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August 9, 2018
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August 9, 2018

VIA E-FILING

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

Re: STB Docket No. FD 36213
Santa Cruz County Regional Transportation Commission -
Petition for Declaratory Order / Expedited Consideration Requested

Dear Ms. Brown:

Enclosed for filing in the above-reference proceeding is a Petition for Declaratory Order being filed on behalf of the Santa Cruz County Regional Transportation Commission ("SCCRTC"). Subject to the fee waiver request below, also enclosed is a credit card authorization for the filing fee of \$1400 representing the filing fee for this Petition.

In this proceeding, SCCRTC is seeking an order from the Board confirming that SCCRTC will *not* become a carrier as a result of its agreement with a new operator for the rail line at issue. Accordingly, SCCRTC is filing this Petition as a "government entity," and believes that the filing fee should be waived in accordance with the Board's policy as set forth in 49 CFR 1002.2(e)(1). In a previous proceeding (STB Docket No. FD 35491) involving SCCRTC and the same rail line but a different operator, the Office of Proceedings granted the fee waiver request. However, so as not to delay the handling of the Petition, SCCRTC has enclosed authorization for the payment of the filing fee. SCCRTC requests that the Office of Proceedings not process the authorization pending the determination of the fee waiver request, or alternatively, promptly process a refund of the filing fee.

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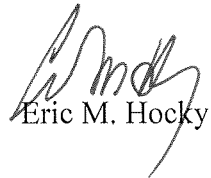
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Cynthia T. Brown
August 9, 2018
Page 2

Please let me know if there are any questions regarding this filing. Thank you for your assistance.

Respectfully,

CLARK HILL PLC



Eric M. Hocky

EMH/e
Encls.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36213

**SANTA CRUZ COUNTY REGIONAL TRANSPORTATION COMMISSION –
PETITION FOR DECLARATORY ORDER**

(color copies included)

EXPEDITED CONSIDERATION REQUESTED

ERIC M. HOCKY
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Dated: August 9, 2018

Attorneys for Santa Cruz County
Regional Transportation Commission

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36213

**SANTA CRUZ COUNTY REGIONAL TRANSPORTATION COMMISSION –
PETITION FOR DECLARATORY ORDER**

Santa Cruz County Regional Transportation Commission (“SCCRTC”) requests that the Board exercise its discretion under 5 USC §554(e) and 49 USC §1321 to remove uncertainty, and declare that the transaction described herein between SCCRTC and St. Paul & Pacific Railroad Company, LLC (“SPR”) is not subject to the Board’s regulatory authority, and that SCCRTC will continue not to be subject to the Board’s regulatory authority as a carrier, under the Board’s precedents, namely *State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad*, 8 ICC 2d 835 (1991) (“*State of Maine*”) and its progeny.¹

BACKGROUND

In 2012, SCCRTC, a public agency created under the law of the State of California, acquired the physical assets of an approximately 31-mile line of railroad (the “Line”) owned by Union Pacific Railroad Company (“UP”) between milepost 0.433 at Watsonville Junction, and milepost 31.39 in Davenport, in Santa Cruz County, California. SCCRTC acquired only the physical assets of the Line, with UP retaining a permanent freight easement which was subsequently transferred to Santa Cruz and Monterey Bay Railway Company (“SCMB”) in order

¹ SCCRTC recognizes that the Board would still have authority over the railroad line, and over the operator of the line as the freight common carrier. *See Friends of the Aquifer*, STB Finance Docket No. 33966 (served August 15, 2001), slip op. at 4.

that SCMB could provide common carrier freight service over the Line.² The SCMB operations have been conducted pursuant to an Administration, Coordination and License Agreement (“ACL Agreement”) entered into by SCCRTC and SCMB. The Board reviewed the ACL Agreement and the Quitclaim Deed (with reserved freight easement), and determined that the transaction did not conflict with *State of Maine*, that the proposed acquisition of assets would not constitute the acquisition of a railroad line under 49 U.S.C. §10901(a)(4), and that SCCRTC would not become a carrier as a consequence of the transaction.³

SCMB has operated the Line since that time. Late last year with SCMB unable to keep up with its common carrier obligations and the obligations under the ACL Agreement, SCMB and SCCRTC agreed that SCCRTC should seek a new third party operator for the Line. Accordingly, SCCRTC issued a new Request for Proposals (“RFP”), and as a result of the RFP process chose Progressive Rail Incorporated (“PGR”) and its newly-formed subsidiary St. Paul & Pacific Railroad Company, LLC (“SPR”) as the new operator. SCMB has agreed to transfer its retained freight easement under the Quitclaim Deed to SPR, and SCCRTC, PGR and SPR have negotiated a slightly revised Administration, Coordination and License Agreement (“New ACL Agreement”) to govern the relations between SPR as operator and SCCRTC as property owner.

In late May, while the parties were negotiating the New ACL Agreement, SCMB suddenly ceased operations as a result of Federal Railroad Administration (“FRA”). To facilitate a prompt change in operators and limit the break in service, on July 16, 2018, SPR filed a change in operators exemption notice in STB Docket No. FD 36207, and PGR filed a continuance in

² *Santa Cruz and Monterey Bay Railway Company – Acquisition and Operation Exemption – Union Pacific Railroad Company*, STB Docket No. 35659 (served August 17, 2012).

³ *Santa Cruz County Regional Transportation Commission – Petition for Declaratory Order*, STB Docket No. FD 35653 (served September 7, 2012), slip op. at 4.

control exemption notice in STB Docket No. 36208. Although SCMB has since been able to resume operations, SCCRTC and SPR still plan to promptly proceed with the change in operators. SCCRTC is filing this Petition to confirm that the entry into the New ACL Agreement will not change the Board's prior findings regarding SCCRTC's status as a non-carrier.

ARGUMENT

As noted, SCCRTC has previously been before the Board with respect to its acquisition of the Line, the retained freight easement in the Quitclaim Deed from UP, and the agreement governing the relations between SCCRTC and the freight operator. Initially, in April, 2011, in *Santa Cruz [County] Regional Transportation Commission – Petition for Declaratory Order*, Docket No. FD 35491, SCCRTC filed a Petition for Declaratory Order (“First Petition”) requesting that the Board declare that the transactions described therein among SCCRTC, UP and Sierra Northern Railway (“SERA”) were not subject to the Board's regulatory authority, and that SCCRTC would not be subject to the Board's regulatory authority as a carrier, under the Board's *State of Maine* precedents. The Board, in a decision served on August 22, 2011, raised questions about the permanence and exclusivity of the freight operating easement reserved by UP, and about whether SCCRTC's rights under the proposed ACL Agreement would allow SCCRTC to unduly interfere with SERA's operation of the Line and the ability of SERA to fulfill its common carrier obligations. The August 22 Decision permitted SCCRTC to submit a modified quitclaim deed (with a reserved freight easement) and a revised ACL Agreement to address the Board's concerns. SCCRTC did so, and in a decision served December 15, 2011 (the “*December 2011 Decision*”), the Board found with respect to the revised Quitclaim Deed and

revised ACL Agreement:

Collectively, these modifications to the proposed Quitclaim Deed and ACL Agreement comport with the *State of Maine* requirements, in that the seller would retain a permanent, exclusive freight rail operating easement and the subsequent third-party easement owner/operator would maintain sufficient control over the line to carry out its common carrier operations. Although the ACL Agreement contains provisions regarding the term of that agreement, as well as its termination and expiration, these provisions cannot be interpreted or enforced in a way that would affect Sierra's common carrier service. Moreover, as several of the parties' revisions suggest, the Freight Easement preserves Sierra's common carrier rights and obligations as to the Line unless and until the Board approves a transfer of the Freight Easement to another carrier or approves discontinuance of Sierra's service.

Based on this record, we find that nothing in the proposed transaction would affect the continuing validity of Sierra's permanent, exclusive Freight Easement, or would otherwise unduly interfere with Sierra's ability to fulfill its common carrier obligation. Therefore, the proposed transaction is consistent with *State of Maine*, and the proposed acquisition of the assets of the Line by Santa Cruz would not constitute the acquisition of a railroad line under 49 U.S.C. §10901(a)(4) or cause Santa Cruz to become a rail carrier. Under these circumstances, we declare that the transaction, as proposed, does not require Board authorization under 49 U.S.C. §10901.

December 2011 Decision, slip op. at 6 (footnotes omitted).

Just one week after the Board issued its decision, SERA filed a petition to withdraw its verified notice of exemption to operate the line, indicating that it no longer wished to acquire the freight service or provide service over the Line. The Board allowed the withdrawal in a decision served February 16, 2012. *Sierra Northern Railway – Acquisition and Operation Exemption – Union Pacific Railroad Company*, STB Docket No. FD 35490 (served February 16, 2012).

SCCRTC went through another RFP and selected SCMB as the potential operator. The parties negotiated a slightly modified ACL Agreement. There were no changes to Quitclaim Deed or retained freight easement. SCCRTC again went to the Board to request a declaratory

order that the acquisition by SCCRTC of the assets comprising the Line was not subject to the Board's jurisdiction and that SCCRTC would not become a carrier as a result of the acquisition or its entry into the ACL Agreement. The Board agreed and found:

The proposed Quitclaim Deed and ACL Agreement are substantially the same as those the Board address in the December 2011 Decision. Collectively, as more fully discussed in that decision, they comport with the State of Maine Requirements: that the seller retain a permanent, exclusive freight rail operating easement and that the subsequent third-party easement owner / operator maintain sufficient control over the Line to carry out its common carrier operations. Therefore, the proposed transaction is consistent with State of Maine, and the proposed acquisition of the assets of the Line by [SCCRTC] would not constitute the acquisition of a railroad line under 49 U.S.C. § 10901(a)(4) or cause Petitioner to become a rail carrier. Under these circumstances, we declare that the transaction, as proposed, does not require Board authorization under 49 U.S.C. § 10901.

Santa Cruz County Regional Transportation Commission – Petition for Declaratory Order, STB Docket No. FD 35653 (served September 7, 2012), slip op. at 4.

As noted above, SCCRTC has selected SPR, a newly formed non-carrier subsidiary of short line holding company PGR as the new operator. SPR will be assigned the retained freight easement under the Quitclaim Deed currently held by SCMB that has previously been reviewed by the Board (there will be no changes). SCCRTC and SPR have now negotiated the New ACL Agreement, a copy of which is attached hereto as Exhibit A. The New ACL Agreement has only minor revisions to the previous ACL Agreement, and the changes will not impede the ability of SPR to control the line to carry out its common carrier obligations.⁴ A comparison between the New ACL Agreement and the previous ACL Agreement showing the revisions is attached hereto as Exhibit B.

⁴ The changes relate primarily to the terms governing the provision of "Transportation Service" (passengers), and to use of the Line for car storage, and would not affect or restrict SPR's ability to carry out its common carrier freight obligations.

Since there has been no change in the retained freight easement, and since the ACL Agreement has not been revised in any material way to limit or restrict common carrier operations over the Line, SCCRTC requests that the Board (1) reiterate its findings with respect to the transaction and ACL Agreement in the September 2012 Decision in Docket FD 35653, and (2) find that the entry into the New ACL Agreement will not cause SCCRTC to become a rail carrier subject to the Board's jurisdiction.

EXPEDITED CONSIDERATION REQUESTED

Given that the current operator is not able to provide service on the Line, and that the proposed new operator SPR has been selected and filed for authority which will be effective August 15, 2018, SCCRTC would like the new operator to begin operations as soon as it has been authorized to do so by the Board to minimize the lack of service faced by customers on the Line. Because there have been only minor changes to the transaction and agreements previously reviewed and analyzed by the Board, SCCRTC does not believe that there should be any significant issues presented by this request. (No adverse comments were filed in any of the previous proceedings.) Accordingly, SCCRTC requests that the Board grant the requested relief at the earliest possible date.

Respectfully submitted,


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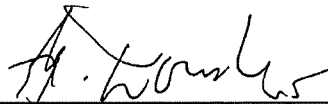
Dated: August 9, 2018

Attorneys for Santa Cruz County
Regional Transportation Commission

VERIFICATION

I, George Dondero, Executive Director of Santa Cruz County Regional Transportation Commission, verify under penalty of perjury that statements contained in the foregoing Petition for Declaratory Order are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verification.

Executed on August 9, 2018



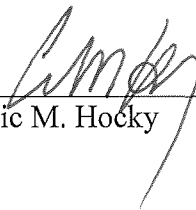
George Dondero

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I caused a copy of the foregoing Petition for Declaratory Order to be served electronically on counsel for St. Paul & Pacific Railroad Company, LLC as follows:

Audrey Brodrick
Bradon J. Smith
Fletcher & Sippel LLC
29 North Wacker Drive, Suite 800
Chicago, IL 60606-3208
abroderick@fletcher-sippel.com
bsmith@fletcher-sippel.com

Dated: August 9, 2018



Eric M. Hocky

EXHIBIT A

NEW ADMINISTRATION, COORDINATION AND LICENSE AGREEMENT

ADMINISTRATION, COORDINATION, AND LICENSE AGREEMENT

This administration, coordination, and license agreement (the "Agreement") is dated as of _____, 2018, and is between the Santa Cruz County Regional Transportation Commission (the "Commission"), a public agency created under California law, and St. Paul & Pacific Railroad, LLC, a Minnesota limited liability company, a subsidiary of Progressive Rail Incorporated ("Railway").

The Commission purchased the Santa Cruz Branch railroad line (the "Property") from Union Pacific Railroad Company ("UP"), via an August 20, 2010, Purchase and Sale Agreement (the "Purchase and Sale Agreement");

UP reserved an easement to conduct common carrier freight railroad operations on and over the Property (the "Freight Easement"), which Freight Easement is set forth in the Quitclaim Deed by which UP, as grantor, quitclaimed all its right, title and interest in and to the Property to the Commission, as grantee;

UP quitclaimed all its right, title, and interest in and to the Freight Easement to a previous operator to act as the sole freight rail operator on the Freight Easement;

For the last few years, a previous operator operated on the Property pursuant to an agreement with the Commission;

The previous operator has agreed to cancel its current administration, coordination and license agreement to operate the Property and to convey the Freight Easement to the Railway;

The Commission has undertaken a study to help determine the best use of the Property by the Commission (the "Study");

Railway needs a long-term agreement of at least 10 years, covering all facets of railroad operations, to justify its investment of time and money needed to conduct railroad operations; and

Railway and the Commission desire to establish their respective rights and obligations with respect to the Property and the Freight Easement by *entering into this Agreement*.

The parties therefore agree as follows:

1. Definitions

- 1.1 The term "Commission" is defined in the introductory paragraphs of this Agreement and includes its directors, officers, employees, agents, parents, subsidiaries, affiliates, commonly controlled entities, and all others acting under its or their authority.
- 1.2 The term "Coordination Committee" is defined as the committee established by the parties pursuant to Section 11.
- 1.3 The term "FRA" is defined as the United States Federal Railroad Administration or its regulatory successor.

- 1.4 The term “Freight Easement” is defined in the introductory paragraphs of this Agreement.
- 1.5 The term “Freight Easement Property” is defined as the portion of the Property subject to the Freight Easement consisting of any and all real and personal property within 10 feet of the centerline of any track on the Property except where roadways, buildings, or Property boundary lines reduce such distance to less than 10 feet, and except for any retained rights and personal property described herein.
- 1.6 The term “Freight Service” is defined as any and all common carrier rail freight operations, rights, or obligations as to the Freight Easement Property including freight transportation, switching, temporary rail car storage (subject to the conditions of Section 2.5), transloading freight and dispatching.
- 1.7 The term “Hazardous Materials” is defined as any substance: (a) that now or in the future is regulated or governed by, requires investigation or remediation under, or is defined as any hazardous waste, hazardous substance, bio-hazard, medical waste, pollutant, or contaminant under any governmental statute, code, ordinance, regulation, rule, or order, or any amendment thereto, including the Hazardous Material Transportation Act 49 U.S.C. § 5101 *et seq.*, the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*, and the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, or (b) that is toxic, explosive, corrosive, flammable, radioactive, carcinogenic, dangerous, or otherwise hazardous, including gasoline, diesel, petroleum hydrocarbons, polychlorinated biphenyls (PCBs), asbestos, radon, and urea formaldehyde foam insulation.
- 1.8 The term “Hazardous Materials Laws” means all present and future governmental statutes, codes, ordinances, regulations, rules, orders, permits, licenses, approvals, authorizations, and other requirements of any kind applicable to Hazardous Materials.
- 1.9 The terms “include”, “includes”, and “including” are to be read as if they were followed by the phrase “without limitation.”
- 1.10 The term “Loss” is defined as any loss, damage, claim, demand, action, cause of action, penalty, fine, payment, cost, liability, or expense of whatsoever nature, including court costs and reasonable attorneys’ fees, resulting from or related to: (a) any injury to or death of any person, including officers, agents, and employees of the Commission or Railway; or (b) damage to or loss or destruction of any property, including the Property, any adjacent property, and the roadbed, tracks, equipment, other property of the Commission or Railway, and any property in the Commission’s or Railway’s care or custody.
- 1.11 The term “Property” is defined as the entire Santa Cruz Branch railroad line right-of-way purchased from UP by the Commission, including all improvements thereto, whether now existing or hereafter constructed.
- 1.12 The term “PUC” is defined as the California Public Utilities Commission.

- 1.13 The term “Railroad Facilities” is defined as all tracks and other railroad property and fixtures, including ties, switches, trackbeds, bridges, trestles, retaining walls, culverts, railroad signs, switch mechanisms, signals, grade crossings, active and passive grade crossing warning devices and other appurtenances associated with the trackage described on Exhibit A and located on the Freight Easement Property.
- 1.14 The term “Railway” is defined in the introductory paragraphs of this Agreement and includes its directors, officers, employees, agents, parents, subsidiaries, affiliates, commonly controlled entities, any other related persons and entities, and all others acting under its or their authority.
- 1.15 The term “STB” is defined as the United States Surface Transportation Board or its regulatory successor.
- 1.16 The term “Study” is defined in the introductory paragraphs of this Agreement and refers to the Unified Corridor Investment Study anticipated to be completed by the end of calendar year 2018. For purposes of this Agreement, the Study shall be deemed to be “completed” on the date that it is presented, with a recommendation of Commission staff regarding the use of the Property, to the governing Board of the Commission.
- 1.17 The term “Transportation Service” is defined as the transportation of passengers by rail, including excursion trains. Transportation Service does not include regularly scheduled mass transit or commuter service.
- 1.18 The term “UP” is defined in the introductory paragraphs of this Agreement.

2. Commission Grants Rights

- 2.1. Freight Service (Phase I). Upon the effective date of this Agreement, the Commission grants Railway the exclusive right and obligation to provide Freight Service on the Freight Easement Property. Railway’s rights and obligations to provide Freight Service under this Agreement are limited to those set forth in the Freight Easement or in this Agreement. The authorization to provide Freight Service under this Agreement shall be referred to as “Phase I” of this Agreement. Railway may not, in performing such Freight Service, exceed the maximum speeds authorized by applicable law for the existing track conditions or transport rail cars exceeding the applicable track and bridge weight limits.
- 2.2. Trackage License. The Commission grants Railway an exclusive license to use, maintain, repair, and operate all of the Railroad Facilities for all Freight Service purposes. Notwithstanding their location on the Freight Easement Property, buildings and other fixtures which are not appurtenances associated with the tracks and related railroad property are not included as part of this license.
- 2.3. No Material Interference with Freight Service. Notwithstanding the rights retained by the Commission under this Agreement, the exercise of such rights by the Commission may not materially interfere with Railway’s Freight Service rights and obligations under federal law, or rights under the Freight Easement, unless first approved by the STB.

