

BLATMAN, BOBROWSKI & MEAD, LLC

ATTORNEYS AT LAW

9 Damonmill Square, Suite 4A4
Concord, MA 01742
Phone: 978-371-3930
Fax: 978-371-3828

MARK BOBROWSKI
mark@bbmatlaw.com

NEWBURYPORT OFFICE
30 Green Street
Newburyport, MA 01950
Phone: 978-463-7700
Fax: 978-463-7747

Via Electronic Filing

February 13, 2013

Chief, Section of Administration
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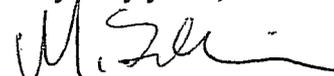
RE: Diana Del Grosso, et al - Petition for Declaratory Order
Finance Docket No.: 35652

Dear Sir/Madam:

Enclosed please Motion to Reconsider Petitioners' Request for Discovery. Kindly docket and file same.

If you have any questions or require any other information, please let me know. Thank you for your consideration.

Very truly yours,



Mark Bobrowski

cc: Atty. Howard (via e-mail only)
Atty. Hocky (via e-mail only)
Upton Development Group (via FedEx)
First Colony Development Company (via FedEx)

FEE RECEIVED
February 13, 2013
SURFACE
TRANSPORTATION BOARD

FILED
February 13, 2013
SURFACE
TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. : 35652

**PETITION OF
DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH,
KATHLEEN KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA**

FOR DECLARATORY ORDER

Petition to Reconsider Request for Discovery

Mark Bobrowski
Blatman, Bobrowski & Mead, LLC
9 Damonmill Square, Suite 4A4
Concord, MA 01742
978.371.3930
mark@bbmatlaw.com

Fritz R. Kahn
Fritz R. Kahn, P.C.
1919 M Street, 7th Floor
Washington, D.C., 20036
202.263.4152
xiccgc@gmail.com

Date: February 13, 2013

PETITION FOR RECONSIDERTION

Petitioners, Diana Del Gross, *et al.*, pursuant to 49 C.F.R. §1115.3, respectfully seek reconsideration of the Board's Decision, served January 24, 2013, insofar as it denied the Petitioners' requests for discovery in this matter. As grounds therefor, Petitioners assert that (1) the Board's Decision involved material error; and (2) that new evidence necessitates that Petitioners be allowed to pursue discovery.

First, the Board committed material error in stating that "the Board does not typically order discovery in declaratory order proceedings" citing Finance Docket No. 33388 (Sub-No. 101), *CSX Transp., Inc.--Petition for Declaratory Order*, served August 27, 2008). The Board's regulation, 49 C.F.R. §1114.21, permits discovery in every Board proceeding other than an informal proceeding, such as an acquisition pursuant to 49 C.F.R. §1150.31, an abandonment pursuant to 49 C.F.R. §1152.50, or a merger pursuant to 49 C.F.R. §1180.2(d). The Board's regulation is as binding upon the Board as if it were law. As the Supreme Court held in *Service v. Dulles*, 354 U.S. 363, 372 (1957), "[R]egulations validly prescribed by a government administrator are binding upon him as well as the citizen . . .", citing *Acardi v. Shaughnessy*, 347 U.S. 260, 265 (1954), in which the Supreme Court held, "The regulations prescribe the procedure to be followed . . ."

The Decision cited by the Board in denying the Petitioners discovery, Finance Docket No. 33388 (Sub-No. 101), *CSX Transportation, Inc.--Petition for Declaratory Order*, served August 27, 2008, was one in which the Board denied the request for declaratory order. In sharp contrast, in the instant proceeding the Board instituted a declaratory order proceeding. The proceeding will be handled under the Board's modified procedure rules, and, while the Board

declared that the Petitioners' Petition for Declaratory Order, served August 21, 2012, would serve as the Petitioners' opening statement, Petitioners' response to the Reply of the Grafton and Upton Railroad ("G&U") and comments from other interested persons will be due 45 days from the service date.

In other declaratory order proceedings the Board routinely has allowed discovery. Finance Docket No. 35496, *Denver & Rio Grande Railway Historical Foundation d/b/a Denver & Rio Grande Railroad, L.L.C.--Petition for Declaratory Order*, served April 30, 2012; Docket No. NOR 42108, *The Springfield Terminal Railway Company--Petition for Declaratory Order--Reasonableness of Demurrage Charges*, served June 16, 2010; Motor Carrier Finance Docket No. 21008, *East West Resort Transportation, LLC, and TMS, LLC D/B/A Colorado Mountain Express--Petition for Declaratory Order--Motor Carrier Transportation of Passengers in Colorado*, served March 21, 2005; Finance Docket No. 34111, *North San Diego County Transit Development Board--Petition for Declaratory Order*, served August 21, 2002. As the late Judge John R. Brown said in his concurring opinion in *Mary Carter Paint Co. v. F.T.C.*, 222 F.2d 654, 660 (5th Cir. 1964), *rev' on other grounds*, 86 S. Ct. 219, "... the law does not permit an agency to grant to one person the right to do that which it denies another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case."

Second, there is new evidence that raises significant questions regarding the G&U. The instant matter involves whether specific operations conducted in the town of Upton, MA (Upton) at a bulk transloading facility (Upton Facility), claimed to be performed by the Grafton and Upton Railroad (G&U), constitute "transportation by a rail carrier."

It has come to Petitioners' attention that the town of Grafton, MA (Grafton), located adjacent to Upton, recently initiated litigation with the G&U in the U.S. District Court on or about January 15, 2013.¹ The litigation in Grafton involves a bulk transloading facility (the Grafton Facility) with a similar set of circumstances. In both Grafton and Upton, G&U initially provided the town with substantially the same one page "Summary of Terms and Conditions of Terminal Transloading" in an attempt to demonstrate preemptive status. In both Grafton and Upton, a new transloading company was established as an affiliate of a parent company that is alleged to otherwise have significant involvement with the rail facility. In both Grafton and Upton, the properties were marketed by G&U as "build to suit" properties, available for immediate development, price negotiable. In the Grafton litigation, the Federal District Court allowed discovery. As a result, certain documents became public record.

These documents show that in Grafton, a specialty transloading company has been established, as in Upton. However, also established were a specialty financing company and a specialty supply company. All three companies were established within the past several months and all three companies are affiliates of a common parent company. The parent company, Spicer Gas (a/k/a Spicer Plus, Inc., hereafter "Spicer"), has an established client base and a long history of owning and operating this type of propane rail facility. The G&U does not.

