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June 27, 2018

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: FD 36178, Metropolitan Council - Petition for Declaratory Order

Dear Ms. Brown:

In response to the Surface Transportation Board's decision of May 22, 2018, enclosed are the Reply Comments of Twin Cities & Western Railroad Company ("TCW"). If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

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Dated: June 27, 2018

**Counsel for Twin Cities & Western
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TABLE OF CONTENTS

ARUGMENT	4
I. ANSWERS TO THE BOARD’S FIVE QUESTIONS ESTABLISHES THAT THE TRANSACTION DOES NOT QUALIFY UNDER THE <u>STATE OF MAINE</u> PRECEDENT	4
1. What steps, if any, would need to be taken with respect to the transaction agreements for which the Council seeks a <u>State of Maine</u> declaratory order in order to appropriately protect TCW’s interests? Are there changes that could bring the parties to common ground?	4
2. What is the effect on the <u>State of Maine</u> analysis, if any, of HCRRA’s exemption from Subtitle IV of Title 49 of the United States Code? <u>See Chi. & N.W. Transp. Co.—Aban. & Discontinuance of Serv.—in Hennepin Cty., Minn., AB 1 (Sub-No. 252X), slip op. at 2-3 (ICC served Dec. 20, 1995) (granting HCRRA an exemption from Subtitle IV with respect to the Kenilworth Corridor)</u>	11
3. What is the effect on the <u>State of Maine</u> analysis, if any, of Section 1(a)(2) of the Joint Powers Agreement between the Council and HCRRA? (See Pet. for Declaratory Order, Attachment 2, Ex. 4c, § 1(a)(2) (“The purpose of this Agreement is . . . to assign responsibility to the Council for administering on behalf of HCRRA . . . HCRRA’s performance of the Common Carrier Obligation”)	20
4. What is the effect on the <u>State of Maine</u> analysis, if any, of the presence of a second easement holder, i.e., TCW? (See Pet. for Declaratory Order, Attachment 2, Ex. 4d at 25 (granting TCW an easement over the Kenilworth Corridor).) <u>See also V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan., FD 35459, slip op. at 10 n.14 (STB served July 12, 2012); City of Denver—Acquis. Exemption—W. Stock Show Ass’n, FD 36157, slip op. at 2 (STB served Mar. 23, 2018)</u>	29
5. Should operational impacts on TCW be considered as part of the <u>State of Maine</u> analysis? If so, should they be considered as a result of treating TCW as the <u>State of Maine</u> “carrier,” as opposed to HCRRA? (See TCW Initial Comments 17, 19.) Alternatively, should they be considered due to TCW’s status as an overhead trackage rights operator? What specific operational impacts would the transactions have on TCW, if any—for example, due to loss of sidings or due to the narrowness of the corridor and shared uses? Record development and analysis regarding interference with TCW operations should be limited to operational effects resulting from the transaction agreements for which the Council seeks a <u>State of Maine</u> declaratory order	34
The Transaction Will Interfere With TCW’s Provision of Common Carrier Service to Shippers	35
Construction.....	36
TCW’s Continued Operations Over the Shared Use Corridor	40
Side Tracks	44

II. THERE IS NO NEED FOR EXPEDITED CONSIDERATION OF MET COUNCIL'S DECLARATORY ORDER REQUEST.....	48
CONCLUSION.....	53

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

Twin Cities & Western Railroad Company (“TCW”) files these comments (“Reply Comments”) in response to the Surface Transportation Board’s (“STB” or “Board”) May 22, 2018 decision (“Decision”). The Decision instituted a declaratory order and requested reply and public comments on the Petition for Declaratory Order (“Petition”) filed on April 4, 2018 by the Metropolitan Council (“Met Council”). In the Petition, Met Council requests the Board to make a State of Maine¹ finding that proposed transactions involving Met Council, Hennepin County Regional Railroad Authority (“HCRRA”) and Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) would not require Board authorization and would not result in Met Council becoming a rail common carrier.²

In particular, the Board asked five questions:

1. What steps, if any, would need to be taken with respect to the transaction agreements for which the Council seeks a State of Maine declaratory order in order to appropriately protect TCW’s interests? Are there changes that could bring the parties to common ground? The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board

¹ State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central R. Co., 8 I.C.C. 2d 835 (1991) (“State of Maine”).

² The various railroad construction, rail relocation, and rail reconfiguration actions to be undertaken by CP, HCRRA, and Met Council, along with the various transfers of ownership and other actions that are described and set forth in the various agreements attached in this proceeding and in FD 36177 will be referred to as the “Transaction.”

proceedings, whenever possible. If the parties are amenable to Board-sponsored mediation, they are requested to so inform the Board.

2. What is the effect on the State of Maine analysis, if any, of HCRRA's exemption from Subtitle IV of Title 49 of the United States Code? See Chi. & N.W. Transp. Co.—Aban. & Discontinuance of Serv.—in Hennepin Cty., Minn., AB 1 (Sub-No. 252X), slip op. at 2-3 (ICC served Dec. 20, 1995) (granting HCRRA an exemption from Subtitle IV with respect to the Kenilworth Corridor).

3. What is the effect on the State of Maine analysis, if any, of Section 1(a)(2) of the Joint Powers Agreement between the Council and HCRRA? (See Pet. for Declaratory Order, Attachment 2, Ex. 4c, § 1(a)(2) (“The purpose of this Agreement is . . . to assign responsibility to the Council for administering on behalf of HCRRA . . . HCRRA's performance of the Common Carrier Obligation”).

4. What is the effect on the State of Maine analysis, if any, of the presence of a second easement holder, i.e., TCW? (See Pet. for Declaratory Order, Attachment 2, Ex. 4d at 25 (granting TCW an easement over the Kenilworth Corridor).) See also V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan., FD 35459, slip op. at 10 n.14 (STB served July 12, 2012); City of Denver—Acquis. Exemption—W. Stock Show Ass'n, FD 36157, slip op. at 2 (STB served Mar. 23, 2018).

5. Should operational impacts on TCW be considered as part of the State of Maine analysis? If so, should they be considered as a result of treating TCW as the State of Maine “carrier,” as opposed to HCRRA? (See TCW Initial Comments 17, 19.) Alternatively, should they be considered due to TCW's status as an overhead trackage rights operator? What specific operational impacts would the transactions have on TCW, if any—for example, due to loss of sidings or due to the narrowness of the corridor and shared uses? Record development and analysis regarding interference with TCW operations should be limited to operational effects resulting from the transaction agreements for which the Council seeks a State of Maine declaratory order.

TCW will answer each of these specific questions. In answering these questions, it will become clear that the legal framework and public policy underlying the State of Maine precedent has not been met. That policy was adopted to ensure that government agencies who acquire the physical assets of a railroad line do not have the ability to manage, control, interfere with, or otherwise limit freight common carrier operations occurring over those physical assets. Here, TCW, the only operating common carrier over Bass Lake Spur and the Kenilworth Corridor

(collectively, the “Line”), and its shippers are not protected by the Transaction. Instead, the very entity that is supposed to avoid interfering with common carrier operations, Met Council, through a contract with HCRRA, is given total authority to manage, control repairs, maintain, construct, rehabilitate, relocate, and carry out all other indicia of operating control over the Line.

The Transaction, as currently structured, clearly does not fit within the State of Maine precedent. Met Council for all intent and purposes will be both the owner of the physical assets and have control of HCRRA’s common carrier obligation so as to effectively make Met Council a “common carrier.” Met Council will also have the ability to undertake actions that will interfere with TCW’s common carrier obligations. It is uncontested that Met Council intends to remove 16,000 feet of sidetracks used daily by TCW to switch, sort, block, and assemble trains and to park and run around trains to clear the mainline for more urgent traffic. It is uncontested that Met Council intends to demolish all the existing track along the Bass Lake Spur and most of the track in the Kenilworth Corridor and to build replacement track. It is uncontested that the Met Council intends to build double light rail tracks in close proximity to the freight rail track, including a 2,870 foot long tunnel within seven feet of the centerline of the freight rail track. (A drawing showing dimensions is attached as Exhibit B.) It is uncontested that construction of the Project³ will take place over at least four years and that there will be freight track outages and interruptions during that period that will inhibit and restrict TCW’s operations. Given these facts, Met Council should be required to obtain STB authority to acquire the physical assets of the Line. Likewise, the Transaction needs to be restructured to ensure that TCW can carry out its common carrier obligations without interference from Met Council.

³ The earlier discussions, developments, ultimate plans, and the construction of a Southwest Light Rail Transit system is referred to as the “Project.” However, as explained in footnote 1, TCW also uses the phrase “Transaction” to describe the proposal currently before the Board.

Restructuring the Transaction is not difficult. Met Council and HCRRA simply need to ensure that TCW and its shippers will not suffer operational impacts during the four year construction period. There also needs to be a shared usage agreement governing future operations between Met Council and TCW so as avoid interference with TCW's common carrier service to its shippers. And there is time for such a restructuring. Met Council's and HCRRA's "the sky is falling" argument regarding the need for the Board to act expeditiously is a red herring. The facts will show that the Board should not assume that the Transaction is a *fait accompli* and that the only thing standing in the way is Board approval. That is far from the case. The light rail project, like the California High-Speed Rail Project before it, involves significant federal dollars and is highly controversial. The Board's review and careful judgment should not be rushed simply because a large public project is involved and there are alleged funding deadlines.⁴ This is especially true when the Transaction will have adverse impacts on shippers and when it is not clear that the funding itself is actually available.

ARGUMENT

I. ANSWERS TO THE BOARD'S FIVE QUESTIONS ESTABLISHES THAT THE TRANSACTION DOES NOT QUALIFY UNDER THE STATE OF MAINE PRECEDENT

1. What steps, if any, would need to be taken with respect to the transaction agreements for which the Council seeks a State of Maine declaratory order in order to appropriately protect TCW's interests? Are there changes that could bring the parties to common ground?

⁴ California High-Speed Rail Authority – Construction Exemption – In Merced, Madera And Fresno Counties, Cal, FD 35724 (STB served June 13, 2013) (Vice Chairman Ann Begeman, Concurring In Part And Dissenting In Part) (Noting that when significant federal dollars are at stake, the public interest merits the Board's "robust scrutiny" and the Board should not rush to judgment to meet tight deadlines).

The simple answer to the Board's question is yes. There are changes that could bring the parties to common ground. The parties can enter into a construction agreement, a version of which was already 95% done, that would ensure that TCW's shippers' transit times are not adversely impacted. The parties could also enter into an operation and maintenance agreement, a version of which was about 90% done, that would prevent Met Council from interfering with TCW's ability to conduct common carrier freight service in the shared corridor. The attached Verified Statement of Mr. Mark Wegner, President and CEO of TCW, sets forth the history of the relations between HCRRA and Met Council. (Exhibit A, "VS Wegner"). As shown therein, there is a long history of discussions between HCRRA, Met Council, and TCW regarding the Transaction. That history resulted in 90%-95% agreement on contracts and arrangements that would ensure TCW's service to its shippers would not be adversely impacted while letting the Transaction move forward.

Discussions between the parties go all the way back to 2004 when TCW was first approached by Hennepin County/HCRRA about the Project. At that point, the Project involved relocating the Line to another routing not parallel to the light rail ("LRT") line. VS Wegner at 7. After various studies and numerous discussions, in 2011, the Federal Transit Administration ("FTA") approved advancing the Project. Further discussions and studies occurred. Hennepin County formally handed the Project to Met Council in January 2013. VS Wegner at 9.

During the summer of 2013, Met Council approached TCW about LRT and freight sharing the Bass Lake Spur because the prospects for Transit Orientated Development were significantly greater on the south side of the shared corridor. VS Wegner at 10. Met Council asked if TCW would be willing to work with Met Council to move the existing freight operations to the north side of the shared corridor (with Met Council building new freight rail tracks), and

building an LRT bridge over the freight rail tracks east of Highway 169 and building the LRT where the current freight rail tracks are now located. Id. TCW told Met Council, “TCW will work with you, as long as TCW is made whole - pre LRT/post LRT TCW’s economics must remain the same.” Met Council’s plan would involve the removal of almost all the sidetracks on the Bass Lake Spur. Id. TCW identified replacing the lost sidetracks as a cost to the Met Council Project which Met Council would have to pay to make TCW whole, and Met Council agreed. Id.

Throughout 2014 and into 2015, there was extensive public debate about whether TCW could be relocated or not. In the end, it was determined that the impacts to an adjacent community from a complete relocation would be too damaging to the city and its residents. Id. at 11. Further meetings were held during 2015 and 2016. Finally, Met Council indicated their plan was to undertake a State of Maine transaction by which it would acquire the physical assets of the Bass Lake Spur from CP and of the Kenilworth Corridor from HCRRA, and have TCW assume the common carrier freight rail obligations over both.

Engineering meetings for the Project were held during 2015 and 2016; however, Met Council did not furnish TCW with any plans to build replacement sidetracks. VS Wegner at 11. Since inception, TCW’s goal has been to “ensure that there would be no adverse impacts resulting from the four-year construction and relocation of the rail line.” VS Wegner at 11.

In the summer of 2016, discussions started with Met Council with the goal to arrive at a Construction Agreement, which would govern TCW’s and Met Council’s roles and responsibilities during the construction of the Project, and an Operations and Maintenance Agreement (“Original OMA”), which would govern TCW’s and Met Council’s roles and

responsibilities once the LRT was completed and put in revenue service.⁵ VS Wegner at 11. TCW believed and continues to believe that a mutually agreed upon and executed Construction Agreement and Original OMA are necessary to protect TCW's customers' interests during construction, and on a permanent basis moving forward due to significant changes in infrastructure TCW needs to provide common carrier service. As such, TCW approached these discussions "in a very thoughtful, deliberate yet collaborative spirit." VS Wegner at 11.

Met Council realized this impact and specifically stated in a June 3, 2016, draft "Technical Position Statement" that the 16,000 feet of sidetracks were to be removed and "will be replaced at a location agreeable to TCW before any Project construction activities begin or any other Project related activities that would impact the freight rail access to these siding locations." VS Wegner at 12. This was to be at Met Council's expense and part of the Project's costs. Indeed, over the next year or more, the discussion was not whether Met Council would pay for the replacement tracks, but rather where such tracks would go and how much they would cost. Id. at 13 to 15. Met Council understood the impact to TCW. It was willing to resolve that impact and was working with TCW to reach a mutual agreement.

In discussing how TCW would undertake the common carrier obligation on both the Kenilworth Corridor and the Bass Lake Spur, it became apparent that Met Council either didn't understand freight rail or didn't care about freight rail and the Project's impact on shippers. Met Council tried to charge a half million dollar annual access fee for the Bass Lake Spur trackage. TCW reiterated its position that "TCW's economics pre and post LRT must remain the same." Id. at 12. With respect to the replacement sidetracks, Met Council did not devise or offer its own

⁵ Attached to this filing as Exhibit C is an August 31, 2017 draft of the Construction Agreement Between Metropolitan Council and Twin Cities & Western Railroad Company that was negotiated by the parties ("Construction Agreement").

proposal. Instead, it asked TCW to find a location, hire an engineering firm to determine a cost estimate, and report back. TCW did just that. TCW identified a site approximately 30 miles west of the existing sidetracks, sought an estimate for construction of 16,000 feet of sidetracks and reported the information back to Met Council. Met Council undertook its own investigation into replacement of the sidetracks and came up with an alternate proposal. *Id.* at 14. After Met Council determined that its alternate proposal for replacement tracks was not feasible, it reconsidered TCW's proposal. *Id.* at 14.

Negotiations over the Construction Agreement, the Original OMA, the replacement of the sidetracks, and the rehabilitation of the Bass Lake Spur track, including a fee TCW was to pay Met Council for using the Bass Lake Spur, continued throughout 2016 and into early Fall of 2017. *Id.* at 17. There were many specific issues that needed to be resolved,⁶ which are detailed in VS Wegner, but the bottom line is that Met Council recognized the impacts on TCW and its shippers, was willing to resolve those concerns, and was negotiating with good faith, as was TCW. To be clear, all parties spent significant time negotiating the various provisions to ensure that LRT and freight could operate in the shared corridor without interference. In the spirit of trying to get close to finalizing arrangements with Met Council, TCW sent Met Council a letter on September 29, 2017 summarizing where things stood and identifying the remaining five issues and suggested how they should be resolved.

Negotiations and draft agreements were progressing such that both parties thought a Construction Agreement would be signed by October 2017 and an Operations and Maintenance

⁶ Some of the issues negotiated by the Met Council and TCW include costs associated to replacement of side tracks, taxes, necessary capital improvement projects, the appropriate access fee to govern TCW's operations, inclusion of FTA Clauses in the various agreements, insurance and indemnity provisions, and reimbursing TCW for legal, engineering, and other outside costs occurred in connection with the Project.

Agreement between TCW and Met Council shortly thereafter. VS Wegner at 21. Indeed, in a March 8, 2018 letter, Met Council specifically stated that it believed the parties had reached agreement on “key business terms.” In its Reply to the Initial Comments of TCW filed on May 2, 2018 (“Met Council Reply”), Met Council again stated, “[I]n the middle of August, 2017, TCWR advised the Council that TCWR’s board of directors had agreed on the key business terms and that the parties’ staffs could finalize the draft agreements.” (Met Council Reply at 18). VS Wegner at 24. As discussed in VS Wegner statement, TCW takes issue with these specific statements because, in TCW’s views, there were several outstanding issues as of August 16, 2017 and those issues were set forth in TCW’s September 29, 2017 letter, which identified and explained the five outstanding issues and proposed how to resolve them. Id. at 24, attached as Attachment 10 to VS Wegner.

Numerous shippers and other public bodies also recognize that there is “common ground” to be found in this situation. As of this date, and not counting the initial letters filed expressing concern and requesting additional time, two dozen individual shippers, a Shipper Coalition, nearly a dozen communities, and 3 other parties have filed letters in response to the Board’s Decision. These letters share a common concern that there will be operational impacts from the four-year-long construction and relocation aspects of the Transaction and potential safety and operational impacts arising from the future shared use of the corridor. These letters note that their concerns could be alleviated if the STB, as part of any order issued in this proceeding, require Met Council to enter into a construction and operation agreement with TCW that would protect shippers’ transit times during the construction phase, provide for safety plans to prevent future accidents that could delay rail service, and sets forth the obligations of the parties with respect to the future shared use of the corridor.

These letters similarly express concern over the plan by Met Council to remove a significant number of the existing sidetracks currently used by TCW. Those tracks are an integral component of TCW's service. As a condition to any STB approval of Met Council's acquisition of the physical assets of the Line, the letters request that Met Council be required to work with TCW to come up with a plan for the replacement of those tracks in a manner and location that would not adversely impact rail service, and that Met Council should pay all costs associated with the replacement tracks.

The point of the above discussion is to answer in the affirmative that "yes, there are changes that could be made to protect TCW's interests and bring the parties to common ground." Those changes are to require Met Council to abide by what it had previously agreed to and self-acknowledged as agreement "on key business terms." This would require Met Council, at a minimum, to enter into the previously negotiated and almost finalized agreements – the Construction Agreement,⁷ the Original OMA, and to finalize its agreement to replace and pay for the relocated sidetracks.⁸

⁷ Met Council has already committed in this proceeding to abide by the Construction Agreement, although it doesn't submit the agreement that it is agreeing to abide by. Furthermore, the problem with that commitment is that it is made to HCRRA, not TCW. There is no privity of contract with TCW. TCW has no legal standing to enforce Met Council's obligations under that agreement. As it stands now, Met Council can change its intentions at any time for any reason and avoid any legal consequences. Requiring Met Council to make that agreement with TCW is fully consistent with Met Council's commitments.

⁸ TCW notes that it is currently still in mediation. To the extent there are unresolved issues at the end of the 30 day mediation period, TCW would be willing to have those issues decided by a Board appointed arbitrator. The arbitrator's decision could then be incorporated as a supplemental order to any Board order in this proceeding.

2. What is the effect on the State of Maine analysis, if any, of HCRRA's exemption from Subtitle IV of Title 49 of the United States Code? See Chi. & N.W. Transp. Co.—Aban. & Discontinuance of Serv.—in Hennepin Cty., Minn., AB 1 (Sub-No. 252X), slip op. at 2-3 (ICC served Dec. 20, 1995) (granting HCRRA an exemption from Subtitle IV with respect to the Kenilworth Corridor).

The existence of HCRRA's Subtitle IV exemption means that if the Transaction results in lines being taken out of service, line embargoes, service delays, or the inability to interchange with connecting carriers, neither the shippers nor TCW will be able to enforce any of the various ICCTA remedies against HCRRA. There are no common carrier protections for shippers or connecting carriers as long as HCRRA remains subject to a Subtitle IV exemption.⁹ The further effect, discussed in Question No. 3, is that the existence of the exemption and of the various Transaction agreements makes it clear that Met Council will be the manager, operator, and controller of almost all aspects of HCRRA's obligations. This requires Met Council to obtain authority to acquire the physical assets of the Bass Lake Spur and the Kenilworth Corridor.

In 1995, the Interstate Commerce Commission ("ICC") completely exempted HCRRA from Subtitle IV from all common carrier obligations over the Kenilworth Corridor when HCRRA acquired the line and assumed Chicago and North Western Transportation Company's ("CNW") obligations under the trackage rights agreements ("TRA") with CP and TCW. At the time, the ICC found the transaction to be of limited scope and that there was no evidence that any vital interests of shippers, communities, or competitors would be adversely affected by a grant of the exemption. Now, twenty-two plus years later, HCRRA is again before the Board

⁹ HCRRA was given a blanket exemption from operations over the Kenilworth Corridor. However, it is unclear as to whether, HCRRA's Subtitle IV exemption would extend to future transactions, such as its acquisition of the Bass Lake Spur. However, for the reasons explained herein, it should not.

seeking to acquire the common carrier obligation over the connecting Bass Lake Spur from CP. As a result of the Transaction, HCRRA will have a common carrier easement on both the Bass Lake Spur and of the Kenilworth Corridor.¹⁰ Met Council will own the physical assets of those lines.

Yet, HCRRA has no regulatory requirement to act as a common carrier on the Kenilworth Corridor and will have no economic or political incentive to do so in the future. As stated by the Minnesota Grain & Feed Association in a comment entered into the Board's record on April 25, 2018, "entrusting the common carrier obligation to a public entity that does not operate freight rail service provides little assurance that important shipper interests will be protected." Indeed, the conduct of HCRRA over the past twenty years that TCW has operated over the Kenilworth Corridor as the only common carrier proves that HCRRA cares little about freight shippers.

One need look no further than observing HCRRA's actions with respect to the TRA executed on August 10, 1998 ("1998 TRA"). HCRRA's sole operating obligation pursuant to that agreement was to pay for capital expenditures over and above normal track maintenance. At the time the 1998 TRA was executed, it was believed that freight operations would be relocated within four years. By 2002, the conditions of Kenilworth track had deteriorated to the point where ordinary maintenance was no longer adequate. VS Wegner at 5. Initially, issues were brought to HCRRA's attention (a tie replacement program, a ballast program, and a bridge strengthening program). To its credit, HCRRA did fund it and TCW arranged for the work. Id.

¹⁰ HCRRA will presumably not have a Subtitle IV exemption for the Bass Lake Spur because it has not asked for one, nor should the Board grant them one.

By 2005, however, routine maintenance was no longer adequate. It was clear that the rails needed to be replaced and TCW notified HCRRA. *Id.* at 5-6. TCW warned HCRRA that absent replacement, the rails could shatter resulting in a derailment. *Id.* HCRRA refused to authorize replacement of the rails. Around the same time, freight traffic over the Kenilworth Corridor increased substantially. In September 2010, TCW had a meeting with HCRRA in which TCW renewed its request that HCRRA replace the rails. On September 30, 2010, HCRRA wrote TCW that it “is not inclined to undertake the wholesale replacement of the track”¹¹ TCW received the letter on October 1, 2010. On October 2, a loaded TCW train derailed in Kenilworth Corridor solely as a result of an internally defective rail. Of course, this accident could have been prevented had HCRRA simply honored its commitments for the Kenilworth Corridor. This history shows HCRRA cares little about ensuring that shippers continue to receive freight service over the rail line.

The above incident was not an isolated event. After the derailment, on November 2, 2010, a track inspector from the Minnesota Department of Transportation wrote a report on the Kenilworth Corridor rail that concluded that a section of the Kenilworth rail had to be upgraded. *Id.* at 6. HCRRA maintained its refusal to replace the rail. In late 2010, the President of TCW, Mark Wegner, had a meeting with two HCRRA commissioners concerning TCW’s request that HCRRA pay the cost of replacing the rail. *Id.* at 6-7. The Commissioners objected to the rail replacement because they thought it would be a disincentive for TCW to relocate. *Id.* at 7. In April 2011, HCRRA had an ultrasonic test performed and it was determined that the Kenilworth Corridor had eleven internally defective rails. *Id.* By late 2011, TCW obtained a bid to replace all of the rail in the Kenilworth Corridor with continuous welded rail at a total cost of \$1.3

¹¹ See Attachment 5 to VS Wegner.

million, but HCRRA still refused to authorize replacement unless TCW entered into an agreement to reroute its operations. *Id.* In effect, HCRRA wanted to use the limited common carrier obligation it held to strong arm TCW into relocating. Ultimately, it would take seven years, constant prodding, a derailment, and a May 2012 Federal Railroad Administration Inspector concluding that “to prevent future property damage and possible injuries and /or death because of a broken rail derailment,”¹² the rail had to be replaced to get HCRRA to honor its only common carrier obligation and replace the rail on the Kenilworth Corridor.

The hostility of Met Council and HCRRA towards freight transportation using the Kenilworth Corridor was evidenced during the negotiations with TCW concerning permanent easements and common carrier responsibilities over a year ago. The plan was for TCW to obtain a new easement over the Kenilworth Corridor from HCRRA. In response to TCW’s draft of an easement, on April 18, 2017, the lawyers for Met Council and HCRRA proposed to revise the draft easement with language restricting TCW’s use of the Kenilworth Corridor: “the Easement shall not extend or expand service beyond the same level of common carrier railroad service over the Line previously authorized to, and required of, Grantor by the Interstate Commerce Commission (“ICC”) in Finance Docket No. AB-1 (Sub-No. 252X) and by the Surface Transportation Board (“STB”) in Finance Docket No. 34217.” Since HCRRA was granted an exemption from Subtitle IV by the cited decisions, the “level of common carrier railroad service over the Line previously authorized to, and required of, Grantor [HCRRA]” was a nullity; **no service of any sort**. The language HCRRA proposed could have cut TCW off from providing any service, much less expanding the number or frequency of freight traffic. Even if the language was only intended to

¹² *Id.* at 7.

restrict TCW's ability to move more traffic in the future, it was highly objectionable and not acceptable to TCW.

The invidious attitudes of HCRRA and Met Council towards freight rail service stem from the simple fact that none of the traffic moved by TCW originates or terminates within Hennepin County. HCRRA has no economic or political or community incentive to preserve freight rail service. The residents of Hennepin County and their elected representatives have no reason to support freight railroad service through their communities. From the residents' viewpoint, freight railroad service through the Kenilworth Corridor is a noisy nuisance which blocks street crossings and is out of place in a public park setting. HCRRA formally agreed with the City of Minneapolis that it would not allow any modification to the 1998 TRA that would "extend or expand railroad use" of the Kenilworth Corridor. (The October 2014 Memorandum of Understanding is attached to TCW's Petition to Reject or Stay the Exemption Notice as Exhibit A.)

Met Council governs a wider geography, but it too has no reason to support freight railroad service for primarily agricultural products produced in central and western Minnesota and eastern South Dakota, far outside the metropolitan Twin Cities area. Indeed, Met Council formally promised the City of Minneapolis that it "will exert whatever influence it has to have the current owner of the rail line in the Kenilworth Corridor [HCRRA] enter into an agreement with the City, committing on behalf of itself and any successors in interest . . . to limit use, to the maximum extent possible" (A copy of the September 29, 2014 Memorandum of Understanding is attached as Exhibit D.) Not that HCRRA needed it, but the Transaction as proposed gives HCRRA even less incentive to honor its obligations going forward because Met Council has agreed to perform all common carrier obligations and to "defend, indemnify, and hold harmless HCRRA and the County and their commissioners, from and against all costs

...arising from, in connection with or incidental or related to (i) the Common Carrier Obligation rights, obligations or liabilities of HCRRA; (ii) the rights, obligations or liabilities of HCRRA under the Trackage Rights Agreements, or (iii) the rights, obligations or liabilities of HCRRA under the Associated Freight Easements.” See Section 7 of the JPA (Petition at PDF page 343). In these circumstances and given HCRRA’s track record, it would be a mistake to entrust the common carrier obligation to a public entity that does not operate freight rail service, has no economic or political interest in the continuation of freight service, and has no financial responsibility should it breach any limited common carrier obligation that it may hold. Clearly, TCW shippers’ interests are not adequately protected by HCRRA serving as the Common Carrier over either the Kenilworth Corridor or the Bass Lake Spur.

Being completely exempt from Subtitle IV, HCRRA knows that there is little TCW or the shippers can do to force HCRRA to abide by the basic requirements imposed on common carriers, such as maintaining, repairing, or replacing rail. HCRRA has no obligation to provide service to shippers, no obligation to interchange with other carriers, no obligation to charge reasonable rates, and no obligation to seek any form of STB approval for any of the transactions it decides to undertake, including the abandonment of lines. HCRRA does not own any railroad equipment, and does not perform any rail carrier functions traditionally deemed to be performed by a carrier.

This history belies any notion that HCRRA will live up to its statements that it will “fulfill CP’s common carrier rights and obligations with respect to the Line” (HCRRA’s April 5, 2018 Notice of Exemption in FD 36177 at 3) (“HCRRA Notice”) and will “ensure the provision of any required common carrier service on the Line.” (HCRRA Notice at 4). HCRRA, once it assumes CP’s obligations on the Bass Lake Spur, is under no obligation to fulfill that obligation

and provide the required common carrier service, unless the Board finds that HCRRA's existing Subtitle IV exemption does not apply to its acquisition of the Bass Lake Spur.¹³ To allow CP's common carrier obligation for the Bass Lake Spur to be transferred to an entity that has no common carrier obligation is a fundamental transfiguration of CP's common carrier obligation from an entity that is subject to the full conditioning and jurisdictional powers of the Board to an entity that may not be, and even if it is, has no economic incentive to abide by any common carrier obligations.