2.4. Transportation Service and Other Third-Party Licenses.

2.4.1. Railway Transportation Service (Phase II). If upon completion of the Study the Commission determines that all of the Freight Easement Property should be used for Transportation Service, the Commission immediately will grant Railway a non-exclusive license to use the Freight Easement Property and Railroad Facilities to provide Transportation Service on the Freight Easement Property; provided that prior to the commencement of operations (a) the Commission has approved in writing a detailed plan from Railway describing such Transportation Service, (b) the Transportation Service will not materially conflict with, and will be subject and subordinate to Freight Service, and (c) Railway has obtained any governmental authorizations required under applicable law for such Transportation Service. Within 12 months of the Commission determining that all of the Freight Easement Property should be used for Transportation Service, Railway will present a detailed plan describing the proposed Transportation Service, including a description of the proposed equipment to be used. The Commission shall have up to one hundred and twenty (120) days to review Railway's proposed plan, and in no case shall the Commission be required to complete its review of Railway's plan prior to the latest date it may grant a license to provide Transportation Service pursuant to Section 8.2.4. Failure to act on the proposed plan within such time period will result in the plan being considered approved by the Commission, provided, however, that any requirements of the California Environmental Quality Act applicable to the Transportation Service have been met. Railway agrees to act in good faith to incorporate the Commission's reasonable requests into its plan. The authorization to provide Transportation Service under this Agreement shall be referred to as "Phase II" of this Agreement.

2.4.1.1. Future Transportation Service. After the effective date of the grant of a license to Railway to provide Transportation Service (Phase II) pursuant to Section 2.4.1, subsequent changes to the plan for Transportation Service approved by the Commission shall be subject to the Commission's approval. The Commission shall have up to sixty (60) days to review such changes. Failure to act on the proposed amendment to the plan within such time period will result in the plan as amended being considered approved by the Commission provided, however, that any requirements of the California Environmental Quality Act applicable to the Transportation Service have been met. Railway agrees to act in good faith to incorporate the Commission's reasonable requests into its plan.

2.4.1.2. Third-Party Licenses. The Commission reserves the right to grant additional licenses over the Freight Easement Property and the Railroad Facilities (excluding licenses for temporary rail car storage or repairs on the Railroad Facilities), provided that any such licenses: (a) do not materially conflict with, and are subject and subordinate to, Railway's right to use, maintain, repair, and operate all of the Railroad

Facilities for all Freight Service purposes, (b) do not materially conflict with, and are subject and subordinate to, any other license granted Railway hereunder, (c) require the licensee to pay its proportionate share of Railway's prior (incurred within the preceding five years) and current costs (including labor costs, materials costs, equipment costs - using equivalent rental costs as a proxy for capital and maintenance and repair costs - travel, fuel, contract labor, and appropriate overhead) to maintain the portion of the Freight Easement Property and Railroad Facilities used by the licensee, and (d) require the licensee to (i) provide adequate insurance based on the scope and potential risks of operations of the licensee, as determined by the Commission and (ii) indemnify and hold harmless Railway and the Commission as to any Loss arising out of or related to licensee's operations.

2.4.1.3. After the effective date of the grant of a license to Railway to provide Transportation Service (Phase II) pursuant to Section 2.4.1, any new third-party license for Transportation Service on the Freight Easement Property, other than special events as described in Section 2.4.1.10, will be deemed to materially conflict with Railway's Transportation Service license. The limiting provisions of this Section 2.4.1.3 are conditioned on the Railway meeting the following conditions:

a. Levels of Service: Railway's Transportation Service shall carry the following numbers of revenue passengers beginning on the third anniversary of receipt of the license to begin Transportation Service (Phase II):

I. First Year of Service: 5,000 passengers.

II. Second Year of Service: 10,000 passengers.

III. Third Year of Service and Thereafter: 15,000 passengers.

2.4.1.4. If Railway or any third-party licensee ("Tourist Operator") fails to initiate and continue to operate Transportation Service substantially in accordance with its license and approved plan, then the applicable Tourist Operator's operations may, at the Commission's option, lose priority over any other operations, but only to the extent of such failure to operate.

2.4.1.5. If Railway constructs capital improvements to the portion of the Freight Easement Property and Railroad Facilities used by a third party licensee, the Commission shall promptly and reasonably determine (i) (a) the benefit of such improvements to such licensee or (b) the diminution of value to such improvements for Railway, (ii) the apportionment of benefit or loss for such improvements between Railway and such licensee, and (iii) the appropriate amortization period for such improvements (for

capital improvements the Commission shall make such determination concurrently with its approval of such capital improvements pursuant to Section 6.2). The Commission's contract with such licensee will (i) require the licensee to pay amounts due within 30 days following receipt of written notice from Railway and (ii) name Railway as a third-party beneficiary with rights of enforcement. As used in this Agreement, the term "capital improvement" means any improvement or repair that is subject to the capital depreciation rules of the Internal Revenue Service.

2.4.1.6. Each third-party licensee's proportionate share of Railway's costs shall be calculated in advance by Railway (based on the prior year's maintenance and repair costs plus any reasonably anticipated extraordinary maintenance and repair costs, and the parties' relative need or usage during the licensee's operating season) on a car-mile basis as to the portion of the Freight Easement Property and Railroad Facilities used by such licensee. (As used in this subsection, "repair costs" refers to the cost of repairs that maintain property in good operating condition and not to repairs that are "capital improvements," which are dealt with in Subsection 2.4.1.5.) Such licensee shall pay its proportionate share of costs monthly in advance during the months of the licensee's operations. Railway shall at the end of each calendar year reconcile the amounts paid to the actual costs incurred. The Commission's contract with such licensee will (i) provide that if the actual costs exceed the amount charged to such licensee, such licensee will, within 30 days following receipt of written notice of such reconciliation from Railway pay the additional amount to Railway and (ii) name Railway as a third-party beneficiary with rights of enforcement. If the actual costs are less than the amount charged to such licensee, Railway will within 30 days following such reconciliation refund the balance to such licensee.

2.4.1.7. The Commission or its designee shall have the right to review, obtain, and copy all books, records, computer records, accounts, documentation and any other materials (collectively "Records") pertaining to Railway's costs that are subject to apportionment under this section, including any Records in the possession of any subcontractors, for monitoring, auditing, or otherwise verifying said costs. Railway agrees to provide the Commission or its designees with any Records requested for this purpose and shall permit the Commission or its designees access to its premises, upon reasonable notice, during normal business hours, for the purpose of inspecting and copying such Records. Railway further agrees to maintain such Records for a period of three years. The Commission acknowledges and agrees that these Records constitute Railway's confidential information and shall not be disclosed to any third-party without

Railway's prior written approval, except as otherwise required by applicable law.

2.4.1.8. The Commission, may elect to require a lower level of liability insurance coverage for the licensee than the level of coverage then required of Railway under Section 9, provided that Railway reasonably concurs with the Commission that the level of operations of a licensee providing a lower level of liability coverage than required of Railway under Section 9 justifies the reduced coverage.

2.4.1.9. Railway will reasonably cooperate with any third party holding rights to use the Property, including, without limitation, any third-party Transportation Service operator seeking to secure the necessary certification or qualification required by applicable law to operate on the Railroad Facilities, provided such cooperation does not require significant unreimbursed expense for Railway.

2.4.1.10. In addition to all other rights of Commission under this Agreement, and notwithstanding anything to the contrary in this Agreement, the Commission reserves the right to use the Freight Easement Property and Railroad Facilities for special events. Such special events shall be subject to the provisions of Sections 2.4.1.5 and 2.4.1.6, provided that such special events will only be deemed to materially conflict with another Transportation Service license if they operate during the same season, and on the same days and times of day, as Railway operations. The Commission will consult with Railway regarding Railway's willingness and ability to operate such special events.

Nothing in this paragraph shall preclude the Commission and Railway from negotiating arrangements for special events.

2.5. Temporary Rail Car Storage. Subject to the terms and conditions of this Agreement, Railway may undertake temporary rail car storage or repairs related to its own rail operations on the Railroad Facilities consistent with the provisions of Sections 2.5.1 and 2.5.2. For clarification, the staging of rail cars for unloading or loading in connection with transloading activities will not be considered rail car storage hereunder.

2.5.1. Unless otherwise expressly agreed by the Commission in writing, Railway will not (i) store more than 100 rail cars, or (ii) store rail cars in locations other than those approved by the Commission, or (iii) store any rail car for more than two (2) months. Absent the Commission's prior written consent, which consent may be withheld in the Commission's sole discretion, Railway may not store railcars that have been used to transport Hazardous Materials unless such railcars are empty or contain only residual amounts of Hazardous Materials.

2.5.2. Railway shall not exercise its right to use the Freight Easement Property or Railroad Facilities for temporary rail car storage or repair in a manner that materially affects the ability of any third party Transportation Service licensee to access the Railroad Facilities for the purpose of exercising its licensed rights.

2.6. Investigation.

2.6.1. Railway hereby acknowledges that (a) it has satisfied itself at the time of this Agreement with respect to the condition of the Freight Easement Property and Railroad Facilities and their suitability for Railway's intended use; (b) it has made such investigations as it deems necessary with respect to the Freight Easement Property and Railroad Facilities, as they exist at the time of this Agreement, and assumes responsibility therefor as to its occupancy and use thereof; and (c) neither the Commission nor any of the Commission's agents has made any oral or written representations or warranties with respect to the Freight Easement Property or Railroad Facilities.

2.6.2. In the event that any public use of the Property, or illegal activities by third parties, including trespassing, cause any significant economic or operational problems for Railway, Railway may terminate this Agreement, provided Railway provides at least ninety (90) days' prior written notice to Commission of the specific problem(s) and cause thereof, cooperates in good faith with Commission throughout such period to resolve such problem(s), and complies with the provisions of Section 8.3.

2.7. Warranties on Freight Easement Property. Other than as set forth herein, Railway shall take the Freight Easement Property without any express or implied warranties, including, but not limited to, any warranties of merchantability, fitness for a particular purpose or volume or quality of traffic on the Freight Easement Property, and subject to: (i) encroachments or other existing conditions, (ii) all existing ways, alleys, privileges, rights, appurtenances and servitudes, howsoever created, and (iii) the Commission's rights hereunder.

2.8. Release. Railway, for itself, its successors and assigns, to the maximum extent permitted by law, hereby waives, releases, remises, acquits and forever discharges the Commission, its officers, employees, agents, successors and assigns, from any Loss of Railway in any way arising out of, or connected with, the known or unknown, existing or future physical or environmental condition of the Freight Easement Property and Railroad Facilities (including any Hazardous Materials contamination in, on, under, or adjacent to, the Freight Easement Property, or any clearance constraints on the Freight Easement Property), or any federal, state, or local law, ordinance, rule or regulation applicable thereto.

2.8.1. Railway hereby grants to Commission, on behalf of any insurer providing property, general liability, or automobile liability insurance to either Railway or Commission with respect to the operations of Railway, a waiver of any right to subrogation which any such insurer of Railway may acquire against Commission by virtue of the payment of any loss under such insurance.

2.8.2. If any Loss described in Section 2.8 is caused by a third party under contract with the Commission, the Commission shall, at its option, (i) pursue any claim it may have against the third-party contractor, or (ii) assign to Railway any such

claim, provided that Railway shall not be obligated to pursue such claim. Any amounts recovered as a result of any such claim shall, to the extent they exceed any fees and costs incurred in pursuing such claim, be used to repair or replace any of the following that are damaged or destroyed in connection with the subject Loss:

2.8.2.1. First, Freight Easement Property and Railroad Facilities;

2.8.2.2. Then, railroad equipment.

If Railway commences abandonment proceedings for the subject portion of the Property under Section 8.3, the Commission will not assign any such claim to Railway and neither party will have any further responsibility under this Subsection 2.8.2 as to such claim. If Railway's abandonment application is withdrawn, or not approved by the STB, the Commission may assign such claim to Railway, as provided above.

2.8.3. The provisions of this Section 2.8 shall survive the termination or expiration of this Agreement.

2.9. The rights granted by the Commission under Sections 2.1- 2.5 are subject to all existing licenses, leases, easements, restrictions, conditions, covenants, encumbrances, liens and claims of title that may affect the Property and the word "grant" as used herein shall not be construed as a covenant against the existence of any thereof.

3. Limitation and Subordination of Rights Granted

3.1. Commission's Use of Property. The foregoing granted rights are subject and subordinate to the Commission's prior and continuing right to use and maintain the Property for any purpose that is not inconsistent with this Agreement. Without limiting the generality of the foregoing, the Commission may construct, maintain, repair, renew, use, operate, change, modify or relocate public projects of any kind (including but not limited to a trail consistent with the Monterey Bay Sanctuary Scenic Trail (MBSST) Network Final Master Plan), railroad tracks, signals, communication equipment, fiber optics, pipelines, or other facilities upon, along, or across any or all of the Property, all or any of which the Commission may freely do at any time or times without liability to Railway for compensation or damages; provided, however, that the Commission may not materially interfere with Railway's rights and operations under this Agreement or Railway's Freight Service rights and obligations under federal law or under the Freight Easement, unless first approved by the STB; and provided, further, that the Commission shall to the extent possible notify Railway as soon as practicable of any such planned or actual interference and provided that the Commission takes all practicable measures to minimize any such interference. Railway shall reasonably cooperate with the Commission in implementing the foregoing uses of the Property. If the Commission or its designee requests Railway's assistance to transport materials or to perform other transportation or construction services for public projects, Railway will provide such assistance at rates reasonably to be determined between the parties.

- 3.2. Commission's Inspection Access; Access for Maintenance. The Commission may, as reasonable and as coordinated in advance with Railway, (i) inspect the Freight Easement Property and the Railroad Facilities, including any facility used in connection with Freight Service or Transportation Service, and (ii) access the Freight Easement Property and Railroad Facilities (including access with Commission or third party rail vehicles) as necessary to maintain areas of the Property outside of the Freight Easement Property that are not otherwise reasonably accessible. The Commission shall defend, indemnify and hold Railway, its officers, directors, employees, and agents, harmless from and against Loss arising from injuries to or death of the Commission's officers, directors, employees, agents, invitees, and contractors relating to such inspections, regardless of the cause of such injuries, death, or damage and regardless of the negligence of any person, except to the extent caused by the willful misconduct or gross negligence of Railway, its employees, or agents. The Commission shall ensure that any of its officers, directors, employees, agents, invitees, and contractors involved in such inspections are trained in all safety requirements and qualified for any operations related to work conducted on or near railroad operations.
- 3.3. Future At-Grade Crossings. The parties acknowledge that (i) local governments may desire to create future at-grade public crossings of the Freight Easement Property, and (ii) the Aptos Village Plan, dated February 23, 2010, specifically includes a future at-grade roadway crossing of the Freight Easement Property at approximately Milepost 12.55. Railway shall, at no cost or expense to itself, cooperate with the efforts of any applicable local governments to secure PUC approval of such crossings; provided, however, that Railway shall be entitled to raise any reasonable safety concerns related to such crossings. The fees and costs associated with the construction, maintenance, and repair of such crossings shall be set either by agreement between Railway and the applicable local government (which agreement shall become a Railway Agreement under Sections 4.2 and 4.3), or by the PUC pursuant to Public Utilities Code Section 1202, *et seq.*

4. Assignment of Certain Contracts and Agreements

- 4.1. Upon approval of Railway to operate the Freight Easement by the STB, the current operator will assign to Railway, certain agreements concerning the operation of the Railroad Facilities, including all track agreements, grade crossing agreements, and other operating agreements set forth in Exhibit C hereto (all such agreements hereinafter referred to as the "Railway Agreements"), and (ii) to the Commission, all other agreements relating to the Property, including all easements, licenses, and leases (all such agreements hereinafter referred to as the "Commission Agreements"). For any assigned Railway Agreements that grant third-party rights of access to, or use of, the Freight Easement or Railroad Facilities, Railway will instruct the holders of such agreements to name the Commission as an additional insured on their insurance policies.
- 4.2. Subject to the provisions of Section 2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law or under the Freight Easement, unless first approved by the STB, any new Railway Agreement granting third- party rights of access to, or use of, the Freight Easement or Railroad

Facilities, or contemplating alterations thereto, is subject to the Commission's prior written consent. Such Railway Agreements will be documented by Railway using forms approved by the Commission, which forms shall, among other things, include provisions indemnifying the Commission and holding it harmless from any Loss in connection with the exercise of rights under such agreements, and the construction, maintenance, or operation, of any facilities constructed in connection with such agreements.

- 4.3. Railway is not, without the Commission's prior written consent (subject to the provisions of Section 2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law or under the Freight Easement, unless first approved by the STB), to execute any new Railway Agreements affecting the Freight Easement Property or Railroad Facilities for a term exceeding the term of this Agreement.
- 4.4. Railway is not, without the Commission's prior written consent, to terminate or modify any Railway Agreement granting third-party rights of access to, or use of, the Freight Easement or Railroad Facilities, or contemplating alterations thereto.

5. Maintenance and Operation of Railroad Facilities

- 5.1. Initial Rehabilitation and Repair Projects. During Phase I of this Agreement, the Commission agrees to pay for (or cause payment for) repairs to the Freight Easement Property, including all damaged bridges, overpasses, trestles, culverts, and track, necessary to allow Railroad to operate the Freight Easement to MP 7.0. During Phase II of this Agreement, the Commission will pay for (or cause payment for) repairs from MP 7.0 to MP 31.39 (up to Class 1 track classification) within the next three years following grant of the license to provide Transportation Service, provided that if the Commission fails to make the required repairs from MP 7.0 to MP 31.39 within the three years, the requirements for service provided by Section 2.4.1.3(a) will be extended accordingly. After these repairs are complete the Commission shall have no further obligation to maintain or repair the Freight Easement Property or Railroad Facilities.

- 5.2. Maintenance of Freight Easement Property and Railroad Facilities.

- 5.2.1. Freight Easement Property and Railroad Facilities. Railway, at its expense, shall keep the Freight Easement Property and Railroad Facilities used by Railway (including occasional use, or use for rail car storage or lay down space) in good repair and in a good and safe condition in conformity with applicable law or any Railway Agreement, and in substantially the same condition provided by the Commission. In the event Railway fails to meet this obligation, the Commission has the right but no obligation to correct or cause the correction of the deficiency, after no less than 10 days' written notice to Railway (except in an emergency, whereupon no notice is required) and, if Railway does not correct the deficiency within 10 days, the Commission may bill the Railway and the Railway shall pay the actual cost of the correction within 30 days.

5.2.2. Weeds, Trash, Drainage and Graffiti. The parties agree that Railway shall be responsible for: (i) drainage and culvert maintenance and clearance on the entire Property unless a third person or entity is contractually responsible for such maintenance and clearance, and (ii) weed abatement, vegetation management, and trash collection over the Freight Easement Property as required by applicable law and in substantially the same condition provided by the Commission. If the Commission observes a condition that requires maintenance under these requirements or applicable law, Commission will notify Railway through a maintenance request. Railway shall resolve maintenance requests from the Commission within 30 days unless contested in good faith by the Railway. In the event Railway contests a maintenance request from the Commission, the request shall be submitted for resolution to the Coordination Committee pursuant to Section 11 and, if no resolution is met, the dispute may be submitted to mediation pursuant to Section 20. In the event Railway fails to meet an uncontested obligation, the Commission has the right but no obligation to correct or cause the correction of the deficiency, after no less than 10 days' written notice to Railway (except in an emergency, whereupon no notice is required) and, if Railway does not correct the deficiency within 10 days, the Commission may bill the Railway and the Railway shall pay the actual cost of the correction within 30 days. Railway's obligation to pay shall be secured by the security provided pursuant to Section 5.2.7. The Commission grants Railway a license to enter all portions of the Property as necessary to perform such maintenance; Railway shall be required to repair any damage caused as the result of Railway's performance of any such maintenance. Except as required by applicable law, Railway shall not be responsible for the prevention, removal, or abatement of graffiti wheresoever it may occur. Railway shall also not be responsible for drainage maintenance, weed abatement, vegetation management, or trash collection related to any construction by the Commission (except for Railroad Facilities that Railway is entitled to use), or necessitated by the actions of any third party authorized by the Commission to be on the Property, or caused by any actions, omissions, or situations off or outside of the Property, except to the extent caused by Railway.

