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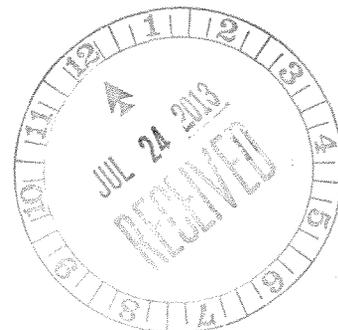
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JUL 24 2013

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July 23, 2013



VIA FEDERAL EXPRESS

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20024

234564



Re: Grafton & Upton Railroad Co.--Petition for Declaratory Order  
Finance Docket No. 35752

Dear Ms. Brown:

Enclosed for filing on behalf of Grafton & Upton Railroad Co. are the original and 10 copies of a Petition for Declaratory Order and the originals and 10 copies each of the Verified Statements of Jon Delli Priscoli, Eric Moffett and Thomas Godfrey. Also enclosed is a check in the amount of \$1,400 in payment of the filing fee for the Petition.

Please contact me if you have any questions or need further information. Thank you for your attention to this matter.

Very truly yours,

*James E Howard*  
James E. Howard

Enclosures

cc: Ginny Sinkel Kremer--Counsel for Town of Grafton, Massachusetts  
Massachusetts State Fire Marshal  
Massachusetts Department of Environmental Protection

**FILED**

JUL 24 2013

SURFACE  
TRANSPORTATION BOARD

**EXPEDITED  
HANDLING  
REQUESTED**

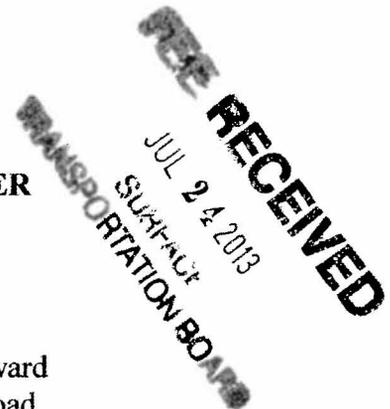
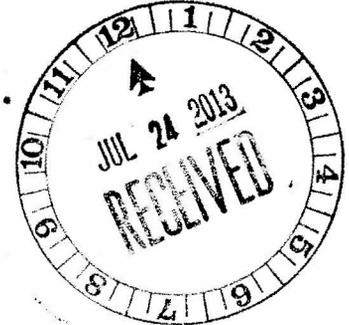
BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35752

GRAFTON & UPTON RAILROAD COMPANY --  
PETITION FOR DECLARATORY ORDER

234564

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



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**FILED**

JUL 24 2013

**SURFACE  
TRANSPORTATION BOARD**

Attorneys for Grafton &  
Upton Railroad Co.

Dated: July 23, 2013

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35752  
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GRAFTON & UPTON RAILROAD COMPANY --  
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\_\_\_\_\_



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

INTRODUCTION

By this Petition, Grafton & Upton Railroad Co. ("G&U") requests the Board to issue a declaratory order to clarify that state and local permitting and preclearance statutes and regulations are preempted pursuant to 49 U.S.C. 10501 in connection with the transloading of liquefied petroleum gas ("propane") from rail cars to trucks at G&U's rail yard located in the Town of Grafton, Massachusetts ("Town" or "Grafton"). G&U intends to construct a facility that will include tanks and associated equipment to facilitate the transfer of propane from rail tank cars received by G&U in interchange at North Grafton to trucks that will deliver the propane to dealers in New England. Pending the completion of construction of the facility, G&U intends to use portable equipment to transload propane.

Both the construction and operation of the permanent facility and transloading using portable equipment on an interim basis are straightforward transloading operations

that are common within the rail industry. G&U's transloading operations will be conducted on property owned by G&U and solely by employees of the railroad. The construction of the permanent facility, as well as the acquisition of the portable equipment, will be financed by G&U without any involvement by propane suppliers or wholesale purchasers. The transloading will constitute "transportation" by a "rail carrier", thereby bringing the activities squarely within the jurisdiction of the Board and the scope of preemption as defined in 49 U.S.C. 10501 and by numerous decisions of the Board and the courts.

Given the nature of the proposed transloading operations, there should be no question that the Board has jurisdiction and that preemption applies. The history of G&U's efforts to build and operate a propane transloading facility suggests, however, that the Town, and perhaps other local or state agencies, will oppose any attempt by G&U to transload propane. As described in more detail below, the Town has used its zoning regulations and litigation<sup>1</sup> as a means to prevent the construction of the propane transloading facility pursuant to a transaction in which several propane wholesalers and distributors agreed to participate in the financing and provide transloading services as a subcontractor to G&U. Even though, as described below, the propane companies are no longer involved, and even though G&U, without financing from any propane interests, will be constructing the facility and operating it with its own employees, it is likely that the Town will continue to oppose the project. Furthermore, based upon positions taken in

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<sup>1</sup> The litigation, which is described more fully below, was initiated in December 2012 by the Board of Selectmen of the Town of Grafton against G&U in the Worcester County Superior Court Department of the Trial Court of the Commonwealth of Massachusetts as Civil Action No. 2012-02464C, and was removed to the United States District Court for the District of Massachusetts (Central Division) as Civil Action No. 4:12-CV-40164TSH. The District Court remanded the case back to the Superior Court in May 2012. In June 2012, the Superior Court referred the preemption issue to the Board, which has prompted the filing of this Petition.

opposition to the construction and operation, as initially structured, it is possible that the Massachusetts State Fire Marshal or the Massachusetts Department of Environmental Protection ("DEP") will also reiterate earlier objections by contending that G&U must obtain certain state or local permits prior to construction and operation of the transloading facility.

As a consequence of the likely opposition of the Town and other state or local agencies, clarification from the Board is needed. For the reasons outlined below, the Board should determine that the proposed propane transloading operations, both on an interim basis with portable equipment and subsequently through the construction and operation of a permanent facility, constitute rail transportation provided by a rail carrier and that state and local regulations which would require permitting, pre-approval or preclearance are preempted.

Furthermore, as demonstrated below, this is a situation in which expedited handling by the Board is justified. G&U has been working over the last several years to implement this project, but its efforts have been stymied by regulatory hurdles raised by the Town and other state and local agencies, thereby delaying and even preventing, in some cases, the realization of opportunities to develop new customers and new business. It is critical, therefore, to have a decision from the Board as quickly as possible so that G&U will be able to serve propane transloading customers as the 2013-2014 winter season approaches.

## FACTS AND RELATED BACKGROUND

### I. The History of G&U and Its Business Development Initiatives

G&U was incorporated in 1873 and has been in continuous operation as a rail common carrier since that time. Verified Statement of Jon Delli Priscoli ("Delli Priscoli V.S.") at ¶ 2. G&U owns and operates a line that is approximately 16.5 miles in length running between a connection with the CSX Albany-Boston mainline at North Grafton, an area within the Town of Grafton, through the towns of Grafton, Upton, Hopedale and Milford, all of which are in Massachusetts, and a connection with another CSX line in Milford. Delli Priscoli V.S. at ¶ 2.

G&U interchanges only with CSX at North Grafton. Like other CSX connections with short line railroads, G&U and CSX have an arrangement pursuant to which CSX quotes rates for rail customers from origins or destinations on the G&U line to and from points on CSX. Verified Statement of Eric Moffett ("Moffett V.S.") at ¶ 3. CSX bills and collects from customers and remits to G&U its share of the line haul revenue. Moffett V.S. at ¶ 3. As described in more detail below, G&U has always offered transloading as an integral part of its rail transportation services. Moffett V.S. at ¶ 4-5.

In 2008, Jon Delli Priscoli purchased the stock of G&U. Delli Priscoli V.S. at ¶3. At that time, G&U's track and infrastructure were in dire need of rehabilitation, and business had sunk to levels that could not generate adequate funding for such rehabilitation, much less any profit. Delli Priscoli V.S. at ¶ 3. Mr. Delli Priscoli had a vision, however, about how to develop G&U's business and make a contribution to the local economy, and he proceeded to invest substantial amounts of his own capital to rehabilitate the line. Delli Priscoli V.S. at ¶ 3-5. The G&U line between North Grafton

and Hopedale has now been restored, and plans are being made to finish the track upgrading work all the way to Milford. Delli Priscoli V.S. at ¶ 3.

In addition to making the substantial capital investment in track and infrastructure, Mr. Delli Priscoli resuscitated the business development efforts of G&U. Realizing that most short line railroads have a difficult challenge in persuading prospective rail customers to build rail served facilities along their rights-of-way, G&U, under the direction of Mr. Delli Priscoli and G&U's marketing and sales executive, Eric Moffett, looked to expand G&U's transloading opportunities as a way to increase its revenues and its customer base. Delli Priscoli V.S. at ¶ 4-5; Moffett V.S. at ¶ 4-5. Transloading is a particularly attractive form of transportation in New England, where inbound rail commodities can be transferred to trucks for relatively short distance deliveries to final destinations. Moffett V.S. at ¶ 4.

With these transloading opportunities in mind, G&U embarked on a program to increase the size and capabilities of its transloading facilities in Upton and Hopedale in order to attract new customers. Delli Priscoli V.S. at ¶ 4-5; Moffett V.S. at ¶ 4-5. G&U published a tariff (originally Tariff 5000, which has been amended as Tariff 5000-A) that is available publicly on its website, providing a schedule of services and rates available to any transloading customers. Moffett V.S. at ¶ 5. Rather than concentrating on persuading customers in need of rail service to build private facilities, solely for the use of a single customer, along G&U's line, G&U focused on the development of rail owned and operated transloading yards that would be open to any customer. Moffett V.S. at ¶ 4. These efforts have resulted in a substantial growth in rail traffic on the G&U line and

recognition this year by CSX of G&U as CSX's fastest-growing short line connection. Delli Priscoli V.S. at ¶ 20.

## II. Development of the Plan for the Propane Transloading Facility

For many years, G&U owned and operated a small yard in North Grafton. The yard was immediately adjacent to the interchange with CSX, and several transloading customers were and continue to be served at that location. Delli Priscoli V.S. at ¶ 4. In 2010, G&U began to consider the creation and operation of a transloading facility specifically for propane at North Grafton. Delli Priscoli V.S. at ¶ 6. As a consequence of the increased domestic production of propane in the Midwest, combined with lower prices for domestic propane compared to propane that was imported, there was a growing need for transportation alternatives, in addition to truck and pipeline, to move propane into New England. Delli Priscoli V.S. at ¶ 6; Moffett V.S. at ¶ 6. G&U believed that transportation by rail tank car to transloading facilities in New England offered a significant opportunity to supplement the existing transportation alternatives, and this belief was confirmed by conversations with CSX marketing personnel and propane dealers in the New England area. Delli Priscoli V.S. at ¶ 6-7; Moffett V.S. at ¶ 6.

With the assistance of consultants who were knowledgeable concerning the propane business, G&U began in 2011 to assess in detail the yard expansion and construction work that would be necessary to build a propane transloading facility in North Grafton. Delli Priscoli V.S. at ¶ 7. As part of the planning, G&U identified a 5 acre parcel of property, located at 42 Westborough Road in North Grafton, that was immediately adjacent to G&U's existing yard and mainline. G&U purchased the property in January 2012. Delli Priscoli V.S. at ¶ 7. In addition, G&U reviewed the projected

costs for grading and clearing the land and constructing new yard track and obtained estimates for designing and building the transloading facility, which would consist of 4 pressurized tanks and associated equipment needed to transfer propane temporarily into tanks and from the tanks to trucks for delivery to propane wholesalers. Delli Priscoli V.S. at ¶ 7-8. LPG Ventures, a nationally recognized design and construction firm that specializes in propane transloading facilities, was engaged to design and build the facility and to coordinate the site improvements. Delli Priscoli V.S. at ¶ 8.

The total cost of the transloading facility was estimated to be approximately \$5 million. Delli Priscoli V.S. at ¶ 10. Of the total estimated cost of \$5 million, G&U was able to commit to the investment of its own funds to the extent of approximately \$1.8 million for the acquisition of the 5 acre parcel and for the site work, including grading and the construction of new yard tracks. Delli Priscoli V.S. at ¶ 10. In order to complete the construction of the facility, however, G&U concluded that it would need financing that was not available to it at that time from any internally generated sources or in any traditional form on reasonable terms and conditions from commercial lenders. Delli Priscoli V.S. at ¶ 10.

To secure the additional financing, G&U entered into negotiations with NGL Supply Terminals Co. ("NGL"), a Canadian propane supplier and wholesaler, and Spicer Plus, LLC ("Spicer"), a propane retailer based in Connecticut. Delli Priscoli V.S. at ¶ 10. These discussions resulted in the execution of a letter of intent in April 2012 and subsequently, in October 2012, of 3 agreements between and among G&U and entities that were jointly owned by NGL and Spicer (collectively, the "Propane Companies"). Delli Priscoli V.S. at ¶ 10. Pursuant to the agreements, the Propane Companies agreed to

take initial responsibility for the acquisition of the tanks and related equipment and the completion of the construction of the facility, and G&U agreed to lease the tanks and equipment for 20 years. Delli Priscoli V.S. at ¶ 11. In addition, another entity owned by the Propane Companies contracted with G&U to perform the transloading operations as a subcontractor under the control and direction of G&U, and a third entity entered into a transportation contract by which it assumed an obligation to provide a minimum number of propane carloads annually for transloading at the facility. Delli Priscoli V.S. at ¶ 11.

### III. Communications with the Town

During the planning and initial construction phase of the propane transloading facility project, G&U communicated with appropriate state and local officials. Moffett V.S. at ¶ 9-10; Delli Priscoli V.S. at ¶ 12-13. In June 2011, G&U representatives, including Eric Moffett, G&U's chief marketing and sales officer, and Stanley Gordon, a Vice President of G&U, met with the Grafton Fire Chief and a representative of the State Fire Marshal's office to discuss the public safety issues associated with the construction and operation of a propane transloading facility. Moffett V.S. at ¶ 9. Mr. Delli Priscoli discussed the transloading yard with the Town Administrator of Grafton on several occasions, including a conversation in the spring or early summer of 2012 at the transloading yard. In each of these meetings, G&U's representatives stated that federal preemption applied and that, as a consequence, it would not be necessary for G&U to seek certain local permits or zoning approvals that might otherwise be applicable. Delli Priscoli V.S. at ¶ 13. The Town Administrator, who reports directly to the Board of Selectmen, which is the governing body of the Town, acknowledged his understanding

that preemption applied and that G&U would not be seeking any permits. Delli Priscoli V.S. at ¶ 13.

On June 28, 2012, Mr. Moffett, on behalf of G&U, and representatives of the Propane Companies and LPG Ventures met with the Grafton Fire Chief and a representative of the State Fire Marshal's office to review the conceptual plans indicating the location of the tanks and equipment that would be used for the transloading. Moffett V.S. at ¶ 10. Based on a recommendation from the local and state fire officials, G&U hired an expert on propane transloading safety to prepare a fire safety analysis for the facility. Moffett V.S. at ¶ 10. On July 2, 2012, G&U officials, including Mr. Delli Priscoli, met with the Town Administrator, the Grafton Fire Chief and the Grafton Police Chief to discuss security issues at the transloading facility, including issues relating to fire safety and a specific request of Town officials that G&U construct fencing around the facility and provide for lighting sufficient to illuminate the facility. Delli Priscoli V.S. at ¶ 13. At an open meeting of residents of the Town in December 2012, Mr. Delli Priscoli volunteered that G&U would continue to work with the Town to provide information to respond to health and safety concerns before putting the transloading facility into operation, and G&U subsequently confirmed this commitment in writing to the Board of Selectmen. Delli Priscoli V.S. at ¶ 15.

