

Sally Mordi
202 429 6287
smordi@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoel.com



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ENTERED
Office of Proceedings
September 25, 2020
Part of
Public Record

September 25, 2020

VIA E-FILING

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

**Re: STB Docket No. FD 33662 (Sub-No. 2), BNSF Railway Company—
Trackage Rights Exemption—Omaha Public Power District**

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is a highly confidential version of BNSF Railway Company's Notice of Exemption under 49 C.F.R. § 1180.2(d)(7), to be filed under seal. We are concurrently filing a Motion for Protective Order, along with a public version of the Notice of Exemption with appropriate redactions that the Board can place in its docket.

The filing fee of \$1,400 was paid using pay.gov. Please contact me with any questions.

Respectfully submitted,

A handwritten signature in dark ink that reads "Sally Mordi".

Sally Mordi
Attorney for BNSF Railway Company

**FEE RECEIVED
September 25, 2020
SURFACE
TRANSPORTATION BOARD**

Enclosures

**FILED
September 25, 2020
SURFACE
TRANSPORTATION BOARD**

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33662 (SUB-NO. 2)

BNSF RAILWAY COMPANY
—TRACKAGE RIGHTS EXEMPTION—
OMAHA PUBLIC POWER DISTRICT

VERIFIED NOTICE OF EXEMPTION
Pursuant to 49 C.F.R. § 1180.2(d)(7)

Tyler R. White
Senior General Attorney
BNSF Railway Company
2500 Lou Menk Drive, AOB-3
Fort Worth, TX 76131-2828

Peter W. Denton
Sally Mordi
Steptoe & Johnson LLP
1330 Connecticut Ave, NW
Washington, DC 20036
(202) 429-3000

*Attorneys for BNSF Railway
Company*

Dated: September 25, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33662 (SUB-NO. 2)

BNSF RAILWAY COMPANY
—TRACKAGE RIGHTS EXEMPTION—
OMAHA PUBLIC POWER DISTRICT

VERIFIED NOTICE OF EXEMPTION
Pursuant to 49 C.F.R. § 1180.2(d)(7)

BNSF Railway Company (“BNSF”)¹ submits this Notice of Exemption pursuant to 49 C.F.R. § 1180.2(d)(7) for the exemption of BNSF’s acquisition of local trackage rights over a rail line owned by Omaha Public Power District (“OPPD”) in Otoe and Lancaster Counties, Nebraska (the “Line”). The Line has a distance of approximately 56.65 miles and is comprised of two line segments with noncontiguous mileposts: (1) a line segment which runs from milepost 56.3, near College View, to milepost 4.95, near Nebraska City, and (2) a connecting line segment which runs from milepost 0.7, near Nebraska City, to milepost 6.0, near Arbor.²

Under 49 C.F.R. § 1180.2(d)(7), the acquisition, renewal or modification of trackage rights by a rail carrier over the lines owned or operated by any other rail carrier or carriers is exempt if the rights are (i) based on a written agreement, and (ii) not filed or sought in a responsive application in rail consolidation proceedings. The trackage rights covered by this notice are based on a written agreement

¹ Prior proceedings in this Finance Docket have listed BNSF’s former name, The Burlington Northern and Santa Fe Railway Company, in the docket title.

² Other proceedings involving the Line, described below, have described the same Line using different mileposts. Following a review of the public dockets in each of these proceedings, we believe the four mileposts listed in this Notice of Exemption most accurately reflect the termini of each of the two noncontiguous Line segments. *See Union Pac. R.R. Co.—Trackage Rights Exemption—Omaha Public Power District*, FD 34388, slip op. at 1 n.2 (STB served Aug. 22, 2003).

between BNSF and OPPD, attached as Exhibit B, and are not being sought in a responsive application in a rail consolidation proceeding. Under these circumstances, the Section 1180.2(d)(7) exemption is applicable to this transaction.

