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232581

July 20, 2012

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**SURFACE  
TRANSPORTATION BOARD**

Karl Morell  
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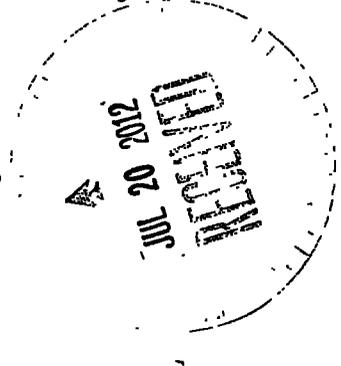
BY HAND DELIVERY

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

**ENTERED  
Office of Proceedings**

JUL 20 2012

**Part of  
Public Record**



Re: STB Finance Docket No. 35644, BNSF Railway Company –  
Acquisition and Operation Exemption – Nebraska  
Northeastern Railway Company

Dear Ms. Brown:

Attached for filing are the original and ten copies of a Petition for  
Exemption under 49 U.S.C. § 10502, and a check covering the  
\$6,600 filing fee.

Please time and date stamp the extra copy of the Petition and  
return it with our messenger.

If you have any questions, please call me.

Sincerely,

Karl Morell  
Of Counsel

Enclosures

**FEE RECEIVED**

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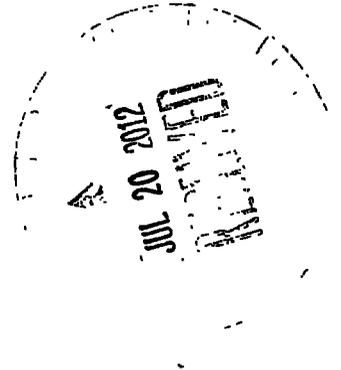
232581

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35644

BNSF RAILWAY COMPANY  
--ACQUISITION AND OPERATION EXEMPTION--  
NEBRASKA NORTHEASTERN RAILWAY COMPANY

PETITION FOR EXEMPTION



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TRANSPORTATION BOARD

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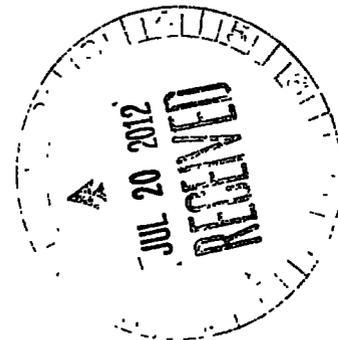
Dated: July 20, 2012

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35644

BNSF RAILWAY COMPANY  
--ACQUISITION AND OPERATION EXEMPTION--  
NEBRASKA NORTHEASTERN RAILWAY COMPANY

PETITION FOR EXEMPTION



BNSF Railway Company (“BNSF”) hereby petitions the Surface Transportation Board (“Board”) for an exemption from prior review and approval under 49 U.S.C. §§ 11323-25 of BNSF’s acquisition of the 120.4-mile rail line owned by Nebraska Northeastern Railway Company (“NENE”).

**SUMMARY OF TRANSACTION**

In 1996, NENE acquired from BNSF the rail line located between milepost 4.0, near Ferry Station, NE, and milepost 124.4, at O’Neill, NE (the “Line”). STB Finance Docket No. 32999, *Nebraska Northeastern Railway Company – Acquisition and Operation Exemption – Burlington Northern Railroad Company* (not printed), served July 29, 1996.

BNSF and NENE have entered into a Purchase and Sale Agreement, dated July 19, 2012 (the “Agreement”)<sup>1</sup>, pursuant to which BNSF has agreed to reacquire the Line from NENE and recommence common carrier operations over the Line. A map of the Line is attached as Exhibit 1.

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<sup>1</sup> A redacted copy of the Agreement is attached as Exhibit 2. Un-redacted copies of the Agreement are being filed under seal simultaneously with this Petition.

## **BACKGROUND**

BNSF is a Class I carrier that owns and operates lines of railroad in 28 states. NENE is a Class III carrier whose only operations are over the Line. Prior to 1996, one of BNSF's predecessors, the Burlington Northern Railway Company, was the owner of, and the exclusive operator over, the Line. Upon the closing of the transaction in STB Finance Docket No. 32999, NENE became the owner of, and exclusive operator over, the Line.

About 99% of NENE traffic consists of grain or grain products. There are two shippers that ship under BNSF's grain shuttle train program on NENE, which allows them to ship dedicated 110-car unit grain trains that cycle between their elevator and the extensive BNSF grain shuttle destination network. NENE also serves three major ethanol production facilities.

BNSF is purchasing the Line in order to strengthen its Agricultural Products franchise in the region. There are opportunities for additional grain shipping facilities that can be achieved under BNSF ownership. Integrating the NENE operation into the BNSF network will produce a seamless operation for shippers. NENE shippers will be able to take full advantage of BNSF's extensive destination network for grain and grain products. BNSF will be able to provide improved service by eliminating the Sioux City area interchange with NENE along with any associated delays. BNSF also plans to invest in the NENE property in order to increase train speeds and improve reliability.

## ARGUMENT

### **I. THE PROPOSED TRANSACTION SHOULD BE EXEMPTED FROM THE PRIOR APPROVAL REQUIREMENTS OF 49 U.S.C. §§ 11323-25.**

Under 49 U.S.C. § 11323(a)(2), prior Board approval is required for a rail carrier to purchase the line of another rail carrier.

Pursuant to 49 U.S.C. § 10502, however, the Board must exempt a transaction from regulation when it finds that:

(1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and

(2) either:

(a) the transaction is of limited scope, or

(b) regulation is not necessary to protect shippers from the abuse of market power.

The legislative history of Section 10502 reveals a clear Congressional intent that the Board should liberally use its exemption authority to free certain transactions from the administrative and financial costs associated with continued regulation. In enacting the Staggers Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, Congress encouraged the Board's predecessor to liberally use the expanded exemption authority under former Section 10505:

The policy underlying this provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemption from remaining regulation.

H.R. Rep. No. 1430, 96th Cong. 2d Sess. 105 (1980). *See also Exemption From Regulation - Boxcar Traffic*, 367 I.C.C. 424, 428 (1983), *vacated and remanded on other grounds, Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984). Congress reaffirmed this policy in the

conference report accompanying the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which re-enacted the rail exemption provisions as Section 10502. H.R. Rep. No. 422, 104th Cong., 1st Sess. 168-69 (1995).

In reviewing an exemption petition under Section 10502, the Board does not undertake a broader analysis than it would apply to a transaction under the statutory provision that would apply in the absence of the exemption. *Blackstone Capital Partners – Control Exemption – CNW Corp.*, 5 I.C.C.2d 1015, 1019 (1989)(“*Blackstone*”); *Vill. of Palestine v. I.C.C.*, 936 F. 2d 1335 (D.C. Cir. 1991).

The proposed transaction does not involve the merger or control of at least two Class I rail carriers. Therefore, absent an exemption, the proposed transaction would be subject to Board review under the standards set forth in 49 U.S.C. § 11324(d). Section 11324(d) provides that the Board “shall approve” the transaction unless it finds both that:

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

49 U.S.C. § 11324(d).

In transactions subject to Section 11324(d), the primary focus is on the probable competitive effects of the proposed transaction. *See, e.g.*, Finance Docket No. 32579, *Canadian Pac. Ltd., and Soo Line R.R. Co. - Control - Davenport, Rock Island & N. W. Ry.* (served February 10, 1995), slip op. at 5; *Wilmington Terminal R.R., Inc. - Purchase & Lease - CSX Transp., Inc.*, 6 I.C.C. 2d 799, 803 (1990), *pet. for review denied sub nom., Ry. Labor*

*Executives' Ass'n v. ICC*, 930 F.2d 511 (6th Cir. 1991). The public interest factors are considered only where significant anticompetitive effects are found. *Id.*

A finding of competitive harm under Section 11324(d)(1) must be grounded on a showing that any adverse competitive effects are both “likely” and “substantial.” *Wisc. Cent. Transp. Corp. – Continuance in Control – Fox Valley & W. Ltd.*, 9 I.C.C.2d 233, 238 (1992). Examples of adverse competitive impacts that would trigger the balancing of the public interest factors under Section 11324(d)(2) “would be the likelihood of significantly higher rates or significantly worsened service, or the likelihood of a combination of the two.” *Blackstone*, at 1019 (footnote omitted). Even if such showings were made, the proposed transaction may not be disapproved unless the anticompetitive effects of the proposed transaction outweigh the public interest factors. *See* Finance Docket No. 31991, *CSX Corp., CSX Transp., Inc. and Carrollton R.R. - Control - Transkentucky Transp. R.R.* (not printed), served April 15, 1991, slip op. at 2.

The acquisition of a rail line by one rail carrier from another rail carrier does not result in harm to competition unless the acquisition creates or enhances the ability of the acquiring carrier to exercise market power. The Board and its predecessor have defined market power as the ability of a carrier profitably to increase rates above competitive levels or to reduce the quality of service for a significant period of time without losing traffic to competing carriers or other sources. *See, e.g., CSX Corp. - Control - Am. Commercial Lines*, 2 I.C.C.2d 490, 515 (1984), *pet. for review denied sub nom., Crouse Corp. v. ICC*, 781 F.2d 1176 (6th Cir.), *cert. denied*, 479 U.S. 890 (1986). In addition, only competitive harm that is directly and causally related to a proposed transaction -- and not pre-existing conditions -- are considered by the Board in determining whether a transaction will lessen competition. *Burlington N. R.R. Co. – Control and Merger - The Atchison, Topeka and Santa Fe Ry. Co.*, 10 I.C.C. 2d 661, 728 (1995).

As is demonstrated in this Petition, there are no anticompetitive effects that flow from the proposed transaction. The proposed transaction will not lead to higher rates or worsened service. To the contrary, the proposed transaction will improve rail service for all of the shippers located on the Line by eliminating interchange costs and delays at Sioux City.

**A. Regulation Of The Proposed Transaction Is Not Necessary To Carry Out The Rail Transportation Policy.**

Detailed scrutiny of the proposed transaction under 49 U.S.C. §§ 11323-25 is not necessary to carry out the Rail Transportation Policy (“RTP”). By minimizing the administrative expense of considering the proposed transaction, the requested exemption will expedite regulatory decisions and reduce barriers to entry and exit [ 49 U.S.C. §§ 10101(2) and (7)]. All operations on the NENE Line will originate or terminate out of BNSF’s Sioux City yard. This will allow NENE traffic to make fast and efficient connections to BNSF trains at Sioux City. BNSF also plans to selectively raise train speeds on the Line by replacing older rail that is limited to 10 miles per hour. Thus, the proposed transaction will create greater efficiency in the operations of BNSF and improve service for the customers on the Line.

Consequently, the proposed transaction will help promote a safe and efficient rail transportation system [49 U.S.C. § 10101(3)], ensure the continuation of a sound rail transportation system with effective competition among rail carriers [49 U.S.C. § 10101(4)], foster sound economic conditions in transportation and ensure effective competition [49 U.S.C. § 10101(5)], encourage honest and efficient management [49 U.S.C. § 10101(9)], and promote energy conservation [49 U.S.C. § 10101(14)]. Other aspects of the RTP will not be adversely affected.

**B. The Proposed Transaction Is Of Limited Scope.**

BNSF is simply reacquiring its formerly owned 120.4-mile rail line from NENE. The Board and its predecessor have found the acquisition and operation of similar lengths of rail line to be limited in scope. *See, e.g., Ind. R.R. Co. – Acquisition & Operation – Ill. Cent. R.R. Co.*, 6 I.C.C.2d 1004, 1011 (1990)(acquisition of 90.3 miles of rail line found limited in scope); Finance Docket No. 31482, *Mid Michigan R.R. Co. – Purchase Exemption – The St. Joseph & Grand Island R.R. Co. Line Between St. Joseph, MO and Upland, KS* (not printed), served August 7, 1989 (acquisition of 107.3 miles of rail line found limited in scope); Finance Docket No. 32149, *Genesee & Wy. Indust., Inc. – Continuance in Control Exemption – Allegheny & E. R.R., Inc.* (not printed), served October 23, 1992 (acquisition of control of carrier operating 147.1 miles of rail line and serving 8 customers found limited in scope).

Moreover, the change in ownership of the Line will not adversely affect traffic volumes on the Line or the routings available to the shippers other than eliminating the interchange between BNSF and NENE. All routings and services currently available to NENE shippers will be available under BNSF ownership. Grain shuttle trains will continue to operate as they do under NENE, with additional opportunity available for grain shuttle elevator development. The proposed transaction will not have any measurable impact on the national, regional or local rail industry. Consequently, the proposed transaction is of limited scope.

**C. Regulation Of The Proposed Transaction Is Not Necessary To Protect Shippers From An Abuse Of Market Power.**

Even if the proposed transaction were not limited in scope, the transaction should nevertheless be exempted because the transaction will not result in any abuse of market power by BNSF. The proposed transaction represents merely a change in the ownership of the Line. Prior to 1996, BNSF was the exclusive owner and operator of the Line. Once this transaction is

consummated, BNSF will once again become the exclusive owner and operator of the Line. Most importantly, no customer directly served today by NENE is also directly served by BNSF. Consequently, there will be no loss of rail competition. BNSF does not anticipate material changes in operations following acquisition. Grain shuttle trains will continue to run as they do today, although faster following track investments that raise selective sections of track to 25 miles per hour. Local operations will be conducted on a similar basis as they are today by NENE.