In Grafton, the three new companies (one of which is the transloading company) and the G&U have all signed a "Memorandum of Understanding" (MOU). The three new companies (one of which is the transloading company) have all also entered into an agreement with G&U entitled "Financing, Development, and Construction Agreement" (Financing Agreement) which

¹ *Board of Selectmen of the Town of Grafton v. Grafton & Upton Railroad Company*, D. Mass., Case USDC 4:12-CV-40164TSH. The essence of this litigation, as in the instant matter, is an assertion by the Town of Grafton that certain activities at the Grafton Facility do not constitute "transportation by a rail carrier" and are thus not preempted from local regulations. The litigation commenced in December 2012.

deals with financing most aspects of the Grafton Facility and providing an equipment lease from the financing company to the G&U for equipment valued at approximately \$3,200,000.

In Grafton, the new supply company has entered into a "Confidential Rail Transportation Contract" with G&U that provides for financial guarantees from the supply company to G&U. This includes a provision that the supply company pay G&U for all sums that are payable from G&U to the financing company under the Financing Agreement, of which the transloading and supply company are both a party to, as well as the supply company paying G&U for property and liability insurance and all real and personal property taxes attributable to the Grafton Facility.

In Grafton, the Financing Agreement, to which the transloading and supply company are parties, also requires that G&U make equipment lease payments to the financing company "solely from fees collected by the Railroad under the Rail Transportation Contract or Transloading Agreement." The Grafton Memorandum of Understanding, Financing, Development, and Construction Agreement, and Confidential Rail Transportation Contract are attached hereto as Exhibits A, B and C, respectively. The Town's Request for Findings of Fact and Rulings of Law, dated January 31, 2013, is attached as Exhibit D. It contains a more detailed explanation of the arrangements of the G&U in Grafton. See, in particular, pages 9-13. Closing arguments took place February 11, 2013, in Federal District Court.

In the instant matter, the Petitioners' counsel has thus far received only the Public Versions of the Upton Terminal Transloading Agreement and a Lease Agreement between Upton Development Group, Inc. and Grafton & Upton Railroad Company. The copy of the Board's Decision granting G&U's Motion for Protective Order, served upon Petitioners' counsel failed to include Exhibits A and B, and, therefore, Petitioners' counsel has just yesterday completed and signed the Undertakings and sent them to G&U's counsel with the request that he provide him

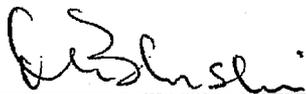
with unredacted copies of the Terminal Transloading Agreement between G&U and Grafton Upton Railcare, LLC, ("Dana") and the Lease Agreement between G&U and Upton Development Group, LLC. The Public Version of the Terminal Transloading Agreement, however, raises a number of questions which need to be answered or at least clarified through discovery. If the arrangement between G&U and Dana can be changed on ten days' notice, how are the Board or the Petitioners to know what the long-term transloading arrangement will be? Is it the normal practice of G&U or, for that matter any independent short line railroad, to have a a packaging facility on its premises in which it bags wood pellets? How are the transloading charges assessed the shipper by Dana fixed by G&U? How much does Dana pay G&U for the use of its property to perform the transloading operations? What are the terms of the insurance policy which Dana is obliged to procure to protect the G&U? These are critical issues, and they only can be resolved through discovery.

Moreover, the Grafton documents set forth as Exhibits A, B and C raise the possibility that there are other agreements involving the Upton Facility heretofore not identified that could bear heavily as to whether or not activities at the Upton Facility constitute "transportation by a rail carrier". Dana Companies have a 40 year history of bulk chemical transportation and storage with a large client base. Dana Companies have been inextricably a part of the Upton Facility, as set forth in the Petitioners' original submittals to the Board. Dana Companies have the ability to finance and operate the Upton Facility. Petitioners believe that additional discovery may show that Dana Companies has a financial interest in the Upton Facility, much like the interest of Spicer in the Grafton Facility. The key question is this: How is it possible for the G&U, a small independent short line railroad, to install transloading facilities in both

Upton and Grafton in a period of two years without financial assistance, the source of which has not yet been disclosed in the instant proceeding?²

Petitioners respectfully request the STB to reconsider its ruling in the Decision served January 24, 2013.

PETITIONERS,
By their attorneys,



Mark Bobrowski
Blatman, Bobrowski & Mead, LLC
9 Damonmill Square, Suite 4A4
Concord, MA 01742
978.371.3930
mark@bbmatlaw.com

Fritz R. Kahn
Fritz R. Kahn, P.C.
1919 M Street, 7th Floor
Washington, D.C., 20036
202.263.4152
xiccgc@gmail.com

DATE: February 13, 2013

² Fueling these questions, Petitioners have also newly discovered a brochure of the Dana Companies in which it states: "Its latest endeavor is the construction of a "state of the art" Rail-to-Truck transfer facility in Upton, MA. In operation for almost two year [sic], the facility services 15 customers with an average 115 rail cars, with zero safety incidents". There is no mention of the G&U in this brochure. See Exhibit E.
<http://www.supplychaindigital.com/reports/The-Dana-Companies>.

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DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN
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FOR DECLARATORY ORDER

CERTIFICATE OF SERVICE

I, Mark Bobrowski, attorney for the Petitioners, hereby certify that I served a copy of Petitioners' Motion to Reconsider via e-mail to:

Eric M. Hocky
Thorp, Reed & Armstrong
One Commerce Square
2005 Market Street
Philadelphia, PA 19103-7041
ehocky@thorpree.com

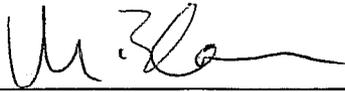
James E. Howard, Esquire
70 Rancho Road
Carmel Valley, CA 93924
jim@jehowardlaw.com

and by Fedex to:

First Colony Development Company, Inc.
929 Boston Post Road East
Marlborough, MA 01752

Upton Development Group
31 Whitewood Road
Milford MA 01757

DATE: February 13, 2013



Mark Bobrowski

EXHIBIT A

MEMORANDUM OF UNDERSTANDING

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

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

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

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

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

NOW, THEREFORE, the parties hereby agree as follows:

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

REDACTED

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

In addition, Patriot shall pay the Railroad:

REDACTED

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

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

REDACTED

Contract Year and Partial Year Guaranty. Operations shall commence upon completion and operation of the Facility. The period between the commencement of terminal operations and April 30, 2013 shall be designated the construction year. During the construction year the Operator shall guarantee minimum fees to the Railroad of \$. Contract Year 1 under referenced agreements shall begin May 1, 2013.

