\$15,000) (hereinafter referred to as the "Annual Fee") which shall be payable regardless of Railroad's use of the Track during that year.

Section 4.2.

A. The Annual Fee shall be subject to adjustment on January 1 of each year beginning January 1, 2011 in accordance with changes in the Consumer Price Index for Wage Earners and Clerical Workers, series CWUR0000SA0 (hereinafter referred to as "CPI-W"). The Annual Fee set forth in Section 4.1 shall be revised by calculating the percentage of increase or decrease for the year to be revised based on the final index of the most recent July as related to the final index of the previous July and applying this percentage of increase or decrease to the current Annual Fee to be revised. The resulting adjusted Annual Fee shall hereinafter be referred to as "the Revised Annual Fee."

By way of example, assuming "A" to be the CPI-W final index figure for July 1, 2009; "B" to be the CPI-W final index figure for July, 2010; and "C" to be the current Annual Fee to be escalated; the Revised Annual Fee effective January 1, 2011 would be determined by the following formula:

$$B/A \times C = \text{Revised Annual Fee, Rounded to Nearest Whole Cent}$$

B. In the event that publication of the CPI-W is discontinued, an appropriate substitute for determining the percentage of increase or decrease shall be negotiated by the parties hereto. In the absence of agreement, the matter shall be submitted to arbitration in accordance with Section 16 herein.

C. Under no circumstances shall the Revised Annual Fee paid by Railroad to City be less than the Annual Fee in effect on the date of this Agreement.

Section 4.3.

A. Railroad agrees that as part of the consideration for obtaining City's permission to use the Track herein, Railroad shall, subject to Legal Requirements, as of the Effective Date and during the term of this Agreement, permanently relocate any interchange receipt operations between Railroad and another rail carrier at Richland Junction to an alternate interchange location except that Railroad may, in emergency situations only, interchange cars at Richland Junction. For purposes of this provision, an emergency situation includes, but is not limited to, the following: Force Majeure events or other Acts of God; movement of High or Wide loads; movement or handling of rail security-sensitive materials (as such term is defined in 49 CFR Part 1580, as amended, supplemented or replaced) in compliance with Legal Requirements or other safety requirements; track or other mechanical conditions necessitating a change in interchange location. Except as required by law or as provided in this Section 4.3.A, Railroad shall not, during the term of this Agreement, enter any agreement to deliver cars in interchange to any other railroad at Richland Jct.

B. City intends to construct a public street, called Center Parkway, at the location of Richland Junction. Railroad further agrees to provide easements and rights of way necessary to complete Center Parkway in exchange for compensation as defined in Section 18.

C. Railroad further agrees that if the design of Center Parkway requires an at-grade crossing of a track owned or used by Railroad, Railroad shall not oppose installation of a crossing designed in compliance with the current version of the Manual on Uniform Traffic Control Devices or any other applicable Legal Requirements, with the appropriate traffic control system to be used at the crossing to be determined by an engineering study involving both the City and Railroad representatives. In the event that both City and Railroad representatives jointly agree as to the appropriate traffic control system to be used at the crossing, Railroad shall execute a waiver of hearing document to the Washington State Utilities and Transportation Commission regarding the proposed crossing.

Section 4.4. City acknowledges that the compensation provided for in this Section 4 shall be the sole consideration for the right to use the Track, and in no event shall City impose any additional charges, tariffs, or surcharges on Railroad or any customer or receiver of Railroad as a condition of use of the Track for the provision of rail transportation service except to the extent expressly set forth below. Notwithstanding the foregoing, City may assess additional charges, tariffs, or surcharges for maintenance, operating and dispatching costs associated with the Track if all of the following conditions are satisfied: (i) City provides Railroad with ninety (90) days advance written notice of the proposed charges, tariffs or

surcharges and detailed information concerning City's costs, including the deficit not covered by the then current Annual Fee; and (ii) City, Railroad and any other users of the Track are not able to negotiate, within sixty (60) days of City providing notice in (i) above, an updated Annual Fee in lieu of the proposed charges to the mutual satisfaction of the parties. The increase in the updated Annual Fee as provided in this Section 4.4, shall not exceed Railroad's proportionate share of the deficit not covered by the Annual Fee prior to update. Railroad's proportionate share shall be calculated by comparing the total number of cars handled by Railroad over the Track to the total number of cars handled by all users over the Track for the twelve (12) full months prior to City's notification to Railroad of its intent to increase the Annual Fee.

SECTION 5 **BILLING AND PAYMENT**

Section 5.1. City shall render to Railroad a bill for the Annual Fee.

Section 5.2. Upon reasonable request by City, Railroad shall furnish to City, within sixty (60) days of receiving such request, a statement of the number of loaded and empty cars handled by Railroad over all or any portion of the Track during the previous twelve (12) months. Notwithstanding the foregoing, City shall only be entitled to make one request for such car information each calendar year during the term of this Agreement.

Section 5.3. All payments called for under this Agreement shall be made by Railroad within thirty (30) days after receipt of a bill therefor except for any claims or demands for payment pursuant to Section 11 of this Agreement. No payment shall be withheld because of any dispute as to the correctness of items in any bill rendered and any discrepancies reconciled between the parties hereto shall be adjusted in the accounts of a subsequent month. In the event that Railroad shall fail to pay any monies due to City within thirty (30) days after the invoice date, Railroad shall pay interest on such unpaid sum of twelve percent (12%), or the maximum rate permitted by law, whichever is less.

Section 5.4. The records of each party, insofar as they pertain to matters covered by this Agreement, shall be open at all reasonable times to inspection by the other party for a period of three (3) years from the date of billing.

Section 5.5. For purposes of this Agreement, the terms "cost," "costs," "expense" and "expenses" shall include actual labor and material costs together with the surcharges, overhead percentages and equipment rentals as specified by City at the time any work is performed for Railroad, which surcharges, overhead percentages and equipment rentals shall be reasonable and consistent with City's then-current standard billing practice, procedures, rates and schedules. City's overhead percentages shall not exceed sixty percent (60%) during the term of this Agreement without Railroad's review and approval.

SECTION 6 **ADDITIONS, RETIREMENTS AND ALTERATIONS**

Section 6.1. City, from time to time, and at its sole cost and expense, may make such changes in, additions and improvements to, and retirements from the Track as shall, in its

judgment, be necessary or desirable for the economical or safe operation thereof, or as shall be required by any law, rule, regulation or ordinance promulgated by any governmental body having jurisdiction. Such additions and improvements shall become part of the Track and such retirements shall be excluded from the Track.

Section 6.2. If Railroad requests City to make changes in or additions or improvements to the Track required to accommodate Railroad's operations thereover, and Railroad agrees to reimburse City therefor, and City determines that the requested improvements will not adversely impact City's economic development goals, then City shall make such changes, additions or improvements to the Track and Railroad shall pay to City the cost thereof, including the annual expense, if any, of maintaining, repairing and renewing such additional or altered facilities. Any facilities other than the Track, which are exclusively funded by Railroad as provided for herein, shall be for the exclusive use of Railroad and City shall not allow any other party access to the facility without Railroad's prior written agreement.

SECTION 7

TERM

Section 7.1. This Agreement shall take effect on the date hereof and shall continue in full force and effect for three (3) years from the date hereof (hereinafter referred to as the "Initial Term") and shall automatically renew for successive one (1) year periods thereafter, absent termination as provided in Section 14.

SECTION 8

OPERATIONS

Section 8.1. Railroad agrees that entry to and exit from the Track shall be controlled by City or any contractor or admittee designated by City. City shall require that any entity allowed by City to control operations thereover shall be required to ensure that the trains, locomotives and cars of all users of the Track shall be operated thereon and thereover without prejudice or partiality and in such manner as will afford the safest and the most economical and efficient movement of all traffic over the Track. Except to the extent prohibited by law, City reserves the right at any time by sixty (60) days prior written notice to Railroad and any other user or users of the Track to assume coordination of operations over the Track consistent with the terms of this Section 8.1.

Section 8.2. Railroad shall provide, at its sole cost and expense, all locomotives, railcars, other rolling stock and transportation equipment, personnel, fuel and train supplies necessary for Railroad to provide safe and adequate rail transportation to the Industries. Railroad shall also provide, at its sole cost and expense, all radios and other communication facilities as necessary to comply with the regulations of the FRA. Railroad shall be solely responsible for all car hire charges and mileage allowances on cars in Railroad's account handled over the Track.

Section 8.3. City, at its sole cost and expense, shall provide all necessary switch locks for use in the operation of the Track. City shall provide at no charge a reasonable number of keys for such switch locks to Railroad and any other user or users of the Track.

Section 8.4. Railroad, at its sole cost and expense, shall perform or cause to be performed any repairs required to make locomotives, cars or other equipment in the custody or control of Railroad on the Track comply with Legal Requirements (as defined in Section 9.1).

Section 8.5. City shall not place, permit to be placed or allow to remain, any permanent or temporary material, structure, pole, or other obstruction within eight and one-half (8-1/2) feet laterally from the centerline of straight track (nine and one-half (9-1/2) feet on either side of the centerline of curved track) or within twenty-three (23) feet vertically from the top of the rail of any track (hereinafter referred to as "Minimal Clearances"), provided that if any Legal Requirements (as defined in Section 9.1) require greater clearances than those provided for in this Section 8.5, City shall comply with such Legal Requirements. However, vertical or lateral clearances which are less than the Minimal Clearances but are in compliance with Legal Requirements shall not be a violation of this Section, so long as City complies with the terms of any such Legal Requirements.

Section 8.6. Railroad shall not place or allow to be placed any rail car within two hundred fifty (250) feet of either side of any at-grade crossing on the Track. Railroad shall not place or permit to be placed on the City's right-of-way any permanent or temporary structure of any kind whatsoever without the prior written consent of City, which consent may be withheld at City's sole discretion. City shall require any other user or users of the Track to comply with the requirements of this Section 8.6.

Section 8.7. Railroad and City agree that with respect to the at-grade road crossings on the Port of Benton's track between the proposed Center Parkway crossing at Richland Junction and SR 240 (Vantage Highway) inclusive, Railroad shall use reasonable efforts to minimize its operations over such crossings during peak highway traffic times Monday through Friday. City acknowledges and understands that Railroad's compliance with its common carrier obligations may, from time to time, require operations over such crossings during peak highway traffic times. Railroad agrees to use reasonable efforts to meet its obligations under this Section 8.7.