Consequently, the proposed transaction will not result in an abuse of market power. Rather, the proposed transaction, overall, will enhance competition. *See* STB Finance Docket No. 33609, *Norfolk S. Ry. – Purchase Exemption – Union Pac. R.R. Co.* (not printed), served October 29, 1998, slip op. at 3 (finding no anticompetitive effect where “transaction represents only a change in owners”); Finance Docket No. 31469, *S.C. Cent. R.R. – Purchase – CSX Transp., Inc. Line Between E. Greenville and Laurens, SC* (not printed), served July 30, 1990, slip op. at 3 (finding no anticompetitive effect where the number of competitive alternatives available to shippers remains unchanged). As a practical matter, the proposed transaction will result in a change of ownership and improved service to the customers along the Line. There will be no adverse change in competition. Accordingly, regulation is not necessary to protect shippers from an abuse of market power.

## **II. LABOR PROTECTION.**

Under 49 U.S.C. § 10502(g), the Board may not use its exemption power to relieve a rail carrier of its statutory obligation to protect the interests of employees. Therefore, as a condition to granting the exemption, BNSF has no objection to the Board imposing the employee

protective conditions set forth in *N.Y. York Dock Ry. – Control – Brooklyn E. Dist. Terminal*, 360 I.C.C. 60 (1979).

### **III. ENVIRONMENTAL AND HISTORIC IMPACTS.**

BNSF is acquiring the Line for continued rail operations. Further Board approval is required for BNSF to abandon any service and there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older. Hence, this Petition for Exemption does not require an historic report under 49 C.F.R. § 1105.8(b)(1).

BNSF's acquisition will not result in significant changes in carrier operations. There will not be a diversion of: (1) more than 1,000 rail carloads a year to motor carriage; or (2) an average of 50 carloads per mile per year for any part of this line to motor carriage. This transaction will not result in: (1) an increase in rail traffic of at least 100 percent or an increase of at least eight trains a day on any segment of the line; (2) an increase of rail yard activity of at least 100 percent; or (3) an average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day. BNSF's acquisition of the Line will not affect a Class I or nonattainment area under the Clean Air Act. In any event, the thresholds of 49 C.F.R. § 1105.7(e)(5)(ii) will not be exceeded. Finally, the transportation of ozone depleting materials is not contemplated. Therefore, no environmental documentation is required under 49 C.F.R. § 1105.6(c)(2).

This action will not significantly affect either the quality of the human environment or energy conservation.

## CONCLUSION

Regulation of the proposed transaction is not necessary to carry out the RTP. Also, the proposed transaction is limited in scope. Furthermore, regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. Consequently, BNSF respectfully request that the Board exempt from the prior approval requirement the proposed acquisition by BNSF of the Line.

Respectfully submitted,



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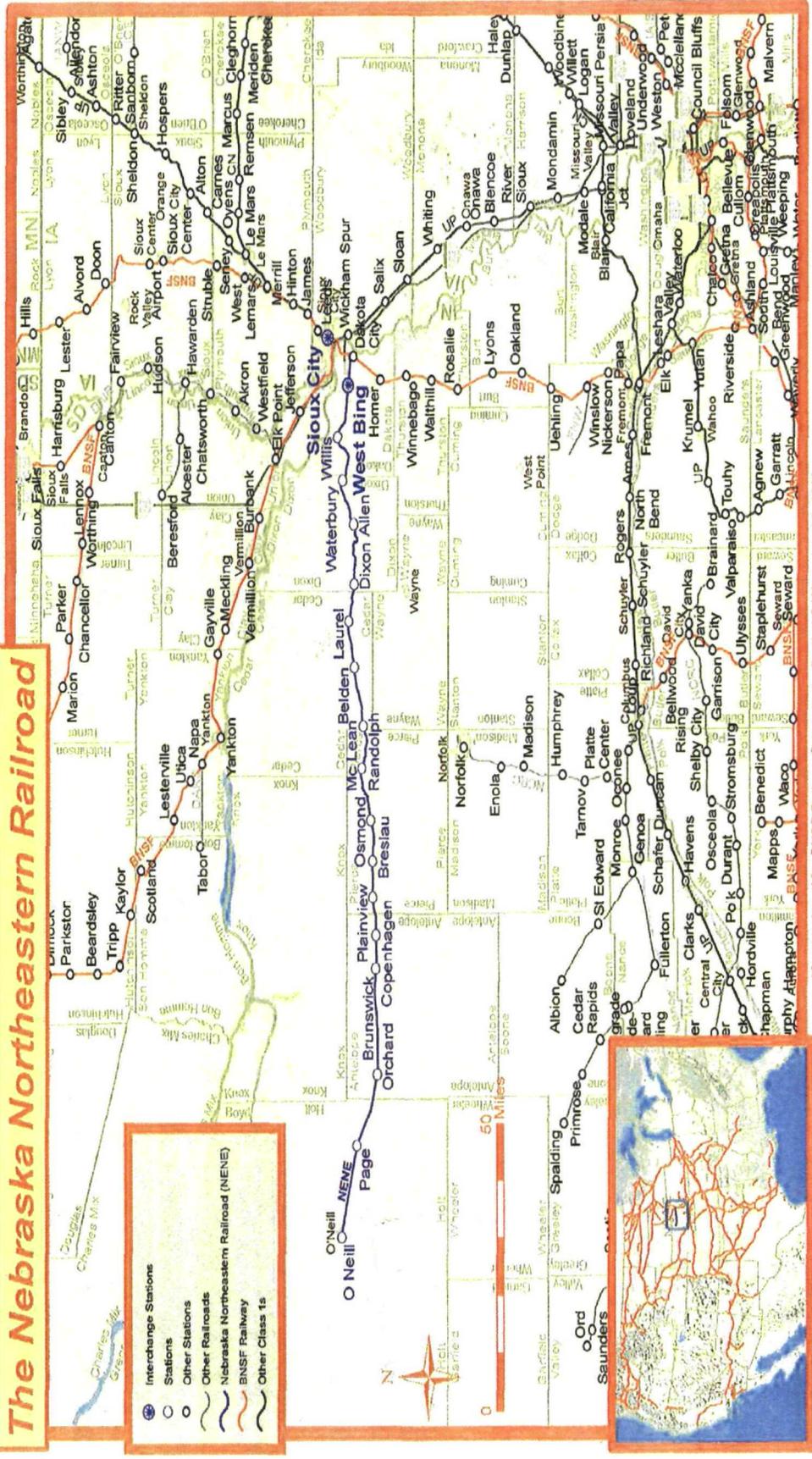
Dated: July 20, 2012

# **EXHIBIT 1**

**MAP**

# NENE Map

## The Nebraska Northeastern Railroad



Map produced for BNSF Railway Company by Bartlett & West, July 15, 2009



EXHIBIT 1

**PURCHASE AND SALE OF REAL PROPERTY AND IMPROVEMENTS  
IN DAKOTA, DIXON, CEDAR, PIERCE, ANTELOPE, AND HOLT COUNTIES, NEBRASKA**

**BY AND BETWEEN**

**BNSF RAILWAY COMPANY, BUYER**

**AND**

**NEBRASKA NORTHEASTERN RAILWAY COMPANY, SELLER**

This Purchase and Sale of Real Property and Improvements (the "Agreement") is entered into as of July 19, 2012 (the "Effective Date") between BNSF RAILWAY COMPANY, a Delaware corporation with its principal place of business at 2500 Lou Menk Drive, Fort Worth, Texas, 76131 (hereinafter referenced as "Buyer"), and NEBRASKA NORTHEASTERN RAILWAY COMPANY, a Nevada corporation with its principal place of business at 5430 LBJ Freeway, Suite 1444, Dallas, Texas, 75240 (hereinafter referenced as "Seller").

In consideration of the mutual covenants set forth in this Agreement and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Buyer agree as follows:

**ARTICLE I  
DEFINITIONS; INTERPRETATION**

Section 1.1 Definitions. For purposes of this Agreement, when used herein with an initial capital letter the following terms shall have the meaning ascribed to them as set forth below.

"Affidavit" shall have the meaning defined in Section 5.2(a)(iv).

"Affiliate" means, with respect to any Person, (i) any Person directly or indirectly controlling, controlled by or under common control with such Person through (A) the ownership of fifty percent (50%) or more of the outstanding equity interests of a Person, or (B) the possession, directly or indirectly, of the power to direct or cause the direction of management or policies (whether through ownership of equity interests, by contract or otherwise), and (ii) any director, officer, manager, shareholder, partner, member, owner or employee of such Person (other than a publicly-traded Person), and in the case of an individual, such individual's estate.

"Asserted Liability" has the meaning set forth in Section 9.5.

"Bill of Sale and Assignment" shall have the meaning defined in Section 5.2(a)(ii).

"Closing" shall have the meaning defined in Section 5.1.

"Closing Date" shall mean the first day of the month immediately following the date that is 30 days after the expiration of the Review Period.

"Cure Period" shall have the meaning defined in Section 3.3.

"Deeds" shall have the meaning defined in Section 5.2(a)(i).

"Encumbrances" shall mean liens, claims, easements, covenants, conditions, rights-of-way, reservations, restrictions, encroachments, tenancies, mineral interests, royalty interests, oil, gas or mineral leases and any other encumbrances on the Transferred Assets, including the mineral estate, and any other encumbrances of whatsoever nature.

"Environmental Loss" means Losses that arise from or are attributable to any violation or requirement of any applicable Environmental Law or from any Hazardous Substance located on, under, or near the Real Property,

where such Losses were caused by Hazardous Substances located on, under or near the Real Property prior to the date of Closing.

**"Environmental Insurance Policy"** means that certain insurance policy to insure against environmental claims made against the Real Property as described in Section 7.1(f).

**"Environmental Laws"** shall mean all federal, state and local laws, statutes, ordinances, regulations, standards, rules, policies, common law rule and other governmental requirements in effect on the date hereof or adopted or modified after the date of this Agreement, and any judicial or administrative interpretation thereof having the force and effect of law, including, without limitation, any applicable judicial or administrative order, consent decree, judgment, order or requirement conferring rights or imposing duties at common law (including without limitation the common law respecting nuisance and tortious liability) relating to (i) emissions, discharges, spills, releases or threatened releases of Hazardous Substances into ambient air, atmosphere, soils, surface and ground water, wetlands, watercourses, stream sediments, publicly or privately owned treatment works, drains, sewer systems, stormwater runoff or discharge, septic systems or onto land; (ii) the use, treatment, storage, disposal, handling, manufacturing, transportation or shipment of Hazardous Substances; (iii) the regulation of storage tanks; or (iv) otherwise relating to the regulation and protection of the environment, plant or animal life, and human health or safety to the extent applicable to the Transferred Assets or the business or operations thereon.

**"Escrow Officer"** shall mean Nebraska Title Company, 6003 Old Cheney Rd, Suite 300, Lincoln, Nebraska, 68516.

**"Existing Agreements"** shall have the meaning defined in Section 4.1(e).

**"FCC"** means the Federal Communications Commission

**"Governmental Approval"** shall mean any consent, license, registration or permit issued, granted, given or otherwise made available by or under the authority of any Governmental Body or pursuant to any Legal Requirement.

**"Governmental Body"** shall mean: (i) any state, county, city, town, borough, village, district or other jurisdiction; (ii) any federal, state, local, municipal or other government; (iii) any governmental or quasi-governmental authority of any nature (including any agency, branch, department, board, commission, court, tribunal or other entity exercising governmental or quasi-governmental powers); (iv) any body exercising, or entitled or purporting to exercise, any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power; (v) the STB; or (vi) any official of any of the foregoing.

**"Handling Carrier Agreement"** shall have the meaning defined in Section 12.3.

**"Hazardous Substance"** shall mean all substances, wastes, pollutants, element, compound, chemical mixture, contaminants and materials regulated, or defined or designated as hazardous, extremely or imminently hazardous, dangerous, or toxic, or regulated by, the following federal statutes and their state counterparts, as well as these statutes' implementing regulations: the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601 et seq., the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§136 et seq., the Atomic Energy Act, 42 U.S.C. §§2011 et seq, and the Hazardous Materials Transportation Act, 49 U.S.C. §§5101 et seq.; petroleum and petroleum products including crude oil and any fractions thereof; asbestos; and natural gas, synthetic gas, and any mixtures thereof.

**"Improvements"** shall have the meaning defined in Section 2.1(c).

**"Independent Contract Consideration"** shall have the meaning defined in Section 4.7.

"Indemnification Notice" has the meaning set forth in Section 9.5.

"Indemnitee" has the meaning set forth in Section 9.5.

"Indemnity Objection" has the meaning set forth in Section 9.6.

"IRC" means the Internal Revenue Code of 1986, as amended.

"Legal Requirement" shall mean any federal, state, local, municipal, foreign, international, multinational or other constitution, law, ordinance, principle of common law, code, regulation, statute or treaty.

"Losses" shall have the meaning defined in Section 9.2.

"New Encumbrances" shall have the meaning defined in Section 3.4.