During the period from June 2012 through December 2012, G&U's fire safety expert communicated with the Town Fire Chief and the State Fire Marshal's office to discuss the fire safety analysis, a draft of which was made available to the Fire Chief and the Fire Marshal's office in October 2012, and address issues raised by the state and local officials. Delli Priscoli V.S. at ¶ 14; Verified Statement of Thomas Godfrey ("Godfrey

V.S.") at ¶ 3-4. Based on these discussions with the state and local officials, G&U finalized its plans for the facility to ensure that the transloading yard would be a state-of-the-art facility that would be in compliance with all applicable safety regulations and, as a consequence, would not pose a threat to the safety of the Town or its residents. Godfrey V.S. at ¶ 4-6; Delli Priscoli V.S. at ¶ 14.

#### IV. Litigation by the Town to Prevent Construction of the Transloading Facility

In early December 2012, G&U notified Town officials that the 4 tanks were about to be delivered to the G&U yard in North Grafton. Delli Priscoli V.S. at ¶ 16. In response, and despite all of the conversations that had taken place between G&U and the Town concerning the propane transloading facility, the Town building inspector, who is the Town's zoning enforcement officer, issued a cease-and-desist order on December 12, 2012, which directed G&U to stop any further construction activities and to apply for and obtain Town approvals before commencing any further construction activities. Delli Priscoli V.S. at ¶ 16. The cease and desist order is attached as Exhibit A. On the same day, the Town filed a complaint in the Superior Court Department of the Trial Court of the Commonwealth of Massachusetts (the "state court") and obtained an ex parte temporary restraining order preventing the delivery of the tanks. On December 13, 2012, G&U removed the case from state court to the United States District Court for the District of Massachusetts (the "federal court"). The federal court entered an order continuing the state court temporary restraining order and scheduled an expedited trial to begin on January 14, 2013. Delli Priscoli V.S. at ¶ 16.

Even though on January 9, 2013, the Town had filed a motion to remand the case to the state court, the federal court started the trial on January 15, 2013, reserving for later

decision the question whether to remand. At a four-day trial, G&U and the Town presented evidence and argument on the question whether the town permitting and zoning regulations were preempted, and each party requested a preliminary injunction in its favor, with the Town seeking to convert the temporary restraining order into a preliminary injunction and G&U requesting a preliminary injunction preventing the Town from blocking the construction and operation of the transloading facility by means of the enforcement of its zoning regulations. More specifically, the Town contended that use of the yard as a propane transloading facility would be illegal and in violation of the Town's zoning bylaws in the absence of a determination that state and local permitting and zoning requirements were preempted. G&U, in response, presented evidence and argument demonstrating that it would be conducting rail transportation operations entitled to the preemptive effect of 49 U.S.C. 10501 and offered un rebutted evidence that the design, construction and operation of the transloading facility would be strictly in accordance with applicable safety regulations.

On May 17, 2013, the federal court issued a decision remanding the case to the state court without reaching the merits of the preemption issue or deciding either of the requests for a preliminary injunction. Both the Town and G&U renewed their request for a preliminary injunction before the state court. On June 12, 2013, the state court entered an order at the request of the Town enjoining the delivery of the tanks to the G&U yard in North Grafton, directing G&U to comply with the cease-and-desist order and staying the state court proceedings pending a determination by the Board on a request by G&U for declaratory relief on the preemption issue. *Delli Priscoli V.S.* at ¶ 17. A copy of the order is attached as Exhibit B. In a second order entered on the same date, the state court

granted the joint request of G&U and the Town and referred the preemption issue to the Board, directing G&U to file a petition for a declaratory order with the Board. Delli Priscoli V.S. at ¶ 17. A copy of the second order is attached as Exhibit C.

V. The New Structure for Construction and Operation

Following the issuance of the state court injunction on June 12, 2013 and the referral of the preemption issue to the Board, G&U and the Propane Companies discussed the status of the propane transloading project. Delli Priscoli V.S. at ¶ 17. As a result of these discussions, G&U and the Propane Companies have agreed to terminate the letter of intent and the 3 agreements. Copies of 4 letters from G&U to the various Propane Companies terminating the arrangements, which have been countersigned by the Propane Companies indicating their acceptance of the terminations, are attached as Exhibits to the accompanying Verified Statement of Mr. Delli Priscoli (the "Termination Agreements"). Delli Priscoli V.S. at ¶ 18. The effect of the Termination Agreements is to eliminate any participation by or role of the Propane Companies in connection with the construction or operation of the transloading facility. Delli Priscoli V.S. at ¶ 18. There will be no financing from the Propane Companies, and the Propane Companies will not be involved in operating the transloading facility as a subcontractor or otherwise. Furthermore, there will be no transportation commitments from the Propane Companies. Delli Priscoli V.S. at ¶ 18.

G&U intends to proceed with the completion of the construction and the operation of the transloading facility with its own resources and employees. Delli Priscoli V.S. at ¶ 19-20. Discussions have been initiated with the Propane Companies to purchase the tanks and other equipment, and LPG Ventures will be asked to complete the construction

work in accordance with the original construction plans. Delli Priscoli V.S. at ¶ 19-20. G&U will be able to finance the acquisition of the tanks and equipment and the completion of the construction by relying on financing sources that will not involve the Propane Companies. Delli Priscoli V.S. at ¶ 19-20.

In addition, G&U will hire employees to operate the transloading facility as G&U employees. Delli Priscoli V.S. at ¶ 19. G&U believes that it can identify and retain qualified employees who will be knowledgeable and experienced with respect to the operation of such facilities. Delli Priscoli V.S. at ¶ 19. Billing and collection for G&U's line haul rail service to move propane tank cars from the interchange with CSX to the propane transloading facility will continue to be handled by CSX, in the same manner that all interline business has been conducted between G&U and CSX. Moffett V.S. at ¶ 13. G&U will, however, perform the invoicing and collection of payments for the transloading services. Moffett V.S. at ¶ 13. G&U will also continue to retain the services of its experts to make sure that the construction and operation are done in accordance with applicable safety regulations. Delli Priscoli V.S. at ¶ 21; Godfrey V.S. at ¶ 5-6.

In short, G&U intends to proceed with construction and operation of the transloading facility as originally conceived but without any involvement of or reliance on the Propane Companies. Assuming that the Board determines that preemption is applicable to transloading propane at G&U's yard in North Grafton, G&U also proposes to proceed immediately upon such determination, while construction of the permanent facility is being completed, with propane transloading conducted by G&U employees through the use of portable equipment. G&U has acquired portable transloading

equipment, which is commonly used to transload propane by means of a direct connection between the tank cars and trucks. Delli Priscoli V.S. at ¶ 26.

#### VI. The Need for Expedition

G&U projects that when the transloading facility has been completed, it will have the capacity to handle approximately 1,500-2,000 rail tank cars of propane annually. Delli Priscoli V.S. at ¶ 22; Moffett V.S. at ¶ 11. This projection is based upon conversations with propane suppliers that have expressed the intention to use the facility to ship propane by rail from the producing areas as well as with propane wholesalers in the New England area that would purchase the propane for further distribution and sale. Delli Priscoli V.S. at ¶ 22; Moffett V.S. at ¶ 11. In order to finish the construction and realize these traffic projections, and to meet the expectations of potential customers, it is critical for G&U to have the facility ready for the upcoming winter propane season. Not surprisingly, propane sales, and consequently the transportation of propane, is a seasonal business with peaks in the fall and winter and valleys in the spring and summer. Delli Priscoli V.S. at ¶ 22; Moffett V.S. at ¶ 12. Propane suppliers and purchasers need to make commitments, including commitments for transportation, in advance of the winter season in order to be in a position to have adequate supplies for customers at peak times. Delli Priscoli V.S. at ¶ 22; Moffett V.S. at ¶ 12.

If the propane suppliers and customers cannot rely on a firm commitment from G&U that it will be able to provide transportation, they will seek alternatives, such as other rail transloading facilities, trucks or pipelines. Delli Priscoli V.S. at ¶ 23; Moffett V.S. at ¶ 12. Once alternatives are lined up, it is extremely difficult--indeed, highly unlikely--that such business can be recaptured. Delli Priscoli V.S. at ¶ 23; Moffett V.S.

at ¶ 12. G&U has already missed one anticipated winter season in 2012-2013, and the inability to compete for propane transportation business for the 2013-2014 season would be extremely damaging to G&U's standing and involvement in the propane transportation market. Delli Priscoli V.S. at ¶ 23. Although impossible to quantify accurately, the damage to G&U would be substantial and irreparable.

An expedited decision by the Board that preemption applies would enable G&U to finish the construction and be ready to operate for the 2013-2014 season. As noted above, the site work, including the installation of additional track, has been substantially completed. Delli Priscoli V.S. at ¶ 25. G&U expects to purchase the tanks and related equipment from the Propane Companies and to have LPG Ventures, the contractor that has done the planning and started the construction work, complete its contract to install the tanks and related equipment. Delli Priscoli V.S. at ¶ 20. Once the tanks and equipment are at the site, it is anticipated that the construction could be completed and the facility would be ready to operate within 4 to 6 weeks. Delli Priscoli V.S. at ¶ 25. During the period prior to the completion of the construction, G&U would be in a position to provide propane transloading service by using portable transloading equipment. Delli Priscoli V.S. at ¶ 26. An expedited decision would also allow for this interim transloading service in the meantime.

#### ARGUMENT

As explained below, G&U proposes to engage in straightforward, "plain vanilla" transloading operations involving the transfer of propane from rail tank cars to trucks. The plans for the configuration, construction and safety features of the facility are the same plans that have been provided to and shared with the Town and other state and local

regulatory agencies. The only difference at this point in time is that the facility will be constructed and transloading will be performed by G&U without any operational or financial involvement of the Propane Companies.

The only basis for the Town's position that preemption did not apply has been the contention that the involvement of the Propane Companies meant that the transloading, which the town conceded was "transportation"<sup>2</sup>, would allegedly not be conducted by or under the auspices of a "rail carrier". With the implementation of the Termination Agreements, the only alleged basis for the Town's opposition has been removed, leaving the Board with a very straightforward analysis. As demonstrated below, construction and operation of the proposed transloading facility will involve "transportation" by a "rail carrier" to which preemption applies.

I. G&U is a "Rail Carrier" that Will be Providing "Transportation" to which Preemption Applies.

A. Permitting and Preclearance Regulations are Preempted.

As the Board has stated, state and local statutes and regulations are categorically preempted by 49 U.S.C. 10501 when the statutes or regulations create "any permit requirement that could be used to deny a railroad the ability to conduct its operations or to proceed with activities the Board has authorized". New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway--Construction, Acquisition and Operation Exemption--In Wilmington and Woburn, MA, STB Finance Docket No. 34797, decision served July 10, 2007 ("New England Transrail"). See, also, Green Mountain R.R. v.

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<sup>2</sup> A pleading filed by the Town in the state court, which is attached as Exhibit D, explains that the Town recognizes the proposed transloading activities as "transportation" but argues that the Propane Companies would not be performing the transloading under the control of G&U. More specifically, the Town concedes that there "is no dispute in this case that the planned activities will fall within the definition of 'transportation'", but it is the other criteria of preemption--that the transportation be undertaken by a rail carrier--that "the Town seeks to challenge before the STB in this case." Exhibit D attached at p. 6.

Vermont, 404 F.3d 638, 643 (2d Cir. 2005) ("Green Mountain") (preconstruction environmental and land use permitting requirements were preempted for a transload facility because otherwise the locality could delay the process indefinitely or deny the carrier the right to construct facilities or conduct operations); City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998) ("City of Auburn") (environmental and land use permitting process was categorically preempted); Joint Petition for Declaratory Order--Boston and Maine Corp. and Town of Ayer, MA, STB Finance Docket No. 33971, decision served May 1, 2001 ("Town of Ayer") (state and local permitting requirements and environmental review of construction and operation of railroad intermodal facility was preempted), aff'd, Boston and Maine Corp. v. Town of Ayer, 191 F. Supp. 2d 257 (D.Mass. 2002); Borough of Riverdale--In re New York, Susquehanna and Western Ry., 4 S.T.B. 380, 387-88 (1999) ("Riverdale") (local zoning and land-use constraints on the railroad's maintenance, use or upgrading of its lines were preempted).

These principles articulating the contours of preemption are now well settled, and they were summarized once again in a decision by the Board last week in a proceeding involving an attempt by the Town of Winchester, Massachusetts to use its zoning regulations to prohibit rail service. In Boston and Maine Corporation and Springfield Terminal Railroad Co.--Petition for Declaratory Order, STB Finance Docket No. 35749, decision served July 19, 2013 ("Pan Am"), the Board prohibited the town from enforcing its zoning regulations to prohibit rail transportation and emphasized that 49 U.S.C. 10501 "prevents states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, construction, and abandonment)" and "from imposing requirements that, by their nature, could be used to deny a railroad's ability to conduct rail

operations." Consequently, the Board stated, "state or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements, are preempted." As demonstrated below, these principles apply to G&U's efforts to provide rail transportation through the use of temporary transloading equipment and the construction and operation of a propane transloading facility and preempt the zoning regulations of the Town and any other state or local regulations that would interfere with or prevent such rail transportation.

B. G&U is a "Rail Carrier" Providing "Transportation".

In order to determine whether preemption applies, the Board's initial inquiry is whether the activity in question constitutes "transportation" by a "rail carrier". In this case, as demonstrated below, the construction and operation of a propane transloading facility by G&U falls squarely within the parameters of transportation by a rail carrier.

A "rail carrier" is "a person providing common carrier railroad transportation for compensation . . . ." 49 U.S.C. 10102(5). "Common carrier" is not defined in the statute, but it refers to an entity that holds itself out to the public for purposes of providing transportation for compensation. New England Transrail. G&U has provided rail transportation since its incorporation in 1873. The conclusion is, therefore, inescapable that G&U is a "rail carrier", and even the Town does not dispute this fact.

"Transportation" is statutorily defined as including any "yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property by rail" and "services related to that movement, including receipt, delivery . . . storage, handling and interchange of passengers and property." 49 U.S.C. 10102(9). The movement of a tank car by rail into a rail yard and the transfer of the contents of the rail

car into tanks prior to loading into trucks or directly into trucks, including temporary storage, fit well within the definition of "transportation".

The Board and a number of courts have without exception determined that "intermodal transloading and activities involving loading and unloading materials from railcars and temporary storage of materials are part of rail transportation that would come within Board's jurisdiction." New England Transrail. See, also, Green Mountain (preemption applied to a cement transloading facility that included the unloading and temporary storage of bulk salt in a shed and unloading bulk cement for storage silos and eventual transportation by truck); New York, Susquehanna & Western Railway Corp. v. Jackson, 500 F.3d 238 (3d Cir. 2007) (construction and demolition debris storage, transloading and extraction of materials from waste piles during the loading process are all part of rail transportation); Canadian National Railway v. City of Rockwood, 2005 WL 1349077, at \*6 (E.D. Mich. June 1, 2005) ("Canadian National") ("transportation" includes the transloading of material from rail to truck); Tri-State Brick and Stone of New York, Inc.--Petition for Declaratory Order, STB Finance Docket No. 34824, decision served August 11, 2006 (unloading rail cars, storing brick and stone products on the ground and loading those products on customer and common carrier trucks are part of rail transportation). Indisputably, therefore, the transloading of propane from rail cars to trucks, whether by use of tanks for temporary storage or directly, constitutes "rail transportation".