If the Board allows the Transaction to proceed as proposed by Met Council and HCRRA, Met Council will not have any common carrier obligation and, if the Subtitle IV exemption applies to HCRRA's operations of the Bass Lake Spur, neither will HCRRA. If the Subtitle IV exemption applies to the Bass Lake Spur, the only remedy a shipper or a connecting carrier will have against HCRRA in the future is to seek to have the Subtitle IV exemption revoked so that the Board could then exercise its jurisdiction.¹⁴ If HCRRA has a Subtitle IV exemption for the Bass Lake Spur, it will **not** have "both the intent and the unconditional ability to continue to assume and exercise [CP's] common carrier rights and obligations." State of Maine, at *5. If the

¹³ Precedent seems to indicate that a Subtitle IV exemption can be either line specific or cover all of the lines owned by an exemption entity. TCW believes that the Subtitle IV exemption applies to all of HCRRA's lines, which will include the Bass Lake Spur, unless the Board specifically indicates otherwise. Regardless, one thing is clear, with respect to the Kenilworth Corridor, HCRRA currently has no obligation to quote a rate and provide service (either directly or through a contractor) and no obligation to obtain prior Board approval to seek abandonment or discontinuance authority. See L.A. Cnty. Metro. Transp. Auth.--Aban. Exemption--in L.A. Cnty., Cal., AB-409 (Sub-No. 5X) (STB served Jul. 17, 2008) (dismissing a verified notice of exemption for abandonment because the owner of the line had been granted a Subtitle IV exemption and thus could abandon the line without STB authority); see also Cf. Caldwell Cnty. Econ. Dev. Comm'n --Exemption from 49 U.S.C. Subtitle IV, FD 32659, 1995 ICC LEXIS 198 (ICC served Aug. 3, 1995).

¹⁴ TCW fully addressed the drawbacks of forcing shippers to file revocation proceedings to get service in TCW's Rebuttal Comments in Support of TCW's Request to Dismiss the Declaratory Order filed on May 17, 2018.

Transaction results in lines being taken out of service, line embargoes, service delays, or the inability to interchange with its connecting carriers, neither the shippers nor TCW will be able to enforce any of the ICCTA remedies against HCRRA if it is exempt from the provisions of Subtitle IV for the Kenilworth Corridor and Bass Lake Spur. Thus, there would be no common carrier protections for shippers or connecting carriers if the Bass Lake Spur is transferred.

Of course, HCRRA's response to these charges will most likely be – we are not asking for a Subtitle IV exemption for our acquisition of the common carrier obligation on the Bass Lake Spur. If that is the case, the Board, if it approves any aspects of the Transaction, should make it clear that the Subtitle IV exemption does not apply to the Bass Lake Spur. The Board should also revoke the Subtitle IV exemption governing the Kenilworth Corridor in order to protect TCW's and the shippers' rights and obligations.

HCRRA's other response will most likely also be that it understands it will be acquiring certain common carrier obligations, whether it is exempt or not, and that is why it has entered into various contractual arrangements with Met Council, i.e., to delegate the responsibility of fulfilling those obligations to Met Council. But that creates another problem and issue. If HCRRA has a common carrier obligation on the Bass Lake Spur, it has done just that – delegated that responsibility to Met Council. In reality, this makes Met Council the de facto common carrier for both the Bass Lake Spur and the Kenilworth Corridor. Met Council is the “common carrier” alter ego of HCRRA. The parties freely admit this. An attachment to HCRRA's May 2, 2018 Reply in FD 36177 (“HCRRA's Reply”) specifically states that upon consummation of the various involved transactions “HCRRA (Met Council)” will become the new Common Carrier

on both the Kenilworth Corridor and Bass Lake Spur.¹⁵ Of course, this document alone undermines the entire premise of this proceeding, i.e., that Met Council will not become a common carrier subject to the Board's jurisdiction as a result of the Transaction. The Transaction documents clearly demonstrate that Met Council will not only control and manage the physical assets of the Line but will also be the de facto common carrier on the Line. Yet, like HCRRA, Met Council has no interest in freight rail, and as discussed later in Question No. 5, the result of Met Council's contractual control of the Line will result in adverse impacts on TCW, its shippers, and the communities served by TCW.

In conclusion, questions concerning the scope of HCRRA's Subtitle IV exemption and the transaction documents collectively demonstrate that this transaction is inapposite for application of State of Maine. Clearly, the Board and its predecessor did not intend for State of Maine to apply to entities (HCRRA) that do not provide any rail service, have a complete exemption from Subtitle IV, and then, to the extent there is some sort of common carrier obligation, delegate that obligation to the very same party (Met Council) that is not supposed to have any ability to use its ownership of the physical assets to manage or control the common carrier obligation. Approving such a structure under State of Maine would be unprecedented. It would allow the exception to swallow the rule as all future transactions will simply involve the non-carrier entity creating a paper "common carrier" with that paper "common carrier" company contracting and delegating all common carrier obligations back to the non-carrier entity. This the Board should not allow. HCRRA does not have "the intent and the unconditional ability to continue to assume and exercise [CP's] common carrier rights and obligations." State of Maine,

¹⁵ See Exhibit F. As addressed in Question 3, the transaction documents make clear that Met Council, not HCRRA, will actually controllall common carrier responsibilities for HCRRA.

at *5. Met Council will not undertake its contractual obligations in a manner where “freight rail service can continue to be provided ... without interference.”¹⁶ It would be a mistake for the Board to entrust the common carrier obligation to two public entities that do not operate freight rail service, have no incentive to encourage or even preserve freight rail service, and have entered into a series of agreements that will result in complete disregard for the operating needs of TCW and its shippers.

3. What is the effect on the State of Maine analysis, if any, of Section 1(a)(2) of the Joint Powers Agreement between the Council and HCRRA? (See Pet. for Declaratory Order, Attachment 2, Ex. 4c, § 1(a)(2) (“The purpose of this Agreement is . . . to assign responsibility to the Council for administering on behalf of HCRRA . . . HCRRA’s performance of the Common Carrier Obligation”).

The effect of Section 1(a)(2) of the Joint Powers Agreement (“JPA”), which is confirmed by several provisions of the Operations and Maintenance Agreement submitted June 5, 2018 (“OMA”), is to make Met Council the de facto common carrier, not HCRRA. A review of the agreements and the record establishes that Met Council will be responsible to manage and carry out nearly all normal functions done by common carriers – maintenance on the Bass Lake Spur, flagging, capital improvements, entering into contracts with third parties, and anything else. HCRRA will have at best a de minimis role, if any role at all.¹⁷ HCRRA is a sham “common carrier,” a straw man inserted into the Transaction in an attempt to shield Met Council from the State of Maine prohibitions against the owner of the physical assets having too much control over the common carrier operations. Met Council will be judge, jury, and executioner with

¹⁶ Fla. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35110, slip op. at 11 (STB served Dec. 15, 2010) (“Florida DOT”).

¹⁷ The only normal common carrier function that HCRRA will apparently continue to control is to determine who, on the Bass Lake Spur, will control dispatching over that line. Even though the OMA makes clear that HCRRA could have Met Council arrange/handle dispatching after June 30, 2019. See OMA Section 4.2.

respect to how common carrier operations are conducted on and over the Line. In these unique circumstances, the Board cannot find that Met Council will not be undertaking the duties of a common carrier so as to avoid the need to obtain STB authority. Met Council should be required to submit itself to STB authority and seek approval for its acquisition of the physical assets of the Bass Lake Spur and the Kenilworth Corridor.

The JPA, the Hennepin County resolution of March 14, 2018 (Attachment 1 to HCRRA's Reply) ("Resolution"), and the OMA all demonstrate that it is Met Council, and not HCRRA, that is the "carrier" responsible for ensuring compliance with any common carrier obligations.

Section 5 of the JPA says:

5. Council's Obligation for Certain Duties and Financial Obligations.

(a) The Council will, if and when requested by HCRRA, at the Council's cost and expense: (i) secure on behalf of HCRRA appropriate third parties to provide any needed rail freight service on the Kenilworth Corridor and/or the Bass Lake Spur Corridor as a designated rail carrier; and (ii) undertake, or secure appropriate third parties to undertake, all other duties, responsibilities, liabilities and obligations of HCRRA that may arise in the Corridors, under the Trackage Rights Agreements or on account of the Associated Freight Easements, or this Agreement, including but not limited to operations (other than the operation of trains referenced in clause (i) above), maintenance and capital repair and replacement. The Council may fulfill its responsibilities on behalf of HCRRA under clause (ii) above by contracting with third parties, but the Council is not relieved of any of its responsibilities or obligations hereunder in the event that the Council cannot secure the services of a third party to fulfill those obligations or if a third party fails to perform.

(b) The Council's and third-party obligations herein will be funded first from fees paid to HCRRA under the Trackage Rights Agreements, which fees HCRRA shall timely pass through to the Council which will be responsible for paying HCRRA or any third parties. If the fees passed through to the Council are insufficient, the Council will be responsible for paying or securing funding for any excess costs, obligations, liabilities and expenses and shall do so from non-County and non-HCRRA sources except to the extent that the County or HCRRA has explicitly agreed to bear such cost, obligation, liability or expense in a separate agreement.

Petition at PDF page 342.

Section 7 of the JPA gives HCRRA sweeping indemnity rights:

7. Indemnification and Defense. Without limiting the Council's obligations under Sections 5 and 6, the Council will also defend, indemnify, and hold harmless HCRRA and the County and their commissioners, employees, consultants and agents from and against all costs, liabilities and exposures of any kind or character, including, without limitation, fines, penalties, losses, damages, actions, suits, demands, judgments, settlements, fines, fees, costs of investigation, expenses at arbitration, trial or appeal and without institution of arbitration or suit, cleanup, repair and replacement, and attorneys' fees, arising from, in connection with or incidental or related to (i) the Common Carrier Obligation rights, obligations or liabilities of HCRRA; (ii) the rights, obligations or liabilities of HCRRA under the Trackage Rights Agreements, or (iii) the rights, obligations or liabilities of HCRRA under the Associated Freight Easements. As between the Council, HCRRA, and the County, the Parties intend that this defense, indemnification and hold harmless obligation be interpreted and applied without limitation and in the broadest possible manner.

See Petition at PDF page 343.

The Resolution passed by Hennepin County makes it clear that HCRRA has no obligations, no management responsibilities, and no financial exposure. All management and control is delegated to Met Council (emphasis supplied):

The Southwest Light Rail Transit Project (SWLRT) will be located in part in two freight railroad corridors (Kenilworth and Bass Lake Spur). As part of the project, the Metropolitan Council will be acquiring the Kenilworth Corridor from Hennepin County Regional Railroad Authority (HCRRA) and the Bass Lake Spur Corridor from Canadian Pacific Railway (CP). HCRRA will also be transferring to the Metropolitan Council for the project certain land adjacent to the CP Bass Lake Spur Corridor. The project will be constructed on the land described above, with freight tracks and the HCRRA-owned bicycle/pedestrian trail undergoing certain adjustments to accommodate light rail in those corridors.

When HCRRA and CP transfer the corridors identified above to the Metropolitan Council for the Transaction, there are certain federal requirements that must be maintained relating to the provision of common carrier freight service in the corridors. HCRRA and the Metropolitan Council had previously negotiated a property transfer agreement (which was never executed) relieving the HCRRA of all such responsibilities, assuming that the Twin Cities and Western Railroad Company (TC&W) would assume the responsibilities. However, contemplated agreements with TC&W were not consummated, which caused the structure of the HCRRA and CP property transfers to be re-evaluated. The new revised agreements now provide that HCRRA will be responsible for that federal common carrier obligation in the event that a shipper requests service on those

lines, and that HCRRA will have freight easements and trackage rights agreements appropriate to provide such service. However, under the Joint and Cooperative Exercise of Powers Agreement, the Metropolitan Council will assume on HCRRA's behalf the responsibility for securing a freight carrier if needed; the Metropolitan Council will also assume on HCRRA's behalf the responsibility for assuring the associated operations, maintenance and capital repair obligations; and the Metropolitan Council will make HCRRA whole for any financial responsibility or exposure, without Metropolitan Council recourse to Hennepin County to pay for these expenses.

The OMA further endorses Met Council's powers to manage and control most aspects of the Line, aspects that are normally reserved to the common carrier in a standard State of Maine proceeding. Section 3 of the OMA gives Met Council the responsibility for the design and construction of the relocation project, control of flagging during the inspection, maintenance, repair and replacement projects, all of which will be conducted by Met Council. The Council is responsible for coordinating with freight operations and for dealing with and repairing grade crossing malfunctions. Met Council will likely control who is hired to do dispatching over the Bass Lake Spur once CP's dispatching obligations are completed. Section 5(v) gives the Met Council the duty to hire a freight manager with the right to inspect and coordinate freight and passenger operations.

Taken together, the JPA, the Resolution, and the OMA establish that all obligations normally "retained" by the common carrier in a State of Maine proceeding, i.e., the right to control, manage, maintain, and repair track and the right to dispatch, quote rates, arrange for freight operators, provide common carrier service, develop new business, while nominally fall on HCRRA, actually fall on Met Council. Yet Met Council claims it will not be a carrier, even though it is ultimately the entity controlling and managing the common carrier responsibilities and obligations. Here, the same entity that will own the physical assets will be the same entity controlling all common carrier responsibilities on those same physical assets.

HCRRA is simply a straw man to give the veneer of a normal State of Maine transaction, without the substance. In effect, Met Council is transferring everything to itself – ownership and control of the common carrier obligation. Such an arrangement has never before been approved in any State of Maine transaction. Naming HCRRA as the common carrier is a sham and a perversion of the State of Maine precedent.¹⁸

In prior cases, if the owning public entity had any ability to manage, limit, or exercise too much control over common carrier operations on the line or if the entity owning the assets would take on the indicia of a common carrier, the ICC has denied the State of Maine finding and either required the public body to obtain common carrier authority in its own right or restructure the transaction. See City of Austin, TX -- Acquisition -- Southern Pacific Transportation Company, FD 30861(A), 1986 ICC LEXIS 95 (ICC served Oct. 23, 1986) (city required to assume a common carrier obligation (even though it did not intend to operate the line itself) because it acquired ownership of the line and assumed responsibility for contracting with and ensuring continued common carrier service).

In Orange Cnty. Transp. Auth. – Acquisition Exemption – The Atchison, Topeka and Santa Fe Ry. Co., 10 I.C.C. 2d 78, 1994 MCC LEXIS 31 (1994) (“Orange County”), the ICC rejected the request to find the acquisitions as falling under the State of Maine precedent and required the transit agency’s to obtain ICC approval. In making that determination, the ICC

¹⁸ Met Council and HCRRA make much of the fact that TCW’s rights are not changing because HCRRA is taking assignment of CP’s obligations under the existing TCW/CP trackage rights agreements so that HCRRA will step into the shoes of CP to fulfill those obligations – the theory being that CP’s common carrier rights and obligations are being transferred from one carrier landlord (CP) to another (HCRRA). But as noted, Met Council is the de facto landlord, not HCRRA. There is nothing inherently wrong with Met Council owning both the physical assets and controlling the common carrier rights, but Met Council should be required to obtain STB authority to do so.

looked at “whether the rights acquired by the Transit Agencies involve the acquisition of control over freight service to such an extent that the Congressional concern requiring our review of such acquisition is implicated.” Id at *83. In answering that question, the ICC looked at who controlled the maintenance; whether the public bodies could remove tracks that would interfere with common carrier operations on the line; whether the priorities of the transit agencies came before freight; whether the carrier would have to resort to litigation or arbitration to protect its operations; and whether the shippers may be in the position of litigating against two parties with divergent interests – the transit agencies and the carrier. Id. Ultimately, the ICC found that the transit agencies would have no interest in preserving freight operations and could unduly disrupt freight operations and directed the Transit Agencies to seek ICC authority to acquire the physical assets.

Here, HCRRA has no interest in preserving freight operations and neither does Met Council. Indeed, HCRRA has given Met Council, through the proposed contracts, the freedom to remove the track, undertake construction of new tracks, relocate tracks, interrupt service, add crossings, and otherwise take actions without any notice or coordination with TCW or its shippers. Yet, TCW is the only carrier operating on the Line.¹⁹ Met Council, acting as HCRRA’s agent, will be responsible for all operations, capital improvements, repairs, and maintenance on the Bass Lake Spur. If Met Council decides to show up one day and remove track or take tracks out of service for maintenance or repairs, TCW’s and its shippers’ only remedies are to litigate against both HCRRA and Met Council. These are identical concerns to those that led the Board to require the transit agencies in Orange County to obtain ICC authority

¹⁹ TCW’s only protection is contained within its TRAs. The Bass Lake Spur TRA prohibits any actions that would “materially interfere” with TCW’s operations.

to acquire the physical assets. The Board should likewise require Met Council to do the same here.

Similarly, in S. Pac. Transp. Co. – Abandonment Exemption – L. A. Cnty., CA, 8 I.C.C. 2d 495, 1992 MCC LEXIS 60 (1992), reconsideration denied, 9 I.C.C. 2d 385, 1993 ICC LEXIS 29 (1993) (collectively, “SP-LACTC”), the ICC required the transit agency (“LACTC”) to obtain ICC authority to acquire the physical assets of the line. The test was whether the entity acquiring the railroad assets was also acquiring sufficient power over the operation of those assets. The ICC focused on the fact that LACTC would have “management, operation, and maintenance” control over the line and would be the de facto common carrier on the line. Id., 8 I.C.C. 2d at *508. Upon reconsideration, the ICC again rejected LACTC’s argument that it did not require common carrier authority because Southern Pacific (“SP”) had that obligation. The ICC again noted that LACTC was given the right to make repairs and undertake other actions that could control or limit the common carrier obligations on the line. Id., 9 I.C.C. 2d at *388.

Here, although, on paper, HCRRA, like SP, is the nominal common carrier, it is Met Council that has agreed to undertake the normal obligations associated with the management, operation, and control of the railroad line. HCRRA retains or manages practically nothing. If HCRRA had not contracted out its obligations to Met Council and had retained independent authority to manage, operate, or maintain the Line, perhaps the Transaction might qualify under State of Maine. But HCRRA has not retained that authority. It has delegated substantially all of the operations, maintenance, and management of the Line back to the very same entity that is not supposed to have any control over activities that could interfere with or otherwise impact

common carrier operations on the line – whether such operations are undertaken by CP, TCW,²⁰ or HCRRA. Under Orange County and SP-LACTC, this requires Met Council to obtain STB authority because it is acquiring a “railroad line.”

Other cases likewise focused on whether the non-carrier entity would have too much control over the maintenance, operations, or management of the railroad line used by the common carrier(s). In San Benito Railroad LLC – Acquisition Exemption – Certain Assets Of Union Pacific Railroad Company, FD 35225, 2011 STB LEXIS 300 (STB served June 23, 2011), the Board focused on the fact that the non-carrier had the discretion to assume the management, operation, dispatch, and maintenance of the line and rejected the State of Maine request. Here, Met Council has more than the “discretion.” It is obligated, via a contract with HCRRA, to undertake those aspects of the Bass Lake Spur.²¹ In City of Oshkosh, WI And Wisconsin Central LTC – Petition For Declaratory Order, FD 32452, 1994 ICC LEXIS 93 (ICC served June 8, 1994) (“City of Oshkosh”), the City of Oshkosh, WI was buying the underlying real estate but the railroad was retaining ownership of the physical assets of the line. The ICC examined the transaction to determine if the City would have too much control over the line so as interfere with the railroad’s operations. The ICC approved the transaction under State of Maine because no maintenance, dispatching, wreck-clearing, policing or other duties related to common carrier

²⁰ Met Council and HCRRA act as if HCRRA would be the only common carrier on the line, but this ignores the fact that the approval of TCW’s TRA’s imposed a common carrier obligation on TCW that cannot be removed without a discontinuance proceeding. Thus, there are (and will be) two common carriers operating on the line. If Met Council’s actions interfere with TCW’s common carrier rights and service that is just as much of a concern as any control or interference with HCRRA’s common carrier rights.

²¹ The STB also noted that the transfer of maintenance and dispatching responsibilities to the non-carrier could be used to circumvent the railway labor laws without sufficient business justification. Id. at *9-10. In this case, CP, a unionized railroad, will be transferring its management and maintenance [and dispatching] responsibilities to HCRRA, who, in turn, has transferred those back to Met Council without any protections to labor.

operations were being allocated to the City. In contrast, here, all such similar common carrier duties are being transferred to HCRRA who then transfers them right back to Met Council, the non-carrier entity. This is in stark contrast to the City of Oshkosh case. See also Wisconsin Department of Transportation – Petition for Declaratory Order – Rail Lines in Almena, Cameron, and Rice Lake, Barron County, WI, FD 35366, slip op at 4 (STB served Sept. 23, 2010) (agreements appeared to give public body too many rights related to the common carrier obligation so the Board was unable to make the requisite State of Maine finding); Atlanta Development Authority D/B/A Invest Atlanta and Atlanta Beltline, Inc. – Verified Petition for a Declaratory Order, FD 35991, slip op. at 8 (STB served Dec. 15, 2016) (public body was given too much control over the common carrier and could have prevented the common carrier from communicating with shippers directly, or entering into track use, grade crossing, or other operating agreements).²²

Met Council and HCRRA have argued that Met Council is not acquiring any “undue control” over HCRRA’s “exercise of the common carrier obligation.” Met Council Reply at 9. But that is not the “test” under the State of Maine cases cited above. The test is whether the non-carrier entity will have **any** indicia of control over a railroad line – such as the ability to manage, maintain, repair, dispatch, undertake capital improvements, and enter into contracts with third parties to undertake the normal obligations associated with controlling a railroad line subject to the STB’s jurisdiction. Here, if those indicia of control were being given to HCRRA’s exclusive

²² Cf. City of Woodinville Wash. – Petition for Declaratory Order, FD 35905 (STB served Oct. 7, 2016) (“City of Woodinville”) (Not finding public body a carrier, but nonetheless noting that the public body could transfer property needed by the common carrier without notice to the common carrier and requiring that no such actions should take place without consulting with and notifying the common carrier in advance). Met Council’s ability to control and interfere with TCW’s common carrier service goes far beyond those authorized in the City of Woodinville case.

control, perhaps, the Transaction could pass muster. However, HCRRA has already abandoned and contracted all of those indicia of control back to Met Council so that the non-carrier entity will have the ability to interfere with common carrier operations on the line – both TCW’s and HCRRA’s. In such a situation, the Board, as it has done in the past in similar factual circumstances, should treat Met Council as a non-carrier that is acquiring a “railroad line.” As such, simply based on the agreements as presented, the Board should deny or dismiss Met Council’s State of Maine request and instead find that Met Council should either obtain STB authority or restructure the transaction agreements.

4. What is the effect on the State of Maine analysis, if any, of the presence of a second easement holder, i.e., TCW? (See Pet. for Declaratory Order, Attachment 2, Ex. 4d at 25 (granting TCW an easement over the Kenilworth Corridor).) See also V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan., FD 35459, slip op. at 10 n.14 (STB served July 12, 2012); City of Denver—Acquis. Exemption—W. Stock Show Ass’n, FD 36157, slip op. at 2 (STB served Mar. 23, 2018).

In Question 4, it appears the Board seeks information concerning whether the presence of a second easement holder outright disqualifies the transaction as a State of Maine transaction. The fact that the Board has never exempted, authorized, or approved a State of Maine Transaction which will result in two rail common carriers holding freight easement operating rights over the same STB regulated rail line and the very definition of the word “exclusive” suggests that there can only be one exclusive easement holder; however, TCW’s research suggests the answer is not quite that simple. The purpose of the State of Maine doctrine is to bring a non-railroad entity, typically a public body, who acquires STB jurisdictional track under the Board’s jurisdiction to ensure that the entity that owns the rail right-of-way does not interfere with the provision of common carrier service over Board-regulated track. As such, the effect of the presence of a second easement holder is that it creates an obligation on the part of the Board

to ensure that in exempting, authorizing or approving rail transaction, it does not do so when the second easement holder's rights will interfere with an existing carrier's easement rights to provide common carrier rail service over Board-regulated track.

TCW was granted a permanent easement in the Kenilworth Corridor that could not be terminated unilaterally by HCRRA, except in accordance with the 1998 TRA (see Section 2.2).²³ Exhibit A to the Railroad Easement gave TCW an actual property interest in the Kenilworth Corridor to permit and ensure that TCW is able to carry out the operations TCW conducts pursuant to the 1998 TRA. Despite the existence of this easement, the Transaction proposes also granting HCRRA an easement in the same corridor. Section 2.1.1. of Exhibit 4 - HCRRA Freight Rail Operating Easement and Consent to LRT (Petition at PDF pages 231-234) states HCRRA will reserve and create for itself a permanent, irrevocable, exclusive, transferable, and assignable HCRRA Freight Rail Operating Easement over and across the Easement Area and the Kenilworth Corridor Trackage for the provision of service as a rail carrier as that term is defined in 49 U.S.C. § 10102(5), subject to the provisions of the TRA as defined in Section 2.4 ("Kenilworth Easement"). Likewise, the Real Estate Purchase Agreement states Met Council will enter into an agreement with HCRRA called the "Bass Lake Spur Freight Rail Easement Agreement" ("Bass Lake Spur Easement"). Petition at PDF pages 236-237. Pursuant to the Bass Lake Spur Easement, HCRRA will have the exclusive right to use the Property for the provision of service as a rail carrier as that term is defined in 49 U.S.C. § 10102 (5). Id.

The Transaction documents do not answer the logical question; which Easement controls? The plan of HCRRA, however, is to allow Met Council and its contractors to demolish virtually all the track in the Kenilworth Corridor, build new freight track on a different

²³ A copy of TCW's easement for Kenilworth Corridor is attached as Exhibit G.

alignment, and dig its 2,870 foot long tunnel within seven feet of the centerline of the new freight rail. These plans will abridge several rights expressly granted TCW in the Kenilworth Easement: the right to “exclusive management, direction, and control” of the Kenilworth Corridor (defined as 50 feet centered on the existing track) and the obligation and right to “perform all construction . . . maintenance, repair and renewal” of the track. 1998 TRA §1.3, 4.1 and 4.2(1). Following the rehabilitation in 1998, TCW was responsible for “all maintenance, rehabilitation, renewal, reconstruction, repairs and improvements, replacement, including bridges, grade crossings and signals.” Id. at §4.4. The 1998 TRA bars HCRRA from constructing “any facility in or over the Rail Corridor where the vertical distance between the top of the rail or the ground surface of the Rail Corridor, and any part of the facility, is less than 23 feet.” Id. at §4.6.

If the proposal is approved, there will be two carriers possessing the same easement on the Kenilworth Corridor. The Board has never approved a State of Maine transaction which will result in two rail common carriers holding freight easement operating rights over the same STB regulated rail line. While the Board might be able to do so, it should refrain from doing so here because HCRRA’s easement and operating rights, with its plan to allow Met Council to build its light rail project, will interfere with TCW’s ability to provide common carrier service over STB regulated track.²⁴ Both the Kenilworth Easement and the proposed Bass Lake Spur Easement will interfere with TCW’s provision of common carrier service to its shippers and directly conflict with TCW’s operating rights under the 1991 and 1998 TRAs.

²⁴ If the Board is inclined to allow HCRRA to also be a common carrier, HCRRA’s common carrier rights should not be allowed to supersede or interfere with TCW’s easement and its common carrier service.

A key requirement of State of Maine is that the entity with the common carrier obligation retains an exclusive permanent easement to ensure the continuation of freight service over the involved rail lines. Here, as discussed in Question No. 5, TCW should be considered the common carrier. Its easement to provide that common carrier service should not be impaired or otherwise burdened by another easement. In fact, the Board has a responsibility to ensure that any easement entered into in a State of Maine case to allow a non-carrier to “conduct non-common carrier rail operations on the rail line (for example, commuter rail operations)” over an STB-regulated line does not interfere with the provision of freight service over the regulated line by a common carrier. See V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan., FD 35459, slip op. at 10 n.14; 13 n.21 (STB served Jul. 12, 2012) (“V&S Ry”). The Board said in State of Maine cases, the agency has “generally required that the parties agree to a permanent easement in order to preserve the common carrier’s rights and obligations on the rail line.” Id. The Transaction as proposed will interfere with the only carrier that has operated over both the Bass Lake Spur and Kenilworth Corridor in a decade’s operating rights, TCW. As such the transaction does not qualify as a State of Maine transaction.

In this Transaction, the easements that HCRRA will acquire will interfere with TCW’s rights granted in the 1991 and 1998 TRAs, which include a properly recorded permanent easement over the Kenilworth Corridor dated August 10, 1998. The easement rights proposed to be given to HCRRA will allow HCRRA to have exclusive control over the remaining 10,000 feet of sidetracks on the Bass Lake Spur that will not be removed as part of the Project. This means that HCRRA could seek to prevent TCW from using them or charge an exorbitant fee. As described in the Verified Statement of Will Brown, TCW’s General Manager of Operations, (“VS Brown”), attached hereto as Exhibit E, those sidetracks, as well as the 16,000 feet of

sidetracks that Met Council plans to remove, are critical components of TCW's common carrier service to its shippers. Neither Met Council nor HCRRA should be allowed to remove tracks that TCW uses for its common carrier obligations. Nor should HCRRA be allowed to have the exclusive right to control the use of these tracks or remove these remaining sidetracks because those tracks are part of TCW's operations.²⁵

The easements, combined with the extent of control that Met Council will have over HCRRA and TCW's common carrier obligation, disqualifies this Transaction from application of State of Maine. Under the Transaction, there will be two common carriers over the Line – TCW and HCRRA – both having contract and easement rights. But, the Board has never exempted a State of Maine transaction where two common carrier parties would both have overlapping easement rights and where the non-carrier owner (Met Council) would also have contract rights to carry out the common carrier obligations of one of the common carriers.

5. Should operational impacts on TCW be considered as part of the State of Maine analysis? If so, should they be considered as a result of treating TCW as the State of Maine “carrier,” as opposed to HCRRA? (See TCW Initial Comments 17, 19.) Alternatively, should they be considered due to TCW's status as an overhead trackage rights operator? What specific operational impacts would the transactions have on TCW, if any—for example, due to loss of sidings or due to the narrowness of the corridor and shared uses? Record development and analysis regarding interference with TCW operations should be limited to operational effects resulting from the transaction agreements for which the Council seeks a State of Maine declaratory order.

²⁵ Such tracks have been an integral part of TCW's common carrier operations for almost 27 years. As such, parties cannot take actions to remove or relocate these tracks if doing so will result in interference of TCW's common carrier rights. This is true whether TCW does or doesn't have an explicit contractual right to use such tracks. See Mark Lange – Petition for Declaratory Order, FD 35037 (STB served Jan. 28, 2008) (rejecting a landowner's attempts to evict a railroad from his land, which the railroad and a predecessor railroad had been using for decades in order to provide common carrier service; and, stating that to the extent the landowner's claims seek to dispossess the railroad of property that is used for railroad operations, the state law claims would effectively regulate rail transportation and be preempted under 49 U.S.C. 10501(b)) (“Mark Lange”).

Yes, the operational impacts on TCW should be considered as part of the State of Maine analysis. Not just because TCW should be treated as the common carrier as opposed to HCRRA, but rather because TCW is an operating common carrier on the line even though its rights are overhead in nature. As an operating common carrier on the Line, the Board's State of Maine precedent is clear: a non-carrier entity should not have the ability to undertake actions that would interfere with common carrier operations on a line, whether there are one, two, or even more operating common carriers.

