

BEFORE THE  
SURFACE TRANSPORTATION BOARD



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FINANCE DOCKET NO 35128

THE PORT OF SEATTLE  
-- ACQUISITION EXEMPTION --  
CERTAIN ASSETS OF BNSF RAILWAY COMPANY

THE PORT OF SEATTLE  
MOTION TO DISMISS NOTICE OF EXEMPTION

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I. INTRODUCTION

The Port of Seattle (the "Port") will acquire ownership of a certain rail line and right-of-way (described below, the "Subject Line") pursuant to a Purchase and Sale Agreement with BNSF Railway Company ("BNSF") BNSF will retain an exclusive freight rail operating easement over the Subject Line and, simultaneously with consummation of the transaction, transfer that easement to a third party operator

The Port has filed a Verified Notice of Exemption pursuant to 49 C F R § 1150 31, et seq in this docket to acquire the underlying physical assets that constitute the Subject Line from BNSF The Port hereby moves the Board to dismiss the Notice The Port submits that because of the nature and terms of the acquisition of the Subject Line from BNSF as described in the Notice and this Motion to Dismiss (and its attachments), the acquisition is not subject to Surface Transportation Board ("Board" or "STB") jurisdiction and consummation of it will not make the Port a rail carrier

## II. STATEMENT OF FACTS

The Port is a municipal corporation of the State of Washington and is a non-carrier. BNSF is a corporation organized under the laws of the State of Delaware and a Class I rail carrier. The purpose of the transaction is to convey ownership of the underlying physical assets that constitute the Subject Line to the Port while a third party operator takes over freight rail operations on the line.

Under the Purchase and Sale Agreement entered into by and between, inter alia, the Port and BNSF, the Port will acquire (as relevant here)<sup>1</sup> BNSF's right, title and interest in the right-of-way, trackage and other physical assets associated with the line of railroad, referred to herein as the "Subject Line," extending between approximately milepost 23.8 (north of Woodinville) and approximately milepost 38.25 in Snohomish, in King County and Snohomish County, Washington. BNSF will retain from the transfer to the Port an exclusive freight rail operations easement (the "Freight Easement")<sup>2</sup>. Simultaneously with closing of the transaction, BNSF will transfer the Freight Easement

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<sup>1</sup> Pursuant to the same Purchase and Sale Agreement, the Port also will acquire BNSF's right, title and interest in the right-of-way, trackage and other property and physical assets between the southern endpoint of the Subject Line at milepost 23.8 and milepost 23.45, together with the Redmond Spur between milepost 0.0 on and approximately milepost 7.3 (Redmond). The Redmond spur connects with the Subject Line at milepost 23.8. Pursuant to a separate agreement, BNSF will donate to the Port its right, title and interest in the right-of-way, trackage and other property and physical assets on the rail line between milepost 23.45 and milepost 5 in Renton, Washington. The sale/donation of the right-of-way and trackage identified in this footnote will not be operated by the third party operator and is not the subject of this Notice. It will be the subject of separate filings in AB-6 (Sub-Nos. 463, 464 and 465).

<sup>2</sup> The Freight Easement is reserved in the Quitclaim Deed, the form of which is attached hereto as Exhibit A.

to a third party operator<sup>3</sup> The Port will not conduct, or have the right or obligation to conduct, freight rail service over the Subject Line and will not hold itself out as willing or able to do so

The third party operator will conduct freight rail service over the Subject Line pursuant to its rights under the Freight Easement In addition, the Port and a third party operator will enter into an Operations and Maintenance Agreement (the "Operations Agreement") governing maintenance, capital improvements and day-to-day operations on the Subject Line<sup>4</sup>

### III. ARGUMENT

Under 49 U S C § 10901, the Board has exclusive jurisdiction over the acquisition of a railroad line by a non-carrier (including public entities such as the Port), where common carrier rights and obligations also are being transferred Common Carrier Status of States, State Agencies, 363 I C C 132, 133 (1980), aff'd sub nom Simmons v ICC, 697 F 2d 326 (D C Cir 1982) Whether a particular transaction is an acquisition of a railroad line subject to Board jurisdiction depends on whether the acquiring entity is holding itself out to provide common carrier rail service and has the ability to provide common carrier rail service Status of Bush Universal, Inc 342 I C C 550, 564 (1973) This is an objective test, the Board (like the former Interstate Commerce Commission ("ICC")) looks at what the acquiring entity will do as opposed to how it labels itself Los Angeles County Transportation Commission – Petition for

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<sup>3</sup> The Freight Easement to be transferred to the third party operator is attached hereto as Exhibit B The third party operator will secure an exemption for acquisition of the Freight Easement before the transfer

<sup>4</sup> The Operations Agreement will be substantially in the form of Exhibit C

Exemption – Acquisition from Union Pacific Railroad Company, STB Fin Docket No 32374 (STB served Jul 23, 1996), see United States v California, 297 U S 175, 181 (1936)

Subtitle IV of Title 49 defines "railroad" to include "the road used by a rail carrier and owned by it or operated under an agreement " 49 U S C § 10102(6)(B) It defines "rail carrier" as a "person providing common carrier railroad transportation for compensation " 49 U S C § 10102(5) A typical Section 10901 acquisition line includes the conveyance of a property interest sufficient to permit the buyer to provide (or at least control) railroad transportation for compensation, and that interest forms the basis of the Board's jurisdiction over the transportation and the buyer However, the Board (like the former ICC) has consistently recognized that under certain circumstances the acquisition of the physical assets of a rail line is not subject to its jurisdiction and does not make the buyer a rail carrier Such precedent is applicable to and should govern this transaction

In State of Maine, Dept of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company, 8 I C C 2d 835 (1991) ("State of Maine"), the State of Maine, acting by and through its Department of Transportation ("MDOT"), sought an exemption to acquire certain railroad right-of-way and trackage from Maine Central Railroad Company ("MEC"), subject to MEC's retained easement for common carrier railroad operations MDOT acquired the line for possible establishment of a public transit system using the acquired assets MEC's retained easement included access rights for maintenance and renewal of the line and was permanent As a result, MDOT's acquisition of the line's underlying physical assets did not impair freight railroad

operations. The ICC found that no common carrier rights or obligations were transferred to MDOT, because nothing in the transaction disabled MEC's affiliate and lessee, Springfield Terminal Railroad ("STR"), from meeting its common carrier obligations, and STR could not cease to offer service on the line without ICC approval. For these reasons, the ICC saw "no reason to impose upon the purchaser of the underlying rail assets an additional common carrier obligation." State of Maine, 8 I C C 2d at 837

In State of Georgia, Dept. of Transportation – Acquisition Exemption – Georgia Southwestern Railroad, Inc., STB Fin Docket No. 33876 (STB served Jul 7, 2000), the State of Georgia, acting by and through its Department of Transportation ("GDOT"), filed a motion to dismiss its notice of exemption for the acquisition of certain railroad assets, including rail line owned by Georgia Southwestern Railroad, Inc. ("GSRW"). Pursuant to an agreement with GSRW, GDOT acquired the rail line, but not the right or obligation to conduct common carrier freight operations on the line. Instead, pursuant to a separate easement agreement, Heart of Georgia Railroad, Inc. ("HOG") acquired an exclusive rail freight service easement over the line from GSRW.

The Board specifically noted that "under the easement agreement, HOG has the ability to provide unrestricted freight service as a railroad common carrier over the line." The Board also noted that "HOG's easement agreement enables it to carry out its common carrier obligation and gives it more than sufficient power over the operation and maintenance of the line to avoid any undue interference by GDOT." The Board acknowledged that based upon the representations made by the parties, GDOT would not conduct any freight rail operations over the line or hold itself out to do so.

Accordingly, the Board held that the proposed transaction did not require Board approval and granted GDOT's motion to dismiss the notice of exemption <sup>5</sup>

In State of Wisconsin Dept of Transportation – Petition for Declaratory Order, STB Fin Docket No 34181 (STB served Aug 1, 2002), the State of Wisconsin Department of Transportation ("WisDOT") requested a declaratory order to determine whether the Board had jurisdiction over its acquisition of certain specified railroad right-of-way and improvements from the Wisconsin and Southern Railroad company ("WSOR") Pursuant to the acquisition transaction, WisDOT would exercise an option to acquire the real estate and improvements on a line of railroad operated by WSOR, but would not assume the common carrier obligation to operate the rail line Instead, WSOR would retain a perpetual easement to operate freight rail service on the rail line <sup>6</sup>

The STB noted that pursuant to the acquisition transaction, no common carrier obligations were being transferred and that WisDOT would not hold itself out as a common carrier performing rail freight service The STB acknowledged that WSOR would retain all common carrier rights and obligations by virtue of its perpetual easement for freight rail operations Therefore, the STB concluded that as a result of the acquisition transaction, there would be no alteration of any common carrier rights or obligations, and therefore STB approval was not required

Taken together, State of Maine and subsequent cases establish that an entry may acquire the physical assets of a rail line without becoming a carrier, provided that

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<sup>5</sup> See also State of Georgia, Dept of Transportation – Acquisition Exemption – South Carolina Central Railroad, Inc., STB Fin Docket No 34057 (STB served Apr 30, 2002)

<sup>6</sup> The option was included in an operating agreement between WSOR and Wisconsin River Rail Transit Commission ("WRRTC") that gave WRRTC the right to contract for commuter rail service on the line

another entity retains sufficient interest to operate as a rail carrier on the line and has autonomy to conduct common carrier freight rail operations. Stated somewhat differently, if an acquisition of a rail line is subject to the existing operating interests of a common carrier and the acquiring entity does not have the ability to materially interfere with the carrier's operations, the acquiring company is not a common carrier subject to Board jurisdiction.