Section 8.8. In the event that any user of the Track, including Railroad, provides notice to the City of any violation of Legal Requirements by any user of the Track, including Railroad, or any violation of the terms of this Agreement or the applicable agreement between such user and City (including without limitation, any applicable obligation to control entry to and exit from the Track or operations thereon or thereover without prejudice or partiality and in such manner as will afford the safest and the most economical and efficient movement of all traffic over the Track), City shall conduct an investigation into such alleged violation, and if, in the reasonable judgment of City, Railroad or such user shall be in violation of applicable Legal Requirements or the terms of this Agreement or such user's agreement with the City, City shall require Railroad or such user as the case may be to cure such conduct in accordance with this Agreement or the applicable agreement, and unless and until same shall be cured in compliance with this Agreement or the applicable agreement, City shall bar Railroad or such user as the case may be from use of the Track.

SECTION 9
COMPLIANCE WITH LAWS

Section 9.1. The parties agree to comply with all applicable provisions of law, statutes, regulations, ordinances, orders, covenants, restrictions and decisions of any governmental body or court having jurisdiction (hereinafter collectively referred to as "Legal Requirements") relating to this Agreement and/or use of the Track. Each party hereto shall indemnify, protect, defend and hold harmless the other party and its officers, agents and employees from and against all fines, penalties, and liabilities imposed on the other party under such laws, rules and regulations by any such public authority or court having jurisdiction when attributable to the failure of the first party to comply with its obligations in this regard.

Section 9.2. It is the understanding of the City and the Railroad that the Track is industry track. Unless otherwise required by law, Railroad does not intend to and will not seek or obtain any approval, authorization or exemption from the STB for its use or discontinuance of use of the Track.

SECTION 10
CLEARING OF WRECKS

Section 10.1. If trains, locomotives, cars or equipment of Railroad are wrecked or derailed on the Track and require rerailling, wrecking service or wrecking train service, Railroad shall be responsible for the performance of such service, including the repair and restoration of roadbed, track and structures, provided however, that if Railroad fails to restore the Track to service within a reasonable period of time, not to exceed forty-eight (48) hours, after such wreck or derailment, City, at its option, may arrange for the performance of such service, including repair and restoration of roadbed, track and structures, and Railroad shall reimburse City for the cost and expense thereof in accordance with Section 5 herein. Any other cost, liability and expense, including without limitation loss of, damage to, and destruction of any property whatsoever and injury to or death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting from such wreck or derailment, shall be determined in accordance with the provisions of Section 11 hereof. All locomotives, cars and equipment and salvage from the same so picked up and removed which are owned by or under the management and control of or used by Railroad at the time of such wreck shall be promptly delivered to Railroad.

Section 10.2. If trains, locomotives, cars or equipment of any admittee of City, other than Railroad, are wrecked or derailed on the Track and require rerailling, wrecking service or wrecking train service, City shall ensure the performance of such service, including the repair and restoration of roadbed, track and structures, provided however, that if City fails to have the Track restored to service within a reasonable period of time, not to exceed seventy-two (72) hours, after such wreck or derailment, Railroad, at its option, may arrange for the performance of such service, including repair and restoration of roadbed, track and structures, and City shall reimburse Railroad for the cost and expense thereof in accordance with Section 5 herein. In order for Railroad's costs to be eligible for reimbursement, Railroad shall provide at least twenty-four (24) hours written notice to City and all other users of the Track of Railroad's intent

to mobilize resources to complete the work. City will be responsible for coordinating resources of various entities to complete the repair and avoid duplication of effort. Any other cost, liability and expense, including without limitation loss of, damage to, and destruction of any property whatsoever and injury to or death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting from such wreck or derailment, shall be determined in accordance with the provisions of Section 11 hereof. All locomotives, cars and equipment and salvage from the same so picked up and removed which are owned by or under the management and control of or used by City or its admittee at the time of such wreck shall be promptly delivered to City or its admittee, as the case may be.

SECTION 11 LIABILITY

Section 11.1

A. TO THE FULLEST EXTENT PERMITTED BY LAW, RAILROAD SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS CITY AND CITY'S OFFICERS, EMPLOYEES, AGENTS, CONTRACTORS AND INVITEES (HEREINAFTER COLLECTIVELY REFERRED TO AS "CITY INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS AND LIABILITIES OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON OR ENTITY, INCLUDING, WITHOUT LIMITATION, PERSONAL INJURIES, DEATHS, DAMAGE OR DESTRUCTION OF PROPERTY AND DAMAGE TO OR DESTRUCTION OF THE ENVIRONMENT WHATSOEVER, INCLUDING WITHOUT LIMITATION LAND, AIR, WATER, WILDLIFE, AND VEGETATION (HEREINAFTER COLLECTIVELY REFERRED TO AS "CLAIMS"), TO THE EXTENT SUCH CLAIMS ARE PROXIMATELY CAUSED BY (I) THE BREACH OF THE TERMS OF THIS AGREEMENT BY RAILROAD AND/OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES, OR (II) THE NEGLIGENCE, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF RAILROAD OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES.

B. TO THE FULLEST EXTENT PERMITTED BY LAW, CITY SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS RAILROAD AND RAILROAD'S OFFICERS, EMPLOYEES, AGENTS, CONTRACTORS AND INVITEES (HEREINAFTER COLLECTIVELY REFERRED TO AS "RAILROAD INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON OR ENTITY, TO THE EXTENT SUCH CLAIMS ARE PROXIMATELY CAUSED BY (I) THE BREACH OF THE TERMS OF THIS AGREEMENT BY CITY AND/OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES, OR (II) THE NEGLIGENCE, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF CITY OR ITS OFFICERS, AGENTS, CONTRACTORS OR EMPLOYEES.

C. UPON WRITTEN NOTICE FROM RAILROAD OR CITY, THE OTHER PARTY AGREES TO ASSUME THE DEFENSE OF CLAIMS OR ANY LAWSUIT OR OTHER PROCEEDING BROUGHT AGAINST ANY INDEMNITEE OF THE OTHER PARTY BY ANY ENTITY, RELATING TO ANY MATTER COVERED IN THIS AGREEMENT FOR WHICH THE OTHER PARTY HAS AN OBLIGATION TO ASSUME

LIABILITY FOR AND/OR SAVE AND HOLD HARMLESS SUCH INDEMNITTEE. THE OTHER PARTY SHALL PAY ALL COSTS INCIDENT TO SUCH DEFENSE, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES, INVESTIGATOR'S FEES, LITIGATION AND APPEAL EXPENSES, SETTLEMENT PAYMENTS, AND AMOUNTS PAID IN SATISFACTION OF JUDGMENTS.

D. NOTWITHSTANDING ANY PROVISION TO THE CONTRARY HEREIN, NEITHER PARTY SHALL BE LIABLE FOR ANY PUNITIVE OR EXEMPLARY DAMAGES ARISING OUT OF THE CONDUCT OF AN INDEMNIFIED PARTY OR THE EMPLOYEES, AGENTS, OFFICERS, OR CONTRACTORS OF AN INDEMNIFIED PARTY.

SECTION 12 **INSURANCE**

Section 12.1.

A. Railroad shall, at its sole cost and expense, procure and maintain during the term of this Agreement the following insurance coverage:

1. Commercial General Liability insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$2,000,000 each occurrence and an aggregate limit of at least \$4,000,000. Coverage must be purchased on a post-1998 ISO occurrence form or equivalent and include coverage for, but not limited to:
 - Bodily Injury and Property Damage
 - Personal Injury and Advertising Injury
 - Fire legal liability
 - Products and completed operations

This policy shall also contain the following endorsements, which shall be indicated on the certificate of insurance:

- The employee and workers compensation-related exclusions in the above policy shall not apply with respect to claims related to railroad employees.
- The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within fifty (50) feet of the Track.
- Any exclusion related to explosion, collapse and underground hazards shall be removed.

No other endorsements limiting coverage may be included on the policy with regard to Railroad's use of the Track under this Agreement.

2. Business Automobile Insurance. This insurance shall contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to:
 - Bodily injury and property damage
 - Any and all vehicles owned, used or hired
 3. Workers' Compensation and Employers Liability insurance including coverage for, but not limited to:
 - Railroad's statutory liability under the worker's compensation laws of the State of Washington. If optional under State law, the insurance must cover all employees anyway.
 - Employers' liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.
 4. Excess Liability insurance in an amount not less than \$10,000,000 each occurrence and \$10,000,000 aggregate limit.
- B. Railroad shall also comply with the following requirements:
1. Where allowable by law, all policies (applying to coverage listed above) shall contain no exclusion for punitive damages and certificates of insurance shall reflect that no exclusion exists.
 2. Railroad agrees to waive its right of recovery against City and Indemnitees under its Commercial General Liability, Automobile Liability, and Workers' Compensation/Employers Liability insurance coverages.
 3. Railroad's insurance policies through policy endorsement must include wording which states that the policy shall be primary and non-contributing with respect to any insurance carried by City. The certificate of insurance must reflect that the above wording is included in evidenced policies.
 4. All policy(ies) required above (excluding Workers' Compensation) shall include a severability of interest endorsement and shall name City as an additional insured by endorsement using additional insured form CG 26 07 04 with respect to Railroad's use of the Track under this Agreement. Severability of interest and naming City as an additional insured shall be indicated on the certificate of insurance.