As explained herein, treating TCW as the State of Maine "carrier" is justified because TCW is the only active rail common carrier operating over the involved lines and as such TCW is the only rail common carrier whose operations/common carrier rights will be adversely affected by the Transaction. Met Council and HCRRA do not have a mutually agreed upon and binding construction and operations agreements with TCW. Such agreements are necessary to eliminate and/or remedy interferences with freight operations both during construction and during continued operations over the shared use corridor once the Transaction is undertaken. Ensuring that transactions involving a government entity do not interfere with or disturb an STB-regulated rail carrier from providing rail service is the very reason that the Board requires parties seeking to undertake a State of Maine transaction to submit the proposal to its review prior to undertaking the transaction. Put simply, the Board's primary interest in a State of Maine transaction is to ensure that shippers continue to receive uninterrupted freight rail service over track subject to the Board's jurisdiction.²⁶ This Transaction fails that test.

²⁶ See V&S Ry, n.21 (explaining that in resolving disputes related to State of Maine cases, the Board looks at whether easements and the particular facts and circumstances involved "provide reasonable assurance that there will likely be no undue interference with the a common carrier's rights and obligations for a regulated line).

Whether the Board treats TCW as the State of Maine carrier in lieu of HCCRA or due to TCW's status as an overhead trackage rights operator, the Board must consider operational impacts to TCW because the Board has an obligation to ensure that TCW's shippers continue to receive rail service and that nothing interferes with TCW's ability to carry out its common carrier obligation. In doing so, the Board must refrain from approving, authorizing, or exempting transactions that cause interferences with the provision of common carrier freight service over the rail lines.

The Board should treat TCW as the common carrier for purposes of its State of Maine analysis because it is completely illogical to base the Board's State of Maine analysis on HCRRA, who, as explained in the answer to Question 2, has had and continues to have a complete exemption from Subtitle IV of the Interstate Commerce Act since 1995 and has never performed any common carrier services. It doesn't matter whether TCW's common carrier operations are local or overhead or that TCW is merely a tenant with overhead rights. TCW is the only carrier now and will be the only operating carrier in the future. Its common carrier service to its shippers should be protected during both the construction/relocation aspect of the Transaction and for the future as it shares the corridor with light rail passenger operations.

**The Transaction Will Interfere With TCW's Provision of
Common Carrier Service to Shippers.**

The documents produced by Met Council clearly demonstrate that the Transaction will require the relocation and reconstruction of much of existing rail trackage in the Kenilworth Corridor and almost all of the Bass Lake Spur, the elimination of a significant amount of sidetracks critical to TCW's terminal operations, and the co-location of LRT and rail freight operations directly adjacent to TCW's freight operations in a shared corridor. To be clear, all of this is to happen over a four year period without any binding construction or operations

agreements between TCW and Met Council/HCRRA providing for shared use of the corridor by freight trains and LRT trains, for relocation and reconstruction of the Line used by TCW, or for the replacement of the miles of critical sidetracks that Met Council plans to eliminate, relocate, or give to HCRRA for HCRRA's exclusive use. Collectively, the proposed Transaction documents provided by Met Council and HCRRA for the Transaction show that TCW will suffer three types of adverse operational impacts as a result of the Transaction – (1) during construction; (2) during continued operations over the shared use corridor; and (3) due to the removal of a significant portion of sidetracks that TCW uses daily to provide common carrier service to its shippers.

Construction

Met Council and TCW engaged in negotiations concerning construction specs, interruptions to freight service, liquidated damages, operating parameters, and other construction-related matters, but the parties never executed a binding agreement to protect TCW's rights and operations during construction or during continued operations over the shared use corridor once the Transaction is undertaken.²⁷ The Construction Agreement, if finalized and executed by all parties, would have afforded TCW protection against foreseeable interferences to freight traffic during the four year construction period. Unfortunately, Met Council unilaterally terminated negotiations with TCW without notice to TCW or executing the Construction Agreement. Yet, a construction agreement is absolutely vital to prevent interruptions of service during the construction period.

²⁷ A copy of the draft Construction Agreement is attached to this filing as Exhibit C. This 48-page proposed construction agreement was carefully crafted to ensure that construction of the Project would not interfere with TCW's common carrier obligation and ability to provide service to its shippers.

Despite filing over 1400 pages of documents, Met Council and HCRRA did not produce the Construction Agreement or even submit one to deal with TCW's concerns. Met Council simply said that "the Council has committed to preserve the freight design, construction and operating protocols to which it and TCW had agreed." See Met Council Reply at 18. This is an empty promise. TCW does not have privity of contract to enforce such commitments against Met Council and/or HCRRA. There is no contract between TCW and Met Council requiring Met Council to do or forbear from doing anything during the four year construction. Met Council is free to change its intentions whenever it wishes and without warning or reason. For example, it may decide an interruption in service or outage "needs" to be longer than what was anticipated, that it "needs" to add new service interruptions, that its plans for how close the new freight rail track will be to the pedestrian/bicycle path "need" to be changed, that it wants to move the freight rail track to a different location than had been negotiated with TCW, or that the schedule of liquidated damages for outages cannot be followed because the Project budget has been exceeded. The abrupt about face Met Council engineered over the last six months shows it may simply change its intentions without warning or sound reason. Without a binding contract, Met Council is free to walk away from any of its commitments any time it wishes, or if performance becomes costlier than they expected or would like. By simply making an empty promise without signing or even producing the agreement that it is allegedly committing to follow, Met Council has avoided providing the Board any evidence of its proposed commitments.

The 13-page OMA submitted to the Board on June 5, 2018 by Met Council and HCRRA makes it clear that TCW's rights are not adequately protected.²⁸ The OMA does address a handful of provisions from the original Construction Agreement,²⁹ but the OMA clearly does not fully protect TCW's rights. Below is a summary of the various rights that the Construction Agreement would have given TCW and the rights that the OMA takes away from TCW:

- TCW would have been given the right to review design plans and provide input on replacement freight rail facilities;
- TCW would have ongoing right to inspect work completed by Met Council;
- TCW and Met Council would have developed a Construction Coordination Committee with two representatives from each party to coordinate information and resolve any issues (but the OMA takes away TCW's right to input and states that the Council will provide a full-time freight railroad coordinator for the inspection of the track and approving safe passage for trains);
- TCW would have an opportunity to review and comment on the Management Plan for the Transaction to ensure that the Transaction did not materially impair the safety or efficient, continuous and uninterrupted operation of freight rail service;
- TCW would have at Met Council's expense and on Met Council's behalf, provided all flagging necessitated by work on freight rail facilities on the Line pursuant to an agreement between the Council and TCW (the OMA seeks to unnecessarily split this between TCW and Met Council, or its contractor);
- the Construction Agreement contained specific provisions that gave TCW rights related to pre-planned outages; work stoppage by TCW; utilities; change orders; As Built CAD Drawings; Wrecks; Temporary Crossings and Roadways, which could foul freight tracks; and inspections (in the OMA any such rights are taken away from TCW);
- the OMA reduces TCW's Access rights, takes away insurance indemnification for work done by contractors related to the Transaction and shifts liability for such work on to the parties (this term is undefined);

²⁸ OMA Section 8.7 - Not for the Benefit of Others. This Agreement is for the exclusive benefit of the Parties and not for the benefit of any third party. Nothing herein may be construed to create or increase any right in any third party to recover by way of damages or otherwise against either of the Parties.

²⁹ For example, Exhibit A to the OMA, provides a proposed schedule for construction related outages; this schedule was discussed in connection with the original Construction Agreement.

Neither the Transaction agreements nor the OMA is tailored to ensure that TCW's operations continue without interruption. Under the Construction Agreement, TCW had the right to inspect the replacement rail facilities; however, the changes to the OMA take away that right and the end result could be that TCW ends up having to operate on new freight rail tracks which are not built correctly. Additionally, the Construction Agreement was to include plans for Met Council to build replacement side tracks for TCW's use. It appears that Met Council decided to only incorporate the provisions of the Construction Agreement that were beneficial to Met Council and omit nearly all of the provisions necessary to ensure that TCW's operations continue without interruption.

TCW's General Manager of Operations Will Brown reviewed the OMA (See VS Brown), attached hereto as Exhibit E. In order for TCW to truly know the impact the proposed Transaction will have on its operations during the construction phase and ongoing, TCW needs to know what the management plan is for how the inspections, maintenance repair or replacement of Freight Rail Facilities will be conducted. See VS Brown at 9. It is crucial that TCW understand the management plan to ensure that railroads are working safely together as concerns movements through the corridor. Coordination of construction, flagging, and operations are necessary to prevent injury or death of railroad personnel.

Section 2.1(c) of the OMA states Met Council and HCRRA have yet to execute freight railroad/LRT Service coordination protocols to ensure that the Transaction does not interfere with freight operations, yet the Transaction Parties tell the Board to not worry because HCRRA and Met Council promise to each other that they will do so at an unknown future date.

Things that Met Council and HCRRA punted “to be agreed upon later” include freight railroad/LRT Service coordination protocols that provide for, among other things, establishment of the following:

- (i) a management plan for inspection, maintenance, repair, or replacement of the Freight Rail Facilities;
- (ii) a freight railroad safety action plan that identifies areas of concern with respect to LRT Service, Local Freight Rail Service, or Overhead Freight Rail Service, and with any inspection, maintenance, repair, or replacement of the Freight Rail Facilities or LRT Facilities;
- (iii) freight railroad flagging procedures so that any inspection, maintenance, repair, or replacement of the Freight Rail Facilities on the Bass Lake Spur Corridor does not interfere with Local Freight Rail Service or Overhead Freight Rail Service;
- (iv) freight railroad flagging procedures for all necessary inspection, maintenance, repair, and replacement of the Freight Rail Facilities on the Kenilworth Corridor not conducted by TCW pursuant to the Kenilworth TRA;
- (v) railroad flagging procedures so that any inspection, maintenance, repair, or replacement of the LRT Facilities on the LRT track do not interfere with Local Freight Rail Service or Overhead Freight Rail Service; and
- (vi) undertaking or securing appropriate third parties to create an annual program of inspection, maintenance, repair, or replacement of the Freight Rail Facilities in the Bass Lake Spur Corridor.

Such unenforceable future promises for coordination simply does not remedy TCW and its shippers’ concerns related to the construction of the LRT facilities or on-going. Additionally, the Transaction documents completely lack any coordination for shared responsibilities over the Kenilworth Corridor and Bass Lake Spur during construction or continued operations over the Line once the Transaction is undertaken.

TCW’s Continued Operations Over the Shared Use Corridor

The OMA acknowledges that HCRRA will have common carrier rights and should Local Freight Rail Service (as defined in the OMA) be requested over the Corridor, HCRRA would provide it. See VS Brown at 10. But how? HCRRA is not a carrier, never has been, and has neither the economic incentive nor intent to be a carrier. This is in stark contrast to CP who

holds a common carrier obligation on the Bass Lake Spur, and, as one of TCW's major interchange partners, has an economic incentive to ensure that tracks are maintained and transit times preserved.

The OMA completely fails to address how HCRRA service would occur and how it would affect TCW's daily operation if the customer is serviced by a railroad other than TCW. See VS Brown at 10. Section 2.1(b) of the OMA states HCRRA will acquire an "exclusive permanent and irrevocable easement on the Bass Lake Spur and become a party to the Bass Lake Spur trackage rights agreement and will succeed to all of CP's rights and obligations under that agreement in the Bass Lake Spur Corridor." While the OMA clearly acknowledges HCRRA's right and obligation to provide Local Freight Rail Service, it is completely silent as to how such service can coexist and operate in conjunction with TCW's common carrier service to shippers and the LRT service provided by Met Council.

Section 2.1(c) of the OMA also states a long list of protocols yet to be developed, discussed or executed between HCRRA and Met Council to ensure that operation of LRT Service (as defined in the OMA) will not interfere with either HCRRA's provision of Local Freight Rail Service, Overhead Freight Rail Service (provided by CP or TCW pursuant to trackage rights in the Corridor), or Overhead Trackage Rights. Collectively, the promises to develop protocols at some time in the future provide no actual information to demonstrate that the proposed Transaction as undertaken will not interfere with TCW's provision of common carrier service to its shippers.³⁰ See VS Brown at 10. TCW needs to be a party to any such

³⁰ There is no agreement between Met Council, HCRRA, and TCW providing for shared use of the Line by freight trains and LRT trains. In every other State of Maine transaction, there was an operating agreement spelling out the various responsibilities between the operating railroad and the non-carrier entity. There is no such agreement here. The shared usage agreement is between

operating protocols, or, at a minimum, needs to see actual operating protocols to determine the effect of such protocols on operations. See VS Brown at 11. Written shared use protocols prevent accidents and reduce the chance of injury to railroad personnel and the greater public.

Another example of how the Transaction documents do not account for TCW's operational concerns relates to the dispatch proposal. Currently CP dispatches the Bass Lake Spur. As noted, CP has both the ability and the economic incentive to ensure efficient dispatch. After June 30th, 2019, HCRRA states that it will secure third parties to provide this function. See VS Brown at 11. Starting July 1, 2018, "freight operations over the Kenilworth Corridor and Bass Lake Spur will continue to be coordinated among the parties responsible for dispatch," but again HCRRA does not say how. Likewise, HCRRA does not commit to 24/7 service as it exists today. See VS Brown at 11. Without details on "how" such operations will be dispatched in the future, TCW cannot effectively plan for operations during the construction phase or afterward. See VS Brown at 11. The Board has an obligation to ensure that adequate plans are in place to protect both TCW's current operations and future operations, and not wait until after TCW's operations have been interrupted to act.

The OMA states that HCRRA will continue to have CP provide the dispatch service and flagging service until June 30th, 2019, but fails to explain how CP, TCW and those doing the construction will be in communication with each other to ensure a smooth flow of freight rail service. Ironically, Met Council, which has never built a line next to a freight railroad before, is quick to promise freight rail operations will not be impacted, even though neither Met Council

two entities who do not provide service, will not provide service, and have no incentive to provide service.

nor HCRRA has any plans in place to prevent any interference to TCW's freight service, including interferences related to removal of numerous side tracks.

Additionally, the Transaction documents fail to recognize TCW's operating rights over the Kenilworth Corridor. The 1998 TRA and 2002 Supplemental Agreement gave TCW exclusive management, direction, and control of the Kenilworth Corridor, as well as responsibility for maintenance and an exclusive easement. Yet, the Transaction will grant HCRRA a permanent, irrevocable, *exclusive*, transferable, and assignable HCRRA Freight Rail Operating Easement over and across the Easement Area and the Kenilworth Corridor Trackage for the exact same purpose. Two carriers cannot both have exclusive rights, and TCW's easement has not been extinguished. As such, the Transaction as proposed will infringe on TCW's easement and should be preempted. Actions that have the effect of interfering with the provision of common carrier service are typically found preempted and given that the Transaction will interfere with TCW's provision of common carrier service the Transaction should likewise be preempted.³¹

³¹ See e.g., Soo Line R.R. Co. v. City of St. Paul, 827 F. Supp. 2d 1017, 1022 (D. Minn. 2010); and Wisc. Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000). See also Petition of Union Pacific Railroad Company for Declaratory Order, FD 35960 (STB served Sept. 30, 2016) (Noting that there may be situations where the application or interpretation of a contract may be preempted because it unreasonably interferes with interstate commerce, especially if the state action would force a rail carrier off of property that it uses for transportation or results in the removal of assets from the interstate rail network); Pinelawn Cemetery – Petition for Declaratory Order, FD 35468 (STB served Apr. 21, 2015) (holding that a landowner's application of state contract and property claims could completely cut off shippers and prevent the common carrier from carrying out its obligation to serve them and thus preemption applied); and California High-Speed Rail Authority – Petition for Declaratory Order, FD 35861 (STB served Dec. 12, 2014) (noting that a railroad's agreements with state or local entities may be preempted if the agreements unreasonably interfere with interstate commerce or railroad operations.)

Side Tracks

TCW operates over the Bass Lake Spur pursuant to the Twin Cities Trackage Rights Agreement (1991 TRA), executed July 26, 1991. In 1991, as part of a transaction in which CP sold tracks west of the Tower E-14 to TCW, CP granted trackage rights on the Bass Lake Spur to TCW.³² Petition at 6. TCW has and continues to operate over the Bass Lake Spur daily. The aforementioned line constitutes the critical route, along with the Kenilworth Corridor, which connects Minnesota and South Dakota shippers with Class I interchanges in the Twin Cities. It is clear from the documents that the Transaction will result in the elimination of numerous sidetracks located in the Bass Lake Spur currently utilized by TCW which are critical to TCW's terminal operations.³³ Since 1991, TCW has had the right to use and has used portions of the CP-owned side tracks in the Bass Lake Spur to provide common carrier service to its shippers (See Sections 1.2 and 2.1 of the 1991 TRA). CP is well aware of the fact that TCW has and continues to use these sidetracks on a daily basis. CP has never objected to TCW's use of such tracks. The Bass Lake Spur Freight Rail Easement Agreement and OMA clearly show that the transaction will interfere with TCW's use of those tracks.

³² While none of the Transaction parties are directly seeking to terminate the 1991 TRA, the actions the Transaction parties plan on taking in connection with the Project can only be accomplished by CP breaching its obligations under the 1991 TRA and the 1993 Supplemental Agreement.

³³ See Section 2.1 of the new Real Estate Purchase Agreement proposed by the Transaction Parties which states that Met Council will acquire the Bass Lake Spur, the Bass Lake Industrial Track and all improvements, subject to the rights retained or excluded by CP; this includes all of CP's rights, title and interest in railroad trackage (and the appurtenances thereto), buildings, and other improvements on the property (Pages 236-237 of the Petition).

Section 2.2 of the same agreement states that Met Council will enter into a Rail Freight Operating Easement to give HCRRA the exclusive right to use Bass Lake Spur, including the various side tracks.

The Transaction as proposed also gives HCRRA the sole right to eliminate TCW's use of a significant portion of the sidetracks entirely,³⁴ or implement unreasonable conditions of TCW's use of such side tracks.³⁵ This is in direct conflict with the TCW's rights under the 1991 TRA. TCW simply cannot provide the same level of service without those tracks. VS Brown at 15. Per the terms of the Transaction documents, HCRRA could decide at will which and how many tracks it wished to remove regardless if TCW uses such tracks to conduct common carrier operations. This would not only breach TCW's current contractual rights (this is currently the subject of a lawsuit in federal district court), but it would also result in a significant degradation of service and directly interfere with TCW's ability to provide common carrier service. Id. at 10. Not to mention, the Board has found that actions taken with the intent to dispossess a railroad of property (regardless of ownership) that is used for railroad operations, are preempted by 49 U.S.C. 10501(b)) See Mark Lange.

Such a result could have been easily avoided, and almost was. For nearly a year, TCW and Met Council originally entered into negotiations for Met Council to provide TCW replacement tracks for the sidetracks Met Council planned to remove; however, no agreements were ever finalized. Now, Met Council plans to move forward with the removal of the side

³⁴ Two maps produced in Petition show how some the Belt Line IT track will be transferred between the Transaction Parties. See Petition at PDF pages 259-260. Blue prints and drawings produced by Met Council also show that certain side tracks will be removed for development purposes.

³⁵ Section 2.1.1 - HCRRA hereby reserves and creates for itself a permanent, irrevocable, exclusive, transferable, and assignable HCRRA Freight Rail Operating Easement over and across the Easement Area and the Kenilworth Corridor Trackage for the provision of service as a rail carrier as that term is defined in 49 U.S.C. § 10102(5), subject to the provisions of the TRA as defined in Section 2.4. (Exhibit 4 to HCRRA Freight Rail Operating Easement and Consent to LRT, Petition at PDF pages 233).

tracks without providing replacement tracks, while completely disregarding the effect the removal of the side tracks will have on TCW's operations.

While Met Council has executed various agreements with HCRRA, who conducts no rail operations, it has completely failed to reach any agreement with TCW. Met Council has reached no agreements with TCW concerning service disruptions or track outages that will occur as a result of tracks being removed and realigned. Nor do they have any agreements with others, such as TCW's shippers, connecting carriers or other impacted shortlines who also have freight that utilizes TCW, to resolve their concerns. For this exact reason, numerous shippers, public officials, and impacted carriers have already written to the Board, expressing significant concern that the Transaction will cause service and operational issues. The Transaction parties are well aware that the Transaction as proposed will breach TCW's contractual rights and interfere with TCW's operation. As explained previously, Met Council has actually indemnified the other parties involved with the transaction by agreeing to cover any liabilities arising from a violation of TCW's rights pursuant to the various TRA's. See Exhibit 4a: Real Estate Purchase Agreement, Section 2.4 – TCW Indemnity (Petition at PDF pages 238-239). Unfortunately, such indemnity provisions, while beneficial for HCRRA and CP, provide no remedies to shippers whose service will be significantly disrupted and does nothing to remedy TCW's operating concerns.

The Transaction will create additional operational interferences once undertaken. The Rail Property Transfer Agreement filed by Met Council anticipates granting various easements in future transactions that could adversely affect TCW's ability to honor its common carrier obligation. It remains unclear as to whether there are any limitations on Met Council's ability to grant easements to other parties that could unreasonably interfere with freight rail service.

In summary, TCW is the only active rail common carrier operating over the involved lines and as such TCW is the only rail common carrier whose operations and common carrier rights will be adversely affected by the Transaction and as such the Board should treat TCW as the State of Maine carrier in lieu of HCRRA. It doesn't matter whether TCW's common carrier operations are local or overhead or that TCW is merely a tenant with overhead rights. TCW is the only carrier now and will be the only operating carrier in the future. As such, the Board has an obligation to ensure that TCW's shippers continue to receive rail service and that nothing interferes with TCW's ability to carry out its common carrier obligation. As shown herein, TCW will suffer three types of adverse operational impacts as a result of the Transaction as proposed – (1) during construction; (2) during continued operations over the shared use corridor; and (3) due to the removal of a significant portion of sidetracks that TCW uses daily to provide common carrier service to its shippers because Met Council and HCRRA failed to enter into a mutually agreed upon and binding construction and operations agreement with TCW and provide for replacement of sidetracks to be removed as part of the Transaction. Such agreements are necessary to eliminate and/or remedy interferences with freight operations both during construction and during continued operations over the shared use corridor once the Transaction is undertaken. Given that ensuring that transactions involving a government entity do not interfere with or disturb an STB-regulated rail carrier from providing rail service is the very reason that the Board requires parties seeking to undertake a State of Maine transaction, the Board has an obligation to ensure that modifications are made to the Transaction that would allow for TCW to continue to honor its common carrier obligation and provide service consistent with the 1991 and 1998 TRAs.

II. THERE IS NO NEED FOR EXPEDITED CONSIDERATION OF MET COUNCIL'S DECLARATORY ORDER REQUEST

The Met Council Reply basically states that Met Council requested expedited consideration of the Transaction because of a crucial milestone associated with the Transaction that must be reached to move forward with the project and that delay could not be corrected later. This may or may not be true, but what is clear is that Met Council completely fails to address certain other considerations that demonstrate robust scrutiny by the Board is not the real reason the Project cannot move forward; such considerations, include Met Council is still trying to figure out how to fund the Transaction and has yet to find a construction firm to be a responsive bidder. Simply put, the Transaction has many roadblocks that must be addressed prior to the Transaction moving forward.

Met Council has asked the Board to rule on an expedited schedule. According to Met Council, the Project has widespread support, is definitely approved and ready to go, and all that needs to happen is for the Board to rule. And, according to them, the Board should rule quickly because there are numerous construction and funding commitments that are in jeopardy if the Board does not act quickly. Met Council doesn't prove these generalized claims or specifically point to any specific funding or construction commitments. Rather, it just makes several blanket assertions that lack any support whatsoever. Contrary to Met Council's claims, the Transaction is highly controversial and there are many issues yet to be resolved before construction could begin. Met Council and HCRRA's claims that the Board is standing in the way of a universally supported public interest project are completely unfounded. As explained herein, the action pending before the Board is minor in comparison to the Transaction's other roadblocks.

For starters, many Minneapolitans disagree with the Transaction, including public officials, shippers, shortlines, and residents. Met Council and HCRRA want the Board and TCW

to accept platitudes and empty promises that the Transaction will not interfere with TCW's common carrier obligation, but even elected officials for Hennepin County have expressed distrust in Met Council actions and concerns over the Transaction.

Just over two weeks ago, several Hennepin County Commissioners expressed concerns over Met Council and the Transaction. Commissioner Mike Opat voted against Hennepin County contributing more money to the Transaction and stated, "This project is just poorly managed" by the Met Council.³⁶ Another Hennepin County Commissioner, Commissioner Jeff Johnson, in voting against the Transaction said Southwest won't relieve traffic congestion "in any meaningful way and it's a huge waste of constituents' money." *Id.* Perhaps even more telling, Commissioner Marion Green, who tentatively voted for increasing funding, said, "Met Council is "forcing the county's hand" and appears to be "playing a game of chicken with the federal government." *Id.* The Board should not be complicit in Met Council's game. Political support aside, Met Council lacks complete funding for the Transaction.

While Met Council wants the Board to believe that the Project is fully funded and ready to go, the truth is that as of now the Transaction is yet to be fully funded. In fact, Met Council recently determined that based on updated estimates more funds are needed. As a result, Met Council went to Hennepin County and asked it to increase its contribution to the Project, which is being funded by a dedicated tax. Hennepin County was reluctant to increase its contribution for the Project, but voted tentatively to do so in hopes that it would persuade the FTA, to contribute \$929 million toward the Transaction. Met Council also applied for a \$187 million "letter of no prejudice" from the FTA –

³⁶ Hennepin County Board approves Southwest light-rail cash infusion – in theory, Janet Moore, Star Tribune, May 31, 2018 available at

<http://www.startribune.com/hennepin-board-approves-southwest-lrt-cash-infusion-in-theory/484231591/>

county money authorized up front for summer construction that could serve as a local match to federal dollars once the federal grant goes through. Met Council does not anticipate a decision on its “letter of no prejudice” until sometime in July. Moreover, this funding would serve as a local match, only if Met Council is able to get federal funding. The truth is Met Council has been trying for years to get federal funding for the Project.

In February of this year, President Trump ordered the FTA to “wind down” its New Starts grant program, which was anticipated to provide a significant amount of funding for the Transaction.³⁷ Around the same time, the FTA released its annual report of funding recommendations. Notably, the Transaction was not included. Id. That’s right – despite Met Council’s assertions that this Project is wholly supported by the Federal Government and all that remains is for FTA to fund it – the Project didn’t even make the list of recommended projects. Moving forward, the Project is simply one of many that will be applying for a federal grant in September, which, if selected, would not be awarded until 2019.³⁸ However, there is no guarantee that the Transaction will be selected, as the Transaction is going up against several other Transactions for a limited pool of funding and Met Council tried previously to get federal funding and was unsuccessful. Even if funding was available, as of today, Met Council has yet to locate a construction firm that fits in Met Council’s budget.

Until Met Council is able to locate and select a responsive bidder for construction of the Transaction, the Project cannot move forward. In May of this year, Met Council resolicited construction bids for the Transaction. Two firms responded with bids of \$799 million and

³⁷ <http://www.startribune.com/trump-budget-nixes-key-funding-for-local-lrt-bus-projects/474229783/>

³⁸ Hennepin County Board approves Southwest light-rail cash infusion – in theory, Janet Moore, Star Tribune, May 31, 2018 available at <http://www.startribune.com/hennepin-board-approves-southwest-lrt-cash-infusion-in-theory/484231591/>

\$812 million – both bids were higher than those thrown out last year because they were too costly and “unresponsive.” In response to the latest bids, officials for Met Council have indicated that the bidding deadline may need to be extended. As such, Met Council cannot move forward with the Transaction until a responsive bidder is selected for construction of the Transaction. So, to be clear, the Transaction is not yet fully funded. Even if it was, Met Council has yet to locate a responsive bidder. As such the Transaction is not shovel-ready and thorough consideration of the relevant transactional issues by the Board is not delaying the Transaction. Contrary to Met Council’s claim of support for the Project, one possible explanation as to why the Project is yet to be funded is because the Project remains highly controversial.

Not only is funding uncertain, but the Project is also not widely supported and is highly controversial. As the Board is aware, since the proceeding commenced three dozen freight shippers filed letters with the Board expressing concerns over the Transaction. Collectively, these shippers asked the Board to act carefully to ensure that TCW’s freight service is preserved and that the Transaction does not interfere with their operations. Many of the shippers that filed comments plan to expand current operations but are hesitant to do so because of the Transaction. While Met Council trivializes these shippers’ concerns, the Board should not. Moreover, continued rail service and the value that these shippers add to the economy are just as important public interest consideration as the Transaction. However, it’s not just political officials and shippers that are worried about the Project, ordinary citizens are too.

Public comments from residents on the Transaction were accepted through April 9, 2018. Many residents expressed dissatisfaction with the Transaction. Some residents expressed concern that the construction of a wall between the BNSF train tracks and the light rail tracks "will cut off access to the Cedar Lake parks and trails, look unpleasant, increase noise and

become the target of graffiti."³⁹ In a public meeting held on March 22, 2018, one resident explained, "Co-location... is the consequence of poor initial planning and scoping at the beginning of the whole process. We are going to spend tens of millions of dollars to accommodate co-location, hundreds of millions. This wall is a concern in that it costs \$20 million. That's a lot of taxpayer dollars that we should really be spending on transit. This isn't transit... I just wanted to say that the presence of this wall and the failed negotiations with TCW... raised even greater questions about safety in the rest of the corridor that we had already expressed when we testified regarding the final EIS."⁴⁰

Not only does the Transaction alarm residents from a noise level and trail access standpoint, but some residents are genuinely concerned about the idea of freight and passenger sharing the same corridor. Resident Arthur Higginbotham raised concerns over "the threat of derailment and explosion of the tankers carrying flammable ethanol and high volatility Bakken crude in the corridor, right over the LRT tunnel, which will contain 18,000-volt overhead power lines, incinerating everyone in the tunnel, and trains, and destroying many homes in the neighborhood," Public Comment at 13. Another resident shared the same sentiment in his comment, writing, "It is just plain stupid to co-locate a high voltage LRT next to a heavy freight rail where the primary freight is a class 3 flammable liquid such as oil and ethanol," Public Comment at 49.

³⁹ Controversy Over Southwest Light Rail Transit Remains At The Other End Of The Tracks, Tim Engstrom, Eden Prairie News, Mar. 27, 2018, available at http://www.swnewsmedia.com/eden_prairie_news/news/local/controversy-over-southwest-light-rail-transit-remains-at-the-other/article_81e123e8-9c65-54df-90c9-d0f5f6b39591.html.