5.2.3. Slopes, Trees and Other Conditions outside of Freight Easement Property. Railway may, at its option, enter portions of the Property outside the Freight Easement Property to maintain or repair slopes, clear fallen trees and branches, or address other conditions, as necessary to ensure the safety and efficiency of Railway's operations. The Commission grants Railway a license to enter all portions of the Property as necessary to perform such work; Railway shall be required to repair any damage caused as the result of Railway's performance of any such maintenance. The Commission shall have no liability to Railway for maintenance of portions of the Property outside of the Freight Easement Property and Railway's exclusive remedies for damage to the Freight Easement Property or Railroad Facilities shall be limited to those set forth in Sections 5.5.3 and 8.3. However, this section shall not apply to any claims to the extent they result from the negligence or

willful misconduct of the Commission or its officers, directors, employees, agents, contractors, or a third party under contract with the Commission, in which case Railway's exclusive remedies are those set forth in Section 2.8.2, 8.3 and 14.2.

- 5.2.4. Scope of Maintenance. For purposes of this section 5.2, the maintenance and repairs to be performed by Railway include, (a) inspections, testing, track profiling, adjustments, lubricating, welding, re-spiking surfacing, tamping, and any other tasks constituting customary and routine maintenance of track structures; (b) repair, renewal, replacement, or other customary and routine work required to ensure the safety of Railroad Facilities, including compliance with any applicable bridge safety management program regulations that may be promulgated by the Secretary of Transportation pursuant to Public Law 110-432, Section 417, including the regulations set forth in 49 CFR Part 237; (c) weed and brush control and drainage management; and (d) compliance with all mandated reporting. Railway shall not be in default under this Agreement if it does not perform tie replacement programs or upgrades of rail, switches, bridges, or other track material provided that (e) Railway's failure to perform such replacement programs or upgrades does not violate applicable law or Railway's specific maintenance obligations under this Agreement, and (f) Railway uses reasonable diligence to seek outside funding sources for such work. The Commission shall have no responsibility to maintain the trackage, structures, or any other Railroad Facilities except as otherwise specifically required herein.
- 5.2.5. Concurrently with the execution of this Agreement, the required parties shall execute and deliver to the FRA a written notice of the assignment of track inspection and maintenance responsibilities, and bridge safety management responsibilities, to Railway in accordance with 49 CFR § 213.5(c) and 49 CFR § 237.3. The notice of assignment shall attach a copy of this Agreement.
- 5.2.6. Limits of Commission Liability. Notwithstanding the limitations on the Commission's maintenance responsibilities set forth in Section 5.2, the Commission shall be responsible for the maintenance of any improvement it constructs on any portion of the Property after completion of its obligations under Section 5.1. As used in this subsection, the term "improvement" excludes improvements made to the Railroad Facilities, unless such improvement is made at the request of a third-party, in which case such third-party shall be responsible for the incremental increase in the maintenance cost thereof. Notwithstanding the foregoing, maintenance responsibility for improvements to public crossings shall be governed by the provisions of Section 3.3.
- 5.2.7. Security. Railway shall provide a performance bond or alternative security acceptable to the Commission guaranteeing its financial responsibility for the

performance of its obligations to provide maintenance of the Freight Easement Property and Railroad Facilities under Section 5.2 and pay all License Fees due under Section 7, in an amount no less than \$160,000, granting the Commission rights as an obligee under the bond or alternative security to cause the performance of these obligations in the event of Railway's failure to do so, after any applicable notice and cure period under the express terms of this Agreement. The exercise of its rights under the bond or alternative security shall not in any way limit the rights of the Commission to terminate this Agreement or any other rights or remedies hereunder or under applicable law.

- 5.3. Ownership of Track Materials. All track materials installed by Railway as part of the Railroad Facilities shall be of equal or better quality than those track materials existing at the time of execution of this Agreement, or after completion of rehabilitation and repair projects by the Commission, including the projects described in Section 5.1, and shall become the Commission's property. All materials removed by Railway from the Railroad Facilities and replaced as part of maintenance, repairs, or capital improvements shall, if the decision to remove them was Railway's, become the property of Railway. Railway shall not, without the prior written approval of Commission, remove track materials or other improvements from the Property unless they are replaced as provided in this section. Railway shall keep a written record of track materials and other improvements removed from, or installed upon, the Property and shall provide an updated copy of the record to the Commission on or before the end of each calendar quarter.
- 5.4. Clearing of Obstructions, Derailments, and Wrecks. Railway shall as soon as practicable clear any obstructions, derailments, and wrecks of railroad equipment on Railroad Facilities.
- 5.4.1. To the extent that any such obstruction, derailment, or wreck damages the Property, Railway shall as soon as practicable restore the Property to the condition it was in prior to the obstruction, derailment, or wreck.
- 5.4.2. If Railway fails to comply with the provisions of this section, the Commission may perform the required action and charge Railway the reasonable cost thereof. Notwithstanding the foregoing, the Commission shall not charge Railway for the restoration of any damage caused by any third party to any bridge if in the Commission's reasonable judgment, such damage does not expose the Commission to potential liability to the FRA, PUC, or any other third party, and either (A) such damage does not obstruct or interfere with any roadway or other property or facility used by the Commission or another third party, or (B) Railway abandons the subject portion of the Property under Section 8.3. In addition, the Commission shall not charge Railway for the restoration of any damage caused by the Commission's contractors, or any third party granted access to the Property by specific agreement with the Commission.

5.4.3. Nothing in this section is intended to preclude legal action by Railway or the Commission against any third party causing such obstruction, derailment, or wreck.

5.5. Responsibility for Repair or Replacement.

5.5.1. Damage Caused by Freight Operations. Except as otherwise set forth in this Agreement, Railway will be responsible to repair or replace any damage to the Freight Easement Property or Railroad Facilities caused by, or related to, Railway's operations.

5.5.2. Damage Caused by Commission. Railway will not be responsible to repair or replace any damage to the Freight Easement Property or Railroad Facilities caused by the Commission, its officers, directors, employees, agents, or contractors.

5.5.3. Damage Caused by Acts of God or Other Factors beyond Railway's Control. If any portion of the Freight Easement Property or the Railroad Facilities are damaged or destroyed by flood, fire, civil disturbance, earthquake, earth movement, storm, sabotage, act of God, terrorism, accident or any other event beyond Railway's reasonable control, including damage or destruction caused by third parties, even if said damage or destruction originates outside of the Freight Easement Property, then Railway may (but, except to the extent covered by insurance required under this Agreement, shall not be required to) at no cost or expense to the Commission, (a) repair, or cause to be repaired, the damaged or destroyed portion of the Freight Easement Property or Railroad Facilities; or (b) replace, or cause to be replaced, such portion of the Freight Easement Property or the Railroad Facilities. In the event Railway does not elect to repair or replace the damaged or destroyed portion of the Freight Easement Property or Railroad Facilities, Railway shall reasonably cooperate, at its own cost, with the Commission to seek funding and cause the repair or replacement of the damaged or destroyed Railroad Facilities, or otherwise to suspend or abandon Transportation Service or Freight Service over such portion of the Property as the parties mutually agree is necessitated by the damage or destruction.

6. Construction, Relocation, or Removal of Railroad Facilities

6.1. By the Commission.

6.1.1. The license herein granted is subject to the Commission's needs and requirements to improve and use the Property. Subject to Railway's rights under this Agreement, the Commission, at its sole cost and expense, may add to or remove any portion of the Railroad Facilities, or change or relocate them to new locations as reasonably designated by the Commission, whenever, in the furtherance of the Commission's needs and requirements, the Commission finds such action to be necessary.

6.1.2. In the course of performing such work, the Commission may not materially

reduce, or otherwise materially interfere with, Railway's rights and operations under this Agreement or Railway's Freight Service rights and obligations under federal law or rights under the Freight Easement, unless first approved by the STB. The Commission shall to the extent possible notify Railway as soon as practicable of any such planned or actual interference and take all practicable measures to minimize any such interference.

- 6.1.3. Railway shall in such cases provide the Commission with a fixed-price quote for performing any related work, and the Commission shall have the option of accepting Railway's quote and having Railway perform the work, performing the work itself, or having another qualified rail contractor perform such work. If the Commission selects a third-party contractor, the contractor shall execute Railway's Right of Entry Agreement (a copy of which is attached as Exhibit D).
- 6.1.4. The Commission shall have the right to salvage, stockpile, or otherwise dispose of any Railroad Facilities removed pursuant to this section; provided, however, that if the removed Railroad Facilities are reusable elsewhere on the Freight Easement Property, then Railway shall have the right to so reuse them. Any Railroad Facilities not so reused on the Freight Easement Property shall be disposed of or otherwise removed at the Commission's expense.
- 6.1.5. All such work performed, and any installation of Railroad Facilities, shall be in conformance with all applicable laws. If the Commission relocates any portion of the tracks used for Freight Service, the centerline of the Freight Easement Property shall, upon completion of the relocation work, be deemed to have been modified to coincide with the centerline of the realigned tracks.
- 6.2. By Railway. Railway may, at its cost and expense, modify or improve the Freight Easement Property and Railroad Facilities as needed to accommodate its Freight Service or Transportation Service; provided, however, that Railway first obtains the Commission's written approval of Railway's plans for such modifications and improvements. Subject to the provisions of Section 2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law, or rights under the Freight Easement, unless first approved by the STB, Railway's modification or improvement of the Freight Easement Property and Railroad Facilities will be coordinated with existing or future legal public uses of the Property that the Commission may authorize. Railway may, upon the termination of this Agreement or upon the abandonment of any applicable section of the Freight Easement Property or portion of the Railroad Facilities, remove any modifications or improvements to such Freight Easement Property or Railroad Facilities that were paid for by Railway, that do not constitute any repair or replacement to such Freight Easement Property or Railroad Facilities, and that have not become fixtures to such Freight Easement Property or Railroad Facilities.
- 6.3. The Commission understands that Railway requires locations outside of the Freight Easement Property at which to store and maintain equipment and materials necessary for Railway's Freight Operations. The parties agree that Railway will need to identify

and construct additional maintenance and storage locations on the Property, which Railway may do as needed, subject to applicable law and the Commission's prior written consent (subject to the provisions of Section 2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law, unless first approved by the STB).

- 6.4. The terms, conditions, and stipulations expressed in this Agreement as to the Freight Easement Property and Railroad Facilities shall apply to the Freight Easement Property and Railroad Facilities as they may at any time be expanded, added to, modified, changed, or relocated.

7. License Fees

- 7.1. For consideration of the rights granted under this Agreement, Railway shall pay the Commission the following fees as calculated on a quarterly basis:

7.1.1. Freight Service:

7.1.1.1. First 750 carloads per quarter: 3% of Railway's handling revenue for such carloads.

7.1.1.2. Any additional carloads per quarter: 5% of Railway's handling revenue for such carloads.

7.1.1.3. Storage: Fifty percent (50%) of Railway's storage revenue in excess of \$2.00 per car per storage day per quarter.

7.1.2. Temporary Use of Laydown Space. Railway may from time to time make arrangements with a temporary shipper by rail for the use of otherwise unused laydown space (open space outside of the Freight Easement Property next to railroad track). The parties agree that Railway will need to identify such temporary laydown locations on the Property, which Railway may do as needed, subject to applicable law and the Commission's prior written consent. Railway shall also notify the Commission of the expected duration of each such use. If subsequently the Commission reasonably objects to any specific use of laydown space by Railway or its shipper, the Commission will make available an alternative laydown location reasonably acceptable to Railway and shipper, and Railway shall as soon as practicable discontinue that use of such laydown space and move to the alternative laydown location. Railway shall, in addition to the license fees set forth above, pay the Commission 20% of all revenue (if any) received by Railway by such shippers for such use of such laydown space.

7.1.3. Transportation Service: 3% of passenger ticket revenue on ticket revenue up to \$500,000 per quarter, plus 5% of passenger ticket revenue on ticket revenue over and above \$500,000 per quarter.

- 7.2. Railway shall, within 60 days following the end of each calendar quarter, determine the amounts payable to the Commission arising from the preceding calendar quarter and shall provide the Commission with a statement describing all amounts due the Commission during the quarter. Railway shall also, upon reasonable request from the Commission,

make available for inspection and copying all documents and receipts upon which such fees are based.

- 7.3. Subject to Section 7.4, Railway shall, within 60 days following the end of each calendar quarter, pay the Commission all amounts due the Commission for the prior calendar quarter. Railway's obligation to pay license fees is specifically acknowledged to be secured by the security required under Section 5.2.7.
- 7.4. The requirement to pay the license fees for Freight Service as set forth in Section 7.1.1 will begin with the first quarter after the first anniversary of Phase I of this Agreement and the requirement to pay the license fees for Transportation Service as set forth in Section 7.1.3 will begin with the first quarter after the first anniversary of Phase II of this Agreement.

8. Term and Termination

- 8.1. This Agreement shall become effective when fully executed and delivered to the parties in accordance with Section 27.4 and shall continue in full force and effect for a period of 10 years unless otherwise terminated as provided herein.

8.2. Termination:

8.2.1. Default.

8.2.1.1. If Railway does not provide regular Freight Service, without the Commission's prior written approval, the Commission may forthwith terminate this Agreement by written notice. As used in this Section 8.2.1.1, the term "regular Freight Service" means revenue train operations for Freight Service consisting of a minimum of (i) 50 freight cars during the first full calendar year of service (beginning January 1); (ii) 150 freight cars during the second calendar year of service; (iii) 200 freight cars during the third calendar year of service; and (iv) 250 freight cars during the fourth calendar year of service and thereafter; or

8.2.1.2. If Railway does not provide regular Transportation Service during Phase II, without the Commission's prior written approval, the Commission may forthwith terminate this Agreement by written notice. As used in this Section 8.2.1.2, the term "regular Transportation Service" means revenue thematic excursion operation, consisting of a minimum of (i) one excursion during the first full calendar year of service after the third anniversary of the receipt of the license to begin Transportation Service (Phase II); (ii) two excursions during the second calendar year of service after the third anniversary of Phase II; and (iii) five excursions during the third year of service after the third anniversary of Phase II and each year thereafter during the term; provided, that if the Commission fails to make required repairs under Section 5.1 during the first three years of Phase II, the commencement date for "regular Transportation Service" as defined herein shall be extended

accordingly. For the avoidance of doubt, the Commission may not terminate this Agreement pursuant to this Section 8.2.1.2 if it has not approved the non-exclusive license to Railway to use the Freight Easement Property and Railroad Facilities to provide Transportation Service on the Freight Easement Property (Phase II).

8.2.1.3. Railway remains in default in its performance of any covenant or agreement contained herein for a period of 30 days after written notice from the Commission to Railway specifying such default, the Commission may, at its option, (i) cure the default and, at its option, invoice Railway for the cost thereof, withhold the cost thereof from any amount otherwise due to Railway, or call any available bond or security for the payment thereof; or (ii) forthwith terminate this Agreement by written notice; provided however, that if such default cannot reasonably be cured within 30 days after such notice, the Commission may not terminate this Agreement provided that Railway begins to cure the default within the 30-day notice period and proceeds diligently to complete such cure.

8.2.2. Upon termination of this Agreement, whether through the expiration of the term or by the Parties as contemplated herein, Railway shall cooperate, at its expense, with the transfer or abandonment of Freight Service as requested by the Commission; provided, that no termination shall be effective unless and until the STB has approved such transfer or abandonment.

8.2.3. The parties acknowledge that initiation of Freight Services by Railway will require Railway to invest substantial funds in anticipation of future revenues from both Phase I (Freight Service) and Phase II (Transportation Service) service. In recognition of Railway's investment, if after completion of the Study and prior to the grant of a license to provide Transportation Service (Phase II), the Commission determines that the Freight Easement Property should not be used for Freight Service from MP 7.0 to MP 0.0, the Commission may terminate this Agreement subject to the provisions of Section 8.2.2, and upon approval of the abandonment by the STB, pay Railway \$300,000.

8.2.4. The Railway can terminate this Agreement if by one hundred and twenty (120) days after completion of the Study, the Commission has not granted a license pursuant to Section 2.4.1 hereof to provide Phase II Transportation Service over all of the Freight Easement Property.

8.2.5. The Commission also agrees that it shall not terminate this Agreement due to Railway's failure to use the rights herein granted with respect to any segment of the Freight Easement Property or Railroad Facilities that is necessary to support any Freight Service over any regularly-used portion of the Freight Easement Property north of any unused segment.

8.3. Abandonment. Railway may at any time, in its sole and absolute discretion, immediately and without any liability to the Commission (except as expressly provided herein,

including but not limited to Section 8.5): (a) abandon Transportation Service over all or such portion of the Property as Railway deems appropriate, and (b) seek STB approval to abandon Freight Service over all or such portion of the Property as Railway deems appropriate. In the event that Railway seeks to abandon Freight Service, Railway shall provide the Commission with 90 days advance notice of Railway's intention and shall, at its cost, cooperate with the Commission's efforts to take upon itself all Freight Service operations relating to the Property, to appoint another person or entity to do so, or to rail bank any portion of the Property as to which Railway intends to abandon Freight Service. Nothing in this Agreement is intended by the parties to limit these rights on the part of Railway and the Commission agrees that it will cooperate with Railway, at Railway's cost, in Railway's efforts to so abandon any Transportation Service or Freight Service. No such abandonment, transfer of Freight Service operations, or rail banking, shall be effective unless and until the STB has issued its approval thereof. In addition, this Agreement shall not terminate with respect to all or any portion of the Property unless and until the STB has issued such approval.

8.3.1. Any abandonment proceedings instituted by Railway shall comply with the abandonment provisions set forth in the Freight Easement, including the railbanking/OFA provisions thereof.

8.3.2. To the extent the STB approves abandonment or transfer of Freight Service over all or any part of the Freight Easement Property or Railroad Facilities, this Agreement and any other rights and obligations of Railway to the Commission, shall, at the time of consummation of such abandonment or transfer, terminate with respect to any abandoned or transferred portions of the Freight Easement Property and Railroad Facilities. Upon the effective date of such abandonment, Railway shall (i) assign to the Commission or new operator, as applicable, any Railway Agreements affecting the abandoned or transferred portions of the Freight Easement Property and Railroad Facilities, (ii) quitclaim the abandoned portion of the Freight Easement to the Commission or new operator, as applicable, and (iii) execute any additional documents reasonably necessary to effectuate the purpose and intent of this Agreement.

8.4. Upon the effective date of termination of this Agreement, Railway shall, if so requested by the Commission, (i) assign to the Commission all Railway Agreements, (ii) quitclaim the Freight Easement to the Commission, and (iii) execute any additional documents reasonably necessary to effectuate the purpose and intent of this Agreement.