"Nondisclosure Agreement" means that certain Nondisclosure Agreement between Buyer and Seller dated February 6, 2012.

"Objections" shall have the meaning defined in Section 3.2.

"Original Sale Agreement" shall mean that certain Agreement for the Sale of Certain Assets, Rights and Obligations Burlington Northern Railroad Company to Nebraska Northeastern Railway Company dated June 20, 1996, as amended.

"Other Rights" shall have the meaning defined in Section 2.1(g).

"Permits" shall have the meaning defined in Section 2.1(d).

"Permitted Encumbrances" shall mean Encumbrances that Buyer has agreed to assume or acquire the Transferred Assets subject to.

"Person" shall mean an individual, corporation, limited liability company, joint stock company, trust, partnership, unincorporated association, or any other legal entity.

"Rail Service" shall have the meaning defined in Section 2.1(b).

"Real Property" shall have the meaning defined in Section 2.1(a).

"Response Period" has the meaning set forth in Section 9.6.

"Review Items" shall have the meaning defined in Section 4.1.

"Review Period" shall mean the period beginning with the Effective Date and expiring at 11:59 p.m. in Fort Worth, Texas on the day that is 60 days following the Effective Date.

"Right of Entry" shall have the meaning defined in Section 4.2.

"Seller Released Encumbrances" means each of the following: (a) monetary Encumbrances created or incurred by Seller, (b) Encumbrances for trade payables created or incurred by Seller other than Origin Efficiency Payments unpaid by Buyer applicable to periods prior to the Closing Date which Seller has passed through to shippers as a matter of practice, and (c) Encumbrances for Third Party Claims known to Seller prior to Closing and not being contested in good faith by Seller, though Seller agrees to pay any amount it finally concedes is owed with respect to any such Third Party Claim. Notwithstanding the foregoing, Seller Released Encumbrances shall not include Encumbrances attributable to amounts payable to, or claimed to be payable by, Buyer.

"Service Agreements" shall have the meaning defined in Section 4.1(n).

"Specifications" shall have the meaning defined in Section 4.1(h).

"STB" shall mean the U.S. Department of Transportation, Surface Transportation Board and its successor agency(ies).

"Studies and Plans" shall have the meaning defined in Section 2.1(f).

"Survey" shall have the meaning defined in Section 3.1.

"Surviving Service Agreements" shall have the meaning defined in Section 4.6.

"Taxes" shall have the meaning defined in Section 5.5(b).

"Tests" shall have the meaning defined in Section 4.2.

"Third Party Claim" means any legal proceeding that is instituted against an Indemnitee by a Person other than Buyer or Seller.

"Title Report" shall have the meaning defined in Section 3.1.

"Transferred Assets" shall have the meaning defined in Section 2.1.

"Warranties" shall have the meaning defined in Section 2.1(e).

Section 1.2 Interpretation. Unless a clear contrary intention appears or the context otherwise requires, in this Agreement:

- (a) the singular number includes the plural number and vice versa;
- (b) reference to any gender includes each other gender;
- (c) reference to any applicable law means such applicable law as amended, modified, codified or reenacted, in whole or in part, and in effect from time to time, including rules and regulations promulgated thereunder;
- (d) reference to any Article, Section or Exhibit means such Article, Section or Exhibit hereof;
- (e) "hereunder," "hereof," "hereto" and words of similar import shall be deemed references to this Agreement as a whole and not to any particular Article, Section, Exhibit or other provision hereof; and
- (f) "including" (and with correlative meaning "include") means including without limiting the generality of any description preceding such term.
- (g) It is the intent of the parties that the provisions of this Agreement and all provisions of the other documents to be delivered at Closing be given effect where possible. In the event of a conflict between the terms set forth in any Exhibit and the main body of this Agreement, the terms of the main body of this Agreement shall control, unless and except to the extent expressly provided otherwise in either the main body or the Exhibit(s).

Section 1.3 Exhibits. The following exhibits are attached hereto and incorporated herein:

<u>Exhibit A</u>	Description of Real Property
<u>Exhibit B</u>	List of Improvements
<u>Exhibit C</u>	Telecommunications Disposition Plan
<u>Exhibit D</u>	Form for Purchase Price Allocation
<u>Exhibit E</u>	Deeds

<u>Exhibit F</u>	Bill of Sale and Assignment
<u>Exhibit G</u>	Form of Notice of Assignment
<u>Exhibit H</u>	List of Agreements that Terminate at Closing

**ARTICLE II**  
**DESCRIPTION OF CONVEYANCE**

Section 2.1 ***Conveyance of Transferred Assets.*** Subject to the terms and conditions set forth in this Agreement, Seller agrees to sell and convey to Buyer, and Buyer agrees to purchase and accept from Seller, free and clear of Seller Released Encumbrances but otherwise "AS IS, WHERE IS" and "with all faults" except for the specific representations and covenants set forth in this Agreement, the Deeds, the Bill of Sale and Assignment and any other document contemplated to be delivered at Closing:

- (a) All of Seller's interests, in the following described railroad line(s): from O'Neill Subdivision milepost 4.0 west of Bing, Nebraska to the western end of the rail line at O'Neill Subdivision milepost 124.4 in O'Neill, Nebraska, including all of Seller's sidings and related trackage, all as more particularly described in the Exhibit A attached hereto and incorporated herein by reference (the "Real Property"), together with all of Seller's interest in strips and gores, easements, rights-of-way, licenses, interests, rights, and appurtenances appertaining to the Real Property and all of Seller's rights, titles and interests in and to any easements, rights-of-way or other interests in, on, or to any alley, highway, or street in, on, across or adjoining the Real Property.
- (b) All of Seller's right to perform the rail freight transportation services which Seller conducts on the Real Property (the "Rail Service").
- (c) All of Seller's interest in the buildings, fixtures, mechanical systems, bridges, trestles, culverts, signaling equipment, rails, ties, spikes, tie plates, rail anchors, ballast, track materials located on the Real Property including but not limited to all of Seller's interest in the items listed on Exhibit B attached hereto and incorporated by reference but excluding all tangible personal property not otherwise expressly provided for including, without limitation, vehicles, locomotives, rolling stock, work equipment, equipment on wheels, small tools, radios, computer equipment, and non-affixed office furnishings and supplies) (collectively, "Improvements").
- (d) All of Seller's interest in the certificates of occupancy, permits, licenses, certifications, authorizations, entitlements and approvals of any governmental authority relating to the ownership, construction, use, development, maintenance or operation of the Real Property and Improvements including, but not limited to, demolition and excavation permits, curb cut and right of way permits and drainage rights and Federal Communication Commission authorizations to use wireless radio licenses [call sign WQD 1840] (collectively, "Permits").
- (e) All of Seller's interest in existing warranties, including manufacturer's warranties (collectively, "Warranties") relating to the Improvements but only to the extent they can be assigned by Seller.
- (f) All of Seller's interest in site plans, surveys, soil and substrata studies, environmental assessments, architectural drawings, plans and specifications, engineering plans and studies, floor plans, landscape plans, operating or maintenance manuals and other plans and studies of any kind relating to the Real Property and Improvements (collectively, "Studies and Plans").
- (g) All of Seller's interest in any other assignable rights affecting any portion of the above-described Real Property and Improvements, that relate to the ownership of the Transferred Assets or are necessary for the conduct of rail freight transportation business on the Transferred Assets (collectively, "Other Rights").

All of the above described interests are collectively referred to herein as the "Transferred Assets."

Section 2.2 ***Encumbrances.*** The Transferred Assets shall be conveyed, assigned, and transferred to Buyer at Closing free and clear of Seller Released Encumbrances but otherwise "AS IS, WHERE IS" and "with all faults" except for specific representations and covenants set forth in this Agreement, the Deeds, the Bill of Sale and Assignment and any other document contemplated to be delivered at Closing.

Section 2.3 Telecommunications Equipment. The Telecommunications Disposition Plan is attached as Exhibit C to this Agreement. The Telecommunications Disposition Plan shall set forth all telecommunications equipment which shall remain on the Transferred Assets and any radio frequencies used in operation of Rail Service that will be transferred and sold to Buyer under the terms of this Agreement and all such equipment which may be removed or relocated by Seller at any time prior to Closing Date.

Section 2.4 Purchase Price Allocation. Attached as Exhibit D is Internal Revenue Service Form 8594 related to the IRS reporting of purchase price allocations. Buyer shall prepare an allocation of the Purchase Price (and all other capitalized costs) among the Transferred Assets in accordance with Section 1060 of the IRC and the Treasury regulations thereunder (and any similar provision of state, local, or non-U.S. law, as appropriate). The allocation of the Purchase Price shall be completed at Closing, or within 30 days thereafter if Buyer needs additional time to obtain an appraisal of the Transferred Assets, and be binding upon Seller and Buyer. Buyer and Seller and their affiliates shall report, act and file tax returns (including, but not limited to, Internal Revenue Service Form 8594) in all respects and for all purposes consistent with such allocation. Neither Buyer nor Seller shall take any position (whether in audits, tax returns or otherwise) that is inconsistent with such allocation unless required to do so by applicable law.

### **ARTICLE III** **BUYER'S DUE DILIGENCE AND REVIEW PERIOD**

Section 3.1 Title Report and Survey. Buyer may obtain, at its own expense, a commitment for an owner's title insurance policy, title opinion, lien report or title report (the "Title Report") from the Escrow Officer showing title to all or portions of the Real Property and Improvements; and a survey of all or portions of the Real Property and Improvements (the "Survey").

Section 3.2 Review Period and Objections. If the Title Report, Survey, or Review Items (defined below) discloses any Encumbrances or other matters that are not acceptable to Buyer in Buyer's sole discretion or if Buyer objects to the legal description contained therein, then Buyer may give Seller written notice of its objections thereto ("Objections") on or before the expiration of the Review Period. If Buyer gives such notice to Seller, Seller may elect whether or not it will endeavor to cure an Objection, and Seller will provide written notice to Buyer of whether or not it has elected to endeavor to cure an Objection.

Section 3.3 Cure Period. If Buyer gives notice of Objections in the manner prescribed in Section 3.2 and Seller does not (i) cure the Objections, cause the Title Report and Survey to be amended to give effect to matters that are cured, and give Buyer written notice thereof within the ten (10) day period following receipt of the notice from Buyer ("Cure Period"), or (ii) provide any written response regarding its election to cure or not cure the Objection during the Cure Period, then Buyer shall have the right to either (i) terminate this Agreement by giving written notice thereof to Seller on or before the expiration of such Cure Period but prior to the Closing, and, upon such termination neither party hereto shall have any further rights or obligations hereunder except for those obligations that expressly survive termination, or (ii) waive the Objections and consummate the purchase of the Transferred Assets subject to the Objections which shall be deemed to be Permitted Encumbrances. Notwithstanding the foregoing, whether or not objected to by Buyer, Seller shall cause any Seller Released Encumbrances affecting the Transferred Assets (other than the lien for current taxes and assessments not yet due and payable), if any, to be fully released at the Closing and if not so released and satisfied, Buyer may deduct the amount thereof from the Purchase Price at Closing to so release or satisfy such matters.

Section 3.4 New Encumbrances. In the event the Title Report and/or Survey are revised after Buyer's initial receipt of the same so as to include any additional exceptions or Encumbrances not shown on the initial Title Report and Survey ("New Encumbrances"), the provisions above shall be applicable to any such New Encumbrance and Buyer shall have the right to deliver Objections with respect thereto in the same manner as Objections to the initial Title Report and Survey except that (i) the Objection Period with respect to any such New Encumbrance shall terminate ten (10) days after Buyer's receipt of the revised Title Report or Survey which first refers to or discloses such New Encumbrance and (ii) the Cure Period with respect to such New Encumbrance shall terminate five (5) days after Seller's receipt of Buyer's Objections with respect thereto.

### **ARTICLE IV** **SELLER'S DELIVERIES AND CONDITIONS TO PERFORMANCE BY BUYER**

Section 4.1 Within five (5) days after the Effective Date, Seller shall give Buyer access to the following items

(or true and correct copies thereof) ("Review Items") for Buyer to review that are in the possession of Seller and reasonably accessible.