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

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

GRT Financing, LLC

By: Paul Chubb
Its member

All American Transloading, LLC

By: Paul Chubb
Its member

Patriot Gas, LLC

By: Paul Chubb
Its member

Grafton & Upton Railroad Company

By: [Signature]
Its [Signature]

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

Spicer Plus, Inc.

By: Paul Chubb
Its President

NGL Supply Terminals Company see next page. h Chubb

By: _____
Its _____

Spicer Plus, Inc.

By: *Jamie Elchick*
Its *President*

NGL Supply Terminals Company

By: *[Signature]*
Its *President.*



EXHIBIT B

EXECUTION COUNTERPART

FINANCING, DEVELOPMENT AND CONSTRUCTION AGREEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GRT Financing, LLC
12 Roosevelt Avenue
Mystic, CT 06355

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

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

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

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

13. Dispute Resolution.

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

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

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

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

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

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

Executed as an instrument under seal as of ^{November 5} October 1, 2012.

GRT Financing LLC

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

All American Terminals, LLC

By: [Signature]

Grafton & Upton Railroad Company

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

Patriot Gas, LLC

By: Quentin P. Clark

EXHIBIT B

Master Plan and Process Flow Diagrams



VENTURES

July 27, 2012

Mr. Jon Holstein
36 Thames Street
Groton, CT 06340

Mr. Holstein,

LPG Ventures is pleased to submit the following quote for the construction and commissioning of your rail terminal in Grafton, MA.

Our Quote follows:

Set Tanks

Excavate pier footings and pour concrete per local code, install per cast piers, and set tanks. This includes the excavation, concrete footers, pre cast piers, freight for piers, crane to unload piers and tanks and labor. \$75,488

Tank Trim

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

Piping: Tanks to Header Lines

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

Piping: Header Lines

Install two 3" vapor lines, one cold vapor and one hot vapor, one 6" liquid in line, and one 12" liquid out lines. These lines will be fitted to the tank piping and will have connections for vapor to be used for railcar unloading, loading operations, and connections to the compressor bank. Parts and labor included. \$79,682

Pump Bank

Install 4 new Blackmer 4" pumps for transport loading. Connect pump bank to tank outlets and route piping to transport loading area. Install new mechanical valves, flex connectors, and strainers. Parts and labor included. \$133,756

Rail Towers and Catwalks

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

Rail Tower Piping

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

*LPG Ventures, L.P.G. LLC Plant Design & Construction, ASME & DOT Certified, Transportation Services, Pro-cess Tank Plants
9611 E. 53rd St., Raytown, MO 64133 • 816.737.1206 • FAX 816.737.1390 • Toll Free 888.779.8761 • www.lpgventures.com*

4FG0013 - 143674

GURR0042

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

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

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

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

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

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

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

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

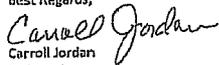
Notes and Exclusions
Not included in this quote is gas to pressurize the system, site improvements (roads, landscaping, grading, etc.) canopy for the loading rack, or tank and system painting.

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

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

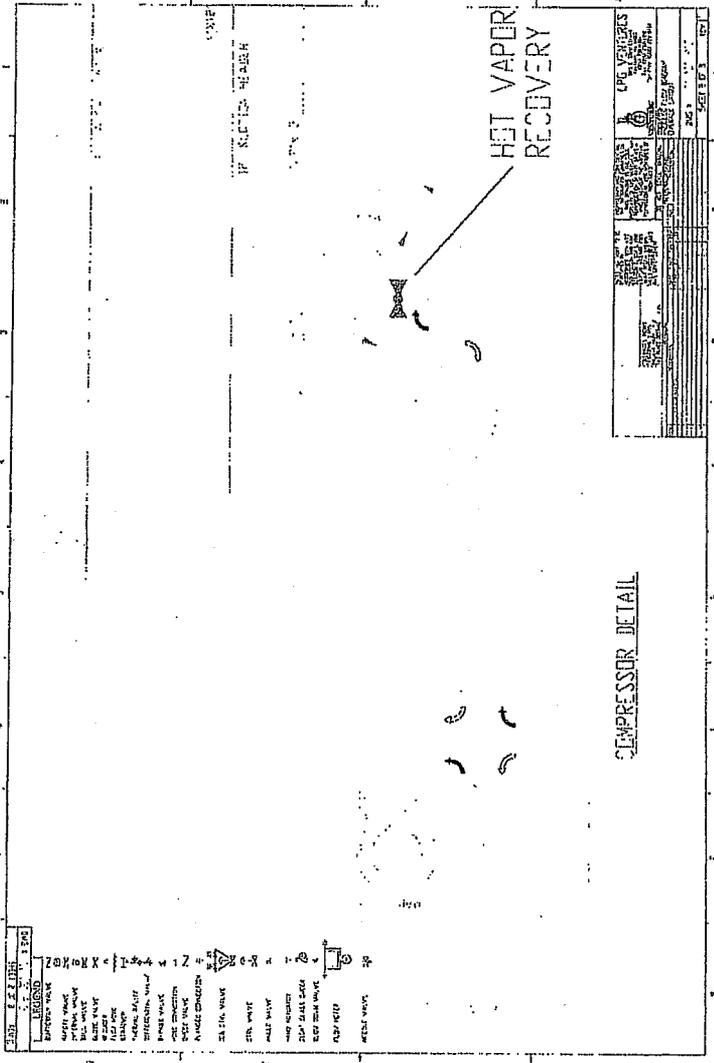
Thank you for the opportunity to submit this quote for your consideration.