#### C. Preemption Applies to All Types of Transportation Activities and Permitting Regulations.

The Town, the State Fire Marshal and the Massachusetts DEP have attempted to enforce a variety of types of regulations having a range of purposes. The Town relies on

its zoning bylaws for the proposition that the storage and transportation of refined petroleum products, such as propane, in quantities greater than normally associated with household use are prohibited. In addition, because the property on which the transloading facility is to be built is technically zoned residential, the Town cites a bylaw provision that prohibits rail terminals, truck terminals and freight yards, as well as all industrial uses, in such residential zones.<sup>3</sup> The State Fire Marshal issued a cease and desist order based upon a state regulation purportedly requiring G&U to apply for a permit in order to construct, maintain or use tanks for storage of propane. A copy of the order is attached as Exhibit E. DEP issued a unilateral administrative order determining that G&U failed to apply for permits in order to perform site work at the yard and prohibiting further work. A copy of the Order is attached as Exhibit F.<sup>4</sup>

If, however, a rail carrier is providing transportation, state and local regulations are preempted if they prevent or interfere with such transportation regardless of the purpose of the regulation. Thus, for example, zoning and land use regulations prohibiting transportation or requiring permits or preapproval are the clearest type of regulation that cannot withstand preemption. Pan Am; Riverdale. Indeed, preemption has been applied to permit rail transportation operations even on property that has been zoned residential. Riverdale. In addition, state and local regulations that appear on their face to address environmental issues but that impose permitting or preclearance requirements are also preempted. Green Mountain; Town of Ayer; Friends of the Aquifer, STB Finance

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<sup>3</sup> The regulations upon which the Town relies are set forth in some detail in the cease and desist order that is attached hereto as Exhibit A and at page 6 of the pleading filed by the Town in the state court, which is attached hereto as Exhibit D.

<sup>4</sup> Resolution of the orders of the State Fire Marshal and the DEP has been temporarily deferred by means of stipulations with each agency pursuant to which G&U and the agency have agreed to reserve all of their rights concerning the preemption issues. In granting this Petition, the Board should explicitly indicate that the attempts by these agencies to impose preapproval/precleanance regulations are preempted.

Docket No. 33966, decision served August 15, 2001 ("Friends of the Aquifer")

(environmental regulations were preempted in order to permit construction by a railroad of storage tanks for diesel fuel and oil located over a source of drinking water).

In addition to prohibiting any type of preclearance regulation regardless of the purpose of the regulation, preemption also applies to rail transportation activities over which the Board has jurisdiction even though it lacks direct licensing authority. In particular, preemption applies to the acquisition, construction or operation of facilities, such as yards, that are ancillary or adjacent to a rail carrier's lines and therefore not within the licensing authority of the Board pursuant to 49 U.S.C. 10906. Such facilities and activities are nonetheless within the jurisdiction of the Board pursuant to 49 U.S.C. 10501, and attempts by state and local agencies to require permitting or preclearance with respect to such facilities have been preempted. Riverdale; Friends of the Aquifer; Flynn v. Burlington Northern Santa Fe Corp., 98 F. Supp. 2nd 1186 (E.D. Wash. 2000). In this case, the construction and operation of a propane transloading yard adjacent to the G&U line in order to facilitate G&U's rail service constitute "transportation" by a "rail carrier" to which preemption applies.<sup>5</sup>

## II. The Current Record Justifies a Determination that Preemption Applies.

Thus far, the Town has based its opposition to the applicability of preemption solely on the argument that the transloading of propane by G&U would not be transportation by or under the auspices of a rail carrier. The Town contended that the

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<sup>5</sup> While state and local agencies may exercise traditional police powers designed to protect the public health and safety, these regulations must be applied in an objective manner and "may not be used simply to permit local communities to hold up or defeat the railroad's right to construct facilities used in rail operations through the guise of saying that they are enforcing [environmental regulations]." Town of Ayer.

involvement of the Propane Companies in the financing and operation of the transloading facility was tantamount to control of the facility by the Propane Companies and, therefore, was not transportation provided under the auspices or control of G&U. This contention has been vigorously rebutted by G&U in both the federal court in the state court, but neither court decided the issue.

Whether or not the transloading by G&U's subcontractor would have been under the auspices of G&U is, however, no longer relevant. The Termination Agreements and the current plans of G&U for construction and operation of the transloading facility, as described above, negate any argument by the Town that the transloading will not be by a rail carrier. As described above, G&U proposes to construct and operate a propane transloading facility, the details of which have been fully disclosed to and thoroughly reviewed by the Town, without financial involvement or support from the Propane Companies and solely with G&U's own employees. Indeed, there will be no involvement whatsoever by the Propane Companies. The operation will entail only transportation by a rail carrier in the form of transloading services that are integral to the overall transportation provided by G&U to its customers.

Based upon the information provided by this Petition and any responses that may be filed, the Board will have a sufficient record to enter a declaratory order confirming that preemption applies to the proposed transloading of propane at North Grafton, whether by means of temporary equipment or the construction and operation of the permanent facility. Instituting a formal declaratory order proceeding simply in order to gather additional information would not assist the Board in deciding this case.<sup>6</sup>

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<sup>6</sup> As the Board is well aware, it has broad discretionary authority to issue a declaratory order in order to eliminate a controversy or to remove uncertainty. Such discretion includes the ability, in appropriate cases,

## RELIEF REQUESTED

G&U requests the Board to enter an order declaring and confirming that the transloading of propane by G&U at its yard in North Grafton, either by means of portable equipment or by the construction and operation of a permanent facility, as described above, will be transportation subject to the Board's jurisdiction and may not be subjected to any zoning, permitting, approval or preclearance procedures by the Town or any other state or local regulatory agency. The Board should determine that this Petition and any timely responses provide a record that is sufficient--indeed, that compels--such an order, particularly in view of the fact that the only opposition by the Town to the applicability of preemption has been based upon the allegation that the involvement of the Propane Companies, which has now terminated, supported the conclusion that the transloading would not be provided by or under the auspices of G&U.<sup>7</sup>

Whether the Board acts on the basis of this Petition and any responses or institutes a declaratory order proceeding in order to gather additional information, G&U respectfully requests the Board to take expedited action. As explained above, the continuing delay concerning G&U's ability to provide transloading services has led and will continue to lead to a significant loss of business opportunities. If propane shippers and receivers make other transportation arrangements, it is unlikely that G&U will be

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to decline to institute a formal declaratory order proceeding, because the issue being raised is so clear that neither the institution of a proceeding nor submission of additional evidence and argument is necessary. James Riffin--Petition for Declaratory Order, STB Finance Docket No. 34997, decision served May 2, 2008 (no need to institute a declaratory order proceeding, even on the basis of limited facts, because "the law is clear as to the reach of the federal preemption"); Friends of the Aquifer; Vermont Railway, Inc.--Petition for Declaratory Order, STB Finance Docket No. 34364, decision served January 4, 2005.

<sup>7</sup> If, in response to this Petition, the Town or any other local or state agency purports to have other reasons to subject the transloading to local zoning or permitting regulation, any such reasons would be purely pretextual and would demonstrate that the only ultimate intention is to attempt to preclude such transloading by any means available.

able to recover the business diverted by those potential customers, and in most cases G&U is likely to miss the opportunity to do business with those customers in the future.

To forestall further harm, G&U respectfully requests the Board to expedite a decision clarifying that state and local zoning, preclearance, approval and permitting regulations are preempted and cannot be applied to the proposed propane transloading operations. More specifically, the Board should clarify that a decision in favor of the applicability of preemption means that the cease and desist order issued by the Town of December 12, 2012, as well as the orders of the State Fire Marshal and Massachusetts DEP, to the extent that they attempt to impose preclearance or preapproval requirements, are void and unenforceable and that, in furtherance of the doctrine of federal preemption under 49 U.S.C. 10501, the state court should terminate the litigation by the entry of an order consistent with the Board's finding that preemption applies.

Respectfully submitted,

GRAFTON & UPTON  
RAILROAD CO.

  
James E. Howard  
70 Rancho Road  
Carmel Valley, CA 93924  
831-659-4112

Linda J. Morgan  
Nossaman, LLP  
1666 K Street, N.W.  
Suite 500  
Washington, DC 20006  
202-887-1400

Dated: July 23, 2013

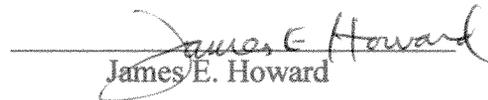
CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Petition for Declaratory Order and the accompanying Verified Statements of Jon Delli Priscoli, Eric Moffett and Thomas Godfrey to be served by sending copies by Federal Express on July 23, 2013 to the following:

Ginny Sinkel Kremer  
Blatman Bobrowski & Mead  
9 Damonmill Square  
Suite 4A4  
Concord, Massachusetts 01742  
Counsel for the Town of Grafton

Stephen D. Coan  
State Fire Marshal  
Steven P. Rourke  
General Counsel  
Department of Fire Services  
State Road  
Stow, Massachusetts 01775

Lee Dillard Adams  
Regional Director  
Central Regional Office  
Massachusetts Department of Environmental Protection  
627 Main Street  
Worcester, Massachusetts 01608

  
James E. Howard

# Exhibit A



**TOWN OF GRAFTON**  
GRAFTON MEMORIAL MUNICIPAL CENTER  
30 PROVIDENCE ROAD  
GRAFTON, MASSACHUSETTS 01519

Phone: (508) 839-5335 ext 190 • FAX: (508) 839-4602  
[www.grafton-ma.gov](http://www.grafton-ma.gov)

**Robert S. Berger**  
**Inspector of Buildings**  
**Zoning Enforcement Officer**  
[bergerr@grafton-ma.gov](mailto:bergerr@grafton-ma.gov)

December 12, 2012

Jon Delli Priscoli, President  
Grafton & Upton Railroad Company  
929 Boston Post Road East  
Marlborough, MA 01752

Re: Grafton Upton Railroad  
42 Westboro Road  
Map 11 Lot 63 Zoned R-20

## **CEASE & DESIST/STOP WORK ORDER**

Dear Mr. Delli Priscoli:

It has come to my attention that there are several new structures being constructed at 42 Westboro Road, which as you know is located in the Residential-20 (R-20) zoning district as well as the Water Supply Protection Overlay District. The Town of Grafton currently does not have any permits on file for the work that has been done. As the property owner, you are responsible for applying for and obtaining all required permits.

**Therefore, I ORDER the following:**

1. That all persons immediately cease and desist from any further construction activity and that all work stops immediately;
2. That all persons apply for permit(s) from all town department and obtain all necessary approvals before construction activity recommences; and
3. That all licenses, permits, travel permits, and any and all other construction control documents related to the work at this sites be provided to the Town of Grafton.

Please refer to the full text of the Commonwealth of *Massachusetts Building Code & Grafton By-Laws*, available on-line at the Town's website, but for your convenience, the following are some provisions that are relevant to your construction activities.

**Massachusetts Building Code 780 CMR Section 105.1 Required.** It shall be unlawful to construct, reconstruct, alter, repair, remove or demolish a building or structure; or to change the use or occupancy of a building or structure; or to install or alter any equipment for which provision is made or the installation of which is regulated by this code without first filing a written application with the *building official* and obtaining the required *permit*.

**Grafton Zoning By-Law Section "1.3.4 Building Permit.** A building permit shall be issued for construction, alteration or moving of a building or structure which as constructed, altered or moved would be in conformance with this By-Law. No building or foundation permit shall be issued in an unsewered area until the applicant has obtained a Disposal Works Construction Permit unless the Board of Health or its agent determines and informs the Inspector of Buildings that an existing sewerage disposal system is adequate for the proposed construction. The Inspector of Buildings may require a determination by the Board of Health as to the adequacy of the existing sewerage disposal system for any proposed alteration or addition to an existing residence or structure. (T.M. 5-9-88)"

**Grafton Zoning By-Law Section 1.3.5 Occupancy Permit:** No building erected, materially altered, relocated or in any way changed as to construction or use under a permit or otherwise, and no land shall be occupied or used without an occupancy permit signed by the Inspector of Buildings. Said Permit shall not be issued until the building, and its use and accessory uses, and the use of all land comply in all respects with this By-Law.

**Grafton Zoning By-Law Section 1.3.2. Zoning Permit (1)** A Zoning Permit issued by the Inspector of Buildings shall be obtained before any building or structure is erected, structurally altered, moved or changed in use or any earth is moved in preparation for any new or changed use.

**3.2.3.1 Use Regulation Schedule--Business Uses (11)** Fuel Oil dealers and stations – an Excluded/Prohibited use in any R20 District.

**7.4.C. Prohibited Uses:** Within the Water Supply Protection Overlay District the following uses are specifically prohibited:

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**7.4.C.9.** Storage, transport or sale of petroleum or other refined petroleum products in quantities greater than normally associated with household use, except for the building which it will heat.

***Included below are the penalties clause(s) from Commonwealth of Massachusetts Building Code & Grafton By-Laws applicable to these violations:***

**M.G.L. chapter 148, Section 94.** Whoever violates any provision of the state building code, except any specialized code as described in section ninety-six, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both, for each such violation. Each day during which a violation exists shall constitute a separate offense.

**Grafton Zoning By-Law Section 1.3.6.3** Whoever violates any provision of this By-Law shall be punished by a fine imposed by a Court of Law not exceeding one-hundred (100) dollars for each offense and each day that such a violation continues shall constitute a separate offense.

*Should you choose to appeal this Order, you may do so according to the following section of the Commonwealth of Massachusetts Building Code & Grafton Zoning By-Law:*

**Massachusetts Building Code, 780 CMR. BOARD OF APPEALS**

**113.1 General.** Appeals of orders, decisions, determinations and failures to act made by any state or local agency or any person or state or local agency charged with the administration or enforcement of the state building code or any of its rules and regulations, except the specialized codes of M.G.L. c. 143, § 96 relative to the application and interpretation of this code shall be addressed by the building code appeals board in accordance with M.G.L. c. 143, § 100.

**1.4.2 Powers of the Zoning Board of Appeals:**

- a. To hear and decide appeals in accordance with Chapter 40A.
- b. To hear and decide petitions for variances in accordance with Chapter 40A in all districts subject to appropriate conditions including but not limited to calendar time period, extent of use, hours of operation, outdoor storage, lighting, parking or similar controls.
- c. To hear and decide applications for expansion of non-conforming uses in accordance with the provisions of Section 3.4.3.5 of this By-law.
- d. To hear and decide applications for special permits upon which the board is empowered to act under this Bylaw.

Regards,



Robert S. Berger  
Certified Building Official  
Inspector of Buildings/ Zoning Enforcement Officer

---

CC Town Administrator  
Board of Health  
Principal Assessor, Jennifer O'Neil  
Town Counsel  
Grafton Fire Department  
Massachusetts State Fire Marshall  
Street File  
1<sup>st</sup> Class U.S. Mail

Robert G. Bowie 1/25/54  
52261883

**CERTIFICATE OF SERVICE**

I, William Kuck, certify that on this 12<sup>th</sup> day of December 2012 I have served a true copy of this Cease and Desist order via hand delivery to: 43 Westboro Rd Grafton Mass.

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

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William Kuck  
Constable  
Town of Grafton

# Exhibit B

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT  
C.A. NO. 2012-02464

BOARD OF SELECTMEN OF THE TOWN  
OF GRAFTON,

Plaintiff,

v.

