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PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35130



CENTRAL OREGON & PACIFIC RAILROAD, INC. – COOS BAY RAIL LINE

REPLY OF THE OREGON INTERNATIONAL PORT OF COOS BAY

VOLUME I – NARRATIVE AND VERIFIED STATEMENTS

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Verified Statement of Gene Davis

Certificate of Service

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I. Introduction

The Surface Transportation Board (“STB” or “Board”) instituted a proceeding and issued a show cause order to RailAmerica, Inc. (“RailAmerica”) and Central Oregon & Pacific Railroad, Inc (“CORP”) with a decision served April 11, 2008 (“Show Cause Order”) In a filing made on May 12, 2008, RailAmerica and CORP responded to the Show Cause Order (“CORP Response”) The Oregon International Port of Coos Bay (“Port”) hereby replies to the CORP Response While CORP submitted a polished defense of its embargo, prepared by the same counsel that represents Fortress Investment, Inc (“Fortress”), its Response rests upon a selective and opportunistic presentation of the facts leading up to and following the embargo As the Port demonstrates herein, CORP’s embargo was unlawful when it was imposed on September 21, 2007, and it has remained unlawful since that time

II. The Oregon International Port of Coos Bay

The Oregon International Port of Coos Bay is located in the Coos Bay-North Bend-Charleston area of Coos County on the southern Oregon coast It is the largest coastal deep draft port between San Francisco and Puget Sound The Port handles

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inbound and outbound traffic for domestic and international markets, an average of 2.3 million tons of cargo moves through the Port annually

As a state port organized under Oregon law, the Port's five commissioners are appointed by the Governor and confirmed by the Oregon Senate for 4-year terms. Day-to-day operations of the Port are managed by a staff of approximately 20 persons. Port funding comes from three main sources: business operations in the Charleston marina complex, real estate leases, and a local tax base. The Port seeks ways to promote the use of Coos Bay's deep-water port to enhance the economy and quality of life in the region and strives to build a diversified, healthy, and stable regional economy along southern Oregon's coast. The Port also serves as a regional economic development entity and an advocate for transportation infrastructure improvements throughout southwestern Oregon. Port staff work in partnership with the local marine industry to promote maritime commerce in the harbor.

Until CORP issued an embargo for its Coos Bay Line ("Line")¹ on September 21, 2007, CORP provided rail service to the Port and the surrounding region. Given the connection of the Coos Bay Line with the Union Pacific Railroad ("UPRR") and the Portland & Western Railroad near Eugene, Oregon, CORP's rail service connected the Port to the national rail network. The south coast region of Oregon depends on rail service

¹ As CORP admits in its Response at footnote 2, the Coos Bay Line extends from milepost 652.11 at Danebo to milepost 763.13 at Cordes and continues to Coquille via a lease of UPRR track and is not just the portion embargoed by CORP between Richardson and Coquille. It should also be noted that the portion listed as Category 1 on CORP's System Diagram Map (filed with the Board May 8, 2008) extends from milepost 669.0 (near Vaughn) to the end of the line at Coquille. Vaughn is just to the east (on the Eugene side) of tunnel 13, the first tunnel on the Coos Bay Line.

because of its rural, coastal location, which is bounded by mountains and served by few major highways

The embargo has injured the Port in several ways. Most importantly, it has stymied the Port's initiatives for economic development in southwestern Oregon. As described in the attached Verified Statement of Port Executive Director Jeffrey Bishop ("V.S Bishop") and in the attached Verified Statement of Martin Callery ("V S Callery"), the disruption of rail service has entirely frustrated the Port's prospective business with companies that were interested in transporting bulk commodities or locating warehouses in the Port area. Moreover, traffic that formerly moved to Port area marine cargo terminals via rail, such as certain outbound manufactured wood products, has now ceased due to the lack of rail service.

III. The Show Cause Order is supported by ample Board authority

The Port applauds the STB for issuing the Show Cause Order in this matter. As the Board is well-aware, CORP's cessation of rail service attracted immediate opposition from shippers, the Port, members of Oregon's Congressional delegation, and state and local officials. On October 16, 2007, representatives of the Port met with the STB's Office of Compliance and Consumer Assistance ("OCCA") in Washington, DC to discuss informal avenues for the restoration of rail service on the Line. On October 19, 2007, Southport Forest Products ("Southport"), a major shipper on the Line submitted a letter to OCCA, asking the office to intercede in the resumption of service. See attached Exhibit 1. OCCA forwarded this letter to CORP, directing the railroad to provide information about its plans for the Line. On October 26, 2007 and November 2, 2007, CORP and RailAmerica, respectively, responded in writing to OCCA, addressing the letter submitted

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by Southport On October 31, 2007, the Port submitted its own written request to OCCA, seeking assistance in the restoration of service See attached Exhibit 2 On November 19, 2007, Chairman Nottingham responded to the Port, conveying information provided by CORP and RailAmerica See attached Exhibit 3 The letter noted that "OCCA is continuing to keep a close eye on the situation in Coos Bay" In response to the letters submitted by the Port and Southport and inquiries from members of the Oregon Congressional delegation, OCCA held a mediation session between members of the shipper-community and representatives of CORP in Washington, DC on January 14, 2008 While the Port and shippers tried to remain optimistic about finding a solution for the Coos Bay Line, the proposal put forward by CORP required a commitment of nearly \$20 million from several parties, and an annual contribution that would guarantee that CORP operated at a profit

Given the Board's active involvement in this matter from the earliest stages, the Port believes that the Show Cause Order was appropriate The Port also believes that the action is well-supported by the STB's statutory authority and obligations First, the Board is charged with carrying out subtitle IV of Title 49, and in order to do so may "inquire into and report on the management of the business of carriers" and "obtain from those carriers and persons information the Board decides is necessary[]" 49 U S C §§ 721(a), (b)(1), and 721(2) Part of this charge includes implementing the Rail Transportation Policy, codified at 49 U S C § 10101

* * *

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense,

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes,

* * *

(8) to operate transportation facilities and equipment without detriment to the public health and safety,

(9) to encourage honest and efficient management of railroads,

* * *

Second, the Board has the authority to “take appropriate action to compel compliance with this part” if the Board “finds that a rail carrier is violating this part” 49 U.S.C § 11701(a) Third, the Board has the power to prescribe temporary through routes and give directions for embargoes on its own initiative under 49 U.S.C §§ 11123(a)(3), 11123(a)(4)(B), and 11123(b)(1) To decide whether such actions are necessary, the Board must “determine” the impact of an “unauthorized cessation of operations or other failure of traffic movement” 49 U.S.C § 11123(a) Of course, to “determine” what is occurring in the rail industry, a show cause order may be useful Finally, the Board has the authority, “when necessary to prevent irreparable harm, [to] issue an appropriate order” without regard to the Administrative Procedure Act 49 U.S.C § 721(b)(4) Indeed, the Board frequently makes use of show cause orders to ensure that its processes are not being frustrated or misused *Railroad Ventures, Inc—Abandonment Exemption*, Docket AB-556 (Sub-No 2X), slip op at pages 2-3 (served April 5, 2000), *Ohio Valley Railroad Co—Petition to Restore Switch Connection and Other Relief*, Docket 34608, slip op at pages 1-2 (served July 13, 2007), *Government of the Territory of Guam v Sea-Land Service, Inc.* Docket WCC-101 (served June 8, 2005)

IV. The Common Carrier Obligation

The Board's Show Cause Order is also timely and appropriate in light of the Board's recent public hearing in Ex Parte No 677, *Common Carrier Obligation of Railroads*, a proceeding that the Board instituted in order to "highlight the importance of the common carrier obligation, to provide a better understanding of it, and to assist the Board in its monitoring and compliance work." The Port believes that CORP's cessation of service on the Coos Bay Line and failure to promptly repair the Line breach the common carrier obligation. Presently, the common carrier obligation is codified at 49 U.S.C. § 11101(a) "a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request." A railroad has two basic duties under the common carrier obligation "First, it must provide written common carrier rates to any person requesting them. Second, it must provide rail service pursuant to those rates upon reasonable request." *Pejepscot Industrial Park—Petition for Declaratory Order*, Docket 33989, slip op. at page 8 (served May 15, 2003) (citation omitted). The obligation to provide rail service upon reasonable request creates a corollary duty such that "railroads are required to provide adequate facilities for their traffic." Docket 33466, *Borough of Riverdale—Petition for Declaratory Order—The New York, Susquehanna and Western Railway Corp.*, 4 S.T.B. 380, n. 15 (1999).

As the Board is well-aware, the common carrier obligation to the shipping public has endured as a fundamental component of Federal oversight of rail transportation since early in the last century. The obligation came into being with the Transportation Act of 1920, 41 Stat. 456, 475, which provided as follows

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It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes[]

Most importantly for present purposes, the deregulation of the railroad industry, accomplished through the Staggers Rail Act of 1980 ("Staggers Act") and the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), perpetuated this basic protection of rail shippers. The Staggers Act's legislative history is particularly instructive on this point.

The Committee believes that the common carrier obligation must be retained to prevent railroads from having the ability to serve only their most profitable business. If railroads were to contract only with shippers of the most profitable traffic, and there were no common carrier obligation, the burden of poor service and perhaps higher rates would fall on the shipper with low volume or low value traffic. The Committee believes that the retention of a common carrier obligation under contract rate making is necessary to protect the smaller shipper with little bargaining power and minimal traffic volumes to offer the railroad.

H. R. Rep. No. 96-1035, at 57 (1980), *reprinted in* 1980 U.S.C.A.N. 3978, 4002.

ICCTA's legislative history is similarly clear.

This section replaces the former section 11101, but retains the existing legal duty of a rail carrier to provide transportation upon reasonable request—the "common carrier" obligation. [A]lthough a casual requester of service cannot legally demand equal treatment with another shipper who has made a prior contract for service, the carrier may not render itself incapable of reasonably responding to such casual requests for service[]

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H R Rep No 104-311, at 103 (1995), *reprinted in* 1995 U S C C A N 793, 815 Plainly, even in the era of deregulation, railroads continue to have a heightened obligation to the public, and are not entirely akin to private companies As the U S Court of Appeals for the Eighth Circuit explained, “[t]he statutory common carrier obligation imposes a duty upon railroads to ‘provide[] transportation or service on reasonable request ’ This duty reflects the well-established principle that railroads ‘are held to a higher standard of responsibility than most private enterprises ’” *GS Roofing Prods Co v STB*, 143 F 3d 387, 391 (8th Cir 1998) (internal citation omitted) Thus, a railroad, unlike most other enterprises, cannot deny service merely because it is inconvenient or unprofitable *Id* at 391

Unfortunately, CORP apparently takes a different view of its common carrier obligation with regard to shippers on the Coos Bay Line. CORP seems to believe its duty to serve shippers is discretionary, and turns on CORP’s own view of whether operation of a line generates sufficient revenue. Simply put, CORP’s perspective turns the common carrier obligation on its head It is well-settled that “[a] rail carrier cannot make its service contingent upon guaranteed profits from that service or upon the shipper’s advance funding of repairs to the rail line over which the service would then be provided” *Pejepscot Industrial Park—Petition for Declaratory Order*, Docket 33989, slip op at page 13 (served May 15, 2003) *Accord GS Roofing Prods Co*, 143 F 3d at 391-392 CORP’s actions in this matter contravene both elements of this rule it has refused to provide service without advance funding for repairs (from the Port, the State, shippers, and UPRR) and it has demanded guaranteed profits in the form of an ongoing subsidy

V. **CORP's embargo was unlawful when it was imposed**

A. **Neglect and deferred maintenance cannot justify an embargo**

CORP wrongly asserts that its embargo was initially lawful. In support of this claim, CORP relies primarily upon the Shannon & Wilson Report, dated July 16, 2007, (and supplemented on September 21, 2007) and the FRA report, from mid-October 2007. While the tunnels are now in grave condition, CORP's assertion ignores controlling law and the factual circumstances of this matter. Applying the law to the facts, the Board must conclude that CORP's embargo was unlawful at imposition because it arose directly from CORP's *own* neglect in failing to properly maintain the tunnels on the Coos Bay Line over the past several years, despite CORP's knowledge of their deteriorated and unsafe condition. See Section V B.