- (a) Any existing title insurance policies, surveys, records, prints, archival information, or any other material that relate to the use or maintenance or title to the Transferred Assets during the time the Transferred Assets were operated by Seller.
- (b) All Permits, Warranties, and Studies and Plans.
- (c) A list of all track related materials located on the Real Property, including, without limitation, rails, ties, ballast, etc.
- (d) All real estate tax bills, statement, and/or assessments for the Transferred Assets for the current year and for the past three (3) years.
- (e) Any track agreements, property agreements, leases, licenses, and any other agreements affecting the possession or use of the Transferred Assets, rail service to industries along the Real Property or revenue attributable to the Transferred Assets (the "Existing Agreements"), including any amendments or modifications.
- (f) List of all security deposits, prepaid rent or other sums currently held by Seller under the Existing Agreements, any letters of credit held by Seller under the Existing Agreements, and a statement of any past amounts due to or from Seller related to Existing Agreements or rail service to industries along the Real Property.
- (g) Any material correspondence with parties to the Existing Agreements, and any financial statements of parties (other than Seller) to the Existing Agreements which are not subject to a confidentiality agreement.
- (h) All "as-built" engineering or architectural plans and specifications, drawings, site plans, surveys, and any soil boring test results for the Real Property and all Improvements in Seller's possession or control (collectively "Specifications").
- (i) All certificates of occupancy for all Transferred Assets, as applicable, and for all occupied spaces, licenses, permits, authorizations, and approvals required by law or by any governmental authority having jurisdiction over the Transferred Assets, relating to the construction, occupancy, operation, or present use of the Transferred Assets.
- (j) Any environmental reports of the Transferred Assets;
- (k) Any documentation related to any insurance claims regarding the Transferred Assets delivered or received by Seller for the current year and the three (3) years preceding.
- (l) Any documentation related to notices of violations of any laws, ordinances, rules, decrees, orders, encumbrances or restrictions affecting the Transferred Assets that remain uncured and any such notices received within the last three years.
- (m) Any claims, suits, actions, judgments, demands, or any other legal matters of any kind, nature or description, directly or indirectly arising out of, resulting from, or related to the Transferred Assets or operations on the Real Property.
- (n) Any service or management contracts, equipment, labor or material contracts, maintenance or repair contracts, commission, leasing, or brokerage agreement, switching agreements or any other agreements for the provision of materials or services to the Real Property or Improvements that apply to periods after Closing (collectively, the "Service Agreements").

Buyer may not take possession of any of the Review Items. However, Buyer may copy any of the Review Items but such copies shall be made at Buyer's expense.

Section 4.2 Tests. Pursuant to the terms of that certain Right of Entry dated May 22, 2012 (the "Right of Entry"), Buyer has the right to enter the Real Property and Improvements to make inspections, surveys, test borings, soil analyses, structural analyses and engineering inspections (including, but not limited to, roof, electrical, plumbing, exterior, HVAC, landscaping, fences and interior), and other tests, studies and surveys thereon and therein, including without limitation, environmental tests, borings, analyses and studies ("Tests").

Section 4.3 Inspection Contingency; Termination. Until the expiration of the Review Period, the following matters shall be conditions precedent to Buyer's obligations under this Agreement:

- (a) Buyer being satisfied in Buyer's sole discretion that the Transferred Assets are suitable for Buyer's intended uses, and that Buyer desires, in Buyer's sole discretion, to go forward with the transaction, it being understood and agreed that Buyer may choose not to go forward with the transaction for any reason or for no reason, all in Buyer's sole and absolute discretion, and without any obligation to act reasonably.
- (b) Buyer being satisfied in Buyer's sole discretion with the Review Items and the results of the Tests, including the results of any additional environmental site assessments of the Transferred Assets to be conducted by an environmental consultant acceptable to Buyer in Buyer's sole discretion.
- (c) Without limitation to Section 3 hereof, Buyer being satisfied in Buyer's sole discretion with the status of title to the Transferred Assets, including rights of access.

Section 4.4 Termination. In the event that the Buyer is not satisfied in Buyer's sole discretion as to all of the conditions precedent described in Section 4.3 hereof, Buyer may give notice thereof to Seller, before the end of the Review Period, whereupon this Agreement shall terminate, and upon such termination, neither party shall have any further rights or obligations hereunder except for any that obligations that expressly survive termination.

Section 4.5 Additional Review Items. In addition to the Review Items, until Closing, Seller shall generally make available to Buyer any and all additional reports, studies, plans, drawings, tax statements, surveys, maps or other written materials or information Seller possesses relative to the Transferred Assets and which may be reasonably requested by Buyer.

Section 4.6 Surviving Service Agreements. If Buyer does not terminate this Agreement as contemplated herein then no later than ten (10) business days after the expiration of the Review Period, Buyer will notify Seller which of the Service Agreements Buyer desires to continue after Closing (the "Surviving Service Agreements"). If and to the extent permitted by each Surviving Service Agreement, Seller shall assign to Buyer Seller's interest in such Surviving Service Agreements pursuant to the Bill of Sale and Assignment. Seller shall terminate on or before Closing all other Service Agreements affecting the Transferred Assets and shall pay all costs, penalties and fees for so terminating such Service Agreements, if any. If any of the Surviving Service Agreements require the consent of the vendor thereunder for such assignment to Buyer, Seller shall at its own expense reasonably endeavor to obtain such consent on or before Closing.

Section 4.7 Independent Contract Consideration. As consideration for Seller's holding the Transferred Assets available for purchase during the Review Period, upon execution of this Agreement Buyer shall pay Seller the sum of One Hundred and No/100 Dollars (\$100.00) ("Independent Contract Consideration"). The Independent Contract Consideration shall be non-refundable in all events. The Independent Contract Consideration is intended as independent consideration for Seller entering into this Agreement. The Independent Contract Consideration shall apply to the Purchase Price at Closing.

Section 4.8 Return of Review Items. In the event that the Closing does not actually occur other than as a result of a breach by Seller, Buyer shall return all Review Items, and any copies thereof, to the Seller without retaining a copy.

Section 4.9 Controlling Nature of this Article. The provisions of this Article 4 shall control all other provisions of this Agreement.

Section 4.10

**ARTICLE V**  
**CLOSING**

Section 5.1 **Closing**. The closing ("Closing") of the sale of the Transferred Assets by Seller to Buyer shall occur in or through the Escrow Officer's office on the Closing Date. In the event the STB has not issued a ruling on Buyer's application to seek approval of the transaction contemplated by this Agreement, Buyer shall have a one-time option to extend the Closing Date for 30 days. The term "Closing Date" shall include any extensions provided for in this Agreement. Notwithstanding the foregoing, the Closing may occur earlier than the Closing Date upon the mutual agreement of Seller and Buyer.

Section 5.2 **Closing Deliveries and Actions**. On the Closing, all of the following must occur, all of which are concurrent conditions:

- (a) On the Closing Date, Seller, at its expense, shall deliver or cause to be delivered to Escrow Officer, as escrow agent, for disbursement and delivery by the Escrow Officer as hereinafter set forth, the following:
- (i) Counterpart quit claim deeds ("Deeds") for each county in which the Real Property is located conveying to Buyer Seller's entire interest in the Real Property and Improvements subject to the Permitted Encumbrances in the form attached hereto as Exhibit E and incorporated herein by reference.
  - (ii) A Bill of Sale and Assignment ("Bill of Sale and Assignment"), dated the date of Closing, conveying to Buyer Seller's entire interest in all of the Personal Property, Surviving Service Agreements, Permits, Warranties, Studies and Plans and Other Rights, subject to the Permitted Encumbrances, in form and substance identical to that attached hereto as Exhibit F.
  - (iii) To the extent that the same have not previously been delivered to Buyer, (1) the originals of all Permits, Warranties and Studies and Plans in the possession of Seller or its agents or contractors, and (2) all keys, combinations, manuals and operating instructions for any security devices on the Improvements or Personal Property in the possession of Seller; provided, however, Seller may elect to arrange for delivery of all or some of such items and documents at the Transferred Assets on the Closing Date.
  - (iv) An Affidavit ("Affidavit") duly executed by Seller in compliance with Section 1445 of the IRC stating that Seller is not a "foreign person" as that term is defined in said Section 1445.
  - (v) Evidence reasonably satisfactory to Buyer that all Seller Released Encumbrances against the Transferred Assets have been removed of record or an instrument necessary to release or record any such liens.
  - (vi) Evidence reasonably satisfactory to Buyer that Seller (and the person executing the closing documents on behalf of Seller) has the full right, power and authority to perform this Agreement and the Closing hereunder.
  - (vii) Any other assignments, documents, and other instruments that may be necessary or required to effect the terms of this Agreement and to consummate the transaction.
  - (viii) A Closing Statement in form and substance mutually acceptable to Seller and Buyer.
  - (ix) A notice to each of the vendors under the Surviving Service Agreements in form and substance acceptable to Buyer notifying them of the assignment of Seller's interests in the Surviving Service Agreements to Buyer.

- (b) Buyer, at Buyer's sole cost and expense, shall deliver or cause to be delivered to Escrow Officer, as escrow agent, for the immediate disbursement and delivery by the Escrow Officer as hereinafter set forth, the following:
  - (i) Immediately available funds in the form of a federal wire transfer, certified or cashier's check or such other means of funding acceptable to Escrow Officer in an amount equal to the Purchase Price as adjusted for the charges and prorations described in this Article V and less the Independent Contract Consideration.
  - (ii) Counterpart of the Closing Statement.
  - (iii) Any other assignments, documents, and other instruments that may be necessary or required to effect the terms of this Agreement and to consummate the transaction.
  - (iv) Evidence reasonably satisfactory to Seller that Buyer (and the person executing the closing documents on behalf of Buyer) has the full right, power and authority to perform this Agreement and the Closing hereunder.

Section 5.3 Closing of Escrow and Recordation of Documents. Upon satisfaction and delivery of all of the matters described in Section 5.2, Escrow Officer shall act as escrow agent in closing the transaction hereunder and shall do the following in the following order:

- (a) Record the Deeds in the real property records of the county (or city, if applicable) in which the Real Property is located with instructions for the recorder and obtain verification the Deeds have been recorded in such Deed Records.
- (b) Deliver an original counterpart of the Affidavit, Bill of Sale and Assignment and Closing Statement and copies of all other closing documents to Buyer.
- (c) Deliver an original counterpart of the Bill of Sale and Assignment and Closing Statement and copies of all other closing documents to Seller.
- (d) Release the Purchase Price to Seller, subject to the prorations and allocation of costs as described in this Article 5.
- (e) When returned from recording, deliver the file stamped recorded original Deeds to Buyer and a copy thereof to Seller.

Section 5.4 Allocation of Closing Costs. Closing costs shall be allocated as follows:

- (a) Seller shall pay the following costs:
  - (i) Its own attorneys' fees.
  - (ii) One-half (1/2) of the escrow fees charged by Escrow Officer.
  - (iii) The premium payable for the Environmental Insurance Policy.
  - (iv) The cost of recording any document necessary to release any Seller Released Encumbrances.
- (b) Buyer shall pay the following costs:
  - (i) Its own attorneys' fees.
  - (ii) One-half (1/2) of the escrow fees charged by the Escrow Officer.
  - (iii) The cost of any deed stamps or other costs to record the Deeds.
  - (iv) The cost of any state, county, or local transfer taxes.

- (v) The cost of recording any document necessary to release any Encumbrances other than Seller Released Encumbrances.
- (c) The obligation of each of the parties to pay the costs set forth in this Section 5.4 shall survive the Closing and, to the extent such costs were incurred, any termination of this Agreement.

Section 5.5 Prorations. Taxes affecting the Transferred Assets shall be pro-rated, paid and/or assumed as follows:

- (a) Subject to Article 12, all income and expenses accruing to the Transferred Assets shall be prorated between Seller and Buyer as of the Closing Date, based on Buyer's and Seller's respective periods of ownership in the year in which Closing occurs.
- (b) Ad valorem and similar taxes and assessments relating to the Transferred Assets for the year in which the Closing occurs ("Taxes") shall be prorated between Seller and Buyer as of the Closing Date, based on the latest available tax rate applied to the latest valuation for the Transferred Assets by the applicable central appraisal district (without regard to any existing special use valuation for the Transferred Assets), with Seller to bear the economic burden of all such Taxes for the period prior to the Closing Date and with Buyer to bear the economic burden of all such Taxes for all periods on and after the Closing Date. Seller's prorata share of Taxes shall be reflected as a credit against the Purchase Price in favor of Buyer. As soon as the actual amount of Taxes on the Transferred Assets for such year is known, Seller and Buyer shall, to the extent the amount of actual Taxes differs from the amount estimated at Closing and upon the request of either party, recalculate the proration of such Taxes between Seller and Buyer in the same manner specified above but based on the actual amount of Taxes for such year. Upon such recalculation, Buyer shall pay to Seller, or Seller shall pay to Buyer, as the case may be, a sufficient amount of money so that when added to or subtracted from the preliminary pro-rated amounts for each party determined at Closing, Seller shall have paid for those Taxes applicable to the Transferred Assets prior to the Closing Date and Buyer shall have paid for those Taxes applicable to the Transferred Assets on and after the Closing Date.
- (c) The provisions of this Section 5.5 shall survive the Closing.

Section 5.6 Transfer of Utilities. The parties shall cooperate so that utilities serving any Improvements, to the extent feasible, shall be switched into the name of Buyer as of the Closing Date, so that a final statement can be issued to Seller for the billing period ending on the Closing Date, and so that the first day of the first billing cycle in Buyer's name can begin on the Closing Date; provided, however, if the final statement covering the final period of ownership by Seller also includes periods of ownership by Buyer, the parties shall estimate the charges for utilities serving the Transferred Assets as of the Closing Date, and Buyer shall receive a credit against the Purchase Price for all amounts estimated to be owed by Seller to the utility companies involved for utility charges for the period up to the Closing Date, and upon actual receipt of a billing statement for such period the parties shall recalculate the portion thereof attributable to Seller's period of ownership. Upon such recalculation, Buyer shall pay to Seller, or Seller shall pay to Buyer, as the case may be, a sufficient amount of money so that when added to or subtracted from the preliminary pro-rated amounts for each party determined at Closing, Seller shall have paid for those utility charges applicable to the Transferred Assets prior to the Closing Date and Buyer shall have paid for those utility charges applicable to the Transferred Assets on and after the Closing Date. The provisions of this Section 5.6 shall survive Closing.