JOHN DELLI PRISCOLI, President  
GRAFTON & UPTON RAILROAD  
COMPANY, AND GRAFTON & UPTON  
RAILROAD COMPANY,  
Defendants.

ORDER FOR PRELIMINARY INJUNCTION

After review of the pleadings and hearing on the parties' cross-motions for preliminary injunctions, the Court orders the following:

The Defendant Grafton & Upton Railroad's Motion for a Preliminary Injunction is **DENIED**.

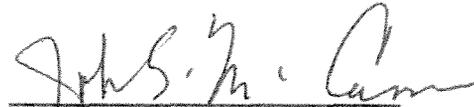
The Plaintiff Town of Grafton's Motion for a Preliminary Injunction is **ALLOWED** as follows:

Effective immediately and until further Order of this Court:

1. The Defendant, Grafton & Upton Railroad, and all of its principals, operators, employees, agents and persons or entities acting on its behalf are hereby **ENJOINED** from delivering LPG storage tanks to the Town of Grafton, and from constructing any part or portion of the proposed LPG facility, including any and all underground and overhead piping;
2. The Defendant, Grafton & Upton Railroad, is further Ordered to comply with the terms of the Cease and Desist Order issued by the Grafton Building Inspector on December 12, 2012;

3. These proceedings will be stayed pending a determination by the Surface Transportation Board on the Defendant's Petition for Declaratory Relief which will be filed pursuant to the parties' Joint Motion for Referral to the Surface Transportation Board.

**So Ordered.**



McMan, J.  
Associate Justice

YSM

CERTIFICATE OF SERVICE

I certify that on this date this document was sent by electronic and First Class Mail to:

John Mavricos, Esq.  
Christopher, Hays, Wojick & Mavricos, LLP  
446 Main Street  
Worcester, MA 01608

Ginny Sinkel Kremer

Date:

A true copy by photostatic process

Attest:  
Asst. Clerk



# Exhibit C

COMMONWEALTH OF MASSACHUSETTS  
SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

WORCESTER, SS.

CIVIL ACTION NO. 2012-02464C

BOARD OF SELECTMEN OF THE TOWN )  
OF GRAFTON, )  
Plaintiff )

vs. )

GRAFTON & UPTON RAILROAD COMPANY, )  
Defendant )

ORDER AS TO REFERENCE  
TO THE SURFACE  
TRANSPORTATION BOARD

After hearing and at the express request of both the Plaintiff and the Defendant in this matter, the Court Orders:

1. This case requires the determination of whether or not the provisions of the Interstate Commerce Commission Termination Act, 49 USC 10501 ("ICCTA"), preempting state and local regulation apply to the construction and operation of a proposed propane transloading facility on the Defendant's property in the Town of Grafton. "Courts have been cognizant of the STB's [Surface Transportation Board] expertise particularly in the area of determining federal preemption [s]ee *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 110 F.Supp.2d 1367, 1378 n. 5 (S.D.Fla.2000) ('[A]s the agency with authority delegated from Congress to implement the provisions of the ICCTA, the STB is uniquely qualified to determine whether state law or local law should be pre-empted')" *Grafton and Upton R. Co. v. Town of Milford*, 417 F.Supp.2d 171, 174 -175 (D.Mass.,2006)
2. At the joint request of the Plaintiff and the Defendant, this matter is hereby referred to the Surface Transportation Board for this determination.
3. Upon the filing of a Petition for Declaratory Order with the STB, this proceeding shall be stayed pending a final decision by the STB.
4. By the joint agreement of the parties, it is hereby ordered that the Grafton & Upton Railroad Company Railroad shall file a Petition for Declaratory Order as the Petitioner, with the STB, within 45 days of this Court's Order.

Dated:

6/12/13

  
John S. McCann, Associate Justice of the  
Superior Court

A true copy by photostatic process

Attest:

Asst. Clerk



# Exhibit D

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT  
C.A. NO. 2012-02464

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

**Plaintiffs,**

v.

**GRAFTON & UPTON RAILROAD  
COMPANY,**

**Defendant.**

**PLAINTIFFS' EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION  
And REQUEST FOR A HEARING**

INTRODUCTION

The Plaintiff, the Town of Grafton, through its Board of Selectmen and its Building Inspector ("the Town"), seeks declaratory and preliminary injunctive relief to enforce a Cease and Desist Order requiring the Defendant, the Grafton and Upton Railroad Company ("the G&U"), to halt construction of a massive propane facility pending determination of the G&U's claim to federal preemption. The requested relief would constitute a continuation of previous orders issued by this Court (Wilkins J.) and kept in place by the U.S. District Court (Hillman, J.) after the G&U's removal of the case to federal court. The order of the U.S. District Court was dissolved on or about May 17, 2013, upon its ruling that the G&U's removal was improper and the federal court lacks jurisdiction over the matter.

Over the past two years, the G&U and two large gas companies, Spicer Gas of Connecticut and NGL of Canada, went through a lengthy planning process for construction of a major propane transloading and storage facility on a parcel of land that is in a residential neighborhood and also located in the town's Water Supply Protection Overlay District unbeknownst to the Town of Grafton and without complying with any local regulations (building permits, conservations permits, site plan review, etc.). The G&U did so on the basis of its

assertion that it is exempt from application of all local and state regulations under the doctrine of federal preemption, but **no tribunal has made such a finding with respect to this proposed propane facility**. When the Town became aware of the nature and scale of the G&U's plan in the late Fall of 2012, it began the process of drafting a Petition to the federal Surface Transportation Board (the "STB"), seeking a Declaratory Order pursuant to 5 U.S.C. § 554 (e) and 49 U.S.C. § 721 (b) (4), for the purpose of determining the scope of preemption under the Interstate Commerce Commission Termination Act ("ICCTA"). The Town seeks a continuation of the orders preventing the G&U from its planned delivery of four massive 80,000 gallon propane tanks and construction of this major propane facility in a residentially zoned district in Grafton until such time as a tribunal of competent jurisdiction finds or rules that the doctrine of preemption applies to this proposed facility.

#### PROCEDURAL AND FACTUAL BACKGROUND

The G&U recently acquired a five acre parcel of land at 42 Westborough Road, Grafton ("the Site"). The Site is in a Residential District (R20) district under Grafton's Zoning By Law, and is also located in Grafton's Water Supply Protection Overlay District. There is an elementary school and a branch of the town library in close proximity, as well as many homes. Exh. A, Affidavit of Bob Berger.

The G&U has no construction permits on file with any Town board, committee or office. Exh. A. At some time in late October or early November of 2012, a document titled "Fire Safety Analysis, Grafton & Upton railroad Propane Rail Terminal, 42 Westboro Road, Grafton." was submitted to the State Fire Marshall's Office and/or the Grafton Fire Department. Exh B, Affidavit of Kevin Mizikar. The Town Administrator's Office and Board of Selectmen became aware of the Fire Safety Report and its contents approximately two weeks later, and immediately requested that John Delli Priscoli, owner and President of the G&U, inform the Town of his plans for the site. Exh. B. On or about November 26 and December 4, 2012, Mr. Delli Priscoli informed the Board of Selectmen and other town officials and residents that he was constructing a major industrial propane facility at the site comprised of four 80,000 gallon tanks and associated infrastructure, including facilities for the transloading of propane onto large tractor trailers that would be transporting the propane from the site. Exh. B. Mr. Delli Priscoli further stated that he was not required to submit to any state or local permitting or inspection due to his claim of federal preemption over the activities in question. Exh. B.

As will be explained in depth below, preemption only applies to the rail-related activities that take place at transloading facilities if the activities are performed by or under the auspices of a rail carrier. Town of Milford, MA-Petition for Declaratory Order, STB Finance Docket No. 34444 (Aug. 12, 2004). **If the transloading operations are not owned or controlled by a railroad, or if the transloader is conducting an independent business, the doctrine of federal preemption does not apply.** In some cases, railroads have attempted to structure relationships with their transloaders in a way that would support a claim of preemption, but such claims have been rejected because in reality, the transloader was not under the control of the railroad. Whether a particular activity constitutes transportation by a rail carrier under Section 10501(b) is a case-by-case, fact-specific determination. Town of Babylon and Pinelawn Cemetery, Petition for Declaratory Order, STB Fin. Dkt. No. 35057, 2008 WL 275697, at 3 (Feb. 1, 2008) (Babylon).

While the Town was still attempting to evaluate the factual basis of G&U's federal preemption claim, on or about December 11, 2012, Mr. Delli Priscoli informed the Board of Selectmen that the first of the tanks--which is approximately 120 feet long, 15 feet high, and weighs approximately 225,000 pounds--would be arriving via tractor trailer the following day, December 13, 2012. Exh. B. Mr. Delli Priscoli stated that the remaining three tanks would be delivered the following week, on December 18, 19, and 20, 2012. Exh. B. As a result, the Board of Selectmen directed the Building Inspector to issue a Cease and Desist Order to halt the construction, which the Building Inspector did the following day, December 12, 2012. Exh. C, Cease and Desist Order. Mr. Delli Prisoli did not cease construction and indicated in no uncertain terms that he had no intention of complying with the Cease and Desist Order, Exh. A, B. Therefore, believing that the delivery of the four massive tanks to a residential neighborhood would cause the Town and its residents, especially the abutters to the site, irreparable harm, the Board of Selectmen directed its town counsel to seek injunctive relief from the Superior Court pending a determination of the merits of the G&U's preemption claim from the STB, the federal entity that has jurisdiction over--and therefore unique expertise in--claims of preemption by railroads. Exh. B.

The Town filed this action in Superior Court on December 13, 2012, seeking a TRO and a short order of notice for a hearing on its motion for a preliminary injunction. By order dated December 13, 2012, this Court (Wilkins, J.) issued the TRO and scheduled a hearing for the next

day, December 14, 2012. Exh. D, Superior Court Order. Prior to the 2 pm hearing, however, the G&U removed the case the Federal District Court, asserting that the case raised a substantial question of federal law. See U.S. District Court D. Mass (Central Division) No. 4:12-CV-40164TSH.

The Town challenged the removal because its Complaint did not raise a federal question, and thus under the well-pleaded complaint rule removal was improper. Louisville & Nashville RR Co. v. Mottley, 211 U.S. 149, 152 (1908) (No “arising under” federal law jurisdiction where plaintiff’s complaint is based on state law, despite reference in the complaint to an anticipated federal defense, even if it is “very likely” that an issue of federal law will be presented). The U.S. District Court, however, took the jurisdictional issue under advisement and scheduled an expedited trial on the merits of the G&U’s preemption claim.

The federal trial took place during the week of January 14, 2013, and the Court heard closing arguments on February 11, 2013. Both parties submitted lengthy Requests for Findings of Fact and Rulings of Law. The Town presented its case that: (1) the construction of a massive propane facility at the planned location in the absence of adherence to local and state permitting requirements was a violation of local law; and (2) that the planned facility was not entitled to federal preemption because under the operative contracts (produced by the G&U pursuant to Judge Hillman’s discovery order) it was clear that the facility was not going to be operated by or under the auspices of the railroad.<sup>1</sup> To the contrary, the operative contracts produced by G&U forcefully demonstrate that it is a third party, a collaboration of NGL, a supplier/shipper of propane, and Spicer, a wholesale and retail distributor of propane, acting through their collection of jointly owned and newly created Delaware LLCs--and *not* G&U--that would effectively own and be in control of the propane transloading facility under the various tests used by the STB. The G&U’s defense was that its planned facility was pre-empt from all local and state regulation.

By Order dated May 20, 2013, the U.S. District Court Ordered allowed the Town’s motion to remand the matter to this Court due to lack of federal jurisdiction. The Court also

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<sup>1</sup> The distinction is important because Congress intended the transportation and related activities undertaken by rail carriers to benefit from federal preemption but did not mean such preemption to extend to activity undertaken by non-rail carriers. Grafton & Upton Railroad v. Town of Milford, 417 F. Supp.2d 171, 176 (D. Mass. 2006).

issued a 26 page document titled Memorandum and Order Grafton Plaintiff's Motion to Dismiss for Lack of Removal Jurisdiction. Exh. F.

Now that the matter is back in this forum, the Town respectfully requests that this Court refer this merits of the federal preemption issue to the STB and retain jurisdiction pending the STB determination. If the Court grants this request, the Town will file a Petition with the STB, seeking a declaratory order pursuant to 5 U.S.C. § 554 (e) and 49 U.S.C. § 721 (b) (4) for the purpose of terminating a controversy and removing uncertainty with regard to the scope of preemption under the Interstate Commerce Commission Termination Act ("ICCTA"). While that process moves forward, the Town requests that the Court issue an injunction to maintain the status quo with respect to the construction and development of the propane facility until such time as the STB acts on the Town's petition.

### ARGUMENT

In order to obtain a preliminary injunction, the Town must demonstrate that: (1) it will suffer "a substantial risk of irreparable harm" without the injunction entering; (2) the risk of this harm outweighs any similar risk of irreparable harm to the defendants caused by the issuance of the injunction; and (3) that it has a likelihood of success on the merits. Packaging Industries Group, Inc. V. Cheney, 380 Mass. 609, 616-617 (1980). Moreover, in cases like this involving public officials performing their statutory duties, "the standard of public interest and not the requirements of private litigation measure the propriety and need for injunctive relief . . . . Thus, before issuing the preliminary injunction, a judge is required to determine that the requested order promotes the public interest or, alternatively, that the equitable relief will not adversely affect the public." Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984). For the reasons that follow, the Town has satisfied the prerequisites for the preliminary relief it seeks.

**A. Based on the Evidence Submitted During the Federal Trial, it is Beyond Dispute that There is a Likelihood of Success on the Merits of the Town's Claim that the Proposed Propane Facility Would be in Violation of the Grafton Zoning By Law and the Cease and Desist Order.**

In order to warrant the granting of a preliminary injunction, there must be a finding by the Court that there is a substantial likelihood of success on the merits. Commonwealth v. County of Suffolk, 383 Mass. 286, 289 (1981). "A complaint must show not merely a grievance but a violation of a legal right which belongs to the plaintiff and which the defendant has

breached.” Donnelly v. Suffolk University, 3 Mass. App. Ct. 788 (1975)(rescript opinion). In this case, that showing is beyond dispute.

The Town’s Complaint seeks to enforce its Zoning By Law and the Cease and Desist Order issued there under. As Judge Hillman found, under Grafton’s Zoning By Law, the proposed facility is absolutely not permitted. See Exh. F at p. 3. Specifically, the storage, transport, and sale of petroleum or other refined petroleum products in quantities greater than normally associated with household use is prohibited in the Water Supply Protection Overlay District. See ZBL § 7.4.C.9; Moreover, the use regulation schedule prohibits rail terminals, truck terminals, and freight yards in a district zoned as R20, as this district is. See ZBL § 3.2.3.1, Communications, Transportation and Public Utility Uses, subsections (3) and (4). Additionally, all industrial uses are prohibited in an area zoned as R20. See ZBL § 3.2.3.1, Industrial and Warehouse Uses. Grafton does not allow any use variances.

**B. The Town Has Demonstrated a Likelihood of Success on the Merits of its Assertion that the Planned Activities are Not Covered by the Doctrine of Federal Preemption.**

The G&U makes no claim whatsoever of compliance with local laws, but rather claims that these laws are simply not applicable to it. That, however, has yet to be determined. The G&U has asserted over and over that its planned propane facility is entitled to federal preemption. However, based on the series of contracts that it produced under Judge Hillman’s discovery order (and which it refused to produce to the Town before that time despite repeated requests) it is very clear that the preemption claim is at best highly questionable.