Pursuant to the Surface Transportation Board’s (“STB” or “Board”) regulations at 49 C.F.R. § 1180.4(g), BNSF submits the following information:

Section 1180.6 Supporting Information

(a)(1)(i) Description of Proposed Transaction

The transaction covered by this Notice of Exemption is the acquisition of local trackage rights by BNSF over the Line, as defined above and as shown on the map attached hereto as Exhibit A (the “Line”). BNSF and OPPD have entered into an agreement under which BNSF will provide service over the Line to OPPD’s Nebraska City Power Station and to shippers other than OPPD located along the Line.

The Line that is the subject of this Notice of Exemption is the same line that OPPD acquired from BNSF in 1997. *Omaha Public Power District—Acquisition Exemption—The Burlington Northern and Santa Fe Ry. Co.*, FD 33447 (STB served Sept. 12, 1997). Following OPPD’s acquisition, Kyle Railroad Company obtained temporary acquisition and operation authority with respect to the Line, to expire on December 31, 2003. *See Kyle R.R. Co.—Acquis. & Oper. Exemption—Omaha Public Power District*, FD 33642 (STB served Aug. 25, 1998); *Kyle R.R. Co.—Acquis. & Oper. Exemption—Omaha Public Power District*, FD 33642 (Sub-No. 1) (STB served Oct. 2, 1998). BNSF also acquired temporary local trackage rights over the Line, to allow BNSF to operate the Line through the end of 1998, when Kyle Railroad would assume operations. *The Burlington Northern and Santa Fe Railway Co.—Trackage Rights Exemption—Omaha Public Power District*, FD 33662 (STB served Oct. 7, 1998); *The Burlington Northern and Santa Fe Railway Co.—Trackage Rights Exemption—Omaha Public Power District*, FD 33662 (Sub-No. 1) (STB served Nov. 16, 1998). In 2003, Union Pacific Railroad Company acquired local trackage rights

over the Line. *See Union Pac. R.R. Co.—Trackage Rights Exemption—Omaha Public Power District*, FD 34388 (STB served Aug. 22, 2003).

Name and address of tenant railroad:

BNSF Railway Company
2650 Lou Menk Drive
Fort Worth, Texas 76131

Questions regarding this transaction are to be addressed to BNSF's counsel:

Peter W. Denton
Steptoe & Johnson LLP
1330 Connecticut Ave, NW
Washington, DC 20036
(202) 429-3000

(a)(1)(ii) Consummation Date

The trackage rights will be consummated on or after January 1, 2021.

(a)(1)(iii) Purpose Sought to be Accomplished

The purpose of the trackage rights is to permit BNSF to provide service over the Line to OPPD's Nebraska City Power Station and to shippers other than OPPD located along the Line.

(a)(5) List of States in which the Party's Property is Situated

The involved trackage rights are located in the State of Nebraska.

(a)(6) Map

A map illustrating the Line is attached as **Exhibit A**.³

(a)(7)(ii) Agreement

The Trackage Rights Agreement is attached as **Exhibit B**.

Labor Protection

BNSF is agreeable to the labor protection conditions generally imposed in trackage rights proceedings as found in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease*

³ A larger version of the map is available at <https://bloximages.chicago2.vip.townnews.com/journalstar.com/content/tncms/assets/v3/editorial/f/cc/fcc0ac51-25b7-5d1b-b530-603877684b21/5420844545a28.pdf.pdf>.

and Operate, 360 I.C.C. 653 (1980).

Caption Summary

A caption summary of this transaction suitable for publication in the *Federal Register* is attached as Exhibit C.

Environmental and Historical Matters

Neither environmental nor historic preservation documentation is required for this transaction. *See* 49 C.F.R. § 1105.6(c)(3) (no environmental documentation will normally be prepared for trackage rights transactions); *id.* § 1105.8(b)(3) (trackage rights which will not substantially change the level maintenance of railroad property do not require a historic report).