⁴⁰ Jeanette Colby, Public Comments on the Southwest LRT Supplemental Environmental Assessment and Amended Draft Section 4(f) Evaluation, at 23 (Apr. 9, 2018), <https://metro council.org/Transportation/Projects/Light-Rail-Projects/Southwest-LRT/Publications-And-Resources/Environmental-Documents/SEA/Comments/Public-Comments-on-the-SWLRT-SEA-Amended-Draft-Sec.aspx> ("Public Comment").

In addition to comments from residents, the Public Comments include mention of adverse effects to a Minneapolis historic district. The Department of Interior ("Department") explained, "The StPM&M/GN Historic District is an approximately 205-mile-long linear historic district that extends from northeast Minneapolis, west through Minneapolis and its several suburbs, and westward across Minnesota to the state border with North Dakota...The FTA has determined that the Transaction, with modifications required by BNSF [the wall], would result in a Section 4(f) direct use of the StPM&M/GN Historic District, and that the use would be an adverse effect under Section 106 of the National Historic Preservation Act," Public Comment at 52-53. The Department claims there is no "feasible and prudent alternative," and as such, the Department, the FTA, and Met Council executed a Memorandum of Agreement ("MOA") "formalizing measures to mitigate effects to the historic property," Id at 53.

Met Council's puffery that the Transaction has attracted unwavering support and that the Transaction will contribute to the public interest, and that delayed action by the Board could be harmful to the Transaction, is simply inconsistent with reports by the media. Press coverage concerning the Transaction demonstrates that the Transaction is controversial, not yet fully funded, and that Met Council has failed to properly manage the Transaction. The Board should not be forced to fast-track its decision just because Met Council's own actions continue time and again to delay the Transaction, which, until it is funded, cannot begin anyway.

CONCLUSION

TCW respectfully renews its requests that the Board dismiss the Petition for failure to structure the Transaction agreements in a manner to meet even the most minimum requirements for a successful State of Maine transaction. The State of Maine policy was adopted to ensure that government agencies who acquire the physical assets of a railroad do not have the ability to

manage, interfere with, or otherwise limit freight common carrier operations over such assets.

This Transaction is no garden-variety State of Maine transaction and as proposed fails to meet the requirements to be exempted under State of Maine.

In no other State of Maine transaction has the:

- common carrier obligation been effectively eliminated because the entity purportedly acquiring the common carrier obligation (HCRRA) has a complete exemption from Subtitle IV;
- entity which would own and control the physical rail assets (Met Council) been granted the authority to perform almost everything a common carrier would do and agreed to indemnify the purported common carrier from any expense or violations of the common carrier obligation;
- acquiring government agency had the power to modify the rail facilities used by the common carrier (TCW) at will, regardless of the effects of modification on operations;
- non-carrier owner of the underlying rail asset been given the power and control given to Met Council in this proceeding;
- government entity acquiring the easement been given the right to impair or burden an existing freight easement, which was recorded to ensure the continued provision of common carrier service over the involved lines;
- acquiring entity (Met Council) or the purported common carrier (HCRRA) both failed to satisfy the statutory definition of a “rail carrier” – a person that “provide[s] common carrier railroad transportation for compensation.” 49 U.S.C. §10102(5);
- purported common carrier demonstrated that it has no incentive, ability, or experience to preserve freight rail service, failed to timely fulfill its obligation to pay for essential capital needs, and been hostile to freight rail operations;
- purported non-carrier owner been given contractual rights to control and perform almost every obligation of a common carrier;
- purported common carrier (HCRRA) delegated almost all responsibilities and obligations of a common carrier to the acquiring entity and obtained an agreement in advance that it will never have any risk or expense;
- freight rail operator – with common carrier rights and obligations and who actually using the rail line -- not been a party to the proffered documents and opposed the transaction; and
- the proposed transaction resulted in interruptions of service to shippers during construction and the significant loss in transit times and operational efficiencies currently enjoyed by shippers.

The bottom line is that the Transaction as proposed is a sham – presented as if it was a standard State of Maine, but beneath the veneer, far from it.

The good news is there are changes that could bring the parties to common ground. Restructuring the Transaction is not difficult. Met Council and HCRRA simply need to ensure that TCW and its shippers will not suffer operational impacts during the four year construction period and once shared operations commence. This could be accomplished by requiring Met Council to abide by what it had previously agreed to and self-acknowledged as agreement “on key business terms,” including ordering Met Council to enter into the previously negotiated and almost finalized agreements – the Construction Agreement, the Original OMA, and to finalize its agreement to replace and pay for the relocated sidetracks.

As such, the Board should either dismiss the Petition until such time as the transaction can be properly restructured under the standard State of Maine precedent, or it should require Met Council to submit itself to STB authority and seek approval for its acquisition of the physical assets of the Bass Lake Spur and the Kenilworth Corridor.

Respectfully submitted,



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June 27, 2018

Counsel for Twin Cities & Western Railroad
Company

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of these Reply Comments of Twin Cities & Western Railroad Company ("Reply Comments") by mailing copies of the Reply Comments via prepaid first class mail to all parties of record in this proceeding or by more expeditious means of delivery.

Dated at Washington, D.C. on this 27th day of June, 2018.



William A. Mullins
Counsel for Twin Cities & Western Railroad
Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT A

VERIFIED STATEMENT OF MR. MARK WEGNER

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

VERIFIED STATEMENT OF MR. MARK WEGNER

Background of TCW and Southwest Light Rail Project

My name is Mark Wegner. I am the President and CEO of Twin Cities & Western Railroad Company (“TCW”). I started at TCW on August 5, 1991, a week after operations began on the TCW, as its Accounting Manager. In 1993, I was promoted to Comptroller. In that role, I became aware of noise issues relative to train operations in St. Louis Park. In 2002, I was promoted to General Manager of the Minnesota Prairie Line, a subsidiary of TCW that operates a line of railroad from Norwood-Young America west to Hanley Falls, Minnesota. In that role, I became involved in discussions with government officials, which eventually led to involvement in the on-going operations of TCW in the Kenilworth Corridor. In 2007, I was promoted to President. In 2015, I was given the additional title of CEO.

I am personally aware and was involved with the negotiations, discussions, and events surrounding development of the Southwest Light Rail Project (“SWLRT” or “Project”). Based upon those discussions, it is my opinion that the parties, Metropolitan Council (“Met Council”), Hennepin County Regional Railroad Authority (“HCRRA”), and TCW, had reached common ground with respect to two important agreements: an Operations and Maintenance Agreement

("Original OMA") and a Construction Agreement ("Construction Agreement"). The parties had worked on the agreements since October 2016. By August 2017, there were only five issues left to be resolved; the agreements were well over 90 percent done. Both agreements, if signed or made a condition to any Surface Transportation Board ("STB") approval, would protect TCW's common carrier obligations from interference that would otherwise occur from Met Council's plans to relocate the tracks over which TCW operates and protect TCW's shippers from incurring added costs and delayed transit times due to the construction of the Project. The agreements also provide the framework by which TCW and Met Council will jointly manage the shared corridor in the future, which is an important missing element of the current proposals in front of the STB.

History of TCW Operations in the Twin Cities

TCW operates from Minneapolis-St. Paul to Milbank, S. D., where it connects to a subsidiary line, Sisseton Milbank Railroad, which has 37 miles of track extending north in South Dakota. TCW's other subsidiary, Minnesota Prairie Line, operates from Norwood-Young America 94 miles to Hanley Falls, Minnesota. (See TCW map, Attachment 1). TCW's customers are chiefly in agribusiness and the goods moved for them includes corn, soybeans, wheat, sugar, ethanol, and fertilizer along with crushed rock, plastics, metals, machinery, lumber, and manufactured goods. TCW annually moves more than \$1.5 billion in goods from Minnesota and South Dakota to markets in 39 states, Canada, Mexico and overseas. Almost all the traffic moves east to the Class I rail yards in the Twin Cities.

On May 7, 1991, the Asset Purchase Agreement was signed for the sale to TCW by Soo Line Railroad (now CP) of what was called the Ortonville Line. Closing took place on July 26, 1991 and included signing the Twin Cities Trackage Rights Agreement (the "1991 TRA") which

gave TCW the right to operate its trains over Soo Line (now CP) track from Tower E-14 (located at roughly the Eden Prairie/Minnetonka border) over the Bass Lake Spur and continuing on the Merriam Park subdivision to St. Paul via what is now the Midtown Greenway. (See map of Twin Cities rail lines Attachment 1)¹ The 1991 TRA also gave TCW the right to use “all of SOO’s trackage, track connections, facilities and appurtenances” because there was no railroad yard with multiple parallel tracks used to switch and sort railroad cars on the rest of the line TCW purchased. See 1991 TRA, §1.2 and 1.3. Soo retained the right to make changes in the trackage “which SOO deems necessary or desirable for the safe, efficient, and economical use of the Subject Trackage by the Parties, provided that any such change shall not materially interfere with Buyer’s right to use the Subject Trackage . . .” See 1991 TRA, §2.1.

The 1991 TRA anticipated the sale of a segment of the Merriam Park subdivision (from the junction with the Kenilworth Corridor on the west to an area in south Minneapolis known as Rand Junction to the east) and Soo agreed to secure an alternate route for TCW. See 1991 TRA, §8.2. The alternate route described was the Kenilworth Corridor, which starts at the Bass Lake Spur and runs north to Cedar Lake Junction where the Kenilworth track connects to the BNSF Wayzata subdivision, and then on the BNSF Wayzata subdivision to Minneapolis Junction north of downtown, and then onto St. Paul. In 1992, HCRRA purchased the segment of the Merriam Park subdivision described above from Soo Line, but both Soo Line and TCW continued to operate over the Merriam Park subdivision.

On July 27, 1993, Soo and TCW entered into a Supplemental Agreement for an Alternate Route for TCW to get to St. Paul.² Several provisions of that agreement concerned the track in

¹ The 1991 TRA is Attachment 2.

² The Supplemental Agreement is Attachment 3.

the Kenilworth Corridor, which was described as the Alternate Route. The agreement supplemented CP's obligations in the 1991 TRA to provide TCW an alternate route to St. Paul were "ongoing obligations. [I]n the event that operations over the Alternate Route [Kenilworth] are materially adversely affected by acts or omissions of parties other than TCW, CP shall have the obligation . . . to provide TCW a replacement route to St. Paul." See Page 3, §7.

In 1997, as construction of Highway 55 was occurring, at the point where the highway previously had an at-grade railroad crossing, just west of Rand Junction on the Merriam Park subdivision, the new highway alignment would be about 4 feet above the rail crossing, thus necessitating severance of the Merriam Park subdivision track. The identified re-route for TCW to get to St Paul, the Kenilworth Corridor, had not been used for freight rail purposes since 1993 (CNW abandoned its residual common carrier obligations on the Kenilworth Corridor sometime between 1993 and 1995). As part of the Highway 55 project, funding was obtained to rehabilitate the Kenilworth Corridor to allow freight rail operations by TCW; the changeover from TCW using the Merriam Park subdivision to get to St. Paul to using the Kenilworth Corridor and BNSF's Wayzata sub occurred in August 1998. As part of this change in route, a Trackage Rights Agreement with HCRRA was executed on August 10, 1998 (the "1998 TRA").

My understanding is that Minnesota governing bodies, including HCRRA, intended TCW's route over the Kenilworth Corridor to be temporary and that they expected that, within 4 years (by 2002), some government entity would build a permanent re-route about 2 miles to the west, connecting the Bass Lake Spur to the Soo Line's (now CP) north-south Minneapolis, Northfield and Southern Railway ("MN&S") freight line, and another connection from the MN&S to the BNSF Wayzata subdivision line about two miles north.

My understanding is that there were soil contamination issues in a parcel of land that would need to be acquired to build the permanent re-route connection onto the MN&S as well as other delays. By the end of 2002 there were no discussions taking place with TCW concerning building a re-route connecting track from the Bass Lake Spur onto the MN&S. TCW was not contacted by any engineers or planners from HCRRA or other government to plan a re-route onto the MN&S; TCW continued to operate in the HCRRA-owned Kenilworth Corridor.

Dealings with HCRRA

Under the 1998 TRA with HCRRA allowing TCW to operate over the Kenilworth Corridor, TCW paid HCRRA a per-train trackage rights fee, which HCRRA put in a dedicated fund. TCW was responsible to maintain the Kenilworth Corridor track, keep track of its expenses, and send HCRRA an annual invoice for the maintenance costs.³ HCRRA then reimbursed TCW from the dedicated fund. TCW was the only railroad operating over the Kenilworth Corridor, although CP also had the right to do so. TCW handled dispatching. HCRRA's only obligation was to pay for capital expense over and above normal track maintenance.

Because the 1998 rehabilitation of the Kenilworth Corridor was done with the idea that within four years the freight rail operations would be relocated, by 2002 the track work needed was beyond the scope of ordinary maintenance. Several issues were brought to HCRRA's attention (a tie replacement program, a ballast program, and a bridge strengthening program), which HCRRA funded and TCW arranged to be done.

In 2005, TCW notified HCRRA that the Kenilworth rails themselves needed replacement. The rails had been manufactured in the 1920's, prior to the controlled cooling

³ The 1998 TRA is Attachment 4.

process for steel manufacturing that was adopted in the late 1930's. The controlled cooling process substantially diminished internal defects in rails which cannot be detected by visual inspection. TCW warned HCRRA that the rails were prone to shattering under a loaded train, which could cause a derailment. HCRRA refused to authorize replacement of the rails. TCW reduced the track classification to Class One with a maximum speed of 10 mph.

During the 2000s, traffic on TCW increased substantially. Unit shuttle trains with over 100 cars and heavy, Class I six axle locomotives began coming onto TCW's line. The weight of loaded railcars increased to 286,000 lbs. While TCW had a 10-mph speed limit on the Kenilworth Corridor, these factors increased the stress on the 80 to 90-year-old steel rails.

In September 2010, TCW had a meeting with HCRRA in which TCW renewed its request that HCRRA replace the rails. On September 30, 2010, HCRRA wrote TCW that it "is not inclined to undertake the wholesale replacement of the track . . ."⁴ TCW received the letter on October 1. On October 2, a loaded TCW train derailed in Kenilworth Corridor solely as a result of an internally defective rail.

On November 29, 2010, Jim Brandt, the Minnesota Department of Transportation track inspector, wrote a report on the Kenilworth Corridor rail that concluded, "[A]lthough this rail has served its purpose for 80+ years, this rail section should be upgraded to handle today's traffic. Considering the curved track, location, tonnage and the amount of hazmat on this line I strongly recommend that the rail be replaced . . ."⁵ HCRRA maintained its refusal to replace the rail.

In December 2010, I had a meeting with two HCRRA commissioners concerning TCW's request that HCRRA pay for the cost of replacing the rail. Commissioner Peter McLaughlin

⁴ See Attachment 5.

⁵ See Attachment 6.

responded that HCRRA did not want to replace the rail in Kenilworth Corridor because then TCW would have no incentive to be relocated onto the MN&S. I objected that the two projects were not joined but were separate issues. In April 2011, HCRRA had an ultrasonic test performed which found eleven internally defective rails.

In September and October 2011, TCW obtained a bid to replace all of the rail in the Kenilworth Corridor with continuous welded rail. HCRRA refused to authorize replacement unless TCW entered into an agreement determining how a re-route onto the MN&S would be built. As explained below, at that time, TCW had not received any engineering plans from HCRRA for a re-route since 2008 and the plans from 2008 were unworkable.

In May 2012, a Federal Railroad Administration (“FRA”) inspector inspected the Kenilworth Corridor track and concluded that “to prevent future property damage and possible injuries and /or death because of a broken rail derailment, I highly recommend replacing the current 100 lb. rail.”⁶ Finally, in August 2012, seven years after TCW had requested it, HCRRA agreed to pay to replace the rail on the Kenilworth Corridor.

I recount this history to show that HCRRA, despite legal obligations to do so, has often times ignored, delayed, or otherwise shown little or no interest in fulfilling those obligations. Yet, in this proceeding, HCRRA claims that it will be responsible for complying with any common carrier obligations on the Kenilworth Corridor and Bass Lake Spur. Given its history, this is a meaningless promise.

The Rise of the Southwest Light Rail project

In approximately 2004, TCW was approached by Hennepin County/HCRRA about the Project. Since Hennepin County owned the former Chicago & Northwestern Transportation

⁶ See Attachment 7.

Company freight rail corridor parallel and immediately north of the CP's Bass Lake Spur, the County proposed to build the future light rail ("LRT") line in its corridor and re-route TCW to a new to-be-built freight rail corridor in Saint Louis Park and establish new connections to the former north-south MN&S route. HCRRA disclosed that the costs of that re-route could not be part of the County's proposal to the Federal Transit Administration ("FTA") for LRT funding, because it was thought that the costs of the re-route would tip the balance unfavorably toward the project.

In 2007, shortly after I became President of TCW, I grew concerned that no one had done any engineering for the proposed re-route connection from the east-west Bass Lake Spur with the north-south MN&S freight rail line. I expressed my concerns to Hennepin County, including that there is a height difference of about 30 feet where the lines cross each other, and a substantial electrical substation is located in the northwest part of the crossing quadrant, where the connecting track would be located.

The County had the engineering firm TKDA under contract, and representatives from TKDA and TCW met on site in the summer of 2007. TKDA came up with proposed drawings which had the connecting track start about a mile and a half west of the crossing (one needs distance to achieve acceptable gradient for freight rail track) as well as a broad curve approaching the connection. TCW provided feedback that the curve was too tight and waited for revised drawings. TCW heard nothing until 2008, when Hennepin County apparently changed engineering firms – AECOM was Hennepin County's new engineer. AECOM's drawing of a connecting track was much more restrictive than the TKDA drawing and was a significant step backwards in TCW's opinion. TCW was told that the opportunity for TCW to formally comment would be forthcoming.

In 2011, the FTA approved advancing the SWLRT, but required the cost of re-routing the freight rail be included in the Project costs. TCW became concerned that it wasn't allowed to comment on the connecting track to allow a re-route of the freight. TCW was told that its opportunity to comment would happen when the Draft Environmental Impact Statement ("DEIS") was released.

When the DEIS was released in October 2012, TCW was shocked to see the same restrictive connection shown in the plans in 2008 remained in the DEIS. TCW realized it needed professional engineering expertise of its own, and hired Civil Design, Inc. of Brookings, South Dakota to describe technically why the proposed connection would not work from a physics/engineering standpoint. In addition to TCW's formal response to the DEIS, over 60 customers and communities served by TCW submitted comments to the DEIS in support of TCW's comments. TCW said it supported the SWLRT as long as it is implemented in a way that preserves TCW's ability to provide its customers with safe and efficient service at the same costs they now pay. TCW's message was clear, the costs for TCW to safely and efficiently transport freight to and from St. Paul must be no greater than they are today.

Hennepin County formally handed the SWLRT project to Met Council in January 2013. In early spring 2013, Met Council asked TCW's engineer for minimum engineering standards for gradient and curvature so Met Council could arrive at some conceptual connections. As it turned out, in order for TCW to be re-routed onto the north-south MN&S to allow safe passage of freight trains, the impact to the City of Saint Louis Park would have been profound. In 2014 and into 2015, there was much public debate about whether TCW could be rerouted onto the MN&S corridor, and as a result led to push-back by the City. In the end, it was determined that the impacts to Saint Louis Park to properly build a connecting track for a re-route onto the MN&S

would be too damaging to the city and its residents. As a result, Met Council decided to plan the SWLRT with the TCW freight rail being co-located adjacent to the SWLRT over the entire corridor from Hopkins to Minneapolis. TCW was okay with this proposal as long as it would not adversely impact its service to its shippers or increase TCW's costs. As such, TCW, Met Council, and HCRRA began good faith negotiations to implement a proposal that would allow TCW and SWLRT to share the Kenilworth Corridor and the Bass Lake Spur.

Proposal to Remove Bass Lake Spur Sidetracks

Critically to the current impasse, in the summer of 2013, Met Council approached TCW with the idea that in the shared Bass Lake Spur corridor, from east of Highway 169 in Hopkins all the way to the Minneapolis border, the prospects for Transit Orientated Development were significantly greater on the south side of the shared corridor. Given this, Met Council asked if TCW would be willing to work with Met Council to move the existing freight operations to the north side of the shared corridor (with Met Council building new freight rail tracks), and build an LRT bridge over the freight rail tracks east of Highway 169, and build the LRT where the current freight rail tracks are now located. TCW told Met council, "TCW would cooperate as long as track capacity remained the same and that as long as TCW is made whole - that is, pre LRT/post LRT, TCW's operating expenses/economics must remain the same." Met Council's plan eventually called for the removal of all the sidetracks on the Bass Lake Spur, Hopkins and east (16,000 feet of sidetrack capacity). TCW identified replacing the lost sidetracks as a cost to the Met Council SWLRT Project which Met Council would have to replace to make TCW whole, and Met Council agreed. This eventually led to Met Council's decision to pay TCW to build replacement side tracks, versus Met Council building them.

In 2014 and into 2015, there was much public debate about whether TCW could be relocated or not to the former MN&S corridor. In the end, it was determined that the impacts to Saint Louis Park to properly build a connecting track for a re-route onto the MN&S would be too damaging to the city and its residents. As such, the parties decided to focus on sharing the Kenilworth Corridor and the Bass Lake Spur. Many engineering meetings were held during 2015 and 2016. Met Council did not furnish TCW with any plans to build replacement sidetracks. The replacement of the Bass Lake Spur sidetracks used by TCW was a crucial component of ensuring that there would not be operational impacts to on TCW's common carrier service to its shippers. TCW also wanted to ensure that there would be no adverse impacts during resulting from the four-year construction project, which would include and relocation of the mainline tracks through Bass Lake Spur and Kenilworth Corridor.

In the summer of 2016, discussions started with Met Council with the goal to arrive at a Construction Agreement, which would govern TCW's and Met Council's roles and responsibilities during the construction of the SWLRT, and the Original OMA, which would govern TCW and Met Council's roles and responsibilities once the SWLRT was completed and put in revenue service. TCW treated these two agreements in the spirit of protecting TCW's customers' interests during construction and recognizing the permanency of the Original OMA on the customers' and TCW's permanent future interests. TCW approached these discussions in a very thoughtful, deliberate yet collaborative spirit. The Met Council indicated their plan was to acquire the Bass Lake Spur from CP and the Kenilworth Corridor from HCRRA and have TCW assume the common carrier freight rail obligations over both.

On June 3, 2016, Met Council prepared a draft "Technical Position Statement" which stated,

As a result of the SWLRT project, ~16,000' (~13,000' of siding east of highway 169 and ~3,000' of siding in Hopkins) of siding capacity for freight transportation will be lost. This capacity will be replaced at a location agreeable to TCWR before any SWLRT construction activities begin or any other project related activities that would impact the freight rail access to these siding locations.⁷

Access Fee for the Bass Lake Spur trackage

In discussing how TCW would undertake the common carrier obligation on both the Kenilworth Corridor and the Bass Lake Spur, it became apparent that Met Council either didn't understand freight rail or didn't care about freight rail and the impacts on shippers. In the summer of 2016, it proposed an annual "access fee" for the 6.2-mile Bass Lake Spur of \$500,000 per year, together with TCW performing all track maintenance at TCW's expense. The current arrangement with CP under the 1991 TRA is that TCW pays CP approximately \$160,000 per year and CP does all track maintenance at no cost to TCW. The proposal by Met Council would have substantially raised shippers' costs and was so far off the mark that TCW felt compelled to write the Met Council's SWLRT Project Manager on September 12, 2016 to remind them of the 2013 discussion that TCW's economics pre and post LRT must remain the same.⁸ In the same letter, TCW indicated that if this principle is not honored by Met Council, then "TCW shippers will have a say in the forthcoming STB application." Id.

Negotiation of Agreements

In October 2016, TCW and Met Council administrative staff began meeting to negotiate a Construction Agreement and the Original OMA. The drafts Met Council proposed were lengthy and not formatted as traditional freight rail agreements, and it took a lot of TCW legal and management time to fully absorb the initial drafts. The Met Council staff went into the October

⁷ A copy of the Technical Position Statement is attached as Attachment 8.

⁸ See Attachment 9.

discussions with the expectation that both Agreements could be executed at by the end of 2016, but there was so much cross-referencing and other minutiae that it was clear to our legal team that this would be a lengthy process in order for it to be done right for both TCW and Met Council. The task became a section-by-section review in meetings with both entities' teams. I sensed dismay from Met Council staff at the tediousness of progress, but both teams soldiered on together. Progress was slow and tedious, but progress was being made going into 2017. TCW had to ensure that the agreements included replacement of the side track which was critical for TCW's operations.

Sidetrack Replacement

Major cost items were identified – the primary one was to replace the 16,000 track feet of sidetracks on the Bass Lake Spur, which Met Council planned to remove. TCW uses the side tracks daily to park, sort, switch, block, stage and run around trains and railcars. The tracks are located east of 5th Street in Hopkins, not further than 6 miles from the junction with BNSF at Cedar Lake Junction just west of downtown Minneapolis. Met Council understood their obligation to TCW to replace this track capacity but did not present a plan. Met Council's preferred path to replace the sidetracks was for TCW to arrange for a location, hire an engineering firm to determine a cost estimate, and report back to Met Council.

TCW studied areas along its existing route, with the goal of finding a site that would 1) disrupt the fewest number of neighbors, 2) have sufficient distance between at-grade road crossings so crossings would not be blocked by use of the sidetracks, 3) have suitable land topography to minimize excavating or filling, and 4) be as close to Minneapolis as possible to reduce TCW's costs for future handling of railcars. The existing sidetracks to be removed are within 6 miles of Cedar Lake Junction and TCW's costs will increase the further west the replacement side tracks are located.

TCW identified a site approximately 30 miles west of the existing sidetracks and arranged to have an engineering firm provide an estimate for construction of 16,000 feet of sidetracks. The estimate for land acquisition was \$1.5 million and the estimated cost to construct the replacement tracks was \$9.1 million. Met Council's reaction was to have their own consultant look at the tracks between Minnetonka and Hopkins (the west three miles of the Bass Lake Spur) to try to identify areas to build replacement sidetracks. TCW expressed its concerns that over the 26 ½ years of operations, TCW gets complaints from adjacent residents of noise from TCW's switching activities and that it might be a problem politically. All of these studies took time. After Met Council determined that it wouldn't be feasible to "shoe-horn" additional side tracks within the western three miles of the Bass Lake Spur, they returned to discuss the \$9.1 million + \$1.5 million construction and land acquisition estimates TCW had obtained.

Once TCW fully considered replacement facilities, it became apparent there were other financial considerations involved in addition to the initial land acquisition and construction costs. One of the most contentious cost increases resulted from the fact that whatever amount Met Council paid TCW to construct sidetracks or buy land would be taxable income to TCW. TCW asked Met Council to "gross-up" the \$10.6 million to account for income taxes that would be paid, so that the net amount TCW would have to work with after paying taxes would be \$10.6 million. This income tax issue apparently surprised Met Council and caused consternation. Met Council then asked TCW to arrange for a tax attorney specializing in Internal Revenue Service Code ("IRSC") Section 1033 or 1031 tax free exchanges.

It was relatively quickly decided that the proposed transaction did NOT qualify for an IRSC 1033 exchange, and the focus became how to structure on an IRSC Section 1031 exchange basis. The land component, \$1.5 million, could not be made non-taxable, and Met Council

agreed it would increase (“gross-up”) the \$1.5 million to \$2.5 million, allowing TCW to pay the taxes that would be due, netting \$1.5 million for the land acquisition.

After considerable legal and executive efforts, it appeared that an IRSC Section 1031 “reverse exchange” was possible, which would save Met Council approximately \$4.68 million by avoiding the cost of “grossing-up” the money needed to build the replacement sidetracks. TCW and Met Council lawyers tried to identify and allocate numerous risks, such as that an audit and tax assessment by the federal IRS could pass through and its affect to TCW’s shareholders years after the transaction was completed. Another set of concerns became which entity (Met Council or TCW) would assume the risks of the IRSC Section 1031 exchange process if somehow the construction of the replacement track was delayed by an external factor not within our control, such as poor soil conditions, weather, or litigation from neighbors, which would delay construction of the replacement sidetracks and could cause the \$9.1 million cost of construction to become taxable. This was identified as one area of disagreement in my letter to Met Council on September 29, 2017 (A copy is Attachment 10), where TCW compromised and offered to take on that risk.⁹

Increase in Railroad Property Taxes

Another contentious cost increase for TCW stemmed from the railroad property tax imposed by the State of Minnesota. The cost to build the replacement sidetracks would have to

⁹ Another cost to TCW caused by building replacement sidetracks would be the increased operating costs for “freight forwarding,” where a customer sends a loaded railcar to TCW to hold for a nominal period until a customer of TCW’s customer orders a carload of product, and TCW can promptly deliver the loaded car for interchange. The costs of this would increase due to having to move the cars some 30 miles west of the Bass Lake Spur to the new sidetracks and then move them back when ordered by the shipper. After much discussion between Met Council and TCW to identify this increased expense, Met Council and TCW arrived at an agreement and an accountable methodology for TCW to track and bill Met Council for this increased expense and this was included in the Original OMA.

be reported to the Minnesota Department of Revenue (“DOR”). The effect of this cost would be to increase the valuation of TCW subject to tax and result in an increase in the railroad property tax paid by TCW of approximately \$150K per year, on a declining balance over the 30-year assigned life of the replacement sidetracks. (Since the existing Bass Lake Spur sidetracks are owned by CP, they are not considered in determining the railroad property tax assessed to TCW.)

TCW requested Met Council reimburse TCW for that tax increase. Met Council initially said it had contacted the DOR and that there would be no tax increase. TCW prepared a spreadsheet calculating its railroad taxes with and without the cost of the replacement sidetracks and sent it to the DOR. On August 31, 2017, the DOR advised that TCW’s spreadsheet was correct – there would be a substantial tax increase over the next 30 years. TCW then requested Met Council reach out to DOR to see if DOR could make an exception in this case. Met Council indicated that from their conversations with DOR, no exception could be made. Met Council resisted agreeing to reimburse TCW for this increased cost but gave no reason. This issue was identified in my September 29, 2017 letter to Met Council where TCW requested Met Council compromise and pay TCW’s increased railroad taxes caused by building the replacement sidetracks.

West End of Bass Lake Spur Rehab

In January 2017, while discussing Met Council’s plans for the new freight rail track to be built east of Highway 169 for freight rail use and allow the current freight rail corridor to be used for the new LRT track, TCW raised the issue of the condition of the western three miles of the Bass Lake Spur. TCW’s opinion was that a major rehabilitation of that track would need to be done within the next five years and asked Met Council whether, in Met Council’s opinion, TCW should wait until the 5th year to make such a request or should the rehabilitation be included as

part of the SWLRT Project. Met Council responded it would be better to have the rehabilitation done as part of the SWLRT Project and asked TCW to obtain an engineering estimate of the cost of the rehabilitation. TCW arranged for an engineer to walk and inspect the western three miles of the Bass Lake Spur. The estimate was approximately \$5 million.