In order to get the benefit of federal preemption, the activities at the facility must qualify **BOTH** as: (1) “**transportation**”<sup>2</sup> and (2) **be undertaken by a rail carrier**. It is the second of these required criteria that the Town seeks to challenge before the STB in this case. Put simply, federal preemption extends to the rail-related activities that take place at transloading facilities only **if the activities are performed by a rail carrier** or the rail carrier holds out its own service through the third party **as an agent** or exerts control over the third-party's operations. *See, e.g., Town of Milford, MA-Petition for Declaratory Order*, STB Finance Docket No. 34444 (Aug. 12, 2004) (no federal preemption over non-carrier operating a rail yard where it transloaded steel

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<sup>2</sup> The ICCTA defines **transportation** as “services related to . . . movement” by locomotive “including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.” *See*, 49 U.S.C. § 10102(9). There is no dispute in this case that the planned activities will fall within the definition of “transportation.”

pursuant to an agreement with the carrier, but the transloading services were not being offered as part of common carrier services offered to the public); Town of Babylon and Pine Lawn Cemetery Petition for Declaratory Order, STB Finance Docket No. 35057 (February 1, 2008) (no preemption where tenant of licensed rail carrier--not rail carrier itself--had exclusive right to conduct transloading operation for construction and demolition debris and exclusive responsibility to construct and maintain facilities and to market and bill public for services.).

The evidence submitted that the federal trial established that the propane facility was not going to be controlled by G&U, but was rather was going to be largely financed and controlled by two established propane corporations, Spicer and NGL. More specifically, the evidence established the following, **which was not (excepted as noted) contested by G&U:**

1. Planning and Development of the Propane Facility.

For several years before the Fire Safety Analysis was submitted to the Grafton Fire Department, G&U was engaged in talks and negotiations to construct a propane facility. Testimony of Moffett. In or around 2010, Eric Moffett, who works for G&U in a marketing and sales capacity, had conversations with Jonathan Holstein, Vice President of Spicer Gas of Connecticut, about the potential of siting a Liquid Propane Gas (LPG) facility along the G&U. Testimony of Moffett, Holstein.

Spicer Gas (a/k/a Spicer Plus, Inc., hereafter "Spicer") is a Connecticut company that since 1960 has been in the business of the retail installation, service, and delivery of propane and propane equipment to the end user. Testimony of Holstein. Mr. Holstein was interested on behalf of Spicer in the concept of a propane rail facility but believed that before making a significant investment in such a facility it was necessary to find an entity that had a significant fleet of propane tanker cars, a large number of supply contracts, and thus an ability to deliver volume commitments. Testimony of Holstein, Delli Priscoli. Mr. Holstein had discussions with representatives of NGL Canada (a/k/a NGL Supply Terminals, Co., hereafter "NGL"), a large propane supplier/shipper. Testimony of Holstein. NGL had both the supply contracts and the fleet of tanker cars. Testimony of Holstein. Sometime thereafter, Spicer and NGL decided to partner as investors in the propane rail facility. Testimony of Holstein, Delli Priscoli.

The original plan was to construct the facility in Upton, but by June of 2011, the location had changed to 42 Westboro Road in North Grafton, which G&U did not yet own. Testimony of Nunnemacher, Delli Priscoli. G&U eventually acquired it at its marketing materials identified the

North Grafton site as an “Approvals Not Required Site” in an “INDUSTRIAL zone” with “Adjacent Users [] Commercial and Industrial.” Exh. P, 4<sup>th</sup> page; Testimony of Delli Priscoli. These representations were not accurate.

## 2. Financing and Corporate Structure of the Propane Facility

In 2012, Spicer and NGL created a host of entities for the purpose of development, construction, financing, and operation of the proposed propane facility. Testimony of Delli Priscoli, Holstein. Those entities are:

- a. All American Terminals (“AAT”), a Delaware LLC which would serve as the propane transloader. AAT is a wholly owned subsidiary of NE Transloading, Co., LLC, which is owned 50% by Spicer and 50% by NGL, and the sole officer and employee of which is Lawrence Chesler, President of Spicer (Testimony of Holstein);
- b. Patriot Gas Supply, LLC, a Delaware LLC which is also owned 50% by Spicer and 50% by NGL (Testimony of Holstein);
- c. GRT Financing, LLC, a Delaware LLC (“GRT Financing”), which is also owned 50% by Spicer and 50% by NGL, and the President of which is Lawrence Chestler, also the President of Spicer. (Testimony of Holstein).

In late summer and Fall of 2012, the various Spicer/NGL Delaware LLCs executed a series of documents with each other and the G&U. Specifically, on August 24, 2012, a Memorandum of Understanding (“MOU”) was executed; it sets forth the negotiated arrangements and the respective roles of the entities “to plan, finance, construct, and operate a liquid petroleum gas distribution and terminal facility” at 42 Westboro Road. Exh. G. The MOU refers to other operative documents: a Terminal Transloading Agreement (Exh. H), a Financing, Development and Construction Agreement (Exh. I), and a Confidential Rail Transportation Contract, (Exh. J).

## 3. Application of the Law of Preemption to the Facts

The deal is complex, but the bottom line of the agreements could not be more apparent: the contracts establish that NGL and Spicer are and will be in control of this facility in almost every conceivable way, and that the only thing G&U brings to the table is its cloak of federal preemption that the parties have attempted to stretch to fit over the proposed propane facility. But it will not stretch that far. The STB and courts have employed many tests to determine whether in a given case it is the railroad that is actually in control of the facility that it claims is

pre-empt, and this proposed facility would not pass muster under any of those tests. See, e.g., Grafton & Upton Railroad v. Town of Milford, 417 F. Supp.2d 171, 176 (D. Mass. 2006); Norfolk Southern Railway Company v. City of Alexandria, 608 F. 3d 150 (4<sup>th</sup> Cir. 2010); Texas Central Business Lines Corp. v. City of Midlothian, 669 F.3d 525, 529 (5<sup>th</sup> Cir. 2012).

The cases in which preemption is found despite the presence of a third party transloader all have a common distinguishing feature: the terms of the contracts ensure that the **railroad** is in control. In this case, the contracts call for Spicer/NGL to do not just the transloading, but also the billing (and collecting) as well as an un-listable number of other services, from assuring compliance with all regulations to having the rugs cleaned. The contracts give Spicer/NGL (as opposed to the railroad) such a wide ranging degree of control over this proposed facility that is unprecedented in any of the preemption cases. In short, virtually every single activity related to the facility will be undertaken by Spicer/NGL, not the G&U. Additionally, Spicer and NGL are the entities that have made the lion's share of the investment in the facility. They own the tanks, and at the time of the Federal trial, Spicer and NGL's investment in the facility was approximately \$3.2 million. Testimony of Holstein. The G&U has contributed only track construction and site development, tasks that would have to occur regardless of what kind of facility is sited there. Thus, in this case, the Town has only to rely on the G&U's own contracts to demonstrate that it has a great likelihood of success on its claim that the facility is in violation of the Town's by laws and the activity as proposed is not preempt.

**C. The Town Has Demonstrated That It and Its Citizens Will Suffer Irreparable Harm Should the Court Decline to Enforce the Cease and Desist Order.**

Over a series of many months, the G&U has planned and begun to construct a 320,000 gallon tank propane facility with no local review or approval in a residential neighborhood in the Water Supply Protection Overlay District. The Town brought this action to forestall the construction of this facility until such time as a tribunal of competent jurisdiction finds that G&U is entitled to disregard those local laws. Should the Court refuse to issue the requested injunction, the G&U will construct and begin to operate a propane facility of enormous scale, including the significant trucking operation that will go along with it. In short, the abutters to the property and the residents of the Town will have to bear this massive industrial facility in their midst simply on the basis of the G&U's bald assertion that its activities are preempt.

It is important to note that any harm to the G&U caused by delay in its ability to construct and operate this facility is self-inflicted. See Citibank, N.A. v. Cititrust, 756 F.2d 273, 276 (2nd Cir. 1985) (a party's failure to act expeditiously undercuts any claim of "emergency"). First, the Town presented evidence at the federal trial that the G&U did not make the Town aware of the existence and scope of its plan to construct the large scale propane facility until the Fall of 2012, despite the fact that G&U, Spicer, and NGL had been planning the facility for months or even years.<sup>3</sup> The G&U had many months to present its plans to Grafton officials and give the Town the time to gather facts and carefully consider the preemption issue. Instead, the G&U kept its plan quiet until the last possible minute, and then sought to imminently deliver the massive propane tanks into a Grafton neighborhood from where they have sat in Fall River for a half a century.

Second, when the Town filed this lawsuit in December of 2012, instead of letting the case proceed in normal course to the STB, the G&U fought tooth and nail to keep the matter in its chosen forum, the Federal District Court. But the STB is where this case belongs. See Judge Hillman's Order at 25 ("the matter is precisely the type of action that should be brought before the STB for a determination of whether the ICCTA preempts the Town's claims. See 49 U.S.C. section 10501(b). In fact, many cases that retained jurisdiction in federal court, nevertheless, recognized the value of the STB's interpretation of specific ICCTA provisions by either referring the case directly to the STB or remanding to district court for further STB determination.") (citations omitted). Had the G&U not chosen to employ every tactic to keep this case out of the STB, the merits of its claim to preemption could very well have been resolved by now.

**D. Failure to Issue the Injunction Will Harm Both the Public Interest and the Interests of Third Parties.**

When a court is considering the question of whether to issue a preliminary injunction in a dispute that involves a public entity, "the court also should consider the risk of harm to the public interest." Biotti v. Board of Selectmen of Manchester, 25 Mass. App. Ct. 637, 640 (1988). In this case, the public interest is served by keeping the status quo until the issue of preemption can

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<sup>3</sup> The G&U bitterly contested this issue at trial, and Judge Hillman noted in his decision that "the amount and nature of information disclosed between the parties during the relevant timeline of events remains disputed . . ." Exh. F at 3. Because he remanded the case based on his lack of jurisdiction, he recited the evidence presented but **found no facts**. He also did not rule on the parties' Requests for Findings of Fact and Rulings of Law.

be determined by the STB. Allowing the Defendants to continue construction and have four massive propane tanks delivered and a large scale trucking operation commence in violation of local law will do harm not just to the abutters but to all residents of the Town.

WHEREFORE, the Town respectfully requests that the Court:

- (a) Declare that the use of 42 Westboro Road is an illegal use in violation of the requirements of Grafton's Zoning By Law;
- (b) Declare that the Cease and Desist Order is valid and enforceable unless and until some tribunal finds and rules that the proposed propane facility will be covered by the doctrine of preemption;
- (c) Enter an injunction requiring the Defendant to cease construction of the proposed propane facility and abide by the terms of the Cease and Desist Order unless and until a tribunal of competent jurisdiction finds and rules that the proposed propane facility is entitled to the doctrine of preemption;
- (d) Refer this matter to the STB to determine the scope of federal preemption under the ITTCA, but retain jurisdiction until the STB acts on the Town's Petition;
- (c) Award the Town its costs and attorneys' fees for bringing this action; and
- (d) Enter such other relief as is just and equitable.

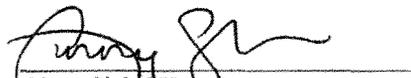
The Town of Grafton  
By its Town Counsel,

  
Ginny Sinkel Kremer  
BBO#629147  
Blatman Bobrowski & Mead LLC  
9 Damonmill Square Suite 4A4  
Concord, MA 01742  
(617) 312-2323

CERTIFICATE OF SERVICE

I certify that on this date this document was sent by Federal Express to:

John Mavricos, Esq.  
Christopher, Hays, Wojick & Mavricos, LLP  
446 Main Street  
Worcester, MA 01608

  
Ginny Sinkel Kremer  
Date: 5/29/13

# Exhibit E



DEVAL L. PATRICK  
GOVERNOR

TIMOTHY P. MURRAY  
LT. GOVERNOR

MARY ELIZABETH HEFFERNAN  
SECRETARY

*The Commonwealth of Massachusetts*  
*Executive Office of Public Safety and Security*  
*Department of Fire Services*

*P.O. Box 1025 ~ State Road*

*Stow, Massachusetts 01775*

*(978) 567~3100 Fax: (978) 567~3121*

*www.mass.gov/dfs*



STEPHEN D. COAN  
STATE FIRE MARSHAL

December 13, 2012

**Via Regular and Certified Mail, Return Receipt Requested**

**#: 7010-1670-0001-5325-3670**

John Delli Priscoli  
929 Boston Post Road East  
Marlborough, Massachusetts 01752

**Via Regular and Certified Mail, Return Receipt Requested**

**#: 7010-1670-0001-5325-3663**

John Delli Priscoli  
100 Prides Crossing  
Sudbury, Massachusetts 01776

**NOTICE TO CEASE AND DESIST**

Dear Mr. Delli Priscoli:

It has come to the attention of my office that your company, Grafton & Upton Railroad ("GURR") has begun construction of a number of aboveground storage tanks, in excess of 10,000 gallons, on the premises located at 42 Westboro Road, Grafton, Massachusetts.

It is my understanding that you intend to use the tanks for the storage of liquid propane. A review of the records on file at the Department of Fire Services, indicates that GURR has neither applied for nor been issued a permit to construct, maintain, or use such tanks as required by the provisions of M.G.L. Chapter 148, s. 37. Section 37 states in pertinent part that "no person shall construct, maintain or use any tank or container of more than ten thousand gallons capacity, for the storage of any fluid other than water . . . without first securing a permit therefor from the Marshal. . ."

Therefore, I hereby **ORDER** the following:

1. That all persons immediately **CEASE AND DESIST** from any and all work related to the

*Administrative Services • Division of Fire Safety*  
*Hazardous Materials Response • Massachusetts Firefighting Academy*

construction of any aboveground storage tank in excess of 10,000 gallons intended for the storage of any liquid other than water;

2. That GURR make proper application for a permit to construct as required pursuant to M.G.L. Chapter 148, s. 37; and
3. That GURR provide all required documents and plans pursuant to the provisions of 527 CMR, *et. seq.* and 502 CMR 5.00.

If you have any questions or concerns regarding this order, please contact my General Counsel, Steven P. Rourke, at (978) 567-3182.

Very truly yours,



Stephen D. Coan  
State Fire Marshal

SDC/ml

CC: Chief Michael Gauthier, Grafton Fire Department

# Exhibit F

**COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

_____	)	
In the Matter of:	)	<b>UNILATERAL</b>
	)	<b>ADMINISTRATIVE</b>
Grafton & Upton Railroad	)	<b>ORDER</b>
Company	)	
_____	)	UAO-CE-12-6W008

**I. THE PARTIES**

1. The Department of Environmental Protection ("Department" or "MassDEP") is a duly constituted agency of the Commonwealth of Massachusetts established pursuant to M.G.L. c. 21A, § 7. MassDEP maintains its principal office at One Winter Street, Boston, Massachusetts 02108, and its Central Regional Office at 627 Main Street, Worcester, Massachusetts 01608.
2. Grafton & Upton Railroad Company (the "Company") is a Massachusetts corporation with its principal office at 929 Boston Post Road, Marlborough, Massachusetts 01752. The Company owns the real property in Grafton, Massachusetts known as 42 Westboro Road by virtue of a deed recorded at the Worcester Registry of Deeds in book 48451 page 144, and also owns the real property in Grafton known as 72 North Main Street Rear by virtue of a deed recorded at the same registry in book 45657 page 81. Collectively, the two parcels of land are referred to in this Order as the "Site."