The transaction described herein is similar in all material respects to the transactions in the State of Maine case and the other cases discussed above. The Port will acquire certain real property and related improvements, but will not acquire the rights necessary to conduct or control common carrier freight rail operations on the Subject Line. BNSF will retain the exclusive right to provide or permit rail freight service on the Subject Line, and transfer that right to a third party operator. See Exhibit A, at 1

The third party operator and the Port will enter into an Operations and Maintenance Agreement pursuant to which the third party operator will have the exclusive right and obligation to provide rail carrier service on the Subject Line. See Section 2.1 of the Operations Agreement, Exhibit B. Neither the Port nor any other person or entity (other than the third party operator) will be permitted to provide any type of freight rail service on the Subject Line. See Section 2.2 of the Operations Agreement. The third party operator will have general maintenance responsibilities on the Subject Line and the right to construct improvements to the Subject Line. See Sections 3.1 and 4 of the Operations Agreement. Consistent with the Freight Easement, the Operations Agreement provides that the third party operator shall have exclusive authority to manage, direct and control all freight rail activities on the Subject

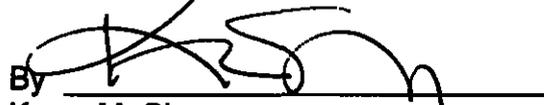
Line See Section 5 of the Operations Agreement The third party operator and the Port will establish a Coordination Committee consisting of at least two representatives of each party to serve as a forum for the parties to share information, discuss matters of interest to either party and resolve any issues that arise under the Operations Agreement See Section 10 of the Operations Agreement

The Port's acquisition of the underlying physical assets of the Subject Line will not constitute an acquisition of lines of railroad subject to the Board's jurisdiction The Port's ownership interest in those assets will not make it a common carrier subject to STB jurisdiction The Port will not conduct freight rail operations on the Subject Line and has not and will not hold itself out as willing or able to do so

**IV. CONCLUSION**

For the reasons set forth above, the Port respectfully requests that the Board dismiss its Verified Notice of Exemption for lack of jurisdiction

Respectfully submitted,

By 

Kevin M. Sheys  
Janie Sheng  
Kirkpatrick & Lockhart  
Preston Gates Ellis LLP  
1601 K Street, NW  
Washington, D C 20006  
(202) 778-9000

**ATTORNEYS FOR  
THE PORT OF SEATTLE**

**Dated:** May 28, 2008

**EXHIBIT B - 1**

**FORM OF DEED FOR FREIGHT PORTION**

After Recording Return To  
Port of Seattle  
Legal Department  
P O. Box 1209  
Seattle, WA 98111  
Attn Isabel R Safora

**QUIT CLAIM DEED**

Woodinville North  
Freight Portion

Grantor           BNSF RAILWAY COMPANY ("BNSF")

Grantee           PORT OF SEATTLE ("Port")

Legal Description     See Exhibit A attached hereto and incorporated herein (the "Property")

Grantor, for and in consideration of TEN AND NO/100 DOLLARS (\$10 00) conveys and quit claims to Grantee, the Property, situated in the County of King, State of Washington, together with all after acquired title of the Grantor therein.

EXCEPTING AND RESERVING THEREFROM, an exclusive easement for freight rail purposes for Grantor and its successors and assigns

Port, King County Washington ("County") and BNSF are parties to that certain Purchase and Sale Agreement dated as of \_\_\_\_\_ concerning the Property Port and BNSF for themselves and their respective successors and assigns hereby covenant and agree that the provisions of Sections 6 and 7 of said Agreement attached hereto as Exhibit B, are incorporated herein by reference (with all references to Port and/or County together therein deemed to be references to Port only for purposes of this Deed) and shall be covenants running with the land that are enforceable by Port, BNSF and their respective successors and assigns

IN WITNESS WHEREOF, BNSF, Port and County have executed this Deed as of the \_\_\_\_ day of \_\_\_\_\_, 200\_

BNSF RAILWAY COMPANY

By \_\_\_\_\_  
Its

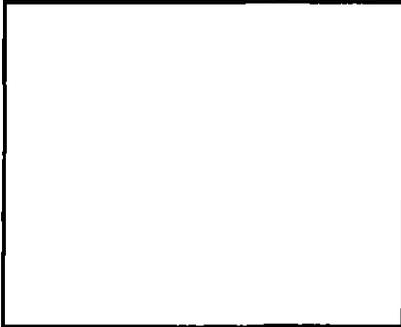
PORT OF SEATTLE

By \_\_\_\_\_  
Its

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF \_\_\_\_\_ )

I certify that I know or have satisfactory evidence that \_\_\_\_\_ is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as the \_\_\_\_\_ of \_\_\_\_\_ to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument

Dated \_\_\_\_\_



\_\_\_\_\_  
Notary Public  
Print Name \_\_\_\_\_  
My commission expires \_\_\_\_\_

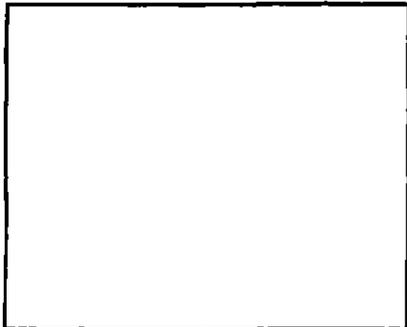
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POS # 681422 -1st of 3 parts Ex A-G

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF \_\_\_\_\_ )

I certify that I know or have satisfactory evidence that \_\_\_\_\_ is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as the \_\_\_\_\_ of \_\_\_\_\_ to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument

Dated \_\_\_\_\_



\_\_\_\_\_  
Notary Public  
Print Name \_\_\_\_\_  
My commission expires \_\_\_\_\_

(Use this space for notarial stamp/seal)

**Exhibit A to Deed for Freight Portion**

**Legal Description**

**Exhibit B to Deed for Freight Portion****COVENANTS****Section 6 Condition of Property**

(a) Port and County have been, or by Closing will have been, allowed to make an inspection of the Property Subject to BNSF's express representations, warranties and obligations under this Agreement and the Deed, **PORT AND COUNTY ARE PURCHASING THEIR INTERESTS IN THE PROPERTY IN AN "AS-IS WITH ALL FAULTS" BASIS WITH ANY AND ALL PATENT AND LATENT DEFECTS, ARE NOT RELYING ON, AND HEREBY WAIVE ANY WARRANTY OF MERCHANTABILITY, HABITABILITY, FITNESS FOR A PARTICULAR PURPOSE AND ANY OTHER REPRESENTATION OR WARRANTIES, EXPRESS OR IMPLIED, OF ANY KIND WHATSOEVER FROM BNSF WITH RESPECT TO ANY MATTERS CONCERNING THE PROPERTY** including, but not limited to the physical condition of the Property, zoning status, tax consequences of this transaction, utilities, operating history or projections or valuation, compliance by the Property with Environmental Laws (defined below) or other laws, statutes, ordinances, decrees, regulations and other requirements applicable to the Property, the presence of any Hazardous Substances (defined below), wetlands, asbestos, lead, lead-based paint or other lead containing structures, urea formaldehyde, or other environmentally sensitive building materials in, on, or under the Property, the condition or existence of any of the above ground or underground structures or improvements, including tanks and transformers in, on or under the Property, the condition of title to the Property, and the Third Party Leases/Licenses permits, orders, or other agreements, affecting the Property (collectively, the "**Condition of the Property**").

(b) Port and County individually represent and warrant for itself to BNSF that except for BNSF's express representations, warranties and obligations under this Agreement and the Deed, Port and County each has not relied and will not rely on, and BNSF is not liable for or bound by, any warranties, guaranties, statements, representations or information pertaining to the Property or relating thereto made or furnished by BNSF, the manager of the Property, or any real estate broker or agent representing or purporting to represent BNSF, to whomever made or given, directly or indirectly, orally or in writing

(c) Subject to BNSF's express representations, warranties and obligations under this Agreement and the Deed Port and County assume the risk that Hazardous Substances or other adverse matters may affect the Property that were not revealed by Port's or County's inspection and except to the extent of BNSF's express representations, warranties and obligations under this Agreement and the Deed, Port and County each waives, releases and discharges forever BNSF and BNSF's officers, directors, shareholders, employees and agents (collectively, "**BNSF Parties**") from any and all present or future claims or demands, and any and all damages, losses, injuries, liabilities, causes of actions (including, without limitation, causes of action in tort) costs and expenses (including, without limitation fines, penalties and judgments, and attorneys' fees) of any and every kind or character, known or unknown (collectively, "**Losses**"), which Port or County might have asserted or alleged against BNSF Parties arising from or in any way related to the Condition of the Property or alleged presence, use, storage, generation, manufacture, transport, release, leak, spill, disposal or other handling of any Hazardous Substances in, on or under the Property Losses shall include without limitation (a) the cost of any investigation, removal, remedial or other response action that is required by any Environmental Law, that is required by judicial order or by order of or agreement with any governmental authority, or that is necessary or otherwise is reasonable under the circumstances, (b) Losses for injury or death of any person, and (c) Losses arising under any Environmental Law enacted after transfer The term "**Environmental Law**" means any federal, state or local statute, regulation, code, rule, ordinance, order, judgment, decree, injunction or common law pertaining in any way to the protection of human health or the environment, including without limitation, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Toxic Substances Control Act, the Model Toxics Control Act, the Water Pollution Control Act, laws concerning above ground or underground storage

tanks, and any similar or comparable state or local law. The term "Hazardous Substance" means any hazardous, toxic, radioactive or infectious substance, material or waste as defined, listed or regulated under any Environmental Law, and includes without limitation petroleum oil and any of its fractions.

BNSF, Port and County acknowledge that the compensation to be paid to BNSF for the Property reflects that the Property is being conveyed subject to the provisions of this Section 6 which provisions shall be included in the deed and which shall be covenants running with the Land.

Section 7. Environmental Obligations.