In its effort to justify its embargo, CORP cites a number of STB and ICC cases that generally stand for the proposition that a railroad may embargo a railroad line when physical conditions render the line inoperable and/or unsafe. While the foregoing proposition is correct, *as far as it goes*, it certainly does not apply to the situation where, as here, the railroad causes the physical conditions through *its failure to undertake prudent maintenance*. The cases cited by CORP are readily distinguishable on this ground, in each instance, the embargo resulted from causes beyond the railroad's control. See *Overbrook Farmers Union Coop—Petition for Declaratory Order—Violation of 49 U.S.C. § 11101(a)*, 5 I.C.C.2d 316 (1989) (flooding of river causes extensive track damage), *Decatur County Comm. v. The Central Railroad Co. of Indiana*, Docket 33386, slip op. at page 4 (served Sept. 29, 2000) (heavy spring rains cause slippage, erosion, slides, and other problems), *Bolen-Brunson-Bell Lumber v. CSX Transportation*, Docket 34236, slip op. at page 3 (served May 15, 2003) (bridge damaged by arson), *Bar Ale, Inc. v.*

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California Northern Railroad Co., Docket 32821, slip op at page 5 (served July 20, 2001) (bridge deemed unsafe at the time of lease by new operator), *Groome & Associates, Inc v Greenville Economic Development Corp.*, Docket 42087, slip op at pages 3-4 (served July 27, 2005) (local economic development corporation purchased rail line in dilapidated condition) None of the cases arose from a railroad's own poor maintenance efforts over an extended period Thus, they are inapposite Indeed, relevant precedent puts CORP's embargo in an entirely different light

For example, the Ninth Circuit held that a railroad's negligence in inspecting and repairing tunnels could render its suspension of service unlawful "The carrier is not excused if the interference with its service could have been avoided by forethought A carrier must anticipate problems and provide against them" *V L Johnson v Chicago, Milwaukee, St Paul & Pacific Railroad*, 400 F 2d 968, 972 (9th Cir 1968) In this case, the shipper complained that the railroad wrongly ceased service to its lumber mill *Id* at 970 The railroad defended its action on the grounds that its suspension resulted from a tunnel cave-in, purportedly an Act of God *Id* at 971 However, the court found compelling the shipper's evidence that the railroad knew of the failing condition of the tunnel at least ten years before the cave-in, and inspected the tunnel only two years before the event, finding serious defects in timber supports installed in 1910 *Id* at 973 Thus, the court held that the question of the railroad's liability should have been presented to the jury "Could the happening have been foreseen and guarded against? Had the Railroad been negligent in the maintenance of the tunnel? Did the negligence contribute to the closing of the tunnel? Could proper repair and maintenance have avoided the closing of the tunnel in May 1966?" *Id* at 974 The same questions could be asked of CORP

Similarly, in *Interstate Commerce Commission v St Johnsbury and Lamoylle County Railroad*, 403 F Supp 903 (D Vt 1973), the court held an embargo to be unlawful at imposition because the railroad's negligence caused its tracks to become inoperable and unsafe. The court observed,

More importantly, the railroad is directly responsible for the track conditions upon which it premised its embargo. This is not a situation in which a roadway has been damaged by a natural disaster. The need for an embargo could have been avoided by defendants' performance of adequate maintenance and establishment of a moderate reconstruction program. Neglect of these duties by the railroad's responsible officers affords no legal justification for the defendants[]. If interference with its service could have been avoided by forethought, a railroad will not be excused from failing to fulfill its obligation to deliver all goods offered to it for transportation.

Id. at 906-907 (citations omitted). See also *Interstate Commerce Commission v Chicago, Rock Island and Pacific Railroad Co.*, 501 F 2d 908, 915 (8th Cir 1975), *General Foods Corp v Baker*, 451 F Supp 873, 877 (D Md 1978) (distinguishing between "external events over which a carrier has no control" and "a long and conscious policy of non-repair")

B. CORP has long known about, and long ignored, the Line's maintenance needs

The facts of this matter demonstrate that CORP has known generally about the condition of the tunnels on the Line for well over a decade and probably since soon after the acquisition in December 1994.² Indeed, as a practical matter, it seems very unlikely that CORP could have been oblivious to the deterioration of its own tunnels. Moreover, CORP has specifically known about immediate repair needs in tunnels 13, 15, and 18 at

² See Exhibit 4 for an applicable timeline of events that will be helpful throughout this Reply

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least since early 2004; these are the same tunnels that gave rise to the supposedly "emergency" embargo in September 2007. Despite this clear knowledge, CORP neglected to initiate a repair and upgrade program until November of 2006 when it belatedly undertook to repair tunnel 15. If CORP had initiated even a modest program shortly after purchasing the line in late 1994, during the admitted profitable period of its operation, then it is highly unlikely that tunnels 13, 15, and 18 would have reached their present state of disrepair. Thus, under controlling law, CORP's embargo was unlawful because it resulted directly from CORP's "long and conscious policy of non-repair." *General Foods Corp.*, 451 F. Supp. at 877.

Evidence of CORP's knowledge of the condition of its tunnels stretches back to the acquisition of the CORP rail lines from Southern Pacific by RailTex in late 1994.

Just a few months prior to the sale of the CORP lines from Southern Pacific to RailTex, a tunnel inventory was completed by Shannon & Wilson, Inc for Montana Rail Link, because it was also considering purchase of the CORP rail lines. See Shannon & Wilson Report (March 1, 1994), attached at Exhibit 5. This report revealed “important instability requiring immediate repair in the timber sets in Coos Bay Tunnels 15 and 18.” Report at page 2. The report also recommended short and long-term repairs costing \$3.2 million for all tunnels on the Coos Bay Line. See Tables 3 and 4 of Report. It is unlikely that this recommended work was ever done. See e-mail from Richard Shankle of Oregon Department of Transportation (“ODOT”) (Jan 9, 2007), attached at Exhibit 6 (noting that Duke Rodley of CORP told him that only 2 or 3 of the 9 Coos Bay Line tunnels have been upgraded in the past 20 years). Crucially, this 1994 report shows that a moderate amount of maintenance during the over 13 years of CORP ownership of the Coos Bay Line would have prevented the tunnel problems that caused the embargo.³

After five years of operations on the Line, CORP and all of RailTex were acquired by RailAmerica in early 2000. See *RailAmerica, Inc – Control Exemption – RailTex, Inc*, Docket 33813 (served Jan 10, 2000) (“*RailAmerica-RailTex Decision*”). Given the expertise of RailAmerica in owning and operating short line railroads, it should be assumed that RailAmerica knew the condition of the CORP rail lines, including the tunnels thereon, and paid a price for RailTex that appropriately reflected the condition of

³ CORP knew of the 1994 Shannon & Wilson report because it was provided by CORP to the Port in August 2005. See letter from Dan Lovelady of CORP to Mike Gaul of the Port (August 3, 2005), attached at Exhibit 7.

the tunnels *Cf RailAmerica-RailTex Decision*, slip op at 3 (describing the expected savings in maintenance costs as a result of the acquisition).

Approximately four years after RailAmerica acquired CORP, in May 2004, the tunnel expert firm Milbor-Pita & Associates, Inc conducted a tunnel inspection of the Coos Bay Line and drafted a report that was forwarded to CORP. Milbor-Pita found “highly deteriorated timber sets” and “heavy seepage” in tunnel 15. Milbor-Pita report at page 1 (May 5, 2004), attached at Exhibit 8. The Milbor-Pita report noted “[i]n many cases the timber sets have racked and/or pushed inward, and the face-to-face contacts of the timber segments are almost completely crushed. In our opinion these timber sets have almost no support capacity.” Milbor-Pita report at page 1. In short, the situation represented “a recipe for a major collapse.” *Id.* Milbor-Pita found additional repair needs in tunnels 13, 18, 19, and 20, and recommended \$1.425 billion in repairs to ameliorate the combined tunnel problems. *Id.* at page 2.⁴ Given the problems CORP encountered with tunnel 15 two years later, it seems likely that CORP did not undertake the repairs advocated by Milbor-Pita in 2004. See two letters from CORP General Manager Dan Lovelady in 2002 and 2003 (noting that little capital investment has been made on the Coos Bay Line), attached at Exhibits 9 and 10.

In early 2006, CORP filed two ConnectOregon applications to receive public funding for, respectively, Winchester Yard expansion and, various track, tunnel, and

⁴ Even though the Milbor-Pita report is titled “draft” it was obviously provided to CORP because the Port obtained its copy from CORP in August 2005. See letter from Dan Lovelady of CORP to Mike Gaul of the Port (August 3, 2005), attached at Exhibit 7.

bridge repairs⁵ The second ConnectOregon application is most relevant here in that CORP sought \$735 million, which CORP proposed to match with \$503 million of its own money, for certain track, tunnel, and bridge work See CORP ConnectOregon track application (dated March 6, 2006), attached at Exhibit 11 The application included a proposal to spend \$724,000 on relining tunnels 13, 15, and 20 of the Coos Bay Line Ultimately, Oregon did not approve CORP's track, tunnel, and bridge application presumably because such work was considered maintenance or ongoing operations which are not eligible under ConnectOregon See ConnectOregon FAQs, Exhibit 12 at page 3 ("It is generally not considered good practice to fund operations or maintenance activities with bond proceeds") Nonetheless, it is clear that CORP had allowed its infrastructure to deteriorate After at least seven derailments in 2004 and 2005 caused by poor track quality CORP entered into a Compliance Agreement with the Federal Railroad Administration ("FRA") regarding CORP's pattern of noncompliance with federal track standards⁶

The Port recently learned that the FRA had recognized the pre-existing problems in tunnel 15 in October 2005 and shared those concerns with CORP, a few months later, in March or April 2006, CORP noticed stone falling into tunnel 15 from the tunnel roof See e-mail from Steven Krause of the FRA (Oct 24, 2006), attached at Exhibit 13 Despite the obvious need for immediate tunnel 15 repair, CORP waited until October 2006 to begin full-scale repairs of the tunnel Along the same lines, Bob Jones of CORP told an

⁵ See also discussion in Section VI below regarding the 2005 Port offer to co-sponsor a ConnectOregon application with CORP to rehabilitate and expand the tunnels for double stack trains

⁶ CORP's chronic FRA violations are addressed in the filing made today by the State of Oregon

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Oregon legislature committee, at a hearing in October 2007, that CORP had known of the tunnel conditions for over a year prior to the embargo. See recording of Oregon Legislature, Joint House and Senate Transportation Committee Hearing (Oct 25, 2007) (for instructions on accessing this audio recording, see Exhibit 14). Lastly, repair of tunnel 18, one of the three tunnels that CORP cited on for its emergency embargo in September 2007, could have taken place after the ODOT found bulging walls in the tunnel in February 2007. See Rail Safety Inspection Report (Feb. 21, 2007), attached at Exhibit 15.

The reports, communications, and history provided above discredit CORP's implicit suggestion that it was unaware of any problems with tunnel 15 until late 2006, and did not know of any problems in other tunnels until mid-2007. See also testimony of Paul Lundberg of RailAmerica at the STB Common Carrier Obligation hearing, Ex Parte No 677, April 25, 2008, transcript at page 185, lines 4 to 15 ("We did not know about the severity of the tunnels we did not have months of notice") CORP and, later, RailAmerica both received successive reports and warnings regarding the conditions of the tunnels beginning from the time the lines were separated from the Southern Pacific in 1994. Acquisitions of the CORP property by new owners in 2000 and 2007 provided a prime opportunity for critical due diligence and a searching investigation. See, e.g., testimony of Paul Lundberg of RailAmerica at the STB Common Carrier Obligation hearing, Ex Parte No 677, April 25, 2008, transcript at pages 159 to 160 (describing due diligence that probably took place when RailAmerica acquired RailTex). See also testimony of John Giles, CEO of RailAmerica, before the House Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines, and Hazardous

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Materials, on March 5, 2008, approximately 3 hours and 7 minutes into the hearing (noting that a "modest amount" of due diligence was done when Fortress acquired RailAmerica, that the evaluation of CORP revealed tunnel problems, and that the due diligence "may have" been inadequate)

The evidence that the Port has gathered to date with the help of the State and the shippers (without even the benefit of discovery from CORP) demonstrates CORP's extensive and ongoing knowledge, since late 1994, of the condition of the tunnels. Repairs were repeatedly recommended by outside consultants. Perhaps most importantly, CORP operated its trains through the tunnels for over thirteen years, at some level the Board must hold a railroad accountable to know the condition of its own property and to keep it in operating condition, until abandonment authority is obtained. The Port believes the Board has been presented with ample evidence establishing CORP's knowledge of the condition of the tunnels long before the embargo. CORP obviously had sufficient notice, and should have properly maintained its tunnels during its 13 years of ownership, at the very least, CORP has had specific knowledge of dangerous conditions existing since 2004, and could have undertaken tunnel repairs at any time since then, including during the 2007 construction season, thereby keeping the Line open.