Section 5.7 Possession of the Transferred Assets. Upon completion of the Closing (including the release of the Purchase Price to Seller, subject to the prorations and allocation of costs as described in Article 5), Seller shall deliver to Buyer actual possession of the Transferred Assets, free and clear of Seller Released Encumbrances but otherwise "AS IS, WHERE IS" and "with all faults" except for the specific representations and covenants set forth in this Agreement, the Deeds, the Bill of Sale and Assignment and any other document contemplated to be delivered at Closing. Buyer and Seller shall cooperate in good faith to transfer possession of applicable Review Items post-Closing and mutual access to such Review Items as necessary.

Section 5.8 Agreements Terminating at Closing. The Parties acknowledge and agree that upon Closing of the transactions contemplated by this Agreement, the existing agreements between the parties listed on Exhibit H shall terminate for all purposes, shall have no further force or effect, except where the terms or provisions of such agreements expressly survive termination, and no party shall be owed damages as a result of such termination. If required under any

of such existing agreements, this Agreement shall constitute notice of the termination effective as of the Closing.

Section 5.9

**ARTICLE VI**  
**COVENANTS, REPRESENTATIONS, AND WARRANTIES**

Section 6.1 Covenants of Seller. Seller covenants and agrees with Buyer that:

- (a) At all times before Closing, Seller shall maintain in force the existing property and liability insurance with respect to damage or injury to person or property occurring on the Transferred Assets in at least such amounts as are maintained by Seller as of the Effective Date.
- (b) At all times before Closing, Seller shall maintain and continue to operate the Transferred Assets in a manner consistent with Seller's prior practice. Seller shall advise Buyer of any significant repair or improvement it makes to keep the Transferred Assets in such condition. Seller shall not make any material alterations in the Transferred Assets without the express written consent of Buyer which consent may be withheld in Buyer's sole discretion. Seller shall not remove any Transferred Assets therefrom without replacing the items removed with items of similar quality and utility.
- (c) Before Closing, Seller may not create, or voluntarily permit to be created, any liens, easements, Encumbrances, tenancies or other conditions instruments affecting the occupation, use, enjoyment, maintenance or operation of all or any part of the Transferred Assets without Buyer's prior written consent, which Buyer may withhold in its sole discretion.
- (d) At all times before Closing, Seller shall use due diligence and commercially reasonable efforts to keep in full force and effect and/or renew all Permits.
- (e) Before Closing, Seller shall pay in full all bills and invoices for labor, material and services relating to the Transferred Assets and applicable to periods prior to the Closing Date which Seller does not contest on reasonable grounds and has provided a bond or other reasonably sufficient assurance to avoid a lien attaching to the Transferred Assets.
- (f) Seller shall reasonably cooperate with Buyer from the Effective Date through the Closing in connection with all applications or other actions taken by Buyer with respect to zoning, site plans, curb cuts, licenses, permits, approvals, and other matters relative to Buyer's purchase or use the Transferred Assets.
- (g) Seller shall immediately notify Buyer if Seller acquires knowledge that any of the representations and warranties of Seller contained in this Agreement, or any Schedule attached to this Agreement, was inaccurate when made or becomes inaccurate in any respect, and with respect to any inaccuracy on a Schedule, shall revise the Schedule.

Section 6.2 Seller Representations and Warranties. In addition to the representations and warranties contained in other sections of the Agreement, Seller hereby makes the following representations and warranties as of the Effective Date and as of the Closing; provided, however, Seller may modify each and any of the Schedules referenced in this Section 6.2 on one or more occasions prior to Closing without being considered in breach of this Agreement. The following representations and warranties and all other representations and warranties contained in other sections of this Agreement shall survive the Closing for the period set forth below regardless of any investigations Buyer may perform with respect thereto prior to the Closing, each of which individual representations and warranties are material and being relied upon by Buyer.

- (a) Seller is a corporation duly organized, validly existing, and in good standing under Nevada law. Seller has all requisite power and authority to own the Transferred Assets, enter into this Agreement, and consummate the transaction contemplated in this Agreement. This Agreement and all documents to be executed and delivered by Seller at Closing are duly executed and delivered, and are legal, valid, and binding obligations of Seller, and do not violate any provisions of any agreement to which Seller is a party or to which Seller is subject or any order, rule, or regulation applicable to Seller or the Transferred Assets of any court or any federal, state, or municipal regulatory body or administrative agency or other governmental body. The persons executing this Agreement and any and all documents on behalf of Seller have the legal power, right, and actual authority to bind Seller. Except as set forth on Schedule 6.2(a), no permission, approval, or consent by third parties or governmental authorities is required for Seller to consummate this transaction except for the Surface Transportation Board and the Federal Communication Commission.
- (b) Except as set forth on Schedule 6.2(b), there is no existing or pending litigation or claim with respect to the Transferred Assets. Except as set forth on Schedule 6.2(b), Seller has no knowledge of, and has received no notice of, (i) any threatened litigation or proceeding by any organization, Person, or governmental agency against Seller with respect to the Transferred Assets or against the Transferred Assets, (ii) any existing or pending violation of the Transferred Assets' compliance with applicable fire safety laws, building code ordinances, zoning ordinances or any other statutes, ordinances, laws, rules or regulations affecting the Transferred Assets, (iii) any proceedings that could cause the change, redefinition or other modification of the zoning classifications or of other Legal Requirements applicable to the Transferred Assets or any part thereof, (iv) any pending or threatened condemnation proceeding that would affect the Transferred Assets, (v) any proceedings that could impose any requirement that the owner of the Transferred Assets pay, directly or indirectly, any special fees or contributions or incur any expenses or obligations in connection with the development of the Transferred Assets or any portion thereof, other than any regular and nondiscriminatory local real estate or school taxes assessed against the Transferred Assets, (vi) any proceedings that could cause an increase in the assessed value of the Transferred Assets other than the transactions contemplated by this Agreement, or (vii) any disputes regarding the boundary lines of the Transferred Assets.
- (c) Except as may be disclosed in the Title Report or on Schedule 6.2(c), Seller has no knowledge of, and has not entered into, (i) any lease, easement, license, or other agreement granting any third party use or occupancy of the Transferred Assets, (ii) any agreement for the provision of services or materials to or for the Transferred Assets other than the Service Agreements disclosed in writing to Buyer as part of the Review Items, (iii) any commission or brokers agreements affecting the Transferred Assets, (iv) any agreement granting any right of first refusal, right of option to purchase, right of first offer or any other agreement granting any legal or equitable interest in the Transferred Assets except as described in the Original Sale Agreement, (v) any commitment to any governmental authority, utility company, school board, church or other religious body, owners' association or any other organization, group or individual relating to the Transferred Assets that would impose an obligation upon Seller or its successors or assigns to make any contributions or dedications of money or land, or to construct, install or maintain any street, road, highway crossing or other improvements of a public or private nature as part of the Transferred Assets or upon separate lands, or (vi) any other agreement or commitment that could be binding upon Buyer as Seller's successor in title. At Closing there will be no Service Agreements affecting the Transferred Assets other than the Surviving Service Agreements, if any. Each of the Surviving Service Agreements is in full force and effect. Seller has not received or given any notice of default under any Surviving Service Agreement and Seller has no knowledge of any fact or circumstance that with the passage of time or the giving of notice would constitute a default under any Surviving Service Agreement.
- (d) Except as set forth on Schedule 6.2(d), to its knowledge, Seller has received no notice of the assertion by any federal, state or local taxing authority of any tax deficiency, lien, interest or penalty, special assessment or other assessment against the Transferred Assets or Seller which has not been paid; and except as set forth on Schedule 6.2(d), to its knowledge Seller has received no notice of the pendency of any audit or inquiry from any federal, state or local tax authority with respect thereto.
- (e) At Closing, there will be no unpaid bills or claims in connection with any work performed or material purchased in connection with the Transferred Assets applicable to periods prior to the Closing Date that are not being contested by Seller on reasonable grounds and, except for unpaid bills payable to, or claims by, Buyer, for which Seller has provided a bond or other reasonably sufficient assurance to avoid a lien attaching to the Transferred Assets.

- (f) Except as set forth on Schedule 6.2(f), Seller has received no notice, nor does Seller have actual knowledge,
- (i) that the Transferred Assets or any occupant using it is in violation of any Environmental Laws relating to the Transferred Assets,
  - (ii) of any Hazardous Substances having been used, generated, transported, treated, stored, released, discharged or disposed of in, onto, under or from the Transferred Assets in violation of any Environmental Laws,
  - (iii) of the presence on the Transferred Assets now or in the past of (A) asbestos-containing materials, PCPs or urea formaldehyde, (B) "underground storage tanks" (as that term is defined under applicable Environmental Laws), above-ground storage tanks, or other containers of Hazardous Substances, (C) wetlands, (D) any landfill, (E) any cemetery or burial ground, or (F) any endangered species habitat, or
  - (iv) of any actions, suits, proceedings, orders, inquiries, or investigations pending or threatened against, involving, or affecting the Transferred Assets, at law or in equity, or before or by any federal, state, municipal, or other governmental department, court commission, board, bureau, agency, or instrumentality, regarding any Environmental Law or Hazardous Substances.
- (g) To Seller's knowledge, no representation, warranty, or statement of Seller in this Agreement or in any document or Information to be furnished to Buyer misstates or omits any material fact necessary to make the statements or facts contained therein not materially misleading. To Seller's knowledge, all such items, including the Review Items, the Title Report and the Survey, are true, accurate and complete in all material respects.
- (h) To its knowledge, Seller has not received any notices from any insurance company of any defects or inadequacies in the Transferred Assets or any part thereof which would materially and adversely affect the insurability of the Transferred Assets or the premiums for the insurance therefor.
- (i) Except as set forth on Schedule 6.2(i), there are no outstanding obligations to install or pay for any improvements on the Transferred Assets or otherwise related to existing water, sewer, gas, telephone and electricity lines, storm sewer and other utility facilities servicing the Transferred Assets.

**Section 6.3 Seller Terms and Conditions.** Seller's representations, warranties, and covenants in this Agreement are subject to the following terms and conditions:

- (a) Seller's representations, warranties, and covenants, as modified by any changes in the applicable Schedules, are continuing, made both as of the Effective Date and as of the Closing Date, except to the extent that Seller otherwise notifies Buyer in writing at or before Closing. If Seller so notifies Buyer in writing at or prior to Closing (by updating the attached schedules or otherwise), or if Buyer independently discovers on or prior to the Closing, that any representation or warranty is no longer true or was untrue when made, Buyer may either (i) terminate this Agreement by written notice to Seller, and neither party will have any further rights or obligations under this Agreement except for those that expressly survive termination; or (ii) waive the representation or warranty and close the purchase of the Transferred Assets. If Buyer discovers after the Closing that any representation or warranty was not true when made, then Buyer shall be entitled to money damages.
- (b) Seller's representations and warranties in this Article 6 shall survive the Closing for a period of eighteen months.
- (c) For purposes of this Article 6, the term "knowledge", "actual knowledge" or any derivation thereof shall mean the knowledge of Dennis L. Prewett and Loren Claussen.

**Section 6.4 Covenants of Buyer.** Buyer covenants and agrees with Seller that at all times before Closing, Buyer shall continue to operate, interchange and conduct business with Seller in a manner consistent with prior practice.

Section 6.5 Buyer Representations and Warranties. In addition to the representations and warranties contained in other sections of the Agreement, Buyer hereby makes the following representations and warranties as of the Effective Date and as of the Closing. The following representations and warranties and all other representations and warranties contained in other sections of this Agreement shall survive the Closing for the period set forth below regardless of any investigations Seller may perform with respect thereto prior to the Closing, each of which individual representations and warranties are material and being relied upon by Seller.

- (a) Buyer is a corporation duly organized, validly existing, and in good standing under Delaware law. Buyer has all requisite power and authority to own the Transferred Assets, enter into this Agreement, and consummate the transaction contemplated in this Agreement. This Agreement and all documents to be executed and delivered by Buyer at Closing are duly executed and delivered, and are legal, valid, and binding obligations of Buyer, and do not violate any provisions of any agreement to which Buyer is a party or to which Buyer is subject or any order, rule, or regulation applicable to Buyer of any court or any federal, state, or municipal regulatory body or administrative agency or other governmental body. The persons executing this Agreement and any and all documents on behalf of Buyer have the legal power, right, and actual authority to bind Buyer subject to obtaining Government Approvals.
- (b) No representation, warranty, or statement of Buyer in this Agreement or in any document or Information to be furnished to Seller misstates or omits any material fact necessary to make the statements or facts contained therein not materially misleading.

Section 6.6 Buyer Terms and Conditions. Buyer's representations, warranties, and covenants in this Agreement are subject to the following terms and conditions:

- (a) Buyer's representations, warranties, and covenants are continuing, made both as of the Effective Date and as of the Closing Date, except to the extent that Buyer otherwise notifies Seller in writing at or before Closing. If Buyer so notifies Seller in writing at or prior to Closing, or if Seller independently discovers on or prior to the Closing, that any representation or warranty is no longer true or was untrue when made, Seller may either (i) terminate this Agreement by written notice to Buyer, and neither party will have any further rights or obligations under this Agreement except for those that expressly survive termination; or (ii) waive the representation or warranty and close the purchase of the Transferred Assets.
- (b) Buyer's representations and warranties in this Article 6 shall survive the Closing for a period of eighteen (18) months.