Best Regards,


Carroll Jordan
LPG Ventures

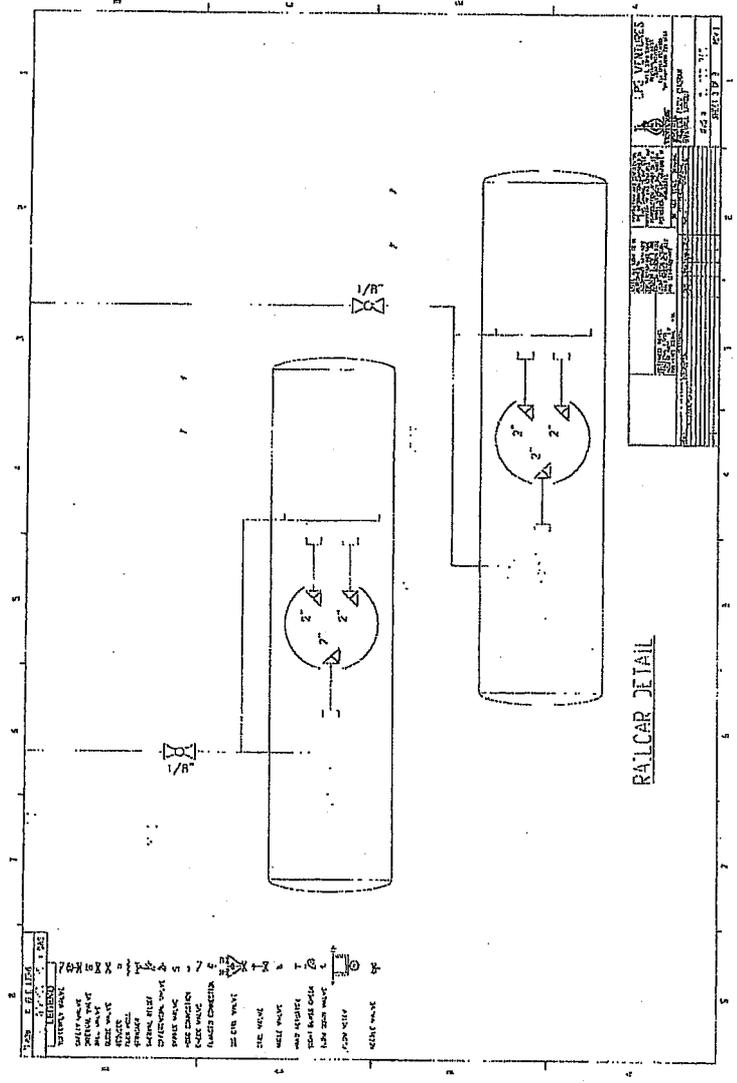
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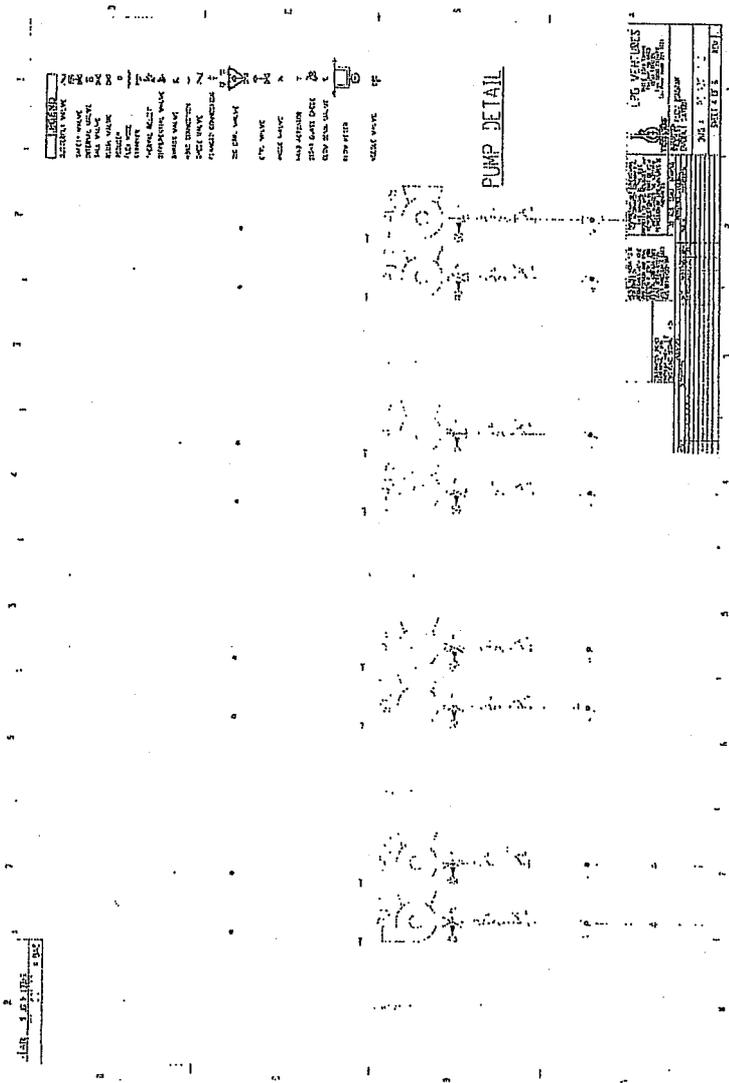
SYMBOL	DESCRIPTION
(Symbol)	PIPE
(Symbol)	VALVE
(Symbol)	COMPRESSOR
(Symbol)	CONDENSER
(Symbol)	EVAPORATOR
(Symbol)	PIPE FITTING
(Symbol)	WATER VALVE
(Symbol)	...

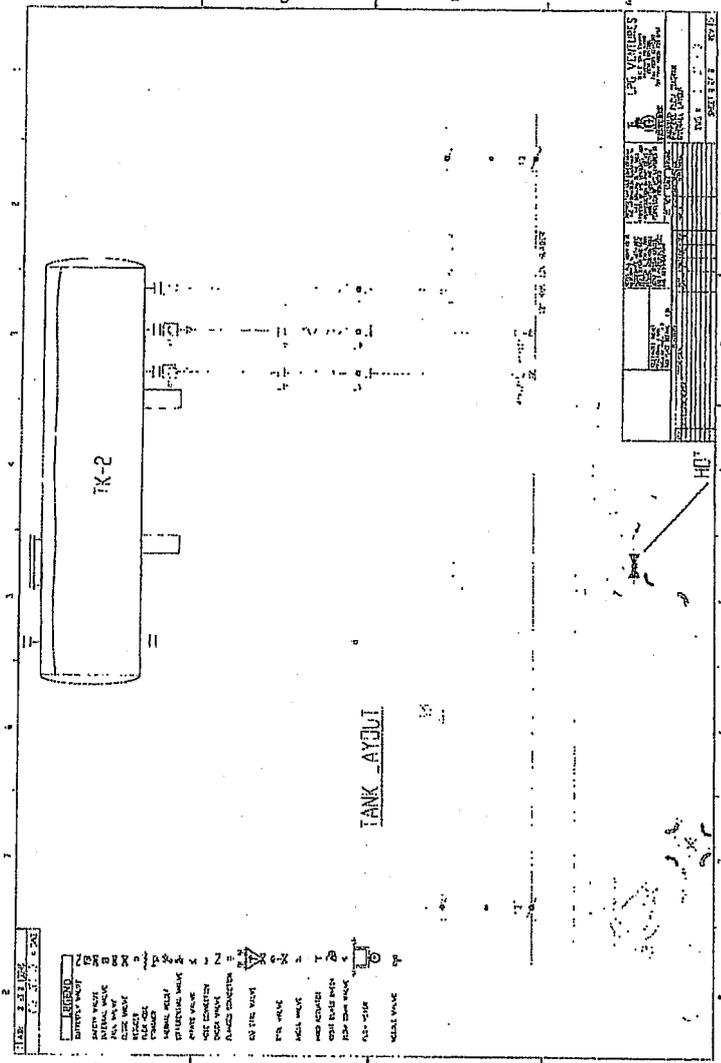
NO.	DESCRIPTION	QTY.	UNIT
1	COMPRESSOR	1	EA.
2	CONDENSER	1	EA.
3	EVAPORATOR	1	EA.
4	PIPE	...	FT.
5	VALVE	...	EA.
6