Assuming for the sake of argument that CORP truly had no knowledge of the conditions of its tunnels (that CORP somehow did not hear the repeated warnings from others such as the 2004 Milbor-Pita report and ignored the conditions that would have been seen during its rail operations through the tunnels), the Board should still not condone CORP's actions. Railroads do not meet their common carrier obligation if they are completely and blindly unaware of the physical conditions of their own lines and

structures. Condoning CORP's actions would set a dangerous precedent and encourage head-in-the-sand behavior by others.

VI. Until the last two years, a public-private partnership had existed among CORP, the state of Oregon, shippers, the federal government, and the Port

In its Response to the Board's Show Cause Order, CORP has attempted to highlight its supposedly vigilant "attempts" to forge a partnership of interested parties (such as shippers, the state of Oregon, UPRR, and the Port) over the past 8 months as a means of addressing the tunnel problems on the Coos Bay Line. *See, e.g.*, CORP Response at pages 4 and 13-17. CORP's short-sighted history of events since September 21, 2007 ignores two key facts: (1) a public-private partnership had previously existed for many years among CORP, the Port, the shippers, the state of Oregon, and UP,⁷ and (2) CORP inexplicably broke off the prior partnership roughly around the time that RailAmerica was being put up for sale and ultimately purchased by Fortress.⁸

The Port has been particularly active in trying to ensure the long-term viability of rail service on the Coos Bay Line, and has frequently partnered with the owners of the Line. In 1992, the then-owner of the Line, the Southern Pacific ("SP"), informed the Port

⁷ However, CORP's proposals since the embargo have been entirely improper and inequitable because they would require others to pay for deferred maintenance that CORP should have been conducting over the past thirteen and a half years and because they include an operating subsidy, thereby eliminating any risk that CORP would otherwise have with its operations. *See* Section V B above.

⁸ Likewise, CORP and RailAmerica seemed to make other decisions negatively impacting the Line as a result of the planned RailAmerica sale and Fortress acquisition. *See* recording of Oregon Legislature, Joint House and Senate Transportation Committee Hearing (Oct. 25, 2007) (CORP representative Bob Jones states that \$40 million FRA RRIF loan application was "on the books, ready to go" but then upper management changed their minds when they saw the opportunity to sell RailAmerica to Fortress) (for instructions on accessing this audio recording, see Exhibit 14). *See also* e-mail from John Johnson of the ODOT (Jan. 19, 2007), attached at Exhibit 16 (stating that "CORP has cancelled their \$40 million" RRIF loan application).

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that the main rail bridge crossing Coos Bay would require major reinvestment in the next 5 to 9 years so that rail operations could continue. As a result of SP's approach, the Port was able to consider various funding strategies over the next several years. The bridge stayed in the hands of SP, and its successor-in-interest UP, despite the sale of the Coos Bay Line to RailTex in late 1994 because RailTex did not want to assume responsibility for the bridge. In 2000, the Port decided that rail service could best be preserved if it acquired the bridge. As described in the Verified Statement of the Port's Executive Director Jeffrey Bishop, the Port decided to acquire the bridge solely to preserve rail service to the Port's marine terminals and to the local businesses of Coos County. UPRR retained the obligation to remove the bridge in the event rail service ceased. V S Bishop at 3

The Port was able to secure roughly \$7 million in funding, most of it from the federal TEA-21 program, for bridge repairs in 2003-2005. A small portion of the funding consisted of a loan from the state to the Port, and CORP provided administrative support for a small tariff that applied to each rail car crossing the bridge so that the Port could repay the loan and build a reserve fund for future bridge maintenance.⁹

In order to ensure the long-term health of the bridge, the Port recently obtained \$8 million from the federal SAFETEA-LU program and \$4 million from the state ConnectOregon program. The bridge repairs to be completed with these funds will likely extend the working life of the bridge 25 years. Unfortunately, these repairs, which were to have begun in late 2007, are now on hold due to the embargo on the rail line. See V S Bishop at 4

⁹ The Port does not receive revenue from cargo moving through it – all cargo terminals are privately owned. See V S Bishop at 2

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The Coos Bay bridge is not the only evidence of the prior partnership between CORP, the Port, the shippers, the state of Oregon, and UP. Various local, state, and federal funds (including another loan from Oregon to the Port) were used to pay for the \$48 million 4-mile North Spit spur rail line construction in 2004-2005. This new rail line was built entirely with public money to give CORP access to revenue from new shippers, such as Southport. Southport's new state of the art facility and the Port's construction of the North Spit rail line were both completed in reliance on the existence of rail access and future rail service. The investments by Southport and the Port are clear examples of prior efforts from the public to add new traffic to the Line since the closing of the Weyerhaeuser facility. CORP assisted the Port by assessing a small tariff surcharge (which was paid directly to the Port) on North Spit spur traffic so that the Port could repay its debt to the state. See V S Bishop at 3-4.

The state of Oregon has awarded sizable grants to CORP over the past 10 years to aid CORP with the Coos Bay Line. CORP received a total of \$700,000 in grants from the Oregon Short Line Railroad Rail Infrastructure Improvement Program for replacement of ties and ballast on the Coos Bay Line: \$300,000 in 2003 and \$400,000 in 2005. See Exhibits 17 and 18. In 2006, CORP was awarded \$7.7 million from the ConnectOregon program for expansion of the Winchester rail yard. Although this yard is on the Siskiyou Line, the expansion would have benefited rail operations on the Coos Bay Line as well.¹⁰ See ConnectOregon yard application attached at Exhibit 19. See also V S Bishop at 5.

In August 2005, the Port became aware of problems with the tunnels on the Line when CORP forwarded the 2004 Milbor-Pita report to the Port. Exhibits 7 and 8.

¹⁰ After giving roughly \$2.7 million of the Winchester Yard funds to CORP, the state of Oregon ceased payments due to CORP's embargo. See V S Bishop at 5.

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Understandably concerned about the future of rail service on the Line, the Port offered in late 2005 to co-sponsor an approximately \$3.5 million 2006 ConnectOregon grant application with CORP in order to rehabilitate the Coos Bay Line tunnels while at the same time open the tunnels to accommodate double-stacked containers. See V S Callery at 2. However, CORP's Manager of Marketing and Sales, Thomas Hawksworth, told Mr Callery that CORP's management determined that the tunnels were in good condition and did not need significant rehabilitation. See V S Callery at 2. This statement was plainly incorrect—as the tunnel 15 collapse would soon demonstrate—and it was contradicted by engineering reports and other warnings that CORP previously received (see Section V B above). The statement displays CORP's "head-in-the-sand" mentality and "milk-the-asset" strategy, which apparently prevented CORP from fulfilling its common carrier obligation and properly maintaining its tunnels.

UPRR has also helped CORP with maintenance funding. UPRR recently stated that it gave \$1 million to CORP for repairs to both the Siskiyou and Coos Bay Lines. See UPRR letter (April 29, 2008), attached at Exhibit 20. Lastly, the federal government gave \$307,458 to CORP for flood damage in 1997. See ODOT documents regarding pass-through of funds from FRA, attached at Exhibit 21.

Over the past decade or more, CORP has benefited from and occasionally worked with shippers, local business, and local and state governments to help promote the Southwestern Oregon region as a place to do business. CORP is a member of the Southwest Economic Transportation Team, a public-private group formed in early 2006 to utilize better transportation as a method to grow the economy of the region. See "Oregon

Gateway,” attached at Exhibit 22. The Team specifically recommended upgrades to the Coos Bay Line

Given this sustained and substantial public investment in CORP, it is entirely disingenuous for RailAmerica to admonish the Coos Bay community and the state of Oregon for rejecting its plan for a public-private partnership. CORP’s failure to maintain the tunnels and CORP’s embargo have deprived the community and the state of an honest return on their already-generous investment in the railroad

VII. The 5-factor embargo balancing test reveals that CORP’s embargo is an unlawful abandonment

As the Board noted in its Show Cause Order, an embargo is typically “issued when the carrier temporarily is unable to provide service because of damage to the line or some other impediment to service.” *Pejepscot Industrial Park, Inc., d/b/a Grimmel Industries – Petition for Declaratory Order*, Docket 33989, slip op. at page 3 (n. 5) (served May 15, 2003) (“*Pejepscot*”). An embargo that extends beyond a reasonable time can be considered an unlawful abandonment. *Groome & Associates, Inc. v Greenville County Economic Development Corporation*, Docket 42087, slip op. at page 11 (served July 27, 2005) (“*Groome*”). At some point, an embargoed line must be fixed, abandoned, or discontinued. *Groome* at 11. Thus, if faced with requests for service, a railroad with an embargoed line “must, within a reasonable time, either provide service or take steps to be relieved of the common carrier obligation.” *Groome* at 15. To determine whether an embargo or a continuation of an embargo is reasonable, the Board considers factors such as

- the cost of repairs necessary to restore service
- the amount of traffic on the line
- the carrier’s intent

- the length of the service cessation
- the financial condition of the carrier

Groome at 12 As described in the Show Cause Order, these factors are considered together in a balancing test to determine if an embargo is reasonable Show Cause Order at 3 See also *Overbrook Farmers Union Cooperative Association – Petition for Declaratory Order – Violation of 49 U.S.C. § 11101(a)*, Docket 31166, 5 I.C.C.2d 316, 322 (1989), *Decatur County Commissioners v Surface Transportation Board*, 308 F.3d 710, 715 (7th Cir. 2002), *Bar Ale, Inc v California Northern Railroad Company and Southern Pacific Transportation Company*, Docket 32821, slip op. at pages 6-7 (served July 20, 2001), *GS Roofing Products Company v Surface Transportation Board*, 143 F.3d 387, 392 (8th Cir. 1998) When all of these factors are considered, it becomes evident that CORP's cessation of service is an unlawful abandonment rather than a legitimate embargo

A. The cost of repairs can be borne by CORP and RailAmerica

In a presentation made in November 2007, CORP unequivocally stated that \$2.9 million was needed to "reopen" the Line CORP Partnership Presentation at 8, attached at Exhibit 23 During the same presentation, CORP proposed that \$23.3 million in repair work be completed, funded by a contribution of \$4.66 million each from UPRR, the State of Oregon, the Port of Coos Bay, the shippers on the Line, and CORP All four parties have declined to contribute the funds requested by CORP under the terms offered

Nevertheless, CORP and RailAmerica have an obligation to remove the impediment that caused the embargo so that the requested rail service can be provided *Pejepscot* at 3, 49 U.S.C. § 11101(a) As mentioned above, CORP admits that the line can be reopened for \$2.9 million and that CORP intended to invest \$4.66 million

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Notwithstanding, CORP has continued to hold out for \$23.3 million in funding, most of it from outside sources, as a pre-condition of reopening the Line. Since CORP has at least the amount of its contribution to the partnership (\$4.66 million), then CORP plainly has, and has had, funds necessary to remove the condition giving rise to the embargo (\$2.9 million). The actions of CORP and RailAmerica in this regard violate the common carrier obligation because rail service may not be held hostage to a railroad's desire to upgrade its line to a condition better than its operational, pre-embargo state. *GS Roofing Products Company v. Surface Transportation Board*, 143 F.3d 387, 393-394 (8th Cir. 1998), *Cf. Pejepscot* at 13 (“[a] rail carrier cannot make its service contingent upon guaranteed profits from that service or upon the shipper’s advance funding of repairs to the rail line over which the service would then be provided”). Under the rule of *GS Roofing*, CORP should invest the comparatively modest sum of \$2.9 million to repair the tunnels and lift the embargo. CORP cannot refuse to resume service because of its desire to “gold-plate” the Line. It is well-settled that “notions of long-term feasibility have no place in a proceeding to determine the reasonableness of an embargo.” *GS Roofing*, 143 F.3d at 394.