8.5. LIQUIDATED DAMAGES. The parties each acknowledge that, in the event Railway exercises its right to abandon Freight Service over the entirety of the Freight Easement and the Commission is unable, despite its reasonable efforts, to obtain a new operator to which Freight Service is transferred by the STB, then determining the resulting damages would be impracticable or extremely difficult, because the Commission has undertaken a commitment to operate Freight Service on the Freight Easement Property as a condition of receipt of funds for purchase of the Property and is incapable of acting as a common carrier itself. Therefore, the parties agree that, in the event Railway exercises its right to abandon Freight Service over the entirety of the Freight Easement and the Commission is unable, despite its reasonable efforts, to obtain a new operator to which Freight Service is transferred by the STB, Railway shall be liable to the Commission in the amount of

\$300,000 in liquidated damages and not as a penalty. Notwithstanding the foregoing, Railway will not be liable for any liquidated damages in abandoning Freight Service in connection with (i) the expiration of the term of this Agreement, (ii) the termination of this Agreement by the Commission pursuant to Section 8.2.1 or 8.2.3, or (iii) the termination of this Agreement by Railway pursuant to Section 8.2.4. In the event the Railway exercises its right to abandon Freight Service and has paid the amount due to the Commission pursuant to this Section 8.5, Commission shall not be entitled to any further damages of any kind, whether direct, special or consequential.

9. **Insurance.** Railway and the Commission shall obtain the insurance set forth below, to be kept in force during the life of this Agreement. All insurance policies must be written by a reputable insurance company reasonably acceptable to the Commission, or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in California. The limits of insurance coverage required under this section shall be increased every five years during the term hereof and any extended term based on any increases or decreases in the Producer Price Index, or any successor index.

- 9.1. Railway Insurance: Railway shall, provide and procure at its own cost and expense Railroad Liability insurance and Worker's Compensation insurance (to the extent required by law).

9.1.1. The liability insurance policy providing bodily injury, including death, personal injury and property damage coverage shall have a limit of not less than \$25 million each occurrence and an aggregate limit of not less than \$50 million. The self-insured retention may not exceed \$250,000 (as that value is periodically adjusted by the Consumer Price Index from and after the effective date of this Agreement.) Prior to the execution of this Agreement, Railway shall provide the Commission with a certificate of insurance on a standard ACORD form, or other form reasonably acceptable to the Commission, substantiating the required coverages and limits set forth herein. Upon request by the Commission, Railway shall immediately furnish a complete copy of any policy required hereunder, including all endorsements, with said copy certified by the insurance company to be a true and correct copy of the original policy.

9.1.2. The liability insurance policy must include the Commission as an "additional insured" and the property insurance policy shall name the Commission as a loss payee.

9.1.3. Required Provisions: The insurance policy shall contain, or be endorsed to contain, the following provisions:

9.1.3.1. For any claims related to this Agreement, Railway's insurance coverage shall be primary insurance as respects the Commission, its directors, officers, employees, and agents and any insurance or self-insurance maintained by the Commission, its directors, officers, employees, or agents, shall be in excess of Railway's insurance and shall not contribute to it. However, this section shall not apply to any claims that result from the sole negligence or willful misconduct of the Commission or its officers, directors, employees, agents, or invitees; as to any such claim, the Commission's insurance shall be

primary, and any insurance or self-insurance maintained by Railway, its directors, officers, employees, or agents, shall be in excess of Commission's insurance and shall not contribute to it.

9.1.3.2. Railway shall comply with all reporting or other provisions of the policies, as necessary to maintain coverage required hereunder, including coverage to be provided to the Commission, its directors, officers, employees, or agents. Railway shall notify Commission in writing of any claims submitted relating to the Property under any policy required under this Agreement.

9.1.3.3. Railway's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

9.1.3.4. Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except after 30 days' prior written notice by certified mail, return receipt requested, has been given to the Commission.

9.1.4. Workers' Compensation insurance shall cover any statutory liability as determined to be applicable by the compensation laws of the State of California with a limit of at least \$1 million. The Railway represents and the Commission understands that all railroad workers are subject to the FELA and are not covered by Worker's Compensation insurance.

9.1.5. The fact that insurance is obtained by Railway or by the Commission on behalf of Railway will not be deemed to release or diminish Railway's liability, including liability under the indemnity provisions of this Agreement. Damages recoverable by the Commission from Railway or any third party will not be limited by the amount of the required insurance coverage.

9.2. Commission Insurance: The Commission shall, at its own cost and expense, provide and procure such Commercial General Liability ("CGL") and Workers' Compensation insurance as it deems necessary to cover its obligations under this Agreement.

10. Notices. All correspondence, notices, and other papers shall be delivered either in person or by certified or registered mail, postage prepaid, to the parties hereto at the following addresses:

If to Railway:

St. Paul & Pacific Railroad, LLC
21778 Highview Avenue
Lakeville, MN 55044

If to Commission:

Executive Director
Santa Cruz County Regional Transportation Commission
1523 Pacific Avenue Santa Cruz, CA 95060 Fax: 831-460-3215

11. Coordination Committee.

- 11.1. In order to ensure the safety and efficiency of all operations on the Property, the parties shall establish a Coordination Committee. The Coordination Committee shall be composed of two representatives from each party (and any other persons or entities as the parties may mutually agree) and shall (a) serve as a forum to coordinate the parties' activities and resolve questions or disputes (but only to the extent the parties' representatives have been so authorized), and (b) be responsible to make recommendations to the parties. The Coordination Committee shall meet on a regular schedule to be determined by the parties, but may be convened for special meetings by either party upon 10 days' written notice to the other party. Following each meeting, the Coordination Committee shall deliver written minutes of such meeting to Railway and the Commission.
- 11.2. Railway shall comply with all reasonable requests of the Commission for representatives of Railway to attend public meetings organized by the Commission to provide non-confidential information about Railway's operations under this Agreement.

12. Claims and Liens for Labor and Material

- 12.1. Railway agrees to pay in full for all materials joined or affixed to the Property, to pay in full all persons who perform labor upon the Property, and not to permit or suffer any mechanic's or materialman's lien of any kind or nature to be enforced against the Property, as to any work done or materials furnished thereon by Railway or at Railway's request. Railway shall indemnify, hold harmless and defend Commission (with counsel reasonably acceptable to Commission) against and from any and all liens, claims, demands, costs and expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed, or materials furnished.

13. Property Taxes

- 13.1. So far as it lawfully may do so, the Commission shall assume, bear, and pay all property and other taxes and assessments of whatsoever nature or kind (whether general, local, or special) levied or assessed upon or against the Property, excepting taxes levied upon and against any Freight Easement Property or Railroad Facilities. Railway shall assume, bear, and pay all property and other taxes and assessments of whatsoever nature or kind (whether general, local, or special) levied or assessed upon or against any Freight Easement Property or Railroad Facilities for which it has a license to operate, including possessory interest taxes under California Revenue and Taxation Code section 107 *et seq.*, unless applicable law otherwise excuses payment of taxes due to the Commission's ownership of the Property, the Freight Easement Property, or the Railroad Facilities.

14. Indemnity

- 14.1. Railway shall indemnify, defend and hold harmless the Commission from any Loss which is due to or arises from: (a) Railway's operation, maintenance, repair, or use of the Freight Easement Property, Railroad Facilities, any appurtenances thereto, or any part thereof; (b) Railway's provision of Freight Service or Transportation Service; or (c) Railway's failure to comply with or perform any of the terms and conditions set forth in

this Agreement; except to the extent that the Loss is caused by the negligence or willful misconduct of the Commission, its officers, agents, or employees, or a breach of an express material warranty of the Commission. The provisions of this section shall survive the termination or expiration of the term of this Agreement for a period of two years.

14.2. The Commission shall indemnify, defend and hold harmless Railway from any Loss to the extent caused by or arising from the negligence or willful misconduct of the Commission, its officers, agents, employees, and contractors. For purposes of this Section 14.2 only, the term "Loss" is limited to any loss, damage, claim, demand, action, cause of action, penalty, fine, payment, cost, liability, or expense of whatsoever nature, including court costs and reasonable attorneys' fees, resulting from or related to: (a) any injury to or death of any person, including officers, agents, and employees of the Commission or Railway; or (b) damage to or loss or destruction of Railway's equipment, rolling stock and any items being transported on behalf of Railway's customers. Any Loss related to damage to or destruction of the Freight Easement Property or Railroad Facilities is subject to the provisions of Section 2.8. The provisions of this section shall survive the termination or expiration of the term of this Agreement for a period of two years.

14.3. Each party's obligations to the other under Sections 14.1 and 14.2 respectively are subject to the following conditions: (a) the party seeking indemnification (the "Indemnified Party") shall, following Indemnified Party's discovery of a Loss for which Indemnified Party seeks indemnification, or of circumstances that may reasonably result in such a Loss, promptly deliver notice to the other party (the "Indemnifying Party") describing such Loss or circumstances, (b) the Indemnified Party shall make reasonable efforts to mitigate the effect of such Loss or circumstances, (c) the Indemnified Party shall give the Indemnifying Party the opportunity to control the defense against such Loss, and shall not compromise or settle such Loss without the Indemnifying Party's prior written consent, and (d) in no event shall either party be liable to the other for consequential, incidental, indirect or punitive damages, even if notified of the possibility of such damages, unless such damages are included in any third-party claim against the Indemnified Party.

15. Removal of Railway Equipment, Personnel, and Property upon Termination of Agreement. Prior to, or upon, the termination of this Agreement, Railway shall, at its sole expense, remove its equipment, personnel, and other property from the Freight Easement Property and Railroad Facilities and shall restore, to the Commission's reasonable satisfaction, such portions of the Freight Easement Property and Railroad Facilities used by Railway to as good a condition as they were after the completion of rehabilitation and repairs by the Commission, including the projects specified in Section 5.1, if completed (or, if the Commission does not complete rehabilitation and repairs, as good a condition as they were in at the beginning of this Agreement), excepting normal wear and tear. If Railway fails to do the foregoing, the Commission may do such work at the cost and expense of Railway. Railway may not remove any property, including the Railroad Facilities, that is or becomes the property of the Commission under this Agreement.

16. Hazardous Substances and Wastes

16.1. Railway shall not be liable or responsible for any Hazardous Materials present on, in, or

under the Property, or other problems relating to the Property, prior to the commencement date of its operations on the Freight Easement Property, except to the extent Railway's activities exacerbate the contamination of any such pre-existing Hazardous Materials.

- 16.2. Railway shall comply with all applicable laws in its occupancy, operation, and maintenance of the Freight Easement Property and Railroad Facilities. Without first obtaining the Commission's written permission (which may be withheld in the Commission's sole reasonable discretion), Railway shall not treat or dispose of Hazardous Materials on the Freight Easement Property or Railroad Facilities. Railway shall not release any Hazardous Materials on or at the Freight Easement Property or Railroad Facilities, including through any drainage or sewer systems. Railway assumes all responsibility for the investigation and cleanup of any such release or exacerbation by Railway and shall indemnify, defend, and hold harmless the Commission and its property, its officers, agents, and employees, for all costs, including reasonable environmental consultant and reasonable attorneys' fees, and claims resulting from or associated with any such release or exacerbation by Railway. Railway shall assume all responsibility for and shall indemnify, defend, and hold harmless Commission against all costs and claims associated with a release or leak of Hazardous Materials, or exacerbation of pre-existing Hazardous Materials, occurring between the commencement date of its operations on the Freight Easement Property, and the expiration or sooner termination of this Agreement, and related to Railway's use of the Freight Easement Property and Railroad Facilities, unless such event was caused by the sole negligence or willful misconduct of the Commission, its officers, employees, or agents.
- 16.3. Railway shall not install any above-ground or underground storage tanks without the Commission's prior written consent, which consent may be granted or withheld in Commission's sole and absolute discretion. If such consent is granted, Railway shall obtain any necessary permits, notify the proper authorities, and provide the Commission with copies of any such permits and notifications. Railway shall assume all responsibility for and shall indemnify, defend, and hold harmless the Commission against all costs and claims associated with a release or leak of the contents of any such tank occurring between the commencement date of its operations on the Freight Easement Property, and the expiration or termination of this Agreement, unless such event was caused by the sole negligence or willful misconduct of the Commission, its officers, employees, or agents.
- 16.4. The Commission understands and acknowledges that the regular operation and maintenance of railroad equipment and tracks involve the storage, use, and release of *de minimus* amounts of Hazardous Materials, including petroleum products, creosote, and chromated copper arsenate. The Commission agrees that Railway shall not be liable or responsible for the *de minimus* release of any such Hazardous Materials, unless (i) such release violates applicable law, or (ii) the Commission is otherwise entitled to defense and indemnity under Section 14.1.
- 16.5. If Railway knows, or has reasonable cause to believe, that any Hazardous Materials have come to be located under or about the Freight Easement Property or Railroad Facilities, other than as specifically provided herein or as previously consented to in writing by

the Commission, Railway shall immediately give the Commission written notice thereof, together with a copy of any statement, report, notice, registration, application, permit, business plan, license, claim, action, or proceeding given to or received from any governmental authority or private party concerning the presence, spill, release, discharge of, or exposure to, such Hazardous Materials.

16.6. This Section 16 shall continue in full force and effect regardless of whether this Agreement is terminated pursuant to any other provision or the Freight Easement Property and Railroad Facilities are abandoned and vacated by Railway.

17. **Trespassers and Dangerous Conditions.** Railway shall not be required to take any action or incur any expense (including posting signage or warnings, providing fencing or other security) as to or against trespassers on the Property, or invitees of the Commission, other than to promptly notify local law enforcement and the Commission concerning any trespassers observed on the Property by Railway personnel. If Railway becomes aware of any dangerous conditions on or about the Property, Railway shall promptly notify the Commission of such conditions.

18. **Waivers.** The failure of either party hereto to enforce any of the provisions of this Agreement, or to enforce any right or option which is herein provided, shall in no way be construed to be a waiver of such provision(s) as to the future, nor in any way to affect the validity of this Agreement or any part hereof, or the right of either party to thereafter enforce each and every such provision and to exercise any such right or option. No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach.

19. **Consent.** Unless expressly provided to the contrary elsewhere in this Agreement, whenever the consent, approval, judgment, or determination (collectively, "consent") of a party is required or permitted under this Agreement, the consenting party shall exercise good faith and reasonable judgment in granting or withholding such consent. No party may unreasonably withhold or delay its consent; except as otherwise expressly provided herein, consent shall be deemed to have been withheld if a party fails to consent to the other party within 30 days of having been given written notice of the other party's intention to take any action as to which consent is required or permitted.

20. **Non-binding Mediation**

20.1. If at any time a question or controversy shall arise between the parties hereto in connection with this Agreement and upon which the parties cannot agree, such question or controversy shall be submitted to a single mediator within 20 days after written notice by one party to the other party of its desire for mediation. The parties shall in good faith consult to select a mutually acceptable mediator. The mediator so selected shall be a person with at least one-year of exposure to the concepts of railroad operations and maintenance.

20.2. Upon selection of the mediator, said mediator shall with reasonable diligence determine the questions as disclosed in said notice of demand for mediation and shall give both parties reasonable notice of the time and place of any mediation. Until the completion of mediation, performance under the Agreement shall continue in the manner and form existing prior to the rise of such question.

- 20.3. The compensation, cost, and expenses of the mediator shall be paid in equal shares by the parties.
21. **Entire Agreement.** This document, and the exhibits attached hereto, constitute the entire agreement between the parties, all oral agreements being merged herein, and supersedes all prior representations, agreements, arrangements, understandings, or undertakings, whether oral or written, between or among the parties relating to the subject matter of this Agreement that are not fully expressed herein.
22. **Modification to Agreement.** The provisions of this Agreement may be modified at any time by agreement of the parties hereto, provided such modification is in writing and signed by all parties to this Agreement. Any agreement made after the date of this Agreement and related to the subject matter contained herein shall be ineffective to modify this Agreement in any respect unless in writing and signed.
23. **No Assignment Absent Consent.** Except as specifically provided in this Agreement, Railway shall not assign this Agreement, in whole or in part, or any rights herein granted, without the Commission's prior written consent.
24. **Successors and Assigns.** Subject to the provisions of Section 23, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, and assigns.
25. **Venue and Choice of Law**
- 25.1. Any and all disputes, controversies, or claims arising out of, relating to, or in connection with this Agreement shall be instituted and maintained in a competent court in Santa Cruz County, California, with regard to claims arising under California law, and Santa Clara County, with regard to claims arising under Federal law, and the parties hereby consent to the jurisdiction of any such court and to service of process by any means authorized under California law.
- 25.2. This Agreement shall be governed, construed, and enforced in accordance with the laws of the State of California, without reference to its conflicts of laws provisions. The prevailing party in any claim or action arising out of or connected with this Agreement shall be entitled to recover all reasonable attorneys' fees and related costs, in addition to any other relief that may be awarded by any court or other tribunal of competent jurisdiction.
26. **Acts of God and Other Disruptions of Service.** Neither party shall be deemed to be in default of this Agreement if any failure to meet any condition or to perform any obligation or provision hereof is caused by, a result of, or due to, directly or indirectly, forces beyond its control, including, without limitation, acts of God, natural disasters, atmospheric disturbance, earthquake, fire, flood, tornado, typhoon, tide, tsunami, lightning, storms, soil subsidence, landslides, rock slides, volcanic activity, governmental action or inaction, change of law or regulation, nuclear or chemical contamination, pressure waves from devices travelling at supersonic speeds, strikes, boycotts or other labor disturbances, labor shortage, plague, epidemic, quarantine, riots, invasion, demonstrations or other civil disturbances, sabotage, explosions, insurrections, war (declared and undeclared), terrorism, or threats of terrorism; provided, however, that

performance shall only be excused for as long as the disruption persists and any delay resulting therefrom.

27. Miscellaneous

- 27.1. In the event that any of the provisions of this Agreement are held by a court or other tribunal of competent jurisdiction to be invalid or unenforceable, the remaining portions hereof shall remain in full force and effect and any invalid or unenforceable provisions shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed to the extent necessary to make such provisions valid and enforceable. Without limiting the generality of the foregoing, if the requirement in Section 5.2 that Railway comply with applicable bridge safety management program regulations (under Public Law 110-432, Section 417) is held to be a non-delegable duty of the Commission, the Commission may, at its option, (i) undertake this obligation and charge Railway for the cost thereof, or (ii) terminate this Agreement.
- 27.2. Each party has participated in negotiating and drafting this Agreement so if an ambiguity or a question of intent or interpretation arises, this Agreement is to be construed as if the parties had drafted it jointly, as opposed to being construed against a party because it was responsible for drafting one or more provisions of this Agreement.
- 27.3. Each party acknowledges that the officer executing this Agreement has the authority to enter into this Agreement on behalf of the party and in so doing is authorized to bind the party on whose behalf he is signing, to the terms and conditions of this Agreement.
- 27.4. This Agreement may be executed in one or more counterparts and by facsimile signature, each of which shall be deemed an original, but all of which together constitute one and the same instrument.

In witness whereof, the parties hereto have caused this Agreement to be executed as of the date first herein written.

ST. PAUL & PACIFIC RAILROAD, LLC

By: _____

SANTA CRUZ COUNTY REGIONAL
TRANSPORTATION COMMISSION

By: _____
George Dondero, Executive Director

Approved as to form

By: _____
T. Brooke Miller, RTC Legal Counsel

EXHIBIT A

Map of Railroad Facilities

EXHIBIT B
[RESERVED]

EXHIBIT C

Railway Agreements

EXHIBIT D

Form of Railway Right of Entry Agreement

[To be provided by operator]

EXHIBIT B

NEW ADMINISTRATION, COORDINATION AND LICENSE AGREEMENT (comparison to prior version)

ADMINISTRATION, COORDINATION, AND LICENSE AGREEMENT

This administration, coordination, and license agreement (the "Agreement") is dated 2012 as of 2018, and is between the Santa Cruz County Regional Transportation Commission (the "Commission"), a public agency created under California law, and ~~Santa Cruz and Monterey Bay Railway Company, a California corporation ("Railway")~~ St. Paul & Pacific Railroad, LLC, a Minnesota limited liability company, a subsidiary of Progressive Rail Incorporated ("Railway").