Respectfully submitted,



Tyler R. White
Senior General Attorney
BNSF Railway Company
2500 Lou Menk Drive, AOB-3
Fort Worth, TX 76131-2828

Peter W. Denton
Sally Mordi
Steptoe & Johnson LLP
1330 Connecticut Ave, NW
Washington, DC 20036
(202) 429-3000

*Attorneys for BNSF Railway
Company*

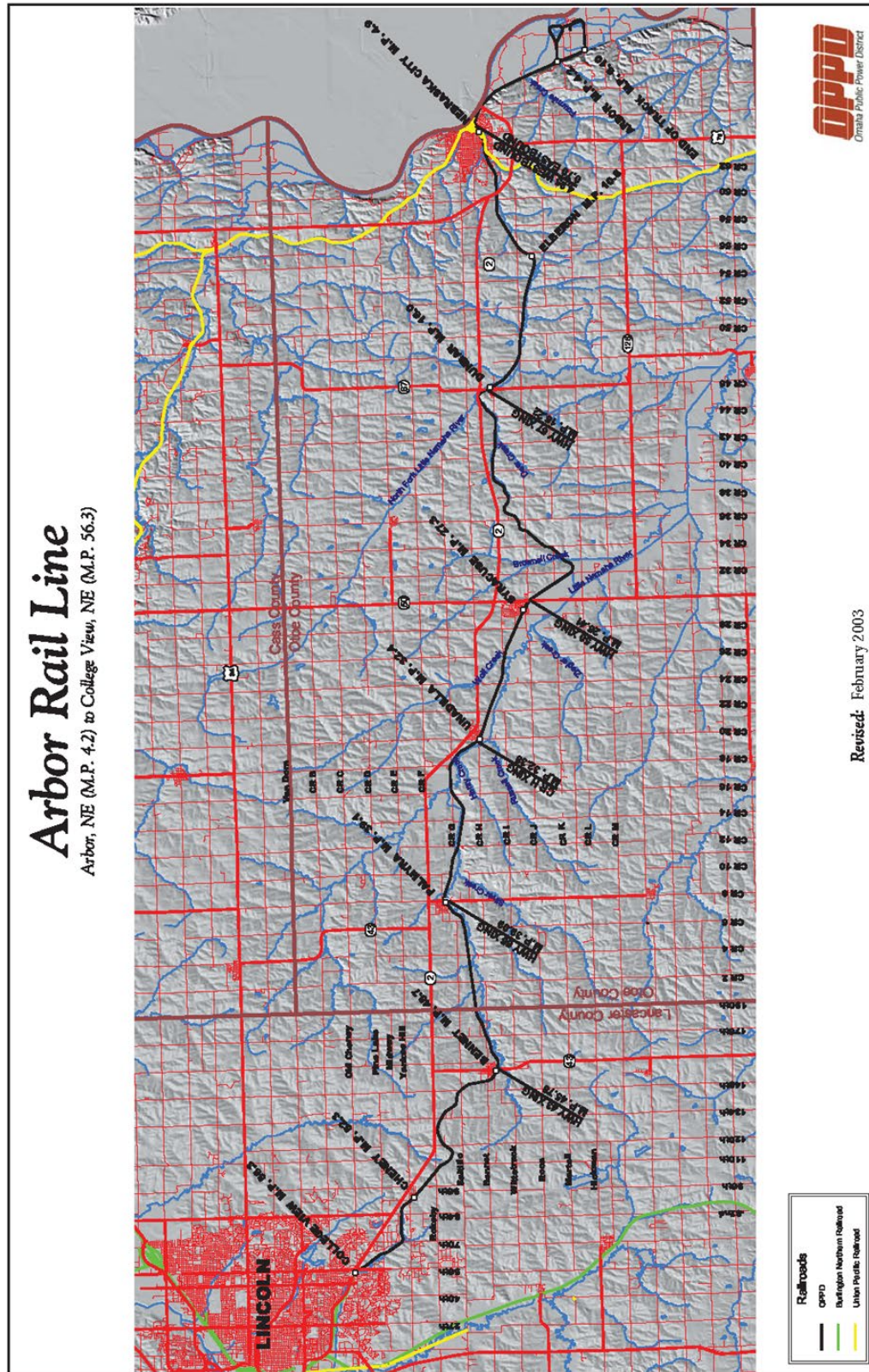
Dated: September 25, 2020

VERIFICATION

I, SARAH W. BAILIFF verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Notice of Exemption. Executed on September 25, 2020.