(a) Consistent with Section 4.2 of this Agreement, if, prior to the expiration of the Review Period, the Port or County notifies BNSF in writing of an existing condition affecting the Property (an "Identified Condition") that is unacceptable to the Port or County, as determined by the Port and County in their respective sole and absolute discretion, and BNSF does not verify in writing by the earlier of (i) fifteen (15) business days thereafter or the end of the Review Period, that such Condition is a condition that BNSF is obligated to Cure in a manner acceptable to the identifying Party pursuant to this Section 7, then the Port or County may terminate this Agreement and the South Agreement together, by written notice to BNSF in accordance with the provisions of Section 4.2 of this Agreement. If the Port or County timely notifies BNSF in writing of an Identified Condition, the Port, County and BNSF shall negotiate diligently and in good faith to reach agreement on Curing such condition. If the portion of the Property affected by an Identified Condition can be excluded from the sale without materially interfering with Port's and County's future use of the Property, as determined by the Port and County (as applicable) in their respective sole and absolute discretion, then BNSF may affect Cure prior to Closing by excluding such affected portion of the Property without any price adjustment and to the extent so excluded BNSF shall have satisfied its obligations under this Agreement to Cure the portion of the Property so excluded, provided, however, that any such Cure by exclusion must first be agreed to in writing by the Port (and County, if it relates to the Railbanked Portion). If Port and County do not terminate this Agreement under Sections 4.2 and 7(a) and proceed to Closing, they shall not be deemed to have waived or released BNSF from any obligations to Cure set forth in Section 7(c), below.

(b) BNSF shall be responsible to investigate, remediate, respond to or otherwise cure (collectively, "Cure") as and when required by and in accordance with Environmental Laws any Identified Condition that concerns a release of Hazardous Substances on the Property occurring prior to the Closing or a violation of Environmental Laws concerning the Property occurring prior to the Closing to the extent that BNSF has agreed to Cure, and to the standards that BNSF has agreed to satisfy, in writing prior to the expiration of the Review Period. Notwithstanding the preceding sentence, BNSF shall not be responsible to Cure any such Identified Conditions to the extent Port or County or their respective agents, or contractors materially exacerbate such Identified Condition during construction performed by or for Port or County, excluding superficial or de *minimis* activity performed by Port or County. Further, BNSF shall not be responsible to Cure any Identified Condition that was not caused by BNSF or its agents, contractors or invitees. Port and County shall cooperate with BNSF in its efforts to Cure any Identified Condition concerning a release of Hazardous Substances on the Property.

(c) (i) For Hazardous Substances released on the Property that BNSF has not agreed to Cure prior to Closing, whether or not BNSF has been notified under Section 7 (a) that such releases are an Identified Condition, BNSF shall pay to the Port or County the costs to investigate, remediate, respond to or otherwise cure (collectively "Remediate" or "Remediation") any such Hazardous Substance releases, or any violation of Environmental Laws prior to Closing, to the extent occurring as a result of the operations of BNSF or its corporate predecessors, or the agents, employees, invitees or contractors of BNSF or its corporate predecessors. BNSF shall pay to the Port or County such costs to Remediate as and when required by and in accordance with Environmental Laws to standards for the Property that the applicable regulatory agency would apply had the Property continued to be used as a freight railroad, and to standards for other affected properties that the applicable regulatory agency would apply for such properties. BNSF shall not be responsible for (i) any costs of Remediation to the extent the Port or County or their respective agents,

contractors or invitees materially exacerbate the released Hazardous Substances during construction performed by or for Port or County (excluding superficial or *de minimis* activity performed by Port or County), or (2) any duplication of efforts by County or Port or their respective agents, contractors or invitees

(ii) As among BNSF, Port and County, any Remediation for which this Section 7(c) applies would be carried out by the Port or County BNSF shall cooperate with such Remediation

(iii) The obligations of BNSF under this Section 7(c) apply only to Remediation ordered or approved by the applicable regulatory agency, provided that for Remediation approved by the applicable regulatory agency BNSF shall have agreed in writing to the Remediation prior to such approval, which agreement by BNSF shall not be unreasonably withheld, conditioned or delayed The obligations of BNSF, Port and County under this Section 7(c) also apply regardless of which entity is issued an order by the applicable regulatory agency

(d) Other than BNSF's obligations under this Section 7, as among BNSF, Port and County, Port and County will be responsible for the all other costs of Remediation of Hazardous Substances released on or from the Property or violations of Environmental Laws

(e) The Section 7 obligations running from BNSF to the Port and County, and the Section 7 rights running to BNSF from the Port and the County, will be allocated as between the Port and County in the manner separately agreed to by the Port and the County

(f) The provisions of this Section 7 shall be included in the Deed and shall run with the land

Exhibit B  
To Freight Easement Sale Agreement  
Form of Deed

After Recording Return To

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**QUIT CLAIM DEED**  
Woodinville Freight Easement

Grantor        BNSF RAILWAY COMPANY ("BNSF")

Grantee        \_\_\_\_\_ ("TPO")

Legal Description        See Exhibit A attached hereto and incorporated herein (the "Property")

WHEREAS, BNSF has conveyed to the Port of Seattle (the "Port") the Property pursuant to that certain Quit Claim Deed dated as of \_\_\_\_\_ and recorded in the real estate records of King County, Washington in Book \_\_\_\_\_, Page \_\_\_\_\_ and in the real estate records of Snohomish County, Washington in B o o k , Page \_\_\_\_\_, and

WHEREAS , BNSF reserved in said deed an exclusive easement for freight rail purposes over the Property (the "Reserved Freight Easement")

NOW, THEREFORE, BNSF, for and in consideration of TEN AND NO/100 DOLLARS (\$10 00) conveys and quit claims to TPO all of BNSF's right, title and interest in and to the Reserved Freight Easement, together with all after acquired title of BNSF therein

TPO and BNSF are parties to that certain Freight Easement Sale Agreement dated as of \_\_\_\_\_ concerning the sale of the Reserved Freight Easement in and to the Property TPO and BNSF for themselves and their respective successors and assigns hereby covenant and agree that the provisions of Sections 6 and 7 of said Agreement attached hereto as Exhibit B, are incorporated herein by reference and shall be covenants running with the land that are enforceable by TPO, BNSF and their respective successors and assigns

IN WITNESS WHEREOF, BNSF and TPO have executed this Deed as of the \_\_\_\_\_ day of \_\_\_\_\_, 200\_

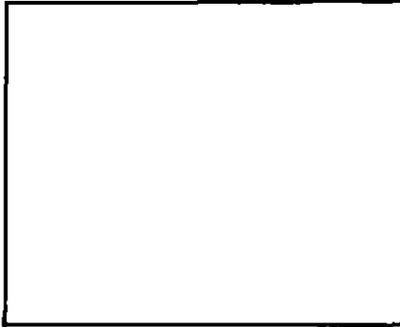
BNSF RAILWAY COMPANY

By \_\_\_\_\_  
Its

\_\_\_\_\_



POS # 681425 - Part 2 - Exhibit H



Notary Public \_\_\_\_\_  
Print Name \_\_\_\_\_  
My commission expires \_\_\_\_\_

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**EXHIBIT A**  
(to Freight Easement Deed)

[To be Attached]

**EXHIBIT B**

(to Freight Easement Deed)

**Section 6. Condition of Property** (a) TPO has been, or by Closing will have been, allowed to make an inspection of the Freight Portion. Subject to BNSF's express representations, warranties and obligations under this Agreement, **TPO IS PURCHASING THE RESERVED FREIGHT EASEMENT IN THE FREIGHT PORTION IN AN "AS-IS WITH ALL FAULTS" BASIS WITH ANY AND ALL PATENT AND LATENT DEFECTS, IS NOT RELYING ON, AND HEREBY WAIVES ANY WARRANTY OF MERCHANTABILITY, HABITABILITY, FITNESS FOR A PARTICULAR PURPOSE AND ANY OTHER REPRESENTATION OR WARRANTIES, EXPRESS OR IMPLIED, OF ANY KIND WHATSOEVER FROM BNSF WITH RESPECT TO ANY MATTERS CONCERNING THE FREIGHT PORTION** including, but not limited to the physical condition of the Freight Portion, zoning status, tax consequences of this transaction, utilities, operating history or projections or valuation, compliance by the Freight Portion with Environmental Laws (defined below) or other laws, statutes, ordinances, decrees, regulations and other requirements applicable to the Freight Portion, the presence of any Hazardous Substances (defined below), wetlands, asbestos, lead, lead-based paint or other lead containing structures, urea formaldehyde, or other environmentally sensitive building materials in, on, or under the Freight Portion, the condition or existence of any of the above ground or underground structures or improvements, including tanks and transformers in, on or under the Freight Portion, the condition of title to the Freight Portion, and the Third Party Leases/Licenses permits, orders, or other agreements, affecting the Freight Portion (collectively, the "Condition of the Freight Portion").

(b) TPO represents and warrants to BNSF that except for BNSF's express representations, warranties and obligations under this Agreement, TPO has not relied and will not rely on, and BNSF is not liable for or bound by, any warranties, guarantees, statements, representations or information pertaining to the Freight Portion or relating thereto made or furnished by BNSF, the manager of the Freight Portion, or any real estate broker or agent representing or purporting to represent BNSF, to whomever made or given, directly or indirectly, orally or in writing.