The Commission purchased the Santa Cruz Branch railroad line (the "Property") from Union Pacific Railroad Company ("UP"), via an August 20, 2010, Purchase and Sale Agreement (the "Purchase and Sale Agreement"); ~~and~~

UP reserved an easement to conduct common carrier freight railroad operations on and over the Property (the "Freight Easement"), which Freight Easement is set forth in the Quitclaim Deed by which UP, as grantor, quitclaimed all ~~of~~ its right, title and interest in and to the Property to the Commission, as grantee; ~~and~~

UP ~~has~~ quitclaimed all ~~of~~ its right, title, and interest in and to the Freight Easement to ~~Railway and Railway is a previous operator to act as~~ the sole freight rail operator on the Freight Easement;

For the last few years, a previous operator operated on the Property pursuant to an agreement with the Commission;

The previous operator has agreed to cancel its current administration, coordination and license agreement to operate the Property and to convey the Freight Easement to the Railway;

The Commission has undertaken a study to help determine the best use of the Property by the Commission (the "Study");

Railway needs a long-term agreement of at least 10 years, covering all facets of railroad operations, ~~in order~~ to justify its investment of time and money needed to conduct ~~such~~ railroad operations; and

Railway and the Commission desire to establish their respective rights and obligations with respect to the Property and the Freight Easement by entering into this ~~a~~ Agreement.

The parties therefore agree as follows:

1. Definitions

1.1 The term "Commission" is defined in the introductory paragraphs of this ~~a~~ Agreement and includes its directors, officers, employees, agents, parents, subsidiaries, affiliates, commonly controlled entities, and all others acting under its or their authority.

1.2 The term "Coordination Committee" is defined as the committee established by the

parties pursuant to Section ~~H~~.11.

- 1.2
- 1.3 The term “FRA” is defined as the United States Federal Railroad Administration or its regulatory successor.
 - 1.4 The term “Freight Easement” is defined in the introductory paragraphs of this ~~a~~Agreement.
 - 1.5 The term “Freight Easement Property” is defined as the portion of the Property subject to the Freight Easement consisting of ~~any and~~ all real and personal property within 10 feet of the centerline of any track on the Property except where roadways, buildings, or Property boundary lines reduce such distance to less than 10 feet, and except for any retained rights and personal property described herein.
 - 1.6 The term “Freight Service” is defined as any and all common carrier rail freight operations, rights, or obligations as to the Freight Easement Property including freight transportation, switching, temporary rail car storage (subject to the conditions of Section ~~2.5~~2.5), transloading freight and dispatching.
 - 1.7 The term “Hazardous Materials” is defined as any substance: (a)- that now or in the future is regulated or governed by, requires investigation or remediation under, or is defined as any hazardous waste, hazardous substance, bio-hazard, medical waste, pollutant, or contaminant under any governmental statute, code, ordinance, regulation, rule, or order, or any amendment thereto, including the Hazardous Material Transportation Act 49 U.S.C. § 5101 *et seq.*, the Comprehensive Environmental Response Compensation and Liability Act, 42-U.S.C. §-9601 *et seq.*, and the Resource Conservation and Recovery Act, 42-U.S.C. §-6901 *et seq.*, or (b)- that is toxic, explosive, corrosive, flammable, radioactive, carcinogenic, dangerous, or otherwise hazardous, including gasoline, diesel, petroleum hydrocarbons, polychlorinated biphenyls (PCBs), asbestos, radon, and urea formaldehyde foam insulation.
 - 1.8 The term “Hazardous Materials Laws” means all present and future governmental statutes, codes, ordinances, regulations, rules, orders, permits, licenses, approvals, authorizations, and other requirements of any kind applicable to Hazardous Materials.
 - 1.9 The terms “include”, “includes”, and “including” are to be read as if they were followed by the phrase “without limitation.”
 - 1.10 The term “Loss” is defined as any loss, damage, claim, demand, action, cause of action, penalty, fine, payment, cost, liability, or expense of whatsoever nature, including court costs and reasonable attorneys’ fees, resulting from or related to: (a) any injury to or death of any person, including officers, agents, and employees of the Commission or Railway; or (b)- damage to or loss or destruction of any property, including the Property, any adjacent property, and the roadbed, tracks, equipment, other property of the Commission or Railway, and any property in the Commission’s or ~~Railway’s~~Railway’s care or custody.

- 1.11 The term “Property” is defined as the entire Santa Cruz Branch railroad line right-of-way purchased from UP by the Commission, including all improvements thereto, whether now existing or hereafter constructed.
- 1.12 The term “~~PUC~~” is defined as the California Public Utilities Commission.
- 1.13 The term “Railroad Facilities” is defined as all tracks and other railroad property and fixtures, including ties, switches, trackbeds, bridges, trestles, retaining walls, culverts, railroad signs, switch mechanisms, signals, grade crossings, active and passive grade crossing warning devices and other appurtenances associated with the trackage described on Exhibit A and located on the Freight Easement Property.
- 1.14 The term “Railway” is defined in the introductory paragraphs of this ~~a~~Agreement and includes its directors, officers, employees, agents, parents, subsidiaries, affiliates, commonly controlled entities, any other related persons and entities, and all others acting under its or their authority.
- 1.15 The term “STB” is defined as the United States Surface Transportation Board or its regulatory successor.
- ~~1.16~~ The term “~~Tourist~~Study” is defined in the introductory paragraphs of this Agreement and refers to the Unified Corridor Investment Study anticipated to be completed by the end of calendar year 2018. For purposes of this Agreement, the Study shall be deemed to be “completed” on the date that it is presented, with a recommendation of Commission staff regarding the use of the Property, to the governing Board of the Commission.
- ~~1.16~~1.17 The term “Transportation Service” is defined as the transportation of ~~tourists~~passengers by rail. ~~Tourist~~, including excursion trains. Transportation Service does not include regularly-scheduled ~~passenger~~mass transit or commuter service.
- ~~1.17~~1.18 The term “UP” is defined in the introductory paragraphs of this ~~a~~Agreement.

2. Commission Grants Rights

- 2.1. ~~Freight Service.~~ ~~The (Phase I). Upon the effective date of this Agreement, the~~ Commission grants Railway the exclusive right and obligation to provide Freight Service on the Freight Easement Property. Railway’s rights and obligations to provide Freight Service under this ~~a~~Agreement are limited to those set forth in the Freight Easement or in this ~~agreement.~~Agreement. ~~The authorization to provide Freight Service under this Agreement shall be referred to as “Phase I” of this Agreement.~~ Railway may not, in performing such Freight Service, exceed the maximum speeds authorized by applicable law for the existing track conditions or transport rail cars exceeding the applicable track and bridge weight limits.
- 2.2. Trackage License. The Commission grants Railway an exclusive license to use, maintain, repair, and operate all of the Railroad Facilities for all Freight Service purposes.

Notwithstanding their location on the Freight Easement Property, buildings and other fixtures which are not appurtenances associated with the tracks and related railroad property are not included as part of this license.

- 2.3. No Material Interference with Freight Service. Notwithstanding the rights retained by the Commission under this ~~a~~Agreement, the exercise of such rights by the Commission may not materially interfere with Railway's Freight Service rights and obligations under federal law, or rights under the Freight Easement, unless first approved by the STB.

Tourist

- 2.4. Transportation Service and Other Third-Party Licenses.

2.4.1. Railway ~~Tourist~~Transportation Service. The Commission grants (Phase II). If upon completion of the Study the Commission determines that all of the Freight Easement Property should be used for Transportation Service, the Commission immediately will grant Railway a non-exclusive license to use the Freight Easement Property and Railroad Facilities to provide ~~Tourist~~Transportation Service ~~between Milepost 18.74 in Santa Cruz and the northern end of~~on the Freight Easement Property; provided that prior to the commencement of operations (a) the Commission has approved in writing a detailed plan from Railway describing such ~~Tourist~~Transportation Service, (b) the ~~Tourist~~Transportation Service will not materially conflict with, and will be subject and subordinate to Freight Service, and (c) Railway has obtained any governmental authorizations required under applicable law for such ~~Tourist Service. Railway's Tourist~~Transportation Service ~~plan shall include, at a minimum, Within 12 months of the Commission determining that all of the Freight Easement Property should be used for Transportation Service, Railway will present a detailed plan describing the proposed seasons, dates and times of operation (Transportation Service, including a description of the proposed train schedule), a financial~~equipment to be used. The Commission shall have up to one hundred and twenty (120) days to review Railway's proposed ~~plan and a marketing, and in no case shall the Commission be required to complete its review of Railway's plan. The parties acknowledge that Railway desires to operate Tourist Service over other segments of the Freight Easement Property as well. Commission approval of a~~ prior to the latest date it may grant a license to provide Transportation Service pursuant to Section 8.2.4. Failure to act on the proposed plan for ~~Tourist Service over~~within such ~~other segments, if~~time period will result in the plan being considered approved by the Commission, provided, however, that any ~~will~~ requirements of the California Environmental Quality Act applicable to the Transportation Service have been met. Railway agrees to act in good faith to incorporate the Commission's reasonable requests into its plan. The authorization to provide Transportation Service under this Agreement shall be referred to as "Phase II" of this Agreement.

2.4.1.2.4.1.1. Future Transportation Service. After the effective date of the grant of a license to Railway to provide Transportation Service

(Phase II) pursuant to Section 2.4.1, subsequent changes to the plan for Transportation Service approved by the Commission shall be subject to the Commission's ~~prior receipt of public comments~~ approval. The Commission shall have up to sixty (60) days to review such changes. Failure to act on the proposed amendment to the plan within such time period will result in the plan as amended being considered approved by the Commission provided, however, that any requirements of the California Environmental Quality Act applicable to the Transportation Service have been met. Railway agrees to act in good faith to incorporate the Commission's reasonable requests into its plan.

2.4.2.2.4.1.2. Third-Party Licenses. The Commission reserves the right to grant additional licenses over the Freight Easement Property and the Railroad Facilities (excluding licenses for temporary rail car storage or repairs on the Railroad Facilities), provided that any such licenses: (a) do not materially conflict with, and are subject and subordinate to, Railway's right to use, maintain, repair, and operate all of the Railroad Facilities for all Freight Service purposes, (b) do not materially conflict with, and are subject and subordinate to, any other license granted Railway hereunder ~~having a plan previously approved in writing by the Commission~~, (c) require the licensee to pay its proportionate share of Railway's prior (incurred within the preceding five years) and current costs (including labor costs, materials costs, equipment costs ~~—~~ using equivalent rental costs as a proxy for capital and maintenance and repair costs ~~—~~ travel, fuel, contract labor, and appropriate overhead) to maintain ~~and repair~~ the portion of the Freight Easement Property and Railroad Facilities used by the licensee, and (d) require the licensee to (i) provide ~~insurance equal to or better than that required of Railway in Section 9~~ adequate insurance based on the scope and potential risks of operations of the licensee, as determined by the Commission and (ii) indemnify and hold harmless Railway and the Commission as to any Loss arising out of or related to licensee's operations.—

For a period of three years after

2.4.2.1.2.4.1.3. After the effective date of ~~this agreement~~, the grant of a license to Railway to provide Transportation Service (Phase II) pursuant to Section 2.4.1, any new third-party license for ~~Tourist~~ Transportation Service ~~between Milepost 20.9 and the northern end of~~ on the Freight Easement Property, ~~other than special events as described in Section 2.4.1.10~~, will be deemed to materially conflict with ~~Railway's Tourist Service license, except in the case of special Tourist~~ Railway's Transportation Service events as described in Section 2.4.2.9 license. The limiting provisions of this Section ~~2.4.2.1~~ 2.4.1.3 are conditioned on

the Railway meeting the following (~~all dates are measured following the effective date of this agreement~~); conditions:

- a. ~~Within 6 months: Railway shall submit its plan for its initial Tourist Service to the Commission pursuant to Section 2.4.1.—~~
- b. ~~Within 3 months after Commission approval of initial plan: Railway shall ensure that the Railroad Facilities for its initial Tourist Service meet and are maintained to Class 1 track standards and obtain appropriate FRA and PUC inspections to verify the same.—~~
- c. ~~Within 5 months after Commission approval of initial plan: Railway shall secure all permits and agreements required to operate its initial Tourist Service.—~~
- d. ~~Within 6 months after Commission approval of initial plan: Railway shall initiate its initial Tourist Service.—~~

e. —

a. Levels of Service: -Railway's Tourist Transportation Service shall carry the following numbers of revenue passengers: beginning on the third anniversary of receipt of the license to begin Transportation Service (Phase II):

I. I. — First Year of Service: 5,000 passengers.

II. II. — Second Year of Service: 10,000 passengers.

III. III. — Third Year of Service and Thereafter: 15,000 passengers.

~~2.4.2.2. Following the date that is three years after the effective date of this agreement, a third-party license for Tourist Service will be deemed to materially conflict with another license granted Railway hereunder under a plan previously approved in writing by the Commission if the third party (a) operates on a substantially similar portion of the Freight Easement Property and Railroad Facilities covered by the previously approved license/plan, (b) permits an activity that is substantially similar to the previously approved license/plan and (c) operates during substantially similar seasons, and on substantially similar days and times of day, as the previously approved license/plan.—~~

~~2.4.2.3; 2.4.1.4.~~ If Railway or any third-party licensee (~~"Tourist Operator"~~) fails to initiate and continue to operate Tourist Transportation Service substantially in accordance with the plan its license and approved ~~by the Commission~~ plan, then the applicable Tourist Operator's operations may, at the Commission's option, lose priority over any other operations, but only to the extent of such failure to operate. —

~~2.4.2.4; 2.4.1.5.~~ If Railway constructs capital improvements to the portion of the Freight Easement Property and Railroad Facilities

used by a third party –licensee, the Commission shall promptly and reasonably determine (i) (a) the benefit of such improvements to such licensee or (b) the diminution of value to such improvements for Railway, (ii) the ~~cost~~ apportionment of benefit or loss for such improvements between Railway and such licensee, and (iii) the appropriate amortization period for such improvements (for capital improvements the Commission shall make such determination concurrently with its approval of such capital improvements pursuant to Section ~~6.2).~~ ~~The Commission's~~ 6.2). The Commission's contract with such licensee will (i) require the licensee to pay amounts due within 30 days following receipt of written notice from Railway and (ii) name Railway as a third-party beneficiary with rights of enforcement. As used in this ~~a~~Agreement, the term “capital improvement” means any improvement or repair that is subject to the capital depreciation rules of the Internal Revenue Service.

~~2.4.2.5-2.4.1.6.~~ Each third-party licensee's proportionate share of Railway's costs shall be calculated in advance by Railway (based on the prior year's maintenance and repair costs plus any reasonably anticipated extraordinary maintenance and repair costs, and the parties' relative need or usage during the ~~licensee's~~ ~~licensee's~~ operating season) on a car-mile basis as to the portion of the Freight Easement Property and Railroad Facilities used by such licensee. –(As used in this subsection, “repair costs” refers to the cost of repairs that maintain property in good operating condition and not to repairs that are “capital improvements,” which are dealt with in Subsection ~~2.4.2.4.)~~ 2.4.1.5.) Such licensee shall pay its proportionate share of costs monthly in advance during the months of the licensee's operations. Railway shall at the end of each calendar year reconcile the amounts paid to the actual costs incurred. The ~~Commission's~~ ~~Commission's~~ contract with such licensee will (i) provide that if the actual costs exceed the amount charged to such licensee, such licensee will, within 30 days following receipt of written notice of such reconciliation from Railway, pay the additional amount to Railway, and (ii) name Railway as a third-party beneficiary with rights of enforcement. If the actual costs are less than the amount charged to such licensee, Railway will within 30 days following such reconciliation refund the balance to such licensee.–

~~2.4.2.6. If the Commission, in its discretion, elects to require a lower level of insurance coverage for the licensee than the level of coverage then required of Railway under Section 9, the Commission shall correspondingly lower the limits of coverage required of Railway under Section 9, provided that if Railway elects to reduce the levels of its insurance, it shall also reduce the self insured retention to the level required of the third-party licensee.~~

~~2.4.2.7-2.4.1.7.~~ The Commission or its designee shall have the right to review, obtain, and copy all books, records, computer records, accounts, documentation and any other materials (collectively "Records") pertaining to Railway's costs that are subject to apportionment under this section, including any Records in the possession of any subcontractors, for ~~the purpose of~~ monitoring, auditing, or otherwise verifying said costs. Railway agrees to provide the Commission or its designees with any Records requested for this purpose and shall permit the Commission or its designees access to its premises, upon reasonable notice, during normal business hours, for the purpose of inspecting and copying such Records. -Railway further agrees to maintain such Records for a period of three years. The Commission acknowledges and agrees that these Records constitute Railway's confidential information and shall not be disclosed to any third-party without Railway's prior written approval, except as otherwise required by applicable law. -

~~2.4.1.8.~~ The Commission, may elect to require a lower level of liability insurance coverage for the licensee than the level of coverage then required of Railway under Section 9, provided that Railway reasonably concurs with the Commission that the level of operations of a licensee providing a lower level of liability coverage than required of Railway under Section 9 justifies the reduced coverage.

~~2.4.2.8-2.4.1.9.~~ Railway will reasonably cooperate with any third party holding rights to use the Property, including, without limitation, any third-party ~~Tourist~~Transportation Service operator seeking to secure the necessary certification or qualification required by applicable law to operate on the Railroad Facilities, provided such cooperation does not require significant unreimbursed expense for Railway.-

~~2.4.2.9-2.4.1.10.~~ In addition to all other rights of Commission under this ~~a~~Agreement, and notwithstanding anything to the contrary in this ~~a~~Agreement, the Commission reserves the right to use the Freight Easement Property and Railroad Facilities for special events. -Such special events shall be subject to the provisions of Sections ~~2.4.2.(a)~~2.4.1.5 and ~~(b);~~2.4.1.6, provided that such special events will only be deemed to materially conflict with another ~~Tourist~~Transportation Service license ~~granted Railway hereunder under a plan previously approved in writing by the Commission~~if they operate during the same season, and on the same days and times of day, as ~~the previously approved license/plan~~Railway operations. The Commission will consult with Railway regarding Railway's willingness and ability to operate such special events.-

~~If the Commission and Railway jointly decide that Railway should operate the special event, Railway will operate the special event for a commercially reasonable all-~~

~~inclusive fee based on Railway's documented costs (including, without limitation, locomotive, fuel, trainset, labor and overhead costs) plus ten percent (10%). If the Commission elects to have another operator operate the special event, the Commission will pay, or cause to be paid, to Railway a fee of \$2,500 per day (the "Special Event Fee"), which fee shall cover all services to be provided by Railway to support an event operated by a third party including, but not limited to, dispatching, inspections, and maintenance (but excluding Railway's provision of any locomotive, trainset, crew, and fuel). The Special Event Fee shall be adjusted annually as of July 1st of each year to an amount calculated by multiplying the Special Event Fee specified above by a fraction, the numerator of which shall be the United States Department of Labor's Bureau of Labor Statistics Consumer Price Index, All Urban Consumers, All Items, San Francisco-Oakland-San Jose, CA (1982-84=100), or the successor of such index (the "CPI"), for the month immediately preceding such adjustment, and the denominator of which shall be the CPI for June 2012. Nothing in this paragraph shall preclude the Commission and Railway from negotiating other arrangements for special events (e.g., special events for which there is a different operational or fee structure, including events for which Railway is both the operator and receives all or a portion of the fare revenue).~~

~~2.5. Temporary Rail Car Storage. Subject to the terms and conditions of this agreement, Railway may enter into agreements with any party for temporary rail car storage or repairs on the Railroad Facilities consistent with the provisions of Sections 2.5.1 and 2.5.2; provided that Railway shall deliver a copy of each such agreement to the Commission promptly following execution thereof. The Commission acknowledges that such agreements are Railway's proprietary information ("Confidential Information") and the Commission shall not disclose any matters contained therein to any person or entity, except as required by law, or to RTC's directors, officers, employees, consultants or advisors. If Commission is requested in any judicial or administrative proceeding, or pursuant to the California Public Records Act (California Government Code 6250 et seq.), to disclose any Confidential Information, the Commission shall promptly notify Railway of such request so that Railway may resist such disclosure or seek an appropriate protective order or other remedy. If, in the absence of such a protective order or other remedy, the Commission is nonetheless compelled to disclose Confidential Information, Commission may disclose such Confidential Information without liability hereunder.~~

Nothing in this paragraph shall preclude the Commission and Railway from negotiating arrangements for special events.