[Name]

EXHIBIT A



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EXHIBIT B

TRackage RIGHTS AGREEMENT

THIS Trackage Rights Agreement (“Agreement”) is made and entered this 30th day of June, 2020 between Omaha Public Power District, a public corporation and political subdivision of the state of Nebraska, whose headquarters are in Omaha, Nebraska (“OPPD”), and BNSF Railway Company a Delaware corporation, whose headquarters are in Fort Worth, Texas (“BNSF”).

WITNESSETH

WHEREAS, OPPD is the owner of a rail line and certain other rights-of-way and assets located in the State of Nebraska between College View (MP 56.3) and Arbor (MP X4.2) (hereafter “Rail Line), shown on Exhibit A attached to and made a part of this Agreement;

WHEREAS, Upon acquiring the Rail Line, OPPD acquired the underlying obligation to provide common carrier freight rail service to shippers located along the Rail Line;

WHEREAS, BNSF and OPPD are parties to an agreement, BNSFC13004 of even date whereby BNSF will provide deliveries of coal to OPPD’s Nebraska City Power Station (“NCPS”) over the Rail Line commencing January 1, 2021 (hereinafter referred to as “Rail Transportation Agreement”);

WHEREAS, OPPD desires that BNSF assume, on a non-exclusive basis, OPPD’s underlying common carrier obligation and responsibility to provide rail service upon reasonable request to rail shippers other than OPPD (“Non-OPPD Shippers”) now or hereafter located along the Rail Line; and;

WHEREAS, BNSF, in addition to delivering coal to NCPS, desires to assume, on a non-exclusive basis, the underlying common carrier obligation and to fulfill all of the responsibilities and requirements of a common carrier with respect to Non-OPPD Shippers now or hereafter located along the Rail Line;

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties hereby agree as follows:

1. **TERM**

This Agreement shall become effective as of 12:01 a.m. January 1, 2021 (the “Effective Date”) and shall continue in effect for a term co-terminus with the Rail Transportation Agreement unless earlier terminated pursuant to the provisions of Section 15 below (the period of time from the Effective Date through and including the date on which the Agreement expires or terminates is referred to hereinafter as the “Term”).

Upon termination or expiration of the Term, BNSF relinquishes all trackage rights granted herein to provide common carrier rail service over the Rail Line. Upon BNSF’s written request, OPPD shall fully cooperate and participate with BNSF to obtain any approval or authority of applicable governmental agencies or departments, including, but not limited

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to the Surface Transportation Board (hereinafter collectively called “Government Approvals”) necessary to terminate and discontinue the rights granted to BNSF herein, including, without limitation furnishing information and executing and delivering any written instruments necessary to obtain such necessary Government Approvals. Any filings may, in BNSF’s sole discretion, be prepared and made at any time after this Agreement has been terminated or expires.

2. USE AND OPERATION OF THE RAIL LINE

OPPD hereby grants BNSF the non-exclusive authority to use and operate its trains and locomotives over the Rail Line pursuant to the terms and conditions set forth herein; *provided, however*, that OPPD shall maintain the sole and exclusive authority to permit any other rail carrier to use or operate over the Rail Line (each, a "Third Party User"); *provided further, however*, that the use of or operation over the Rail Line by any Third Party User(s) shall not unduly interfere with BNSF's use of and operation over the Rail Line as permitted by this Agreement.