(c) Subject to BNSF's express representations, warranties and obligations under this Agreement TPO assumes the risk that Hazardous Substances or other adverse matters may affect the Property that were not revealed by TPO's inspection and except to the extent of BNSF's express representations, warranties and obligations under this Agreement, TPO waives, releases and discharges forever BNSF and BNSF's officers, directors, shareholders, employees and agents (collectively, "BNSF Parties") from any and all present or future claims or demands, and any and all damages, losses, injuries, liabilities, causes of actions (including, without limitation, causes of action in tort) costs and expenses (including, without limitation fines, penalties and judgments, and attorneys' fees) of any and every kind or character, known or unknown, which TPO might have asserted or alleged against BNSF Parties arising from or in any way related to the Condition of the Freight Portion or alleged presence, use, storage, generation, manufacture, transport, release, leak, spill, disposal or other handling of any Hazardous Substances in, on or under the Freight Portion. Losses shall include without limitation (a) the cost of any investigation, removal, remedial or other response action that is required by any Environmental Law, that is required by judicial order or by order of or agreement with any governmental authority, or that is necessary or otherwise is reasonable under the circumstances, (b) losses for injury or death of any person, and (c) losses arising under any Environmental Law enacted after transfer. The term "Environmental Law" means any federal, state or local statute, regulation, code, rule, ordinance, order, judgment, decree, injunction or common law pertaining in any way to the protection of human health or the environment, including without limitation, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Toxic Substances Control Act, the Model Toxics Control Act, the Water Pollution Control Act, laws concerning above ground or underground storage tanks, and any similar or comparable state or local law. The term "Hazardous Substance" means any hazardous, toxic, radioactive or infectious substance, material or waste as defined, listed or regulated under any Environmental Law, and includes without limitation petroleum oil and any of its fractions.

BNSF and TPO acknowledge that the compensation to be paid to BNSF for the Reserved Freight Easement reflects that the Reserved Freight Easement is being conveyed subject to the provisions of this Section 6 which provisions shall be included in the Deed and which shall be covenants running with the land

### Section 7 Environmental Obligations

(a) Consistent with Section 4.2 of this Agreement, if, prior to the expiration of the Review Period, the TPO notifies BNSF in writing of an existing condition affecting the Freight Portion (an "Identified Condition") that is unacceptable to the TPO, as determined by the TPO in its sole and absolute discretion, and BNSF does not verify in writing within fifteen (15) business days thereafter that such Condition is a condition that BNSF is obligated to Cure pursuant to this Section 7, then the TPO may terminate this Agreement by written notice to BNSF in accordance with the provisions of Section 4.2 of this Agreement. If the TPO timely notifies BNSF in writing of an Identified Condition, the TPO and BNSF shall negotiate diligently and in good faith to reach agreement on curing such condition. If the portion of the Freight Portion affected by an Identified Condition can be excluded from the sale of the Reserved Freight Easement without materially interfering with TPO's future use of the Reserved Freight Easement, as determined by the TPO in its sole and absolute discretion, then BNSF may affect Cure prior to Closing by excluding such affected portion of the Freight Portion without any price adjustment and to the extent so excluded BNSF shall have satisfied its obligations under this Agreement to Cure the portion of the Freight Portion excluded from the Reserved Freight Easement, provided, however, that any such Cure by exclusion must first be agreed to in writing by the TPO. If TPO does not terminate this Agreement under Sections 4.2 and 7.1 and proceeds to Closing, it shall be deemed to have waived and released BNSF from any obligations with respect to such Identified Condition.

(b) BNSF shall be responsible to investigate, remediate, respond to or otherwise cure (collectively, "Cure") as and when required by and in accordance with Environmental Laws any Identified Condition that concerns a release of Hazardous Substances on the Freight Portion occurring prior to the Closing or a violation of Environmental Laws concerning the Freight Portion occurring prior to the Closing to the extent that BNSF has agreed to Cure, and to the standards that BNSF has agreed to satisfy, in writing prior to the expiration of the Review Period. Notwithstanding the preceding sentence, BNSF shall not be responsible to Cure any such Identified Conditions to the extent TPO, its agents, or contractors materially exacerbate such Identified Condition during construction performed by or for TPO, excluding superficial or *de minimis* activity performed by TPO. Further, BNSF shall not be responsible to Cure any Identified Condition that was not caused by BNSF or its agents, contractors or invitees. TPO shall cooperate with BNSF in its efforts to Cure any Identified Condition concerning a release of Hazardous Substances on the Freight Portion.

(c) The provisions of this Section 7 shall be included in the Deed and shall run with the land

**OPERATIONS AND MAINTENANCE AGREEMENT  
BETWEEN  
THE PORT OF SEATTLE  
AND  
[THIRD PARTY OPERATOR]**

**TABLE OF CONTENTS**

**SECTION 1. Definitions .....2**

1.1 "Additions and Alterations" . . . . . 2

1.2 "Automatic Warning Devices".....2

1.3 "BNSF" . . . . .2

1.4 "Corridor"..... 2

1.5 "Deed" . . . . . 2

1.6 "Easement" . . . . . 2

1.7 "Environmental Laws" . . . . . 2

1.8 "Excluded Conduct".....2..

1.9 "Excursion Rail Service" . . . . . 3

1.1 "Execution Date" .....3..

1.11 "Facilities".....3

1.12 "FRA" . . . . . 3

1.13 "Freight Rail Service" .....2..

1.14 "Hazardous Materials"..... 3..

1.15 "Invoice" .....3..

1.16 "Loss" or "Losses" .....3..

1.1 "Port" .....4

1.18 "Port Property" .....4

1.19 "TPO" .....4

**SECTION 2. Freight Rail Service.....4**

2.1 TPO's Rights and Obligations.....4

2.2 Port's Rights and Obligations..... 5

**SECTION 3. Maintenance, Repair and Replacement Obligations.....5**

3.1 General Maintenance, Repair and Replacement Obligations . . . . .6

3.2 Remedies. . . . .6

3.3 Grade Crossing Reconstruction.....7

**SECTION 4. Construction of Additions and Alterations.....7**

4.1 Design and Construction Standards.....7..

4.2 Design Review.....7..

4.3 Grade Separation Projects.....7..

**SECTION 5. Operations.....8**

5.1 TPO's Operations . . . . .8

**SECTION 6. Access.....8**

6.1 Reciprocal Access and Notice Rights. . . . .8

**SECTION 7. Liability.....9**

7.1 Assumption of Responsibility..... 9

7.2 Allocation of Responsibilities. . . . . 10

7.3 Excluded Conduct .....1..

7.4 Scope of Indemnification. . . . .11

75	Procedure.....	12
76	Compliance With Laws . . . . .	13
77	Delay/Interruption of Service.. . . .	13
78	No Limitation on Risk Allocation.. . . .	14
79	Statutory Defenses.....	14
<b>SECTION 8. Insurance.....</b>		<b>14</b>
81	TPO Insurance. . . . .	14
82	Failure to Maintain Insurance. . . . .	15
8.3	Waiver of Subrogation. . . . .	15
<b>SECTION 9. Compensation and Billing.....</b>		<b>15</b>
9.1	Invoices. . . . .	15
92	Audit.....	16
93	Supporting Documentation . . . . .	16
9.4	Rent. . . . .	16
<b>SECTION 10. Coordination.....</b>		<b>16</b>
10.1	Coordination Committee.....	16
<b>SECTION 11. Binding Arbitration.....</b>		<b>17</b>
11.1	Controversies Subject to Arbitration.....	17
112	Selection of Arbitrator. . . . .	17
113	Expedited Arbitration Schedule.....	17
11.4	Pending Resolution.....	18
11.5	Cost of Arbitration.....	18
<b>SECTION 12. Term and Termination.....</b>		<b>19</b>
121	Term . . . . .	19
122	Termination for Abandonment . . . . .	19
123	Offers of Financial Assistance ("OFA"). . . . .	19
124	Railbanking . . . . .	19
12.5	Binding Successors; Assignment.....	20
126	Notices.....	20
127	Headings.....	20
128	Integration, Amendment, and Waiver... . . . .	20
129	Counterparts. . . . .	21
12.10	Governing Law.....	21
1211	Time of Essence.....	21
1212	Agreement Runs With Land, Recordation . . . . .	21
1213	Not for the Benefit of Others. . . . .	21
1214	Attorneys' Fees . . . . .	21
12.15	Regulatory Requirements.....	22
<b>SIGNATURES.....</b>		<b>21</b>
<b>EXHIBITS.....</b>		<b>23</b>

Exhibit A.....	23
Exhibit B.....	24
Exhibit C .....	25
Exhibit D .....	26

**OPERATIONS AND MAINTENANCE AGREEMENT  
BETWEEN  
THE PORT OF SEATTLE  
AND  
[THIRD PARTY OPERATOR]**

This Operations and Maintenance Agreement (the "Agreement") is entered into as of the \_\_\_\_ day of \_\_\_\_\_, 2 0 0 ("Execution Date"), between the PORT OF SEATTLE, a Washington Municipal Corporation ("Port"), and [THIRD PARTY OPERATOR], a \_\_\_\_\_ corporation ("TPO") This Agreement shall become effective on the Execution Date (as defined in Section 1.10 below)

**Recitals**

A Pursuant to the Purchase and Sale Agreement between Port and BNSF Railway Company, a Delaware corporation ("BNSF"), dated \_\_\_\_\_, 200-, as shown on **Exhibit A**, attached hereto and incorporated herein, Port acquired certain rights-of-way from BNSF ("Port Property") and BNSF reserved for itself certain freight easement rights under the Quitclaim Deed ("Deed") to the Port as shown in **Exhibit B**, attached hereto and incorporated herein, and

B. BNSF has conveyed its freight easement rights to TPO by quit claim deed dated of even date herewith ("Easement"), as shown on **Exhibit C**, attached hereto and incorporated herein. The Easement gives TPO the right to operate on a portion of the Port Property (as defined in Section \_\_ below, the "Corridor"), and

C TPO intends to use the Corridor to provide Freight Rail Service and Excursion Rail Service (defined below), and

D Pursuant to a Railroad Right-of-way License Agreement ("License") between Port dated of even date herewith, attached hereto and incorporated herein as **Exhibit D**, TPO intends to use the Excursion Spur (as defined in the License) to provide Excursion Rail Service on the Excursion Spur

E The parties desire to set forth in this Agreement their respective rights and obligations with respect to TPO's use of the Corridor and adjacent Port Property for Freight Rail Service and related activities.

## Agreement

NOW, THEREFORE, in consideration of the mutual covenants in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows.