**II. STATEMENT OF FACTS AND LAW**

3. MassDEP is responsible for the implementation and enforcement of the Massachusetts Wetlands Protection Act, M.G.L. c. 131, § 40 and the Wetlands Regulations at 310 CMR 10.00. MassDEP has authority under M.G.L. c. 111, § 2C to issue orders to any person in violation of any law or regulation MassDEP is authorized to enforce.
4. On December 13 and December 14, 2012 MassDEP personnel inspected the Site in response to a complaint that construction activities at the Site had caused discharges of silt/sediment which caused the water in Pratt's Pond to turn brown after a rainstorm. During the course of the inspections, MassDEP personnel observed the following violations:
  - A. The Company has performed substantial filling and grading activities in areas subject to protection under the Wetlands Protection Act, specifically, Riverfront Area associated with Big Bummer Brook, without first filing a Notice of Intent or obtaining an Order of Conditions, in violation of the Wetlands Protection Act and 310 CMR 10.02.

- B. The Company has performed substantial filling and grading activities in the buffer zone of areas subject to protection under the Wetlands Protection Act without first filing a Notice of Intent or obtaining an Order of Conditions, in violation of the Wetlands Protection Act and 310 CMR 10.02. Specifically, the Company's unpermitted work was performed in the buffer zone of Bordering Vegetated Wetlands to Big Bummet Brook and of Pratt's Pond.
- C. The Company has stockpiled at least 5,000 cubic yards of soil in the Riverfront Area and the buffer zones without providing effective erosion and sedimentation controls on the Site. The Company's failure to maintain hay bales, silt fences, or other erosion controls around the unstable soils at the Site has caused discharges of silt and sediment into Bordering Vegetated Wetlands, in violation of the performance standards at 310 CMR 10.55(4). The alteration of Bordering Vegetated Wetlands is a violation of the Wetlands Protection Act, M.G.L. c. 131, § 40.
- D. The Company's stockpiling of soil in the Riverfront Area has altered the Riverfront Area, in violation of the performance standards at 310 CMR 10.58, and is a violation of the Wetlands Protection Act, M.G.L. c. 131, § 40. In addition, the location of a 50 foot-high pile of soil within 20 feet of Big Bummet Brook without adequate and effective erosion controls threatens to completely fill the brook.

### III. DISPOSITION AND ORDER

5. For the reasons stated above, and pursuant to the authority granted to MassDEP under the laws and regulations set forth above in paragraph 3, MassDEP hereby ORDERS the Company to take the following actions:
- A. Effective immediately, the Company shall cease and desist from all work or activities at the Site that could contribute or exacerbate the amount of unstable, erodible soils on the Site.
  - B. Effective immediately, the Company shall take every reasonable step to prevent further violations of the Wetlands Protection Act and the Wetlands Regulations.
  - C. Within 10 days of the date of this ORDER, the Company shall hire an erosion control specialist to prepare a written plan (the "Erosion and Sedimentation Control Plan") to control the discharge of silt and sediment-laden runoff to wetland resource areas during the construction phase of the project, and to develop measures to stabilize the soils at the Site. Considerations under the plan shall include, but not be limited to, construction of temporary sedimentation ponds and diversion swales, stabilizing exposed slopes with one or more of the following: rip rap, tackifier, bonded fiber matrix, stump grindings, or the use of erosion control blankets such as Curlex®. The Company shall also consider the use of polyacrylamide polymers and flocculating

agents in sedimentation ponds and diversion swales to help limit the discharge of turbid water to wetlands.

- D. Within 20 days of the date of this ORDER, the Company shall submit the Erosion and Sedimentation Control Plan to the Department with a copy to the Grafton Conservation Commission.
- E. Within 20 days of the date of this ORDER, the Company shall hire a wetlands scientist/specialist to evaluate/assess any impacts to Bordering Vegetated Wetlands, Riverfront Area, Bank, and Land Under Waterbodies on the Site and any adjacent properties from the Company's activities.
- F. Within 45 days of the date of this ORDER, the wetland scientist/specialist shall prepare a wetland restoration plan to restore all altered wetland resource areas. All plans shall be signed and stamped by a Registered Professional Engineer (R.P.E.). All plans shall be submitted to MassDEP for review and approval, and shall also be copied to the Grafton Conservation Commission.

6. Notwithstanding this ORDER, MassDEP reserves the right to exercise the full extent of its legal authority in order to obtain full compliance with all applicable requirements, including but not limited to, referral to the Attorney General's Office for criminal prosecution or civil action including court-imposed civil penalties, or administrative penalties assessed by MassDEP.

7. The Company is advised that M.G.L. c.131, §40 provides, "Whoever violates any provision of this section, (a) shall be punished by a fine of not more than twenty-five thousand dollars or by imprisonment for not more than two years, or both such fine and imprisonment; or (b) shall be subject to a civil penalty not to exceed twenty-five thousand dollars for each violation."

8. This ORDER serves as a Notice of Noncompliance issued pursuant to M.G.L. c.21A, § 16 and 310 CMR 5.00 for the violations cited in Section II above. The Company is further advised that M.G.L. c.21A, § 16 provides for civil administrative penalties of up to twenty-five thousand dollars (\$25,000.00) for each day after the issuance of this ORDER during which each violation covered by this ORDER continues or is repeated.

9. This ORDER is an action of MassDEP. If you are aggrieved by this action, you may request an adjudicatory hearing. A request for a hearing must be made in writing and must be received by MassDEP as provided in 310 CMR 1.01, within twenty-one (21) days from the date of this ORDER.

10. Under 310 CMR 1.01(6)(b), the request must state clearly and concisely the facts that are the grounds for the request, and the relief sought. Additionally, the request must state why the ORDER is not consistent with applicable laws and regulations.

11. The original hearing request must be mailed to:

Case Administrator  
Office of Appeals and Dispute Resolution  
One Winter Street  
Boston, MA 02108

A valid check payable to the Commonwealth of Massachusetts in the amount of one hundred dollars (\$100.00), for the filing fee must be mailed separately along with a transmittal form to:

Massachusetts Department of Environmental Protection  
P.O. Box 4062  
Boston, Massachusetts 02241-4062.

A copy of the transmittal form is attached for your convenience.

A copy of the hearing request should be sent to:

Philip Nadeau, Wetlands Section Chief  
Massachusetts Department of Environmental Protection  
627 Main Street  
Worcester, Massachusetts 01608.

12. The request will be dismissed if the filing fee is not paid, unless the appellant is exempt or granted a waiver. MassDEP may waive the adjudicatory hearing filing fee for a person who shows that paying the fee will create an undue financial hardship. A person seeking a waiver must file, together with the hearing request as provided above, an affidavit setting forth the facts believed to support the claim of undue financial hardship.

13. The Company may also be subject to administrative or civil penalties for the past violations described in the ORDER. Questions regarding the contents of the ORDER should be directed to Philip Nadeau, Wetlands Section Chief, Massachusetts Department of Environmental Protection, 627 Main Street, Worcester, Massachusetts 01608, (508) 767-2728.

**MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION**

By: Mary K Gardner for  
Lee Dillard Adams, Regional Director  
Central Regional Office  
627 Main Street  
Worcester, MA 01608

Date: 12/14/2012

# Delli Piscoli VS

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

Finance Docket No. 35752

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GRAFTON & UPTON RAILROAD COMPANY --  
PETITION FOR DECLARATORY ORDER

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**VERIFIED STATEMENT OF JON DELLI PRISCOLI**

1. My name is Jon Delli Priscoli, and I am the owner, Chief Executive Officer and President of Grafton & Upton Railroad Co. ("G&U"). I am familiar with the Petition for Declaratory Order filed by G&U in these proceedings, with the matters referred to in the Petition and with the business and operations of G&U.

2. G&U was formed in, and has been in continuous operation since, 1873. The G&U line extends a total of approximately 16.5 miles between a connection at North Grafton, Massachusetts with the CSX Albany-Boston mainline that runs in a east-west direction through Massachusetts and a connection with another line of CSX in Milford, Massachusetts. The line runs through the towns of Grafton, Upton, Hopedale and Milford.

3. In 2008, I acquired ownership of all of the outstanding stock of G&U. At that time, and for several years prior to 2008, G&U handled very low volumes of business, and its track and other rail infrastructure facilities had deteriorated to a point where substantial rehabilitation was required. In fact, in 2008 only the 7 mile portion of the G&U line between North Grafton and Upton was operable. Promptly after acquisition of

ownership of G&U, I invested a substantial amount of funds in order to completely rehabilitate the 7 miles of line between North Grafton in Upton. Subsequently, G&U rebuilt and restored the track between Upton and Hopedale, and we are in the process of upgrading the track between Hopedale and Milford.

4. I recognized that G&U not only needed substantial capital investment, but also required significant efforts to develop new rail customers and business. In 2008, there were no rail served customers with facilities located on the G&U line. The only customers were served by small G&U transloading yards in North Grafton and Upton, where commodities from inbound rail cars were transferred to trucks for final delivery. I understood and believed that the future of G&U was dependent upon an ability to develop and increase its transloading business. New England is an area that generally receives more products and commodities than it ships out, and the relatively short distances from the G&U line to major consuming areas in Massachusetts, Rhode Island and Connecticut made the G&U line an ideal candidate for transloading services.

5. With the express goal of increasing our transloading business, G&U embarked upon a program to promote its transloading services and to increase the size of its transloading yards. In addition to expanding the existing yard in Upton, we also concentrated on increasing the ability to do business at North Grafton, which is immediately adjacent to the interchange with the Albany-Boston CSX mainline, which handles approximately 50 trains daily. For many years, G&U had done some transloading business for a few customers at North Grafton, but in 2010 we identified an opportunity to consider the construction and operation of a propane transloading facility in North Grafton.

6. For many years, the majority of the propane consumed in New England was imported. In 2010, however, increased domestic production of propane, primarily in the Midwest, made it less expensive and more attractive for propane users in New England to obtain propane from domestic sources. Propane wholesalers and retailers in New England were not being adequately served by motor carrier transportation from the Midwest or pipelines, which opened an opportunity for rail transportation by tank car and transloading from tank cars to trucks for distribution in New England. We investigated the markets and economics of transloading propane, discussing the possibilities with CSX and propane dealers in the New England area, and we concluded that there was a demand for rail transloading service that could be met by G&U.

7. In 2011, we began the planning process to construct and operate a propane transloading facility in North Grafton. We identified a 5 acre parcel of property, known as 42 Westborough Road in North Grafton, that was located immediately adjacent to the G&U mainline and existing yard. In January, 2012, G&U purchased the property, and shortly thereafter we began to clear and grade the land. In addition, as a result of an introduction provided by CSX, G&U had conversations with representatives of Spicer Gas, a propane dealer based in Connecticut. Spicer operated a propane rail to truck transfer facility in Connecticut, and, as a result, had experience and expertise in connection with transloading operations. Spicer agreed to provide consulting and other assistance to G&U for purposes of designing, constructing and operating the facility.

8. In addition, LPG Ventures, which is a nationally recognized design and construction firm specializing in propane transloading facilities, was retained for that purpose. LPG Ventures was charged with the responsibility of designing and

constructing a facility at North Grafton that would have four 80,000 gallon pressurized tanks and associated equipment required in order to transfer propane from rail tank cars into the pressurized tanks and eventually from the tanks into trucks for delivery to propane wholesalers. We were advised that for purposes of maximizing the efficiency of the facility, it would be desirable to have a temporary storage capacity of 320,000 gallons, which could accommodate propane from approximately 10 rail tank cars. In addition, LPG Ventures advised us that the best method of transferring propane from rail tank cars to trucks was to use the intermediate step of the storage tanks.

9. In addition to grading and clearing the land at the new yard, G&U also partially completed the construction of new yard tracks that would be used to place the rail tank cars while they were being unloaded. The entire facility was designed to be below grade level and surrounded by earthen berms. The tanks are designed to lay on their sides, rather than upright, so that the entire facility would barely be visible from Westborough Road and would be isolated from adjacent properties.

10. The total cost of the transloading facility was estimated to be approximately \$5 million. I realized that conventional financing would not be available to G&U in order to undertake a project of this magnitude. Although G&U incurred the cost of acquiring the 5 acre parcel at 42 Westborough Road and was able to assume responsibility to perform the site work and track construction work at its own expense, at a total cost of approximately \$1.8 million, we could not at that time finance the entire cost by any conventional or reasonable commercial means. In order to complete the construction of the facility, therefore, we entered into discussions with NGL Supply Terminals ("NGL"), which is a substantial Canadian propane supplier and wholesaler,

and Spicer Plus, LLC ("Spicer"), an affiliate of Spicer Gas. The discussions resulted in the execution of a letter of intent in April, 2012 and 3 agreements in October, 2012. The parties to the letter of intent and agreements were G&U and, depending upon the particular agreement, NGL, Spicer or entities that were jointly owned by NGL and Spicer (the "Propane Companies").

11. The letter of intent outlined the overall arrangement among the parties and provided for the execution of the 3 agreements. One of the agreements provided that one of the Propane Companies would, at its initial expense, acquire the 4 tanks and related equipment and would provide funding to complete the construction of the transloading facility. G&U agreed to lease the tanks and equipment for 20 years, thereby providing the mechanism by which the Propane Companies would recover their investment. Another agreement provided for an entity owned by the Propane Companies to perform the transloading operations as the agent of G&U and under G&U's direction and control. The third agreement was a confidential transportation contract pursuant to which another company owned by the Propane Companies agreed to ship propane tank cars to the facility in certain minimum required volumes.

12. From the outset of the planning for the propane transloading facility, G&U intended to structure the operations so that federal preemption would apply and so that it would be unnecessary to obtain approvals or preclearances for the construction and operation of the facility from the Town of Grafton (the "Town" or "Grafton") and other state or local agencies. In particular, the transloading subcontract and the other agreements established that the transloading would be under the direction and control of G&U. We also understood, however, that consultation with Grafton officials in order to

advise them of the project was appropriate and desirable. At my direction, therefore, Eric Moffett, the principal marketing and sales officer of G&U, met with the Fire Chief of Grafton in June, 2011 to describe G&U's plans for a propane transfer facility that was being considered for construction at the North Grafton yard. In his Verified Statement, which is being filed with this Verified Statement and the Petition, Mr. Moffett has described his various meetings and conversations with Town officials and representatives of the Massachusetts State Fire Marshal's office.

13. I had several conversations with the Town Manager, Tim McInerney, to advise him of our plans concerning the propane facility. In particular, on July 2, 2012, I met with the Police Chief, the Fire Chief and Mr. McInerney at the Grafton Police Department and provided them with an overview of the plans for the propane transfer facility. A memorandum from the Police Chief to Mr. McInerney, which was produced by the Town in discovery in litigation and which is attached as Exhibit A, confirms the occurrence of the meeting, the persons who attended and that I discussed G&U's intentions for the construction of the facility. On another occasion in mid-2012, Mr. McInerney, who was accompanied by the Fire Chief and the Police Chief, visited the site, and I showed him the ongoing excavation and grading work for the propane transloading facility. We discussed fire safety, and I agreed to a request from the Town officials to construct a fence around the facility and to provide lighting. Mr. McInerney stated to me on these occasions that he understood preemption and, more specifically, that G&U would not be subject to local land use and zoning regulations. The Town Administrator reports to the Board of Selectmen of Grafton and also appoints the Fire Chief and the Police Chief. Based upon this organizational structure and the various meetings and

discussions that had occurred, G&U believed that the Board of Selectman was fully informed of G&U's plans for a propane transloading yard.