2.5. Temporary Rail Car Storage. Subject to the terms and conditions of this Agreement, Railway may undertake temporary rail car storage or repairs related to its own rail operations on the Railroad Facilities consistent with the provisions of Sections 2.5.1 and 2.5.2. For clarification, the staging of rail cars for unloading or loading in connection with transloading activities will not be considered rail car storage hereunder.

2.5.1. Unless otherwise expressly agreed by the Commission in writing, Railway will not (i) store more than 100 rail cars, or (ii) store rail cars in locations other than those ~~marked on Exhibit B (which locations are intended to~~

~~substantially avoid visibility from Highway 1 and blocking designated public beach access), approved by the Commission, or (iii) store any rail car for more than sixtwo (2) months. Absent the Commission's prior written consent, which consent may be withheld in the Commission's sole discretion, Railway may not store railcars that have been used to transport Hazardous Materials unless such railcars are empty or contain only residual amounts of Hazardous Materials.-~~

~~Following the earlier of (i) Railway's institution of Tourist Service pursuant to Subsection 2.4.1, or (ii) three years after the effective date of this agreement,-~~

2.5.2. Railway shall not exercise its right to use the Freight Easement Property or Railroad Facilities for temporary rail car storage or repair in a manner that materially affects the ability of any third-party ~~Tourist~~Transportation Service licensee to access the Railroad Facilities for the purpose of exercising its licensed rights.-

~~2.5.3. The provisions of Subsections 2.5.1 and 2.5.2 apply to future storage agreements as well as storage agreements existing as of the effective date of this agreement.-~~

2.6. Investigation.

2.6.1. Railway hereby acknowledges that (a) it has satisfied itself at the time of this ~~a~~Agreement with respect to the condition of the Freight Easement Property and Railroad Facilities and their suitability for Railway's intended use; (b) it has made such investigations as it deems necessary with respect to the Freight Easement Property and Railroad Facilities, as they exist at the time of this ~~a~~Agreement, and assumes responsibility therefor as to its occupancy and use thereof; and (c) neither the Commission nor any of the Commission's agents has made any oral or written representations or warranties with respect to the Freight Easement Property or Railroad Facilities.

~~The Commission acknowledges that Railway cannot make any investigation, or satisfy itself, with respect to how the Property or the public's use of the Property may change following the Commission's purchase of the Property from UP.-~~

2.6.2. In the event that any public use of the Property, or illegal activities by third parties, including trespassing, cause any significant economic or operational problems for Railway, Railway may terminate this ~~a~~Agreement, provided Railway provides at least ninety (90) days' prior written notice to Commission of the specific problem(s) and cause thereof, cooperates in good faith with Commission throughout such period to resolve such problem(s), and complies with the provisions of Section ~~8.3.-~~1.1.

~~As-Is, Where-Is.-~~

- 2.7. Warranties on Freight Easement Property. Other than as set forth herein, Railway shall take the Freight Easement Property ~~in an "as-is, where-is" condition and~~ without any express or implied warranties, including, but not limited to, any warranties of merchantability, fitness for a particular purpose or volume or quality of traffic on the Freight Easement Property, and subject to: (i) encroachments or other existing conditions, (ii) all existing ways, alleys, privileges, rights, appurtenances and servitudes, howsoever created, and (iii) the Commission's rights hereunder.

2.8. Release. Railway, for itself, its successors and assigns, to the maximum extent permitted by law, hereby waives, releases, remises, acquits and forever discharges the Commission, its officers, employees, agents, successors and assigns, from any Loss of Railway in any way arising out of, or connected with, the known or unknown, existing or future physical or environmental condition of the Freight Easement Property and Railroad Facilities (including any Hazardous Materials contamination in, on, under, or adjacent to, the Freight Easement Property, or any clearance constraints on the Freight Easement Property), or any federal, state, or local law, ordinance, rule or regulation applicable thereto.-

2.8.

2.8.1. Railway hereby grants to Commission, on behalf of any insurer providing property, general liability, or automobile liability insurance to either Railway or Commission with respect to the operations of Railway, a waiver of any right to subrogation which any such insurer of Railway may acquire against Commission by virtue of the payment of any loss under such insurance.

2.8.2. If any Loss described in Section 2.8.2.8 is caused by a third party under contract with the Commission, the Commission shall, at its option, (i) pursue any claim it may have against the third-party contractor, or (ii) assign to Railway any such claim, provided that Railway shall not be obligated to pursue such claim. Any amounts recovered as a result of any such claim shall, to the extent they exceed any fees and costs incurred in pursuing such claim, be used to repair or replace any of the following that are damaged or destroyed in connection with the subject Loss:-

2.8.2.1. First, Freight Easement Property and Railroad Facilities;

2.8.2.2. Then, railroad equipment.-

If Railway commences abandonment proceedings for the subject portion of the Property under Section 8.3.1.1, the Commission will not assign any such claim to Railway and neither party will have any further responsibility under this Subsection 2.8.2.8.2 as to such claim. If Railway's abandonment application is withdrawn, or not approved by the STB, the Commission may assign such claim to Railway, as provided above.-

2.8.3. The provisions of this Section 2.8.2.8 shall survive the termination or expiration of this aAgreement.-

- 2.9. The rights granted by the Commission under Sections ~~2.1—2.5~~ 2.1–2.5 are subject to all existing licenses, leases, easements, restrictions, conditions, covenants, encumbrances, liens and claims of title that may affect the Property and the word “grant” as used herein shall not be construed as a covenant against the existence of any thereof.—

3. Limitation and Subordination of Rights Granted

- 3.1. Commission’s Use of Property. The foregoing granted rights are subject and subordinate to the Commission’s prior and continuing right to use and maintain the Property for any purpose that is not inconsistent with this ~~a~~Agreement. Without limiting the generality of the foregoing, the Commission may construct, maintain, repair, renew, use, operate, change, modify or relocate public projects of any kind, ~~(including but not limited to a trail consistent with the Monterey Bay Sanctuary Scenic Trail (MBSST) Network Final Master Plan)~~, railroad tracks, signals, communication equipment, fiber optics, pipelines, or other facilities upon, along, or across any or all of the Property, all or any of which the Commission may freely do at any time or times without liability to Railway for compensation or damages; provided, however, that the Commission may not materially interfere with Railway’s rights and operations under this ~~a~~Agreement or Railway’s Freight Service rights and obligations under federal law or under the Freight Easement, unless first approved by the STB; and provided, further, that the Commission shall to the extent possible notify Railway as soon as practicable of any such planned or actual interference and provided that the Commission takes all practicable measures to minimize any such interference. Railway shall reasonably cooperate with the Commission in implementing the foregoing uses of the Property. If the Commission or its designee requests Railway’s assistance to transport materials or to perform other transportation or construction services for public projects, Railway will provide such assistance at rates reasonably to be determined between the parties.—

3.1.

- 3.2. Commission's Inspection Access; Access for Maintenance. The Commission may, as reasonable and as coordinated in advance with Railway, (i) inspect the Freight Easement Property and the Railroad Facilities, including any ~~rail-yard or maintenance~~-facility used in connection with Freight Service or ~~Tourist Transportation~~ Service, and (ii) access the Freight Easement Property and Railroad Facilities (including access with Commission or third party rail vehicles) as necessary to maintain areas of the Property outside of the Freight Easement Property that are not otherwise reasonably accessible. The Commission shall defend, indemnify and hold Railway, its officers, directors, employees, and agents, harmless from and against Loss arising from injuries to or death of the Commission's officers, directors, employees, agents, invitees, and contractors relating to such inspections, regardless of the cause of such injuries, death, or damage and regardless of the negligence of any person, except to the extent caused by the willful misconduct or gross negligence of Railway, its employees, or agents. The Commission shall ensure that any of its officers, directors, employees, agents, invitees, and contractors involved in such inspections are trained in all safety requirements and qualified for any operations related to work conducted on or near railroad operations.
- 3.3. Future At-Grade Crossings. The parties acknowledge that (i) local governments may desire to create future at-grade public crossings of the Freight Easement Property, and (ii) the Aptos Village Plan, dated February 23, 2010, specifically includes a future at-grade roadway crossing of the Freight Easement Property at approximately Milepost 12.55. Railway shall, at no cost or expense to itself, cooperate with the efforts of any applicable local governments to secure PUC approval of such crossings; provided, however, that Railway shall be entitled to raise any reasonable safety concerns related to such crossings. The fees and costs associated with the construction, maintenance, and repair of such crossings shall be set either by agreement between Railway and the applicable local government (which agreement shall become a Railway Agreement under Sections ~~4.2~~4.2 and ~~4.3~~4.3), or by the PUC pursuant to Public Utilities Code Section 1202, *et seq.*

4. Assignment of ~~e~~Certain Contracts and Agreements

- 4.1. Upon ~~close approval~~ of ~~escrow under~~Railway to operate the ~~Purchase and Sale Agreement, Union Pacific~~Freight Easement by the STB, the current operator will assign ~~(i)~~ to Railway, certain agreements concerning the operation of the Railroad Facilities, including all track agreements, grade crossing agreements, and other operating agreements set forth in Exhibit C hereto (all such agreements hereinafter referred to as the "Railway Agreements"), and (ii) to the Commission, all other agreements relating to the Property, including all easements, licenses, and leases (all such agreements hereinafter referred to as the "Commission Agreements"). For any assigned Railway Agreements that grant third-party rights of access to, or use of, the Freight Easement or Railroad Facilities, Railway will instruct the holders of such agreements to name the Commission as an additional insured on their insurance policies.
- 4.2. Subject to the provisions of Section ~~2.3~~2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law or under the Freight Easement, unless first approved by the STB, any new Railway Agreement

granting third-party rights of access to, or use of, the Freight Easement or Railroad Facilities, or contemplating alterations thereto, is subject to the Commission's prior written consent. Such Railway Agreements will be documented by Railway using forms approved by the Commission, which forms shall, among other things, include provisions indemnifying the Commission and holding it harmless from any Loss in connection with the exercise of rights under such agreements, and the construction, maintenance, or operation, of any facilities constructed in connection with such agreements.

4.3. Railway is not, without the Commission's prior written consent (subject to the provisions of Section ~~2.3~~2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law or under the Freight Easement, unless first approved by the STB), to execute any new Railway Agreements affecting the Freight Easement Property or Railroad Facilities for a term exceeding the term of this ~~a~~Agreement.

4.3.

4.4. Railway is not, without the Commission's prior written consent, to terminate or modify any Railway Agreement granting third-party rights of access to, or use of, the Freight Easement or Railroad Facilities, or contemplating alterations thereto.

5. Maintenance and Operation of Railroad Facilities

~~5.1. Initial Rehabilitation and Repair Projects. The Commission may, subject to the Commission's contracting policies, rules, and procedures and to the terms of this agreement, including Section 6.1, perform any rehabilitation of, or repairs to, the Railroad Facilities required to be performed under the terms of the Purchase and Sale Agreement.~~

5.1. Initial Rehabilitation and Repair Projects. During Phase I of this Agreement, the Commission agrees to pay for (or cause payment for) repairs to the Freight Easement Property, including all damaged bridges, overpasses, trestles, culverts, and track, necessary to allow Railroad to operate the Freight Easement to MP 7.0. During Phase II of this Agreement, the Commission will pay for (or cause payment for) repairs from MP 7.0 to MP 31.39 (up to Class 1 track classification) within the next three years following grant of the license to provide Transportation Service, provided that if the Commission fails to make the required repairs from MP 7.0 to MP 31.39 within the three years, the requirements for service provided by Section 2.4.1.3(a) will be extended accordingly. After these repairs are complete the Commission shall have no further obligation to maintain or repair the Freight Easement Property or Railroad Facilities.

5.2. Maintenance of Freight Easement Property and Railroad Facilities.

5.2.1. Freight Easement Property and Railroad Facilities. Railway, at its expense, shall keep the Freight Easement Property and Railroad Facilities used by Railway (including occasional use, or use for rail car storage or lay down space) in good repair and in a good and safe condition in conformity with applicable law or any Railway Agreement, and in substantially the same condition provided by the Commission. In the event Railway fails to meet

this obligation, the Commission has the right but no obligation to correct or cause the correction of the deficiency, after no less than 10 days' written notice to Railway (except in an emergency, whereupon no notice is required) and, if Railway does not correct the deficiency within 10 days, the Commission may bill the Railway and the Railway shall pay the actual cost of the correction within 30 days.

5.2.1.

5.2.2. Weeds, Trash, Drainage and Graffiti. The parties agree that Railway shall be responsible for: (i) drainage and culvert maintenance and clearance on the entire Property unless a third person or entity is contractually responsible for such maintenance and clearance, and (ii) weed abatement, vegetation management, and trash collection over the Freight Easement Property as required by applicable law and in substantially the same condition provided by the Commission. If the Commission observes a condition that requires maintenance under these requirements or applicable law, Commission will notify Railway through a maintenance request. Railway shall resolve maintenance requests from the Commission within 30 days unless contested in good faith by the Railway. In the event Railway contests a maintenance request from the Commission, the request shall be submitted for resolution to the Coordination Committee pursuant to Section 11 and, if no resolution is met, the dispute may be submitted to mediation pursuant to Section 20. In the event Railway fails to meet an uncontested obligation, the Commission has the right but no obligation to correct or cause the correction of the deficiency, after no less than 10 days' written notice to Railway (except in an emergency, whereupon no notice is required) and, if Railway does not correct the deficiency within 10 days, the Commission may bill the Railway and the Railway shall pay the actual cost of the correction within 30 days. Railway's obligation to pay shall be secured by the security provided pursuant to Section 5.2.7. The Commission grants Railway a license to enter all portions of the Property as necessary to perform such maintenance; Railway shall be required to repair any damage caused as the result of Railway's performance of any such maintenance. Except as required by applicable law, Railway shall not be responsible for the prevention, removal, or abatement of graffiti wheresoever it may occur. Railway shall also not be responsible for drainage maintenance, weed abatement, vegetation management, or trash collection related to any construction by the Commission (except for Railroad Facilities that Railway is entitled to use), or necessitated by the actions of any third party authorized by the Commission to be on the Property, or ~~related to~~ caused by any actions, omissions, or situations off or outside of the Property, ~~—, except to the extent caused by Railway.~~

5.2.2.

5.2.3. Slopes, Trees and Other Conditions outside of Freight Easement Property. Railway may, at its option, enter portions of the Property outside the Freight Easement Property to maintain or repair slopes, clear fallen trees and branches, or address other conditions, as necessary to ensure the safety and efficiency of Railway's operations. The Commission grants Railway a license to enter all portions of the Property as necessary to perform such work;

Railway shall be required to repair any damage caused as the result of Railway's performance of any such maintenance. The Commission shall have no liability to Railway for maintenance of portions of the Property outside of the Freight Easement Property and Railway's exclusive remedies for damage to the Freight Easement Property or Railroad Facilities shall be limited to those set forth in Sections ~~5.5.3~~ 5.5.3 and ~~8.3.1.1~~ 1.1. However, this section shall not apply to any claims ~~that to the extent they~~ result from the ~~sole active~~ negligence or willful misconduct of the Commission or its officers, directors, employees, agents, contractors, or a third party under contract with the Commission, in which case Railway's exclusive remedies are those set forth in Section ~~2.8.2, 8.3.2.8.2,~~ 1.1 and ~~14.2.1~~ 4.2.

5.2.4. Scope of Maintenance. —For purposes of this section ~~5.2.5.2,~~ the maintenance and repairs to be performed by Railway include, ~~as required by applicable law,~~ (a) inspections, testing, track profiling, adjustments, lubricating, welding, re-spiking surfacing, tamping, and any other tasks constituting customary and routine maintenance of track structures; (b) repair, renewal, replacement, or other customary and routine work required to ensure the safety of Railroad Facilities, including compliance with any applicable bridge safety management program regulations that may be promulgated by the Secretary of Transportation pursuant to Public Law 110-432, Section 417, including the regulations set forth in 49 CFR Part 237; (c) weed and brush control and drainage management; and (d) compliance with all mandated reporting. Railway shall not be in default under this ~~a~~Agreement if it does not perform tie replacement programs or upgrades of rail, switches, bridges, or other track material provided that (e) Railway's failure to perform such replacement programs or upgrades does not violate applicable law or Railway's specific maintenance obligations under this ~~a~~Agreement, and (f) Railway uses reasonable diligence to seek outside funding sources for such work.— The Commission shall have no responsibility to maintain the trackage, structures, or any other Railroad Facilities except as otherwise specifically required herein.

~~5.2.5.~~ 5.2.5. Concurrently with the execution of this ~~agreement, both~~Agreement, the ~~required~~ parties shall execute and deliver to the FRA a written notice of the assignment of track inspection and maintenance responsibilities, and bridge safety management responsibilities, to Railway in accordance with 49 CFR § 213.5(c) and 49 CFR § 237.3. —The notice of assignment shall attach a copy of this ~~a~~Agreement.

~~5.2.5.~~ 5.2.6. Limits of Commission Liability. Notwithstanding the limitations on the Commission's maintenance responsibilities set forth in Section ~~5.2.5.2,~~ the Commission shall be responsible for the maintenance of any improvement it constructs on any portion of the Property.— after completion of its obligations under Section 5.1. As used in this subsection, the term "improvement" excludes improvements made to

the Railroad Facilities, unless such improvement is made at the request of a third-party, in which case such third-party shall be responsible for the incremental increase in the maintenance cost thereof. Notwithstanding the foregoing, maintenance responsibility for improvements to public crossings shall be governed by the provisions of Section ~~3.3.3.3.~~

5.2.7. Security. Railway shall provide a performance bond or alternative security acceptable to the Commission guaranteeing its financial responsibility for the performance of its obligations to provide maintenance of the Freight Easement Property and Railroad Facilities under Section 5.2 and pay all License Fees due under Section 7, in an amount no less than \$160,000, granting the Commission rights as an obligee under the bond or alternative security to cause the performance of these obligations in the event of Railway's failure to do so, after any applicable notice and cure period under the express terms of this Agreement. The exercise of its rights under the bond or alternative security shall not in any way limit the rights of the Commission to terminate this Agreement or any other rights or remedies hereunder or under applicable law.

~~5.2.6.~~

5.3. Ownership of Track Materials. All track materials installed by Railway as part of the Railroad Facilities shall be of equal or better quality than those track materials existing at the time of execution of this ~~a~~Agreement, or after completion of rehabilitation and repair projects by the Commission, including the projects described in Section ~~5.1, 5.1,~~ and shall become the Commission's property. All materials removed by Railway from the Railroad Facilities and replaced as part of maintenance, repairs, or capital improvements shall, if the decision to remove them was Railway's, become the property of Railway. Railway shall not, without the prior written approval of Commission, remove track materials or other improvements from the Property unless they are replaced as provided in this section. -Railway shall keep a written record of track materials and other improvements removed from, or installed upon, the Property and shall provide an updated copy of the record to the Commission on or before the end of each calendar quarter.—

~~5.3.~~

5.4. Clearing of Obstructions, Derailments, and Wrecks. Railway shall as soon as practicable clear any obstructions, derailments, and wrecks of railroad equipment on Railroad Facilities.-

~~5.4.~~

5.4.1. To the extent that any such obstruction, derailment, or wreck damages the Property, Railway shall as soon as practicable restore the Property to the condition it was in prior to the obstruction, derailment, or wreck.