### SECTION 1 Definitions

1.1 "Additions and Alterations" means any improvements constructed by or on behalf of either party on the Corridor after the Execution Date, including, without limitation, additions, alterations and betterments of any Facilities, and any construction, reconstruction, modifications and renewals thereof or any reconstruction, modification or renewal of additional Facilities, but excluding maintenance items

1.2 "Automatic Warning Devices" means traffic control devices at railroad-street at-grade crossings and at railroad-pedestrian at-grade crossings, including, without limitation, any combination of flashing light signals, bells, automatic gates, active advance warning devices, highway traffic signals and their associated activation and control devices, control relays and batteries, microprocessor technology, and associated electrical circuitry

1.3 "BNSF" is defined in Recital A.

1.4 "Corridor" means the portion of rail line to which TPO acquired certain rights pursuant to the Easement, located between milepost 23.8 in Woodinville, King County, Washington north to milepost 38.25 in Snohomish, Snohomish County, Washington.

1.5 "Deed" is defined in Recital A.

1.6 "Easement" is defined in Recital A.

1.7 "Environmental Laws" means any and all applicable laws, statutes, regulations, enforceable requirements, orders, decrees, judgments, injunctions, permits, approvals, authorizations, licenses, permissions or binding agreements issued, promulgated or entered into by any governmental agency having jurisdiction over the environmental condition of the Corridor, relating to the environment, to preservation or reclamation of natural resources, or to the management, release or threatened release of contaminants or noxious odors, including, without limitation, the Hazardous Materials Transportation Act, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA), the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, and the Hazardous and Solid Waste Amendments of 1984, the Federal Water Pollution Control Act, as amended by the

Clean Water Act of 1977, the Clean Air Act of 1970, as amended by the Clean Air Act Amendments of 1990, the Toxic Substances Control Act of 1976, and any similar or implementing state law, and all amendments or regulations promulgated thereunder

1.8 "Excluded Conduct" is defined in Section 7.3

1.9 "Excursion Rail Service" means the deployment and operation of trains using the facilities for purposes other than hauling common carrier freight or in service other than Freight Rail Service. This could include but not be limited to dinner train operations.

1.10 "Execution Date" means the date on which this Agreement is executed and becomes effective.

1.11 "Facilities" means all rails, fastenings, switches, switch mechanisms and frogs with associated materials, ties, ballast, signals and communications devices (and associated equipment), Additions and Alterations, drainage facilities, Automatic Warning Devices, traction power substations, overhead catenary systems, bumpers, roadbed, embankments, bridges, trestles, culverts, and any other structures or things necessary for the support thereof and, if any portion thereof is located in a thoroughfare, the term includes pavement, crossing planks and other similar materials or facilities used in lieu of pavement or other street surfacing materials at vehicular and pedestrian crossings of tracks, and any and all structures and facilities required by lawful authority in connection with the construction, renewal, maintenance and operation of any of the foregoing.

1.12 "FRA" means the Federal Railroad Administration.

1.13 "Freight Rail Service" means the common carrier freight rail operations conducted by TPO or TPO's tenants or assignees on the Corridor.

1.14 "Hazardous Materials" means any material or substance (a) the presence of which requires investigation or remediation under any Environmental Law, or (b) which is defined as a "hazardous waste," "hazardous substance," "pollutant" or "contaminant" under any Environmental Law, or (c) the presence of which on, under or over adjacent properties constitutes a trespass by the owners of the Corridor and poses a hazard to the health or safety of persons on adjacent properties; or (d) the presence of which on, under, or over the Corridor causes a nuisance on adjacent properties and poses a hazard to the health or safety of persons on adjacent properties.

1.15 "Invoice" is defined in Section 9.1.

1.16 "Loss" or "Losses" means all losses, damages, claims, demands, costs, liabilities, judgments, fines, fees (including, without limitation, reasonable attorneys' fees) and expenses (including, without limitation, costs of investigation, defense

expenses at arbitration, trial or appeal and without institution of arbitration or suit, and, with respect to damage or destruction of property, cleanup, repair and replacement expenses) of any nature arising from or in connection with death of or injury to persons, including, without limitation, employees or tenants of the parties, or damage to or destruction of property, including, without limitation, property owned by either of the parties or their tenants, in connection with Freight Rail Service or Excursion Rail Service on the Corridor

1.17 **"Port"** is defined in the preamble.

1.18 **"Port Property"** means the rights-of-way acquired by Port from BNSF under the Deed that are subject to TPO's rights under this Agreement; provided, that if Port transfers individual parcel(s) to third parties not affiliated with Port, and the transferred parcel(s) do not remain subject to this Agreement as provided in Section 12.12, such individual parcel(s) shall not be deemed "Port Property"

1.19 **"TPO"** is defined in the preamble

## SECTION 2. **Freight Rail Service**

2.1 **TPO's Rights and Obligations** TPO shall have the exclusive right and obligation (subject to TPO's unfettered right to abandon or discontinue Freight Rail Service) to provide, by itself and/or by or through any entity designated by TPO, Freight Rail Service and/or Excursion Rail Service on and over the Corridor. TPO, and/or its designee, shall also have the right to:

- (a) Modify, maintain, replace, remove and operate the industrydrill tracks constructed upon and across the Corridor in order to fulfill common carrier obligations to existing shippers and receivers of freight.
- (b) Construct, modify, maintain, replace, remove and operate industrydrill and/or Excursion Rail Service-related tracks upon and across the Corridor in order to fulfill common carrier obligations to future prospective shippers and receivers of freight, at the expense of entities other than Port
- (c) Use existing trackage in the Corridor for switching cars to or from industries served by industrydrill tracks described in subparagraphs (a) and (b), which use includes setting out or picking up cars but excludes car classification or storage.
- (d) In the event the construction of any excursion or industrydrill tracks under subparagraph (b), or modification to any excursion

or industry tracks under subparagraphs (a) or (b), necessitates the construction of new Port Facilities, or modifications to, or relocations of, Port's existing Facilities, such construction, modifications and/or relocations shall be at the expense of entities other than Port

- (e) The design, construction, modification or removal of any industrydrill tracks under subparagraph (b), the modification or removal of any industrydrill tracks under subparagraph (a), and any new, modified or relocated Port Facilities necessitated thereby, shall be subject to Port's prior review and approval, which approval shall not be unreasonably withheld, conditioned or delayed
- (f) Use existing trackage in the Corrdor for performing Excursion Rail Service described in Sections 2.1 and 5 1
- (g) TPO acknowledges and agrees that, consistent with Section 2 2, Port may permit certain transportation uses on the Corridor (e g , commuter rail service) during the term of this Agreement that are not inconsistent with TPO's rights under this Agreement and do not materially interfere with TPO's right and obligation to operate Freight Rail Service on the Corridor TPO shall cooperate with Port's permitted users to ensure the accommodation of such transportation uses on the Corridor.

2 2 Port's Rights and Obligations Port expressly declines to assume any obligation to provide common carrier freight rail service on the Corridor. Neither Port nor any person or entity other than TPO (or its permitted successors or assigns) shall be permitted to provide any type of freight rail service on the Corridor

- (b) Port, at Port's election, may perform any of the work of construction, modification, repair, removal or maintenance of industrydrill tracks on the Port Property that TPO would otherwise perform or cause to be performed Any such work by Port shall be performed in accordance with TPO's schedule and design (as approved by Port under subparagraph 2 1 (e) above), and the reasonable documented out-of-pocket cost thereof shall be reimbursed by TPO to Port in accordance with Section 9 1

### SECTION 3 Maintenance, Repair and Replacement Obligations

**3 1 General Maintenance, Repair and Replacement Obligations**

- (a) Except as otherwise provided in this Agreement, TPO shall provide general maintenance and maintenance of way services, including without limitation, inspection, maintenance, repair, installation, alteration and replacement (as necessary) of all rail traction electrification, signal systems, trackage, properties and Facilities, including without limitation, Automatic Warning Devices and grade crossings (including embankments, crossing panels or planking, pavement and curbing) to the extent the same are subject to governmental requirements in connection with grade crossings, located within the Port Property, including the Corridor, in accordance with all applicable laws, rules and regulations, and in a condition reasonably suitable for TPO's intended use of the Corridor
- (b) Notwithstanding the provisions of subparagraph (a) above, any damage to or destruction of Facilities caused by a party or its employees, contractors, invitees or licensees shall be repaired or replaced at the sole cost of such party

**3 2 Remedies**

- (a) In the event that TPO, as the responsible party for maintenance, repair and replacement of any item, fails to perform its maintenance obligations under this Agreement, and such failure results in an imminent and substantial danger to human health or safety or to property, Port may perform such obligations immediately upon notifying TPO by telephone at the number set forth below, and shall be entitled to full reimbursement from TPO within thirty (30) days after submission of a written invoice therefor.
- (b) In the event that TPO or Port discovers any malfunction of, or damage to, Automatic Warning Devices, the discovering party shall promptly notify the other party by telephone at the telephone number set forth below, and TPO shall follow its usual response practices in the event of any malfunction of, or damage to, Automatic Warning Devices

Port Telephone Contact: Telephone No. \_\_\_\_\_

TPO Telephone Contact: Telephone No \_\_\_\_\_

**3.3 Grade Crossing Reconstruction.** The parties acknowledge that certain maintenance procedures may cause an increase in the surface elevation of grade crossings, and that TPO may, from time to time, need to perform additional maintenance or reconstruction work in order to prevent unsafe elevation differentials between the tracks used by TPO and other tracks. TPO will be responsible for any such maintenance and reconstruction work of any such grade crossings.

**4. Construction of Additions and Alterations**

**4.1 Design and Construction Standards.** The design and construction of any Additions and Alterations on the Corridor shall comply with all applicable laws, rules and regulations. The party constructing Additions and Alterations shall follow its customary safety procedures and shall use reasonable efforts to perform work on Additions and Alterations at such times and in such manner as not to materially interfere with, delay or endanger the equipment, Facilities or other facilities of the other party.