4FG0013-143674

GURR0047





4FG0013 - 143674

GURR0052

EXHIBIT C

Grafton & Upton LPG Transfer Facility Construction Responsible Parties

Pre-Construction

G&U RR

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

Spicer Group / LPG Ventures

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

Construction

G&U RR

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

Spicer Group / LPG Ventures

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

For Discussion

- 1) Final Sitework
- 2) Water Retention

EXHIBIT D

Construction Schedule

Separately Distributed

4FG0013 - 143674

GURR0054

EXHIBIT F

Railroad Permitted Encumbrances

Chicago Title Insurance Company

ALTA LOAN POLICY OF TITLE INSURANCE Policy No. 72307-86382997

SCHEDULE B PART I (ADDENDUM)

EXCEPTIONS FROM COVERAGE

6. Easements and wires granted to New England Power Company by Bronfen M. Drimcombe in an agreement dated August 18, 1939 and recorded Book 2763, Page 527.
7. Permit: Bank 4. Issued by the Grafton Conservation Commission to Charles Alchue dated January 31, 2011 and recorded page 55, Permit No. 024.
8. Order of Eminent Domain: Issued by the Grafton Conservation Commission to Charles Alchue, applicant and owner, dated January 31, 2011, Page 00, DEP File No. 164-0704.

FORM 804

ALTA Form Mgr (09)

4FC0013 - 143674

GURR0056

EXHIBIT C

EXECUTION COUNTERPART

CONFIDENTIAL RAIL TRANSPORTATION CONTRACT

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

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

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

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

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

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

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

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

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

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

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

3. Patriot Volume Commitment.

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

4. Transportation Charges.

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

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

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

REDACTED

REDACTED

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

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

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

REDACTED

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

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

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

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

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

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

10. Assignment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17. Dispute Resolution.

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

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

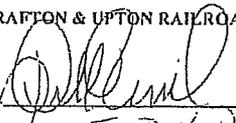
(b) All disputes arising in connection with or involving the interpretation, implementation, or application of this Agreement shall be resolved through arbitration. The Party initiating arbitration shall notify the other of the issues to be arbitrated and propose a process to select an arbitrator knowledgeable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

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

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

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

GRAFTON & UPTON RAILROAD CO.

By: 

Printed Name: Jon David Puzos

Title: President

PATRIOT GAS SUPPLY, LLC

By: 

Printed Name: AUSTIN P. CLARK

Title: MANAGER

GURR0033

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

Spicer Plus, Inc.

NGL Supply Terminals Company

By: *Lauren Elbert*
Its *President*
Duly Authorized

By: _____
Its
Duly Authorized

GURR0034

EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
CENTRAL DIVISION

WORCESTER, ss.

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

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

Plaintiffs,

v.

GRAFTON & UPTON RAILROAD
COMPANY,

Defendant.

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

I. PROPOSED FINDINGS OF FACT

A. Parties

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

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

B. Background

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

C. The Fire Safety Analysis

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

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

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

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

D. The Cease and Desist Order

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

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

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

E. The Propane Facility Deal

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

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

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

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

F. The Contracts

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

75. The MOU sets forth that the obligations of the railroad and AAT with respect to transloading services are substantially set forth in a separate agreement entitled Terminal Transloading Agreement. Exh. Q., ¶ 3.
76. The MOU makes provision for GURR to be paid “guaranteed minimum fees of [redacted]” by the “Operators” (i.e., Spicer Plus, Inc. and NGL) during what is defined as “the Construction Year.” Exh. Q., ¶ 3.
77. The MOU was signed as follows:
- a. For GRT Financing, by Lawrence Chesler, President of Spicer Plus;
 - b. For AAT, by Lawrence Chesler, President of Spicer Plus;
 - c. For Patriot Gas, by Lawrence Chesler, President of Spicer Plus;
 - d. For Spicer Plus, Inc., by Lawrence Chesler, President;
 - e. For NGL Supply Terminals Co. by an unidentified individual.
- Exh. Q.
78. Thus, other than GURR, all of the entities involved in the propane facility deal are Spicer, NGL, or a combination of Spicer and NGL.
79. The Terminal Transloading Agreement referred to in the MOU was signed on October 1, 2012.¹
80. On or about October 1, 2012, GURR and Patriot Gas entered into a Confidential Rail Transportation Contract, with Spicer Plus and NGL as guarantors. Exh. S.
81. The Confidential Rail Transportation Contract provided by GURR through discovery is signed by Mr. Delli Priscoli as President of GURR, by Austin P. Clark as manager of Patriot Gas, and by Lawrence Chesler as President of Spicer. There is no signature on the line designated for NGL. Exh. S.
82. The Confidential Rail Transportation Contract is a 20 year contract between GURR and Patriot, under which Patriot has the right to extend the contract for an additional 10 years and to negotiate for even further extensions, as long as Patriot is not in default and the contract has not been terminated. Exh. S, ¶ 1.

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

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

- i. The Shortfall Payment is a multiplier (which is redacted) of the number of cars under 800 delivered by Patriot, with a credit for any cars delivered by any other supplier.
 - ii. So the Shortfall Payment (SP) calculation is as follows:
$$SP = W \times (800 - YZ)$$
where W is the redacted multiplier, Y is the number of cars delivered by Patriot (if under 800) and Z is the number of cars delivered by any other supplier.
 - iii. Therefore, the Shortfall Payment increases to the extent that no cars are accepted from suppliers other than Patriot (Spicer/NGL).
- d. All sums that are payable under the equipment lease, including property and liability insurance and all real and personal property taxes attributable to the facility (hereafter, "Equipment Lease repayment"). Exh. S ¶4(b)(ii); Testimony of Delli Priscoli.