14. In July, 2012, G&U retained Thomas Godfrey, a fire safety expert with considerable expertise and experience involving propane transfer facilities. At my direction, Mr. Godfrey communicated with the Town Fire Chief and the State Fire Marshal's office in order to discuss the fire safety analysis that would be performed and to address various safety issues raised by State and local officials. The purpose for retaining Mr. Godfrey was to make sure that the facility would be as safe as possible. Mr. Godfrey's communications with the various fire officials are described in his Verified Statement, which is being filed with the Petition.

15. By November, 2012, the site work had been substantially completed by G&U, and we were awaiting the delivery of the 4 tanks. The timing of the delivery was extremely uncertain due to the fact that the tanks were being transported by truck and approval of the route of the trucks by the Massachusetts Department of Transportation was required. The Town had retained legal counsel to review the preemption issues, and our lawyer was providing information concerning preemption and discussing the issues with Town counsel. On December 4, 2012, I attended a public meeting in Grafton at which Mr. Godfrey and I made presentations concerning the proposed propane transloading facility. A representative of the Surface Transportation Board was also present, and he addressed questions concerning preemption. At the meeting, which was attended by members of the Board Selectmen, I stated that G&U would continue to work with the Board of Selectmen to provide information responding to health and safety concerns prior to bringing in propane tank cars and activating the facility. I confirmed

this representation in a letter dated December 6, 2012 to the Board of Selectmen of Grafton.

16. On December 12, 2012, which was a day or 2 prior to the scheduled arrival of the tanks, the Town building inspector issued a cease and desist order prohibiting G&U from any further construction activity and requiring G&U to obtain permits before construction could recommence. On that same day, the Town filed a complaint and application for a temporary restraining order in the Superior Court for Worcester County, Massachusetts and, without any notice to G&U or opportunity to attend, obtained a restraining order prohibiting the delivery of the tanks. G&U removed the case to the federal district court in Worcester, which held a four-day trial in January, 2013 that focused on the question whether preemption applied to the construction and operation of the propane transloading facility or, as contended by the Town, preemption did not apply and the construction and operation were prohibited by the Town's zoning laws. These issues were not decided by the District Court, which remanded the case to the state court in May, 2013.

17. On June 12, 2013, the state court granted the request of the Town and enjoined the delivery of the tanks to the G&U yard, directed G&U to comply with the cease and desist order and directed G&U to petition the Surface Transportation Board for a declaratory order on the question whether preemption applied to the construction and operation of the proposed propane transloading facility. Promptly after these decisions by the state court, G&U discussed the implications of the decisions by the state court with the Propane Companies. In particular, both G&U and the Propane Companies considered the various issues relating to proceeding with the project in accordance with the letter of

intent and 3 agreements described above, including the time that would likely be required order to obtain a final decision on preemption.

18. As a result of these discussions, G&U and the Propane Companies have agreed to terminate the letter of intent and 3 agreements. Copies of 4 letters from G&U terminating the arrangements, countersigned by the appropriate Propane Company indicating their agreement to the terminations, are attached as Exhibits B, C, D and E (the "Termination Agreements"). As a result of the Termination Agreements, G&U has eliminated any participation or role of the Propane Companies in the construction or operation of the transloading facility. The equipment lease is not in effect, and the financing to be provided by one of the subsidiaries of the Propane Companies will not be provided. The subcontract pursuant to which an affiliate of the Propane Companies would have operated the facility on behalf of G&U has been terminated, and the transportation contract providing for minimum volumes has also been voided.

19. G&U will hire and train employees to operate the transloading yard. We estimate that we will need 3 employees, and we believe that it will be possible to identify and hire qualified employees. We will not use a subcontractor for such operations. The design of the facility will be essentially unchanged from the original design, and we are asking LPG Ventures, the original contractor, to complete the construction on behalf of G&U. If a satisfactory arrangement cannot be reached with LPG Ventures, G&U will contract with another qualified contractor to complete the work. In short, G&U will construct and operate the facility on its own with its own resources and without any involvement by the Propane Companies or any other entities involved in the propane business.

20. G&U has initiated discussions to purchase the 4 tanks and related equipment from the Propane Companies. If the equipment cannot be acquired from the Propane Companies at a reasonable price, G&U will make other arrangements to acquire tanks and related equipment. We estimate that the cost to acquire the tanks and related equipment and to complete the construction of the facility, including completion of the track work in the yard, will be approximately \$3 million. G&U will be able to bear these expenses from a combination of (a) current cash flow from other operations, which have grown in the last few year to the extent that CSX recently recognized G&U as CSX's fastest-growing short line connection, (b) by placing new financing on the railroad, which currently does not have any third-party financing, or (c) by financing on reasonable terms and conditions from other business entities that I control. As a result of the recent restructuring of certain debt obligations and the refinancing of commercial real estate assets of several nonrailroad companies that I own, these companies are today in a position to provide the necessary financing to G&U to purchase of the tanks and related equipment and to complete the construction of the transload facility so that it is operational.. After the transloading facility becomes operational, traditional commercial financing is expected to be available based upon the income stream that is anticipated to be generated from the propane transloading business. Whatever the source or combination of sources of financing to complete the project, they will not include any financing or participation by the Propane Companies or any other person or entity involved in the propane business.

21. G&U has continued to retain Mr. Godfrey, who will be responsible for the fire safety analysis for the facility and on a continuing basis to make sure that the facility

is operated safely. In addition, G&U will rely on Theodore Lemoff, an expert in the area of the construction of facilities so that they comply with fire safety rules, in order to ensure that the construction is completed in a manner that is consistent with such rules.

22. When completed, the transloading facility will have the capacity to handle approximately 1,500-2,000 rail tank cars of propane each year. Based upon conversations with propane suppliers and dealers in the New England area, we believe that this volume of propane will be readily available and achievable. A significant potential problem in realizing such volumes, however, is the uncertainty concerning the date when operations will begin. Propane use, and therefore transportation of propane, is highest in the fall and winter months. Suppliers and purchasers of propane make plans prior to the fall of any year in order to be assured that they will have adequate transportation alternatives and to ensure that they will have propane to supply their customers during the peak fall and winter seasons.

23. If there is a delay in completing the transloading facility, propane suppliers and purchasers will make alternative arrangements for transportation. More specifically, if G&U cannot assure potential propane customers that it will be in operation at the North Grafton facility by a date certain, G&U will lose the business opportunities not only for the coming season but most likely permanently. Experience has shown that once customers make alternative arrangements to use trucks, for example, in many situations they never come back to rail. In addition to losing actual business opportunities and revenues, the inability to operate the transloading facility in the near term will result in a loss of credibility for G&U as a viable alternative in the market for transporting and transloading propane.

24. We have received inquiries from a number of propane shippers and purchasers that have expressed an intention to use the G&U facility to transload propane when it is in service. As noted above, I believe that the business that could be generated from these potential customers would be sufficient to enable G&U to handle the maximum capacity at the yard, which is approximately 1,500 to 2,000 carloads annually.

25. At the present time, the site work and a majority of the construction of yard tracks at the facility have been completed. When the tanks and equipment are at the site, it will take approximately 4 to 6 weeks of construction work to complete the transloading facility and make sure that it is ready for operation.

26. Pending the completion of the construction, we have made plans to transload propane at North Grafton by means of portable transloading equipment. This equipment attaches the rail tank car directly to trucks, without the need to construct or use tanks and related equipment. The equipment is located on a wheeled trailer and has various safety systems that would stop the transfer process in the event of a loss of pressure or a fire. G&U has access to one portable unit, which could be put into operation almost immediately and which has the ability to transfer propane from up to 3 rail tank cars per day. While the capacity of the North Grafton yard using such portable equipment would be limited to approximately 500 tank cars annually, using the portable equipment would enable G&U to begin serving propane customers, earning revenue and establishing business relationships that could be expanded once the permanent facility is operational.

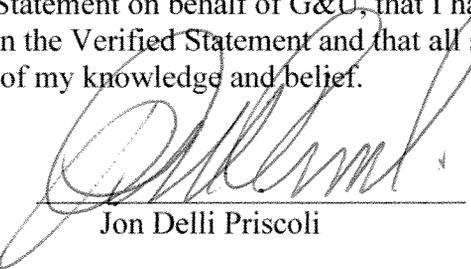
VERIFICATION

Commonwealth of Massachusetts

ss:

County of Middlesex

I, Jon Delli Priscoli, being duly sworn, depose and state that I am President and Chief Executive Officer of Grafton & Upton Railroad Company ("G&U"), that I am authorized to sign the foregoing Verified Statement on behalf of G&U, that I have examined all of the statements contained in the Verified Statement and that all such statements are true and correct to the best of my knowledge and belief.

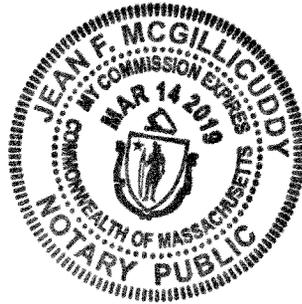


Jon Delli Priscoli

Subscribed and sworn to  
before me this 17<sup>th</sup> day of  
July, 2013



Notary Public



# Attachment A



# Grafton Police Department

28 Providence Road • Grafton, Massachusetts 01519  
Telephone (508) 839-8517 • Fax (508) 839-8562  
[www.graftonpolice.com](http://www.graftonpolice.com)

Normand A. Crepeau, Jr.  
Chief of Police

DATE: January 3, 2013  
TO: Timothy P. McInerney – Town Administrator  
SUBJECT: Request for Documents (Grafton & Upton Railroad)

Please find attached the following documents in my possession pertaining to the proposed Grafton & Upton Railroad propane facility:

- Copies of all email correspondence with attachments to include:
  - Copy of Commonwealth of Massachusetts Superior Court Summons and Restraining Order including Application for Temporary Restraining Order and associated affidavits.
  - Town issued press releases.
  - Tank transport route
- Copy of Cease and Deist/Stop Work Order – Town of Grafton including GPD log entry noting service.
- Copy of Massachusetts DOT permit for Movement of Non-Divisible Oversize and Overweight Loads.

The following is a list, of discussions and/or meetings regarding the G&U RR proposed propane facility in chronological order:

On July 2, 2012, at about 1:00 pm, a meeting was held in the Grafton Police Department conference room. Timothy McInerney, Fire Chief Michael Gauthier, Jon Delli Priscoli and another individual from the railroad attended. There was a discussion regarding site improvements and new crossings on the tracks at North St. and Boulevard St. as well as on Upton St. Mr. Delli Priscoli also briefly discussed his intentions for the construction of a propane storage facility on G&U RR property located at 42 Westborough Rd.

On December 10, 2012 at about 11:30 am, I attended a conference call held in the office of Timothy McInerney. On the line were Jon Holstein and John Baandars representing G&U RR. Mr. Holstein discussed the route for the four tanks being transported into Grafton including the possibility of getting approval from the Town to move the tanks after their arrival in town, in the early morning hours as the state permit only allowed the transport during the daylight hours. Mr. McInerney stated that the request would require BOS approval and that there was a meeting on December 11<sup>th</sup> and they could present their proposal then.

TOWN 2

On December 12, 2012 at about 8:45 am, Kevin Mizikar asked if I could provide two officers to assist in serving Cease and Desist Orders to G&U RR. Lt. Wayne Tripp and Detective William Kuck were assigned. (Order was served at 11:33 am.)

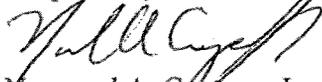
On December 12, 2012 at about 2:00 pm, I spoke with MA State Police Sgt. Craig McGarry (area Detail Officer) and advised him that the Town had issued a Cease and Desist Order for the work on the G&U RR site pending a hearing in Superior Court. I also asked Sgt. McGarry if he could provide with me a copy of the DOT permit issued to G&U RR. He faxed me a copy a short time later.

On December 13, 2012 at about 7:30 am, I spoke with Sgt. McGarry and told him that there was a hearing scheduled in Superior Court, Worcester and I would advise on the status of the tank transport.

On December 14, 2012 at about 1045 am, I contacted Sgt. McGarry and told him about the restraining order that had been issued and future court dates. Sgt. McGarry stated he would pull the permits issued for the following week.

On December 18, 2012 at about 5:00 pm, a meeting was held in the Grafton Police Department training room to discuss the proposed G&U RR propane facility. I attended along with Mr. McInerney, Kevin Mizikar, Raymond Mead (Grafton Emergency Management Director), Nicholas Child (Deputy EMD), Fire Chief Michael Gauthier, Deputy Fire Chief Michael Mills, Asst. Chief Steven Charest and Asst. Chief James Barker. Discussion centered on safety precautions regarding the site to include emergency response, current water issues in that area, emergency notification procedures and evacuations.

Respectfully Submitted,



Normand A. Crapeau, Jr.  
Chief of Police

# Attachment B

# Grafton & Upton Railroad Company

929 Boston Post Road East  
Marlborough, MA 01752  
508-481-6095 \* Fax 508-460-0378

July 15, 2013

Spicer Advanced Gas  
36 Thames Street  
Groton, CT 06340  
Attention: Larry Chesler, President

## Notice of Termination of Letter of Intent of April 6, 2012 and All Other Agreements

Dear Mr. Holstein:

The Grafton & Upton Railroad Company has terminated the Financing, Development and Construction Agreement of November 5, 2012 effective Wednesday, July 17, 2013 at 5:00 PM. Therefore, this letter is being written to give you written notice that Grafton & Upton Railroad Company hereby terminates the Letter Of Intent of April 6, 2012 and all other agreements, of every type and kind, between the parties and all respective rights and obligations thereunder, effective on Wednesday, July 17, 2013 at 5:00 PM.

Very Truly Yours,

Grafton & Upton Railroad Company

By: Jon Delli Priscoli  
Jon Delli Priscoli, President &  
Treasurer & not individually

The termination is accepted and agreed to as of this 16<sup>th</sup> day of July, 2013 by:

Spicer Advanced Gas

By: Larry Chesler  
Larry Chesler, President

Copy To: GRT Financing, LLC  
Patriot Gas Supply, LLC  
All American Terminals, LLC  
Spicer Plus, Inc.  
NGL Supply Terminals Co.

# Attachment C

# Grafton & Upton Railroad Company

929 Boston Post Road East  
Marlborough, MA 01752  
508-481-6095 \* Fax 508-460-0578

July 15, 2013

**SENT BY FEDERAL EXPRESS AND  
FIRST CLASS MAIL**

All American Transloading, LLC  
42 Westborough Road  
North Grafton, MA 01536  
Attention: Jonathan Holstein, Manager

Notice of Termination of  
Terminal Transloading Agreement of October 1, 2012 and All Other Agreements

Dear Mr. Holstein:

The Grafton & Upton Railroad Company has terminated the Financing, Development and Construction Agreement of November 5, 2012 effective Wednesday, July 17, 2013 at 5:00 PM. Therefore, this letter is being written to give you written notice that Grafton & Upton Railroad Company hereby terminates the Terminal Transloading Agreement of October 1, 2012 and all other agreements, of every type and kind, between the parties and all respective rights and obligations thereunder, effective on Wednesday, July 17, 2013 at 5:00 PM.

Very Truly Yours,

Grafton & Upton Railroad Company

By:   
Jon Delli Priscoli, President &  
Treasurer & not individually

This termination is accepted and agreed to as of this 16<sup>th</sup> day of July, 2013 by:

All American Transloading, LLC

By:   
Jonathan Holstein, Manager

Copy To: GRT Financing, LLC  
Patriot Gas Supply, LLC  
Spicer Plus, Inc.  
NGL Supply Terminal Co.