Met Council proposed that it would pay TCW the \$5 million rehab cost and TCW would arrange for the rehab. Since the \$5 million would be paid given to TCW to rehab track that Met Council would own, the entire \$5 million would be expensed to the rehab project; there would be no income taxes due from TCW. Since TCW would be responsible to control the rehab, TCW would retain the salvage from the rehabilitation. This salvage could then be used to maintain the 6.2 miles of Bass Lake Spur freight track that TCW would be responsible to maintain following completion of the SWLRT.

Related to this were back-and-forth conversations with Met Council over the amount of an access fee to be paid by TCW for use of the 6.2 miles of Bass Lake Spur that Met Council would own. As mentioned above, Met Council's original proposal was for TCW was to pay \$500K per year and do the track maintenance, a long way from the existing arrangement with CP where TCW pays approximately \$160,000 per year to CP and CP does all the track maintenance at no cost to TCW. This major difference had to be explained to Met Council in explicit detail. TCW proposed an access fee of \$40,000 per year, factoring in its estimate that future annual maintenance of the 6.2 miles would cost approximately \$120,000 per year, roughly equating to the current economics. Met Council wanted TCW to "prove" its proposal, which TCW did.

Met Council then said that they absolutely could not accept anything less than \$55,000 per year. So, a compromise was struck, TCW would presumably receive the salvage of the west three miles of the Bass Lake Spur rehab, TCW would pay an access fee of \$55,000 annually, and

Met Council would pay “up front” to TCW \$225,000 (which represented 15 years of a \$15,000 per year offset reduction of the \$55,000 per year access fee). Even though there would be some modest income tax ramifications for TCW to receive accept this “up front” money, TCW did NOT demand a gross-up for taxes.

For reasons unknown to TCW, without discussion or notice, in approximately July 2017, the \$5 million for the rehabilitation of the west three miles of the Bass Lake Spur disappeared from the schedule which was an appendix to the draft Construction Agreement. After TCW noticed the change, TCW asked Met Council what happened to that item and the answer was “Met Council will contract that work.” When TCW asked about the salvage, Met Council said that TCW never brought up the issue of salvage.

The reason TCW had not brought up the salvage issue previously was that under TCW’s agreement to conduct the rehab of the west three miles of the Bass Lake Spur, TCW would assume control of the salvage. Met Council’s material change in the schedule (without notice to or consultation with TCW), forced TCW to raise the issue, because the value of the salvage was a factor in TCW agreeing to the \$55,000 per year access fee. This issue was identified in the letter sent to Met Council on September 29, 2017 (Attachment 10) requesting Met Council to restore the salvage of the west three miles of Bass Lake Spur to TCW.

FTA Clauses

Another issue that arose during the contract discussions was Met Council’s insistence that FTA contract clauses and rules be included in the Construction Agreement. Since TCW is governed by the FRA, TCW is not familiar with FTA contract clauses and rules, many of which seemed both unduly burdensome and inapplicable to the work TCW would do (such as the Fly America, Energy Conservation, Disadvantaged Business Enterprise, and Clean Water

requirements). In the spirit of trying to get to an Agreement with Met Council, in the letter sent to Met Council on September 29, 2017, TCW agreed to comply with FTA rules. I told TCW's legal counsel that if, during the project's construction the FTA points out a rule violation, TCW would figure out a way to become compliant.

Insurance and Indemnity

Another very challenging and frustrating set of issues to arrive at a Construction Agreement and the Original OMA were the issue of insurance and indemnity. Under the current TRAs, TCW operates freight trains over the Bass Lake Spur and the Kenilworth Corridor and is responsible for any derailments that it causes and procures insurance to cover these potential events. Introducing passengers in LRT trains in close proximity to freight tracks vastly increases the risks and potential losses. The current TRAs do not have provisions to deal with the exponentially magnified risks caused by the LRT project. My understanding is that Met Council expects to run 200 LRT trains every day with several hundred passengers in each train. The LRT trains will run at 45 mph and will be in close proximity to the freight rail track. While Met Council agreed to build a ten-foot-high crash barrier between the freight and light rail tracks along on the BNSF Wayzata subdivision, no such crash barrier is planned along most of the Bass Lake Spur and Kenilworth Corridor.

The example TCW used to explain this exponentially magnified risk issue to the Met Council was the scenario of a garbage truck running a railroad crossing signal and a freight train hitting it and derailling. Under today's conditions, the losses to TCW would be the damage to the locomotives and derailed cars, their contents, and possible injuries to the train crew. After the LRT track is built and operational, the risks increase exponentially, especially if an LRT train is in the immediate vicinity of the same crossing. After much discussion, Met Council agreed it

would indemnify TCW for loss or damage that would not exist or have occurred “but for” the LRT service, parties or facilities. TCW agreed to bear the loss or damage arising from freight rail service or facilities that does not relate to or involve the LRT.

In order to make certain that Met Council has the power to indemnify TCW as it agreed to do and to cover TCW with insurance, TCW asked the Minnesota legislature to enact a statute expressly authorizing indemnification and the purchase of insurance. The result was Minn. Stat. Sec. 473.4052. Developing an insurance program for both parties was the subject of many meetings. The devil is always in the details, and many meetings were spent with TCW’s risk person and Met Council’s risk person, some which included Met Council’s insurance brokers and TCW’s insurance brokers. What was particularly frustrating to me was that in those meetings, four hours could be spent on one paragraph, but at the end of the four hours, there was agreement between Met Council’s risk person and TCW’s risk person, but Met Council’s risk person had to send the changes to (presumably) Met Council’s legal team, and two weeks later the document would be sent back to TCW with the agreed upon changes in the paragraph undone, with no explanation.

As a solution to this issue, in its September 29, 2017 letter to Met Council, TCW suggested letting the risk experts from both teams arrive at a solution, and that each side would accept that. A lawyer for TCW and Met Council’s risk person did exchange emails and had discussions in October 2017 as to arriving at definitions of the damages for which Met Council would indemnify TCW and for insurance purposes. Those discussions resulted in apparent agreement in principle on loss and damage language, although it remains an outstanding issue.

Reimbursement of Expenses

The issue of TCW needing reimbursement for its ongoing legal, engineering and management time was acknowledged by Met Council and Met Council reimbursed TCW for certain of its outside costs, through May 2017, at the rate of \$50K per month. None of the internal costs to TCW had been requested.

TCW then incurred approximately \$50K per month in expenses from June through September 2017 in legal and engineering costs to accommodate Met Council's IRSC Section 1031 exchange request and to arrive at a Construction Agreement and the Original OMA. When TCW requested reimbursement for these expenses, Met Council's reply was that TCW would be reimbursed via the Construction Agreement, which both sides anticipated would be signed by October 2017.

Soil Borings

In the fall of 2017, TCW engaged in soil borings and wetlands delineation to learn whether the land which TCW had identified for the replacement sidetracks was suitable. This cost an additional \$30K.

Silence from Met Council

On September 11, 2017, the press related all the bids for the SWLRT were rejected. In addition, Met Council's agreement to build a 10-foot-high crash barrier wall on the BNSF Wayzata subdivision was disclosed and became the subject of comment and controversy. Eventually, we understood that additional environmental studies had to be done. Meanwhile, Met Council never responded to TCW's September 29, 2017 letter.

By February 2018, TCW was increasingly concerned that in the absence of information from Met Council as to the Project schedule, obtaining the land to do the Section 1031

transaction was no longer possible for 2018. Also, we had never received any update or additional information as to reimbursement of our legal and administrative costs for the June to September period. Accordingly, TCW sent a letter on February 27 rescinding the Section 1031 proposal and requesting reimbursement of the \$200,000 that had been promised and the \$30,000 costs of soil work. (A copy of the letter is Attachment 11).

Met Council Withdrawal from Negotiations & Rejection of Previous Efforts

As noted, TCW never received an official response to its September 29, 2017 letter nor to the subsequent letter sent on February 27, 2018. On March 6, 2018, upon landing in Washington D.C., I had a voicemail conveying the Met Council needed to have an urgent meeting immediately. I conveyed that I was in Washington D.C. until Thursday, March 8, and I would be leaving for a family vacation on March 9, so a meeting was not possible. On March 7, I received a call requesting an urgent need for a conference call, and since my last meeting on March 8 in Washington D.C. ended at 11:45 am Eastern Time, and my flight back to Minneapolis was at 2:30 pm Eastern Time, I agreed to a 12 noon Eastern Time call on March 8. I was in a cab in Washington, D.C. heading to my hotel to pick up my luggage when I took the urgent phone call from Met Council and HCRRA. During the call, a new plan for the Project (without ANY input from TCW), which plan is now in front of the STB, was summarily explained; Met Council would buy Bass Lake Spur from CP; CP would transfer its common carrier rights and obligations to HCRRA; and TCW would be expected to continue to use the Bass Lake Spur and Kenilworth Corridor under the existing TRAs. This was the first I had heard of these changes in the plan. This was a shock. I felt that the parties had reached agreement on approximately 95% of the issues and didn't understand why, and still do not understand why the plan changed.

I was out of the country for a week thereafter. During that time, the press reported that Met Council leaders claimed that TCW had sought indemnity for business risks that had no relation to the LRT. This was not true. I also received a letter from the Chair of the Met Council dated March 8, 2018, which correctly stated that TCW and Met Council had reached agreement on “key business terms” but, in my opinion, incorrectly claimed that “TCW [had] imposed new and additional conditions, including new indemnification and tax provisions that were unacceptable.” The March 8, 2018 letter, which cannot be submitted to the Board because it is subject to the settlement privilege doctrine, presented a “take it or leave it” settlement demand. Without disclosing what was offered, TCW can disclose that the offer did not resolve TCW and its shippers’ concerns regarding the removal and replacement of the 16,000 feet of sidetracks, would not include a construction agreement or an operations agreement, and as presented to the STB gave Met Council sole authority for all decisions with respect to the LRT construction and operation without any contractual input from TCW (the only railroad operating on the Bass Lake Spur and Kenilworth Corridor), and would entrust the common carrier responsibilities to HCRRA, which has no interest, experience, or ability to provide freight rail transportation and has been hostile to freight rail. TCW rejected the settlement demand on April 13, 2018.

While the Met Council's March 8, 2018 letter related the settlement demand was open until April 18, 2018, on April 4, 2018, two weeks prior, Met Council and HCRRA filed over 1100 pages of new contracts which TCW had never seen with the STB and requested the STB approve their new plan. Again, this came as a surprise because TCW was in the process of responding in good faith to the March 8, 2018 offer when the April 4, 2018 filing occurred. This was unfortunate because TCW believed that there was room for compromise, especially given that the parties had reached agreement on approximately 95% of the language in the

Construction Agreement and the Original OMA. Indeed, in its Reply to the Initial Comments of TCW filed on May 2, 2018 ("Met Council Reply"), Met Council stated, "[I]n the middle of August 2017, TCWR advised the Council that TCWR's board of directors had agreed on the key business terms and that the parties' staffs could finalize the draft agreements." (Met Council Reply at 18). Agreement had been reached on many issues, although it was made clear to Met Council that there were remaining issues to be negotiated.

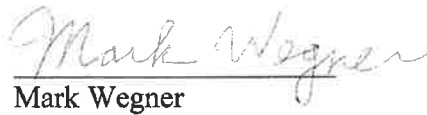
I do believe that the parties had essentially reached common ground with respect to the Construction Agreement and the Original OMA. With further time and discussion, I believe those agreements could be finalized, and in a manner that would allowed Met Council and HCRRA to undertake the essentials of their proposal. There are five outstanding issues that were contained in my September 29, 2017 letter, but with sufficient time, I believe the parties can work through and resolve those issues.

Accordingly, I believe the Board should not adopt the Project as currently proposed. The current transaction documents do not adequately protect TCW or, its shippers' transit times, would result in increased costs to shippers, and would result in significant operational problems during the four-year construction period. There are also significant liability and safety issues associated with dual freight and LRT operations in the same corridor and in some cases within 25 feet of each other. These concerns can and should be resolved and TCW commits to working in good faith to resolve the concerns.

Verification

I, Mark Wegner, President and CEO of Twin Cities & Western Railroad Company, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to file this Verified Statement in connection with the Reply Comments of Twin Cities & Western Railroad Company being filed with the Surface Transportation Board.

Executed on June 27, 2018


Mark Wegner

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

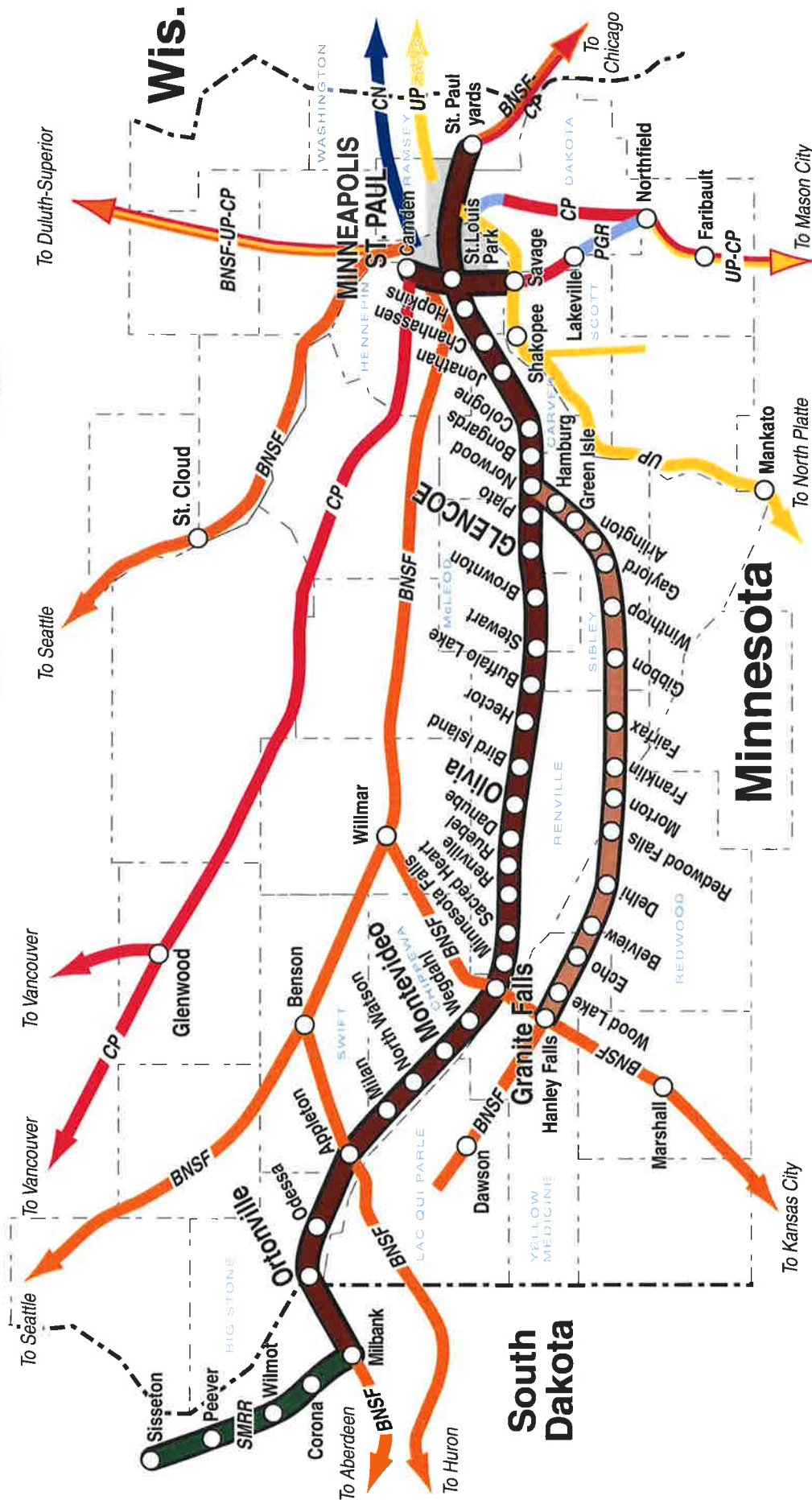
EXHIBIT A

VERIFIED STATEMENT OF MR. MARK WEGNER

ATTACHMENT 1

Twin Cities & Western Railroad Company and Affiliates

T&W



- Twin Cities & Western
- Minnesota Prairie Line
- Sisseton Milbank Railroad



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT A

VERIFIED STATEMENT OF MR. MARK WEGNER

ATTACHMENT 2

TWIN CITIES
TRACKAGE RIGHTS AGREEMENT

THIS AGREEMENT dated as of July 26, 1991, is made between Twin Cities & Western Railroad Company, 2110 First Bank Place West, Minneapolis, Minnesota 55440, ("Buyer"), and Soo Line Railroad Company, 105 S. 5th Street, P. O. Box 530, Minneapolis, Minnesota 55440, ("SOO"), sometimes collectively referred to below as "the Parties."

RECITALS

1. SOO and Buyer have entered into an Asset Purchase Agreement ("Purchase Agreement") dated May 7, 1991, pursuant to which Buyer will acquire and SOO will sell certain railroad assets, including the railroad line between Appleton, Minnesota (Milepost 578.93) and Hopkins, Minnesota (Milepost 435.06, near Tower E-14) (the "Ortonville Line");

2. SOO owns certain lines of railroad in the Twin Cities Terminal Area; and

3. Pursuant to the Purchase Agreement, SOO has agreed to grant to Buyer, and Buyer has agreed to accept from SOO, certain rights for Buyer's use of the above-referenced trackage in accordance with the terms and conditions set forth below;

IN CONSIDERATION of the mutual and dependent covenants by each of the Parties, they have agreed as follows:

Section 1. GRANT OF RIGHTS

1.1 All capitalized terms not specifically defined in this Agreement shall have the same meaning given those terms in the Purchase Agreement.

1.2 Attached to, incorporated in and made a part of this Agreement is a print marked Exhibit "A" of the Twin Cities terminal, which shows in solid red lines certain railroad lines from Tower E-14 (Milepost 435.06) near Hopkins, Minnesota, to Merriam Park (Milepost 416.43) (the "Merriam Park Line"); and from St. Louis Park (Milepost 17.23) to North Minneapolis near Camden (Milepost 0.85) (the "Camden Line"); and the connecting track between the two line segments (the "Connection"); and a print marked Exhibit "A-1" which shows in dashed red lines certain railroad lines from Milepost 3.07 at Camden to Milepost 8.66 in New Brighton, including certain tracks at Shoreham, which Exhibit A and A-1 trackage are hereinafter collectively referred to as the "Subject Trackage". The Subject Trackage includes all of SOO's trackage, track connections, facilities and appurtenances, signals and switches, as such facilities and appurtenances, signals and switches are from time to time added to, modified, or removed at the sole discretion of SOO.

1.3 Subject to the terms and conditions contained in this Agreement, SOO hereby grants to Buyer, and Buyer hereby accepts from SOO, the nonexclusive rights to use the Subject Trackage for the operation of its freight trains and the locomotives and cabooses of said trains. Buyer shall have the following rights on the Subject Trackage:

(a) Subject to the limitations set forth in this Section 1, Buyer shall have the right to handle over the Subject Trackage all traffic originating

or terminating at industries physically located on the Ortonville Line, traffic originating and terminating at industries physically located on the Appleton - Ortonville segment, and traffic originating or terminating at industries physically located on the current Minnesota Valley Railroad ("Permitted Traffic"). Additionally, Buyer shall have the right to handle over the Subject Trackage cars hauled for SOO under a Haulage Agreement of an even date herewith, pursuant to Appendix VI to the Purchase Agreement ("Haulage Cars").

(b) Buyer shall have the right to originate and terminate traffic to or from the municipal river terminal at Camden, Minnesota, currently known as the Packer River Terminal ("Upper Harbor Terminal") (near Milepost 2.56).

(c) Buyer shall have the right to interchange Permitted Traffic and Haulage Cars in connection with its use of the Subject Trackage with any carrier that connects with the Subject Trackage or that SOO has admitted or may admit to the use of all or part of the Subject Trackage, including without limitation, Burlington Northern Railroad Company, Chicago and Northwestern Transportation Company, Minnesota Commercial Railway Company and SOO, at points consented to by SOO, which consent shall not be unreasonably withheld, which

interchange shall be subject to SOO's management and operation of the Subject Trackage pursuant to Section 2.2 hereof and shall not unreasonably interfere with SOO's operations on the Subject Trackage Rights.

(d) Buyer shall have the right to use that portion of the Merriam Park Line between Tower E-14 and Milepost 427 for setting out, picking up and switching of cars; Buyer shall have the right to use other parts of the Subject Trackage as necessary from time to time for purposes of setout, pickup and switching, only with the prior consent of SOO.

(e) Buyer shall have the right to operate one (1) train in each direction each 24 hour period either over that portion of SOO track (a) between Camden and the connection to Burlington Northern's Northtown Yard in the vicinity of University Avenue (designated as E - H on Exhibit A-1) for the sole purpose of interchanging cars with the Burlington Northern Railroad, or (b) between Camden and the connection to the Minnesota Commercial Railroad in New Brighton (designated as E - J on Exhibit A-1) for the sole purpose of interchanging cars with the Minnesota Commercial Railroad, or both, so long as done within the one (1) train limitation.

(f) Buyer shall have the right to enter and exit the Subject Trackage at the following endpoints: Tower E-14 (Milepost 435.06), Merriam Park (Milepost 416.43),

and North Minneapolis (Milepost 2.56), and at other locations agreed to by the parties for purposes of interchange of Permitted Traffic and Haulage Cars only (SOO hereby consents to Buyer entering and exiting the Subject Trackage at Milepost 0.85 in North Minneapolis and at University Avenue near Northtown Yard for the sole purpose of interchanging with Burlington Northern Railroad Company, as well as at Milepost 7.66 in New Brighton for the sole purpose of interchanging with the Minnesota Commercial Railroad).

(g) Buyer shall have the right, at its own expense, to construct, or have constructed, tracks for a connection between the Merriam Park Line and the Camden Line at St. Louis Park. SOO shall construct, at Buyer's expense, the portion of such connection located on property owned by SOO. Any tracks so constructed shall become part of the Subject Trackage and may be used equally by SOO and Buyer; provided if SOO uses such connection, SOO shall pay a fee of \$10 per train for such use.

(h) Buyer shall have the right to directly serve a transload facility established by the Buyer, or Buyer's customers, on SOO in the Twin Cities Terminal Area at such location, as is acceptable to SOO, for the purpose of handling rock, crushed rock, or other aggregate materials originating on the Ortonville Line or the

Appleton to Ortonville segment (Appendix IV) to such transload facility, provided it is understood that the location of such facility may change from time to time. Buyer shall be permitted to set out, switch, and pick up cars at such facility using the tracks constructed or tracks designated to be used for service to such facility. Any tracks constructed shall be constructed on the basis provided in (g) above.

1.4 Buyer's operations on the Subject Trackage shall be in common with SOO, and such other railroad company or companies as SOO has prior to the date of this Agreement admitted or may at any time in the future admit to the use of all or any part of the Subject Trackage.

1.5 Buyer shall not have the right to do any of the following on the Subject Trackage:

(a) Except as permitted in Section 1.3(b), (d) and (h) hereof, setout, pickup, or store equipment or switch industries upon all or any part of the Subject Trackage, except as necessary for handling locomotives, cabooses or cars had ordered enroute;

(b) Except as permitted by Section 1.3(b) and (h) hereof, serve any industry, team or house track now existing or located at any time in the future along the Subject Trackage;

(c) Permit or admit, without permission in writing from SOO, any third party to the use of all or any part

of the Subject Trackage, nor under the guise of doing its own business, contract, or make any agreement to handle as its own over the Subject Trackage the trains, locomotives, cabooses or cars of any third party which in the normal course of business would not be considered as the trains, locomotives, cabooses or cars of Buyer; provided that the foregoing shall not prevent Buyer, pursuant to a run-through agreement with any railroad, or a bona fide equipment lease, from using the locomotives and cabooses of another railroad as its own under this Agreement; or

(d) Except as permitted by Section 1.3(g) and (h) hereof, construct any tracks connecting to the Subject Trackage.

1.6 (a) Notwithstanding anything else contained in this Trackage Rights Agreement, Buyer shall not have the right to handle any Overhead Traffic whatsoever on the Subject Trackage. For purposes of this provision, Overhead Traffic shall mean any traffic that is not Permitted Traffic or Haulage Cars. In the event Buyer handles traffic other than Permitted Traffic or Haulage Cars over the Subject Trackage, Buyer agrees to pay \$750.00 as \$750's liquidated damages ("Liquidated Damages") for each car so handled.

(b) Further, Buyer agrees not to seek trackage rights, terminal access rights to industries or interchange with other carriers over the Subject Trackage or other SOO trackage in the Twin Cities Terminal, other than provided herein, under 49 U.S.C. Sec. 11103 or any other law or regulation now in force or subsequently enacted or promulgated; provided that SOO shall take no action to unreasonably interfere with Buyer's ability to effectively utilize the rights granted under this Agreement or the Interchange and Operating Agreement of a like date herewith. For violation of this restriction, at its option, SOO may terminate this Agreement.

Section 2. CONSTRUCTION, REPAIR, MAINTENANCE, ADDITIONS TO,
OPERATION AND CONTROL OF THE SUBJECT TRACKAGE

2.1 The construction, maintenance, repair and renewal of the Subject Trackage together with the discretion to add, modify, or remove facilities and appurtenances, signals and switches, along the Subject Trackage shall be under the exclusive direction and control of SOO. SOO shall make any additions, modifications, or removals to or along the Subject Trackage which SOO deems necessary or desirable for the safe, efficient, and economical use of the Subject Trackage by the Parties; provided that any such change shall not materially interfere with Buyer's right to use the Subject Trackage for the purposes defined in

Section 1. SOO shall maintain the Subject Trackage to at least FRA Class II condition for all tracks that are in such condition or better condition as of the date of this Agreement, and shall maintain tracks that are in less than FRA Class II condition as of the date of this Agreement to such lesser condition. SOO shall make track repairs, as agreed to jointly by SOO and Buyer, to the Connection as soon as practical after closing. Buyer agrees to pay SOO for all costs associated with such repair in accordance with the terms contained in Section 3.3 in this Agreement.

2.2 The management and operation of the Subject Trackage shall be under the exclusive direction and control of SOO. SOO shall have the unrestricted right to change the management of and operations on and over the Subject Trackage as in its judgment may be necessary, expedient or proper for the operation of the Subject Trackage pursuant to the Agreement; provided that any such change shall not materially interfere with Buyer's right to use the Subject Trackage for the purpose defined in Section 1.

2.3 SOO shall employ all persons necessary to operate, maintain, repair and renew the Subject Trackage. SOO shall be bound to use only reasonable and customary care, skill and diligence in the operation, maintenance, repair, renewal and management of the Subject Trackage and Buyer shall not, by reason of SOO's performing or failing, or neglecting to perform any operation, maintenance, repair, renewal or management of the Subject Trackage, have or make against SOO any claim or demand for loss, damage, destruction, injury or death whatsoever resulting

from SOO's performance, failure or neglect, except as otherwise provided in Section 4.

2.4 Buyer, at its expense, shall install and maintain upon its trains, locomotives, cabooses and cars such equipment or devices as may now or in the future be necessary or appropriate, in the reasonable judgment of SOO, for the safe and efficient operation of trains over the Subject Trackage.

2.5 If the use of the Subject Trackage is at any time interrupted or traffic over the Subject Trackage is delayed for any cause, SOO shall, with reasonable diligence, restore the line for the passage of trains of the Parties. Neither Party shall have or make any claim against the other for loss or damage of any kind resulting from such interruption or delay.

2.6 Each Party shall be responsible for furnishing, at its own expense all labor, fuel and train supplies necessary for the operation of its own trains over the Subject Trackage.

2.7 The operation of Buyer over the Subject Trackage shall at all times be in accordance with the rules, instructions and restrictions of SOO, but such rules, instructions and restrictions shall be reasonable, just and fair between all parties using the Subject Trackage and shall not unjustly discriminate against any of them. SOO shall provide Buyer with a copy of existing rules and instructions and provide Buyer with prior, written notice of any changes in such rules or instructions. These rules and instructions shall include, but not be limited to, Operating Rules, Timetables, Special Instructions, Bulletins,

General Orders and authoritative directions of Train Dispatchers and Operating Officers.

2.8 Buyer shall be responsible for all mileage allowances and car hire charges accruing on cars in Buyer's account on the Subject Trackage and Buyer shall report and pay the allowances and charges direct to the owners of such cars.

2.9 All employees of Buyer engaged in the operation of Buyer trains over the Subject Trackage shall be required to qualify for entry onto the Subject Trackage by passing periodic examinations on the rules of SOO, provided that with respect to such examinations, upon request of Buyer, SOO shall qualify one or more of Buyer's supervisory officers who will then examine and certify to SOO the qualification of Buyer's employees. In addition to examination, SOO may condition qualification of Buyer's employees under this provision upon the completion of a reasonable number of trips over the Subject Trackage piloted by a qualified SOO employee, and require that such qualification trips be repeated if the subject Buyer employee has not made a trip over the Subject Trackage within a reasonable period of preceding time. Pending qualification of Buyer employees, SOO shall furnish a pilot or pilots, at the expense of Buyer, to allow operation as contemplated in this Agreement. For purposes of allocation of liability under Section 4 of this Agreement only, any employee of SOO acting as a pilot for Buyer, or deadheading for that purpose, will be treated as if were an employee of Buyer.

2.10 If any employee of Buyer, in the sole and reasonable opinion of SOO, neglects, refuses or fails to abide by SOO's rules, instructions or restrictions governing the operation over the Subject Trackage, SOO shall in writing so notify Buyer. SOO shall have the right to require Buyer to withhold any employee of Buyer from service over the Subject Trackage pending the result of formal investigation of the alleged neglect, refusal or failure. After the notice is given Buyer, SOO and Buyer shall promptly hold a joint investigation, in which each of the Parties shall bear its own expenses for its own employees and witnesses. Upon proper notice, Buyer's failure to participate in a joint investigation shall not bar SOO from restricting the Buyer employees from the Subject Trackage. Notice of such investigation to Buyer employees shall be given by Buyer officers, and failure to give proper notice shall not bar SOO from restricting the subject Buyer employee. The investigation shall be conducted in accordance with the standards and procedures used in investigations of SOO employees, to the extent consistent with the terms and conditions of schedule agreements between Buyer and its employees, if any. If, in the sole and reasonable judgment of SOO, the result of such investigation warrants restriction of the investigated employee from operating on the Subject Trackage, SOO shall furnish Buyer with a written explanation of its basis for restriction of the investigated employee, and such employee shall be restricted by Buyer from operation on the Subject Trackage. SOO's restriction of an investigated employee shall be subject to arbitration in

accordance with Section 6. In the event an employee brings an action, suit or proceeding against SOO in connection with a restriction of such employee pursuant to this Section 2.10, Buyer shall indemnify and hold harmless SOO from any expenses or losses in connection therewith unless the court, agency, arbitrator, or tribunal hearing the matter finds that SOO's restriction of the employee was not in accordance with law.