**4.2 Design Review.** In the course of designing Additions and Alterations, the constructing party shall reasonably notify and consult with the other party with respect to the design and construction of the Additions and Alterations. If requested by the other party, the constructing party shall deliver to the other party for review and comment copies of each set of plans for Additions and Alterations during the planning and design process. The other party shall notify the constructing party in writing within fifteen (15) days after its receipt of the plans as to whether it wishes to comment on the plans. If so, then the other party shall have the right to provide the constructing party, within thirty (30) days after the other party's receipt of any such set of plans, written comments and suggestions regarding such plans. If the other party timely disapproves such plans, the parties shall meet within fifteen (15) days after disapproval to negotiate in good faith to develop plans acceptable to both. If the parties are unable to agree upon changes to the plans, either party may submit the matter to arbitration pursuant to Section 11. Upon completion of final plans, the constructing party shall give a copy of the final plans to the other party for review to ensure the incorporation of all agreed-upon changes to the plans.

**4.3 Grade Separation Projects.** In the event of a public grade separation project, TPO shall be solely responsible for any costs assessed thereunder. If TPO determines that a proposed grade separation project is desirable and is not feasible unless TPO contributes more than the costs that would be assessed to TPO under applicable laws, then Port agrees to consider in good faith the desirability of the proposed project and whether TPO's additional contribution should be reimbursed by

Port; provided, however, that Port shall have no obligation to reimburse TPO for such additional contribution except to consider it in good faith as provided above.

**SECTION 5 Operations.**

**5.1 TPO's Operations** TPO shall have exclusive authority to manage, direct and control all activities on the Corridor to provide Freight Rail Service and Excursion Rail Service, including, without limitation, the operations of all trains, locomotives, rail cars and rail equipment, and the movement and speed of the same on the Corridor

**SECTION 6 Access**

**6.1 Reciprocal Access and Notice Rights** Subject to the procedures set forth below, and to be in compliance with all applicable rules and regulations of the FRA, the parties shall have the following reciprocal access rights:

- (a) Port may enter upon the Corridor for the purposes set forth in Sections 3.1 and 3.2
- (b) In the event of an emergency of any kind, Port may enter upon the Corridor (i) to warn TPO's trains by any reasonable means, including, without limitation, use of flaggers or placement of torpedoes upon TPO's tracks, or (ii) in the event of a wreck or derailment of train or equipment, to clear the train, equipment or other debris from TPO's tracks. Port shall provide immediate notice of such events to TPO's dispatcher by radiotelephone
- (c) Security personnel of either party in pursuit of a criminal suspect may enter upon the Corridor for the purposes of apprehending the suspect
- (d) TPO may enter upon the Port Property for the purposes set forth in Sections 2.1 and 3.1
- (e) Except for emergencies when reasonable notice under the circumstances shall be given, Port shall give TPO at least forty-eight (48) hours' prior telephonic notice of any entry onto the Corridor, and shall not enter upon the Corridor until a valid work permit is issued by TPO. If flagging is necessary, no entry shall be made until TPO has made arrangements for flagging.

- (f) Any entry by Port (or its contractors, invitees or licensees) on any portion of the Corridor within twenty feet (20') of the track center of the Corridor shall be subject to the notice and flagging requirements under subparagraph (e) above, unless the parties agree to an alternative procedure
- (g) Hazardous Materials may be brought by TPO onto the Corridor only to the extent necessary for the purposes for which entry is allowed under this Section 6, and in all events in compliance with all applicable Environmental Laws.
- (h) In the event of leakage, spillage, release, discharge or disposal of any Hazardous Materials by TPO (including, without limitation, by explosion), TPO shall give Port prompt notice of such event, and at its sole cost and expense, clean or remediate Port's property to the standards required by law or by any governmental agency or public body having jurisdiction in the matter. Should any such leakage, spillage, release, discharge or disposal result in a fine, penalty, cost, or charge, TPO shall promptly and fully pay such fine, penalty, cost or charge. TPO shall be responsible for any such leakage, spillage, release, discharge or disposal by any third party it admits to the Corridor. TPO shall indemnify, protect, defend, and hold harmless Port, its trustees, directors, officers, employees, agents, contractors, parent corporations and subsidiaries from and against any and all liabilities or claims for all loss, damage, injury, and death arising as a result of any such leakage, spillage, release, discharge or disposal. The provisions of this Section 6 1(h) are in addition to and not in limitation of the provisions of Section 7 hereof, except that the provisions of Sections 7 2(a) and 7 2(b) shall govern Losses with respect to personal injury (including bodily injury and death)

**SECTION 7 Liability**

**7 1 Assumption of Responsibility**

- (a) Except as otherwise expressly provided in this Section 7, TPO will assume all Losses and will indemnify Port for all Losses which arise from TPO's presence on the Corridor or on Port Property without regard to fault, failure, negligence, misconduct, malfeasance, or misfeasance of TPO or its employees, agents or servants.

- (b) The allocation of responsibility for Losses under this Section 7 applies only to Losses proximately caused by incidents occurring on or adjacent to the Corridor or Port Property, and arising out of TPO's presence on the Corridor, or on Port Property
- (c) All costs and expenses incurred in connection with the investigation, adjustment and defense of any claim or suit shall be included as part of the Loss for which responsibility is assumed under the terms of this Section 7, including, without limitation, salaries or wages and associated benefits of, and out-of-pocket expenses incurred by or with respect to, employees of either party engaged directly in such work and a reasonable amount of allocated salaries and wages of employees providing support services to the employees so engaged directly in such work.

## 7.2 Allocation of Responsibilities.

- (a) Invitees. Losses arising out of personal injury (including bodily injury and death) to, or property damage suffered by, an invitee of either party shall be the responsibility of and borne and paid solely by TPO, except as otherwise provided in Section 7.2(a)(i) and Section 7.3. Consultants and contractors of TPO, and any person who is on, or has property on, a train or other rolling stock operated by or for the account of TPO or admitted to operate on the Corridor (other than an employee of TPO engaged in performing duties for TPO), shall rebuttably be presumed to be an invitee of TPO.
  - (i) If an invitee of Port is negligent and causes Losses to TPO or Port, Port will be responsible for such Losses and will indemnify TPO.
- (b) Persons Other Than Invitees Except as provided in Section 7.3, Losses arising out of personal injury (including bodily injury and death) to, or property damage directly suffered by any person who is not an invitee of Port or TPO (including, without limitation, Port, TPO, employees of Port or TPO while engaged in the performance of their duties as an employee, persons in adjacent public streets (including public sidewalks), and trespassers), shall be the responsibility of and borne and paid exclusively by TPO
- (c) Unenforceability If any of the provisions of this Section 7.2 would otherwise be prohibited by or unenforceable under the

laws of Washington State (including a determination by a final judgment of a Washington State court with jurisdiction that indemnification under the circumstances involved is against the public policy of Washington State), the indemnity provided by such provision shall be deemed to be limited to and operative only to the maximum extent permitted by law. Without limitation, if it is determined by a final judgment of a Washington State court with jurisdiction that any law or public policy of Washington State prohibits the indemnification of a party for its own sole negligence in any instance covered by the provisions of this Section 7.2, those provisions shall be deemed to exclude indemnification for such party's sole negligence but to permit full indemnification, as specified in this Section 7.2, if both parties were negligent.

**7.3 Excluded Conduct.** "Excluded Conduct" shall mean conduct by a supervisory level or higher employee of one of the parties, which such conduct is alleged in a properly filed complaint by a plaintiff or plaintiffs as the basis for an award of exemplary or punitive damages under Washington State law, and actually results in an award of exemplary or punitive damages by a jury after trial of the issues and exhaustion of judicial appeals which would permit the award of exemplary or punitive damages. Neither party shall be indemnified for any Loss resulting from its own Excluded Conduct, and in any such case such party shall be responsible for and bear the Loss in proportion to its relative degree of fault and be responsible for and bear all exemplary or punitive damages, if any, resulting from its Excluded Conduct. If a party asserts that the other was guilty of Excluded Conduct and denies liability for indemnification of the other party based thereon, the party asserting such Excluded Conduct shall have the burden of proof in establishing such conduct.

**7.4 Scope of Indemnification.** In any case where a party is required under the provisions of this Section 7 to bear a Loss, it shall pay, satisfy and discharge such Loss and all judgments that may be rendered by reason thereof and all costs, charges and expenses incident thereto, and such party shall forever indemnify, defend and hold harmless the other party and its commissioners, trustees, directors, officers, agents, employees, shareholders, parent corporations, subsidiaries and affiliated companies, or governmental entities from, against and with respect to any and all Losses which arise out of or result from the incident giving rise thereto. TPO hereby waives any immunity TPO may have under applicable workers' compensation benefit or disability laws (including but not limited to Title 51 RCW) in connection with the foregoing indemnity. Such waiver shall not prevent TPO from asserting such immunity against any other person or entities.