# Attachment D

Attachment D

# Grafton & Upton Railroad Company

929 Boston Post Road East  
Marlborough, MA 01752  
508-481-6095 \* Fax 508-460-0578

July 15, 2013

GRT Financing, LLC  
12 Roosevelt Avenue  
Mystic, CT 06355  
Attention: Larry Chesler, Manager

Notice of Termination of  
Financing, Development and Construction Agreement of November 5, 2012  
and All Other Agreements

Dear Mr. Chesler:

This letter is being written to give you written notice that Grafton & Upton Railroad Company hereby terminates the Financing, Development and Construction Agreement of November 5, 2012 and all other agreements, of every type and kind, between the parties and all respective rights and obligations thereunder, effective on Wednesday, July 17, 2013 at 5:00 PM.

Very Truly Yours,

Grafton & Upton Railroad Company

By: Jon Delli Priscoli  
Jon Delli Priscoli, President &  
Treasurer & not individually

The above-described termination is accepted and agreed to as of this 16<sup>th</sup> day of July, 2013 by:

GRT Financing, LLC

By: Larry Chesler  
Larry Chesler, Manager

Copy To: Patriot Gas Supply, LLC  
All American Transloading, LLC  
Spicer Plus, Inc.  
NGL Supply Terminals Co.

# Attachment E

## Grafton & Upton Railroad Company

929 Boston Post Road East  
Marlborough, MA 01752  
508-481-6095 \* Fax 508-460-0578

July 15, 2013

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

Notice of Termination of  
Confidential Rail Transportation Agreement of October 1, 2012 and All Other  
Agreements

Dear Mr. Clark:

The Grafton & Upton Railroad Company has terminated the Financing, Development and Construction Agreement of November 5, 2012 effective Wednesday, July 17, 2013 at 5:00 PM. Therefore, this letter is being written to give you written notice that the Grafton & Upton Railroad Company hereby terminates the Confidential Rail Transportation Agreement of October 1, 2012 and all other agreements, of every type and kind, between the parties and all respective rights and obligations thereunder, effective on Wednesday, July 17, 2013 at 5:00 PM.

Very Truly Yours,

Grafton & Upton Railroad Company

By:   
Jon Dell Priscoli, President &  
Treasurer & not individually

This termination is accepted and agreed to as of this 17<sup>th</sup> day of July, 2013 by:

Patriot Gas Supply, LLC

By:   
Austin P. Clark, Manager

Copy To: GRT Financing LLC  
All American Transloading, LLC  
Spicer Plus, Inc.  
NGL Supply Terminals Co.

Moffett VS

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35752

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GRAFTON & UPTON RAILROAD COMPANY --  
PETITION FOR DECLARATORY ORDER

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**VERIFIED STATEMENT OF ERIC MOFFETT**

1. My name is Eric Moffett, and I am the Vice President of Business Development for Grafton & Upton Railroad Co. ("G&U"). I am familiar with the Petition for Declaratory Order filed by G&U in these proceedings. My responsibilities for G&U include all aspects of marketing and sales, including communications with customers and other rail carriers and the development of new business.

2. I have over 20 years experience in sales and marketing in the rail industry. I held sales and marketing positions with Canadian Pacific Railway, Railtex, CSX Transportation and Vermont Railway.

3. G&U is a Class III short line that interchanges only with CSX at North Grafton, Massachusetts. All of the rail business done by G&U is interchanged with CSX. There is no local traffic that moves from origins to destinations solely on G&U's line. G&U's relationship with CSX for purposes of such interline business is typical of the relationships between CSX and its other short line connections. Specifically, CSX quotes rates for rail customers from origins or to destinations on G&U to and from points on CSX or connections with CSX. G&U negotiates with CSX to determine G&U's portion of the line haul charges for rail transportation for any particular movement. CSX bills

and collects the freight charges from customers and remits to G&U its share of the line haul revenue. As a consequence of this arrangement, G&U does not bill or collect directly from customers for line haul services. There are many instances, however, in which G&U identifies potential rail customers that could be served by G&U and works jointly with CSX, and in some instances other interline connections, in order to secure new business.

4. Working with Jon Delli Priscoli, the owner and president of G&U, we very quickly recognized that there was a very limited potential for attracting customers needing rail transportation to locate and build new facilities on the G&U line. New facilities require land adjacent to the line and, in most cases, a significant capital investment by the customer. On the other hand, we also recognized, as many other short lines have, that there was significant potential on G&U for transloading services, particularly for inbound commodities. Transloading from rail cars to trucks for final delivery is particularly attractive to businesses in New England, where trucking distances from the rail facility to the customer's location are relatively short. We understood that providing transloading services from rail to truck would enable G&U to expand its customer base substantially without requiring customers to build facilities along the G&U line. While we offered to assist potential rail customers to acquire and build private facilities along the G&U line, our preferred method to increase business was to establish railroad owned and operated transloading facilities that would be open to multiple customers and that would not be limited to serving the private sidetrack of one customer. Potential rail customers also found it attractive to use an open rail operated facility that

would be subject to federal preemption, as distinguished from private customer owned facilities that would not.

5. Shortly after Mr. Delli Priscoli's acquisition of G&U, we identified existing yards on the G&U line that might be expanded in order to accommodate additional transloading services. G&U acquired approximately 33 acres of property adjacent to its line in Upton, and this site has been developed into an active transloading yard. In addition, we saw a potential for transloading in Hopedale and at North Grafton. As I began to put together promotional material for G&U, we emphasized our ability to provide transloading services in connection with the line haul service. On the G&U website, for example, we explained that G&U was in business to provide transloading services as an integral part of its overall transportation service, and we published G&U Tariff 5000, which was later amended as Tariff 5000-A, listing the various transloading services and rates.

6. In 2010, I learned of a potential opportunity for G&U to get into the propane transportation and transloading market. The increased production of propane in the Midwest was resulting in domestic propane prices that were lower than the price of imported propane, on which consumers in New England had primarily relied. Transportation from the Midwest to New England was being done primarily by truck, which was expensive, and to some extent by pipeline, which proved to be somewhat unreliable. Mr. Delli Priscoli and I consulted with CSX about the possibility of developing the propane business, and as a result of those discussions we were put in touch with people from Spicer Gas, a Connecticut propane retailer that believed that rail transportation of propane was a viable alternative to truck.

7. With the assistance of Spicer, G&U began in 2011 to analyze in detail the possibility of constructing a propane transloading facility on G&U. In order to minimize the distance over which propane tank cars would travel from the interchange with CSX to the transloading site, we thought that North Grafton, which is only yards away from the interchange, would be ideal. As described by Mr. Delli Priscoli, G&U purchased a 5 acre parcel of property, known as 42 Westborough Road, in January, 2012, and detailed plans were drafted for the design and construction of the facility.

8. My concept, and the concept shared by Mr. Delli Priscoli and others at G&U, as well as the Spicer people who were involved, was to create a propane transloading facility that would be open to any customer. It would not be limited in any way to certain shippers or receivers of propane, but rather would be operated as any other common carrier rail transloading facility--available, as part of G&U's overall transportation services, to any customer.

9. During the course of the planning for the propane facility, I participated in several meetings with representatives of the Town of Grafton ("Town" or "Grafton") and the State Fire Marshal's office. On June 7, 2011, there was a meeting at the Grafton firehouse with the Assistant State Fire Marshal, Jacob Nunnemacher, the Grafton Fire Chief, Michael Gauthier, other members of the Grafton Fire Department, Stanley Gordon, a vice president of G&U, and Jon Holstein, an employee of Spicer who was consulting with G&U. At the meeting, the G&U representatives advised the state and local officials of G&U's plan to design and construct a propane transloading facility at North Grafton. We also solicited and received feedback regarding the safety of the design of the facility.

10. On June 27, 2012, I attended another meeting at the Grafton firehouse with the Assistant State Fire Marshal, the Grafton Fire Chief and other members of the Grafton Fire Department. Mr. Holstein was also in attendance, along with several employees of LPG Ventures, the contractor hired to design and construct the transloading facility. At the meeting, we provided drawings and process flow diagrams of the piping and other equipment to be used in connection with the tanks at the facility, explaining that the drawings were not finalized but did show the major components of the plan. The LPG Ventures representatives discussed the safety controls that would be implemented, specifically taking into account the concerns expressed at the 2011 meeting. Mr. Nunnenmacher, the Assistant Fire Marshal, requested G&U to undertake a fire safety analysis of the facility, which G&U agreed to do.

11. Based upon my conversations with propane suppliers and purchasers, there is a significant amount of interest in using the North Grafton facility for transloading. It seems clear that once the facility is completed and in operation, we will be able to generate sufficient traffic to meet the full capacity of the yard, which is 1,500-2,000 cars annually. Delay and uncertainty concerning the opening date for the facility will, however, have a serious adverse impact on G&U's ability to attract and retain customers.

12. The propane business in New England runs in seasonal cycles. The fall and winter months are the busiest time for delivery of propane, but the process by which propane suppliers and retailers contract for propane begins much earlier in the year. Retailers and wholesalers must make commitments to provide and purchase propane beginning in April of every year in order to be sure that they will have adequate supplies for their customers. In order to make pricing decisions, retailers and wholesalers need to

take into account not only the price of the propane itself, but also the cost of transportation, which is an important factor in determining the overall price. It will be of critical importance to propane customers whether they can count on doing business with G&U at North Grafton at relatively lower rail transportation prices or whether they are resigned to using other, more expensive means of transportation and other points of delivery. If customers do not have certainty concerning the availability of G&U's transloading services, they will make other arrangements. They will refuse to make any commitments to do business with G&U. We have lost a year's worth of business and revenues as a result of the inability to open the facility last year, and we are facing the risk of losing, or not being able to make commitments in order to realize, business for the 2013-2014 season. My experience in the railroad business is that when rail customers make alternative arrangements for transportation it is often very difficult, if not possible, to induce them to reverse those decisions and come back to use the railroad.

13. G&U will be operating the transloading facility solely with its own employees. Billing and collection for line haul services to the transloading yard will continue to be performed by CSX on behalf of G&U, just as other line haul business is being handled today. G&U will assume direct responsibility for the invoicing and collection of payments for the transloading services in accordance with Tariff 5000-A and any other arrangements made with propane customers.

VERIFICATION

State of Rhode Island

ss:

County of Washington

I, Eric Moffett, being duly sworn, depose and state that I am Vice President of Business Development of Grafton & Upton Railroad Company ("G&U"), that I am authorized to sign the foregoing Verified Statement on behalf of G&U, that I have examined all of the statements contained in the Verified Statement and that all such statements are true and correct to the best of my knowledge and belief.



Eric Moffett

Subscribed and sworn to  
before me this 18 day of  
July, 2013



Notary Public

CHARLOTTE PELLEGRINO  
NOTARY PUBLIC  
MY COMMISSION EXPIRES 11-9-2016

Godfrey VS

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**VERIFIED STATEMENT OF THOMAS GODFREY**

1. My name is Thomas Godfrey, and I am the President of Tom Godfrey HSSE Services LLC d/b/a Godfrey Energy Safety & Compliance ("GESC"). I established GESC in 2011 for the purpose of consulting with respect to safety and compliance in the energy and transportation industries. My work includes the preparation of fire safety analyses associated with petroleum and propane facilities. In the last 18 months, I have completed 8 technical propane terminal risk management plans and filed them with the United States Environmental Protection Agency. I also provide training with respect to fire protection codes and techniques, including teaching a course in propane emergency response procedures and tactics that is held semiannually by the Massachusetts Fire Training Academy.

2. I have been involved in the field of fire safety for the past 30 years. As a regulator with the United States Coast Guard for 21 years, I frequently had responsibility for inspecting petroleum facilities and enforcing applicable regulations on behalf of the Coast Guard. In the ports of New Orleans and Philadelphia, I oversaw the loading and unloading of petroleum and chemical products, including propane. From 2004 to 2011, I worked for Irving Oil Co., eventually becoming their terminal operations manager. As an

employee of Irving Oil, I was responsible for overseeing 24 propane terminals in the northeast and subsequently assumed oversight responsibility for Irving's 38 propane plants in the United States and Canada. I performed risk assessments and prepared prevention plans to addressing the safety issues at these facilities.

3. In mid-2012, I was retained by Grafton & Upton Railroad Co. ("G&U") to prepare a fire safety analysis for a proposed propane transloading facility to be located in North Grafton, Massachusetts. In order to prepare the analysis, which I determined should be in compliance with National Fire Protection Association (NFPA) Code 58, I reviewed the plans and designs for the propane transloading facility. I also had several conversations with the Grafton Fire Chief, Michael Gauthier, and Jacob Nunnemacher of the Massachusetts State Fire Marshal's office. In addition, as required by NFPA 58, I contacted Matthew Pearson of the Grafton Department of Public Works in August, 2012, in order to discuss the firefighting capacities of Grafton. With the permission and cooperation of Mr. Pearson, waterflow tests at the North Grafton yard site were successfully conducted on October 5, 2012.

4. On October 29, 2012, I completed the fire safety analysis and sent copies to the State Fire Marshal, the Grafton Fire Department and the Fire Department of the Town of Shrewsbury, which is the next closest town to the North Grafton yard. I had a number of conversations with Mr. Nunnemacher, the Assistant State Fire Marshal, concerning the fire safety analysis. In December, 2012, I sent a revised fire safety analysis to the State Fire Marshal and the Grafton Fire Department, taking into account and accommodating the comments that I had received from them. In my opinion, based upon by experience and knowledge of the applicable regulations, the propane transloading facility

constructed as proposed by G&U and operated in accordance with OSHA Process Safety Management standards will satisfy the requirements of NFPA 58 and exceed the standards contained in the applicable safety regulations of Massachusetts.

5. In December, 2012 and January, 2013, I conferred with Theodore Lemoff, who is a licensed Massachusetts professional engineer and an expert in the area of the construction of facilities in order to comply with NFPA 58. It is my understanding that Mr. Lemoff helped to draft and interpret NFPA 58 during his career as an employee with the National Fire Protection Association. I understand that Mr. Lemoff will be consulted by G&U and will be conferring with me in order to ensure that the completion of the construction of the propane transfer facility will comply with NFPA 58.

6. G&U has continued my retention in order to complete the fire safety analysis and to assist in the review of and compliance with other applicable regulations going forward. In this connection, it is my opinion that the propane transfer facility will not only exceed applicable Massachusetts regulations but will be a state-of-the-art facility in terms of safety standards in the propane transloading industry. Before the facility is put into operation, it will be inspected by a qualified engineer to make sure that it is ready for use, and it will be inspected annually thereafter. After it becomes operational, the transloading facility will be subject to oversight by several state and federal agencies, including annual inspections by the State Fire Marshal, inspections by the Federal Railway Administration pursuant to its hazardous materials handling regulations, and inspections by OSHA. In addition, the facility will have a risk management plan that will be equivalent to such plans for facilities that are subject to the jurisdiction of the United States Environmental Protection Agency.

VERIFICATION

State of New Hampshire

ss:

County of Merrimack

I, Thomas Godfrey, being duly sworn, depose and state that I have examined all of the statements contained in the foregoing Verified Statement and that all such statements are true and correct to the best of my knowledge and belief.

  
Thomas Godfrey

Subscribed and sworn to  
before me this 22<sup>nd</sup> day of  
July, 2013

  
Notary Public