## **ARTICLE VII**

### **CONDITIONS TO CLOSING**

Section 7.1 Conditions of Closing. Notwithstanding anything to the contrary in this Agreement, until Closing the following matters are conditions precedent to Buyer's obligations under this Agreement. Subject to Buyer's right to extend the Closing Date as described above, in the event any of these conditions are not satisfied by the date of Closing, Buyer or Seller may in its sole discretion terminate this Agreement by delivery of written notice to the other party.

- (a) All of the parties' representations and warranties must be true and correct as of Closing in all material respects.
- (b) Buyer shall have obtained all necessary Governmental Approvals, as determined in Buyer's sole discretion. In the event any Governmental Body shall impose additional material terms or conditions upon this conveyance or revoke the authority to enter into this Agreement, either party may terminate this Agreement without liability to the other, regardless of whether the transaction has closed.
- (c) The parties must deliver, perform, observe, and comply with all of the items, instruments, documents, covenants, agreements, and conditions required of it by this Agreement.
- (d) Neither party is in receivership or dissolution, nor has made any assignment for the benefit of creditors, nor admitted in writing its inability to pay its debts as they mature, nor has been adjudicated a bankrupt, nor had filed a petition in voluntary bankruptcy, or a petition or answer

seeking reorganization or an arrangement with creditors under state or federal bankruptcy law or any other similar law or statute, nor may any such petition have been filed against it.

- (e) There shall be no material change between the expiration of the Review Period and the Closing Date in the Transferred Assets, the rights of access to the Real Property and Improvements, or in the owner of the Transferred Assets' obligations with respect to any of the Transferred Assets.
- (f) An Environmental Insurance Policy with coverage for both Seller and Buyer in an amount of \$5 million, a \$100,000 deductible and other terms acceptable to Buyer and Seller is available for purchase on or before the Closing. Buyer agrees to allow Seller the use of its Phase I environmental report in conjunction with Seller's efforts to obtain an Environmental Insurance Policy. Seller agrees to return such report and all copies thereof to Buyer on the earlier of Closing or termination of this Agreement.

Section 7.2 Further Assurances. The parties agree to take any action (including, but not limited to, the execution, acknowledgement and delivery of documents, and filing of applications, petitions, or other documentation with any regulatory authorities) as may reasonably be required by the other party for the implementation or continuing performance of this Agreement.

## **ARTICLE VIII GOVERNMENTAL APPROVALS**

Section 8.1 Governmental Approvals. Until Closing, if Buyer deems it necessary or desirable to apply with any Governmental Body to secure such Governmental Body's approval for this transaction, including without limitation any approval, or exemption from approval, of this transaction by the STB and FCC, then Seller will fully cooperate with Buyer's efforts to obtain these approvals on or before Closing.

Section 8.2 Cost of Governmental Approvals. Buyer shall bear and assume any and all expense of acquiring any required Governmental Approvals, including the cost of any conditions of approval required by such bodies.

## **ARTICLE IX LIABILITY ALLOCATION**

Section 9.1 Cooperation in Defense. Buyer and Seller agree that, following the Closing Date, they will reasonably cooperate as necessary in defense of any claim, demand, investigation, or litigation arising out of Seller's or Buyer's acquisition, transfer, use, occupation, possession, or operation of the Transferred Assets; provided, however, neither party will be required to incur any expense in conjunction with such cooperation.

Section 9.2 Definition of Losses. In this Agreement the term "Losses" shall include Environmental Losses and all costs, expenses, fees, costs of claims, activities in response to enforcement, damages, judgments, awards, orders, decrees, payments, fines, penalties, assessments, court costs, and attorney, consultant and expert witness fees or liabilities of, or in any way related to the following:

- (a) any violation of law, order, or regulation;
- (b) any damage to the environment;
- (c) any bodily injury or death of any person;
- (d) the breach of any contract; and
- (e) unknown amounts for bills and invoices for labor, material and services relating to the Transferred Assets and applicable to periods prior to the Closing Date.

Losses shall exclude incidental, consequential, economic, lost opportunity or lost profits of Buyer.

Section 9.3 Seller's General Liability and Indemnity.

- (a) Except as limited by Section 9.3(b), Seller shall be responsible for and shall indemnify, defend, and hold harmless Buyer fully against all Losses, which:
- (i) arise out of Seller's ownership or operation of the Transferred Assets prior to the Closing Date of this Agreement; provided, however, Seller is not obligated to indemnify, defend, or hold harmless Buyer for any Encumbrance that is not a Seller Released Encumbrance; or
  - (ii) result from any breach by Seller of any of its representations or warranties set forth in this Agreement, or any failure by Seller to perform any of its obligations under this Agreement.
- (b) Notwithstanding anything to the contrary contained in Section 9.3(a) or elsewhere in this Agreement:
- (i) if Buyer incurs a Loss that is not an Environmental Loss, then Seller is not liable to, or obligated to pay, indemnify, defend or hold harmless, Buyer for or against such Loss if and to the extent that when aggregated with all prior Losses that are not Environmental Losses, the sum of such Losses exceeds twenty-five thousand dollars (\$25,000); and
  - (ii) if Buyer incurs a Loss that is an Environmental Loss, then Seller is not liable to, or obligated to pay, indemnify, defend or hold harmless, Buyer for or against such Loss; provided, however, Seller will be obligated to pay fifty percent (50%) of any required deductible payment for an Environmental Loss that is otherwise covered by the Environmental Insurance Policy and a claim is made against and paid pursuant to the Environmental Insurance Policy. Except as provided in the prior sentence with respect to fifty percent (50%) of a deductible payment, Buyer's sole remedy for satisfaction of an Environmental Loss shall be a claim against the Environmental Insurance Policy. EXCEPT FOR SELLER'S OBLIGATION CONTAINED IN SECTION 9.3(b)(ii), BUYER, TOGETHER WITH ITS SUCCESSORS AND ASSIGNS, RELEASES AND COVENANTS NOT TO SUE SELLER, TOGETHER WITH ITS AFFILIATES, SUCCESSORS AND ASSIGNS, FROM AND AGAINST ANY AND ALL PAST, PRESENT OR FUTURE KNOWN OR UNKNOWN ENVIRONMENTAL LOSSES. THIS RELEASE AND COVENANT NOT TO SUE SHALL INCLUDE, WITHOUT LIMITATION, ANY ENVIRONMENTAL LOSSES THAT ARE BASED ON OR ARISE FROM, IN WHOLE OR IN PART, STRICT LIABILITY OR THE SELLER'S OWN NEGLIGENCE.

**Section 9.4 Buyer's General Liability and Indemnity.** Buyer shall be responsible for and shall indemnify, defend, and hold harmless Seller fully against all Losses which:

- (a) arise out of Buyer's ownership or operation of the Transferred Assets on and after the Closing Date of this Agreement; or
- (b) result from any breach by Buyer of any of its representations or warranties set forth in this Agreement, or any failure by Buyer to perform any of its obligations under this Agreement.

**Section 9.5 Notice of Potential Claims for Indemnification.** In order for Buyer or Seller (each, as the case may be, the "Indemnitee") to be entitled to any indemnification provided for under this Article IX, such Indemnitee shall give prompt written notice (an "Indemnification Notice") to the Seller, on the one hand, or to the Buyer, on the other hand, as applicable (each, as the case may be, an "Indemnifying Party"), of any matter or event that would reasonably be expected to give rise to any Loss for which indemnification by an Indemnifying Party (so called) under this Article IX may be due including but not limited to any Third Party Claim, (an "Asserted Liability"). Each Indemnification Notice shall expressly reference this Agreement and specify, to the extent known, the basis on which indemnification is sought and, to the extent known, the Indemnitee's good faith estimate of the amount of its Loss and/or Asserted Liability and, in the case of a Third Party Claim, contain (by attachment or otherwise) all material information as such Indemnitee may have received from the third party claimant concerning such Third Party Claim. After the delivery of an Indemnification Notice, the Indemnitee shall provide notice to such Indemnifying Party of all developments relating to the related Loss or Asserted Liability. No delay in or failure to give an Indemnification Notice, or provide developments with respect thereto, will adversely affect any of the other rights or remedies that the Indemnitee has under this Agreement, or alter or relieve an Indemnifying Party of its obligation to indemnify the applicable Indemnitee except to the extent that the Indemnifying Party is actually and materially prejudiced thereby. The Indemnitee shall provide such an Indemnifying Party with access, upon reasonable notice and during normal business hours, to its non-privileged books and records, properties and personnel relating to the

## Loss or Asserted Liability.

Section 9.6 Claims Not Involving Third Parties. Upon receipt of an Indemnification Notice not involving a Third Party Claim, an Indemnifying Party shall have thirty (30) business days (the "Response Period") to object to the claim set forth in the Indemnification Notice by delivery of a written objection (an "Indemnity Objection") to the Indemnitee specifying in reasonable detail the basis for such Indemnity Objection. Failure to timely deliver an Indemnity Objection shall constitute a final and binding acceptance of the claim by such Indemnifying Party and such Indemnifying Party shall be deemed not to dispute the claim in such related Indemnification Notice. If the Indemnifying Party accepts a claim in an Indemnification Notice or elects not to dispute a claim described in an Indemnification Notice, whether by failing to provide a timely Indemnity Objection or otherwise, then the amount of the Losses alleged in such Indemnification Notice will be conclusively deemed to be an obligation of the relevant Indemnifying Party, and the relevant Indemnifying Party shall satisfy such obligation within thirty (30) business days after the last day of the applicable Response Period. If the Indemnifying Party timely delivers an Indemnity Objection, the parties shall in good faith seek to resolve any dispute within the thirty (30) business day period following the Indemnity Objection (the "Dispute Resolution Period"). If the parties have not resolved their dispute within the Dispute Resolution Period, either party may bring an action and the parties shall proceed in accordance therewith.

Section 9.7 Third Party Claims. The obligations and liabilities of an Indemnifying Party hereunder with respect to a Third Party Claim for which an Indemnitee is entitled to indemnification pursuant to this Article IX shall be subject to the terms and conditions set forth in this Article IX. An Indemnifying Party shall have the right to contest any Asserted Liability so long as it shall notify the Indemnitee of its intent to do so by sending a notice to the Indemnitee (the "Contest Notice"); provided, that the Indemnifying Party shall not be permitted to assume such defense if (a) the Indemnifying Party is also a party to such proceeding or matter and the Indemnitee reasonably determines in good faith that joint representation would be inappropriate or (b) the matter subject to indemnification (i) involves injunctive or other equitable relief against the Indemnitee or (ii) is otherwise beyond the scope of the indemnification obligations of the Indemnifying Party. An Indemnifying Party shall not consent to the entry of any judgment or enter into any settlement with respect to the Asserted Liability without the prior written consent of the Indemnitee. So long as such Indemnifying Party is contesting any Asserted Liability, the Indemnitee shall not consent to the entry of any judgment or enter into any settlement with respect to the Asserted Liability. If the Indemnifying Party elects not to contest the Asserted Liability, the Indemnitee (upon further notice to the Indemnifying Party) shall have the right to pay, compromise or contest such Asserted Liability. In any event, such Indemnifying Party and the Indemnitee may participate, at their own expense, in the contest of an Asserted Liability. The Indemnifying Party and the Indemnitee shall cooperate fully with each other as to all Asserted Liabilities, shall make available to each other as reasonably requested all information, records, and documents relating to all Asserted Liabilities and shall preserve all such information, records, and documents until the termination of any Asserted Liability.

## **ARTICLE X** **TERMINATION, DEFAULT, AND REMEDIES**

Section 10.1 Default by Buyer. Buyer will be in default under this Agreement if (i) it fails to perform any of its obligations either before or at the Closing, and such failure is not cured within five (5) business days after written notice of default from Seller, or (ii) it fails to perform any of its obligations to be performed after Closing and such failure is not cured within 30 days after written notice of default from Seller. Buyer will not be in default, however, if it terminates this Agreement when it has an express right to terminate or when a condition to obligation of Buyer that was not performed has not been satisfied. If Buyer is in default under (i) above, then Seller, as its exclusive remedy, is entitled to terminate this Agreement by giving written notice to Buyer before or at the Closing, whereupon neither party will have any further rights or obligations under this Agreement except for any obligations that expressly survive termination. Following the termination notice, neither party will have any further rights or obligations under this Agreement except for any obligations that expressly survive termination. If Buyer is in default under (ii) above then Seller may pursue any remedy available at law or in equity.