**TPO AND PORT AGREE AND ACKNOWLEDGE THAT THIS PROVISION IS THE PRODUCT OF MUTUAL NEGOTIATION**

- (b) TPO shall indemnify, hold harmless and defend Port from any and all Railroad Unemployment Insurance Act (45 U S C A §§ 351 et seq ), Railroad Retirement Act (45 U S C §231 et seq ), Railway Labor Act (45 U S C Sec 151 et seq ), Federal Employers Liability Act (45 U S C Sec 51 et seq ), common carrier obligations pursuant to (49 U S C Sec. 10101 et seq ), and any Federal rail safety legislation, that arise from TPO's use of the Corridor and the Port Property

**7.5 Procedure**

- (a) If any claim or demand (short of a lawsuit) shall be made by any person against an indemnified party under this Section 7, the indemnified party shall, within thirty (30) days after actual notice of such claim or demand, cause written notice thereof to be given to the indemnifying party, provided that failure to notify the indemnifying party shall not relieve the indemnifying party from any liability which it may have to the indemnified party under this Section 7 except to the extent that the rights of the indemnifying party are in fact prejudiced by such failure. The indemnifying party shall have the right, at its sole cost and expense, to control (including the selection of counsel reasonably satisfactory to the indemnified party) or to participate in the defense of, negotiate or settle, any such claim or demand, and the parties agree to cooperate fully with each other in connection with any such defense, negotiation or settlement. In any event, the indemnified party shall not make any settlement of any claims or demands which might give rise to liability on the part of the indemnifying party under this Section 7 without either providing the indemnifying party with a full release with respect to such liability or obtaining the prior written consent of the indemnifying party, which consent shall not be unreasonably withheld, conditioned or delayed.
- (b) In the event any lawsuit is commenced against either party for or on account of any Loss for which the other party may be solely or jointly liable under this Agreement, the party sued shall give the other party timely written notice of the pendency of such action, and thereupon the party so notified may assume or join in the defense thereof. If the party so notified is liable therefor under

this Agreement, then, to the extent of such liability, such party shall defend, indemnify and save harmless the party so sued from Losses in accordance with the liability allocations set forth in this Agreement. Neither party shall be bound by any judgment against the other party unless it shall have been so notified and shall have had reasonable opportunity to assume or join in the defense of the action. When so notified and the opportunity to assume or join in the defense of the action has been afforded, the party so notified shall, to the extent of its liability under this Agreement, be bound by the final judgment of the court in such action.

- (c) Subject to the provisions of Section 7.5(a), on each occasion that the indemnified party is entitled to indemnification or reimbursement under this Section 7, the indemnifying party shall, at each such time, promptly pay the amount of such indemnification or reimbursement. If the indemnified party is entitled to indemnification under this Section 7 and the indemnifying party does not elect to control any legal proceeding in connection therewith, the indemnifying party shall pay to the indemnified party an amount equal to the indemnified party's reasonable legal fees and other costs and expenses arising as a result of such proceeding.
- (d) Any dispute between the parties as to the right to indemnification or the amount to which it is entitled pursuant to such right with respect to any matter shall be submitted to arbitration pursuant to Section 11 of this Agreement.

**7.6 Compliance With Laws.** Both parties shall comply with all applicable federal, state and local laws and regulations, and all applicable rules, regulations or orders promulgated by any court, agency, municipality, board or commission. If any failure of either party to comply with such laws, regulations, rules or orders in respect to that party's use of the Corridor results in any fine, penalty, cost or charge being assessed against the other party, or any Loss, the party which failed to comply agrees to reimburse promptly and indemnify, protect, defend (with counsel reasonably acceptable to the indemnified party) and hold harmless the other party for such amount.

**7.7 Delay/Interruption of Service.** Port shall not be held liable for any delay or interruption to the trains, locomotives or cars of TPO unless due to Excluded Conduct or except as otherwise provided for in Section 7.2(a)(i).

**7.8 No Limitation on Risk Allocation** The provisions of this Section 7 shall apply notwithstanding the provisions of Section 8. In no event shall the indemnification provisions of this Section 7 be limited to the insurance coverage required under Section 8.

**7.9 Statutory Defenses** All statutory defenses and limitations applicable to Port shall be retained by Port with respect to parties other than TPO, and none are intended to be waived with respect to parties other than TPO by Port under this Agreement.

## **SECTION 8 Insurance**

### **8.1 TPO Insurance**

- (a) [TPO shall obtain and maintain general liability insurance written on an "occurrence" basis, with minimum limits of [\_\_\_\_\_] Dollars (\$\_\_\_\_\_) per occurrence. Coverage for punitive damages shall be included to the extent such coverage is permitted under Washington State law. Insurance shall be placed with a company having a current Best's Insurance Guide Rating of at least A, or equivalent, and which is a carrier admitted as an insurer by the Washington State Office of the Insurance Commissioner. TPO may self-insure to an amount not to exceed [\_\_\_\_\_] Dollars (\$\_\_\_\_\_), provided that total coverage limits (self-insurance plus excess liability insurance) are at least [\_\_\_\_\_] Dollars (\$\_\_\_\_\_) per occurrence, provided, however, that this sentence shall not inure to the benefit of TPO's successors or assigns absent the reasonable written consent of Port. In the event Port does not reasonably consent to self-insurance by a successor or assign of TPO, the self-insured amount for such successor or assign shall not exceed [\_\_\_\_\_] Dollars (\$\_\_\_\_\_). The foregoing policy limits shall be adjusted by the parties every three (3) years to reflect industry standards, liability claim trends and market conditions. In any event, however, the total coverage (self-insurance plus excess liability) shall not be less than [\_\_\_\_\_] Dollars (\$\_\_\_\_\_). The foregoing self-insurance limit shall not exceed \_\_\_\_\_ percent (\_\_\_%) of the total coverage limits (self-insurance plus excess liability insurance) maintained by TPO; provided, however, that the foregoing self-insurance limit may be increased by up to an additional \_\_\_\_\_ percent (\_\_\_%) of the total coverage limits if TPO provides adequate security acceptable to and approved by Port for the

increased self-insurance amount over and above the initial \_\_\_\_\_ percent (\_\_\_%) limit ]

- (b) TPO's insurance shall be primary with respect to its obligations under this Agreement and with respect to the interest of the Port as an additional insured. TPO shall provide Port with evidence that it has named the Port as an additional insured under TPO's policy. Any other insurance maintained by an additional insured shall be excess of the coverage herein defined as primary and shall not contribute with it.
- (c) TPO's insurance shall be maintained for the full term of this Agreement and shall not be permitted to expire or be canceled or materially changed. Each such insurance policy shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in coverage or limits except after thirty (30) days' prior written notice has been given to each insured and additional insured.
- (d) Prior to the Effective Date, TPO shall provide Port with certified copies of its policies, as well as certificates of insurance and endorsements evidencing the insurance required by this Section. Certificates of insurance shall be issued on the ACORD or equivalent form.
- (e) All statutory defenses and limitations applicable to TPO shall be retained by TPO with respect to parties other than Port, and none are intended to be waived with respect to parties other than Port by TPO by the acquisition of insurance by TPO or under this Agreement.

**8.2 Failure to Maintain Insurance.** A failure of TPO to maintain the insurance required by this Section 8 shall not relieve TPO of any of its liabilities or obligations under this Agreement.

**8.3 Waiver of Subrogation.** Every policy of insurance required under this Section 8 to be held by TPO shall include a waiver of all rights of subrogation against Port.

## **SECTION 9. Compensation and Billing**

**9.1 Invoices** Any Invoice or Invoices submitted to the parties under this Agreement ("Invoice" or "Invoices") must be itemized with a detailed description of the work performed, the date of such work, the person performing such work, the time

expended and the associated hourly billing rate or charge for such work, and any reimbursable expenses (including, without limitation, the cost of materials used) incurred in the performance of the work. The party requesting reimbursement shall certify that it has actually incurred the expenses set out in its Invoice. Invoices for reimbursable expenses may not exceed the out-of-pocket expense for such items. Invoices shall be paid within thirty (30) days after receipt thereof by the payor. If a party disputes any items on an Invoice, that party may deduct the disputed item from the payment, but shall not delay payment for the undisputed portions. The amounts and reasons for such deductions, if any, shall be documented to the other party within thirty (30) days after receipt of the Invoice. Once documentation is given for the disputed amounts, and accepted by the paying party, the disputed amounts shall be paid by the paying party with fifteen (15) days after receipt of the documentation. No Invoice shall be submitted later than one hundred twenty (120) days after the last day of the calendar month in which the reimbursable expense or cost covered thereby is incurred.

**9.2 Audit.** So much of the books, accounts and records (except for privileged or confidential records) of each party hereto as are related to the subject matter of this Agreement shall at all reasonable times be open to inspection and audit by the authorized representatives and agents of the parties. All accounting records and other supporting papers shall be maintained for a minimum of three (3) years from the date thereof. If work relating to this Agreement is funded in whole or in part by a federal grant, the Comptroller General of the United States and authorized representatives of the federal agency furnishing the grant shall have the right to examine and audit such books, accounts, and records in accordance with applicable federal laws and regulations.

**9.3 Supporting Documentation** Upon request, a party disputing the accuracy of any Invoice shall be entitled to receive from the invoicing party copies of such supporting documentation and/or records as are kept in the ordinary course of the invoicing party's business and which are reasonably necessary to verify the accuracy of the Invoice as rendered.

**9.4 Fees** TPO shall pay Port \$\_\_\_\_\_ per month in rental compensation for use of the Corridor. This amount shall escalate by \_\_\_\_\_ when carloads exceed \_\_\_\_\_ per \_\_\_\_\_

## SECTION 10. Coordination

**10.1 Coordination Committee** Port and TPO shall establish a Coordination Committee consisting of at least two (2) representatives of each party. The Coordination Committee shall be a forum for the parties to share information, discuss

matters submitted by one party to the other party for review and/or approval, and seek resolution of any issues between the parties with respect to this Agreement. The Coordination Committee shall meet regularly (in person or telephonically) and also as necessary to address issues between the parties that require prompt resolution

## **SECTION 11      Binding Arbitration**

**11.1 Controversies Subject to Arbitration** Any and all claims, disputes or controversies between Port and TPO arising out of or concerning the interpretation, application, or implementation of this Agreement that cannot be resolved by the parties through the Coordination Committee or by negotiations shall be submitted to binding arbitration administered by the American Arbitration Association ("AAA") under its Commercial Arbitration Rules, except as otherwise provided in this Section 11. If the AAA discontinues promulgation of the Commercial Arbitration Rules, the parties shall use the AAA's designated successor rules, and if the AAA does not designate successor rules, the parties shall agree on other rules. The judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

**11.2 Selection of Arbitrator** In the event a claim, dispute or controversy arises, either party may serve a written demand for arbitration upon the other party. If the claim, dispute or controversy is not resolved by the parties within thirty (30) days after the service of the demand, the matter shall be deemed submitted to arbitration. If within forty (40) days after service of the demand, the parties have not selected a single arbitrator, each party shall within an additional ten (10) days thereafter select an arbitrator. (In such case, if either party has not selected an arbitrator within ten (10) days after receipt of notice that the other party has selected an arbitrator, the arbitrator selected by the other party shall arbitrate the claim, dispute or controversy.) The two selected arbitrators shall select a third arbitrator. If the two arbitrators are unable to agree upon the third arbitrator within ten (10) days of the selection of the two selected arbitrators, the AAA shall select the third arbitrator. The arbitrator(s) shall be disinterested.