5.4.2. If Railway fails to comply with the provisions of this section, the Commission may perform the required action and charge Railway the reasonable cost thereof. Notwithstanding the foregoing, the Commission shall not charge Railway for the restoration of any damage caused by any third party to any bridge ~~or~~ if in the Commission's reasonable judgment,

such damage does not expose the Commission to potential liability to the FRA, PUC, or any other third party, and either (A) such damage does not obstruct or interfere with any roadway or other property or facility used by the Commission or another third party, or (B) Railway abandons the subject portion of the Property under Section ~~8.3-1.1~~. In addition, the Commission shall not charge Railway for the restoration of any damage caused by the Commission's contractors, or any third party granted access to the Property by specific agreement with the Commission.

- 5.4.3. Nothing in this section is intended to preclude legal action by Railway or the Commission against any third party causing such obstruction, derailment, or wreck.—

5.5. Responsibility for Repair or Replacement.

- 5.5.1. Damage Caused by Freight Operations. Except as otherwise set forth in this ~~a~~Agreement, Railway will be responsible to repair or replace any damage to the Freight Easement Property or Railroad Facilities caused by, or related to, Railway's operations.

- 5.5.2. Damage Caused by Commission. Railway will not be responsible to repair or replace any damage to the Freight Easement Property or Railroad Facilities caused by the Commission, its officers, directors, employees, agents, or contractors.

- 5.5.3. Damage Caused by Acts of God or Other Factors beyond Railway's Control. If any portion of the Freight Easement Property or the Railroad Facilities are damaged or destroyed by flood, fire, civil disturbance, earthquake, earth movement, storm, sabotage, act of God, terrorism, accident or any other event beyond Railway's reasonable control, including damage or destruction caused by third parties, even if said damage or destruction originates outside of the Freight Easement Property, then Railway may— ~~(but, except to the extent covered by insurance required under this Agreement,~~ shall not be required to;) at no cost or expense to the Commission, (a) repair, or cause to be repaired, the damaged or destroyed portion of the Freight Easement Property or Railroad Facilities; ~~or~~ (b) replace, or cause to be replaced, such portion of the Freight Easement Property or the Railroad Facilities; In the event Railway does not elect to repair or (e)replace the damaged or destroyed portion of the Freight Easement Property or Railroad Facilities, Railway shall reasonably cooperate, at its own cost, with the Commission to seek to funding and cause the repair or replacement of the damaged or destroyed Railroad Facilities, or otherwise to suspend or abandon Tourist Transportation Service or Freight Service over all or such portion of the Property as Railway deems appropriate as set forth in Section 8.3the parties mutually agree is necessitated by the damage or destruction.

6. Construction, Relocation, or Removal of Railroad Facilities

6.1. By the Commission.-

6.1.1. The license herein granted is subject to the Commission's needs and requirements to improve and use the Property. Subject to Railway's rights under this ~~a~~Agreement, the Commission, at its sole cost and expense, may add to or remove any portion of the Railroad Facilities, or change or relocate them to new locations as reasonably designated by the Commission, whenever, in the furtherance of the Commission's needs and requirements, the Commission finds such action to be necessary.-

6.1.2. In the course of performing such work, the Commission may not materially reduce, or otherwise materially interfere with, Railway's rights and operations under this ~~a~~Agreement or Railway's Freight Service rights and obligations under federal law or rights under the Freight Easement, unless first approved by the STB. The Commission shall to the extent possible notify Railway as soon as practicable of any such planned or actual interference and take all practicable measures to minimize any such interference.-

6.1.3. Railway shall in such cases provide the Commission with a fixed-price quote for performing any related work, and the Commission shall have the option of accepting Railway's quote and having Railway perform the work, performing the work itself, or having another qualified rail contractor perform such work. If the Commission selects a third-party contractor, the contractor shall execute Railway's Right of Entry Agreement (a copy of which is attached as Exhibit D).

6.1.4. The Commission shall have the right to salvage, stockpile, or otherwise dispose of any Railroad Facilities removed pursuant to this section; provided, however, that if the removed Railroad Facilities are reusable elsewhere on the Freight Easement Property, then Railway shall have the right to so reuse them. Any Railroad Facilities not so reused on the Freight Easement Property shall be ~~returned to the Commission upon expiration or termination of this agreement and may not be sold to third parties or used elsewhere.~~ disposed of or otherwise removed at the Commission's expense.

~~6.1.4.~~6.1.5. All such work performed, and any installation of Railroad Facilities, shall be in conformance with all applicable laws. If the Commission relocates any portion of the tracks used for Freight Service, the centerline of the Freight Easement Property shall, upon completion of the relocation work, be deemed to have been modified to coincide with the centerline of the realigned tracks.

6.2. By Railway. Railway may, at its cost and expense, modify or improve the Freight Easement Property and Railroad Facilities as needed to accommodate its Freight Service or ~~Tourist~~Transportation Service; provided, however, that Railway first obtains the

Commission's written approval of Railway's plans for such modifications and improvements. ~~Subject to the provisions of Section 2.3, 2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law or rights under the Freight Easement, unless first approved by the STB. Subject to the provisions of Section 2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law,~~ or rights under the Freight Easement, unless first approved by the STB, Railway's modification or improvement of the Freight Easement Property and Railroad Facilities will be coordinated with existing or future legal public uses of the Property that the Commission may authorize. Railway may, upon the termination of this ~~a~~Agreement or upon the abandonment of any applicable section of the Freight Easement Property or portion of the Railroad Facilities, remove any modifications or improvements to such Freight Easement Property or Railroad Facilities that were paid for by Railway, that do not constitute any repair or replacement to such Freight Easement Property or Railroad Facilities, and that have not become fixtures to such Freight Easement Property or Railroad Facilities.

- 6.3. The Commission understands that Railway requires locations outside of the Freight Easement Property at which to store and maintain equipment and materials necessary for Railway's Freight Operations ~~including a locomotive pit. The parties agree that Railway may store equipment and materials at the location known as Wrigley's, located between Swift Street and Natural Bridges Drive at or about Milepost 21.5.~~ The parties agree that Railway will need to identify and construct additional maintenance and storage locations on the Property, which Railway may do as needed, subject to applicable law and the Commission's prior written consent (subject to the provisions of Section 2.3, 2.3, which prohibit material interference with Railway's Freight Service rights and obligations under federal law, unless first approved by the STB).
- 6.4. The terms, conditions, and stipulations expressed in this ~~a~~Agreement as to the Freight Easement Property and Railroad Facilities shall apply to the Freight Easement Property and Railroad Facilities as they may at any time be expanded, added to, modified, changed, or relocated.

7. License Fees

- 7.1. For consideration of the rights granted under this ~~a~~Agreement, Railway shall pay the Commission the following fees as calculated on a quarterly basis:

7.1.1. Freight Service:

7.1.1.1. First ~~7500~~ carloads per quarter: ~~\$0.00; 3% of Railway's handling revenue for such carloads.~~

~~7.1.1.2.~~ Any additional carloads per quarter: 5% of Railway's handling revenue for such carloads.

7.1.1.3. Storage: Fifty percent (50%) of Railway's storage revenue in excess of \$2.00 per car per storage day per quarter.

- 7.1.2. Temporary Use of Laydown Space. Railway may from time to time make arrangements with a temporary shipper by rail for the use of otherwise unused laydown space (open space outside of the Freight Easement Property next to railroad track). The parties agree that Railway will need to identify such temporary laydown locations on the Property, which Railway may do as needed, subject to applicable law and the Commission's prior written consent. Railway shall also notify the Commission of the expected duration of each such use. If subsequently the Commission reasonably objects to any specific use of laydown space by Railway or its shipper, the Commission will make available an alternative laydown location reasonably acceptable to Railway and shipper, and Railway shall as soon as practicable discontinue that use of such laydown space and move to the alternative laydown location. Railway shall, in addition to the license fees set forth above, pay the Commission 20% of all revenue (if any) received by Railway by such shippers for such use of such laydown space.

Tourist

- 7.1.3. Transportation Service: 3% of passenger ticket revenue on ticket revenue up to \$500,000 per quarter, plus 5% of passenger ticket revenue on ticket revenue over and above \$350,000 per quarter.
- 7.2. Railway shall, within 60 days following the end of each calendar quarter, determine the amounts payable to the Commission arising from the preceding calendar quarter and shall provide the Commission with a statement describing all amounts due the Commission during the quarter. Railway shall also, upon reasonable request from the Commission, make available for inspection and copying all documents and receipts upon which such fees are based.
- 7.3. Subject to Section 7.4, Railway shall, within 60 days following the end of each calendar quarter, pay the Commission all amounts due the Commission for the prior calendar quarter. Railway's obligation to pay license fees is specifically acknowledged to be secured by the security required under Section 5.2.7.
- 7.4. The requirement to pay the license fees for Freight Service as set forth in Section 7.1.1 will begin with the first quarter after the first anniversary of Phase I of this Agreement and the requirement to pay the license fees for Transportation Service as set forth in Section 7.1.3 will begin with the first quarter after the first anniversary of Phase II of this Agreement.

8. Term and Termination

- 8.1. This ~~a~~Agreement shall become effective when fully executed and delivered to the parties in accordance with Section ~~27.4~~, 27.4 and shall continue in full force and effect for a period of 10 years unless otherwise terminated as provided herein.

~~If (i) Railway does not regularly use the Freight Service or Tourist Service rights in accordance with the plan approved by the Commission (other than railcar storage rights) herein granted over any segment of the Freight Easement Property, or the Railroad Facilities on such segment, for a period of one year without the Commission's prior written approval, or (ii)~~

8.2. Termination:

8.2.1. Default.

8.2.1.1. If Railway does not provide regular Freight Service, without the Commission's prior written approval, the Commission may forthwith terminate this Agreement by written notice. As used in this Section 8.2.1.1, the term "regular Freight Service" means revenue train operations for Freight Service consisting of a minimum of (i) 50 freight cars during the first full calendar year of service (beginning January 1); (ii) 150 freight cars during the second calendar year of service; (iii) 200 freight cars during the third calendar year of service; and (iv) 250 freight cars during the fourth calendar year of service and thereafter; or

8.2.1.2. If Railway does not provide regular Transportation Service during Phase II, without the Commission's prior written approval, the Commission may forthwith terminate this Agreement by written notice. As used in this Section 8.2.1.2, the term "regular Transportation Service" means revenue thematic excursion operation, consisting of a minimum of (i) one excursion during the first full calendar year of service after the third anniversary of the receipt of the license to begin Transportation Service (Phase II); (ii) two excursions during the second calendar year of service after the third anniversary of Phase II; and (iii) five excursions during the third year of service after the third anniversary of Phase II and each year thereafter during the term; provided, that if the Commission fails to make required repairs under Section 5.1 during the first three years of Phase II, the commencement date for "regular Transportation Service" as defined herein shall be extended accordingly. For the avoidance of doubt, the Commission may not terminate this Agreement pursuant to this Section 8.2.1.2 if it has not approved the non-exclusive license to Railway to use the Freight Easement Property and Railroad Facilities to provide Transportation Service on the Freight Easement Property (Phase II).

8.2.8.2.1.3. Railway remains in default in its performance of any covenant or agreement contained herein for a period of 30 days after written notice from the Commission to Railway specifying such default, the Commission may, at its option, ~~forthwith terminate this agreement~~(i) cure the default and, at its option, invoice Railway for the cost thereof, withhold the cost thereof from any amount otherwise due to Railway, or call any available bond or security for the payment thereof; or (ii) ~~forthwith terminate this Agreement~~ by written notice; provided however, that if such default cannot reasonably be cured within 30 days after such notice, the Commission may not terminate this ~~a~~Agreement provided that Railway begins to cure the default within the 30-day notice period and proceeds diligently to complete such cure. ~~Upon expiration or termination of this agreement by either party,~~

~~Railway shall proceed to abandon Freight Service in accordance with section 8.3; provided, that no expiration or termination of this agreement shall be effective unless and until the STB has approved such abandonment. As used in this Section 8.2, the term "regularly use" means revenue train operations for either Freight Service or Tourist Service consisting of a minimum of 40 freight cars per year, or 15,000 passengers per year (beginning with the third year following the effective date of this agreement), as applicable.~~

~~8.2.1. The parties recognize that there are currently little or no revenue train operations on the Freight Easement Property or Railroad Facilities and that it may take time for Railway to develop such operations, if they can be developed. The Commission thus agrees that it shall not terminate this agreement due to the lack of any such revenue train operations for a period of three years from the effective date of this agreement.~~

8.2.2. Upon termination of this Agreement, whether through the expiration of the term or by the Parties as contemplated herein, Railway shall cooperate, at its expense, with the transfer or abandonment of Freight Service as requested by the Commission; provided, that no termination shall be effective unless and until the STB has approved such transfer or abandonment.

8.2.3. The parties acknowledge that initiation of Freight Services by Railway will require Railway to invest substantial funds in anticipation of future revenues from both Phase I (Freight Service) and Phase II (Transportation Service) service. In recognition of Railway's investment, if after completion of the Study and prior to the grant of a license to provide Transportation Service (Phase II), the Commission determines that the Freight Easement Property should not be used for Freight Service from MP 7.0 to MP 0.0, the Commission may terminate this Agreement subject to the provisions of Section 8.2.2, and upon approval of the abandonment by the STB, pay Railway \$300,000.

8.2.4. The Railway can terminate this Agreement if by one hundred and twenty (120) days after completion of the Study, the Commission has not granted a license pursuant to Section 2.4.1 hereof to provide Phase II Transportation Service over all of the Freight Easement Property.

~~8.2.2-8.2.5.~~ The Commission also agrees that it shall not terminate this ~~a~~Agreement due to Railway's failure to use the rights herein granted with respect to any segment of the Freight Easement Property or Railroad Facilities that is necessary to support any Freight ~~Service or Tourist~~ Service over any regularly-used portion of the Freight Easement Property north of any unused segment.)~~+~~.

~~8.3.~~ Abandonment.

~~8.3.1.8.3.~~ Railway may at any time, in its sole and absolute discretion, immediately and without any liability to the Commission: ~~(a) abandon Tourist (except as expressly provided herein, including but not limited to Section 8.5); (a) abandon Transportation~~ Service over all or such portion of the Property as Railway deems appropriate, and (b) seek STB approval to abandon Freight Service over all or such portion of the Property as Railway deems appropriate. In the event that Railway seeks to abandon Freight Service, Railway shall provide the Commission with 90 days advance notice of Railway's intention and shall, at ~~no~~ cost ~~to Railway~~, cooperate with the Commission's efforts to take upon itself all Freight Service operations relating to the Property, to appoint another person or entity to do so, or to rail bank any portion of the Property as to which Railway intends to abandon Freight Service. Nothing in this ~~a~~Agreement is intended by the parties to limit these rights on the part of Railway and the Commission agrees that it will cooperate with Railway, at Railway's cost, in Railway's efforts to so abandon any ~~Tourist~~Transportation Service or Freight Service. No such abandonment, transfer of Freight Service operations, or rail banking, shall be effective unless and until the STB has issued its approval thereof. In addition, this ~~a~~Agreement shall not terminate with respect to all or any portion of the Property unless and until the STB has issued such approval.

~~8.3.2.8.3.1.~~ Any abandonment proceedings instituted by Railway shall comply with the abandonment provisions set forth in the Freight Easement, including the railbanking/OFA provisions thereof.

~~8.3.3.8.3.2.~~ To the extent the STB approves abandonment or transfer of Freight Service over all or any part of the Freight Easement Property or Railroad Facilities, this ~~a~~Agreement and any other rights and obligations of Railway to the Commission, shall, at the time of consummation of such abandonment or transfer, terminate with respect to any abandoned or transferred portions of the Freight Easement Property and Railroad Facilities. Upon the effective date of such abandonment, Railway shall, ~~if so requested by the Commission~~, (i) assign to the Commission or new operator, as applicable, any Railway Agreements affecting the abandoned or transferred portions of the Freight Easement Property and Railroad Facilities, (ii) quitclaim the abandoned portion of the Freight Easement to the Commission or new operator, as applicable, and (iii) execute any additional documents reasonably necessary to effectuate the purpose and intent of this ~~a~~Agreement.

~~8.4. All obligations incurred by the parties prior to the termination of this agreement shall be preserved until satisfied. Notwithstanding the foregoing, if Railway terminates this agreement as to any portion of the Freight Easement Property or Railroad Facilities after damage to the same by any third party, or because the cost to maintain, repair, or replace the same is not economical, Railway shall thereafter have no liability to the Commission for the cost to perform any related obligations.~~

~~8.4.~~ Upon the effective date of termination of this ~~a~~Agreement, Railway shall, if so requested by the Commission, (i) assign to the Commission all Railway Agreements, (ii) quitclaim the Freight Easement to the Commission, and (iii) execute any additional documents reasonably necessary to effectuate the purpose and intent of this ~~agreement~~Agreement.

~~8.5. LIQUIDATED DAMAGES. The parties each acknowledge that, in the event Railway~~

exercises its right to abandon Freight Service over the entirety of the Freight Easement and the Commission is unable, despite its reasonable efforts, to obtain a new operator to which Freight Service is transferred by the STB, then determining the resulting damages would be impracticable or extremely difficult, because the Commission has undertaken a commitment to operate Freight Service on the Freight Easement Property as a condition of receipt of funds for purchase of the Property and is incapable of acting as a common carrier itself. Therefore, the parties agree that, in the event Railway exercises its right to abandon Freight Service over the entirety of the Freight Easement and the Commission is unable, despite its reasonable efforts, to obtain a new operator to which Freight Service is transferred by the STB, Railway shall be liable to the Commission in the amount of \$300,000 in liquidated damages and not as a penalty. Notwithstanding the foregoing, Railway will not be liable for any liquidated damages in abandoning Freight Service in connection with (i) the expiration of the term of this Agreement, (ii) the termination of this Agreement by the Commission pursuant to Section 8.2.1 or 8.2.3, or (iii) the termination of this Agreement by Railway pursuant to Section 8.2.4. In the event the Railway exercises its right to abandon Freight Service and has paid the amount due to the Commission pursuant to this Section 8.5, Commission shall not be entitled to any further damages of any kind, whether direct, special or consequential.

8.5.

9. **Insurance.** Railway and the Commission shall obtain the insurance set forth below, to be kept in force during the life of this ~~a~~Agreement.- All insurance policies must be written by a reputable insurance company reasonably acceptable to the Commission, or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in California. The limits of insurance coverage required under this section shall be increased every five years during the term hereof and any extended term based on any increases or decreases in the Producer Price Index, or any successor index.

- 9.1. Railway Insurance: Railway shall, provide and procure at its own cost and expense; ~~provide and procure Commercial General Railroad Liability ("CGL") insurance and, as applicable, Workman's Worker's Compensation or Federal Employer's Liability Act ("FELA")~~ insurance; (to the extent required by law).