Section 10.2 Default by Seller. Seller will be in default under this Agreement if (i) it fails to perform any of its obligations either before or at the Closing and such failure is not cured within five (5) business days after written notice of default from Buyer, or (ii) it fails to perform any of its obligations to be performed after Closing and such failure is not cured within 30 days after written notice of default from Seller. Seller will not be in default, however, if it terminates this Agreement when it has an express right to terminate or when a condition to the obligation Seller did not perform has not been satisfied. If Seller is in default under (i) above, then Buyer is entitled either (a) to terminate this Agreement by giving

written notice to Seller before or at the Closing, whereupon neither party will have any further rights or obligations under this Agreement except for any obligations that expressly survive termination, or (b) to enforce specific performance of Seller's obligations under this Agreement and recover Buyer's reasonable attorneys' fees and costs of enforcing such obligations of Seller. If Seller is in default under (ii) above then Buyer may recover damages.

## **ARTICLE XI SUCCESSION AND ASSIGNMENT**

Section 11.1 **General Assignment.** This Agreement inures to the benefit of and binds the parties and their respective legal representatives, successors, and permitted assigns. Buyer may assign its rights or obligations under this Agreement without Seller's consent, but with written notice to Seller, to any wholly owned subsidiary of Buyer. If Buyer assigns this Agreement, Buyer nonetheless remains liable with respect to all of its duties, covenants, indemnifications, defenses, representations and warranties as if it remained a party to the Agreement.

Section 11.2 **Assignment for Tax Exchange Purposes.** Buyer may assign its rights (but not its obligations) under this Agreement to Goldfinch Exchange Company LLC, an exchange intermediary, in order for Buyer to effect an exchange under Section 1031 of the IRC. In such event, Buyer shall provide Seller with a Notice of Assignment, Exhibit G attached hereto, and Seller shall execute an acknowledgement of receipt of such notice. Seller may also assign its rights (but not its obligations) under this Agreement to an exchange intermediary in order for Seller to effect an exchange under Section 1031 of the IRC. Each party agrees to cooperate with the other to permit the requesting party to accomplish the tax deferred exchange, but at no additional expense or liability to the non-requesting party for the tax deferred exchange, and with no delay in the Closing. Cooperation will include, without limitation, executing such supplemental documents as the requesting party may reasonably request.

## **ARTICLE XII TRANSITION OF RAIL OPERATIONS**

Section 12.1 **Transfer of Rail Operations and Liabilities.** Except to the extent expressly provided otherwise in this Article XII, the following shall apply to the parties:

- (a) Before the Closing Date of this Agreement, Seller shall be responsible for:
  - (i) all rail operations, including car supply, on the Real Property;
  - (ii) any freight loss and damage claims attributable to rail operations over the Real Property; and
  - (iii) all car hire and car mileage allowance payments accruing from rail operations over the Real Property.
  
- (b) On and after the Closing Date, Buyer shall be responsible for:
  - (i) all rail operations, including car supply, on the Real Property;
  - (ii) any freight loss and damage claims attributable to rail operations over the Real Property; and
  - (iii) all car hire and car mileage allowance payments accruing from rail operations over the Real Property.

Section 12.2 **Transition of Operations.** Unless otherwise agreed in writing, the transition of rail freight operations on the Real Property on the Closing Date and the apportionment of transportation revenues and expenses shall be governed by the terms of this Article XII.

Section 12.3 **Billing and Freight Revenue.** Buyer will continue to be responsible for processing and accounting for waybills (including freight billing of prepaid shipments originating and waybilled prior to Closing Date and collect shipments terminating prior to Closing Date) and submission of interline settlements, for all shipments concerning the

Real Property prior to Closing Date as set forth in the Original Sale Agreement between Buyer and Seller (the "Handling Carrier Agreement").

**Section 12.4 Inventory of Cars.** Seller will make an inventory of all cars on the Real Property as of the Closing Date, for the purpose of identifying and allocating revenue, Car Hire and Mileage Allowances between Seller and Buyer and determining responsibility for Car Hire and Mileage Allowances. The inventory will show separately (a) loaded cars at the interchange yard or origin point, which have not moved in linehaul service on the Real Property as of the Closing Date; (b) loaded cars at the interchange yard or at destination for which linehaul service on the Real Property has been completed as of the Closing Date; (c) loaded Seller cars en route (in a train consist or at an intermediate siding or yard) on the Real Property as of the Closing Date; and (d) empty cars on the Real Property.

**Section 12.5 Allocation of Revenue.** Transportation revenue for Seller cars located on the Real Property, as shown in the inventory made pursuant to Section 12.4 shall be allocated between Seller and Buyer as provided in this Section.

- (a) Where inbound loaded cars are located at an interchange yard on the Closing Date, and no linehaul service over the Real Property has been performed by Seller, Seller shall not be entitled to any handling carrier charges under the Handling Carrier Agreement for movement of such cars over the Real Property.
- (b) Where outbound loaded cars are located at an interchange yard on the Closing Date, and linehaul service has been completed by Seller, Seller shall be entitled to the handling carrier charges under the Handling Carrier Agreement as applicable for movement of such cars over the Rail Line.
- (c) Where inbound or outbound loaded cars are located at origin or destination points or en route on the Real Property on the Closing Date, Buyer shall be entitled to fifty percent (50%) of the handling carrier charges otherwise payable to Seller under the Handling Carrier Agreement as applicable for movement of the cars over the Real Property.

**Section 12.6 Demurrage Revenue.** Seller shall be entitled to all demurrage charges accruing on cars on the Real Property prior to Closing Date. Buyer shall be entitled to all demurrage charges accruing on cars on the Real Property on or after the Closing Date, regardless of whether such cars were originally placed on the Real Property prior to the Closing Date.

**Section 12.7 Allocation of Car Hire and Mileage Allowances.** For purposes of determining responsibility for Car Hire and Mileage Allowances, a paper interchange of all cars, as shown in the inventory prepared pursuant to Section 12.4 (except outbound cars which have reached the interchange point), shall be deemed made from Seller to Buyer, as of the Closing Date. Seller will be responsible for Car Hire and Mileage Allowances accrued prior to the Closing Date, and Buyer shall be responsible for Car Hire and Mileage Allowances accrued on and after the Closing Date. Mileage allowances and the mileage portion of Car Hire shall be calculated based on the actual location of the car as of the Closing Date.

**Section 12.8 Freight Loss and Damage.** As between the parties hereto, and notwithstanding any provision to the contrary in this Agreement, Seller shall be responsible for and shall indemnify, defend, and hold harmless Buyer from freight loss and damage claims arising from events which can be ascertained to have occurred on the Real Property prior to the Closing Date. Buyer shall be responsible for and shall indemnify, defend, and hold harmless Seller from freight loss and damage claims arising from events which can be ascertained to have occurred on the Real Property on and after the Closing Date. If the date or location of an event giving rise to a claim cannot be determined, freight loss and damage liability attributable to movements over the Real Property shall be assumed by Seller and Buyer in accordance with AAR Freight Claims Rules, except to the extent expressly provided otherwise herein. This Section provides only for the allocation between Seller and Buyer of responsibility for valid claims for freight loss and damage with respect to shipments on the Real Property at Closing Date, and is not intended, and shall not be interpreted, as an admission or acknowledgement of liability by Seller or Buyer to any third party with respect to any claim for freight loss and damage.

**Section 12.9 Settlements.**

- (a) Any payments required by this Article XII to be paid from one party to the other shall be settled and made in accordance with AAR Accounting Rules.

- (b) The parties will process loss and damage claims in accordance with AAR Rules, Principles and Practices.

**ARTICLE XIII**  
**MISCELLANEOUS**

Section 13.1 **Notices**. All communications provided for in this Agreement shall be in writing and shall become effective when delivered by hand or by a nationally recognized overnight courier service or received by telex, telecopy, or other wire transmission (with request for assurance of receipt in a manner customary for communications of such respective type), to the respective party at such address as such party may from time to time designate by notice duly given in accordance with the provisions of this Section 13.1 to the other party. Until further notice, the following addresses and telephone numbers shall be used for all such notices:

To Buyer:

BNSF Railway Company  
2650 Lou Menk Drive  
Fort Worth, Texas 76131  
Attn: AVP Joint Facilities  
AVP Short Line Development  
Telecopy No.: (817) 352-7154  
Confirm No.: (817) 352-6434

To Seller:

NEBRASKA NORTHEASTERN RAILWAY COMPANY  
5430 LBJ Freeway, Suite 1444,  
Dallas, Texas, 75240  
Attn: Chief Financial Officer  
Phone: 972-386-0117  
Fax 972-386-0374

Section 13.2 **Choice of Law**. This Agreement shall be governed by the laws of the State of Nebraska. All actions and proceedings arising out of or relating to this Agreement shall be heard and determined in a Texas state or a federal court sitting in either Dallas County or Tarrant County, Texas, and the Buyer and Seller irrevocably submit to the exclusive jurisdiction of such courts in any such action or proceeding and irrevocably waive the defense of an inconvenient forum to the maintenance of any such action or proceeding.

Section 13.3 **Severability**. Every provision of this Agreement is intended to be severable and, if any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of this Agreement.

Section 13.4 **Amendment**. This Agreement may not be modified or amended except by an instrument in writing signed by both Seller and Buyer.

Section 13.5 **Execution**. This Agreement (or any amendments hereto) may be executed in any number of counterparts and by Seller and Buyer in separate counterparts, each of which shall be deemed an original. The exchange of copies of this Agreement and of signature pages by facsimile transmission shall constitute effective execution and delivery of this Agreement as to the parties and may be used in lieu of the original Agreement for all purposes. Signatures of the parties transmitted by facsimile shall be deemed to be their original signatures for all purposes.

Section 13.6 **Binding Effect**. Subject to the provisions of Article 13.4, this Agreement shall be binding upon each of the parties and their respective successors, legal representatives and permitted assigns, and shall inure to the benefit of each of the parties, and their respective successors, legal representatives and permitted assigns.

Section 13.7 **No Waiver**. Except as may be expressly provided otherwise in this Agreement, no failure on the part of either party or any of its agents to exercise, and no course of dealing with respect to, and no delay in exercising, any right, power or remedy hereunder or thereunder shall operate as a waiver thereof; nor shall any single or partial

exercise by either party or any of its agents of any right, power or remedy hereunder or thereunder preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

Section 13.8 No Third Party Beneficiaries. This Agreement is made and intended for the benefit of the parties hereto and their respective successors and permitted assigns and for no other parties.

Section 13.9 Integration. The Schedules and Exhibits referenced in this Agreement and attached hereto are specifically made a part of this Agreement by reference. This Agreement together with its Schedules and Exhibits embodies the entire agreement and understanding between the parties hereto with respect to the subject matter hereof and supersedes all prior understandings and agreements (whether oral or written) concerning the subject matter hereof. Any other prior or contemporaneous agreements, understandings, representations or statements, whether oral or written, relating to this transaction are merged herein. The headings and titles to provisions in this Agreement are for convenience only and shall not be deemed to modify or affect the rights or duties of the parties. All rights and obligations of the parties set forth in this Agreement are integral parts of this Agreement. The consideration inducing the parties to enter into this Agreement includes all of the commitments by Seller to Buyer, and by Buyer to Seller, as set forth in this Agreement. The terms of this Agreement have been arrived at after considerable arms' length negotiation and mutual review of the parties, and the parties agree that none of the provisions herein shall be deemed or presumed to be construed against either party, regardless of which party drafted all or part of the terms of this Agreement.

Section 13.10 Survival of Rights and Obligations. The parties agree that terms of this Agreement shall not survive Closing except as otherwise expressly provided in this Agreement, and then only for the period provided for in this Agreement; provided, however, the agreement of Buyer set forth in Section 5.9, Additional Payment, shall survive Closing.

[signature page follows]

EXECUTED as of the Effective Date.

**BNSF RAILWAY COMPANY**

By: \_\_\_\_\_  
Print: \_\_\_\_\_  
Title: \_\_\_\_\_

**NEBRASKA NORTHEASTERN RAILWAY COMPANY**

By: \_\_\_\_\_  
Print: \_\_\_\_\_  
Title: \_\_\_\_\_

EXECUTED as of the Effective Date.

**BNSF RAILWAY COMPANY**

By: \_\_\_\_\_  
Print: \_\_\_\_\_  
Title: \_\_\_\_\_

**NEBRASKA NORTHEASTERN RAILWAY COMPANY**

By: \_\_  
Print:  
Title:

**SCHEDULE 6.2(a)**

**Comerica Bank**

**SCHEDULE 6.2(b)**

**SCHEDULE 6.2(c)**

**SCHEDULE 6.2(d)**

**SCHEDULE 6.2(f)**

**SCHEDULE 6.2(i)**

**EXHIBIT A**  
**REAL ESTATE**

Buyer and Seller agree the metes and bounds description of the Real Property shall be the legal descriptions attached to the quit claim deeds recorded upon the closing of the Original Sale Agreement save and except legal descriptions of land parcels sold or conveyed by Seller to third parties. During the Review Period, the parties shall cause the Escrow Officer to prepare the Title Report in a manner consistent with the form of property description described on this Exhibit "A"

**EXHIBIT B**  
**IMPROVEMENTS**

**Buildings**

Office Building – Osmond  
Shop Building – Osmond  
Other Building – Waterbury

Buildings include mechanical, electrical systems, plumbing and other building components integral thereto, and interior improvements and fixtures which are fixed, immovable and appurtenant to the Buildings.