5. Except if Railroad is a Class I rail carrier as defined under the regulations of the STB, Railroad is not allowed to self-insure without the prior written consent of City. If granted by City, any deductible, self insured retention or other financial responsibility for claims shall be paid directly by Railroad. Any and all City liabilities that would otherwise, in accordance with the provisions of this Agreement, be covered by Railroad's insurance shall be paid by Railroad as if Railroad elected not to include a deductible, self-insured retention or other financial responsibility for claims.
6. Prior to entering upon the Track, Railroad shall furnish to City an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify City in writing at least thirty (30) days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision shall be indicated on the certificate of insurance. In the event of a claim or lawsuit involving City arising out of this Agreement, Railroad will make available any required policy covering such claim or lawsuit.
7. Any insurance policy shall be written by a reputable insurance company acceptable to City or with a current Best's Guide Rating of A and Class VII or better, and authorized to do business in the State of Washington.
8. Railroad represents that this Agreement has been thoroughly reviewed by Railroad's insurance agent(s)/broker(s), who have been instructed by Railroad to procure the insurance coverage required by this Agreement. Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above.
9. Not more frequently than once every five (5) years, City may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.
10. Failure to provide evidence as required by this section shall entitle, but not require, City to terminate this Agreement immediately. Acceptance of a certificate that does not comply with this section shall not operate as a waiver of Railroad's obligations hereunder.
11. The fact that insurance (including, without limitation, self-insurance) is obtained by Railroad shall not be deemed to release or diminish the liability of Railroad including, without limitation,

liability under the indemnity provisions of this Agreement. Damages recoverable by City shall not be limited by the amount of the required insurance coverage.

C. City shall waive in writing the above insurance requirements if Railroad is a Class I rail carrier as defined in the regulations of the STB.

SECTION 13 **ENVIRONMENTAL**

Section 13.1

A. Railroad shall strictly comply with all federal, state and local environmental laws and regulations in its use of the Track, including, but not limited to Environmental Laws. Railroad shall not maintain a treatment, storage, transfer or disposal facility, or underground storage tank, as defined by Environmental Laws, anywhere on the Track. Railroad shall not release or suffer the release of oil or hazardous substances, as defined by Environmental Laws, anywhere on the Track. Any such release shall not be considered a default of this Agreement but shall be remedied as described below.

B. In the event of any such release described in Section 13.1.A., then Railroad shall provide immediate notice to City's Contract Officer at (509) 942-7327 of any release of hazardous substances on or from the Track, violation of Environmental Laws, or inspection or inquiry by government authorities charged with enforcing Environmental Laws with respect to Railroad's use of the Track. Railroad shall use reasonable efforts to promptly respond to any release on or about the Track. Railroad also shall give City immediate notice of all measures undertaken on behalf of Railroad to investigate, remediate, respond to or otherwise cure such release or violation.

C. In the event that City receives notice from Railroad or otherwise learns of a release or violation of Environmental Laws on the Track which occurred or may occur during the term of this Agreement for which Railroad is responsible pursuant to this Agreement, City may require Railroad, at Railroad's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure or prevent such release or violation affecting the Track.

D. Railroad shall promptly report to City in writing any known conditions or activities on the Track which create a risk of harm to persons, property or the environment and shall take whatever action is necessary to prevent injury to persons or property arising out of such conditions or activities; provided, however, that Railroad's reporting to City shall not relieve Railroad of any obligation whatsoever imposed on it by this Agreement. Railroad shall promptly respond to City's request for information regarding said conditions or activities.

SECTION 14 **TERMINATION**

Section 14.1. Railroad may terminate this Agreement at any time after one year from the Effective Date, by giving City not less than six (6) months' written notice of

termination. Upon expiration or termination of this Agreement consistent with the terms herein, all rights of Railroad to use the Track shall cease.

Section 14.2. Notwithstanding any other provision of this Agreement except Section 14.3, at any time after the Effective Date, City may terminate this Agreement if Railroad shall default on or breach any of its material obligations hereunder, including but not limited to timely payment of compensation to City pursuant to Section 4.1, and Railroad fails to cure such default or breach within thirty (30) days of receipt of written notice from City specifying such default or breach.

Section 14.3. Notwithstanding any other provision of this Agreement, at any time after the Effective Date, City may terminate this Agreement if Railroad fails to comply with its material obligations under Section 4.3 herein and Railroad does not cure such failure within thirty (30) days of receipt of written notice from City specifying such failure.

Section 14.4. Termination of this Agreement shall not relieve or release either party hereto from any obligation assumed or from any liability which may have arisen or been incurred by either party under the terms of this Agreement prior to the termination hereof. The Annual Fee paid by Railroad to City pursuant to Section 4.1 shall be non-refundable if termination of this Agreement becomes effective after June 1 of the year to which the Annual Fee applies.

SECTION 15 **NOTICES**

Section 15. Any notice required or permitted to be given hereunder by one party to the other shall be in writing and the same shall be given and shall be deemed to have been served and given if (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address for such party specified below, or to such other address as the party to be notified may designate by giving the other party no less than thirty (30) days' advance written notice for such change in address:

If to City:	Community Development Services Attn: Horn Rapids Rail Spur City of Richland 975 George Washington Way P.O. Box 190, MS #18 Richland, WA 99352 (509) 942-7593
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If to Railroad:

General Manager Joint Facilities
1400 Douglas Street
MS 1180
Omaha, Nebraska 68179
(402) 544-2292

SECTION 16 **ARBITRATION**

Section 16.1. Any dispute arising between the parties hereto with respect to any of the provisions of this Agreement which cannot be settled by the parties themselves shall be resolved in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as such rules may be amended from time to time, and as shall be applied with reference to the customs and practices of the railroad industry. Any such arbitration shall be held in Richland, Washington or at such other location as may be mutually acceptable to the parties hereto. The decision of the arbitrator or arbitration panel shall be final and conclusive upon the parties hereto. A final decision and award of the arbitration panel shall be enforceable in any court of competent jurisdiction in the United States of America. Each party to the arbitration shall pay the compensation, costs, fees and expenses of its own arbitrator, witnesses, exhibits and counsel. The compensation, costs and expenses of any neutral arbitrator, if any, shall be borne equally by the parties hereto. The arbitrator or arbitration panel shall not have the power to (a) award punitive or consequential damages, (b) determine violations of antitrust or criminal laws, or (c) reform the terms of this Agreement, in whole or in part.

SECTION 17 **MISCELLANEOUS**

Section 17.1. This Agreement expresses the entire agreement between the parties and supersedes all prior oral or written agreements, commitments, or understandings with respect to the matters provided for herein, provided however, no modification of this Agreement shall be binding upon the party affected unless set forth in writing and duly executed by the affected party.

Section 17.2. This Agreement shall be binding upon and inure to the benefit of City and Railroad, and shall be binding upon the successors and assigns of Railroad, subject to the limitations hereinafter set forth. Railroad may not assign its rights under this Agreement or any interest therein, or attempt to have any other person assume its obligations in whole or in part under this Agreement, without the prior written consent of City which consent may be withheld; in City's sole discretion; provided, however, no such consent shall be required where assignment occurs as a result of a sale or transfer of all or substantially all of the assets of Railroad pursuant to merger, sale, consolidation, combination, or order or decree of governmental authority.

Section 17.2.1. Notwithstanding Section 17.2 of this Agreement, UP shall have the right, at its sole discretion and upon ten (10) days advance written notice to the City, to name an agent to handle UP rail traffic to and from Industries located along the Track. While handling

such UP traffic, for the purposes of this Agreement, any agent so named by UP shall be considered to be UP, and City may enforce the provisions of this Agreement against UP for the acts of such agent. Regardless of whether or not UP names an agent as provided for in this Section 17.2.1, UP shall continue to have the right to handle part or all of its own traffic to Industries.

Section 17.3. If fulfillment of any provision hereof shall be declared invalid or unenforceable under applicable law, such provision shall be ineffective only to the extent of such invalidity or unenforceability, without invalidating or rendering unenforceable the remainder of such provision or the remaining provisions of this Agreement, which shall remain in full force and effect.

Section 17.4. Section headings used in this Agreement are inserted for convenience of reference only and shall not be deemed to be a part of this Agreement for any purpose.

Section 17.5. This Agreement shall be governed and construed in accordance with the laws of the State of Washington. It is expressly agreed that no party may sue or commence any litigation against the other party unless such legal proceeding is brought in state court in Washington.

Section 17.6. No modification, addition or amendment to this Agreement shall be effective unless and until such modification, addition or amendment is in writing and signed by the parties hereto. This Agreement is made and intended for the benefit of the parties hereto and their respective successors and permitted assigns and for no other parties.

Section 17.7. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

Section 17.8. The parties each represent and warrant to each other that neither has employed a broker in connection with this transaction. In the event there is a claim against either party hereto with respect to any broker whatsoever other than as set forth in this Section 17.8, the party whose action gives rise to the claim for commission shall indemnify the other party against any liability, damage, cost or fee in connection with such claim, including, without limitation, attorneys' fees and costs.

Section 17.9. The failure of either of the parties hereto in one or more instances to insist upon strict performance or observation of one or more of the covenants or conditions hereof, or to exercise any remedy, privilege, or option herein conferred upon or reserved to such party, shall not operate and shall not be construed as a relinquishment or waiver for the future of such covenant or condition or of the right to enforce the same or to exercise such privilege, option, or remedy, but the same shall continue in full force and effect.

Section 17.10. Railroad shall, on the last day of the term, or upon any earlier termination of this Agreement, peaceably and in an orderly manner vacate the Track free of any property of Railroad or third parties placed by Railroad thereon. Railroad shall, if not in default

hereunder, remove its equipment, goods, trade fixtures and effects and those of all persons claiming by, through or under it, provided that such removal does not cause irreparable damage to the Track. Any personal property not used in connection with the operation of the Track and belonging to Railroad, if not removed at the termination hereof, and if City shall so elect, shall be deemed abandoned and become the property of City without any payment or offset therefor. City may remove such property from the Track and store it at the risk and expense of Railroad if City shall not so elect. Railroad shall repair and restore all damage to the Track caused by the removal of any of Railroad's equipment and personal property. Railroad, if requested by City, shall remove all signs placed on the Track by Railroad and restore the portion of the Track on which they were placed substantially to the same condition as immediately prior to installation thereof.

Section 17.11. The failure of Railroad to vacate the Track on the expiration or termination of this Agreement as required pursuant to the terms of this Agreement and the subsequent holding over by Railroad, with or without the consent of City, shall result in the creation of a tenancy at will at a monthly fee equal to one hundred fifty percent (150%) of the then-applicable Annual Fee divided by twelve (12), for each month or portion thereof in which the Railroad holds over, payable on the tenth (10th) day of the following month. This provision does not give Railroad any right to hold over at termination of this Agreement, and all other terms and conditions of this Agreement shall remain in force during any tenancy at will created by any holding over by Railroad.