3. COMMON CARRIER OBLIGATION

- 3.1 Subject to Sections 2 and 5 of this Agreement, BNSF hereby assumes and agrees to fulfill any and all common carrier obligations and responsibilities that relate to OPPD and Non-OPPD Shippers located along the Rail Line, arising under federal, state, or local laws or authorities, including the common law of Nebraska. BNSF agrees to perform all common carrier operations related to the Rail Line by performing rail transportation service upon reasonable request of any Non-OPPD Shipper located on the Rail Line, including but not limited to freight train service, haulage, industry switching, and interchange service with other rail carriers whose tracks connect to the Rail Line.
- 3.2 In fulfilling the common carrier obligations related to the Rail Line, BNSF agrees to provide such common carrier rail service to all Non-OPPD Shippers that are located on the Rail Line upon the effective date of this Agreement and to any Non-OPPD Shipper that may locate on the Rail Line during the term of this Agreement.

4. DISPATCHING OF TRAINS

- 4.1 BNSF hereby acknowledges and agrees that unit train movements of coal to or from NCPS shall have priority over all other railroad operations performed over the Rail Line.
- 4.2 BNSF shall have exclusive direction and control of operations (including dispatching) on, over and along the respective segments of the Rail Line as in its judgment may be reasonably necessary or desirable for the economical and safe operating thereof for the combined use of all parties using the Rail Line. At all times, dispatching shall be in accordance with the rules, instructions and restrictions of BNSF. Such rules, instructions and restrictions shall be reasonable, just and fair between all parties using the Rail Line and shall not unjustly discriminate against any of them.

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- 4.3 BNSF shall coordinate with Third Party Users' train scheduling, control, dispatching, communications and issuance of train orders associated with traffic of Non-OPPD Shippers transported over the Rail Line. BNSF and any Third Party User of the Rail Line shall each provide at each party's sole cost and expense all necessary communications equipment to allow communication with BNSF's dispatching systems in order to ensure that all train operations are dispatched and performed safely. BNSF shall also designate a BNSF supervisor who will monitor and provide detailed day-to-day supervision of the operations over the Rail Line.

5. INTERCHANGES WITH CARRIERS

BNSF shall have the right, but not the obligation, to perform any interline service with any other rail carriers with rights to provide local service along the Rail Line.

To the extent BNSF engages in interchange operations with other railroads, the points of interchange for purposes of such service shall be either Nebraska City, NE or College View, NE, at BNSF's sole discretion.

6. COMPENSATION

7. BILLING AND PAYMENT

- 7.1 If the number of carloads of non-coal traffic transported by BNSF over the Rail Line exceeds five hundred (500) during any calendar year during the Term, OPPD shall invoice BNSF for the Charges, adjusted as provided in Section 6, above, on a monthly basis.

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- 7.2 All undisputed payments on invoices submitted by OPPD under Subsection 7.1 shall be due and payable within thirty (30) days following their receipt by BNSF.
- 7.3 In the event BNSF disputes the amount of the charges which have been invoiced by OPPD, BNSF shall notify OPPD of the amount in question and the parties shall have 45 days in which to attempt to resolve the dispute through good faith discussions. If OPPD and BNSF cannot resolve the dispute within the 45-day period, the dispute shall be subject to resolution pursuant to the provisions of Section 14, below.

8. EQUIPMENT

- 8.1 BNSF shall provide the locomotives required for the safe and efficient operation of trains it operates over the Rail Line, and for maintaining, fueling, and lubricating such locomotives. BNSF shall provide sufficient rolling stock and other equipment needed to perform the coal and common carriage services it provides over the Rail Line and shall perform any required inspections of railroad freight cars that it operates over the Rail Line.
- 8.2 All locomotives and equipment employed by BNSF or any Third Party User in operations over the Rail Line shall comply with all applicable safety and maintenance standards and all applicable federal, state, and local laws, regulations and ordinances. BNSF shall also complete and submit to the appropriate federal, state, or local authorities or other entities all prescribed reports related to locomotives and other equipment utilized by BNSF in operations over the Rail Line.
- 8.3 If locomotives or equipment shall become derailed, wrecked, or otherwise disabled while upon the Rail Line, outside of the NCPS plant proper, such locomotives or equipment shall be re-railed or cleared by BNSF or its agents as the operating railroad of the Rail Line. Except to the extent provided otherwise in Section 12.2 of this Agreement, the reasonable costs and expenses of re-railing or clearing derailed, wrecked or disabled locomotives and/or equipment and any loss or damage incidental thereto shall not be borne by OPPD. BNSF shall make reasonable efforts to re-rail or clear equipment in a manner that minimizes delays and interruption of train movements.