Indeed, CORP's system-wide revenues over the last three years have been more than sufficient to fund the repairs immediately necessary to reopen tunnels 13, 15, and 18. As reported to the state of Oregon, CORP's revenue is stable, if not increasing. Gross revenue for the entire CORP system, including the Coos Bay Line and the Siskiyou Line, grew from \$22.2 million in 2002 to \$24.4 million in 2007, with the three best years falling within that same time period: 2005 (\$30.0 million) and 2006 (\$27.6 million), and 2007

(\$24.4 million) See traffic and revenue chart, attached at Exhibit 24¹¹ Revenue for 2007 would have been higher if not for the embargo in September

Even if the CORP believes that the Line is not economically viable in the long-term, this is not an acceptable justification for an embargo “[T]he proper response to an unprofitable line is to obtain abandonment authority and not to unilaterally withdraw service” *Overbrook Farmers Union Cooperative Association – Petition for Declaratory Order – Violation of 49 USC § 11101(a)*, Docket 31166, 5 I C C 2d 316, 328 (1989), *San Pedro Railroad Operating Company, LLC – Abandonment Exemption – In Cochise County, AZ*, Docket AB-1081X, slip op. at page 4 (served Feb. 3, 2006) (Board approves abandonment because “requiring SPROC to expend significant funds to repair and provide service on the line when there is an insufficient amount of traffic available would be an unreasonable burden”) Furthermore, CORP’s belated attempt to list a portion of the Line on its System Diagram Map does not relieve CORP of its common carrier obligation for this Line Docket SDM-515, filed by CORP on May 8, 2008 *Consolidated Rail Corporation – Abandonment Exemption – In Mercer County, NJ*, Docket AB-167 (Sub-No. 1185X), slip op. at 4 (served Jan. 26, 2007) (the “common carrier obligation cannot be extinguished without Board authorization or exemption”) In fact, CORP’s attempt to split the Line and thereby ensure its demise cannot be permissible See Section IX B below.

Due to CORP’s pattern of behavior in ignoring its maintenance obligation, the embargo was unlawful from day one Most importantly, CORP’s own statements

¹¹ As the Board can note in Exhibit 24, CORP’s numbers for revenue, traffic, maintenance and capital expenditures seem to vary depending on CORP’s needed purpose for the numbers Of course none of this data is formally documented by CORP and CORP has not provided audited financial statements or other financial data

establish that the repairs necessary to reopen the Line would cost \$29 million and that CORP has \$466 million available to invest in those repairs. Thus, CORP's actions are unlawful.

B. The amount of traffic on the line justifies immediate repair

As reported by CORP, traffic on the Coos Bay rail line was fairly steady for the four years prior to the embargo. CORP Partnership Presentation at 13, attached at Exhibit 23. In particular, car traffic for the three years prior to 2007 was 5,849 (2004), 6,247 (2005), and 5,845 (2006).¹² See traffic and revenue chart, attached at Exhibit 20. During 2007, CORP transported 3,652 cars until the embargo was issued on September 21, 2007. From a historical perspective, traffic was somewhat higher in 2002 (8,376 cars) and 2003 (9,039 cars), but those years were again preceded by a three-year period, 1999-2001, with traffic each year roughly 6,000 cars. See traffic and revenue chart, attached at Exhibit 24. The situation facing CORP is not one where only a handful of cars per year are transported, or where there is a steep decline in traffic. Cf. *Bar Ale, Inc v California Northern Railroad Company and Southern Pacific Transportation Company*, Docket 32821, slip op. at pages 2 and 6-8 (served July 20, 2001) (embargo found reasonable where the only shipper on the rail line was planning to relocate its facility), *Groome & Associates, Inc v Greenville County Economic Development Corporation*, Docket 42087, slip op. at page 14 (served July 27, 2005) (traffic on rail line prior to embargo declined from 1,642 cars in 1994 to 1,066 cars in 1996 and largest shipper on line relocated in 1996, leaving only 250 cars per year of likely traffic).

¹² The figure for 2006 actually does not represent a full year because a tunnel collapse in November 2006 required an embargo of the line for the last several weeks of the year so that repairs could be made.

As noted above, CORP reported stable, if not growing, gross revenue to the state of Oregon. Indeed, CORP admits that the Line was doing well until 2004 – and 2004 was followed by the three highest revenue years in the history of CORP. See Lundberg V S, page 5, attached to CORP Response. See also traffic and revenue chart, attached at Exhibit 24. Moreover, according to revenue and traffic data reported to the state, CORP's overall revenue jumped from \$15.25 million in 1995 (the first year of operation after the SP sale) to \$24.42 million in 2007 (for only a partial year because of the embargo) for approximately the same number of carloads. Therefore, it is disingenuous for CORP to assert that the Line is uneconomic over the long term and that CORP was justified in its decisions to defer maintenance, embargo the Line, and (possibly) attempt to abandon a portion of the Line.

C. Actions of CORP and RailAmerica reveal intent devoid of good faith

i. CORP and RailAmerica chronically underinvested in the Line

The sequence of events leading up to and following the embargo reveal that CORP and RailAmerica have deliberately neglected maintenance of the Line in an attempt to “milk” as much profit from the Line as possible. CORP and RailAmerica admit that the condition of the Line “is the result of many years of use and little funding to invest in the line.” CORP Partnership Presentation at 2, attached at Exhibit 23. CORP and RailAmerica contributed greatly to this lack of investment. In April 2002, the General Manager of CORP admitted that the railroad had not “invest[ed] in any substantial capital improvements on the [Coos Bay] line.” See letter from Dan Lovelady to Ed Immel of Oregon Department of Transportation (April 4, 2002), attached at Exhibit 9. The following year, the General Manager again admitted that investment remained insufficient, noting that there had been “years of deferred maintenance.” See letter from

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Dan Lovelady to Ed Immel of Oregon Department of Transportation (Feb 7, 2003), attached at Exhibit 10

Furthermore, transfers of ownership of the Line confirm that the Line was subject to repeated evaluation or due diligence review. Along with the rest of CORP, the Line was purchased by RailTex in 1994 from Southern Pacific Railroad, RailTex was purchased by RailAmerica in 2000, finally, RailAmerica was purchased by Fortress in February 2007. CORP and RailAmerica cannot legitimately claim that the slow deterioration of the Line and tunnels surprised them or was unknown to them. See Section V B, above. This is not a case where CORP is a new or unsuspecting owner of the Line. *Bar Ale, Inc v California Northern Railroad Company and Southern Pacific Transportation Company*, Docket 32821, slip op at pages 3-5 (served July 20, 2001) (newly-created California Northern Railroad embargoes rail line two months after beginning operations). Instead, CORP repeatedly refused to undertake repairs necessary to keep the Line in good operational condition. See e-mail from John Johnson of ODOT (Jan 19, 2007), attached at Exhibit 16 (describing problems in tunnels 15 and 18, and then noting that "my Walkway and Clearance Inspector is consistently finding defective conditions and reporting them to CORP only to find them not corrected when he returns")

The embargo declared by CORP on September 21, 2007 was not the result of any catastrophic event such as a tunnel collapse or line wash-out. In fact, CORP removed its own equipment via the Line after declaring the embargo, thereby stranding many shippers' products. Nevertheless, the embargo was inexplicably declared with less than 24 hours notice to the shippers on the Line. Despite removing its own equipment with the last train after the embargo was declared, CORP refused to transport shippers' goods that were

ready and waiting for rail service at the time. As discussed in the Reply of the Coos-Siskiyou Shippers Coalition, shippers encountered difficulty in fulfilling their commercial commitments in the wake of the sudden embargo.¹³

The ongoing duration of the embargo reveals no intent on the part of CORP to re-start rail service. The embargo has exceeded the length of time necessary to make repairs, the cost of repairs to “re-open” the line is less than what CORP and RailAmerica are willing to contribute to the Line, and CORP has taken no steps to begin repairs. *Decatur County Commissioners v. Surface Transportation Board*, 308 F.3d 710, 718-719 (7th Cir. 2002) (“if a carrier could financially undertake repairs but instead maintains the embargo for a long period of time, it may be reasonable to conclude that the carrier is not acting in good faith”). *Cf. Overbrook Farmers Union Cooperative Association—Petition for Declaratory Order—Violation of 49 U.S.C. § 11101(a)*, Docket 31166, 5 I.C.C.2d 316, 323 (n. 15) (1989) (“evidence that the embargo was lengthy and the carrier showed no intent to restore service in a reasonable time would favor a finding that the embargo had become an unlawful abandonment”).

¹³ CORP/RailAmerica did make a verbal offer of \$200 to offset additional costs incurred by shippers in trucking their goods to a transload facility, but shipper requests for a written agreement were rejected. Moreover, the \$200 offer was insufficient to fully compensate the shippers for their increased transportation costs. *Overbrook Farmers Union Cooperative Association – Petition for Declaratory Order – Violation of 49 U.S.C. § 11101(a)*, Docket 31166, 5 I.C.C.2d 316, 326-327 (1989) (ICC finds violation of common carrier obligation where railroad’s offer of a trucking allowance would not have put shipper “in the same economic position” as if the railroad provided service, in other words, the railroad “had the duty either to provide rail service or to make the shipper whole through substituted service”).

ii. CORP knew about the tunnel repairs needed and made no good faith efforts to keep the Line open

What is most troubling about CORP's embargo is that CORP knew of the tunnel repairs needed, yet CORP chose not to make the repairs and CORP chose not to come to the state or the shippers at a time when the Line was still open and repairs could have been made. CORP's Response makes clear that CORP knew of the serious deterioration of the tunnels for at least 18 months. Lundberg V S at 5. Likewise, CORP's own expert, Shannon & Wilson, states that CORP knew of the serious condition since at least November 2006. Yet, CORP chose to wait until March 2007 to engage Shannon & Wilson to start the most recent tunnel inventory. Lundberg V S at 6, Shannon & Wilson's September 21, 2007 letter (page 12 of Exhibit 6 of the CORP Response) ("Some of the areas – particularly in Tunnel 15 and Tunnel 18, were identified and discussed with you as early as November 2006"). CORP allowed nearly five months to pass before hiring Shannon & Wilson. If CORP had instead done what it is obligated to do under its common carrier obligation, CORP should have hired Shannon & Wilson to start the inventory no later than November 2006. See Verified Statement of Gene A. Davis, P.E. ("V.S. Davis"). If Shannon & Wilson took the same amount of time to complete its inventory, four months, that CORP claims was needed during the summer of 2007, the report would have been completed in March 2007.¹⁴ CORP could have then started the

¹⁴ By using CORP's timeframes, the Port is not agreeing that those timeframes are appropriate. The Port finds it incredulous that CORP would have waited four months for the Shannon & Wilson report and then waited an additional two months to embargo the Line (which seems to be too coincidentally tied to the start of the rainy season) when the evidence now shows that CORP knew that these tunnels were in serious condition in November 2006, not to mention CORP's knowledge for years previous to that date. See Section V B above.

bidding process which CORP states would take approximately two months or would have been completed by May 2007 CORP Partnership Presentation at 9, attached at Exhibit 23 CORP then should have started construction in May 2007¹⁵ Under CORP's own proposed construction timeframe, the construction could have been completed by September or October 2007 CORP's failure to undertake these actions is not consistent with sound business judgment V S Davis at 4 Furthermore, these actions show that CORP was not acting in good faith to fulfill its common carrier obligation

iii. Post-embargo actions of CORP and RailAmerica show no intention of repairing the tunnels

Since CORP embargoed the Linc on September 21, 2007, halting service on no more than a day's notice to affected shippers and communities, CORP has refused within a reasonable time to provide adequate service over the Line Simply put, CORP has taken no concrete steps that show any inclination toward a timely resumption of rail service *See, e.g.*, statement of Paul Lundberg of RailAmerica at the STB Common Carrier Obligation hearing, Ex Parte No 677, April 25, 2008, transcript at page 172 (line 19) to page 173 (line 1) On the contrary, CORP's actions since the embargo suggest a strategy of delay to convince shippers, the state, and the Port to make the maintenance investments that should have been made over the past 13 years by CORP itself While CORP claims it has made multiple proposals, CORP has really only made one proposal with slight modifications CORP Response at 4; testimony of John Giles, CEO of RailAmerica, before the House Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines, and Hazardous Materials, on March 5, 2008, approximately 3 hours

¹⁵ CORP's assertion that no work can be done during the rainy season is debatable See Section VII D below

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and 8 minutes into the hearing (“we made proposal after proposal”) CORP’s only written proposal was made four months after the embargo started and required several other parties to cover deferred maintenance plus an additional multi-million dollar commitment from the state to cover all of CORP’s operating expenses and guarantee a profit

In the ten day period following the imposition of its embargo, CORP’s public communications were limited. Its explanatory press-release did not provide a timeline for the resumption of rail service, or otherwise offer any concrete, interim steps that CORP would take to make repairs that would allow operations to continue. See Exhibit 25. Instead, the company represented that it would make space available on its Eugene to Roseburg line, so that Coos Bay shippers could use trucks to move their freight in transloading operations. CORP cited a (then) projected amount of \$7 million in tunnel repairs as an insurmountable obstacle to providing service. “The Coos Bay Line just doesn’t have enough business on it today to justify us making the repairs.” *Id.* The release also represented that the company would seek a public-private partnership to raise funds. *Id.* On Sept 24, 2007, CORP and RailAmerica officials attended a meeting called by the Southern Oregon Transportation Working Group, where they addressed the embargo but provided no details on reopening the Line. When asked about efforts to restore service, CORP officials reportedly stated, “we have no plans.” See “DeFazio calls for rail probe” *The World Link*, Sept 28, 2007, attached as Exhibit 26.