SECTION 18

RELOCATION AND COMPENSATION

Section 18.1. Railroad has secured all agreements necessary with Tri-City Railroad Company, LLC ("Tri-City Railroad") to permanently relocate the UP/Tri City Railroad interchange ("Interchange") from Richland Junction and the path of the Center Parkway. Pursuant to the Tri-City Railroad agreements, Railroad shall relocate its Interchange with Tri-City Railroad within thirty (30) days of the effective date of this Agreement.

Section 18.2. Within sixty (60) days after relocation of the Interchange, City shall pay to Railroad \$2,100,000 (which constitutes \$2,000,000 for the relocation of the Interchange and offset for Railroad's increased operating expense and \$100,000 for the easement, as described below).

Section 18.3. The payment described in Section 18.2 provides compensation to the Railroad for the following:

- a. The Railroad's estimated cost of increased operating expense and to replace rail assets lost due to the relocation of the Interchange.
- b. A roadway and utility easement conveyed by the Railroad to the City of Kennewick for the completion of Center Parkway across Railroad's property at Richland Junction as described below.

- c. Salvage by the City of all Railroad Track Materials (defined below) located on Railroad’s property at Richland Junction west of the Richland Junction switch between MP 18.8 and the end of track at MP 19.5.

Section 18.4 Railroad shall convey an easement in width not to exceed eighty (80) feet to City for the Center Parkway across Railroad’s right of way. The easement shall allow for curb cuts on each side of the road to serve Railroad’s adjacent property. The easement shall be delivered to City no later than the date upon which the Interchange operations are relocated away from the Center Parkway.

Section 18.5 As of the date Interchange operations are relocated away from Richland Junction and the Center Parkway, the City will assume ownership and control of the Railroad Track Materials. Railroad Track Materials is defined to include rail, ties, switches and other track materials which make up the current interchange track between MP 18.8 and the end of track at MP 19.5 of Railroad’s Kalan Industrial Lead west of the Richland Junction switch. At its sole risk, cost and discretion the City may remove, salvage or reuse all Railroad Track Materials; provided, however, that the City first obtains a right of entry to Railroad’s property from Railroad.

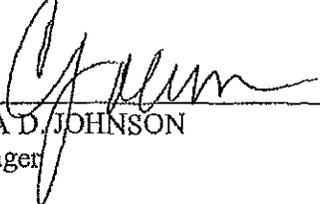
Section 18.6 Subsequent to relocation of the Interchange, Railroad shall not reestablish an interchange operation at Richland Junction or the Center Parkway location, or any portion thereof, or sell or lease property at Richland Junction or the Center Parkway location to another railroad for the purposes of establishing a switching or interchange operation.

Section 18.7 Notwithstanding any termination of this Agreement, Section 18.6 above shall remain in full force and effect until City, at its sole election, shall agree to any proposed change.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate the day and year first herein above written.

**CITY OF RICHLAND,
WASHINGTON**

**UNION PACIFIC
RAILROAD COMPANY**



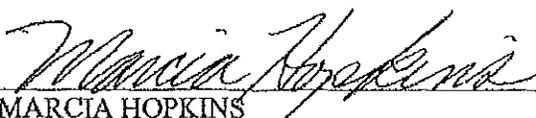
CYNTHIA D. JOHNSON
City Manager



George M. Sturm
General Manager Joint Facilities

ATTEST:

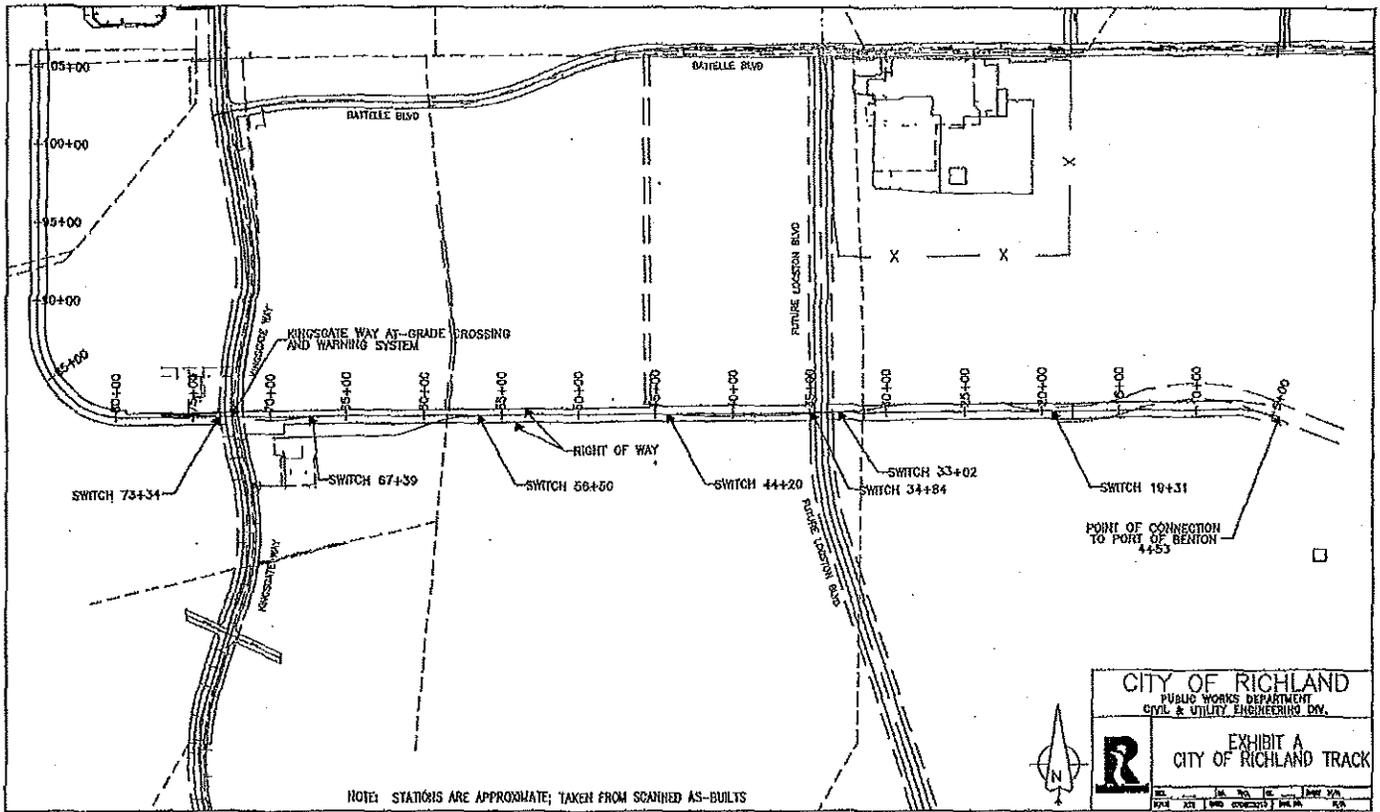
APPROVED AS TO FORM:



MARCIA HOPKINS
City Clerk



THOMAS O. LAMPSON
City Attorney





City of Richland
Public Works Administration & Engineering
840 Northgate Drive
Richland, WA 99352
(509) 942-7500

July 22, 2010

Mr. Randolph V. Peterson, Manager
Tri-City and Olympia Railroad
10 N. Washington Avenue
PO Box 6106
Kennewick, WA 99336

**SUBJECT: HORN RAPIDS INDUSTRIAL TRACK USE AGREEMENT
TERMINATION NOTICE FOR TEMPORARY SERVICE AGREEMENT**

Dear Mr. Peterson:

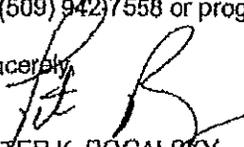
Enclosed with this letter is the City's Standard Form Railroad Track Use Agreement that will describe the terms of use and operations on the City-owned track in the Horn Rapids Industrial Park. This agreement was developed over the past nine months with input from your company and other potential railroad operators. It is the City's intent through this agreement to establish a safe and fair operating environment on which multiple railroads may serve client businesses. The City also intends to use this agreement to create a clear path to its goal of completing Center Parkway.

The City intends that railroad operations on its track under the new agreement will begin no later than September 15, 2010. This letter is notice that the Temporary Service Agreement executed in December, 2001, is hereby terminated as of September 15, 2010.

As reflected in the Agreement any prior permission or agreement for rail operations on the City's track is superseded, and therefore terminated on September 15, 2010, and is reestablished by execution of the new Agreement. Enclosed are two (2) original copies of the Track Use Agreement. Please execute both copies and send them back to me. The City will then send one (1) fully executed copy of the agreement back for your files.

Please contact me to discuss any issues related to the Track Use Agreement. The Agreement will be formalized only after signature by the Tri-City and Olympia Railroad and action by the City Council. Prior to September 15, action by the City Council could occur at any of its regular meetings, scheduled for August 3rd, August 17th and September 7th. Thank you for your attention to this matter. I may be reached at (509) 942-7558 or progalaky@ci.richland.wa.us

Sincerely,


PETER K. ROGALSKY
Public Works Director

c: Cindy Johnson
Bill King
Tom Lampson
Gary Ballew
Craig Levie, Tangent Services

Enclosure

CITY OF RICHLAND
STANDARD FORM RAILROAD TRACK USE AGREEMENT

THIS RAILROAD TRACK USE AGREEMENT (hereinafter referred to as "Agreement") is made and entered into as of this ____ day of _____, 20____ (hereinafter referred to as the "Effective Date") by and between the **CITY OF RICHLAND**, a municipal corporation in the State of Washington (hereinafter referred to as "City") and _____, a _____ corporation and a duly licensed corporation in the State of Washington (hereinafter referred to as "Railroad").