9. TRAIN CREWS AND PERSONNEL

BNSF shall employ experienced, qualified and properly trained crews to perform its freight train operations over the Rail Line. BNSF shall be solely responsible for hiring, a BNSF supervising and compensating its train crews and any other personnel necessary to fulfill its obligations hereunder.

10. CONSTRUCTION OF FACILITIES

OPPD shall maintain the sole and exclusive authority to approve the construction or installation of any additional tracks, structures or facilities that would connect to or adjoin the Rail Line. Notwithstanding the foregoing, all such new tracks, structures or facilities must meet BNSF's engineering standards and BNSF shall have the right to review and approve all proposed construction for facilities over which BNSF will operate.

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11. MAINTENANCE

- 11.1 OPPD, or a third-party contractor retained by OPPD, shall be responsible for maintaining the Rail Line in a good and workmanlike manner in accordance with applicable federal, state and local safety standards to a minimum FRA Class 2 Safety Standards. In addition, the Rail Line shall be maintained to a standard suitable, consistent with industry custom and practice, for trains with a maximum weight limit of 286,000 pounds, provided, however, that BNSF shall report promptly to OPPD, or its third-party contractor, any defects in the track or related structures or any repairs required to be made to the Rail Line of which BNSF becomes aware during the course of its operations over the Rail Line. In the event OPPD or its contractor fails to promptly address any such defects after BNSF's notice thereof, BNSF may, at its sole discretion, and without prejudice to any other available rights or remedies, correct such defect(s), and OPPD shall reimburse BNSF for the expense thereof. Notwithstanding the foregoing, BNSF shall not waive any rights or otherwise be liable for any failure to identify or report any conditions that are not in compliance with this Agreement.
- 11.2 BNSF may conduct inspections of the Rail Line; provided, however, that BNSF shall notify OPPD of BNSF's desire to conduct such an inspection five (5) days prior to the date of inspection. Any such inspections shall be conducted jointly with OPPD, and/or its maintenance contractor, and BNSF.
- 11.3 OPPD, or its third-party contractor, shall make reasonable efforts to ensure that BNSF is given reasonable advance notice of maintenance plans and schedules and BNSF shall have the right to review and provide input on such schedules to ensure BNSF can adequately fulfill its common carrier obligation to provide adequate rail service over the Rail Line.
- 11.4 OPPD shall require its third-party contractor to provide and maintain insurance coverage naming BNSF as an additional insured, and shall release, defend and indemnify BNSF to the same extent and under the same terms and conditions as the third-party contractor is required to release, defend and indemnify OPPD.

12. INDEMNIFICATION

13. COMPLIANCE WITH LAWS

All responsibilities incurred by either party under this Agreement and all operations performed by BNSF or any Third Party User over the Rail Line shall conform to all applicable federal, state, and local, laws, statutes, and regulations. Each party agrees to indemnify and hold the other party harmless from and against any and all claims, suits, damages, penalties or fines that arise from the indemnifying party's (or its contractors' or agents') failure to comply with such laws, statutes and regulations.

14. DISPUTE RESOLUTION

- 14.1 Any claims or controversies arising under this Agreement shall be resolved in accordance with the Dispute Resolution procedures set out in the Rail Transportation Agreement as it may be amended from time to time.

15. TERMINATION FOR DEFAULT

If during the Term either party breaches any of its obligations hereunder and fails to substantially correct such breach within thirty (30) days of receiving written notice from the other party of the breach, the non-breaching party may terminate this Agreement by giving ten (10) days' written notice of termination to the breaching party.