- i. Under this provision, for every dollar GURR pays to GRT (which is co-owned by Spicer and NGL) to "lease" the tanks and transloading equipment under the Financing, Development and Construction Agreement (Exh. R, ¶ 6(c)), it is *repaid* that dollar by Patriot (also co-owned by Spicer and NGL), *plus* it is paid for money expended on insurance and taxes.
- ii. As a result of this provision, GURR's outlay for leasing the equipment is effectively zero.
- iii. That is *unless* GURR takes shipment of LPG from suppliers/shippers other than Patriot (Spicer/NGL), in which case its Equipment Lease Repayment will be reduced by a redacted amount.
- iv. So Patriot receives a credit in the amount of the total annual equipment lease payment (K) divided by the total number of cars of LPG delivered from all sources (L) times the number of cars from shippers other than Patriot (M).
- v. Therefore, GURR's recoupment of lease costs (R) is reduced by an amount equal to $K/L \times M$.

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

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

II. PROPOSED RULINGS OF LAW

A. ICCTA Background

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

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

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

B. Multi-Factor Tests

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

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

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

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

injury or loss is caused by the negligence or willful misconduct of GURR; Exh. 28 at p. 9, Section 3(A)(i)(a);

- ii. injury or death of any person whatsoever and damage to any property whatsoever caused by AAT (Spicer/NGL); Exh. 28 at p. 9, Section 3(A)(i)(b);
- iii. any failure by AAT (Spicer/NGL) to meet applicable payroll and other employment obligations; Exh. 28 at p. 10, Section 3(A)(i)(c);
- iv. any release of any hazardous substance occurring after the date of the Agreement and the cost of remediation thereof. Exh. 28 at p. 10, Section 3(A)(i)(d).

- b. Under Section 3(B) of the Transloading Agreement, the transloader AAT (Spicer/NGL) indemnifies not only GURR, but all subsidiaries of GURR and all officers, directors and employees of GURR for the cost of workers' compensation insurance, employers' liability insurance, commercial general liability insurance, and all risk property insurance.
- c. Under Section 1(A)(iv)(C) of the Transloading Agreement (p. 4), the transloader AAT (Spicer/NGL) "shall retain full responsibility and shall indemnify and hold harmless Railway from any consequences of the acts and omission of" the AAT's subcontractors or agents.

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

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

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

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

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

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

site and rail work already paid for by GURR, as that term is in no way limited to the cost for the completion and construction of the facility itself,⁴ paid for by GRT Financing (Spicer/NGL) under paragraph 6(a).

- k. Under the Memorandum of Understanding, Exh. Q., ¶ 2(b), Patriot, also wholly owned by Spicer and NGL, shall pay GURR “all sums payable under the equipment lease described in the Financing, Development and Construction Agreement, including property and liability insurance and all real and personal property taxes attributable to the facility.”
- l. Therefore, not only does GURR not *own* the propane facility, its lease thereof is a fiction since it will recoup every penny it pays to GRT (Spicer/NGL) from Patriot (Spicer/NGL), possibly including the only investment it has made (the site and track work) and also including all property and liability insurance and all real and personal property taxes attributable to the Facility.
- m. Therefore, unlike Alexandria, the third party here, ATT (Spicer/NGL) both owns the facility and reimburses GURR for its “lease” thereof.
- n. The fact that the third party paid for the construction of the facility and is reimbursing the railroad for its “lease” payments and all its equipment costs (e.g., taxes and insurance) makes this case factually distinct from Alexandria, where the railroad owned the facility and constructed it with its own funds.
- o. Moreover, in contrast to the expert transloader in Alexandria, the third party “transloader” in this case is a limited liability company that was created in Delaware in June of 2012 and had exactly one employee – Jonathan Holstein, Vice President of Spicer. Testimony of Delli Priscoli, Holstein.

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

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

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

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

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

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

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

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

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

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

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

negotiate with GURR for additional extensions beyond thirty years. Exh. 27, Section 5(A).