WITNESSETH

WHEREAS, City is the owner of a railroad industrial spur track, commonly known as the Horn Rapids Rail Spur, located at the Horn Rapids Industrial Park in the City of Richland and connected to the Southern Connection of the Hanford Railroad (owned by the Port of Benton, Washington (hereinafter referred to as the "Port"), successor in interest to the United States Department of Energy), as shown on Exhibit A attached hereto (hereinafter referred to as the "Track");

WHEREAS, Railroad operates pursuant to separate agreement(s) over tracks owned by the Port which tracks connect with the Track near Milepost B 37 on the Port's trackage and a portion of which tracks have been used for the interchange of traffic between rail carriers at or near Richland Junction, Washington (hereinafter referred to as "Richland Junction");

WHEREAS, Railroad desires to use the Track for the purpose of providing railroad freight service thereon and thereover to industries located on or adjacent to the Track (hereinafter referred to individually as "Industry" and collectively as "Industries");

WHEREAS, City desires that all railroad interchange operations at Richland Junction be permanently eliminated to facilitate commercial development and improve vehicular traffic movement in the area; and

WHEREAS, City is willing to allow Railroad to use the Track on a non-exclusive basis but only on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the parties, intending to be bound, do hereby agree as follows:

SECTION 1 - GRANT OF USE

Section 1.1. City hereby grants to Railroad non-exclusive permission to operate its trains, locomotives, cars and equipment with its own crews over the Track for the purposes set forth herein. Railroad's use of the Track shall be in common with such other user or users of the Track as City has heretofore admitted, or may at any time in the future admit, to use of all or any portion of the Track, provided that City shall require such user or users to comply with all Legal Requirements (as defined in Section 9.1) applicable to such user's or users' use of the Track.

Subject to the foregoing, City shall retain the exclusive right to grant to other persons the right to use all or any portion of the Track, provided that such use does not unreasonably interfere with the rights granted to Railroad herein.

Section 1.2. The Track shall include, without limitation, the right-of-way, tracks, rails, ties, ballast, other track materials, switches, bridges, grade crossings and any and all other improvements or fixtures affixed to the right-of-way.

Section 1.3. Railroad shall take the Track in an "AS IS, WHERE IS" condition subject to all rights, interests and estates of third parties in and to the Track.

Section 1.4. City represents that it owns or controls the land underlying the Track and that there are no existing easements or encumbrances affecting such land that would interfere with Railroad's rights under this Agreement.

SECTION 2 - PERMITTED USE

Section 2.1. Railroad's use of the Track shall be limited to the movement of goods by rail to and from an Industry via tracks of such Industry that connect to the Track.

Section 2.2. Railroad shall not permit the loading or unloading of railcars on the Track and shall not enter into agreements or arrangements with any person for the storage of empty or loaded railcars on the Track or any portion thereof, without the prior written consent of City.

Section 2.3. Neither party shall use the Track or any portion thereof, for the storage, transload or disposal of any hazardous substances, as defined by the Comprehensive Environmental Response, Compensation and Liability Act, as amended (hereinafter referred to as "CERCLA"), or petroleum or oil as defined by CERCLA, the Resource Conservation and Recovery Act, as amended (hereinafter referred to as "RCRA"), the Clean Water Act, the Oil Pollution Act, and the Hazardous Materials Transportation Act (hereinafter collectively referred to herein as the "Environmental Laws"), provided however, that nothing herein shall preclude Railroad or any other admittee of City from using the Track for the movement of hazardous substances in railcars in the normal course of providing rail transportation service to or from an Industry.

Section 2.4. Neither party shall use nor allow the use of the Track for the transportation of passengers thereon or thereover, provided however, that nothing herein shall preclude Railroad or any other admittee of City from operating a hi-rail vehicle over the Track for the purpose of inspecting the Track.

Section 2.5. Railroad shall not cause or permit any liens to be filed against the Track. In the event any such liens are filed, Railroad shall cause such liens to be released within fifteen (15) days.

Section 2.6. Railroad shall not create, store or allow any waste or nuisance on the Track. Railroad shall neither use nor occupy the Track or any part thereof in violation of Legal

Requirements (as defined in Section 9.1) nor operate or conduct its business in a manner constituting a nuisance of any kind. Railroad shall immediately, on discovery of any unlawful use of the Track, notify City in writing of such activity.

SECTION 3 - MAINTENANCE

Section 3.1. City, at its cost and expense, shall be solely responsible for, and shall have exclusive direction and control over, the maintenance of the Track which shall include, but not be limited to, maintenance of tracks, subgrade, track drainage, grade crossings, grade crossing warning signs and devices, signal boxes, bridges and abutments, culverts, drainage ditches, retaining walls and any fences or barriers that City may erect. City shall also be solely responsible for litter and vegetation control and for keeping the Track sufficiently free and clear of snow and ice to permit railroad operations thereover.

Section 3.2. City shall maintain the Track to not less than Federal Railroad Administration (hereinafter referred to as "FRA") Class 2 track standards with a maximum gross weight limitation of not less than 286,000 lbs. per car. City shall maintain all grade crossing signal equipment on the Track in accordance with all applicable Legal Requirements (as defined in Section 9.1).

Section 3.3. City, in its sole discretion, may contract with a third party to perform City's maintenance obligations hereunder, provided, however, City shall remain responsible for any obligations of City under this Agreement that may be performed by any such contractor.

Section 3.4. Railroad shall notify City in writing of any deficiencies in City's maintenance of the Track and City shall, as soon as practicable, but in any event not more than thirty (30) days after its receipt of such notice, commence necessary repairs and maintenance and shall proceed to complete same with reasonable diligence.

Section 3.5. If the use of the Track is at any time interrupted or traffic thereover is delayed for any cause whatsoever, City shall, with reasonable diligence, restore the Track for the passage of trains. Railroad shall not have nor make any claim against City for loss, damage, loss of business or expenses of any kind resulting from such interruption or delay.

Section 3.6. City shall be bound to use only reasonable and customary care, skill and diligence in the maintenance, repair and renewal of the Track and Railroad shall not, by reason of City's performing or failing, or neglecting to perform any maintenance, repair or renewal of the Track, have or make against City, its officers, agents or employees, any claim or demand for loss, damage, destruction, injury or death whatsoever resulting from any defect in the Track or City's performance, failure or neglect.

Section 3.7. Subject to the provisions of Section 8.1 herein, Railroad shall have the right to enter upon the Track and make inspections to determine compliance with the terms of this Agreement. In no event shall Railroad be obligated to make any such inspections, and Railroad shall not be liable for any failure to make any such inspections or failure to identify any matters that are not in compliance with this Agreement. In no event shall Railroad's conducting

of inspections be deemed to result in a waiver of City's compliance with any terms of this Agreement.

Section 3.8. City shall be responsible for reporting of grade crossings and structures inventory and any other similar information as may be required by the FRA or any other governmental body having jurisdiction over such matters.

SECTION 4 - COMPENSATION

Section 4.1. As compensation for Railroad's use of the Track, Railroad shall pay to City annually at the beginning of each calendar year a fee of Fifteen Thousand Dollars (\$15,000) (hereinafter referred to as the "Annual Fee") which shall be payable regardless of Railroad's use of the Track during that year.

Section 4.2.

A. The Annual Fee shall be subject to adjustment on January 1 of each year beginning January 1, 2011 in accordance with changes in the Consumer Price Index for Wage Earners and Clerical Workers (hereinafter referred to as "CPI-W"). The Annual Fee set forth in Section 4.1 shall be revised by calculating the percentage of increase or decrease for the year to be revised based on the final index of the most recent July as related to the final index of the previous July and applying this percentage of increase or decrease to the current Annual Fee to be revised. The resulting adjusted Annual Fee shall hereinafter be referred to as "the Revised Annual Fee."

By way of example, assuming "A" to be the CPI-W final index figure for July 1, 2009; "B" to be the CPI-W final index figure for July, 2010; and "C" to be the current Annual Fee to be escalated; the Revised Annual Fee effective January 1, 2011 would be determined by the following formula:

$$B/A \times C = \text{Revised Annual Fee, Rounded to Nearest Whole Cent (5 Mills or More Rounds to Next Cent)}$$

B. In the event that publication of the CPI-W is discontinued, an appropriate substitute for determining the percentage of increase or decrease shall be negotiated by the parties hereto. In the absence of agreement, the matter shall be submitted to arbitration in accordance with Section 16 herein.

C. Under no circumstances shall the Revised Annual Fee paid by Railroad to City be less than the Annual Fee in effect on the date of this Agreement.

Section 4.3.

A. Railroad agrees that as part of the consideration for obtaining City's permission to use the Track herein, Railroad shall as of the Effective Date of this Agreement permanently relocate any interchange operations between Railroad and another rail carrier at Richland Junction to an alternate interchange location.

B. The City intends to construct a public street, called Center Parkway, at the location of Richland Junction. Railroad further agrees to provide easements and rights of way necessary to complete Center Parkway in exchange for fair market value compensation as determined by an independent appraisal obtained by the City at the City's sole cost and expense performed in compliance with City and Washington State Department of Transportation right of way acquisition policies and procedures.

C. Railroad further agrees that if the design of Center Parkway requires an at-grade crossing of a track owned or used by Railroad, Railroad shall not oppose installation of a crossing designed in compliance with standards published by the Washington State Department of Transportation. Railroad shall execute a waiver of hearing document for the Washington State Utilities and Transportation Commission regarding the proposed crossing.

SECTION 5 - BILLING AND PAYMENT

Section 5.1. City shall render to Railroad a bill for the Annual Fee.

Section 5.2. Railroad shall furnish to City, within twenty (20) days after the end of each calendar quarter, a statement of the number of loaded and empty cars handled by Railroad over all or any portion of the Track during such quarter. Should Railroad fail to provide the quarterly car count information within forty-five (45) days after the end of a calendar quarter, City may exercise its right to terminate this Agreement as provided in Section 14.3 hereof.

Section 5.3. All payments called for under this Agreement shall be made by Railroad within thirty (30) days after receipt of a bill therefor. No payment shall be withheld because of any dispute as to the correctness of items in any bill rendered and any discrepancies reconciled between the parties hereto shall be adjusted in the accounts of a subsequent month. In the event that Railroad shall fail to pay any monies due to City within thirty (30) days after the invoice date, Railroad shall pay interest on such unpaid sum of twelve percent (12%), or the maximum rate permitted by law, whichever is less.

Section 5.4. The records of Railroad, insofar as they pertain to matters covered by this Agreement, shall be open at all reasonable times to inspection by City for a period of two (2) years from the date of billing.