2.11 If any cars, cabooses, or locomotives of Buyer are bad ordered enroute on the Subject Trackage and it is necessary that they be set out, those cars, cabooses or locomotives shall, after being promptly repaired, be promptly picked up by Buyer. If Buyer fails to promptly repair and remove such cars, or upon request of Buyer, SOO may, at Buyer's expense, furnish required labor and material to perform repairs required to make such bad ordered equipment safe and lawful for movement, and billing for this work shall be at rates prescribed in the Field and Office Manuals of the Interchange Rules of the Association of American Railroads. SOO shall prepare and submit billing directly to and collect from the car owner for car owner responsibility items called for by said Interchange Rules, and shall prepare and submit billing to and collect from Buyer for handling line responsibility items under said Interchange Rules. If SOO performs repairs to Buyer's equipment other than freight cars, SOO shall prepare and submit billing directly to and collect from Buyer.

Section 3. COMPENSATION AND BILLING

3.1 Buyer shall pay to SOO on a monthly basis during the term of this Agreement, an amount equal to \$0.30 per car-mile (the "Base Charge"), for each car operated by Buyer upon or over the Subject Trackage or any portion thereof, except that on the Subject Trackage east of South Minneapolis Yard (Milepost 418.7), Buyer shall pay SOO no charge for empty cars interchanged with SOO.

For purposes of computing the payments due SOO under this Agreement, the Base Charge as adjusted shall be applied to distances as follows:

Tower E-14 to Merriam Park	14.19 miles
Tower E-14 to Municipal River Terminal	23.73 miles*
Tower E-14 to Burlington Northern	
@ North Minneapolis	24.44 miles*
@ University Avenue	24.44 miles*
Tower E-14 to New Brighton	28.37 miles*
South Minneapolis Yard to Merriam Park	2.27 miles

*Such mileages to be adjusted when connection is built pursuant to Section 1.3(g).

3.2 Seventy percent (70%) of the Base Charge in Section 3.1 and the entire amount of Liquidated Damages contained in Section 1.5 shall be adjusted upward or downward effective July 1 of each year, beginning July 1, 1992, by use of the Annual Index of Charge-Out Prices and Wage Rates (1977=100), Series Q-MPW

included in "Indexes of Railroad Material Prices and Wage Rates (excluding fuel), issued for the Western District by the Association of American Railroads, provided, however, that said per car-mile rate shall never be less than \$0.30 and the Liquidated Damages shall never be less than \$750.

The adjustment formula shall be:

$$(1) \quad \frac{B - A}{A} = E$$

(2) (i) For Base Charge:

$$E \times (0.7 \times C) + C = \text{Adjusted Base Charge}$$

(2) (ii) For Liquidated Damages:

$$(E \times D) + D = \text{Adjusted Liquidated Damages}$$

Where:

A = the index for the year preceding "B"

B = the index number for year immediately preceding the year of the subject adjustment

C = Base Charge (as adjusted if previously adjusted)

D = Liquidated Damages (as adjusted if previously adjusted)

E = Percent increase or decrease

If the base for the annual Indexes of Charge-Out Prices and Wage Rates issued by the Association of American Railroads shall be changed from the year 1977, appropriate revision shall be made in the index number used for factor "A" of the formula set forth above. If the Association of American Railroads or any successor organization discontinues publication of the Annual Indexes of Charge-Out Prices and Wage Rates, the Parties shall select an appropriate substitute index. In the absence of agreement on a substitute index, the Parties shall submit the matter to the binding arbitration under Section 6 hereof.

3.3 Except as otherwise specifically provided for, bills rendered pursuant to this Agreement shall be prepared in conformity with, and with additives (other than to the Base Charge) in accordance with, the then-current reasonable billing practices of SOO. Buyer shall furnish SOO, within 30 days after the end of each month, a statement showing the number of cars, engines and cabooses operated over the Subject Trackage during the month and the mileage attributed to each such car, engine and caboose. Each diesel unit, whether in the operating locomotive consist or dead-in-train, and each caboose, for the purposes of this Agreement, shall be treated as one car. All payments called for under this Section shall be made by Buyer within thirty (30) days after invoice, and any amount outstanding after said thirty (30) days shall bear interest at a rate of one percent (1%) per month. Charges not billed within two years of their being incurred shall be deemed waived. The payment

of bills shall not be delayed nor payment refused or shorted on payment of the face amount of bill rendered because of errors in supporting details which are not serious and important, but bills shall be paid as rendered and exception taken in writing addressed to the officer of SOO responsible for the issuance of the bill. SOO will adjust the next subsequent billing if exception is valid. No exception to any bill shall be honored if filed after two years from the last day of the calendar month during which the bill was rendered; provided, however, that nothing in this Section will bar the rendering and collection of bills arising from the operation of Section 4.

3.4 The records of each Party pertaining to this Agreement shall be open to inspection by representatives of the other Party upon reasonable notice, during regular office hours.

3.5 Waiver of a default in any given instance or many similar instances shall not be construed as a waiver in any other instance. Failure of a Party to enforce its remedies in any one instance or many similar instances shall not constitute a waiver of the right to enforce its remedies in any other instance.

Section 4. LIABILITY

Definition: Whenever the expression "Loss or Damage" is used in this Section, it means all costs, liabilities, judgments, fines, fees (including without limitation reasonable attorneys' fees and disbursements) and expenses of any nature arising from or in connection with death of or injury to persons, including without limitation employees of the Parties, or damage to or destruction

of property including without limitation property of the Parties or the Subject Trackage, in connection with operations of the Parties over or on the Subject Trackage.

Definition: Whenever the expression "proportionally by the Parties" is used in this Section, it means that expenses will be borne in proportion to the total trains handled by each Party over any part of a segment of the Subject Trackage on which the Loss or Damage occurs during the three calendar months prior to the month of the occurrence, or if the occurrence is in any of the first three months of operation under this Agreement, such lesser period as precedes the date of occurrence. For the purposes of determining proportionality as herein provided, light engines shall not be considered a train and the Subject Trackage shall be divided into three (3) segments marked A - G, C - D, and D - F - H - J on Exhibit A and Exhibit A-1 attached hereto.

4.1 Both Parties shall undertake to comply with all applicable Federal, State and local laws or regulations, and all applicable rules, regulations or orders promulgated by any Court, Agency, Municipality, Board or Commission. If any failure of either Party to comply with such laws, rules, regulations or orders in respect to the use of the Subject Trackage results in any fine, penalty, cost or charge being assessed against the other Party, the Party which failed to comply agrees to reimburse promptly and indemnify the other Party for such amount.

4.2 The employees of either Party while operating, maintaining or directing operation along the Subject Trackage shall not be considered as joint employees but will remain the sole employees of either Party. However, when any sole employee of SOO or Buyer is engaged in the direct activity of maintaining, repairing, renewing, removing, or inspecting the Subject Trackage, or in dispatching, giving orders for or directing the movement of trains over the Subject Trackage, or performing other service involving the Subject Trackage for the common benefit of the Parties, and Loss or Damage to SOO, Buyer or a third party, arises out of such service for the common benefit of the Parties, then the expense of the Loss or Damage shall be borne proportionally by the Parties (but in no event shall Buyer's proportion exceed 50% in cases in which the Loss or Damage does not involve the employees, trains or equipment of Buyer); provided that the terms of this Section 4.2 shall control in the case of conflict with the provisions of Section 4.4 below, but in the case of conflict with Section 4.3 below, that Section shall control.

4.3 Notwithstanding anything else contained in this Agreement, liability for Loss or Damage resulting from or in connection with the operation of locomotives, trains or cars of either Party, or in connection with the presence on the Subject Trackage of locomotives, trains, cars or property of either Party, shall be borne and paid by the Parties as follows:

(a) When the same shall involve the train or equipment of only one of the Parties, regardless of any third party involvement, all Loss or Damage, including but not limited to, restoration and repair of the Subject Trackage and third party persons or property will be borne by that Party.

(b) When the same shall involve the trains or equipment of both Parties, Loss or Damage shall be borne by each Party as to its own employees, property, or property in its custody (except for damage to the Subject Trackage). As to third party persons or property and the Subject Trackage, Loss or Damage shall be borne equally by the Parties.

4.4 Liability for Loss or Damage not involving the train or equipment of either Party, or where the identity of the train or equipment involved is unknown, shall be borne and paid by the Parties as follows:

(a) Liability for Loss or Damage shall be borne by each Party as to its own employees (except for employees performing services for the common benefit of the Parties), property (other than the Subject Trackage), or property in its custody, but as to third party persons or property, employees performing service for the common benefit of the Parties, and the Subject Trackage, the cost of Loss or Damage shall be borne proportionally by the Parties.

(b) Third party claims for Loss or Damage arising out of the killing or injuring of livestock or the setting of fires on or along the Subject Trackage, when caused by the locomotive, train, car or fusee of one of the Parties, shall be handled or settled by the Party whose locomotive, train, car or fusee caused such Loss or Damage, but if it cannot be determined whose locomotive, train or car caused such Loss or Damage, the claim will be handled or settled on behalf of both Parties in the first instance by SOO, and the Loss or Damage will then be borne equally by the Parties.

4.5 Each Party agrees that it will pay for all Loss or Damage, the risk of which it has herein assumed, the judgment of any court to the contrary notwithstanding, and will forever indemnify and save harmless the other Party, its successors and assigns, from such payment; provided, however, the indemnifying Party shall be assigned any rights which the indemnified Party may have against any third party or parties for recovery of any indemnified amount.

4.6 In the event that both Parties hereto shall be liable under the Agreement for Loss or Damage, and the same shall be compromised and settled by voluntary payment of money or valuable consideration by one of the Parties, the settling Party shall obtain a valid and enforceable release from liability for Buyer and Soo Line Railroad Company, Soo Line Corporation and their Parents, Subsidiaries and Affiliated Companies, and all of their

Officers, Agents, and Employees, etc. Neither Party shall make any such compromise or settlement in excess of \$5,000 without prior, written authority of the other Party having liability, but any settlement made by one Party in consideration of \$5,000 or less shall be a settlement releasing all liability of both Parties and shall be binding upon both Parties.

4.7 In case a lawsuit or lawsuits shall be commenced against either Party hereto for or on account of any Loss or Damage for which the other Party would be solely or jointly liable under this Agreement, the Party thus sued shall give the other Party timely written notice of the pendency of such suit, and thereupon the Party so notified shall assume or join in the defense thereof, and if the Party so notified is liable therefore under this Agreement, such Party shall save harmless the Party so sued from all Loss or Damage in accordance with the liability allocation set forth in this Agreement. Neither Party shall be bound by any judgment against the other Party unless it shall have been so notified and shall have had reasonable opportunity to assume or join in the defense of the action. When so notified, and said opportunity to join in the defense of the action has been afforded, the Party so notified shall to the extent of its liability under this Agreement be bound by such judgment.

4.8 If trains, locomotives or cars of Buyer are wrecked or derailed on the Subject Trackage, SOO shall pick up and remove said equipment, and Buyer shall bear the entire cost of such service (except to the extent that the allocation of liability in

this Agreement provides otherwise), except that if SOO does not have the necessary personnel or equipment, Buyer may furnish both as required, at its own expense; provided, however, that in the case of a minor derailment where the derailed equipment can be promptly rerailed by rerailers or blocking by Buyer's employees, then in such event Buyer may, at its sole expense, rerail such equipment unless SOO's supervisory employees direct otherwise.

4.9 It is understood and agreed that a number of vehicular crossings on the Subject Trackage presently exist, or may be constructed. Buyer agrees to accept all crossings in whatever condition they may be during the term of this Agreement and will not assert any claim, demand or cause of action against SOO and will hold SOO harmless from any claim, demand or cause of action arising out of any crossing accident on the Subject Trackage in which the engines, cars or trains of Buyer only are involved; provided, however, that nothing in this Section 4.9 shall relieve SOO or Buyer from liability arising from its gross negligence or intentional acts.

4.10 Detour of foreign line equipment under Standard Industry Detour Agreements over the Subject Trackage is at the sole discretion and permission of SOO. In the event of a collision between such foreign line equipment and that of Buyer or any injury, death, loss or damage to employees or property of Buyer on or along the Subject Trackage, such foreign line equipment will be considered to be that of SOO for purposes of liability under this Agreement.

Section 5. INSURANCE

5.1 Buyer, at its own cost or expense, will procure and maintain in effect during the term of this Agreement, a policy or policies of insurance covering the liability to which Buyer is or may be subject under this Agreement. Such policy shall name SOO as an additional insured which shall provide the following total insurance coverage:

Third party liability coverage covering injury to or death of persons and damage to property in any one occurrence in the amount of not less than \$10,000,000 (ten million dollars) with a maximum deductible of \$100,000 (one hundred thousand dollars) per occurrence. Such coverage shall include all employees and shall insure named Insureds against workmen's compensation and Federal Employer's Liability Act claims. SOO agrees to cooperate in the processing of insurance claims.

5.2 If the insurance procured by Buyer, pursuant to this Section, takes the form of a claims-made policy and is cancelled or allowed to expire without renewal, Buyer will provide evidence of insurance that provides per occurrence and annual aggregate limits not less than those required pursuant to Section 5.1. Such coverage must be retroactive to the original inception date of the cancelled or non-renewed policy. Buyer further agrees promptly to give written notice to SOO's Director of Insurance of any claim or notice of incident or notice of potential claim that is required to be reported to its liability insurance company.

5.3 At any time not less than sixty (60) days prior to an anniversary date of this Agreement, SOO, in consideration of current and reasonably anticipated claims and litigation costs, may notify Buyer of SOO's intent to increase the amount of insurance required by this Agreement or to require that the terms and conditions of such insurance be modified. Should Buyer object to any such increase or modification, Buyer and SOO will attempt in good faith to negotiate a resolution of their disagreement. If Buyer and SOO are not able to agree and such disagreement continues for thirty (30) days past the anniversary date of this Agreement, then the matter or matters in disagreement will be submitted to arbitration pursuant to Section 6 hereof.

5.4 Each policy of insurance obtained by Buyer pursuant to the requirement of this Section will contain provisions requiring that the insurance carrier give SOO, through the SOO's Director of Insurance, at least thirty (30) days notice in writing of any proposed policy cancellation or any modification of the terms and conditions of any policy of insurance Buyer is required to provide under this Section.

5.5 The terms and conditions of each policy of insurance obtained by Buyer to satisfy the requirements of this Section will be subject to the approval of SOO, which approval shall not be unreasonably withheld or delayed. At least thirty (30) days prior to the effective date of this Agreement pursuant to Section 8.3 of this Agreement, Buyer will furnish to SOO's Director of Insurance an accurate copy of each policy of insurance obtained pursuant to

the requirements of this Section. Neither compliance with this requirement nor SOO's approval of the terms and conditions of any such policy will in any way limit or modify the obligation of Buyer to provide the specific insurance coverage required by this Section.

5.6 In the event Buyer fails to maintain the levels of insurance coverage required in this Section, or fails to properly notify SOO of said coverage, after giving Buyer written notice of noncompliance and ten (10) days from receipt of such notice within which to comply, SOO may require Buyer to suspend operations over the Subject Trackage until such time as Buyer complies with the insurance requirements hereunder or otherwise provides SOO evidence of financial responsibility acceptable to SOO in its sole discretion.

Section 6. ARBITRATION

6.1 Disputes between the Parties arising from the application or interpretation of any provision of this Agreement involving amounts of \$100,000 or less may, at the election of either Party, be resolved through arbitration.

6.2 The Party initiating arbitration shall notify the other of such action in writing, naming in said notice the person chosen to represent the moving Party as arbitrator, and giving a formal statement of the question or questions to be decided.

6.3 The Party receiving notice of arbitration shall respond within thirty (30) days of the date of mailing of the moving Party's notification letter by naming the person chosen to

represent the responding Party as arbitrator. The arbitrators representing the moving party and the responding party shall agree upon a third neutral arbitrator, who shall be a person experienced in the railroad business. The responding Party may name additional questions to be decided.

6.4 In the event that the responding Party fails to name its arbitrator, or in the event that the arbitrators of the moving and responding Parties are unable to agree on a neutral arbitrator, and forty-five (45) days have passed from the date that the notice of arbitration was mailed, the moving Party may request either the American Arbitration Association or the Chief Judge of any United States District Court that would be the proper venue for litigation of the issue to be arbitrated to name the neutral arbitrator. In such cases, the neutral arbitrator need not be a person experienced in the railroad business.

6.5 At a date agreed among the arbitrators, or in the absence of agreement, on the 30th day after the date the neutral arbitrator is appointed, the moving Party's written statement of the case shall be due in the hands of the neutral arbitrator.

6.6 At a date agreed among the arbitrators, or in the absence of agreement, on the 30th day after the moving Party's case was due in the hands of the neutral arbitrator, the responding Party's statement of the case, including the responding Party's statement of the case on additional questions named by the responding Party, shall be due in the hands of the neutral arbitrator.

6.7 At a date agreed among the arbitrators, or in the absence of agreement, on the 14th day after the responding Party's statement of the case was due in the hands of the neutral arbitrator, rebuttal statements of both Parties shall be due in the hands of the neutral arbitrator. Such rebuttal statements shall not contain new evidence but shall be confined to a response to the statement of the case by the other Party. The neutral arbitrator may, at any time, request either Party to submit additional information or furnish such information to the other Party.

6.8 At a date agreed among the arbitrators, or in the absence of agreement, on the 14th day after the rebuttal statements were due in the hands of the neutral arbitrator, an oral hearing shall be held. The neutral arbitrator shall determine the format of the oral hearing, which shall be for the purpose of permitting the neutral arbitrator to ask questions of representatives of the Parties. The Parties may offer witnesses for the arbitrators to questions, but the neutral arbitrator shall determine which witnesses shall be heard and the scope of questioning thereof.

6.9 At a date agreed among the arbitrators, or in the absence of agreement, on or before the 60th day after the oral hearing, the neutral arbitrator shall render his decision in writing, giving his reasoning therefore, on each and every question which was presented in the moving Party's notice and the responding Party's response. In rendering his decision, the neutral arbitrator shall select only remedies proposed by one or the other of the Parties, and in the event of conflicting remedies proposed

by each Party, shall select the one remedy which he finds to be the most reasonable. The neutral arbitrator shall not design remedies of his own or select elements from conflicting remedies proposed by the Parties. The Parties agree to be bound by this decision in all respects, and to carry it into effect without delay.

6.10 When any date called for in this Section shall fall on a Saturday, Sunday, or a legal holiday of the United States, the same shall instead be the next day that is not a Saturday, Sunday, or legal holiday of the United States.

6.11 If either Party shall fail to furnish a statement or appear at the oral hearing at dates called for in this Agreement, the neutral arbitrator shall have the sole discretion to declare a default and decide the case based on the information in his hands, and such decision shall be binding on the Parties the same as if the entire arbitration procedure had been carried out.

6.12 If the neutral arbitrator becomes incapacitated or fails to comply with any or all of the requirements set forth in this Agreement, the arbitration shall be considered void. The moving Party may then initiate the procedure again.

6.13 Each Party shall bear the cost of its chosen arbitrator and witnesses and one-half the cost of the neutral arbitrator and his expenses. Each Party shall bear the entire costs of its submission, including but not limited to its attorney fees.

Section 7. GOVERNMENT APPROVAL

7.1 Buyer shall, at its own expense, initiate and prosecute the necessary application for approval, or exemption from approval, from any Governmental agency having jurisdiction to approve this Agreement. SOO, at its own expense, shall assist and support such application and will furnish such information and execute, deliver and file such instrument or instruments in writing as may be necessary and appropriate to obtain such approval.

7.2 In the event Buyer desires to discontinue its rights conferred by this Agreement, Buyer shall, at its own expense, initiate and prosecute the necessary application for approval from any Governmental agency having jurisdiction to approve such discontinuance.

Section 8. OTHER CONSIDERATIONS

8.1 This Agreement shall be binding upon and inure to the benefit of the Parties, their respective successors and assigns. Buyer shall not transfer or assign this Agreement, or any of its rights, interests, or obligations hereunder to any successor without obtaining the prior written consent of SOO, which consent shall not be unreasonably withheld.

8.2 It is understood and accepted by Buyer that SOO may abandon or sell to a third party any portion of the Merriam Park Line between Points A - G, and Buyer agrees to relinquish its rights hereunder over such Merriam Park Line and not to oppose such

abandonment or sale; provided, however, in the event of such abandonment or sale, SOO shall secure each of the alternate route for Buyer as follows:

(a) SOO and Buyer shall arrange for and Buyer shall accept a route to St. Paul Yard whereby Buyer shall operate over property owned by Hennepin County Regional Rail Authority, or its successor, ("HCRRA"), from the vicinity of either Tower E-14, Hopkins, or St. Louis Park to Cedar Lake Junction (approximately 9.5, 5.9, or 3.3 miles respectively), and over Burlington Northern (BN) trackage from Cedar Lake Junction to Minneapolis Junction (approximately 3.7 miles), and thence to Hoffman Avenue in St. Paul (approximately 10.1 miles), all as shown in red on Exhibit B attached hereto; including the right to interchange with the Minnesota Commercial Railroad along such line subject to any required BN consent. Buyer shall operate over BN as though Buyer's trains were SOO trains under the agreement between SOO and BN, and Buyer shall indemnify and hold SOO harmless against any cost or expense for Loss or Damage arising out of Buyer's use of BN trackage. Buyer shall pay trackage rights fees to (1) HCRRA for Buyer's operations over HCRRA trackage, and (2) to SOO for Buyer's operation over any SOO and any BN trackage. Fees payable to SOO and HCRRA shall be based on the miles operated on HCRRA, SOO and BN trackage, but in no event shall Buyer be required to pay a per-car mile

fee, loaded and empty, that is greater than the Base Charge, as adjusted.

(b) SOO and BUYER shall arrange for and BUYER shall accept a route to Upper Harbor Terminal whereby BUYER shall operate over property owned by Hennepin County Regional Rail Authority, or its successor, ("HCRRA"), from the vicinity of either Tower E-14, Hopkins, or St. Louis Park to Cedar Lake Junction (approximately 9.5, 5.9, or 3.3 miles respectively), and over Burlington Northern (BN) trackage from Cedar Lake Junction to Minneapolis Junction (approximately 3.7 miles), and thence to Shoreham all as shown in red on Exhibit C attached hereto; Buyer shall operate over BN as though BUYER's trains were SOO trains under the agreement between SOO and BN, and BUYER shall indemnify and hold SOO harmless against any cost or expense for Loss or Damage arising out of BUYER's use of BN trackage. BUYER shall pay trackage rights fees to (1) HCRRA for BUYER's operations over HCRRA trackage, and (2) to SOO for BUYER's operation over any SOO and any BN trackage. Fees payable to SOO and HCRRA shall be based on the miles operated on HCRRA, SOO and BN trackage, but in no event shall BUYER be required to pay a per-car mile fee, loaded and empty, that is greater than the Base Charge, as adjusted.

(c) Soo and Buyer may agree to routes other than the routes contained in (a) or (b) above.

8.3 The Agreement shall be effective on the date Buyer first commences operation over the Subject Trackage pursuant to this agreement after having received all necessary approval, or exemption therefrom, from any Governmental agency having jurisdiction to approve this Agreement and the operations to be carried out thereunder, except that if no operation occurs within one year of the last dated signature on this Agreement, this Agreement shall be of no force and effect. Once activated by the commencement of Buyer's operation as above indicated, this Agreement shall remain in effect thereafter until terminated by Buyer at any time by giving not less than sixty (60) days written notice of its intentions to do so. Notwithstanding anything else in this Agreement, SOO may terminate this Agreement based upon a material default by Buyer of its obligations hereunder if Buyer fails to cure such default within sixty (60) days following receipt of written notice of such default, or in the case of contested matters, if the default continues for sixty (60) days after the final resolution of such contest.

THE PARTIES hereto have caused this Agreement to be duly executed on the dates and at the places indicated, and agree that the laws of the State of Minnesota will apply to its interpretation.

TWIN CITIES & WESTERN RAILROAD
COMPANY

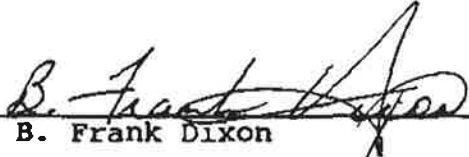
By 
Kent Shoemaker

(Title) Chairman

(Location) Minneapolis, Minnesota

(Date) July 26, 1991

SOO LINE RAILROAD COMPANY

By 
B. Frank Dixon

(Title) Senior Vice President
Development

(Location) Minneapolis, Minnesota

(Date) July 26, 1991

TCTRACK

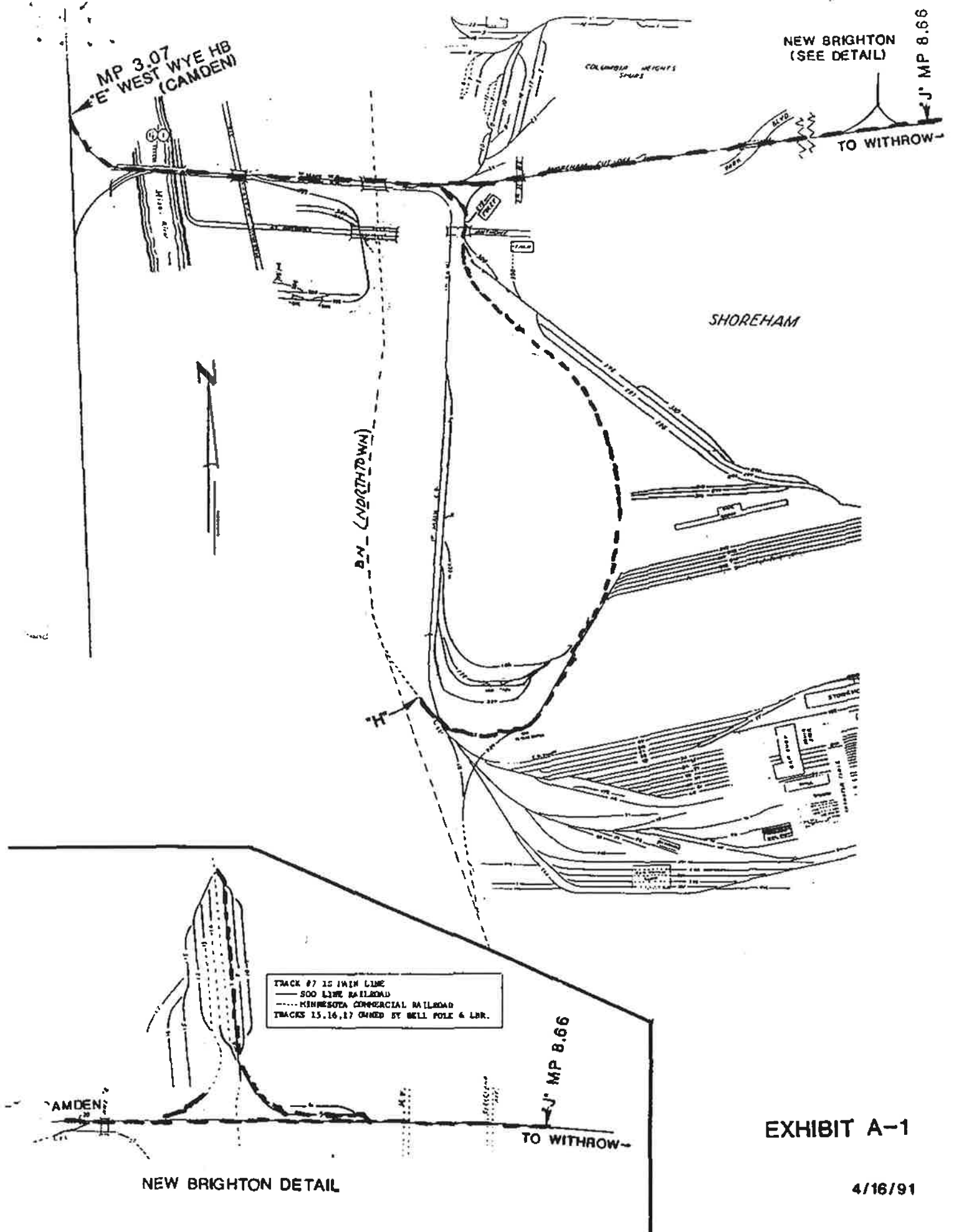


EXHIBIT A-1

4/16/91

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT A

VERIFIED STATEMENT OF MR. MARK WEGNER

ATTACHMENT 3

July 22, 1993

SUPPLEMENTAL AGREEMENT

TCW COUNTERPART

THIS SUPPLEMENTAL AGREEMENT dated as of July 27, 1993, is made between Soo Line Railroad Company (sometimes operating under the name CP Rail System) ("CP"), and the Twin Cities & Western Railroad Company ("TCW"); CP and TCW are sometimes collectively referred to below as "the Parties."

RECITALS

CP and TCW are Parties to the Twin Cities Trackage Rights Agreement dated July 26, 1991, as amended ("Base Agreement"), wherein TCW has been granted trackage rights with respect to certain railroad lines owned by CP in the Minneapolis-St. Paul metropolitan area; and TCW has also been granted certain rights to operate over certain other tracks in the Minneapolis-St. Paul metropolitan area in an Interchange and Operating Agreement between the Parties dated July 26, 1991; and

In accordance with Section 8.2 of the Base Agreement, TCW has agreed, subject to certain terms and conditions, to relinquish its rights over all or a portion of the CP's Merriam Park Line (as defined in the Base Agreement) in the event of a sale or abandonment of all or any portion of said Line and accept an Alternate Route for its trains; and

CP has entered into an agreement with Hennepin County Regional Railroad Authority for the sale of CP's line from the westerly city limits of the City of Minneapolis (m.p. 428.00) to the east boundary of Hiawatha Avenue (m.p. 423.17 on the north leg of the wye and m.p. 418.77 on the south leg of the wye) (the "Subject Line"), which sale will result in CP's being obligated to provide TCW an Alternate Route to St. Paul Yard in accordance with Section 8.2 of the Base Agreement; and

The Parties are each and separately parties to agreements with the Chicago and North Western Railroad Company ("CNW"), and with Burlington Northern Railroad Company ("BN"), wherein those railroads have granted TCW and CP, respectively, certain rights to use of their lines of railroad as described in Section 8.2(a) of the Base Agreement to accomplish the Alternate Route; and

The Parties desire to enter into this Supplemental Agreement so as to clarify their respective rights and obligations.