After approximately two more weeks, and under mounting public pressure from state officials and Congressman Peter DeFazio, representatives of CORP met with shippers and Oregon state officials, including representatives of the Governor’s office. See “Railroad not budging on closure” *The World Link*, Oct 6, 2007, attached at Exhibit

27 However, CORP failed to provide definite measures for reestablishing service over the Line. Instead, as reported in local news media, CORP offered a timeline to *develop* a plan for repairing the line, which included the following steps:

- Gather Facts and Data on the Line (By Nov 1, 2007)
- Synthesize Data and Organize a Meeting with Stake Holders, Meet, Review, and Share Information; Brain Storming and Problem Solving, Assign Tasks as Necessary (By Nov 15, 2007)
- Follow-up Meeting to Report on Tasks, Refine Options and Determine Best Path Forward (By Dec 15, 2007)
- Preliminary Recommendations (By Dec 31, 2007)

Essentially, CORP put forward a 'plan to make a plan' that was comprised of amorphous action-items that would generate nothing more than "preliminary recommendations" more than three months after its closure of the Line.

As events played out, CORP strayed from even the modest objectives that it set for itself. On Nov 14, representatives of CORP and RailAmerica met with shippers and Oregon officials, where they unveiled an idea to form a public-private partnership that would raise \$23 million for comprehensive restoration of the Line over a period of 26 months. See Exhibit 23. In its PowerPoint presentation, CORP stated it would be requesting \$466 million each from the Port, ODOT, and local shippers, offering to contribute the same amount from its own funds. In short, CORP sought over three times the amount that it originally represented as necessary for tunnel repairs to resume service. In fact, CORP's proposal was nothing more than another 'plan to make a plan,' setting forth additional contingencies that would allow CORP to avoid any on-the-ground activity to reopen the Line.

- CORP will issue a formal request to all stakeholders to participate in the partnership (Nov 21, 2007)
- All stakeholders make a determination to participate in the partnership (Dec 15, 2007)

- All stakeholders secure funding for their share of the partnership (Mar 1, 2008)
- Tunnel repairs commence (May 1, 2008)
- Coos Bay Line re-opens (Sept 2008)

See Exhibit 23, at 9 Oregon state representatives and transportation officials expressed doubt that the state would participate in the proposal See Exhibit 28 Importantly, no formal written proposal was provided until two months after this meeting and four months after the embargo was imposed

CORP then allowed another six weeks to pass without taking any concrete steps toward a plan for resumption of service During that time, CORP drafted an open letter to the Coos Bay community, which it published as a paid advertisement in the December 22, 2007 edition of *The World Link* Exhibit 29 CORP expressed regret over the sudden closure of line, purporting that it became aware of the dangerous tunnel conditions only immediately prior to the closure—nevermind that CORP received the Shannon & Wilson Report in July of 2007 (and had years of experience with the tunnels – exemplified by things such as the May 2004 Milbor-Pita report) Consistent with its previous public statements and proposals, CORP’s paid advertisement also lacked tangible commitments or firm plans for re-establishing service

We believe the owners of CORP will be served with a successful reopening of the line if we have a viable financial plan after it reopens So we stand prepared to contribute some more of the owners’ money to reopening the line But the owners alone cannot justify the cost of reopening the line, so we have proposed a public-private partnership to fund the line’s reopening and continued operation

As before, CORP offered nothing more than a plan to make a plan, standing “prepared” to commit funds, which is a far cry from a measurable commitment of its resources

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After approximately three more weeks, and roughly four months after imposing the embargo, CORP finally provided a written proposal to the shippers at a January 14, 2008 informal mediation with the Board's OCCA that the shippers and the Port had requested. It was not until January 24, 2008, that Paul Lundberg, RailAmerica's vice-president of operations met with Oregon Governor Theodore Kulongoski, U S Representative Peter DeFazio, and rail shippers to provide a written proposal. The meeting did not go well, and the Governor flatly rejected the idea of a partnership unless CORP first repaired the tunnels and resumed service on the Coos Bay Branch. Despite the Governor's stated objections, CORP persisted with a letter, approximately ten days later, which memorialized its supposedly new proposal. In fact, CORP simply continued its practice of making a commitment in one breath and taking it back in the next.

The CORP will begin the process of repairing the tunnels to the extent that service on the Coos Bay from Vaughan [sic] to Coquille can be safely resumed, as promptly as safe engineering and construction standards will permit. The CORP will fund these repairs.

* * *

As soon as all of these elements [of the public-private partnership] are in place, the CORP can immediately begin the work necessary to restore the Coos Bay line from Vaughan [sic] to Coquille, and the shippers can look forward to rail service by this Fall.

See Letter of Paul Lundberg (Feb 4, 2008), attached at Exhibit 30. Of course, Governor Kulongoski saw through CORP's charade.

As I understand your proposal, you will only commence repair of the tunnels if the State of Oregon agrees to guarantee all of the additional funds necessary to repair and improve the line, plus provide your corporation with an ongoing subsidy for operating losses on the line. From your letter, it appears to me that you are only willing to pay

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dollars sufficient to reopen the tunnels . Under your proposal, this would leave the state and others to pick up the rest of the \$20 4 million, plus operating costs

See Letter of Gov Theodore Kulongoski (Feb 12, 2008), attached at Exhibit 31
Understandably, the Governor rejected CORP's offer, which was nothing more than the proposal that was presented and rejected in mid-November 2007

Allowing another two months to pass, CORP issued a slightly modified proposal to the Governor on April 9, 2008, borrowing the same key elements that had been repeatedly rejected over the past six months an initial contribution of \$23 million and an ongoing annual operating subsidy from public sources The twist on CORP's overture was that the State of Oregon, through ODOT, would obtain a 50% interest in the line from Vaughn to Cordes Not surprisingly, Governor Kulongoski wasted little time in rejecting it

As I stated when we met in person on January 24th and repeated in my letter on February 12th, the State of Oregon would be open to a discussion with all of the stakeholders on a long-term solution for the line *after* you have re-opened it Your refusal to address this bottom line leads me to believe that you have no intention of fixing and reopening the line without a significant infusion of public dollars

See Letter of Gov. Theodore Kulongoski (April 21, 2008), attached at Exhibit 32

Scrutiny of CORP's actions since the embargo, as provided above, undermines the narrative that CORP offered in its Response to the Board's Show Cause Order A week after imposing the embargo, CORP told the public "We have no plan " Over the past eight months, despite a series of contingent proposals and elastic commitments, CORP's actions have borne out this initial declaration While CORP's proposals lend the appearance of action, they were in reality attempts to excuse CORP's intransigence by foisting responsibility onto the State, the Port, and the shippers and to "move the goal

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posts ” By linking its repair work to the actions of others, CORP created indefinite delay, as it supposedly waited for stakeholders to take purportedly necessary steps Thus, CORP could blame other stakeholders for its own failure to repair the Line by asserting that they did not adopt its plan

Indeed, CORP failed to crystallize a concrete action plan to bring the Line back into service Instead of narrowing objectives and commissioning specific projects, CORP’s iterations added layers of uncertainty that further retarded any concrete action By putting together a proposal for a public-private partnership of \$23 million and 26 months of work, CORP opportunistically moved the agenda well beyond its basic obligation to restore service on the line by repairing tunnels 13, 15, and 18 This became glaringly obvious in an exchange between Chairman Nottingham and Mr Lundberg on the second day of the Board’s hearing on the common carrier obligation, held April 25, 2007

Chairman Nottingham Did I hear you say—have you begun to make any preparations for procurement, identifying qualified firms to do this work, getting more detailed cost estimates, that kind of information?

Mr Lundberg No, we have the cost estimates We know what kind of material we need to—and where it’s going to go We know all that We just haven’t taken any further action

Testimony of Paul Lundberg of RailAmerica at the STB Common Carrier Obligation hearing, Ex Parte No 677, April 25, 2008, transcript at page 172, line 13 to page 173, line

1

In all likelihood, if CORP had simply committed to repairing the tunnel conditions giving rise to the embargo, then it could have restored service on the Line in a matter of months Instead, CORP played a shell game, insisting that \$7 million, and then \$23

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million must be spent before it could resume operations. Thus, CORP avoided any “boots on the ground” effort to repair the tunnels

The Verified Statement of Gene A Davis, attached hereto, describes the procurement process that CORP and RailAmerica would have been expected to undertake, if they intended to promptly repair the tunnels in order to resume service. The process could have been completed prior to the embargo and the additional planning step costs likely would not have exceeded \$10,000. V.S. Davis at 5-6. CORP’s and RailAmerica’s failure to initiate this process belies their professed intention to repair the tunnels and resume service on the Line. For the foregoing reasons, the Board should properly find that CORP’s intent is inconsistent with a lawful embargo, and instead that CORP has perpetrated an unlawful abandonment. *Overbrook Farmers Union Coop.*, 51 C.C.2d 316, 323 (n. 15) (1989).

D. The service cessation is unreasonably long

Over eight months have passed since CORP issued the embargo on September 21, 2007. According to CORP, repairs to the tunnels could have been completed in four months, or six months after a bid process for repairs. CORP Partnership Presentation at 9, attached at Exhibit 23. Furthermore, CORP knew of the tunnel problems at least in November 2006 so that the seven month period for bidding and construction could have been completed prior to the embargo. V.S. Davis 5. These simple facts alone should be sufficient to find that the embargo has continued for an unreasonably long time. *Pejepscot Industrial Park, Inc., d/b/a Grimmel Industries – Petition for Declaratory Order*, Docket 33989, slip op. at page 3 (n. 5) (served May 15, 2003) (“An embargo is not considered to

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be unreasonable unless it remains in effect longer than necessary to remove the impediment ”)

CORP has suggested that the length of the embargo is reasonable because no repairs could have been conducted in the rainy winter season. This excuse is an oversimplification that ignores the key issue – CORP knew about the deterioration of the tunnels for many years and deferred or ignored pressing maintenance needs. As described in Section V B, CORP had repeated warnings in the 2004-2007 time periods from FRA, Oregon DOT, and outside consultants regarding the condition of the tunnels that caused the embargo. CORP also inexplicably delayed responding to the inspection of Shannon & Wilson, which was done in March and April 2007, and to the report, which was issued in July 2007. Furthermore, CORP’s own recent history shows that winter tunnel repairs are possible – the collapse of tunnel 15 was repaired from November 2006 to January 2007. The evidence available to the Port also shows that CORP had other crews working on tunnel 13 of the Siskiyou Line in late October 2006. See e-mail from Steve Hefley of CORP (Oct. 25, 2006), attached at Exhibit 33.