Section 5.5. For purposes of this Agreement, the terms "cost," "costs," "expense" and "expenses" shall include actual labor and material costs together with the surcharges, overhead percentages and equipment rentals as specified by City at the time any work is performed for Railroad, which surcharges, overhead percentages and equipment rentals shall be reasonable and consistent with City's then-current standard billing practice, procedures, rates and schedules.

SECTION 6 - ADDITIONS, RETIREMENTS AND ALTERATIONS

Section 6.1. City, from time to time, and at its sole cost and expense, may make such changes in, additions and improvements to, and retirements from the Track as shall, in its

judgment, be necessary or desirable for the economical or safe operation thereof, or as shall be required by any law, rule, regulation or ordinance promulgated by any governmental body having jurisdiction. Such additions and improvements shall become part of the Track and such retirements shall be excluded from the Track.

Section 6.2. If Railroad requests City to make changes in or additions or improvements to the Track required to accommodate Railroad's operations thereover, and Railroad agrees to reimburse City therefor, City shall make such changes, additions or improvements to the Track and Railroad shall pay to City the cost thereof, including the annual expense, if any, of maintaining, repairing and renewing such additional or altered facilities.

SECTION 7 - TERM

Section 7.1. This Agreement shall take effect on the date hereof and shall continue in full force and effect for three (3) years from the date hereof (hereinafter referred to as the "Initial Term") and shall automatically renew for successive one (1) year periods thereafter, absent written notice of termination by either party made at least one hundred eighty (180) days prior to expiration of the Initial Term or prior to any expiration of any such one-year renewal term unless earlier terminated pursuant to the terms of this Agreement.

SECTION 8 - OPERATIONS

Section 8.1. Railroad agrees that entry to and exit from the Track shall be controlled by City or any contractor or admittee designated by City. City shall require that any entity allowed by City to control operations thereover shall be required to ensure that the trains, locomotives and cars of all users of the Track shall be operated thereon and thereover without prejudice or partiality and in such manner as will afford the safest and the most economical and efficient movement of all traffic over the Track. City reserves the right at any time by written notice to Railroad and any other user or users of the Track to assume management and control of all operations over the Track.

Section 8.2. Railroad shall provide, at its sole cost and expense, all locomotives, railcars, other rolling stock and transportation equipment, personnel, fuel and train supplies necessary for Railroad to provide safe and adequate rail transportation to the Industries. Railroad shall also provide, at its sole cost and expense, all radios and other communication facilities as necessary to comply with the regulations of the FRA. Railroad shall be solely responsible for all car hire charges and mileage allowances on cars in Railroad's account handled over the Track.

Section 8.3. City, at its sole cost and expense, shall provide all necessary switchlocks for use in the operation of the Track. City shall provide at no charge a reasonable number of keys for such switchlocks to Railroad and any other user or users of the Track.

Section 8.4. Railroad, at its sole cost and expense, shall perform or cause to be performed any repairs required to make locomotives, cars or other equipment in the custody or control of Railroad on the Track comply with Legal Requirements (as defined in Section 9.1).

Section 8.5. City shall not place, permit to be placed or allow to remain, any permanent or temporary material, structure, pole, or other obstruction within eight and one-half (8-1/2) feet laterally from the centerline of straight track (nine and one-half (9-1/2) feet on either side of the centerline of curved track) or within twenty-three (23) feet vertically from the top of the rail of any track (hereinafter referred to as "Minimal Clearances"), provided that if any Legal Requirements (as defined in Section 9.1) require greater clearances than those provided for in this Section 8.5, City shall comply with such Legal Requirements. However, vertical or lateral clearances which are less than the Minimal Clearances but are in compliance with Legal Requirements shall not be a violation of this Section, so long as City complies with the terms of any such Legal Requirements.

Section 8.6. Railroad shall not place or allow to be placed any rail car within two hundred fifty (250) feet of either side of any at-grade crossing on the Track. Railroad shall not place or permit to be placed on the City's right-of-way any permanent or temporary structure of any kind whatsoever without the prior written consent of City, which consent may be withheld at City's sole discretion. City shall require any other user or users of the Track to comply with the requirements of this Section 8.6.

Section 8.7. Railroad and City agree that with respect to the at-grade road crossings on the Port of Benton County's track between the proposed Center Parkway crossing at Richland Junction and SR 240 (Vantage Highway) inclusive, Railroad shall use its best efforts to confine its operations over such crossings to the period 9:00 a.m. to 3:00 p.m. and 7:00 p.m. to 6:00 a.m. and, except in emergencies, to avoid operations over such crossings during the peak highway traffic times between 6:00 a.m. and 9:00 a.m. and between 3:00 p.m. and 7:00 p.m. Monday through Friday. City acknowledges and understands that Railroad's compliance with its common carrier obligations may, from time to time, require operations over such crossings inconsistent with those set forth above. Railroad agrees to use its best efforts to meet its obligations without having to operate over such crossings during the peak traffic times set forth above. Railroad agrees to maintain a daily log of its operations over such crossings, including the date and time of its operations over them and to provide City with a copy of such log at least quarterly.

Section 8.8. In the event that any user of the Track, including Railroad, provides notice to the City of any violation of Legal Requirements by any user of the Track, including Railroad, or any violation of the terms of this Agreement or the applicable agreement between such user and City (including without limitation, any applicable obligation to control entry to and exit from the Track or operations thereon or thereover without prejudice or partiality and in such manner as will afford the safest and the most economical and efficient movement of all traffic over the Track), City shall conduct an investigation into such alleged violation, and if, in the reasonable judgment of City, Railroad or such user shall be in violation of applicable Legal Requirements or the terms of this Agreement or such user's agreement with the City, City shall require Railroad or such user as the case may be to cure such conduct immediately, and unless and until same shall be cured to the reasonable satisfaction of the City, City shall bar Railroad or such user as the case may be from use of the Track.

SECTION 9 - COMPLIANCE WITH LAWS

Section 9.1. Railroad agrees to comply with all applicable provisions of law, statutes, regulations, ordinances, orders, covenants, restrictions and decisions of any governmental body or court having jurisdiction (hereinafter collectively referred to as "Legal Requirements") relating to this Agreement or Railroad's use of the Track. Railroad shall indemnify, protect, defend and hold harmless City and its officers, agents and employees from and against all fines, penalties, and liabilities imposed on City or its officers, agents or employees under such laws, rules and regulations by any such public authority or court having jurisdiction when attributable to the failure of Railroad to comply with its obligations in this regard.

Section 9.2. City and Railroad agree that the Track is excepted trackage under 49 U.S.C. Section 10906 and that no approval, authorization or exemption from the Surface Transportation Board (hereinafter referred to as the "STB") is required for Railroad to use the Track or to discontinue its use of the Track. Railroad agrees that it will not seek or obtain any approval, authorization or exemption from the STB for its use or discontinuance of use of the Track.

SECTION 10 - CLEARING OF WRECKS

Section 10.1. If trains, locomotives, cars or equipment of Railroad are wrecked or derailed on the Track and require rerailling, wrecking service or wrecking train service, Railroad shall be responsible for the performance of such service, including the repair and restoration of roadbed, track and structures, provided however, that if Railroad fails to restore the Track to service within a reasonable period of time, not to exceed twenty-four (24) hours, after such wreck or derailment, City, at its option, may arrange for the performance of such service, including repair and restoration of roadbed, track and structures, and Railroad shall reimburse City for the cost and expense thereof in accordance with Section 5 herein. Any other cost, liability and expense, including without limitation loss of, damage to, and destruction of any property whatsoever and injury to or death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting from such wreck or derailment, shall be apportioned in accordance with the provisions of Section 11 hereof. All locomotives, cars and equipment and salvage from the same so picked up and removed which are owned by or under the management and control of or used by Railroad at the time of such wreck shall be promptly delivered to Railroad.

SECTION 11 - LIABILITY

Section 11.1.

A. TO THE FULLEST EXTENT PERMITTED BY LAW, RAILROAD SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS CITY AND CITY'S OFFICERS, EMPLOYEES, AGENTS, CONTRACTORS AND INVITEES (HEREINAFTER COLLECTIVELY REFERRED TO AS "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, FINES, PENALTIES, COSTS, DAMAGES, LOSSES, LIENS, CAUSES OF ACTION, SUITS, DEMANDS, JUDGMENTS AND EXPENSES

(INCLUDING, WITHOUT LIMITATION, COURT COSTS, ATTORNEYS' FEES AND COSTS OF INVESTIGATION, REMOVAL AND REMEDIATION AND GOVERNMENTAL OVERSIGHT COSTS) ENVIRONMENTAL OR OTHERWISE (HEREINAFTER COLLECTIVELY REFERRED TO AS "LIABILITIES") OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON OR ENTITY DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO (IN WHOLE OR IN PART):

1. THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, ITS ENVIRONMENTAL PROVISIONS,
2. ANY RIGHTS OR INTERESTS GRANTED PURSUANT TO THIS AGREEMENT,
3. RAILROAD'S OCCUPATION AND USE OF THE TRACK,
4. THE ENVIRONMENTAL CONDITION AND STATUS OF THE TRACK CAUSED BY, AGGRAVATED BY, OR CONTRIBUTED TO, IN WHOLE OR IN PART, BY RAILROAD, OR
5. ANY ACT OR OMISSION OF RAILROAD OR RAILROADS' OFFICERS, AGENTS, INVITEES, EMPLOYEES, OR CONTRACTORS, OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY ANY OF THEM, OR ANYONE THEY CONTROL OR EXERCISE CONTROL OVER.

EVEN IF SUCH LIABILITIES ARISE FROM OR ARE ATTRIBUTABLE TO, IN WHOLE OR IN PART, ANY NEGLIGENCE OF ANY INDEMNITEE. THE ONLY LIABILITIES WITH RESPECT TO WHICH RAILROAD'S OBLIGATION TO INDEMNIFY THE INDEMNITEES DOES NOT APPLY ARE LIABILITIES TO THE EXTENT PROXIMATELY CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF AN INDEMNITEE.