- 9.1.1. The ~~CGL~~liability insurance policy providing bodily injury, including death, personal injury and property damage coverage shall have a limit of not less than \$25 million each occurrence and an aggregate limit of not less than \$50 million. The self-insured retention may not exceed \$250,000 (as that value is periodically adjusted by the Consumer Price Index from and after the effective date of this ~~agreement~~). ~~The CGL insurance policy must be written on ISO occurrence form CG-00-01-12-04 or a substitute form providing reasonably equivalent coverage. This insurance shall contain broad form contractual liability covering the indemnity provisions contained in this agreement, coverage for railroad operations, and coverage for construction or demolition work on or near railroad tracks. Prior to the execution of this agreement~~Agreement). Prior to the execution of this Agreement, Railway shall provide the Commission with a certificate of insurance on a standard ACORD form, or other form reasonably acceptable to the Commission, substantiating the required coverages and limits set forth herein. Upon request by the Commission, Railway shall immediately furnish a

complete copy of any policy required hereunder, including all endorsements, with said copy certified by the insurance company to be a true and correct copy of the original policy.

9.1.2. The ~~CGL~~liability insurance policy must include the Commission as an "additional insured" ~~(using ISO Additional Insured Endorsement CG 20 26 or a substitute form reasonably acceptable to and the property insurance policy shall name the Commission providing reasonably equivalent coverage).~~ as a loss payee.

9.1.3. Required Provisions: The ~~CGL~~ insurance policy shall contain, or be endorsed to contain, the following provisions:

9.1.3.1. For any claims related to this ~~a~~Agreement, Railway's insurance coverage shall be primary insurance as respects the Commission, its directors, officers, employees, and agents and any insurance or self-insurance maintained by the Commission, its directors, officers, employees, or agents, shall be in excess of Railway's insurance and shall not contribute to it. However, this section shall not apply to any claims that result from the sole negligence or willful misconduct of the Commission or its officers, directors, employees, agents, or invitees; as to any such claim, the Commission's insurance shall be primary, and any insurance or self-insurance maintained by Railway, its directors, officers, employees, or agents, shall be in excess of Commission's insurance and shall not contribute to it.—

~~Any failure by~~

~~9.1.3.2.~~ Railway ~~to~~shall comply with all reporting or other provisions of the policies, as necessary to maintain coverage required hereunder, including ~~breaches of warranties, shall not affect~~ coverage to be provided to the Commission, its directors, officers, employees, or agents. Railway shall notify Commission in writing of any claims submitted relating to the Property under any policy required under this Agreement.

~~9.1.3.2.~~

9.1.3.3. Railway's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

9.1.3.4. Each insurance policy required by this ~~a~~Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except after 30 days' prior written notice by certified mail, return receipt requested, has been given to the Commission.—

9.1.4. Workers' Compensation ~~or FELA~~ insurance shall cover any statutory liability as determined to be applicable by the compensation laws of the State of California ~~or FELA, as applicable,~~ with a limit of at least \$1 million. The

Railway represents and the Commission understands that all railroad workers are subject to the FELA and are not covered by Worker's Compensation insurance.

- 9.1.5. The fact that insurance is obtained by Railway or by the Commission on behalf of Railway will not be deemed to release or diminish Railway's liability, including liability under the indemnity provisions of this aAgreement. Damages recoverable by the Commission from Railway or any third party will not be limited by the amount of the required insurance coverage.

9.2. Commission Insurance: The Commission shall, at its own cost and expense, provide and procure such Commercial General Liability ("CGL") and Workman'ers' Compensation insurance as it deems necessary to cover its obligations under this aAgreement.

9.2.

10. **Notices.** All correspondence, notices, and other papers shall be delivered either in person or by certified or registered mail, postage prepaid, to the parties hereto at the following addresses:

If to Railway: President
Santa Cruz and Monterey Bay Railway Co.
118 S. Clinton St., Suite 400
Chicago, IL 60661
Attn: Ed Ellis and Kevin Busath
Fax: 312-466-9589

St. Paul & Pacific Railroad, LLC 21778 Highview Avenue
Lakeville, MN 55044

If to Commission:
Executive Director
Santa Cruz County Regional Transportation Commission
1523 Pacific Avenue
1523 Santa Cruz, CA 95060 Fax: 831-460-
3215

11. Coordination Committee.

- 11.1. In order to ensure the safety and efficiency of all operations on the Property, the parties shall establish a Coordination Committee. -The Coordination Committee shall be composed of two representatives from each party (and any other persons or entities as the parties may mutually agree) and shall (a) serve as a forum to coordinate the parties' activities and resolve questions or disputes (but only to the extent the parties' representatives have been so authorized), and (b) be responsible to make recommendations to the parties. -The Coordination Committee shall meet on a regular schedule to be determined by the parties, but may be convened for special meetings by either party upon 10 days' written notice to the other party. -Following each meeting, the Coordination Committee shall deliver written minutes of such meeting to Railway and the Commission.-

11.2. Railway shall comply with all reasonable requests of the Commission for representatives of Railway to attend public meetings organized by the Commission to provide non-confidential information about Railway's operations under this Agreement.

12. Claims and Liens for Labor and Material

12.1. Railway agrees to pay in full for all materials joined or affixed to the Property, to pay in full all persons who perform labor upon the Property, and not to permit or suffer any mechanic's or materialman's lien of any kind or nature to be enforced against the Property, as to any work done or materials furnished thereon by Railway or at Railway's request. Railway shall indemnify, hold harmless and defend Commission (with counsel reasonably acceptable to Commission) against and from any and all liens, claims, demands, costs and expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed, or materials furnished.—

13. Property Taxes

~~13.1.~~ 13.1. So far as it lawfully may do so, the Commission shall assume, bear, and pay all property and other taxes and assessments of whatsoever nature or kind (whether general, local, or special) levied or assessed upon or against the Property, excepting taxes levied upon and against any Freight Easement Property or Railroad Facilities. Railway shall assume, bear, and pay all property and other taxes and assessments of whatsoever nature or kind (whether general, local, or special) levied or assessed upon or against any Freight Easement Property or Railroad Facilities for which it has a license to operate, including possessory interest taxes under California Revenue and Taxation Code section 107 *et seq.*, unless applicable law otherwise excuses payment of taxes due to the ~~Commission's~~Commission's ownership of the Property, the Freight Easement Property, or the Railroad Facilities.—

14. Indemnity

14.1. Railway shall indemnify, defend and hold harmless the Commission from any Loss which is due to or arises from: (a) Railway's operation, maintenance, repair, or use of the Freight Easement Property, Railroad Facilities, any appurtenances thereto, or any part thereof; (b) Railway's provision of Freight Service or ~~Tourist Transportation~~ Service; or (c) Railway's failure to comply with or perform any of the terms and conditions set forth in this ~~a~~Agreement; except to the extent that the Loss is caused by the ~~sole~~ negligence or willful misconduct of the Commission, its officers, agents, or employees, or a breach of an express material warranty of the Commission. The provisions of this section ~~shall~~ survive the termination or expiration of the term of this ~~agreement~~Agreement for a period of two years.

14.2. The Commission shall indemnify, defend and hold harmless Railway from any Loss ~~which is due to the extent caused by~~ or ~~arising~~ from the ~~sole~~ negligence or willful misconduct of the Commission, its officers, agents, employees, and contractors. For purposes of this Section ~~14.2~~14.2 only, the term ~~"Loss"~~ is limited to any loss, damage, claim, demand, action, cause of action, penalty, fine, payment, cost, liability, or expense of whatsoever nature, including court costs and reasonable attorneys' fees,

resulting from or related to: (a) any injury to or death of any person, including officers, agents, and employees of the Commission or Railway; or (b) ~~damage to or loss or destruction of Railway's equipment, rolling stock and any items being transported on behalf of Railway's customers.~~ Any Loss related to damage to or destruction of the Freight Easement Property or Railroad Facilities is subject to the provisions of Section ~~2.8.2.8.~~ The provisions of this section ~~shall survive the termination or expiration of the term of this agreement.~~ Agreement for a period of two years.

~~14.3~~

~~14.3.~~ Each party's obligations to the other under Sections ~~14.1~~14.1 and ~~14.2~~14.2 respectively are subject to the following conditions: (a) the party seeking indemnification (the "Indemnified Party") shall, following Indemnified Party's discovery of a Loss for which Indemnified Party seeks indemnification, or of circumstances that may reasonably result in such a Loss, promptly deliver notice to the other party (the "Indemnifying Party") describing such Loss or circumstances, (b) the Indemnified Party shall make reasonable efforts to mitigate the effect of such Loss or circumstances, (c) the Indemnified Party shall give the Indemnifying Party ~~every~~the opportunity to control the defense against such Loss, and shall not compromise or settle such Loss without the Indemnifying Party's prior written consent, and (d) in no event shall either party be liable to the other for consequential, incidental, indirect or punitive damages, even if notified of the possibility of such damages, unless such damages are included in any third-party claim against the Indemnified Party.

15. **Removal of Railway Equipment, Personnel, and Property upon Termination of Agreement.** Prior to, or upon, the termination of this ~~a~~Agreement, Railway shall, at its sole expense, remove its equipment, personnel, and other property from the Freight Easement Property and Railroad Facilities and shall restore, to the Commission's reasonable satisfaction, such portions of the Freight Easement Property and Railroad Facilities used by Railway to as good a condition as they were ~~in at the beginning of this agreement or~~ after the completion of rehabilitation and repairs by the Commission, including the projects specified in Section ~~5.1, 5.1, if completed (or, if the Commission does not complete rehabilitation and repairs, as good a condition as they were in at the beginning of this Agreement).~~ excepting normal wear and tear. If Railway fails to do the foregoing, the Commission may do such work at the cost and expense of Railway. -Railway may not remove any property, including the Railroad Facilities, that is or becomes the property of the Commission under this ~~a~~Agreement.-

16. **Hazardous Substances and Wastes**

~~16.1.~~ Railway shall not be liable or responsible for any Hazardous Materials present on, in, or under the Property, or other problems relating to the Property, prior to the commencement date of its operations on the Freight Easement Property, except to the extent Railway's activities exacerbate the contamination of any such pre-~~existing~~ Hazardous Materials.

~~16.1.~~

16.2. Railway shall comply with all applicable laws in its occupancy, operation, and maintenance of the Freight Easement Property and Railroad Facilities. Without first obtaining the Commission's written permission (which may be withheld in the Commission's sole reasonable discretion), Railway shall not treat or dispose of Hazardous Materials on the Freight Easement Property or Railroad Facilities. Railway

shall not release any Hazardous Materials on or at the Freight Easement Property or Railroad Facilities, including through any drainage or sewer systems. Railway assumes all responsibility for the investigation and cleanup of any such release or exacerbation by Railway and shall indemnify, defend, and hold harmless the Commission and its property, its officers, agents, and employees, for all costs, including reasonable environmental consultant and reasonable attorneys' fees, and claims resulting from or associated with any such release or exacerbation by Railway. Railway shall assume all responsibility for and shall indemnify, defend, and hold harmless Commission against all costs and claims associated with a release or leak of Hazardous Materials, or exacerbation of pre-existing Hazardous Materials, occurring between the commencement date of its operations on the Freight Easement Property, and the expiration or sooner termination of this ~~a~~Agreement, and related to Railway's use of the Freight Easement Property and Railroad Facilities, unless such event was caused by the sole negligence or willful misconduct of the Commission, its officers, employees, or agents.

~~16.3.~~ Railway shall not install any above-ground or underground storage tanks without the Commission's prior written consent, which consent may be granted or withheld in Commission's sole and absolute discretion. If such consent is granted, Railway shall obtain any necessary permits, notify the proper authorities, and provide the Commission with copies of any such permits and notifications. Railway shall assume all responsibility for and shall indemnify, defend, and hold harmless the Commission against all costs and claims associated with a release or leak of the contents of any such tank occurring between the commencement date of its operations on the Freight Easement Property, and the expiration or termination of this ~~a~~Agreement, unless such event was caused by the sole negligence or willful misconduct of the Commission, its officers, employees, or agents.

~~16.3.~~

16.4. The Commission understands and acknowledges that the regular operation and maintenance of railroad equipment and tracks involve the storage, use, and release of *de minimus* amounts of Hazardous Materials, including petroleum products, creosote, and chromated copper arsenate. The Commission agrees that Railway shall not be liable or responsible for the *de minimus* release of any such Hazardous Materials, unless (i) such release violates applicable law, or (ii) the Commission is otherwise entitled to defense and indemnity under Section ~~14.1~~ 14.1.

16.5. If Railway knows, or has reasonable cause to believe, that any Hazardous Materials have come to be located under or about the Freight Easement Property or Railroad Facilities, other than as specifically provided herein or as previously consented to in writing by the Commission, Railway shall immediately give the Commission written notice thereof, together with a copy of any statement, report, notice, registration, application, permit, business plan, license, claim, action, or proceeding given to or received from any governmental authority or private party concerning the presence, spill, release, discharge of, or exposure to, such Hazardous Materials.

16.6. This Section ~~16~~16 shall continue in full force and effect regardless of whether this ~~a~~Agreement is terminated pursuant to any other provision or the Freight Easement Property and Railroad Facilities are abandoned and vacated by Railway.

17. **Trespassers and Dangerous Conditions.** Railway shall not be required to take any action or incur any expense (including posting signage or warnings, providing fencing or other security) as to or against trespassers on the Property, or invitees of the Commission, other than to promptly notify local law enforcement and the Commission concerning any trespassers observed on the Property by Railway personnel. If Railway becomes aware of any dangerous conditions on or about the Property, Railway shall promptly notify the Commission of such conditions.
18. **Waivers.** The failure of either party hereto to enforce any of the provisions of this **aAgreement**, or to enforce any right or option which is herein provided, shall in no way be construed to be a waiver of such provision(s) as to the future, nor in any way to affect the validity of this **aAgreement** or any part hereof, or the right of either party to thereafter enforce each and every such provision and to exercise any such right or option. ~~No waiver of any breach of this **aAgreement** shall be held to be a waiver of any other or subsequent breach.~~
19. **Consent.** Unless expressly provided to the contrary elsewhere in this **aAgreement**, whenever the consent, approval, judgment, or determination (collectively, "consent") of a party is required or permitted under this **aAgreement**, the consenting party shall exercise good faith and reasonable judgment in granting or withholding such consent. ~~No party may unreasonably withhold or delay its consent; except as otherwise expressly provided herein, consent shall be deemed to have been withheld if a party fails to consent to the other party within 30 days of having been given written notice of the other party's intention to take any action as to which consent is required or permitted.~~
20. **Non-binding Mediation**
- 20.1. If at any time a question or controversy shall arise between the parties hereto in connection with this **aAgreement** and upon which the parties cannot agree, such question or controversy shall be submitted to a single mediator within 20 days after written notice by one party to the other party of its desire for mediation. ~~The parties shall in good faith consult to select a mutually acceptable mediator.~~ The mediator so selected shall be a person with at least one-year of exposure to the concepts of railroad operations and maintenance.
- 20.2. Upon selection of the mediator, said mediator shall with reasonable diligence determine the questions as disclosed in said notice of demand for mediation and shall give both parties reasonable notice of the time and place of any mediation. Until the completion of mediation, performance under the **aAgreement** shall continue in the manner and form existing prior to the rise of such question.
- 20.3. The compensation, cost, and expenses of the mediator shall be paid in equal shares by the parties.
21. **Entire Agreement.** This document, and the exhibits attached hereto, constitute the entire agreement between the parties, all oral agreements being merged herein, and supersedes all prior representations, agreements, arrangements, understandings, or undertakings, whether oral or written, between or among the parties relating to the subject matter of this **aAgreement** that are not fully expressed herein.

22. **Modification to Agreement.** The provisions of this ~~a~~Agreement may be modified at any time by agreement of the parties hereto, provided such modification is in writing and signed by all parties to this ~~a~~Agreement. Any agreement made after the date of this ~~a~~Agreement and related to the subject matter contained herein shall be ineffective to modify this ~~a~~Agreement in any respect unless in writing and signed.
23. **No Assignment Absent Consent.** -Except as specifically provided in this ~~a~~Agreement, Railway shall not assign this ~~a~~Agreement, in whole or in part, or any rights herein granted, without the Commission's prior written consent.
24. **Successors and Assigns.** Subject to the provisions of Section ~~23~~, 23, this ~~a~~Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, and assigns.
25. **Venue and Choice of Law**
- 25.1. Any and all disputes, controversies, or claims arising out of, relating to, or in connection with this ~~a~~Agreement shall be instituted and maintained in a competent court in ~~San Francisco~~Santa Cruz County, California, with regard to claims arising under California law, and Santa Clara County, with regard to claims arising under Federal law, and the parties hereby consent to the jurisdiction of any such court and to service of process by any means authorized under California law.
- ~~25.2.~~ This ~~a~~Agreement shall be governed, construed, and enforced in accordance with the laws of the State of California, without reference to its conflicts of laws provisions. The prevailing party in any claim or action arising out of or connected with this ~~a~~Agreement shall be entitled to recover all reasonable attorneys' fees and related costs, in addition to any other relief that may be awarded by any court or other tribunal of competent jurisdiction.-
- ~~25.2.~~
26. **Acts of God and Other Disruptions of Service.** Neither party shall be deemed to be in default of this ~~a~~Agreement if any failure to meet any condition or to perform any obligation or provision hereof is caused by, a result of, or due to, directly or indirectly, forces beyond its control, including, without limitation, acts of God, natural disasters, atmospheric disturbance, earthquake, fire, flood, tornado, typhoon, tide, tsunami, lightning, storms, soil subsidence, landslides, rock slides, volcanic activity, governmental action or inaction, change of law or regulation, nuclear or chemical contamination, pressure waves from devices travelling at supersonic speeds, strikes, boycotts or other labor disturbances, labor shortage, plague, epidemic, quarantine, riots, invasion, demonstrations or other civil disturbances, sabotage, explosions, insurrections, acts of God, or any other causes beyond the party's control war (declared and undeclared), terrorism, or threats of terrorism; provided, however, that performance shall only be excused for as long as the disruption persists and any delay resulting therefrom.
27. **Miscellaneous**
- 27.1. In the event that any of the provisions of this ~~a~~Agreement are held by a court or other

tribunal of competent jurisdiction to be invalid or unenforceable, the remaining portions hercof shall remain in full force and effect and any invalid or unenforceable provisions shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed to the extent necessary to make such provisions valid and enforceable. Without limiting the generality of the foregoing, if the requirement in Section 5.25.2 that Railway comply with applicable bridge safety management program regulations (under Public Law 110-432, Section 417) is held to be a non-delegable duty of the Commission, the Commission may, at its option, (i) undertake this obligation and charge Railway for the cost thereof, or (ii) terminate this ~~a~~Agreement.

- 27.2. Each party has participated in negotiating and drafting this ~~a~~Agreement so if an ambiguity or a question of intent or interpretation arises, this ~~a~~Agreement is to be construed as if the parties had drafted it jointly, as opposed to being construed against a party because it was responsible for drafting one or more provisions of this ~~a~~Agreement.
- 27.3. Each party acknowledges that the officer executing this ~~a~~Agreement has the authority to enter into this ~~a~~Agreement on behalf of the party and in so doing is authorized to bind the party on whose behalf he is signing, to the terms and conditions of this ~~a~~Agreement.
- 27.4. This ~~a~~Agreement may be executed in one or more counterparts and by facsimile signature, each of which shall be deemed an original, but all of which together constitute one and the same instrument. ~~Each party shall deposit the executed agreement into escrow with instructions to deliver the agreement upon close of escrow under the Purchase and Sale Agreement.~~

In witness whereof, the parties hereto have caused this ~~a~~Agreement to be executed as of the date first herein written.

ST. PAUL & PACIFIC RAILROAD, LLC

~~SANTA CRUZ AND MONTEREY BAY~~
~~RAILWAY COMPANY~~

By: _____

Edwin E. Ellis

President

By: _____

SANTA CRUZ COUNTY REGIONAL
TRANSPORTATION COMMISSION

~~SANTA CRUZ COUNTY REGIONAL
TRANSPORTATION COMMISSION~~

By: _____

-

By: _____

George A. Dondero

Executive Director

Approved as to form