IN CONSIDERATION of the mutual and dependent covenants by each of the Parties, the Parties agree as follows:

1. In connection with the agreement between CP and HCRRA for the sale of the Subject Line, CP and TCW have agreed that the alternative

route by which TCW shall operate between approximately the westerly limits of the City of Minneapolis (m.p. 428.59) and St. Paul Yard shall be as follows: from St. Louis Park (CNW m.p. 16.2) to Cedar Lake Junction (CNW m.p. 13.7) (the "CNW Segment") over the Chicago and North Western Transportation Company; and from Cedar Lake Junction (BN m.p. 13.27) to St. Paul Yard (the "BN Segment") over the Burlington Northern Railroad Company (the route via CNW and BN as set forth above shall be referred to herein as the "Alternate Route"). TCW has entered into a Trackage Rights Agreement with CNW, dated July 26, 1993 (the "CNW Agreement"), whereby CNW has granted TCW trackage rights over the CNW Segment, and TCW has entered into a Trackage Rights Agreement with BN, dated July 9, 1993, (the "BN Agreement"), whereby BN has granted TCW trackage rights over the BN Segment.

2. TCW shall pay to CNW the trackage rights fees set forth in Section 5 of the CNW Agreement. CP shall reimburse TCW on a monthly basis for the trackage rights fees paid by TCW to CNW for each TCW train operated over the CNW trackage for the purpose of interchange with the CP at St. Paul Yard, the Minnesota Commercial Railroad at Merriam Park, the BN at Northtown Yard and CNW at the Hoffman Avenue Yard or Western Avenue Yard; provided, that such reimbursement shall apply only to the fees incurred with respect to the first twenty-one (21) trains in each direction per week. Payment shall be made by CP upon receipt of invoice from TCW or any other procedure mutually agreed upon. It is understood and agreed between the Parties that all compensation due CNW for TCW's operations over CNW for purposes other than interchange with CP at St. Paul Yard or elsewhere CP and TCW may agree, the Minnesota Commercial Railroad at Merriam Park, the BN at Northtown Yard and the CNW at the Hoffman Avenue Yard are the sole responsibility of TCW.

3. The Parties acknowledge and agree that, due to an arrangement between CP and BN, the BN Agreement does not impose trackage rights fees for TCW's operations over the BN Segment. In the event that BN successfully asserts in a proceeding before the Interstate Commerce Commission or in any other forum that it is entitled to receive compensation from TCW for the trackage rights granted by BN to TCW under the BN Agreement, TCW shall pay to BN such trackage rights fees, and CP shall reimburse TCW for the full amount thereof. Payment shall be made by CP upon receipt of invoice from TCW or any other procedure mutually agreed upon.

4. It is understood and agreed that all payments due to CNW or BN under the provisions of applicable trackage rights, other than charges accepted by CP under the terms of paragraphs 2 and 3 above, are the sole responsibility of TCW.

5. For each TCW car moved over the CNW Segment and the BN Segment to or from Cedar Lake, the Minnesota Commercial Railroad, or St. Paul for the purposes described in paragraph 2, TCW shall continue to pay to CP (i) the per-car mile rate fee as provided in the Base Agreement as amended (Base Charge) for the mileage on the current route between Tower E-14 and Merriam Park in accordance with the Base Agreement

and, (ii) additionally, the amounts required under Section 1.4 of the Interchange and Operating Agreement for those cars moved to and from St. Paul.

For each TCW car moved over the CNW Segment and BN Segment to and from the Upper Harbor Terminal, Northtown Yard, or other such destination of TCW's trains west of Minneapolis Junction, TCW shall pay to CP (i) the Base Charge for TCW's operation applied to the track mileage between Tower E-14 and Bass Lake in accordance with the terms of the Base Agreement as amended, and (ii) the Base Charge applied to the track miles on the BN between Lyndale (Cedar Lake) Junction and University Avenue (or Northtown Yard when applicable), and (iii) the Base Charge applied to the track miles from University Avenue (Shoreham) to the Upper Harbor Terminal or other such destination of TCW's trains west therefrom.

6. The Parties agree that the initial rehabilitation required before TCW can begin operations on the CNW's 2.5 miles of track on the Alternate Route are the repairs itemized on Attachment 1 hereto. CP shall undertake the steps necessary to ensure said repairs are completed prior to the severing of the current route and TCW's subsequent operation over the CNW's track at no cost to TCW. In addition, CP agrees to reimburse TCW for any and all reasonable and necessary expenses incurred by TCW, and not reimbursed by CNW or its assignee under the CNW Agreement, for the repair, maintenance or renewal of the CNW Segment to permit the continued operation of that segment at FRA Class 1 standards.

CP acknowledges and agrees that, under the terms of the Base Agreement, TCW is entitled to a route from Hopkins to St. Paul Yard under a trackage rights arrangement whereby TCW does not incur any cost or expense for ordinary maintenance or rehabilitation (or an arrangement under which TCW is promptly reimbursed for any such cost or expense), and that TCW is entering into this Agreement based upon CP's agreement that it shall take whatever steps are necessary, including, but not limited to reimbursement of all expenses incurred by TCW under the last sentence of the immediately preceding paragraph, to cause such an arrangement to be in place from and after the date hereof.

7. The Parties acknowledge and agree that CP's obligation under Section 8.2 of the Base Agreement to provide TCW with an alternative route to St. Paul Yard and TCW's obligation to relinquish rights to the Merriam Park Line shall be and are ongoing obligations. In the event that the Alternate Route becomes unavailable or in the event that operations over the Alternate Route are materially adversely affected by acts or omissions of parties other than TCW, CP shall have the obligation under Section 8.2 to provide TCW a replacement route to St Paul Yard provided, however, that CP shall have no such obligations as a result of temporary condition pending repair or restoration of TCW's service.

8. CP agrees that as part owner of the MT Properties, CP will support the granting of overhead trackage rights to TCW and further,

in the event such rights are granted to TCW, CP shall agree to permit TCW to operate over CP between Merriam Park and St. Paul Yard in accordance with the Interchange and Operating Agreement dated July 26, 1991.

SOO LINE RAILROAD COMPANY


P. A. Pender
Vice President and Chief
Operating Officer

TWIN CITIES & WESTERN RAILROAD
COMPANY


Chairman

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT A

VERIFIED STATEMENT OF MR. MARK WEGNER

ATTACHMENT 4

EXHIBIT II

A18158
HCRRA: Contract No. ~~A18229~~
August 3, 1998

**TRACKAGE RIGHTS AGREEMENT
BETWEEN
SOO LINE RAILROAD COMPANY,
TWIN CITIES & WESTERN RAILROAD COMPANY
AND
HENNEPIN COUNTY REGIONAL RAILROAD AUTHORITY**

THIS Agreement, made and entered into this 10th day of August, 1998 by and between the SOO LINE RAILROAD COMPANY, a Minnesota corporation doing business as Canadian Pacific Railway (hereinafter sometimes called "Soo"), TWIN CITIES & WESTERN RAILROAD COMPANY, a Minnesota corporation (hereinafter sometimes called "TCW") and the HENNEPIN COUNTY REGIONAL RAILROAD AUTHORITY, a political subdivision and local government unit of the State of Minnesota (hereinafter sometimes called the "Authority").

RECITALS

The Authority presently owns a line of railroad approximately 2.5 miles in length, extending from a point of connection with Soo trackage in the City of St. Louis Park, in the vicinity of Lake Street and the westerly city limits of the City of Minneapolis, northeasterly to a point of connection with trackage owned and operated by The Burlington Northern and Santa Fe Railway Company in the vicinity of Cedar Lake, in the City of Minneapolis. The Authority acquired the right-of-way, bridges and other related structures, but not the trackage, west from the Chicago and North Western Transportation Company (hereinafter called "CNW") in 1984. CNW retained ownership of the trackage, including rails and ties, and was granted an easement to continue freight service over said line of railroad.

On July 26, 1993, CNW granted overhead trackage rights to Soo and TCW over said trackage, subject to an Operating Agreement dated December 31, 1990 between CNW and the Authority.

CNW subsequently abandoned its operating rights over said railroad line and sold its interest in the trackage, including rail and ties, to the Authority. The Authority acquired the trackage subject to the trackage rights held by the Soo and TCW.

Soo and the Authority entered into an Agreement dated December 23, 1992 in which the parties agreed to cooperate in obtaining a rail route alternative to the 29th Street trackage in the City of Minneapolis, being acquired by the Authority pursuant to said Agreement. The Cedar Lake line of railroad described in the first recital has been identified by the parties as an alternative route under the December 23, 1992 Agreement.

The Soo and TCW desire to commence operations over this trackage on or after the date of this Agreement as a result of the implementation of the earlier agreements mentioned above.

The parties, therefore, agree as follows:

SECTION 1 - DEFINITIONS

1.1. "Agreement" shall mean this Agreement dated _____, 1998. All references in this document to Exhibits are to those attached to, and made a part of, this Agreement.

1.2. "Rail Line" is defined as the trackage and underlying right-of-way formerly owned by the CNW, extending from a point of connection with Soo Line trackage at or near CNW milepost 16.2 in the City of St. Louis Park, easterly to CNW milepost 13.7 at a point of connection with BNSF in the City of Minneapolis.

1.3. "Rail Corridor" shall mean the area where a right of use is created by this Agreement providing for operation by Soo and TCW over the Rail Line consisting of a corridor 50 feet in width centered on the Rail Line, except where the Authority does not own sufficient land to provide a 50-

foot corridor, and where the Kenilworth Trail as described in Section 1.5 is to be located less than 25 feet from the center line of the Rail Line. The Rail Corridor is further described in Exhibit A.

1.4 "Railroad(s)" shall mean the Soo and TCW.

1.5 "Kenilworth Trail" shall mean the public trail described in Exhibit B attached hereto.

1.6 "Sole Employees" and "Sole Property" shall mean employees, agents, contractors, passengers, invitees, railroad and motor vehicle equipment, including lading, and other equipment of each of the parties or their agents or contractors while engaged in, or about to engage in, maintaining, using, operating, constructing, repairing, renewing, replacing and improving the trackage in the Rail Corridor, or in switching or handling railroad cars of the respective parties hereto.

1.7 "Taxes" shall mean lawfully imposed real estate taxes and assessments including, but not limited to, special assessments.

1.8 "Trackage" shall mean all rail, cross ties, related track appliances such as spikes and tie plates (sometimes known as "other track material"), ballast, all grade crossing signals and other signal and communication equipment located upon the Rail Line, and including trackage laid in and across public streets and highways.

SECTION 2 - GRANT OF RIGHTS

2.1 Subject to the terms and conditions in this Agreement, Authority grants to Soo and TCW, and their respective permitted assigns, non-exclusive rights to conduct railroad operations over the Rail Line within the Rail Corridor for the operation of freight trains, occasional passenger trains, locomotives, cabooses, rail cars, maintenance-of-way equipment and other rail equipment in common with other railroad users the Authority may admit to the joint use of the Rail Line in the future. This grant of rights shall be known as the Rail Corridor rights under this Agreement and

supersedes and replaces all other agreements, including trackage rights agreements between CNW and Soo, and between CNW and TCW, governing use of the Rail Line in the Rail Corridor.

2.2 The Authority shall convey a Railroad Easement to TCW in the form shown on Exhibit C attached.

2.3 Soo and TCW shall not have the right to set out, pick up or store cars or switch any existing or future industries on the Rail Line, or serve any industry or team tracks now or hereafter located on the Rail Line without the express written consent of the Authority. Neither Soo nor TCW may admit additional tenants, and assignment of existing operating rights shall require the consent of the Authority, except as otherwise provided in this Agreement.

2.4 Nothing in this Agreement is to be construed as establishing any common carrier status on the part of the Authority.

2.5 Soo and TCW acknowledge that, concurrent with the exercise of their rights and obligations under this Agreement, the City of Minneapolis will exercise rights granted to it by the Authority for the Kenilworth Trail (State Project No. 141-090-05) in proximity to the Rail Corridor as more fully described in Exhibit B and made a part of this acknowledgment.

SECTION 3 - RENT

3.1 The rental for use of the Rail Corridor payable by TCW or Soo, in addition to payment of any expenses provided elsewhere in this Agreement, shall be \$7.50 per train mile, for each train operated by either TCW or Soo. To compute charges, the train mile rate shall be multiplied by 2.5 miles. Any movement of one or more pieces of railroad equipment over the Rail Corridor, except maintenance-of-way equipment and work trains while actually engaged in work on the Rail Corridor, shall be considered a train movement.

3.2 Rent shall be payable to the Authority quarterly. The rate of \$7.50 per train mile shall be adjusted retroactively to July 1, 1992 and on each July 1 thereafter, by utilization of the Annual

Indices of Charge-Out Prices and Wage Rates (1977= 100) Series RCR, included in the "AAR Railroad Cost Recovery Index", and supplements thereto, issued by the Association of American Railroads. In making such adjustment, the final "Material prices, wage rates and supplements combined (excluding fuel)" Index for the Western District for the calendar year 1990 shall be compared to the final Index for the calendar year immediately preceding the year in which such adjustment is to become effective. Said Train Mile Rate shall then be adjusted by the percentage of increase or decrease, as the case may be, in the Index of the year to be escalated as related to the year 1990, provided, however, that said Train Mile Rate shall never be less than \$7.50. If the Association of American Railroads, or any successor organization or association, discontinues such Index, an appropriate substitute for determining in a similar manner the percentage of increase or decrease in the Train Mile Rate shall be agreed upon by the parties hereto.

3.3. At such time as use of, and the right to use, the Rail Corridor is terminated by written notice by either Soo or TCW, the terminating party shall have no further obligation to pay rental to the Authority and shall have no claim against the Authority for any payment of any kind, except as may have arisen prior to such termination or by reason of other provisions of this Agreement. At such time as TCW relinquishes its right to use the Rail Corridor, Soo shall become obligated to pay a minimum Annual Rental until such time as Soo provides written notice to the Authority of its intention to permanently abandon Railroad rights to use the Rail Corridor. Soo shall be obligated to pay a minimum Annual Rental of \$10,000 for any year in which rentals payable in accordance with Sections 3.1 and 3.2 do not reach \$10,000. In such case, the minimum Annual Rental payment shall be in lieu of rental required under Section 3.1 and Section 3.2.

SECTION 4 - MAINTENANCE, CONTROL AND OPERATIONS

4.1. TCW shall have the exclusive management, direction and control of the Rail Corridor, including the obligation to dispatch rail traffic, at its sole cost and expense. In dispatching,

directing and controlling use of the Rail Corridor, TCW shall not discriminate against the trains of Soo or any other railroad tenants admitted to use of the rail line. In the event the Authority seeks to admit additional railroad tenants to use of the Rail Line, the Authority agrees to require such tenant to agree to terms, including liability, substantially as contained in this Agreement. The parties agree to renegotiate this Section 4 in the event any additional railroad tenants are admitted to use of the Rail Line by the Authority in order that additional costs incurred by TCW that are attributable to such additional tenants may be fairly compensated.

4.2(1) TCW shall perform all construction, derailment and wreck clearing, maintenance, repair and renewal of the Trackage, including any additions Soo or TCW may deem necessary or desirable for the safe and efficient operation of all trains. Any additions deemed necessary or desirable for the safe and efficient operation of trains will be paid for by the Railroad or Railroads requesting the same. The cost of derailment and wreck clearing are governed by Section 10. The Authority shall reimburse TCW for construction, maintenance, repair and renewal costs, as outlined in Section 4.3. The provisions of Sections 4.2(2) through 4.2(6) shall control as between the Railroads in the case of conflict with other provisions of this Agreement.

4.2(2) TCW shall employ all persons necessary to operate, maintain, repair and renew the Rail Corridor. TCW shall be bound to use only reasonable and customary care, skill and diligence in the operation, maintenance, repair, renewal and management of the Rail Corridor and Soo shall not, by reason of TCW's performing or failing, or neglecting to perform any operation, maintenance, repair, renewal or management of the Rail Corridor, have or make against TCW any claim or demand for delay, loss, damage, destruction, injury or death whatsoever resulting from TCW's performance, failure or neglect, except as otherwise provided in Section 10.3.

4.2(3) Soo, at its expense, shall install and maintain upon its trains, locomotives, cabooses and cars such equipment or devices as may now or in the future be necessary or appropriate, in the reasonable judgment of TCW for the safe and efficient operation of trains over the Rail Corridor.

4.2(4) If the use of the Rail Corridor is at any time interrupted or traffic over the Rail Corridor is delayed for any cause, TCW shall, with reasonable diligence, restore the line for the passage of trains of the parties. Neither Railroad shall have or make any claim against the other for loss or damage of any kind resulting from such interruption or delay.

4.2(5) The operation of Soo over the Rail Corridor shall at all times be in accordance with the General Code of Operating Rules, or such other rules as TCW and Soo agree upon, TCW timetables, bulletins, instructions and restrictions, but such rules, instructions and restrictions shall be reasonable, just and fair between all Railroads using the Rail Corridor and shall not unjustly discriminate against any of them. TCW shall provide Soo with a copy of existing rules and instructions and provide Soo with prior, written notice of any changes in such rules or instructions. These rules and instructions shall include, but not be limited to, General Code of Operating Rules, Timetables, Special Instructions, Bulletins, General Orders and authoritative directions of Train Dispatchers and Operating Officers and all applicable federal statutes and regulations regarding railroad safety.

4.2(6) All employees of Soo engaged in the operation of Soo trains over the Rail Corridor shall be required to qualify, at Soo's expense, to operate over the Rail Corridor. TCW shall have the right to bar Soo employees from service over the Rail Corridor for cause until such time the barred individual is deemed to be qualified.

4.3. The Authority will reimburse TCW for construction, maintenance, repair and renewal costs on an annual basis upon presentation of a complete description of work done and materials used for the preceding calendar year. The Authority shall have the right to audit such billings and

to inspect work done upon reasonable notice. The Authority's obligation to reimburse TCW for such costs shall be limited to sixty percent (60%) of the trackage rights fees paid to the Authority by all users for the calendar year during which the maintenance charges were incurred, subject to an authorized minimum expenditure for maintenance cost of \$16,000 per year in any year when trackage rights fees are not sufficient to justify expenditures to that level. The authorized minimum expenditure shall be adjusted annually from \$16,000 beginning July 1, 1999 and thereafter in accordance with the formula set forth in Section 3.2 hereof. The authorized expenditures for maintenance, as limited by the foregoing, shall be known as the *Maintenance Allowance*. Any unexpended Maintenance Allowance may be drawn upon in future years for authorized expenditures, including the above minimum expenditure. TCW may draw, as additional Maintenance Allowance, an amount equivalent to a maximum of 100% of the prior year's rentals as calculated under Section 3, only for the following purposes:

1. To reach the authorized minimum expenditure for maintenance of \$16,000 per year;
or
2. To carry out necessary bridge repairs or repairs to crossing signals.

If at any time the cumulative Maintenance Allowances justified by rental payments and this Section 4.3 are not sufficient to permit the safe and continued operation of the Rail Line, the additional maintenance and repair costs will be borne by the Authority. The Authority shall have no other obligation to reimburse TCW for construction, maintenance, repair or renewal costs, including long-term rehabilitation and capital expenditures.

4.4. Prior to commencement of operations over the Rail Corridor under this Agreement, MNDOT will arrange for rehabilitation of the Rail Line to FRA Class 2 standards. Following said commencement of operations, all maintenance, rehabilitation, renewal, reconstruction, repairs and improvements, replacement, including bridges, grade crossings and signals, will be the sole

responsibility of TCW to perform, the costs of which shall be reimbursed by the Authority, in accordance with Section 4.3.

4.5. TCW shall have a right of access over other portions of the Rail Corridor within 25 feet either side of the center line of the now existing Trackage for the sole purpose of maintaining said Trackage over the Rail Corridor, except as limited by the physical proximity of fencing for the pedestrian and bicycle trails as provided for in the Kenilworth Trail (Exhibit B). Provided, however, that TCW shall not have the right to remove trees and other vegetation found more than 15 feet either side of the center line of the now existing trackage, except for purposes of wreck clearance, track repair, visibility at grade crossings, or with the consent of the Authority.

4.6. Neither Soo nor TCW shall be permitted to erect any structures in or upon the Rail Corridor without the express written permission of the Authority. The Authority shall not construct any facility in or over the Rail Corridor where the vertical distance between the top of the rail or the ground surface of the Rail Corridor, and any part of the facility, is less than 23 feet.

4.7. Unless otherwise ordered by the State, the Authority shall not pay the expenses of any public crossing of the Rail Corridor which may be opened or improved, including all expenses of crossing protection, unless such crossings are requested or opened by the Authority. The Authority shall not be responsible for any expenses incurred by Soo or TCW as a result of activities of third parties not authorized by the Authority occupying or otherwise interfering with the Rail Corridor, except as otherwise provided in this Agreement.

4.8. The Authority will permit construction of pedestrian and bicycle trails in proximity to the Rail Line as shown in Exhibit B. At any point where a trail is located within 25 feet of the center line of the Trackage, a fence along the boundary of the trail corridor will be provided, maintained and promptly repaired at no expense to Soo or TCW by the City of Minneapolis. No

trespassing and other appropriate warning signs shall be provided by the City. The Authority will require that the City agree to the terms of this provision.

SECTION 5 - TERMINATION

5.1. The Rail Corridor rights shall become effective upon execution of this Agreement, and shall continue in full force and effect until terminated by either TCW or Soo as to the respective rights of the terminating party upon thirty (30) days' written notice, which notice may be given at any time. Trackage, other facilities and all improvements to the Rail Corridor will remain the property of the Authority. The permanent easement conveyed, however, may not be terminated by the Authority, except in accordance with this Agreement.

5.2. At such time as either Railroad desires to terminate its rights over the Rail Corridor, such Railroad shall have the obligation to obtain necessary Surface Transportation Board ("STB") and other regulatory approval that may be required. The Authority agrees to cooperate in seeking regulatory approval.

5.3. TCW and Soo will vacate all use of, and permanently terminate all rights to use, the Rail Corridor no later than thirty (30) days after a new connection between the Soo Hopkins line (TCW's current operating route) and the former Minneapolis, Northfield & Southern line in St. Louis Park (MNS connection), and between the MNS and The Burlington Northern and Santa Fe Railway (BNSF connection) becomes operational, or at such time as any other feasible alternative to use of the Rail Corridor satisfactory to TCW becomes available and is operational. The MNS connection and the BNSF connection are shown on Exhibit D attached to this Agreement.

SECTION 6 - CONDITIONS PRECEDENT

Operation over the Rail Corridor is contingent upon obtaining any required regulatory and government approvals, and any necessary corporate authorization.

SECTION 7 - TAXES

7.1. The Authority agrees to pay promptly to taxing authorities when due all Taxes, if any, duly levied on the Property with respect to the Authority's ownership, leases, air rights development, and/or operations. TCW and Soo agree to pay promptly to taxing authorities when due all Taxes, if any, with respect to their use or operations duly levied, to the extent Soo or TCW's property rights have been separately assessed by the appropriate assessing authority while either TCW or Soo are conducting operations over the Rail Corridor. To the extent TCW's property right is not so separately assessed to TCW, but the underlying fee in the Rail Corridor is assessed as railroad operating property and would be exempt except for TCW's use in operations, then TCW agrees to pay all such Taxes duly levied while conducting operations over the Rail Corridor. TCW reserves the right to protest to a taxing authority any such Taxes it deems to be unfair or excessive and may in good faith litigate and settle with the taxing authority any such protested amount. This subparagraph 7.1 will apply to Soo for any period during which Soo exercises its operating rights.

7.2. The Authority shall pay without reimbursement from Soo or TCW all Taxes, if any, attributable to any passenger transportation system installed by or at the direction of the Authority.

SECTION 8 - ASSIGNMENT RIGHT

Soo may admit a third-party operator as assignee of Soo's common carrier freight service obligation, or in connection with the sale of, or merger of, all or most of its railroad system, subject to the consent of the Authority, which shall not be unreasonably withheld, and subject to orders of the Surface Transportation Board ("STB"). TCW may admit a third-party operator as assignee of TCW's common carrier freight service obligation in connection with the sale of, or merger of all or most of its railroad system, subject to the consent of the Authority, which shall not be unreasonably withheld, subject to the orders of the STB.

SECTION 9 - OBLIGATIONS FOLLOWING TERMINATION.

Upon termination of all rights to the Rail Corridor, the parties hereto are relieved from any and all obligations relating thereto, except for any obligations which may have accrued or which may have been incurred prior to the date of such termination or in accordance with the terms of this Agreement.

SECTION 10 - LIABILITY AND ENVIRONMENTAL INDEMNIFICATION.

10.1. TCW agrees to defend, indemnify and hold harmless the Authority, its commissioners, officers, agents and employees from any liability, claims, damages, costs, judgments, or expenses, including reasonable attorneys' fees, resulting directly or indirectly from any act or omission of TCW, its agents, employees, customers, tenants, or invitees, occurring on or from the Rail Corridor after the effective date of this Agreement, except that portion of liability caused by, or contributed to by, acts or omissions of the Authority, its agents, employees and invitees, notwithstanding the provisions of Section 12.

10.2. Soo agrees to defend, indemnify and hold harmless the Authority, its commissioners, officers, agents and employees from any liability, claims, damages, costs, judgments, or expenses, including reasonable attorneys' fees, resulting directly or indirectly from any act or omission of Soo, its agents, employees, customers, tenants, or invitees, occurring on or from the Rail Corridor after the effective date of this Agreement, except that portion of liability caused by, or contributed to by, acts or omissions of the Authority, its agents, employees and invitees, notwithstanding the provisions of Section 12.

10.3 The Authority agrees to defend, indemnify and hold harmless Soo and TCW, their respective officers, agents and employees from any liability, claims, damages, costs, judgments, or expenses, including reasonable attorneys' fees, resulting directly or indirectly from any act or omission of the Authority, its commissioners, officers, agents and employees, tenants, customers or

invitees occurring on the Rail Corridor after the effective date of this Agreement, except that the Authority shall not be required to defend, indemnify or hold TCW harmless to the extent the liability is caused or contributed by acts or omissions of TCW, and the Authority shall not be required to defend, indemnify or hold Soo harmless to the extent the liability is caused or contributed by acts or omissions of Soo, notwithstanding the provisions of Section 12.

10.4 Railroads. In the event Soo commences operations on the Rail Corridor, Soo and TCW shall allocate liability as between them only as follows.

Definition: Whenever the expression "Loss or Damage" is used in this Section 10.4, it means all costs, liabilities, judgments, fines, fees (including without limitation reasonable attorneys' fees and disbursements) and expenses of any nature arising from or in connection with death of or injury to persons, including without limitation employees of the Railroads, or damage to or destruction of property including without limitation property of the Railroads or the Rail Corridor, in connection with operations of the Railroads over or on the Rail Corridor.

Definition: Whenever the expression "proportionally by the Railroads" is used in this Section, it means that expenses will be borne in proportion to the total trains handled by each Railroad over any part of a segment of the Rail Corridor on which the Loss or Damage occurs during the three calendar months prior to the month of the occurrence, or if the occurrence is in any of the first three months of operation under this Agreement, such lesser period as precedes the date of occurrence. For the purposes of determining proportionality as herein provided, light engines shall not be considered a trains. In case of conflict with other provisions of this Agreement, the provisions of Section 10.4 shall control as between the Railroads.

10.4(1) The employees of either Railroad while operating, maintaining or directing operation along the Rail Corridor shall not be considered as joint employees but will remain the sole employees of either Railroad. However, when any sole employee of TCW or Soo is engaged in the

direct activity of maintaining, repairing, renewing, removing, or inspecting the Rail Corridor, or in dispatching, giving orders for or directing the movement of trains over the Rail Corridor for the common benefit of the Railroads, and Loss or Damage to TCW, Soo or a third party, arises out of such service for the common benefit of the Railroads, then the expense of the Loss or Damage shall be borne proportionally by the Railroads; provided that the terms of this Section 10.4(1) shall control in the case of conflict with the provisions of Section 10.4(3) below, but in the case of conflict with Section 10.4(2) below, that Section shall control.

10.4(2) Notwithstanding anything else contained in this Agreement, liability for Loss or Damage resulting from or in connection with the operation of locomotives, trains or cars of either Railroad, or in connection with the presence on the Rail Corridor of locomotives, trains, cars or property of either Railroad, shall be borne and paid by the Railroads as follows:

(a) When the same shall involve the train or equipment of only one of the Railroads, regardless of any third party involvement, all Loss or Damage, including but not limited to, restoration and repair of the Rail Corridor and third party persons or property will be borne by that Railroad.

(b) When the same shall involve the trains or equipment of both Railroads, Loss or Damage shall be borne by each Railroad as to its own employees, property, or property in its custody (except for damage to the Rail Corridor). As to third party persons or property and the Rail Corridor, Loss or Damage shall be borne equally by the Railroads.

10.4(3) Liability for Loss or Damage not involving the train or equipment of either Railroad, or where the identity of the train or equipment involved is unknown, shall be borne and paid by the Railroads as follows:

(a) Liability for Loss or Damage shall be borne by each Railroad as to its own employees (except for employees performing services for the common benefit of the

Railroads), property (other than the Rail Corridor), or property in its custody, but as to third party persons or property, employees performing service for the common benefit of the Railroads, and the Rail Corridor, the cost of Loss of Damage shall be borne proportionally by the Railroads.

(b) Third party claims for Loss or Damage arising out of the killing or injuring of livestock or the setting of fires on or along the Rail Corridor, when caused by the locomotive, train, car or fusee of one of the Railroads, shall be handled or settled by the Railroads whose locomotive, train, car or fusee caused such Loss or Damage, but if it cannot be determined whose locomotive, train or car caused such Loss or Damage, the claim will be handled or settled on behalf of both Railroads in the first instance by TCW, and the Loss or Damage will then be borne equally by the Railroads.

10.4(4) Each Railroad agrees that it will pay for all Loss or Damage, the risk of which it has herein assumed, the judgment of any court to the contrary notwithstanding, and will forever indemnify and save harmless the other Railroad, its successors and assigns, from such payment; provided, however, the indemnifying Railroad shall be assigned any rights which the indemnified Railroad may have against any third party or parties for recovery of any indemnified amount.

10.4(5) In the event that both Railroads hereto shall be liable under the Agreement for Loss or Damage, and the same shall be compromised and settled by voluntary payment of money or valuable consideration by one of the Railroads, the settling Railroad shall obtain a valid and enforceable release from liability for TCW and Soo Line Railroad Company, Soo Line Corporation and their Parents, Subsidiaries and Affiliated Companies, and all of their Officers, Agents, and Employees, etc. Neither Railroad shall make any such compromise or settlement in excess of \$5,000 without prior, written authority of the other Railroad having liability, but any settlement made by

one Railroad in consideration of \$5,000 or less shall be a settlement releasing all liability of both Railroads and shall be binding upon both Railroads.