## **11.3 Expedited Arbitration Schedule**

- (a) In the event either party reasonably finds that the issues of any claim, dispute or controversy are likely to directly, imminently, materially and adversely affect human health or safety, either party may request, in the arbitration demand delivered pursuant to Section 11.2, an expedited arbitration procedure as set forth in this Section 11.3 solely for the purpose of obtaining a provisional remedy that by law or in equity could be imposed in a court proceeding against a rail carrier subject to the jurisdiction of the

Surface Transportation Board (e.g., temporary restraining order, preliminary injunction or injunction)

- (b) Within five (5) days after service of a demand for expedited arbitration, the parties shall agree on an arbitrator. If the parties fail to agree on an arbitrator within such five-day period, each party shall within two (2) days select an arbitrator. In such case, if either party has not selected an arbitrator within two (2) days after receipt of notice that the other party has selected an arbitrator, the arbitrator selected by the other party shall arbitrate the claim, dispute or controversy. The two selected arbitrators shall select a third arbitrator. If the two arbitrators are unable to agree upon the third arbitrator within two (2) days of the deadline for the selection of the two selected arbitrators, the AAA shall select the third arbitrator. The arbitrator(s) shall be disinterested.
- (c) The expedited arbitration hearing shall commence no later than ten (10) days after service of a demand for expedited arbitration and shall be concluded on the same day. The arbitration decision shall be rendered by the arbitrator(s) in writing on or before the day following the arbitration hearing.
- (d) Prior to rendering any decision, the arbitrator must find that the issues of the claim, dispute or controversy are likely to directly, imminently, materially and adversely affect human health or safety. In the event the arbitrator finds that the foregoing criteria have not been met, the proceeding shall be dismissed without prejudice and the parties shall proceed with the arbitration procedure and schedule set forth in Sections 11.1 and 11.2; provided, however, that no new demand for arbitration need be served by the party demanding arbitration.

11.4 Pending Resolution During the pendency of such arbitration proceedings, the business and the operations to be conducted, and compensation for service under this Agreement, to the extent that they are the subject of such controversy, shall continue to be transacted, used and paid in the manner and form existing prior to the arising of such controversy, unless the arbitrator shall make a preliminary ruling to the contrary.

11.5 Cost of Arbitration Each party solely shall bear the attorneys' fees, costs and expenses incurred by it in connection with such arbitration; provided, however, the arbitrator shall have the power to award attorneys' fees and costs to either party if the

arbitrator determines in its reasonable discretion that the position of the other party to the arbitration was frivolous.

## **SECTION 12      Term and Termination**

**12.1 Term** The initial term of this Agreement shall expire on the 10<sup>th</sup> anniversary of the Execution Date. So long as TPO is not in default with respect to a material term or condition of this Agreement, TPO may elect to continue this Agreement for one (1) additional renewal term of 10 years by giving Port written notice of such intent at least one (1) year prior to the expiration of the initial term. Notwithstanding the foregoing, this Agreement shall terminate 60 days after written notice by Port to TPO that TPO is in default with respect to a material term or condition of this Agreement, which default has not been cured on or prior to such 60<sup>th</sup> day.

**12.2 Termination for Abandonment**. In the event that TPO, or a permitted successor or assign, lawfully abandons, discontinues or otherwise lawfully ceases to provide Freight Rail Service on the Corridor by obtaining any necessary authority or exemption from the Surface Transportation Board ("STB"), Port may choose to (1) terminate this Agreement upon ninety (90) days written notice to TPO, or (2) terminate all the rights of TPO, or that of a permitted successor or assign, to provide Freight Rail Service over the Corridor under this Agreement. Notwithstanding the previous sentence, after the termination of this Agreement under this Section 12.2, TPO may, with Port's approval, continue to provide Excursion Rail Service over the Corridor. In all events, TPO shall remain liable for all accrued or continuing obligations under this Agreement, and all obligations required upon termination and surrender of the Corridor.

**12.3 Offers of Financial Assistance ("OFA")**. In the event TPO, or a permitted successor or assign, seeks STB authority (or an exemption therefrom) to abandon any portion or segment of the Corridor, if TPO receives an OFA with respect thereto, TPO shall promptly notify Port, Port (or its designee) shall submit its own OFA and TPO shall accept the OFA submitted by Port (or its designee) for the offer amount of \$1

**12.4 Railbanking**. In the event TPO, or a permitted successor or assign, seeks STB authority (or an exemption therefrom) to abandon any portion or segment of the Corridor, if Port, King County ("County"), or the designee of either of them timely files with the STB a Statement of Willingness to Assume Financial Responsibility ("SWAFR") meeting the requirements of the STB's regulations, TPO shall file with the STB: (i) an expression of willingness to enter into a railbanking/trail use agreement; (ii) a statement that TPO and Port, or TPO and County, or TPO and such designee, have entered into such an agreement; and (iii) a request that the STB issue a Notice of Interim Trail Use ("NITU") or a Certificate of Interim Trail Use ("CITU") (as appropriate). Upon the effective date of each such NITU or CITU, TPO shall transfer to Port, (or Port's

designee) TPO's right to restart freight rail service on the portion of the Corridor that is the subject of the SWAFR

12.5 Binding Successors, Assignment This Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective permitted successors and assigns, except that TPO may not assign its rights and obligations under this Agreement without the prior written consent of Port, which consent may not be unreasonably denied, delayed or conditioned. Any assignment, encumbrance or other transfer in violation of the foregoing shall be void. Port may assign its rights and obligations under this Agreement freely.

12.6 Notices Except as otherwise expressly provided in this Agreement, all notices and other communications under this Agreement shall be in writing and shall be deemed to have been duly given (a) on the date of delivery, if delivered personally to the party to whom notice is given, or if made by telecopy directed to the applicable telecopy number listed below and the transmission is confirmed by mail as provided under (b) below which is deposited on the first business day after the transmission, or (c) at the earlier of actual receipt or the third business day following deposit in the United States mail, postage prepaid. Notices and other communications shall be directed to the parties at the addresses shown below. A party may change its person designated to receive notice, its telecopy number or its address from time to time by giving notice to the other party in accordance with the procedures set forth in this Section.

Port	PORT OF SEATTLE [ADDRESS] Telephone No _____ Telecopy _____
TPO:	[THIRD PARTY OPERATOR] [ADDRESS] Telephone No _____ Telecopy: _____

12.7 Headings The section and subsection headings in this Agreement are for convenience only and shall not be used in its interpretation or considered part of this Agreement

12.8 Integration, Amendment, and Waiver This Agreement controls all the rights and obligations of TPO and Port as to the operation of Freight Rail Service and Excursion Rail Service on the Corridor. (The License controls all the rights and

obligations of TPO and Port as to the operation of Excursion Rail Service on the Excursion Spur) This Agreement is the entire agreement, and supersedes all prior and contemporaneous agreements, representations, and understandings of the parties concerning the subject matter hereof. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing by both of the parties. No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provisions, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

**12.9 Counterparts.** This Agreement may be executed in any number of counterparts, and by different parties in separate counterparts, each of which, when executed and delivered, shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument. Facsimile signatures shall be deemed original for all purposes.

**12.10 Governing Law.** This Agreement shall be construed and interpreted in accordance with the laws of Washington State.

**12.11 Time of Essence.** Time is of the essence of each and every provision of this Agreement.

**12.12 Agreement Runs With Land; Recordation.** This Agreement is made for the benefit of the Corridor and shall run with the land, except that any parcel transferred by a party to an unaffiliated person or entity for purposes other than rail operations or trail use that does not contain any facilities used in connection with the rail operations intended by this Agreement shall be deemed removed from the Corridor or Port Property as applicable. This Agreement shall bind and inure to the benefit of the parties' respective successors in interest in the Corridor to the extent stated in the prior sentence. This Agreement shall be recorded, and each party, upon request of the other party, agrees to execute a document in recordable form evidencing the removal of any parcel from the Corridor or the Port Property.

**12.13 Not for the Benefit of Others.** This Agreement and each and every provision herein is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein shall be construed to create or increase any right in any third party to recover by way of damages or otherwise against either of the parties hereto.

**12.14 Attorneys' Fees.** If any legal action or any arbitration or other proceeding is brought for the enforcement or interpretation of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any of the provisions of this Agreement, the prevailing party or parties shall be entitled to recover

reasonable attorneys' fees and other costs in connection with that action or proceeding, in addition to any other relief to which it or they may be entitled

12 15 Regulatory Requirements. If any governmental agency imposes any requirement on either or both of Port and TPO which Port can reasonably demonstrate would not have been imposed but for TPO's use of the Corridor for TPO's Freight Rail Service or Excursion Rail Service, the entire cost of compliance shall be borne solely by TPO, including, without limitation, costs and expenses for construction and maintenance of improvements, relocation of Facilities, implementation of safety procedures, and the filing of or participation in regulatory proceedings. Both parties shall reasonably cooperate to ensure compliance with all such governmental requirements Notwithstanding the foregoing sentence, TPO's cooperation shall not include any modification to, or restriction of, its operations in the Corridor, provided, however, that TPO's cooperation may include modifications to the Facilities to the extent such modifications do not restrict TPO's operations, and subject to TPO's obligation to bear all costs and expenses thereof.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective as of the Execution Date.

PORT OF SEATTLE,  
a Washington Municipal Corporation

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

[THIRD PARTY OPERATOR],  
a \_\_\_\_\_ corporation

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