B. RAILROAD FURTHER AGREES, REGARDLESS OF ANY NEGLIGENCE OR ALLEGED NEGLIGENCE OF ANY INDEMNITEE, TO INDEMNIFY, AND HOLD HARMLESS THE INDEMNITEES AGAINST AND ASSUME THE DEFENSE OF ANY LIABILITIES ASSERTED AGAINST OR SUFFERED BY ANY INDEMNITEE UNDER OR RELATED TO THE FEDERAL EMPLOYERS' LIABILITY ACT (HEREINAFTER REFERRED TO AS "FELA") WHENEVER EMPLOYEES OF RAILROAD OR ANY OF ITS AGENTS, INVITEES, OR CONTRACTORS CLAIM OR ALLEGE THAT THEY ARE EMPLOYEES OF ANY INDEMNITEE OR OTHERWISE. THIS INDEMNITY SHALL ALSO EXTEND, ON THE SAME BASIS, TO FELA CLAIMS BASED ON ACTUAL OR ALLEGED VIOLATIONS OF ANY FEDERAL, STATE OR LOCAL LAWS OR REGULATIONS, INCLUDING BUT NOT LIMITED TO THE SAFETY APPLIANCE ACT, THE BOILER INSPECTION ACT, THE OCCUPATIONAL HEALTH AND SAFETY ACT,

THE RESOURCE CONSERVATION AND RECOVERY ACT, AND ANY SIMILAR STATE OR FEDERAL STATUTE.

C. Upon written notice from City, Railroad agrees to assume the defense of any lawsuit or other proceeding brought against any Indemnitee by any entity, relating to any matter covered in this Agreement for which Railroad has an obligation to assume liability for and/or save and hold harmless any Indemnitee. Railroad shall pay all costs incident to such defense, including, but not limited to, attorney's fees, investigator's fees, litigation and appeal expenses, settlement payments, and amounts paid in satisfaction of judgments.

SECTION 12 - INSURANCE

Section 12.1.

A. Railroad shall, at its sole cost and expense, procure and maintain during the term of this Agreement the following insurance coverage:

1. Commercial General Liability insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$2,000,000 each occurrence and an aggregate limit of at least \$4,000,000. Coverage must be purchased on a post-1998 ISO occurrence form or equivalent and include coverage for, but not limited to:

- Bodily Injury and Property Damage
- Personal Injury and Advertising Injury
- Fire legal liability
- Products and completed operations

This policy shall also contain the following endorsements, which shall be indicated on the certificate of insurance:

- The employee and workers compensation-related exclusions in the above policy shall not apply with respect to claims related to railroad employees.
- The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within fifty (50) feet of the Track.
- Any exclusion related to explosion, collapse and underground hazards shall be removed.

No other endorsements limiting coverage may be included on the policy with regard to Railroad's use of the Track under this Agreement.

2. Business Automobile Insurance. This insurance shall contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to:

- Bodily injury and property damage
- Any and all vehicles owned, used or hired

3. Workers' Compensation and Employers Liability insurance including coverage for, but not limited to:

- Railroad's statutory liability under the worker's compensation laws of the State of Washington. If optional under State law, the insurance must cover all employees anyway.
- Employers' liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

4. Excess Liability insurance in an amount not less than \$10,000,000 each occurrence and \$10,000,000 aggregate limit.

B. Railroad shall also comply with the following requirements:

1. Where allowable by law, all policies (applying to coverage listed above) shall contain no exclusion for punitive damages and certificates of insurance shall reflect that no exclusion exists.

2. Railroad agrees to waive its right of recovery against City and Indemnitees under its Commercial General Liability, Automobile Liability, and Workers' Compensation/Employers Liability insurance coverages.

3. Railroad's insurance policies through policy endorsement must include wording which states that the policy shall be primary and non-contributing with respect to any insurance carried by City. The certificate of insurance must reflect that the above wording is included in evidenced policies.

4. All policy(ies) required above (excluding Workers' Compensation) shall include a severability of interest endorsement and shall name City as an additional insured by endorsement using additional insured form CG 20 07 04 with respect to Railroad's use of the Track under this Agreement. Severability of interest and naming City as an additional insured shall be indicated on the certificate of insurance.

5. Except if Railroad is a Class I rail carrier as defined under the regulations of the STB, Railroad is not allowed to self-insure without the prior written consent of City. If granted by City, any deductible, self insured retention or other financial responsibility for claims shall be paid directly by Railroad. Any and all City liabilities that would otherwise, in accordance with the provisions of this Agreement, be covered by

Railroad's insurance shall be paid by Railroad as if Railroad elected not to include a deductible, self-insured retention or other financial responsibility for claims.

6. Prior to entering upon the Track, Railroad shall furnish to City an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. The policy(ies) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify City in writing at least thirty (30) days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision shall be indicated on the certificate of insurance. In the event of a claim or lawsuit involving City arising out of this Agreement, Railroad will make available any required policy covering such claim or lawsuit.

7. Any insurance policy shall be written by a reputable insurance company acceptable to City or with a current Best's Guide Rating of A and Class VII or better, and authorized to do business in the State of Washington.

8. Railroad represents that this Agreement has been thoroughly reviewed by Railroad's insurance agent(s)/broker(s), who have been instructed by Railroad to procure the insurance coverage required by this Agreement. Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above.

9. Not more frequently than once every five (5) years, City may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

10. Failure to provide evidence as required by this section shall entitle, but not require, City to terminate this Agreement immediately. Acceptance of a certificate that does not comply with this section shall not operate as a waiver of Railroad's obligations hereunder.

11. The fact that insurance (including, without limitation, self-insurance) is obtained by Railroad shall not be deemed to release or diminish the liability of Railroad including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by City shall not be limited by the amount of the required insurance coverage.

C. City shall waive in writing the above insurance requirements if Railroad is a Class I rail carrier as defined in the regulations of the STB.

SECTION 13 - ENVIRONMENTAL

Section 13.1

A. Railroad shall strictly comply with all federal, state and local environmental laws and regulations in its use of the Track, including, but not limited to Environmental Laws. Railroad shall not maintain a treatment, storage, transfer or disposal facility, or underground storage tank, as defined by Environmental Laws, anywhere on the Track. Railroad shall not release or suffer the release of oil or hazardous substances, as defined by Environmental Laws, anywhere on the Track.

B. Railroad shall provide immediate notice to City's Contract Officer at (509) 942-7327 of any release of hazardous substances on or from the Track, violation of Environmental Laws, or inspection or inquiry by government authorities charged with enforcing Environmental Laws with respect to Railroad's use of the Track. Railroad shall use its best efforts to promptly respond to any release on or about the Track. Railroad also shall give City immediate notice of all measures undertaken on behalf of Railroad to investigate, remediate, respond to or otherwise cure such release or violation.

C. In the event that City receives notice from Railroad or otherwise learns of a release or violation of Environmental Laws on the Track which occurred or may occur during the term of this Agreement, City may require Railroad, at Railroad's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure or prevent such release or violation affecting the Track.

D. Railroad shall promptly report to City in writing any conditions or activities on the Track which create a risk of harm to persons, property or the environment and shall take whatever action is necessary to prevent injury to persons or property arising out of such conditions or activities; provided, however, that Railroad's reporting to City shall not relieve Railroad of any obligation whatsoever imposed on it by this Agreement. Railroad shall promptly respond to City's request for information regarding said conditions or activities.

SECTION 14 - TERMINATION

Section 14.1. Railroad may terminate this Agreement at any time after one year from the Effective Date, by giving City not less than six (6) months' written notice of termination. Upon expiration of the time in such notice, this Agreement and all rights of Railroad to use the Track shall cease.

Section 14.2. Notwithstanding any other provision of this Agreement except Section 14.3, at any time after the Effective Date, City may terminate this Agreement if Railroad shall default on or breach any of its obligations hereunder, including but not limited to timely payment of compensation to City, and Railroad fails to cure such default or breach within ten (10) days of receipt of written notice from City specifying such default or breach.

Section 14.3. Notwithstanding any other provision of this Agreement, at any time after the Effective Date, City may terminate this Agreement if Railroad fails to comply with its obligations under Section 4.1, Section 4.3, Section 5.2 or Section 8.7 herein and Railroad does not cure such failure within thirty (30) days of receipt of written notice from City specifying such failure.

Section 14.4. Termination of this Agreement shall not relieve or release either party hereto from any obligation assumed or from any liability which may have arisen or been incurred by either party under the terms of this Agreement prior to the termination hereof. The Annual Fee paid by Railroad to City pursuant to Section 4.1 shall be non-refundable if termination of this Agreement becomes effective after June 1 of the year to which the Annual Fee applies.

SECTION 15 - NOTICES

Section 15. Any notice required or permitted to be given hereunder by one party to the other shall be in writing and the same shall be given and shall be deemed to have been served and given if (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address for such party specified below, or to such other address as the party to be notified may designate by giving the other party no less than thirty (30) days' advance written notice for such change in address:

If to City: Community Development Services
 Attn: Horn Rapids Rail Spur
 City of Richland
 975 George Washington Way
 P.O. Box 190, MS #18
 Richland, WA 99352
 (509) 942-7593

If to Railroad: _____

SECTION 16 - ARBITRATION

Section 16.1. Any dispute arising between the parties hereto with respect to any of the provisions of this Agreement which cannot be settled by the parties themselves shall be resolved in accordance with the Commercial Arbitration Rules of the American Arbitration Association, as such rules may be amended from time to time, and as shall be applied with reference to the customs and practices of the railroad industry. Any such arbitration shall be held in Richland, Washington or at such other location as may be mutually acceptable to the parties hereto. The decision of the arbitrator or arbitration panel shall be final and conclusive upon the parties hereto. A final decision and award of the arbitration panel shall be enforceable in any court of

competent jurisdiction in the United States of America. Each party to the arbitration shall pay the compensation, costs, fees and expenses of its own witnesses, exhibits and counsel. The compensation, costs and expenses of the arbitrator or panel, if any, shall be borne equally by the parties hereto. The arbitration panel shall not have the power to (a) award punitive or consequential damages, (b) determine violations of antitrust or criminal laws, or (c) reform the terms of this Agreement, in whole or in part.