16. REPORTING

BNSF shall be responsible for and shall perform all applicable reporting, accounting, and document retention requirements related to the common carriage railroad operations that it

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performs pursuant to this Agreement. BNSF shall provide OPPD with a copy of all reports, accounts and data that it is required to produce to any federal, state or local authority or other entities, including, without limitation, the Association of American Railroads.

17. TAXES

OPPD shall be responsible for all applicable local, state and federal government taxes that relate to the Rail Line. BNSF shall be responsible for all applicable local, state and federal government taxes that relate to BNSF's equipment, personnel, crews, or any other taxable item owned or provided by BNSF in performing its obligations hereunder.

18. NOTICES

Any notice or other correspondence required or permitted hereunder, except as otherwise provided herein, shall become effective upon receipt and shall be deemed to have been properly given or delivered when made in writing and delivered personally to the Party to whom directed, or when sent by United States first class mail or an express letter service and addressed to the party to whom directed at its below specified address:

Notices to OPPD: Omaha Public Power District
 Attention: Attn: Manager Programs-Fuels
 444 South 16th Street
 Omaha, NE 68102-2247

Notices to BNSF: AVP Contracts & Joint Facilities
 BNSF Railway Company
 2500 Lou Menk Drive
 Fort Worth, TX 76131

These addresses may be changed upon giving written notice in the manner above provided.

19. CHOICE OF LAW

This Agreement shall be governed by and construed according to the law of the State of Nebraska, without regard to its conflict of laws principles. Should any provision of this Agreement be deemed unenforceable for any reason, such provision shall be deemed null and void, but the other provisions of this Agreement shall remain in full force and effect.

20. ASSIGNMENT

This Agreement may not be assigned by either party to a third party without the prior written consent of the other party, which consent shall not be unreasonably withheld; *provided, however*, that either party may assign this Agreement (1) to a corporation limited liability, partnership or other entity that it controls, is controlled by or in common control with, or (2) in connection with its merger or consolidation or the sale of all or substantially all of its assets. Subject to the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

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21. MODIFICATION

This Agreement may not be modified or amended except by an instrument in writing signed by both parties.

22. SECTION HEADINGS

All section headings in this Agreement are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

23. NO THIRD PARTY BENEFICIARIES

This Agreement is made and intended for the benefit of the parties hereto and their respective successors and permitted assigns and for no other parties.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed in BNSF by their duly authorized representatives.

OMAHA PUBLIC POWER DISTRICT

DocuSigned by:
By: Mary Fisher
C185DDBBB12A4BA...
Title: Vice President, EP&ND
Date: 6/30/2020 | 10:11 AM CDT

BNSF RAILWAY COMPANY

DocuSigned by:
By: Carl Lee
12C9DB684CD549F...
Title: President & CEO
Date: 6/30/2020 | 12:12 PM CDT

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Exhibit A: OPPD's Arbor Rail Line