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

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

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

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

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

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

The Town of Grafton
By its Town Counsel,

/s/Ginny Kremer

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

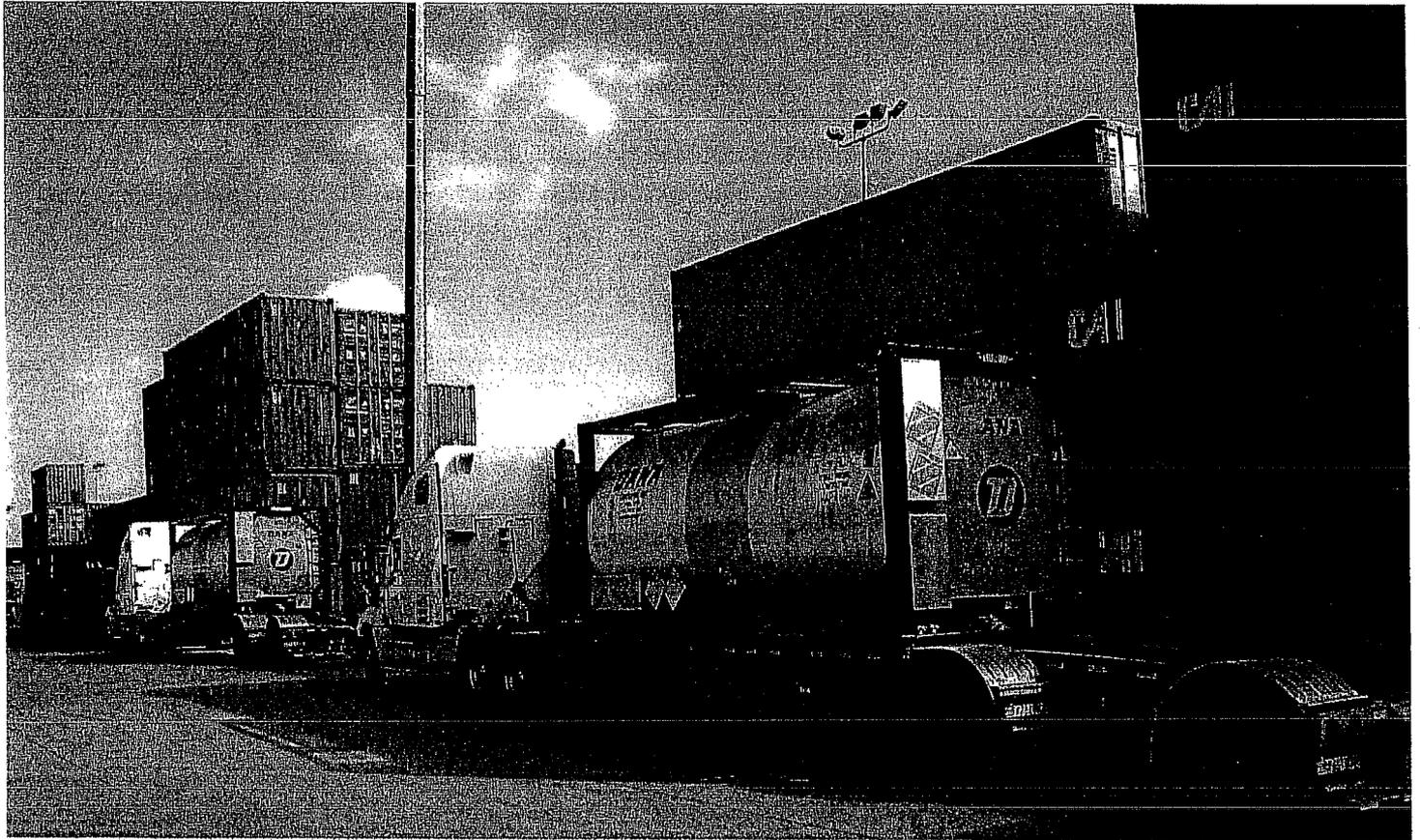
CERTIFICATE OF SERVICE

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

/s/ Ginny S. Kremer

Ginny Sinkel Kremer

EXHIBIT E



The Dana Companies

The Dana Companies' Rich History Supports Continued Growth

Supply Chain

The Dana Companies' Rich History Supports Continued Growth

Written by: Jamie Robinson

Produced by: Dan Story >>>

The Dana Companies has expanded over the past 40 years via acquisitions, fleet expansion and keen management practices



The Dana Companies

The Dana Companies' Rich History Supports Continued Growth

The Dana Companies has grown from a one-truck, one-driver operation at its inception in 1972 to become an international corporation recognized as one of the top five liquid bulk carriers in the United States. Founder Ronald Dana was a former owner-operator for Matlack, and he noticed a gap in some services neglected to customers. He began the operation and expanded both his fleet, and in purchasing other companies to meet the needs he recognized among his customers.

The Dana Companies expanded its fleet of trucks for hauling hazardous commodities, purchasing more vehicles, equipment and employees. The subsequent purchase of tank wash facilities in key chemical markets expanded the Dana Companies to include Dana Container. Seeing customers needs for the use of cargo tank trailer equipment on a temporary basis, its leasing division was born.

The growth and acquisitions – most notably Suttles Truck Leasing and Liquid Transport Corp. in

1999 and 2006, respectively – of The Dana Companies furthered not only its capabilities, but its reach and recognition across the nation. The Dana Companies provide a broad range of services, including chemical and petroleum transportation, equipment leasing and storage, intermodal services, logistics and railcar leasing. Its latest endeavor is the construction of a “state of the art” Rail-to-Truck transfer facility in Upton, MA. In operation for almost two year, the facility services 15 customers with an average 115 rail cars, with zero safety incidents.

Growth Through Programs and Technology

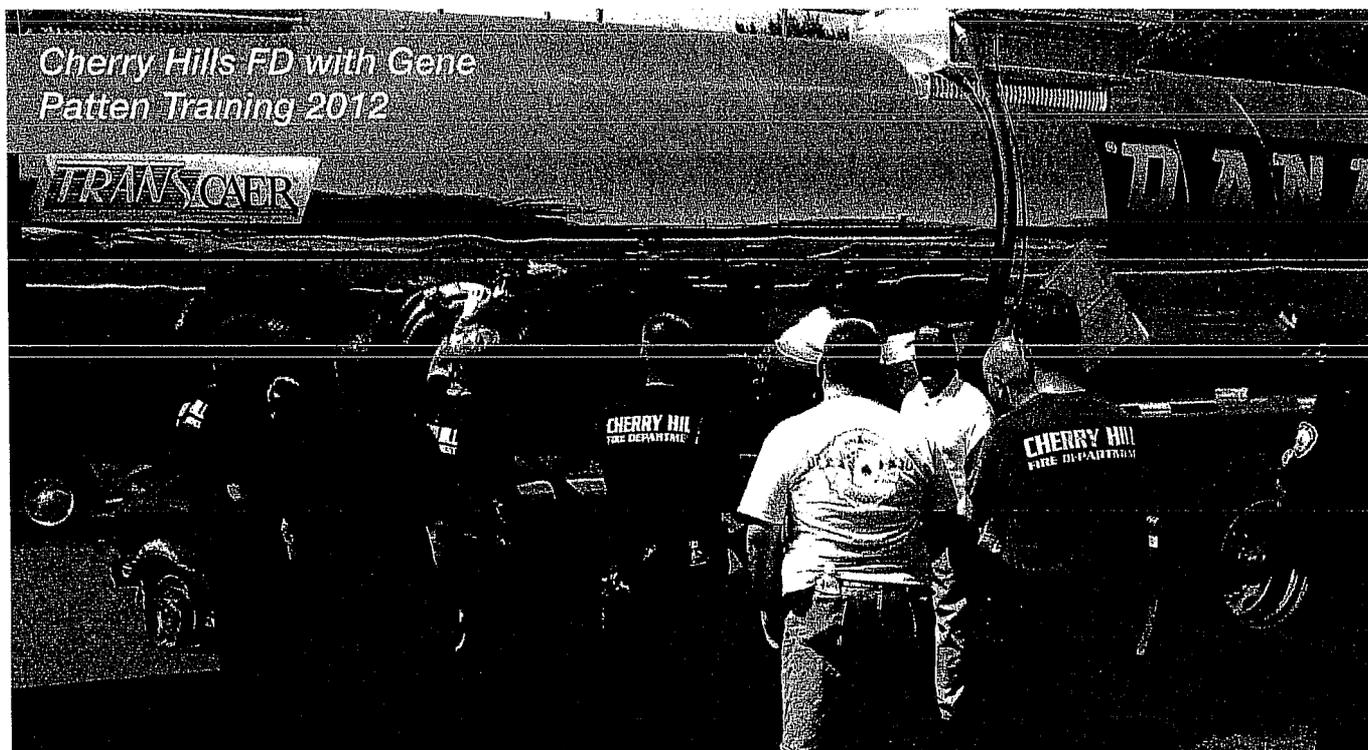
Dana Companies must meet strict safety regulations, making safety a daily concern, particularly for VP of Corporate Responsible Care Gene Patten. Patten covers internal auditing, interfacing with regulatory agencies, the coordination of region safety managers and operations. Patten’s career spans over 30 years in liquid bulk chemical transportation, and has worked as a dispatcher, terminal manager and

regional manager in the Northeastern United States. Dana's Responsible Care Management System is certified by Midland Engineering of Midland, MI. Southeast Region Operations Manager, Ben Wood, claims "we use the RCMS whenever we open a new terminal in my region, and it has proven itself over and over again." Dana is also involved in the ACC's Transcaer® program, training hundreds of emergency responders in 19 cities in 10 states during 2012.