Most importantly, the embargo was not precipitated by any catastrophic event such as a landslide or wash-out. CORP has long known about the condition of the Line and the need for repairs. CORP and RailAmerica should have been conducting ongoing maintenance and capital investment projects on the Line during their entire ownership of the Line to prevent the need for a sudden embargo. For this reason, the Port asserts that the embargo was unlawful when imposed and has remained unreasonable for all eight months of its duration.

The evidence strongly suggests that CORP engaged in an intentional deferral of maintenance for several years in an effort to “milk” profits from the Line prior to the embargo. CORP has been in control of the Line for over 13 years. Meanwhile, RailAmerica is the largest shortline and regional railroad operator in the United States, having grown from just one railroad in 1986 to over 40 separate operating subsidiary railroads today. Due to its expertise in acquiring and owning shortline and regional railroads, RailAmerica cannot claim ignorance of the condition of the Line when it purchased CORP in 2000 or in the ensuing years. Similarly, Fortress Investments is a sophisticated multi-billion dollar asset management firm, it is highly unlikely that it acquired RailAmerica in early 2007 with no knowledge of CORP’s condition. The gradual deterioration of the Line was not unknown to CORP, RailAmerica, and Fortress – it was the product of neglect. No embargo should have been necessary at all on the Line if CORP and RailAmerica had properly maintained the Line as necessary in order to meet their common carrier obligation. Under the unique facts of this case, no embargo of any length of time is reasonable. Although the Board generally defers to a railroad’s initial decision regarding whether a line is unsafe for continued rail operations,¹⁶ no such deference is appropriate in this case.

E. The financial condition of CORP and RailAmerica is sufficient

As described above, CORP’s revenues over the past three years have been between \$24.4 million (2007) and \$30.0 million (2005), higher than at any time in CORP’s history. Moreover, as a subsidiary of RailAmerica, CORP benefits from certain efficiencies and expertise not available to smaller railroads.

¹⁶ *Groome & Associates, Inc v Greenville County Economic Development Corporation*, Docket 42087, slip op. at page 12 (served July 27, 2005)

CORP has stated that reopening the Line would cost \$29 million¹⁷ While this is not a small sum of money, it is not excessive compared to CORP's 2007 revenue of \$24.4 million or compared to the Coos Bay Line revenue for 2006 (the most recent near-full year) of somewhere in the vicinity of \$2 million to \$3.5 million¹⁸ Additionally, UPRR (1) has given \$1 million to CORP for repairs since 2004, and (2) pays CORP a 3% supplement for reporting car movements through Railinc¹⁹ Especially when one considers that the tunnel repairs necessary to reopen the Line should be amortized over the life of the repair, which could be several decades, the cost is not prohibitive The situation facing CORP is wholly unlike that in *Bar Ale, Inc v California Northern Railroad Company and Southern Pacific Transportation Company*, Docket 32821, slip op at pages 2 and 6-8 (served July 20, 2001) (embargo found reasonable because, among other things, cost of repairs is 10 times the railroad's annual revenue)

It would be unfair and inequitable to force others to pay for deferred maintenance because the price paid by Fortress Investments in 2007 reflected the current, neglected condition of the Line²⁰ Hence, Fortress paid a lower price due to the poor condition of the Line To allow CORP to now shift the cost of deferred maintenance to shippers, the Port, and the state would unfairly give (1) CORP and RailAmerica the benefit of high

¹⁷ Over the last 8 months, CORP has claimed, at different times, that the Line can be reopened for \$29 million, \$6.7 million, \$7 million, \$23 million, \$23.3 million, and \$27.1 million Some of these figures clearly represent improvement repairs unrelated to the embargo See attached Exhibit 34

¹⁸ Specific revenue figures are not available to the Port, but public information reveals a wide range of possible Coos Bay Line revenues See traffic and revenue chart, attached at Exhibit 24

¹⁹ See UPRR letter to the STB in Ex Parte 677 (April 29, 2008), attached at Exhibit 20

²⁰ The same goes for RailAmerica's purchase of CORP in 2000

profits from the deferred maintenance years without ever having to pay for that maintenance itself, and (2) Fortress the windfall of a rail line in good condition when it paid for a rail line in poor shape

Moreover, CORP cannot now seek to excuse its deferred maintenance and under-investment by asserting that its agreement with UPRR imposes uneconomic interchange terms. This newly-minted claim could have been presented during the Board's proceeding in Ex Parte No. 575 (Sub-No. 1), *Disclosure of Rail Interchange Commitments*, and therefore should be rejected in this Show Cause proceeding. In any event, according to CORP, the purportedly uneconomic terms do not apply to roughly a quarter of the cars that it handles on the Line: 932 of out 4,018 in 2007. See *Lundberg V S*, page 3, attached to CORP Response. In light of this allegation, CORP should ask the Board to reopen its recent rulemaking, and to expand its new rules to cover more than just a disclosure requirement. Ex Parte No. 575 (Sub-No. 1), *Disclosure of Rail Interchange Commitments* (served May 29, 2008)

VIII. The embargo is shown to be an unlawful abandonment by balancing the five factors

In sum, balancing the five factors listed above shows that the embargo imposed by CORP on the Coos Bay Line has always been an unlawful abandonment. First, CORP has publicly stated that the cost to "reopen" the line is \$2.9 million, a not insignificant sum, but less than the \$4.66 million CORP and RailAmerica are willing to invest in the Line. Second, the amount of traffic on the Line has been relatively stable over the past few years, with no year, prior to the embargo year of 2007, falling below 5,800 cars per year. There have been some higher traffic years, such as 2002 and 2003, but all other years since 1999 have been within a few hundred cars of 6,000 per year. See traffic and revenue

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chart, attached at Exhibit 24 Third, the actions of CORP and RailAmerica reveal an intent to defer maintenance as long as possible, thus milking profits from the Line, and then shut down the Line and seek repair money from the state, the shippers, the Port, and UP The Line has been subject to numerous studies and evaluations of its condition over the past 14 years, yet CORP and RailAmerica withheld capital investment as long as possible Board approval of the strategy of CORP will only encourage other railroads to do the same It would also be grossly unfair For others such as the Port to now pay for the deferred maintenance would be a windfall for CORP, RailAmerica, and Fortress Fourth, the embargo has now continued for over 8 months, in excess of the time needed for repairs according to the schedule of CORP Fifth, CORP and RailAmerica finances are sufficient for the repairs CORP revenues have been between \$22 million and \$30 million for each of the last 6 years, and revenue on the just the Coos Bay Line has been somewhere in the region of \$2 0 to \$3 5 million per year CORP and RailAmerica have stated that they could contribute \$4 66 million to repairs on the Line. In short, CORP and RailAmerica should never have embargoed the Line, and should have repaired it long before the embargo was imposed.

IX. Abandonment is too late, may not be lawful, and, if approved, would necessitate payment of damages by CORP

In its Response, CORP has indicated that it now “pledges to file an application seeking abandonment authority at the earliest possible time” CORP Response at 27 The particular facts and circumstances surrounding CORP’s operations, or lack thereof, on the Line reveal that an attempted abandonment would raise many serious questions, as described below

A. If CORP is truly unable to undertake necessary maintenance, the Line should have been abandoned long ago

For a railroad that finds it is unable to engage in repairs and maintenance necessary to fulfilling its obligation as a common carrier, the proper step is abandonment of the affected rail line *Pejepscot Industrial Park, Inc., d/b/a Grimmel Industries – Petition for Declaratory Order*, Docket 33989, slip op at page 13 (n 28) (served May 15, 2003) (“the proper response to an unprofitable line is to obtain abandonment authority and not to unilaterally withdraw service”) (internal citations omitted) In this way, rail service can continue on the line during the abandonment proceedings at the Board, interested parties can comment and participate regarding the future of the line, and a reasoned decision can be reached by the Board This is not the approach taken by CORP

As shown above, CORP had extensive knowledge regarding the condition of the tunnels on the Coos Bay Line during its 13 years of Line ownership CORP admitted the existence of large repair needs, and also admitted that these repairs were not being made Nevertheless, instead of abandoning the Line, CORP followed a milk-the-asset strategy of squeezing every last bit of revenue out of the Line until the Line became impossible to operate Now, over 8 months later, CORP agrees that abandonment is the correct step for at least part of the Line – with no concern for the economic dislocation and hardship that have been caused due to the lack of rail service since September of last year, and no concern for the possible further deterioration of the Line since that date²¹ In short, the abandonment is too little, too late If CORP is truly unable to make the necessary repairs,

²¹ For further information regarding the embargo’s effect on local businesses in Southwestern Oregon, see the verified statements filed by Ray Barbee of Roseburg Forest Products and Fred Jacquot of the American Bridge Company, which the Port understands are being filed today by the shippers in their reply to the CORP Response

CORP should have proposed abandonment long ago, such as soon after CORP received the 2004 Milbor-Pita report and decided that it was not going to make the recommended repairs²²

B. The proposed abandonment would not be lawful

CORP's new plan to file an abandonment application with the Board raises a host of legal issues. First, the System Diagram Map filed by CORP on May 8, 2008 reveals that CORP has truncated the Coos Bay Line at Milepost 669, thereby attempting to reserve for itself the initial 20 miles of the Line. This 20-mile segment connects the rest of the Line, including the Port and virtually all Line shippers, with the national rail network at the Eugene Rail Yard.

In attempting to truncate the Line, CORP violates the rule of *Caddo Antoine and Little Missouri Railroad Company v Surface Transportation Board*, 95 F.3d 740, 748 (8th Cir. 1996) (court warns against "a segmentation of line that would have the effect of foreclosing the viability of contiguous segments, making their eventual abandonment a foregone conclusion") *See also Caddo Antoine and Little Missouri Railroad Company – Feeder Line Acquisition – Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR*, Docket 32479 (served Aug. 12, 1999). CORP's truncation proposal is a thinly-disguised attempt to retain all the benefits of any future traffic on the Line beyond the tunnels if and when rail service is resumed by some future operator, such as via a feeder line acquisition. In *Caddo Antoine*, the court described a new ICC policy designed to prevent situations where the owning carrier

²² Similarly, CORP's effort to "forge a public-private partnership" should have occurred years ago, when CORP knew it was unwilling or unable to spend the money needed for ongoing tunnel maintenance.

downgrades (by failing to maintain and repair its tracks) services over a portion of its line that it deems more expensive to operate, while maintaining service to a single shipper that it deems easier and more profitable to serve, and then files a SDM covering only the undesirable portion of the line shortly before the abandoned shippers are able to file a feeder line application

95 F 3d at 747 All traffic using the Coos Bay Line would have to traverse CORP's 20-mile segment to reach the national rail network, thus, it would be subject to CORP's rate and surcharge authority CORP's plan would likely prevent the profitability of any later operator of the remainder of the Line In sum, CORP's proposal seeks to retain all benefits of future Line operations while, at the same time, removing the responsibility of maintaining the tunnels and the majority of the Line This clearly violates *Caddo Antoine* and should not be allowed

Even without the Line truncation, any abandonment application of CORP would implicate the rural and community development consideration required in the Board's evaluation of the public convenience and necessity 49 U.S.C. § 10903(d), 49 C.F.R. § 1152.22(e); *Waterloo Railway Company – Adverse Abandonment – Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine*, Docket AB-124 (Sub-No. 2), slip op. at 11-12 (served May 3, 2004). By statute, the Board is required to consider “whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development” 49 U.S.C. § 10903(d) A cessation of rail service on the Coos Bay Line will clearly have a serious and adverse impact on the communities and rural areas of coastal Southwestern Oregon This area is not served by an interstate highway, and access to I-5 from towns such as Coos Bay or Coquille requires travel on mountainous, winding two-lane roads for 60-80 miles See

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Exhibit 10, letter from Dan Lovelady of CORP (Feb 7, 2003) (CORP General Manager notes that "State Coastal Highways are very precarious" and CORP keeps 30,000 trucks off of them, thereby allowing "our rail shippers in these rural communities to be competitive regionally and nationally") Cf *Georgia Public Service Commission v Interstate Commerce Commission*, 704 F 2d 538, 544-545 (11th Cir 1983) ("*Georgia PSC*") (court overturns ICC decision granting abandonment in part due to rural and community development concerns and because nearest major highways are 65 miles away, court also notes that transportation alternatives must be "logistically and economically feasible").