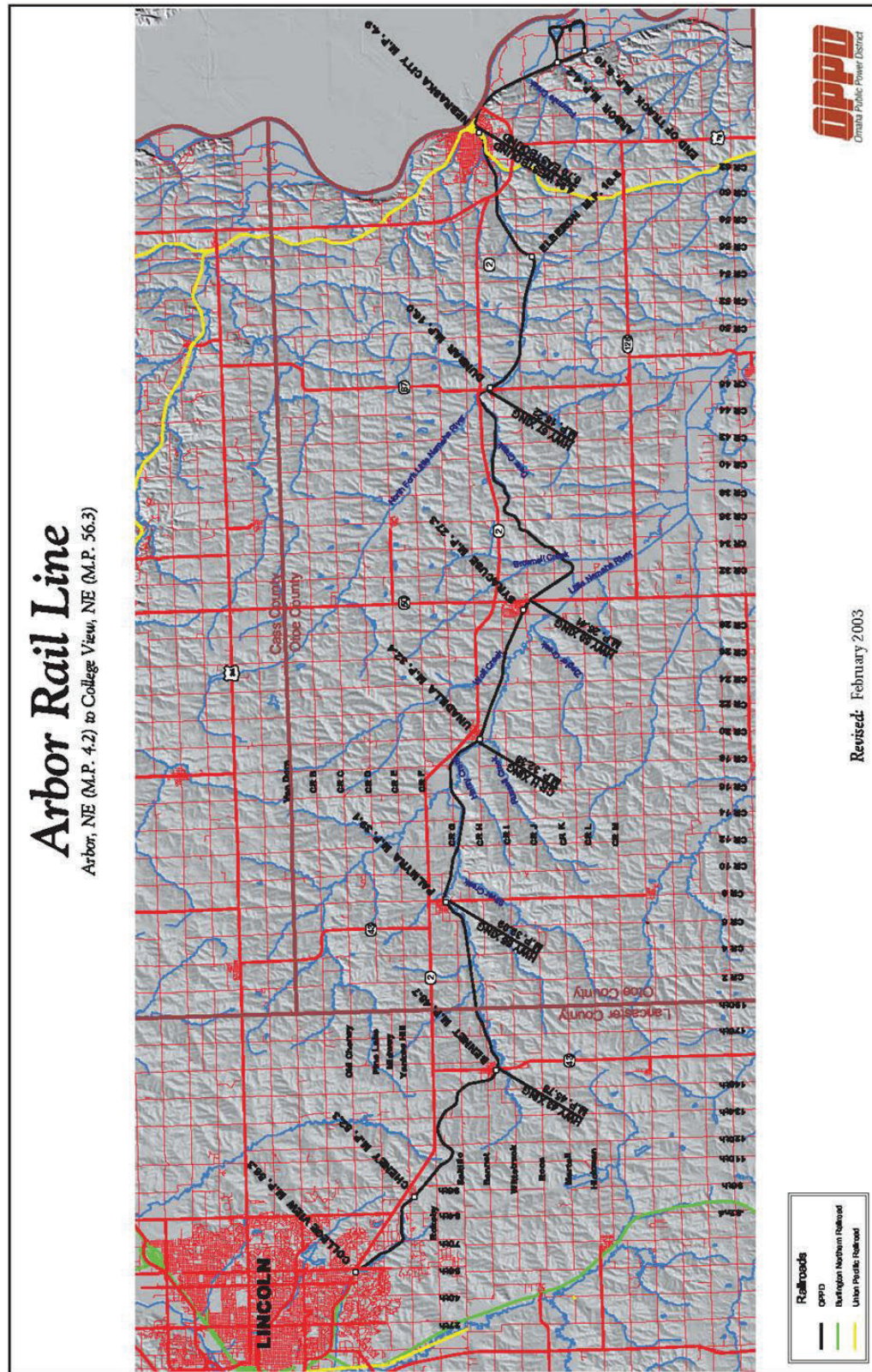


EXHIBIT C

SURFACE TRANSPORTATION BOARD

NOTICE OF EXEMPTION

FINANCE DOCKET NO. 33662 (SUB-NO. 2)

**BNSF RAILWAY COMPANY
—TRACKAGE RIGHTS EXEMPTION—
OMAHA PUBLIC POWER DISTRICT**

Omaha Public Power District (“OPPD”) has agreed to grant local trackage rights to BNSF Railway Company (“BNSF”) over a rail line owned by OPPD in Otoe and Lancaster Counties, Nebraska (the “Line”). The Line has a distance of approximately 56.65 miles and is comprised of two segments: (1) a line segment which runs from milepost 56.3, near College View, to milepost 4.95, near Nebraska City, and (2) a connecting line segment which runs from milepost 0.7, near Nebraska City, to milepost 6.0, near Arbor. The trackage rights will be effective on or after January 1, 2021.

This notice is filed under 49 C.F.R. § 1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated:

By the Board.

[Insert name],

Director, Office of Proceedings.