SECTION 17 - MISCELLANEOUS

Section 17.1. This Agreement expresses the entire agreement between the parties and supersedes all prior oral or written agreements, commitments, or understandings with respect to the matters provided for herein, provided however, no modification of this Agreement shall be binding upon the party affected unless set forth in writing and duly executed by the affected party.

Section 17.2. This Agreement shall be binding upon and inure to the benefit of City and Railroad, and shall be binding upon the successors and assigns of Railroad, subject to the limitations hereinafter set forth. Railroad may not assign its rights under this Agreement or any interest therein, or attempt to have any other person assume its obligations in whole or in part under this Agreement, without the prior written consent of City, which consent may be withheld in City's sole discretion; provided, however, no such consent shall be required where assignment occurs as a result of a sale or transfer of all or substantially all of the assets of Railroad pursuant to merger, sale, consolidation, combination, or order or decree of governmental authority.

Section 17.3. If fulfillment of any provision hereof shall be declared invalid or unenforceable under applicable law, such provision shall be ineffective only to the extent of such invalidity or unenforceability, without invalidating or rendering unenforceable the remainder of such provision or the remaining provisions of this Agreement, which shall remain in full force and effect.

Section 17.4. Section headings used in this Agreement are inserted for convenience of reference only and shall not be deemed to be a part of this Agreement for any purpose.

Section 17.5. This Agreement shall be governed and construed in accordance with the laws of the State of Washington. It is expressly agreed that no party may sue or commence any litigation against the other party unless such legal proceeding is brought in state court in Washington.

Section 17.6. No modification, addition or amendment to this Agreement shall be effective unless and until such modification, addition or amendment is in writing and signed by the parties hereto. This Agreement is made and intended for the benefit of the parties hereto and their respective successors and permitted assigns and for no other parties.

Section 17.7. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

Section 17.8. Subject to the provisions of Section 11, Railroad shall pay for any and all damage to the Track and damage to or loss of any of the property or equipment of City and/or any other property of City or of any person resulting from the activities or use of the Track by Railroad or Railroad's employees, agents, contractors, licensees, or invitees.

Section 17.9. The parties each represent and warrant to each other that neither has employed a broker in connection with this transaction. In the event there is a claim against either party hereto with respect to any broker whatsoever other than as set forth in this Section 17.9, the party whose action gives rise to the claim for commission shall indemnify the other party against any liability, damage, cost or fee in connection with such claim, including, without limitation, attorneys' fees and costs.

Section 17.10. The failure of either of the parties hereto in one or more instances to insist upon strict performance or observation of one or more of the covenants or conditions hereof, or to exercise any remedy, privilege, or option herein conferred upon or reserved to such party, shall not operate and shall not be construed as a relinquishment or waiver for the future of such covenant or condition or of the right to enforce the same or to exercise such privilege, option, or remedy, but the same shall continue in full force and effect.

Section 17.11. Railroad shall, on the last day of the term, or upon any earlier termination of this Agreement, peaceably and in an orderly manner vacate the Track free of any property of Railroad or third parties placed by Railroad thereon. Railroad shall, if not in default hereunder, remove its equipment, goods, trade fixtures and effects and those of all persons claiming by, through or under it, provided that such removal does not cause irreparable damage to the Track. Any personal property not used in connection with the operation of the Track and belonging to Railroad, if not removed at the termination hereof, and if City shall so elect, shall be deemed abandoned and become the property of City without any payment or offset therefor. City may remove such property from the Track and store it at the risk and expense of Railroad if City shall not so elect. Railroad shall repair and restore all damage to the Track caused by the removal of any of Railroad's equipment and personal property. Railroad, if requested by City, shall remove all signs placed on the Track by Railroad and restore the portion of the Track on which they were placed substantially to the same condition as immediately prior to installation thereof.

Section 17.12. The failure of Railroad to vacate the Track on the expiration or termination of this Agreement as required pursuant to the terms of this Agreement and the subsequent holding over by Railroad, with or without the consent of City, shall result in the creation of a tenancy at will at a monthly fee equal to one hundred fifty percent (150%) of the then-applicable Annual Fee divided by twelve (12), for each month or portion thereof in which the Railroad holds over, payable on the tenth (10th) day of the following month. This provision does not give Railroad any right to hold over at termination of this Agreement, and all other terms and conditions of this Agreement shall remain in force during any tenancy at will created by any holding over by Railroad.

Section 17.3. The parties expressly agree that this Agreement and any rights and obligations under this Agreement shall not be deemed an "interchange commitment" as such

term is defined in Bill No. S-2889 dated December 9, 2009 entitled "the Surface Transportation Board Reauthorization Act of 2009."

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate the day and year first herein above written.

CITY OF RICHLAND

By: _____

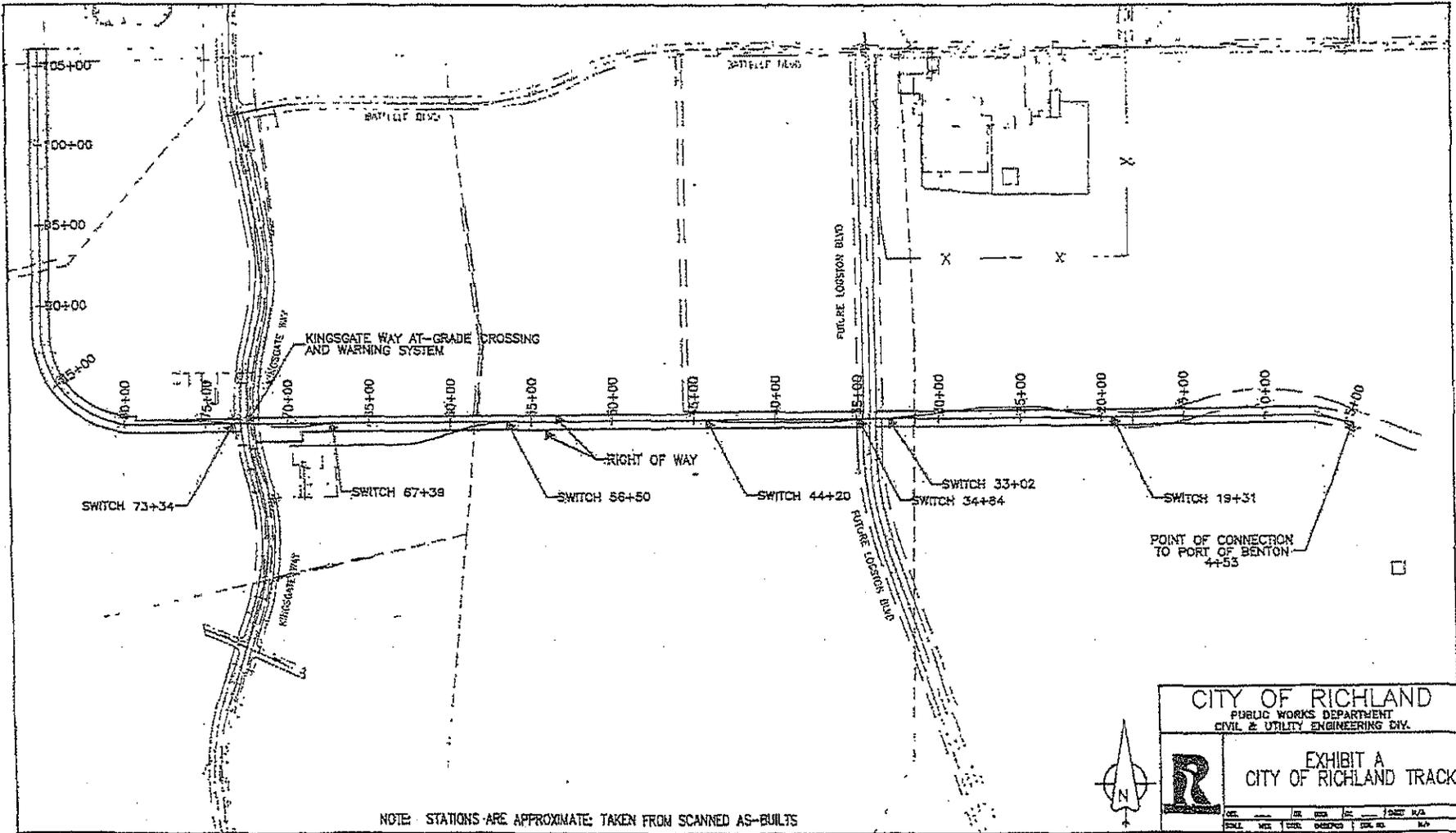
By: _____

Its: _____

Its: _____

APPROVED AS TO FORM

Thomas O. Lampson, City Attorney



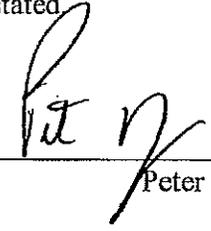
NOTE: STATIONS ARE APPROXIMATE; TAKEN FROM SCANNED AS-BUILTS

CITY OF RICHLAND PUBLIC WORKS DEPARTMENT CIVIL & UTILITY ENGINEERING DIV.													
EXHIBIT A CITY OF RICHLAND TRACK													
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VERIFICATION

State of Washington)
)
County of Benton) SS:

Peter Rogalsky, being duly sworn, deposes and says that he is Public Works Director for the City of Richland, Washington, that he has read the foregoing statement, knows the facts asserted therein, and that the same are true as stated

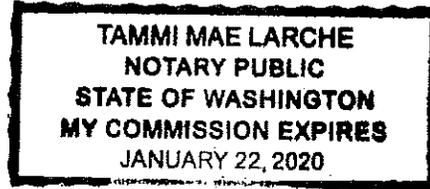


Peter Rogalsky

SUBSCRIBED AND SWORN TO
before me this 13th day of
July, 2016.



Notary Public



CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2016, a copy of the foregoing **Reply of City of Richland, Washington to Tri-City Railroad Company, LLC's Petition for Declaratory Order** was served by electronic mail and first class mail, postage prepaid, upon:

William C. Schroeder, Esq.
will.schroeder@painehamblen.com
Anne K. Schroeder, Esq.
anne.schroeder@painehamblen.com
Paine Hamblen, LLP
717 West Sprague Avenue, Suite 1200
Spokane, WA 99201-33505



Robert A. Wimbish