**Railroad related Improvements**

Rails, ties, spikes, tie plates, rail anchors, ballast, and other track materials installed in-place as components of the railroad line constituting the Real Property, and including bridges, trestles, culverts, and signaling equipment

**Other railroad related Improvements**

Rails, ties, spikes, tie plates, rail anchors, ballast, and other track materials which are parts and materials inventory and have not been installed, used or consumed in the normal operation of the Transferred Assets. Seller has the right to continue to use, consume and draw-down the items and quantities of parts and materials inventory existing on the Effective Date with no obligation to restore such items and quantities at the Closing.

**EXHIBIT C**

**DISPOSITION OF TELECOMMUNICATIONS EQUIPMENT**

The Telecommunications Equipment to be retained by Seller will be removed within sixty (60) days of Commencement Date with the following exceptions:

**NOTE:** All of Seller's FCC licensed base radios will be removed prior to Closing, or as soon as practicable thereafter.

**EQUIPMENT TO BE REMOVED AND RETAINED BY SELLER:**

Base Radios to be removed prior to Closing Date or as soon as practicable thereafter.

**EQUIPMENT TO BE LEFT IN PLACE AND TRANSFERRED TO BUYER:**

One repeater antenna in Orchard, Nebraska

**EQUIPMENT TO BE REMOVED AND RETAINED BY BNSF:**

None

**EXHIBIT D**

**FORM FOR PURCHASE PRICE ALLOCATION**

(Attached)

**Asset Acquisition Statement  
 Under Section 1060**

OMB No. 1545-1021

Attachment  
 Sequence No **61**

▶ Attach to your income tax return. ▶ See separate instructions.

Name as shown on return	Identifying number as shown on return
-------------------------	---------------------------------------

Check the box that identifies you:

Purchaser  Seller

**Part I General Information**

1 Name of other party to the transaction	Other party's identifying number
--	----------------------------------

Address (number, street, and room or suite no.)

City or town, state, and ZIP code

2 Date of sale	3 Total sales price (consideration)
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**Part II Original Statement of Assets Transferred**

4 Assets	Aggregate fair market value (actual amount for Class I)	Allocation of sales price
Class I	\$	\$
Class II	\$	\$
Class III	\$	\$
Class IV	\$	\$
Class V	\$	\$
Class VI and VII	\$	\$
<b>Total</b>	<b>\$</b>	<b>\$</b>

5 Did the purchaser and seller provide for an allocation of the sales price in the sales contract or in another written document signed by both parties?  Yes  No

If "Yes," are the aggregate fair market values (FMV) listed for each of asset Classes I, II, III, IV, V, VI, and VII the amounts agreed upon in your sales contract or in a separate written document?  Yes  No

6 In the purchase of the group of assets (or stock), did the purchaser also purchase a license or a covenant not to compete, or enter into a lease agreement, employment contract, management contract, or similar arrangement with the seller (or managers, directors, owners, or employees of the seller)?  Yes  No

If "Yes," attach a schedule that specifies (a) the type of agreement and (b) the maximum amount of consideration (not including interest) paid or to be paid under the agreement. See instructions.



**EXHIBIT E**

**FORM OF DEEDS**

STATE OF NEBRASKA           §  
  §  
COUNTY OF [CEDAR]       §

**QUIT CLAIM DEED**

KNOW ALL MEN BY THESE PRESENTS, that NEBRASKA NORTHEASTERN RAILWAY COMPANY, a Nevada corporation, whose address is c/o TNW Corporation, 5430 LBJ Freeway, Suite 1444, Dallas, Texas, 75240 ("Grantor"), for and in consideration of Ten and no/100 Dollars (\$10.00) and other good and valuable consideration, to it duly paid, the receipt whereof is hereby acknowledged, has granted, conveyed, remised, released and quitclaimed, and by these presents does grant, convey, remise, release and forever quitclaim unto [BNSF Railway Company, a Delaware corporation], whose mailing address is 2500 Lou Menk Drive, Fort Worth, Texas 76131 ("Grantee"), and to its successors and assigns forever, all its right, title, interest, estate, claim and demand, if any, both at law and in equity of, except as set forth in this Quit Claim Deed, in and to that certain parcel of land situated in or near the town of [Allen, County of Dixon, State of Nebraska], as is more particularly described on Exhibit "A" attached hereto and made a part hereof, together with Grantor's interests in any and all improvements, rights, privileges, hereditaments and appurtenances thereon or in any way appertaining thereto, including, without limitation, all rights, title and interest of Grantor in and to adjacent streets, roads, alleys, easements and rights-of-way (said parcel of land and all improvements, rights, privileges, hereditaments, appurtenances, titles and interests being hereinafter called the "Premises"), said conveyance and quitclaim being "AS IS, WHERE IS" and "with all faults", without recourse to Grantor, and without warranty except for the specific representations and covenants set forth in that certain Purchase and Sale of Real Property and Improvements entered into as of July \_\_, 2012 between Grantor and Grantee (the "Purchase Agreement"), this Quit Claim Deed, the Bill of Sale, Assignment and any other document contemplated to be delivered at Closing. Any capitalized term used in this Quit Claim Deed and not defined has the meaning given to that term in the Purchase Agreement.

The conveyance and quitclaim of the Premises is SUBJECT, however, to all existing non-fee, underlying or reversionary interests in the Premises that were not created by Grantee, all reservations, easements and other encumbrances, of record or otherwise, building lines, building and liquor restrictions, covenants, conditions and other restrictions, whether or not of record, zoning, building and other applicable laws, codes or ordinances, and public or private roads, highways, streets and alleys, if any.

**Except for those set forth in the Purchase Agreement, this Quit Claim Deed, the Bill of Sale, Assignment and any other document contemplated to be delivered at Closing, Grantor has not made and is not making and hereby specifically disclaims any warranties, representations or guarantees of any kind or character, express or implied (or arising by operation of law), oral or written, past, present or future, with respect to or in any way related to or concerning the Premises or its suitability for any particular purpose or use, including, but not limited to, warranties or representations as to matters of title, zoning, tax consequences, physical or environmental conditions, availability of access or utilities, ingress or egress, drainage, operating history or projections, valuation, governmental approvals, governmental regulations or any other matter or thing relating to or affecting the Premises, including, without limitation, the following: (i) the nature and condition of the Premises, including but not by way of limitation, the water, soil, geology and environmental condition of the Premises, and the suitability thereof, and of the Premises, for any and all activities and uses which Grantee may elect to conduct thereon or any improvements Grantee may elect to construct thereon, income to be derived therefrom or expenses to be incurred with respect thereto, or any obligations or any other matter or thing relating to or affecting the same; (ii) the manner or quality of construction (or of any materials**

incorporated into) and condition and state of repair or lack of repair of any improvements located thereon; (iii) the nature and extent of any easement, right-of-way, lease, possession, lien, encumbrance, license, reservation, condition or otherwise; (iv) the compliance of the Premises or the operation of the Premises with any laws, rules, codes, ordinances or regulations of any government or other body; (v) the value, condition, merchantability, marketability, profitability, suitability, habitability, or fitness for a particular use or purpose of the Premises; and/or (vi) the manner or quality of the Premises. Grantee, by its acceptance of this Quit Claim Deed, acknowledges that it is generally familiar with the Premises and is a sophisticated purchaser of real estate, and that it is relying upon its own expertise and that of its consultants in purchasing the Premises and that it has conducted such inspections and investigations as it deemed necessary including, but not limited to, the physical and environmental conditions thereof and shall rely upon the same.

TO HAVE AND TO HOLD the same unto Grantee, its successors and assigns forever. To the maximum extent possible, each provision of this Quit Claim Deed shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Quit Claim Deed shall be prohibited by, or be held invalid under applicable law, such provision shall be ineffective solely to the extent of such prohibition or invalidity, and this shall not invalidate the remainder of such provision or any other provision of this Quit Claim Deed.

**BALANCE OF PAGE INTENTIONALLY LEFT BLANK**

**SIGNATURE PAGE FOLLOWS**

IN WITNESS WHEREOF, Grantor and Grantee have each caused this instrument to be signed by its authorized representative, on the \_\_\_\_\_ day of \_\_\_\_\_, 2012.

**GRANTOR:**

**GRANTEE:**

NEBRASKA NORTHEASTERN  
RAILWAY COMPANY, a Nevada corporation

\_\_\_\_\_

BY: \_\_\_\_\_  
Name: George P. Macatee, IV, Vice President  
Title: Vice President

BY: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

STATE OF TEXAS           §  
                                      §  
COUNTY OF DALLAS       §

This instrument was acknowledged before me on this \_\_\_\_\_ day of \_\_\_\_\_, 2012, by George P. Macatee, IV, the Vice President of Nebraska Northeastern Railway Company, a Nevada corporation, on behalf of said corporation.

\_\_\_\_\_  
Notary Public  
My Commission expires \_\_\_\_\_

STATE OF TEXAS           §  
                                      §  
COUNTY OF TARRANT    §

This instrument was acknowledged before me on this \_\_\_\_\_ day of \_\_\_\_\_, 2012, by \_\_\_\_\_ the \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_ corporation, on behalf of said corporation.

\_\_\_\_\_  
Notary Public  
My Commission expires \_\_\_\_\_

Attach Exhibit A – Legal Description

**EXHIBIT F**

**BILL OF SALE AND ASSIGNMENT**

THIS BILL OF SALE AND ASSIGNMENT (the "Assignment") is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2012, by NEBRASKA NORTHEASTERN RAILWAY COMPANY, a Nevada corporation ("Seller") for the benefit of BNSF RAILWAY COMPANY, a Delaware corporation ("Buyer").

WHEREAS, Seller and Buyer have entered into that certain Purchase and Sale of Real Property and Improvements in Dakota, Dixon, Cedar, Pierce, Antelope, and Holt Counties Nebraska dated \_\_\_\_\_, 2012 (the "Purchase Agreement") for the sale by Seller of the Transferred Assets to the Buyer;

WHEREAS, each capitalized term used in this Assignment that is not defined has the meaning set forth in the Purchase Agreement.

NOW, THEREFORE, Seller, for and in consideration of Ten Dollars (\$10.00) and other good and valuable consideration in hand paid to Seller by Buyer, does hereby grant, sell, assign, transfer, convey and deliver to Buyer all of Sellers' right, title and interest in and to the Transferred Assets and the Surviving Service Contracts set forth on the Exhibit A attached hereto subject to the terms and conditions contained in the Purchase Agreement.

Seller shall execute and deliver such additional instruments and government filings necessary or reasonably advisable to further effectuate the transfers contemplated herein.

This Assignment shall be construed and enforced in accordance with and governed by the laws of the State of Nebraska.

This Assignment shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

To have and to hold the Transferred Assets and Surviving Service Contracts unto Buyer, its legal representatives and assigns forever.

EXECUTED as of the date first hereinabove written.

**SELLER:**

**NEBRASKA NORTHEASTERN RAILWAY COMPANY**  
a Nevada corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

THE STATE OF TEXAS

§  
§  
§

COUNTY OF DALLAS

This instrument was acknowledged before me on the \_\_\_\_\_ day of \_\_\_\_\_, 2012, by \_\_\_\_\_ of NEBRASKA NORTHEASTERN RAILWAY COMPANY, a Nevada corporation, on behalf of said corporation.

\_\_\_\_\_  
Notary Public, State of \_\_\_\_\_

\_\_\_\_\_

**Notary's Typed or Printed Name**

**My Commission Expires:** \_\_\_\_\_

**Exhibits:**

**Exhibit A:      Surviving Service Agreements**

**EXHIBIT G**

**FORM OF NOTICE OF ASSIGNMENT**

Goldfinch Exchange Company LLC  
A Delaware limited liability company  
40 Lake Bellevue Drive, Suite 101  
Bellevue, WA 98005  
425-646-4020  
425-637-2873 fax

**NOTICE OF ASSIGNMENT**

TO: \_\_\_\_\_ a(n) \_\_\_\_\_ ("Seller") and any assignees or exchange intermediaries of Seller

You and BNSF Railway Company ("BNSF") have entered into the Purchase and Sale Contract dated \_\_\_\_\_, 20\_\_\_\_, for the sale of the real property described therein. You are hereby notified that BNSF has assigned its rights as Buyer, but not its obligations, to Goldfinch Exchange Company LLC for the purpose of completing a tax deferred exchange under Internal Revenue Code Section 1031. This is an assignment of rights only and you will deed the property directly to BNSF.

ACKNOWLEDGED:

[Seller]

\_\_\_\_\_  
a(n) \_\_\_\_\_

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_ ]

**EXHIBIT H**

**LIST OF AGREEMENTS THAT TERMINATE AT CLOSING**

Blocking Agreement dated November 24, 2009

Original Purchase Agreement

Shuttle Train Agreement dated July 30, 2010

Handling Carrier Fuel Surcharge and Car Hire Reclaim Program Agreement dated January 1, 2006

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Petition has been served on the following entities by first class mail this 20<sup>th</sup> day of July, 2012:

The Honorable David Heineman  
Governor  
State Capitol  
1445 K Street  
Lincoln, NE 68509-4848

Nebraska Department of Roads  
1500 Highway 2  
Lincoln, NE 68502

Nebraska Public Service Commission  
300 The Atrium  
1200 N Street  
Lincoln, NE 68508-2023

  
Karl Morell