The Southwestern Oregon coast has had to adapt to stringent environmental laws regarding logging and ocean fishing in the past decade or more, which is compounded by the area's isolated geographical location *Georgia PSC*, 704 F 2d at 546 (noting that the proposed abandonment would have a large impact on the economy of an already depressed region) In addition, the national housing market downturn in the past year has temporarily lowered the demand for certain wood products The businesses served by the Coos Bay Line are major employers for the area, and would possibly either cease operations or relocate if rail service did not resume See, e g, testimony of Allyn Ford, President of Rosburg Forest Products, at the STB Common Carrier Obligation hearing, Ex Parte No 677, April 24, 2008, transcript at page 54, lines 1-3 ("Most of our facilities are located in rural areas and represent the principal employer in these communities"), and also transcript at page 107, lines 8-11 (in response to question from Chairman Nottingham about what would happen if the Line were abandoned, Mr Ford noted "[e]conomics are such that we would obviously pull investment out of the port and Coos

Bay is just not going to work economically”) Even if the individual businesses survive by relocating, that does not help the communities that are left behind, and it is “communities” that are the focus of the statute *Georgia PSC*, 704 F 2d at 546

C. Any abandonment would require payment of damages

As described in Section VI above, significant investment in the Line has been made by the state of Oregon, the Port, the federal government, local governments, and shippers. With the encouragement, assistance, and cooperation of CORP and RailAmerica in the past, these entities invested millions of dollars in the Line. As just a few representative examples: (1) the state of Oregon gave money to CORP for tie and ballast replacement, (2) the Port took responsibility for the crucial Coos Bay bridge (and obtained millions in state, federal, and local repair funds) so that CORP could continue to benefit from serving shippers south of the bridge, (3) the Port obtained federal, state, and local funds to build a new 4-mile spur to provide CORP access to new shippers²³; and (4) American Bridge and Southport Forest Products built or expanded facilities with the understanding that rail service would continue. See Exhibit 9, letter from Dan Lovelady of CORP (April 4, 2002) (recognizing that, although CORP has not made substantial capital investments in the Line, the CORP customers and the Port have made investments). All of these funds were expended in 2003 or later – the same time period that CORP was ignoring the critical maintenance needs of the tunnels. The Port, the state of Oregon, the federal government, local governments, and shippers on the Line relied on CORP’s encouragement, assistance, and cooperation in making their expenditures. See

²³ See e-mail from Dan Lovelady of CORP to Robert Melbo, Oregon Department of Transportation, Rail Division, Sept 16, 2004, attached at Exhibit 39 (“We believe the new rail spur . to the North Spit will generate many new industrial rail opportunities for the CORP.”)

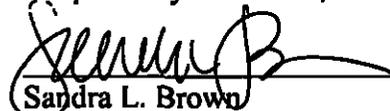
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Exhibit 10, letter from Dan Lovelady of CORP (Feb 7, 2003) (in asking for Oregon funds for maintenance project, CORP General Manager states “[t]his project will insure rail service that is so critical to the economy of the Bay Area and the many rural communities along the line remains for many years to come”) If CORP does eventually file for abandonment of the Line, then the Board should calculate damages due to these entities and either require payments to them or, in the event of a feeder line application, reduce the net liquidated value of the line by the level of damages *Central Michigan Railway Company – Abandonment Exemption – In Saginaw County, MI, Docket AB-308 (Sub-No 3X), slip op at 6-7 (served Oct 31, 2003) (where shipper made a “good faith investment” and “had no basis for thinking that its investment would be lost shortly after it was made,” Board orders abandoning railroad to reimburse shipper \$100,710 (less salvage value) for cost of installing rail trackage and unloading facilities built in 1996-1998)*

X. Conclusion

The Port commends the Board for issuing the Show Cause Order to CORP and RailAmerica. As described in this Reply, the evidence shows that the embargo was unreasonable from day one, and has always been an unlawful abandonment.

Respectfully submitted,



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June 3, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35130

CENTRAL OREGON & PACIFIC RAILROAD, INC. – COOS BAY RAIL LINE

VERIFIED STATEMENT OF JEFFREY BISHOP

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35130

CENTRAL OREGON & PACIFIC RAILROAD, INC. – COOS BAY RAIL LINE

VERIFIED STATEMENT OF JEFFREY BISHOP

1 My name is Jeffrey Bishop I am the Executive Director for the Oregon International Port of Coos Bay (“Port”), which is located in Coos Bay, Oregon I am qualified and authorized to offer this Verified Statement on behalf of the Port in the above-captioned proceeding My testimony concerns the history of rail service on the Coos Bay Line over the last 14 years, as well as the impact of the embargo on the Port’s business development efforts

2 In January 2005, I joined the Port as CEO after working for three years as the Industrial Development Manager for the Port of Tacoma, Washington Prior to my time at the Port of Tacoma, I worked for five years with the Port of Pasco, Washington, serving as Director of Properties and Development I have extensive experience in public administration, having served as a city manager or city administrator for several cities I have a Bachelor of Arts degree from Central State University (now known as the University of Central Oklahoma) and did graduate work in Public Administration at the University of Oklahoma

3 The Port occupies a unique position as the largest coastal deep draft port between San Francisco and Puget Sound The Port handles inbound and outbound traffic for domestic

and international markets, an average of 2.3 million tons of cargo moves through the Port annually. The Port is organized under Oregon law, with five commissioners appointed by the Governor and confirmed by the Oregon Senate for 4-year terms. Day-to-day operations of the Port are managed by me and a staff of approximately 20 persons.

4 The Port does not receive revenue from cargo moving through terminals in the Coos Bay harbor, which are all privately owned. Port activities are funded by business operations in the Charleston marina complex, leasing of land, and the local tax base. Instead of revenue generation, the Port's focus is on promoting the use of Coos Bay's deep-water port to enhance the economy and quality of life in the region. The Port strives to build a diversified, healthy and stable regional economy along southern Oregon's coast. The Port also serves as a regional economic development entity and an advocate for transportation infrastructure improvements throughout southwest Oregon. Port staff work in partnership with the local marine industry to promote maritime commerce in the harbor.

5 In my role as Executive Director of the Port, I have become very familiar with the operations of the Central Oregon & Pacific Railroad ("CORP"), a railroad subsidiary of RailAmerica, Inc. CORP provides rail access to many of the terminals at the Port. Given the connection of the Coos Bay Line with the Union Pacific Railroad and the Portland & Western Railroad near Eugene, Oregon, the rail service provided by CORP connected the Port to the national rail network.

6 The embargo issued by CORP on September 21, 2007 has affected the Port in several ways. First, the embargo has limited transportation options for inbound and outbound cargo moving through terminals at the Port. As an example, the embargo has meant the cessation of shipments of certain manufactured wood products that formerly used rail on their

way to the Port and ultimately to an ocean-going vessel. Second, the embargo has adversely affected the economic development efforts of the Port, and, by implication, the economy of the entire Southwestern Oregon region. Since the beginning of the embargo, the Port has been approached by two parties interested in transporting bulk commodities through the Port. When these parties learned that rail service to the Port has ceased, their interest quickly evaporated. Similarly, the lack of current rail service also quashed the interest of a warehousing business in relocating to the Coos Bay area.

7 CORP has been provided a significant level of financial assistance by federal, state, and local sources in the years since the CORP rail lines were sold by the Southern Pacific Railroad ("SP") in late 1994. In fact, there has been some degree of partnership among the Port, CORP, the state of Oregon, local rail shippers, and the Union Pacific Railroad ("UP") during this time frame. The relations between the parties were not always perfect, but CORP definitely benefited from the efforts of these other entities.

8 The Port currently owns and maintains the rail bridge used by CORP trains to cross Coos Bay. This bridge was not sold by SP to CORP's corporate parent RailTex in late 1994 because RailTex did not want the responsibility associated with the bridge. The bridge remained with SP and its successor-in-interest UP. The Port acquired the bridge from UP in 2000 because significant bridge maintenance needs existed, and public ownership appeared the best method to acquire the funding necessary to maintain the crucial rail link provided by the bridge for local businesses. UP retains the financial responsibility to remove the bridge if rail operations on the Coos Bay Line cease permanently. After acquiring ownership of the bridge, the Port proceeded to secure roughly \$7 million in funding, with \$5.5 million from the federal TEA-21 program, for bridge repairs in 2003-2005. A small portion of the funding consisted of a

loan from the state to the Port, and CORP provided administrative support, after resisting at first, for a small tariff (paid directly to the Port) that applied to each rail car crossing the bridge so that the Port could repay the loan and build a reserve fund for future bridge maintenance. As the earlier repairs were only a short-term measure, the Port also recently obtained \$8 million from the federal SAFETEA-LU program and \$4 million from the state ConnectOregon program. The bridge repairs to be completed with these funds will likely extend the working life of the bridge 25 years. Unfortunately, these repairs, which were to have begun in late 2007, are now on hold due to the embargo on the rail line.

9 CORP also benefited from the construction of the 4-mile North Spit spur rail line in 2004-2005. The northspit project was developed in reliance on there being rail service to Coos Bay and as part of the Port's long-term economic development plan. This new spur connected to CORP at the northern edge of Coos Bay and provided rail service to a new facility being constructed by Southport Forest Products, who used CORP rail service until the embargo. The North Spit spur was built with \$4.8 million in funds from the U.S. Economic Development Administration, the Oregon Department of Transportation Rail Division and the State of Oregon (Strategic Reserve and Special Public Works Funds), Coos County, the North Bay Urban Renewal Agency, the CCD Regional Investment Board, and another loan from Oregon to the Port. After some initial reluctance, CORP again assisted the Port by assessing a small tariff (that was paid directly to the Port) on North Spit spur traffic so that the Port could repay its loan to the state.

10 Over the past few years, CORP has received a number of grants from the state of Oregon to aid the Coos Bay Line. The Oregon Short Line Railroad Rail Infrastructure Improvement Program gave CORP \$300,000 in 2003 and \$400,000 in 2005 for replacement of

ties and ballast on the Coos Bay Line. In 2006, CORP was awarded \$7.7 million from the ConnectOregon program for expansion of the Winchester rail yard. Although this yard is on the Siskiyou Line, the expansion would have benefited rail operations on the Coos Bay Line as well. I am aware that CORP has not received all of the money awarded, however. The state of Oregon ceased payments to CORP after \$2.7 million due to CORP's embargo.

11 As recipient or beneficiary of significant public funds over the past few years, CORP has enjoyed a privileged position. At times, CORP seemed to recognize its good fortune. For example, CORP participated with other businesses and public entities in forming the Southwest Economic Transportation Team in early 2006. This group of parties was formed to facilitate business development in Southwestern Oregon through improvements to various transportation modes and interconnections.

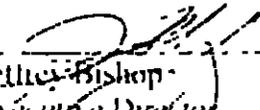
12 I am aware that CORP's explanation of the embargo is that the tunnels became unsafe in September 2007. I am also aware that CORP contends that the Coos Bay Line generates insufficient revenue to justify repairs to the tunnels. While I will let others debate these issues in depth, I would like to state that the Port itself was aware of the deteriorating condition of the tunnels several years ago. In fact, the Port offered to work with CORP in co-sponsoring a ConnectOregon grant application for rehabilitation of Coos Bay Line tunnels in late 2005 when the Port became aware that there might be serious problems with the tunnels. The Port learned of this potential condition when it received a copy of the Milbor-Pita 2004 report from CORP in mid-2005 as part of joint effort between the Port and CORP to look into expanding the tunnels to handle double stack trains and container traffic. However, CORP declined the Port's offer to co-sponsor a ConnectOregon grant application, claiming that its tunnels were in good shape and did not need significant rehabilitation. The Port relied on

CORP's assertion since the Port had no access to CORP's tunnels and at that time had no reason to disbelieve CORP, but later events show that CORP knew this assertion was wrong

13 The Port's experience in dealing with CORP has never been smooth. However, in the past year or two, CORP has seemed to be even less responsive to efforts of the Port and others in working together to preserve and improve rail service to the Southwestern Oregon region. I am well aware of CORP's public-private partnership proposal, which was made in several similar forms during the winter of 2007-2008. These proposals have been unacceptable to the Port because they require substantial commitments of public money to upgrade the entire Coos Bay Line just as a condition of reopening tunnels 13, 15, and 18. The work that CORP wants to do with the proposal funds consists of regular, but deferred, maintenance that CORP should have been doing during its 13 and a half years of ownership of the Line. Moreover, the requirement of a multi-million dollar operating subsidy from the state means that CORP seeks to guarantee a positive return from Line operations for itself. This is inequitable and an unacceptable use of limited public funds.