In the transportation side of the business, The Dana Companies has employed new technologies, many of which also support green practices and environmental consciousness. Peterbilt manufactured "Clean idle" tractors are one of many ways in which the company reduces its carbon footprint, as well as the International "ProStar" tractor featuring a MaxxForce engine that improves fuel economy.

"We're very mindful of the environment at each of our locations," says Dan Bonanni, VP of Risk Management. "Our goal is to meet or exceed all regulatory requirements."

Employees at Dana Companies have participated in six Sigma projects to increase carrier reliability and reduce detention. Also, in the safety and



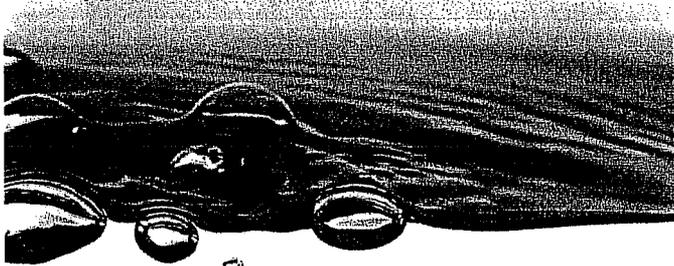
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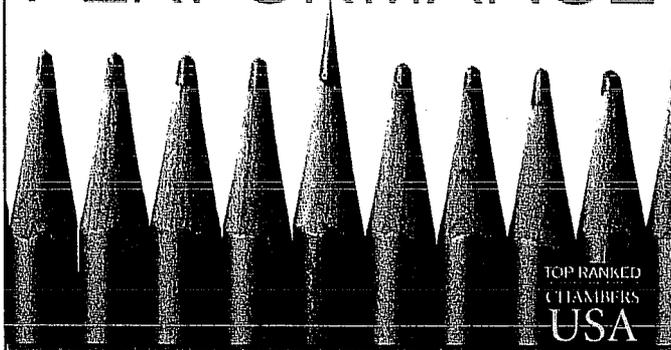
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The Dana Companies

*The Dana Companies' Rich History
Supports Continued Growth*

performance arena, Patten says Dana Companies has a "Goal Zero" policy on incidents, accidents and injuries. Each year, the company sets a goal to reduce the number of incidents by 20 percent.

"We've met these annual goals consistently over the past three years," Patten says.

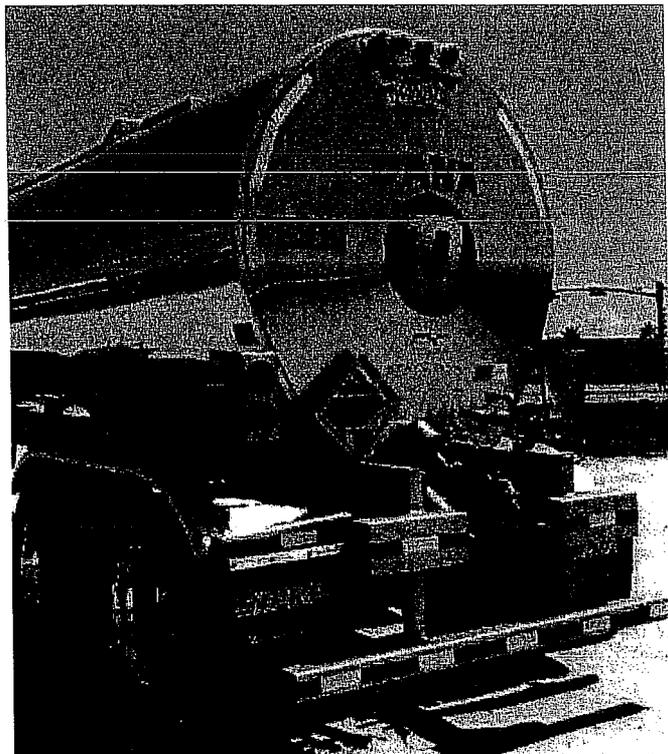
Owner-Operators and Employees

Vehicle owner-operators and employees are an important aspect of The Dana Companies' continuous improvement.

"We have the highest paid owner-operators in the tank truck business, and we are currently at an all-time low owner-operator turnover rate of less than 19 percent," says Patten. "This is mostly due to our network abilities to keep our trucks loaded all of the time with minimum empty miles."

Patten says the Dana Companies strive to bring in the best qualified professionals for the right positions and goes the extra mile to keep employees on long-term, saying Dana Companies "always looks for individuals that want to grow with [the] company."

Dana Companies will need to continue to hire these right-fit, long-term employees more and



more these days as the business expands into new markets. With high owner-operator, employee and client recommendations and a technologically driven future, Dana Companies will continue to attract good employees and maintain great internal and external relationships.

STATISTICS



INDUSTRY:

BULK CHEMICAL TRANSPORTATION

FOUNDED:

1972

HEADQUARTERS:

Avenel, NJ

KEY PEOPLE/TITLES:

- Ronald B. Dana, President / Founder
- Bob Cottrell, VP – Operations
- Ted Jamison & Chuck Martinez – Sales Directors
- Dale Hirschfield, VP – Special Projects
- Gene Patten, VP – Planning & Development, Corporate Responsible Care® Coordinator

EMPLOYEES:

2000+

WEBSITE:

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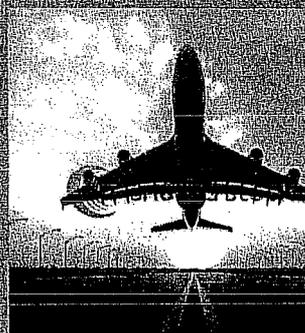
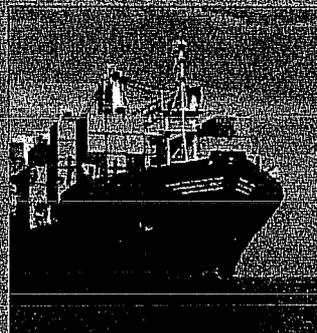
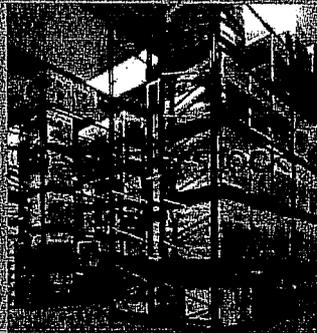
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