VERIFICATION

I Jeffrey Bishop verify under penalty of perjury that the foregoing is true and correct based on my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.



Jeffrey Bishop
Executive Director
Oregon International Port of Coos Bay

Dated 6/2/08 _____

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35130

CENTRAL OREGON & PACIFIC RAILROAD, INC. – COOS BAY RAIL LINE

VERIFIED STATEMENT OF MARTIN CALLERY

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35130

CENTRAL OREGON & PACIFIC RAILROAD, INC. – COOS BAY RAIL LINE

VERIFIED STATEMENT OF MARTIN CALLERY

1 My name is Martin Callery. I am the Director of Communications & Freight Mobility for the Oregon International Port of Coos Bay ("Port"), which is located in Coos Bay, Oregon. I am qualified and authorized to offer this Verified Statement on behalf of the Port in the above-captioned proceeding. My testimony concerns the public-private partnership that the Port proposed to Central Oregon & Pacific Railroad ("CORP") in 2005 for the tunnels as well as the impact of the embargo on the Port's business development efforts.

2 I joined the Port in July 1992 as Director of Marketing. I have a Bachelor of Arts in Journalism/Mass Communications from the University of Texas at El Paso, and have completed Master's level course work in Marketing Management. I also taught communications courses at UT El Paso for several years in the early '80s. In July 1993, my position was expanded to include all Port communications. I am responsible for promoting the Port's North Bay Marine Industrial Park, directing marketing and advertising for the Port's Charleston Marina Complex, working with public agencies and private industry in economic development efforts, and promoting maritime trade and commerce in the Port of Coos Bay. I also coordinate activities in the Coos County Foreign-Trade Zone No. 132. In November 2005, my position was

expanded to include transportation issues and projects. At the state-wide level, I serve on the Oregon Freight Advisory Committee, I am a regional representative on the South West Area Committee on Transportation, I served on the ConnectOregon I Consensus Committee and I am a member of the Oregon Rail Users League (ORULE)

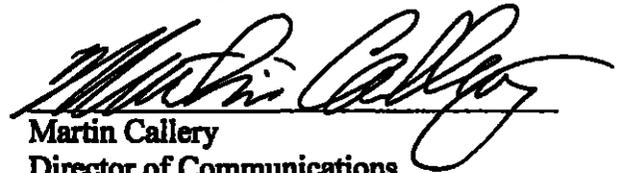
3 The Port has been actively working on expanding traffic at the Port for many years. In 2005, the Port contacted CORP regarding the Port's interest in improving the tunnels on the Coos Bay Line in order to accommodate double stack containers. In August 2005, CORP sent a letter to Mike Gaul of the Port with portions of a 1994 Shannon & Wilson report and a 2004 Milbor-Pita report regarding the tunnels. Upon reviewing the materials provided by CORP, the Port became aware that there might be serious problems with the tunnels.

4 I spoke with Thomas Hawksworth, then Manager – Marketing & Sales with CORP, and told him that the Port would like to partner with CORP in submitting a joint application to ConnectOregon seeking approximately \$3.5 million to rehabilitate the tunnels, while at the same time opening the tunnel entrances to be able to accommodate double stack intermodal trains. In December 2005, as the January 2006 deadline for ConnectOregon applications came closer, I urged CORP to join with the Port to obtain money for the tunnels. Mr. Hawksworth informed me that CORP management had determined that the tunnels were not in serious condition and did not need significant rehabilitation.

5. The embargo has adversely affected the economic development efforts of the Port. Since the beginning of the embargo, I have been contacted by two parties interested in transporting bulk commodities through the Port. When these parties learned that rail service to the Port has ceased, their interest quickly evaporated. Similarly, the lack of current rail service also quashed the interest of a warehousing business in relocating to the Coos Bay area.

VERIFICATION

I, Martin Callery, verify under penalty of perjury that the foregoing is true and correct based on my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.



Martin Callery
Director of Communications
& Freight Mobility
Oregon International Port of Coos Bay

Dated: June 2, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35130

CENTRAL OREGON & PACIFIC RAILROAD, INC. – COOS BAY RAIL LINE

VERIFIED STATEMENT OF GENE A. DAVIS, P.E.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35130

CENTRAL OREGON & PACIFIC RAILROAD, INC. – COOS BAY RAIL LINE

VERIFIED STATEMENT OF GENE A. DAVIS, P.E.

1 My name is Gene A. Davis, P.E. I am the Director, Transportation Engineering at R. L. Banks & Associates, Inc. ("RLBA"), whose home office is located in Arlington, VA. I am qualified and authorized to offer this Verified Statement on behalf of the Oregon International Port of Coos Bay ("the Port") in the above-captioned proceeding. My testimony concerns the contractor selection process that the Central Oregon & Pacific Railroad ("CORP") could have pursued in order to ensure that repair work on Tunnels 13, 15, and 18 could commence promptly.

2 In August, 2002, I joined RLBA, after working in the Engineering Department of Norfolk Southern Corporation ("NS") for 18 years, specifically ten years in the Track Department, followed by eight years in the Bridge Department. At the time of my departure from NS, I held the position of Assistant Division Engineer, Bridges. It should be noted that my last territory I supervised before leaving NS was the Pocahontas Division which contained over fifty tunnels of all construction types. Since joining RLBA, I have inspected rail lines across the country, assessed track and bridge structure integrity, determined track upgrade costs to handle freight cars weighing up to 286,000 pounds or hosting passenger operations, developed track and

bridge structure maintenance costs, estimated intermodal facility and commuter rail station construction costs and determined net liquidation values of multiple line segments. My experience spans management and engineering of railroad track structure, bridge and building inspection and condition assessment, maintenance, rehabilitation and construction, railroad design, construction and operations.

3 RLBA has been retained by the Port in connection with CORP's embargo of the Coos Bay Branch Line (the "Line"). I am particularly familiar with the Line because of on-site inspections that I conducted in April 2008. I physically inspected publicly-accessible portions of the Line and I further inspected non-publicly-accessible portions of the Line by helicopter to the extent possible. I have also closely reviewed track charts of the Line (provided by the Port), two engineering reports prepared by Shannon & Wilson, concerning the condition of the Tunnels on the Line, the inspection report of the Federal Railroad Administration ("FRA") from October 2007 and the Public Version of the Verified Statement of Paul Lundberg filed on May 12, 2008 with the Surface Transportation Board.

4 The enclosure to the July 16, 2007 Shannon & Wilson engineering report provides a description of the urgent repairs necessary to ameliorate dangerous conditions existing in Tunnels 13, 15 and 18. The recommended repairs as well as estimated costs are found, respectively, at Tables 2, 4 and 7 and call for measures including removal of timber sets, installation of rockbolts, application of steel fiber reinforced shotcrete; replacement of wood footing blocks, installation of steel sets, etc. Shannon & Wilson's recommendations appear consistent with my understanding of the progressively deteriorating condition of the tunnels' support system. The condition of the tunnels reported by Shannon & Wilson and the FRA would have occurred from many years of deterioration and/or deferred maintenance to these structures.

5 The Shannon & Wilson supplemental letter of September 2007 points out that RailAmerica knew of the tunnel conditions at least as early as November 2006. In addition, the July 2007 report states that RailAmerica personnel were present during the tunnel inspections with Shannon & Wilson in March 2007. Shannon & Wilson then states that it is equipped to submit a detailed proposal for engineering design work and construction plans for the repair work.

6 Given the expert recommendations in the Shannon & Wilson report, I believe that CORP should have immediately undertaken certain steps and preparations in November 2006 so that repair work on the Line could have been completed prior to the start of the 2007 rainy season.

7 It is my belief that CORP may not have the expertise or resources to perform the engineering and construction work in-house in which case it would be necessary to engage an outside firm to design and perform tunnel repairs. In fact, tunnel work is very specialized and only a limited number of contractors can and do perform that type of work, with many likely being utilized on other large projects such as Norfolk Southern's "Heartland Corridor" project. These factors further support the need to immediately start the process if CORP intended to maintain service.

8 In my professional opinion, the process that CORP should have undertaken in order to promptly restore service would involve four basic steps: (1) identifying competent engineering firms capable of designing the repairs and selecting one (if Shannon & Wilson would not be used for this phase), (2) preparing a request for proposal ("RFP") based on the engineering designs of the repair work and submitting it to known qualified tunnel contractors, (3) evaluating the responses to the RFP and conducting follow-up interviews, as necessary, and

(4) selecting the winning contractor and finalizing a contract For a project such as making repairs necessary to ameliorate the dangerous conditions existing in Tunnels 13, 15, and 18, the entire process described above could be completed in about six to eight weeks

9 Accordingly, it is my opinion that CORP, knowing the serious condition of these tunnels, should have moved promptly at least in November 2006, to engage Shannon & Wilson and the inventory could have been completed by March 2007 (same four month time frame it took Shannon & Wilson to complete the inventory that was not started until March 2007) and then the engineering and bidding for a construction firm, could have been completed by the end of May 2007 (two months) at which time it should have started construction I note that the duration of the selection process I have identified is, in fact, consistent with the duration that CORP suggested in its public-private partnership proposal, dated Nov 14, 2007 (CORP proposed a two month bid process) Then, consistent with construction time frame in Mr Lundberg's statement (four to five months), the tunnel repairs could have been completed by September or October 2007

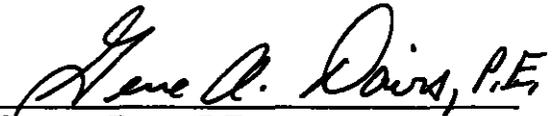
10 Even if it was somehow found prudent for CORP to have waited to engage Shannon & Wilson until March 2007 (four months after CORP definitely knew of the serious condition of the tunnel based upon CORP's own evidence) and then waited four months for the Shannon & Wilson report, CORP should have moved promptly after receiving the report to complete designs and engage an outside construction firm If CORP intended to reopen the Line, CORP could have completed the selection process at least by the end of January 2008 and then CORP should have begun the process of purchasing and staging materials in order to start construction as soon as possible

11 I estimate the costs of the contractor selection process would likely not exceed \$10,000 in office time of CORP personnel, materials and travel (if required)

12 I understand that CORP did not undertake any of the steps that I identified above for purposes of selecting a contractor to repair Tunnels 13, 15, and 18, which would be expected in the ordinary course of business, if CORP intended to accomplish repairs and keep the Line in service or to reopen the Line once embargoed. CORP's failure to undertake these necessary steps indicates to me that CORP did not properly undertake steps to maintain the tunnels and that CORP has no plan or intention to promptly restore service on this Line

VERIFICATION

I, Gene A Davis, verify under penalty of perjury that the foregoing is true and correct based on my knowledge, information and belief Further, I certify that I am qualified and authorized to file this Verified Statement


Gene A Davis, P E
Director, Transportation Engineering
R L Banks & Associates, Inc.

Dated 5/28/08

CERTIFICATE OF SERVICE

I hereby certify that I have caused the PUBLIC VERSION of Volume I - THE REPLY OF THE OREGON INTERNATIONAL PORT OF COOS BAY to be served by email and/or overnight delivery service this 3rd day of June, 2008 on the following

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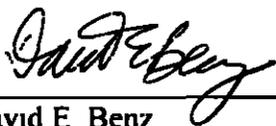
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And a HIGHLY CONFIDENTIAL VERSION of Volume I – THE REPLY OF THE OREGON INTERNATIONAL PORT OF COOS BAY to be served by email and/or overnight delivery service to counsel that has signed the Highly Confidential Undertaking pursuant to the Protective Order imposed on May 16, 2008



David E Benz