10.4(6) In case a lawsuit or lawsuits shall be commenced against either Railroad hereto for or on account of any Loss or Damage for which the other Railroad would be solely or jointly liable under this Agreement, the Railroad thus sued shall give the other Railroad timely written notice of the pendency of such suit, and thereupon the Railroad so notified shall assume or join in the defense thereof, and if the Railroad so notified is liable therefore under this Agreement, such Railroad shall save harmless the Railroad so sued from all Loss or Damage in accordance with the liability allocation set forth in this Agreement. Neither Railroad shall be bound by any judgment against the other Railroad unless it shall have been so notified and shall have had reasonable opportunity to assume or join in the defense of the action. When so notified, and said opportunity to join in the defense of the action has been afforded, the Railroad so notified shall to the extent of its liability under this Agreement be bound by such judgment.

10.4(7) If trains, locomotives or cars of Soo are wrecked or derailed on the Rail Corridor, TCW shall arrange to pick up and remove said equipment, and Soo shall bear the entire cost of such service (except to the extent that the allocation of liability in this Agreement provides otherwise), except that if TCW does not have the necessary personnel or equipment, Soo may furnish both as required, at its own expense; provided, however, that in the case of a minor derailment where the derailed equipment can be promptly rerailed by rerailers or blocking by Soo's employees, then in such event Soo may, at its sole expense, rerail such equipment unless TCW's supervisory employees direct otherwise.

10.4(8) It is understood and agreed that a number of vehicular crossings on the Rail Corridor presently exist, or may be constructed. Soo agrees to accept all crossings in whatever condition they may be during the term of this Agreement and will not assert any claim, demand or cause of action

against TCW and will hold TCW harmless from any claim, demand or cause of action arising out of any crossing accident on the Rail Corridor in which the engines, cars or trains of Soo only are involved; provided, however, that nothing in this Section 10.4(8) shall relieve TCW or Soo from liability arising from its gross negligence or intentional acts.

10.5. Soo shall remediate any environmental pollution or contamination on the Rail Corridor that is in violation of any applicable environmental statute, ordinance, rule or regulation which first occurred during its period of use and was caused by Soo or its invitees. Soo shall bear the expense of all practices or work, preventative, investigative or remedial, which may be required because of any such conditions on the Rail Corridor caused by Soo, or its invitees during Soo's period of use, including conditions caused by Soo or its invitees which affect other lands. Soo expressly agrees that the obligations it hereby assumes shall survive cancellation of this Agreement. Soo agrees that statutory limitation periods on actions to enforce these obligations shall not be deemed to commence until the Authority discovers any such conditions and Soo hereby knowingly and voluntarily waives the benefits of any shorter limitation period.

10.6. TCW shall remediate any environmental pollution or contamination on the Rail Corridor that is in violation of any applicable environmental statute, ordinance, rule or regulation which first occurred during its period of use and was caused by TCW or its invitees. TCW shall bear the expense of all practices or work, preventative, investigative or remedial, which may be required because of any such conditions on the Rail Corridor caused by TCW, or its invitees during TCW's period of use, including conditions caused by TCW or its invitees which affect other lands. TCW expressly agrees that the obligations it hereby assumes shall survive cancellation of this Agreement. TCW agrees that statutory limitation periods on actions to enforce these obligations shall not be deemed to commence until the Authority discovers any such conditions and TCW hereby knowingly and voluntarily waives the benefits of any shorter limitation period.

10.7. Authority shall have the right, but not the duty, to enter upon the Rail Corridor from time to time as set forth below to inspect the Rail Corridor for environmental contamination and in the course thereof to conduct soil and groundwater testing and to perform environmental investigation, remediation or mitigation. Authority may enter the Rail Corridor upon 24 hour notice to TCW and Soo, and may enter the Corridor in the case of an emergency, without prior notice, but the Authority shall give TCW and Soo immediate notice of the emergency. Authority shall conduct any such inspections or testing so as to not to interfere with Soo's and TCW's operations and shall provide sufficient notice of actions that might impair safe train operation. Authority's entry on to the Rail Corridor pursuant to this paragraph shall not relieve Soo's and TCW's obligations to pay rent under this Agreement.

10.8. At the request of the Authority, Soo (if Soo commences operations over the rail corridor) and TCW shall pay for the services of a state-approved contractor to sample what appears to be any visibly contaminated areas of the Rail Corridor for which they respectively appear to be responsible. For any contaminated areas, Soo's and TCW's respective contractor shall provide remediation recommendations to the Authority, and shall provide remediation as may be required by law. Copies of the results shall be forwarded to the Authority to ensure that the Rail Corridor is returned to the Authority reasonably free of contamination and in compliance with all applicable environmental law, ordinances, regulations and requirement. The provisions of this paragraph shall survive the termination of this Agreement.

Notwithstanding the foregoing, Soo and TCW is not responsible, by virtue of the terms of this Agreement, for any testing or sampling costs resulting from contamination existing on the Rail Corridor prior to their respective use or occupancy of the Rail Corridor, or which was not caused by TCW or Soo or their invitees, or where no contamination was found.

10.9. Each party shall give the other parties prompt written notice of any and all claims or suits arising from operations on or about the Rail Corridor.

10.10. Notwithstanding the foregoing, the terms of this Agreement are not to be construed as, nor operate as, waivers of the Authority's statutory or common law immunities or limitations on liability, including, but not limited to, Minnesota Statutes Chapter 466. Further, the Authority's obligations set forth in this Section and otherwise in this Agreement, are expressly limited and governed by the provisions of Minnesota Statutes Chapter 466, Minnesota Statutes Chapter 604, and any other applicable law or regulation.

SECTION 11 - INSURANCE.

11.1 TCW, at its own cost or expense, will procure and maintain in effect during the term of this Agreement, a policy or policies of insurance covering the liability to which TCW is or may be subject under this Agreement. Such policy shall name Soo as an additional insured which shall provide the following total coverage:

Third party liability coverage covering injury to or death of persons and damage to property in any one occurrence in the amount of not less than \$10,000,000 (ten million dollars) with a maximum deductible of \$100,000 (one hundred thousand dollars) per occurrence. Such coverage shall include all employees and shall insure named insureds against workmen's compensation and Federal Employers' Liability Act claims. Soo agrees to cooperate in the processing of insurance claims.

11.2. If the insurance procured by TCW, pursuant to this Section, takes the form of a claims-made policy and is cancelled or allowed to expire without renewal, TCW may provide evidence of insurance that provides per occurrence and annual aggregate limits of not less than those

required pursuant to Section 11.1 Such coverage must be retroactive to the original inception date of the cancelled or non-renewed policy.

11.3. At any time not less than sixty (60) days prior to an anniversary date of this Agreement, Soo, in consideration of current and reasonably anticipated claims and litigation costs, may notify TCW of Soo's intent to increase the amount of insurance required by this Agreement or to require that the terms and conditions of such insurance be modified. Should TCW object to any such increase or modification, TCW and Soo will attempt in good faith to negotiate a resolution of their disagreement. If TCW and Soo are not able to agree and such disagreement continues for thirty (30) days past the anniversary date of this Agreement, then the matter or matters in disagreement will be submitted to arbitration in accordance to the rules of the American Arbitration Association.

11.4. Each policy of insurance obtained by TCW pursuant to the requirement of this Section will contain provisions requiring that the insurance carrier give Soo, through the Soo's Director of Insurance, at least thirty (30) days' notice, in writing, of any proposed policy cancellation or any modification of the terms and conditions of any policy of insurance TCW is required to provide under this Section.

11.5. The terms and conditions of each policy of insurance obtained by TCW to satisfy the requirements of this Section will be subject to the approval of Soo, which approval shall not be unreasonably withheld or delayed. TCW will furnish to Soo's Director of Risk Management an accurate copy of each policy of insurance obtained pursuant to the requirements of this Section. Neither compliance with this requirement nor Soo's approval of the terms and conditions of any such policy will in any way limit or modify the obligation of TCW to provide the specific insurance coverage required by this Section.

11.6. In the event TCW fails to maintain the levels of insurance coverage required in this Section, or fails to properly notify Soo of said coverage, after giving TCW written notice of

noncompliance and then (10) days from receipt of such notice within which to comply, Soo may require TCW to suspend operations over the Rail Corridor until such time as TCW complies with the insurance requirements hereunder or otherwise provides Soo evidence of financial responsibility acceptable to Soo in its sole discretion.

SECTION 12 - REPRESENTATIONS AND WARRANTIES

Soo and TCW accept the Rail Corridor and the Rail Line in an "as is" condition, with no express or implied representations or warranties by the Authority as to the physical condition or fitness or suitability for any particular purpose, express or implied, except as otherwise provided in this Agreement. Soo and TCW are responsible for, had ample opportunity to inspect the Rail Line and are familiar with the same. As between the parties, Soo and TCW acknowledge the risks to their rail operations associated with the proximity of the Rail Line to the pedestrian and bicycle trails adjacent to the Rail Corridor. Soo and TCW do not assume liability for damages to the property of third persons or for injury to third persons by reason of Soo or TCW rail operations on the Rail Corridor nor waive any claims they might have against such third persons.

SECTION 13 - SURVIVAL

All of the terms of this Agreement, including all warranties, representations, and indemnification given by each party to this Agreement, all of which are relied upon by each party, shall survive and be enforceable after the execution of this Agreement and any subsequent transfer of title of the Property.

SECTION 14 - LAWS GOVERNING

This Agreement shall be governed to the extent applicable and not preempted by federal law, and the parties agree to be bound, by the laws of the State of Minnesota; and the parties agree to comply with or abide by all laws relevant to this Agreement governing their respective operations in the State of Minnesota.

SECTION 15 - REMEDIES FOR BREACH

Should Soo or TCW default in any payments to be made hereunder or fail to faithfully perform any of their covenants herein or violate any term or condition of this Agreement and, if such default, failure or violation shall continue for a period of sixty (60) days after the Authority shall have given Soo or TCW notice of an "event of default", the Authority may thereupon exclude Soo or TCW, as the case may be, from all the rights and privileges granted to it hereunder, and Soo and TCW shall have no claim or depend upon the authority at law or in equity on account of such exclusion. The rights and remedies granted to the parties in this Section 14 are intended to be cumulative to all other rights and remedies available to the parties (whether under this Agreement, at law, in equity or otherwise); accordingly, the exercise by any party of any such right or remedy shall not preclude it from exercising any other such right or remedy.

SECTION 16 - ASSIGNMENT; BINDING EFFECT

The terms and provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns, including without limitation, any entities into or by which either of the parties is merged, combined, reorganized or acquired.

SECTION 17 - NOTICES

Unless explicitly stated to the contrary elsewhere in this Agreement, all notices and other communications required or contemplated by this Agreement must be in writing and shall be deemed given when delivered in legible form to the business address of the party to whom addressed. The business addresses of the parties are as follows:

SOO:

Mailing Address: P.O. Box 530
Minneapolis, Minnesota 55440
Attention: Director - Commercial Development

Delivery Address: 1710 Soo Line Building
105 South 5th Street
Minneapolis, Minnesota 55402
Attention: Director - Commercial Development

Fax: 612/347-8064
Attention: Director - Commercial Development

TCW:

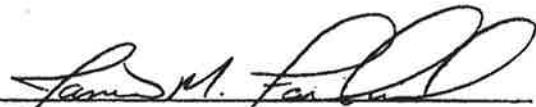
Mailing Address: 2925 - 12th Street East
Glencoe, MN 55336
Attention: President
Fax: 320/864-7220

THE AUTHORITY:

Mailing Address: Hennepin County Regional Railroad Authority
and Delivery A2300 Government Center
Minneapolis, MN 55487-0230
Attention: Executive Director
Fax: 612/348-8228

Notices not given in the manner or within the time limits set forth in this Agreement are of no effect and may be disregarded by the party to whom they are directed. Either party may change its business address, for notice purposes, by giving notice of the change to the other party.

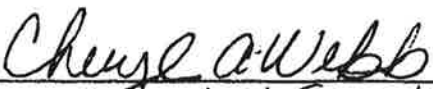
ATTEST:


Title: MGR- CONTRACTS

SOO LINE RAILROAD COMPANY

By: 
Its: VP

ATTEST:


Title: Assistant Secretary

**TWIN CITIES & WESTERN RAILROAD
COMPANY**

By: 
Its: Chairman

Approved as to Form


Assistant Hennepin County Attorney

Date: 8/5/98

Approved as to Execution


Assistant Hennepin County Attorney

Date: 8-6-98

**HENNEPIN COUNTY REGIONAL
RAILROAD AUTHORITY**

By: 
Its: Chair

and

By: 
Its: Executive Director

RAILROAD EASEMENT

(reserved for valuation and tax data)

(reserved for recording data)

STATE DEED TAX DUE HEREON: \$ _____

Date: August 10, 1998

FOR VALUABLE CONSIDERATION, the Hennepin County Regional Railroad Authority, a political subdivision and local government unit under the laws of the State of Minnesota, Grantor, hereby conveys and quitclaims to the Twin Cities and Western Railroad Company, a corporation under the laws of the State of Minnesota, Grantee, a railroad easement over real property in Hennepin County, Minnesota, the terms of which are set forth in Trackage Rights Agreement between the Twin Cities and Western Railroad Company, Soo Line Railroad Company and the Hennepin County Regional Railroad Authority dated August 10, 1998. The real property is described as follows:

(Legal description on Exhibit A)

Hennepin County Regional Railroad Authority

By Mary Tamborino
Its Chairman

By Jeff Spartz
Its Executive Director

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

The foregoing was acknowledged before me this 10th day of August, 1998, by Mary Tamborino and Jeff Spartz, the Chairman and Executive Director of Hennepin County Regional Railroad Authority, a political subdivision and local government unit under the laws of Minnesota, on behalf of the Authority.

Mary Ellen Hudson
Notary Public

This instrument was drafted by:

Hennepin County Regional Railroad Authority
417 North Fifth Street, Suite 320
Minneapolis, MN 55401-1362

Tax Statements for the real property
described in this instrument should be sent to:

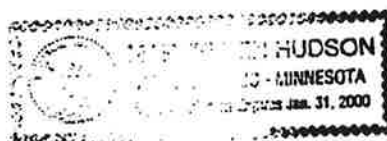


EXHIBIT A

Description of Railroad Easement

A strip of land fifty feet in width lying 25 feet on either side of the centerline of the railroad tracks extending from the point of connection with Soo Line trackage at or near Chicago North Western Railway milepost 16.2 in the City of St. Louis Park, easterly to Chicago North Western Railway milepost 13.7 at a point of connection with Burlington Northern Santa Fe Railway in the City of Minneapolis except as the width is limited by the Trackage Rights Agreement between the Twin Cities and Western Railroad, Soo Line Railroad Company and the Hennepin County Regional Railroad Authority dated *Aug. 10, 1998*.



EXHIBIT

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

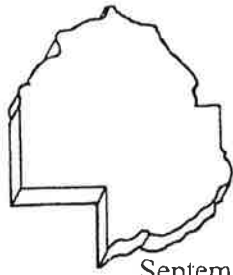
METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT A

VERIFIED STATEMENT OF MR. MARK WEGNER

ATTACHMENT 5



HENNEPIN COUNTY REGIONAL RAILROAD AUTHORITY

417 North Fifth Street, Suite 320, Minneapolis, MN 55401-1362 (612) 348-9260
FAX: (612) 348-9710

September 30, 2010

Mr. Mark Wegner,
President,
Twin Cities and Western Railroad Company,
2925 12th Street East,
Glencoe, MN.
55336

Dear Mr. Wegner,

RE: Kenilworth Corridor

This is further to our meeting September 3, 2010 at which time TCW made a request for the total replacement of the rail within the corridor. Since that time we have considered TCW's request, have revisited the agreement between TCW and Hennepin County and participated on a track geometry inspection on September 23, 2010.

After due consideration, Hennepin County is not inclined to undertake the wholesale replacement of the track but will continue to fulfill its responsibilities as provided for in the agreement with TCW. We will continue to work with TCW in the appropriate upkeep and maintenance of the corridor. Hennepin County's record of providing resources for the upkeep and maintenance over the past several year demonstrates our commitment. We see no changes in either this relationship or practice.

We are always available to discuss matters relating to our relationship.

Yours very truly,

J. Michael Noonan,
Senior Administrative Manager,
Real Estate Division

BOARD OF COMMISSIONERS

Peter McLaughlin
Chair

Mike Opat

Mark Stenglein

Gail Dorfman

Randy Johnson

Jan Callison

Jeff Johnson

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT A

VERIFIED STATEMENT OF MR. MARK WEGNER

ATTACHMENT 6

November 29, 2010

Subject: Kenilworth Track Assessment

To: Susan Aylesworth, Manager
Railroad Administration – Mn/DOT

From: Jim Brandt
MN State Track Inspector

On November 2, 2010 I inspected the Kenilworth track, a 2.5 mile segment of track owned by the Hennepin County Regional Rail Authority. This line segment comes off the BNSF's Wayzata Sub at Cedar Lake Jct. and changes into Canadian Pacific owned track at Bass Lake in St Louis Park. The Twin Cities & Western railroad has operating rights over this line and is responsible for the inspection and maintenance of track. .

Accompanying me on my foot inspection was Tim Jeske – TCW Director of Mechanical and Maintenance, Bob Wagner – TCW Track Inspector and Dean Michalko – Senior Administrative Manager, Hennepin County. The entire segment was walked starting at Cedar Lake Jct.

This track is operated at 10 MPH, FRA class 1 and maintained to FRA class 2 standards. Alinement is generally curved track with 10 curves in this 2.5 segment ranging from 1 – 6 degree. The grade ascends east – west with the maximum grade 0.75 %.

Train operations consist of 4 trains per day, one roundtrip between Hopkins and the CP Pigs Eye yard and one (1) roundtrip Hopkins – Union Pacific yards. In addition to the two (2) regular trains the BNSF delivers a unit coal train approximately every other week. Locomotive power consists of 6-axle units with 2 units assigned to each TCW train and 3 BNSF units assigned to the coal trains. The track is rated for 286,000 loading.

The TCW reports that over 30,000 carloads are moved over this segment annually with grain, coal and ethanol the majority of the traffic. That amount includes the traffic on the Minnesota Prairie Line (MPL) which the TCW also serves. A significant increase in traffic is expected on the MPL railroad next year as a major rehab project is planned that will upgrade the line to 286,000 # loading and allow 100-car unit train movements at the Winthrop ethanol and fertilizer plants.

The FRA geometry car was operated over this segment this fall and no exceptions were taken. However, there were some areas where rail cant was marginal. The track condition is as follows.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT A

VERIFIED STATEMENT OF MR. MARK WEGNER

ATTACHMENT 7

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION (FRA)

INSPECTION REPORT

OMB Approval No.: 2130-0509

Inspector's Name Broski, Chad		Inspector's Signature		Inspector's ID No 11790	Report No 74	Date yy mm dd 2012 05 17		
Railroad/Company Name & Address HENNEPIN COUNTY REGIONAL RAIL 701 FOURTH AVENUE SOUTH SUITE 400 MINNEAPOLIS MN 55415				R/C R	Division SYSTEM	RR/Co Representative (Receipt Acknowledged) Name PHIL ECKHERT Title DIRECTOR OF TRANSIT Signature _____		
From City MINNEAPOLIS	Codes 4760	Destination City & County			Codes 4760	From Latitude		
State MN	27	City MINNEAPOLIS			4760	From Longitude		
County HENNEPIN	C053	County HENNEPIN			C053	To Latitude		
Mile Post From 0014.40 To 0015.60		Inspection Point CEDAR LAKE SPUR				To Longitude		
Activity Code MTW	MSB	RWP						
Units 1	1	1						
Sub Units		6						

Item	Initials/Milepost	Equipment/Track #	Type/Kind	49 CFR/USC	Defect	Subrule	Speed	Class	Train #/Site	SNFR*	RCL**	# of Occ.***	Activity Code
1			M	213	0037	CI	10	1		N	N	1	MTW
Description VEGETATION INTERFERES WITH RAILROAD EMPLOYEES PERFORMING NORMAL TRACKSIDE DUTIES AT VARIOUS LOCATIONS ALONG THE CEDAR LAKE SPUR													
Violation Recommended ☐ Yes ☒ No				Latitude:		Longitude:							
Written Notification to FRA of Remedial Action is: ☐ Required ☒ Optional				Railroad Action Code		Date(mm/dd/yyyy):		Comments on back?					
2										N	N	0	
Description - [** Comment to Railroad/Company **] MY WALKING INSPECTION INCLUDED THE FOLLOWING INDIVIDUALS: BLAIN LUCK, FRA RAIL INTEGRITY SPECIALIST, TIM JESKE, TC&W DIRECTOR OF MECHANICAL AND MAINTENANCE; BOB WAGNER, TC&W TRACK INSPECTOR; DEAN MICHALKO, HENNEPIN COUNTY SENIOR ADMINISTRATIVE MANAGER; STEVE TEDERSON, HENNEPIN COUNTY SENIOR TECHNICIAN. TC&W REPORTS OVER 30,000 CARLOADS TRAVERSE THE CEDAR LAKE SPUR WHICH INCLUDES HAZMAT TRAINS (ETHANOL) AND UNIT COAL TRAINS. THE 2.5 MILE SEGMENT IS GENERALLY CURVED TRACK WITH 4 CURVES THAT APPEAR TO AVERAGE 6 DEGREES. THE CEDAR LAKE SPUR IS ADJACENT TO THE MINNEAPOLIS KENWOOD BIKE TRAIL, ALONG WITH NUMEROUS LAKES AND PARKS THAT ARE WITHIN 1/4 MILE, AS IT MAKES ITS WAY THROUGH THE DENSE POPULATION FROM MINNEAPOLIS TO THE ST. LOUIS PARK SUBURB. THERE ARE HOMES AND APARTMENT BUILDINGS DIRECTLY ADJACENT TO THE RAILROAD PROPERTY													
Violation Recommended ☐ Yes ☒ No				Latitude:		Longitude:							
Written Notification to FRA of Remedial Action is: ☐ Required ☒ Optional				Railroad Action Code		Date(mm/dd/yyyy):		Comments on back?					

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION (FRA)

INSPECTION REPORT
(Continuation)

OMB Approval No. 2130-0509

Inspector's ID No 11790	Report No 74	Report Date 5/17/2012
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Item	Initials/Milepost	Equipment/Track #	Type/Kind	49 CFR/USC	Defect	Subrule	Speed	Class	Train #/Site	SNFR*	RCL**	# of Occ ***	Activity Code
3										N	N	0	

Description - [** Comment to Railroad/Company **]

THE CONVENTIONAL RAIL IS GENERALLY 100 LB AND MANUFACTURED IN THE 1920'S AND 30'S. THERE WAS A FRA REPORTABLE DERAILMENT IN OCT 2010 FOR A BROKEN RAIL WHICH WAS REPORTED TO COST \$20,083 IN EQUIPMENT AND TRACK DAMAGES. THERE WAS A RAIL DETECTOR SURVEY IN APRIL 2011 WHICH IDENTIFIED ELEVEN DEFECTS WHICH INCLUDED TWO 80% DETAIL FRACTURES AND SIX HEAD WEB SEPARATIONS THAT MEASURED FROM 2 TO 6 INCHES LONG. THERE IS SIGNIFICANT LATERAL AND VERTICAL RAIL HEAD WEAR IN THE CURVES COMBINED WITH SEVERE PLASTIC FLOW OR MECHANICAL DEFORMATION OF THE RAIL HEAD. PLASTIC FLOW IS A RESULT OF WHEEL/RAIL CONTACT STRESS THAT IS EXCEEDING THE MATERIAL STRENGTH OF THE RAIL STEEL. RAIL DEFECTS NORMALLY ORIGINATE FROM THE RAIL MANUFACTURING PROCESS, CYCLICAL LOADING, IMPACT FROM ROLLING STOCK, RAIL WEAR, AND PLASTIC FLOW. THUS, TO PREVENT FUTURE PROPERTY DAMAGE AND POSSIBLE INJURIES AND/OR DEATH BECAUSE OF A BROKEN RAIL DERAILMENT, I HIGHLY RECOMMEND REPLACING THE CURRENT 100 LB RAIL.

Violation Recommended	☐ Yes	☒ No	Latitude:	Longitude:
Written Notification to FRA of Remedial Action is	☐ Required	☒ Optional	Railroad Action Code	Date(mm/dd/yyyy):
				Comments on back?

Ties

Ties are mixed grade 3 (6" x 8") and grade 4, (7" x 8") softwood/hardwood ties in 8'6" lengths. The tie condition is generally good but there are some marginal joint ties and few areas where there are 3-4 bad ties in a row. The tie condition is well within FRA standards but with the 286,000 loading and light rail section on this line there should be no more than 2 bad ties in a row and at least 2 good ties in the joint area.

Plates are single shoulder 10 & 11 inch plates. Due to the small plate size (bearing area) and the heavy loads the tie plates were cutting into the ties at several locations. This condition is where the tie plate digs into the tie, crushing the wood fibers. This condition will get progressively worse over time and eventually will cant the rail outward resulting in wide gage and in extreme cases, rail "roll-over". This is not a problem now but something that will have to be watched as this condition will worsen and will deteriorate at an accelerated rate with 286,000 loading and 6-axle locomotives.

Anchoring

Rail anchors are installed to maintain alinement and prevent rail movement and buckled track. The majority of the track is either not anchored or the anchors are wore out allowing the rail to "run". At the locations where anchors have been applied only every 4th tie had been anchored.

With the tonnage on this line, standard practice would be to box-anchor every other tie. To be effective the track requires a full ballast section and good tie condition with rail anchors applied against sound ties.

Ballast

The ballast section is standard grade 4 granite with the ballast distributed as required. There appears to be approximately 6 inches of ballast under the ties. For 286,000 loading at least 10 inches of ballast is recommended. Track surface and alinement is currently good.

Rail

The rail is a mixture of 100# rail sections manufactured by several steel mills with a good share of the rail manufactured in Canada. Rail mills included Lackawanna (1840-1922), Carnegie (1870 – 1936) Inland (1893-1998) and Mackie, Algoma and Dominion (Canadian rail). The rail was manufactured in 1922 – 1936, with a short stretch of Inland Steel dated 1951.

The Inland steel is the only rail that is control-cooled. To solve the problem with internal defects and eliminate the primary cause of derailments (shatter cracks, thermal ruptures) a "control-cooled" process was developed that was adopted by American steel mills in 1936-1938.

Rail manufactured prior to 1936 is known for internal defects and shattering under load, which was reported as the cause in a recent derailment on this line.

Before a standard rail section was adopted the steel mills manufactured rail in accordance with each railroad's specifications and as a result rail height, head width and bolt-hole dimensions and spacing varied. In 1900 there were 27 rail weights and 119 patterns. Attached are 2 tables showing the steel mills that manufactured the 100# rail installed in this track and the various specifications for that rail section.

We found several locations where the mismatch at the rail ends measured $\frac{3}{16}$ inch, just under the $\frac{1}{4}$ inch allowed by the FRA. The mismatched rail was a result of the manufacturers rail spec's and/or wear. We also found locations where the TCW had recently changed out a broken rail and could install only one (1) bolt in one rail end because the bolt holes in the 100# replacement rail were drilled 6 inches apart and the bolt holes in the existing 100# rail/joint bars were $5\frac{1}{2}$ inches apart. The FRA allows only 1 bolt per rail end in class 1 track but considering the traffic on this line two (2) bolts would be required as one (1) bolt would break under pressure resulting in the rails pulling apart, which is a FRA defect and potential hazard. During the inspection I saw at least 50 new bolts installed where bolts had already snapped.

Curve-worn rail is common on the high-side of the curves (outer rail) with side wear measuring as much as $\frac{5}{8}$ inch. This is a problem when changing out a broken rail and replacing it with no.1 relay rail that has maximum wear of $\frac{1}{8}$ inch. The maximum mismatch allowed by the FRA is $\frac{1}{4}$ inch and to comply with that standard the TCW has to weld and/or grind several feet of rail whenever changing out rail on the high-side of the curve.

For 100# rail AREMA (American Railway Engineering and Maintenance of Way Assoc.) recommends a maximum side wear of $\frac{1}{8}$ inch (no.1 relay) for Main lines and $\frac{3}{16}$ inch (no. 2 relay) for Branch lines. With the majority of the metal located in the head of the rail the girder strength is reduced as the rail is worn away and the chances of breakage is greater. The girder strength of some of this rail is comparable to 85-90 # rails.

Several minor surface defects were observed such as shelling, flaking and checking, which are commonly found in curved track, and which do not require immediate replacement but should be watched. Those defects will not be picked-up during rail testing but a detail fracture may develop, which is a dangerous defect because failure occurs before the defect becomes visible and it tends to occur in several places in the same rail. Growth of detail fractures and fissures depends on the loading.

In conclusion, although this rail has served its purpose for 80+ years, this rail section should be upgraded to handle today's traffic. Considering the curved track, location, tonnage and the amount of haz/mat on this line I strongly recommend that the rail be replaced with a rail section of 115# or heavier. With the exception of the rail, this track is generally in good condition and well maintained which was evident by the number of repairs that were observed during the inspection

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT A

VERIFIED STATEMENT OF MR. MARK WEGNER

ATTACHMENT 8

DRAFT Memorandum

Date: June 3, 2016

Subject: TCWR/SPO Technical Position Statement - **DRAFT**

Background

Twin Cities & Western (TCWR) is a regional railroad company that operates freight rail service on the Bass Lake Spur (BLS), Kenilworth Corridor (KC) and a portion of BNSF's Wayzata Subdivision through overhead Trackage Rights.

The Southwest LRT Project Office (SPO) has engaged TCWR staff in technical discussions beginning in early 2013 to better understand the conditions that would facilitate successful joint corridor use of freight and passenger operations.

The proposed Southwest LRT (SWLRT) project is not final and is still under environmental review and the project is subject to change.

The Metropolitan Council, through these discussions and coordination does not intend that they will prejudice or compromise any state or federal environmental review or other legal requirements. These discussions and coordination do not limit the project design alternatives that the Council may undertake if the proposed SWLRT project proceeds to construction. Any previous agreements based on discussions between TCWR and the SPO will be honored through construction unless an alternate agreement is made and agreed to in writing.

As a result of the SWLRT project, ~16,000' (~13,000' of siding east of highway 169 and ~3,000' of siding in Hopkins) of siding capacity for freight rail transportation will be lost. This capacity will be replaced at a location agreeable to TCWR before any SWLRT construction activities begin or any other project related activities that would impact the freight rail access to these siding locations.

The Council will not take final action on this matter unless the Council proceeds with the project after the FTA's record of decision and the Council's determination of adequacy.

The proposed SWLRT Project plans incorporate the following, consistent with the technical discussions to date:

1. With respect to the general layout of the single track alignment as compared to existing conditions, TCWR would:
 - a. Continue to operate freight service on a single contiguous line on the BLS, KC and a segment of BNSF's Wayzata Subdivision;
 - b. From STA 33+00 to STA 59+25, operate freight service on single contiguous line shifted up to 13 feet south of the existing main line to accommodate the light rail in the BLS;
 - c. From STA 59+25 to STA 234+00, operate freight service on single contiguous line shifted up to 48 feet north of the existing freight track to accommodate the light rail alignment in the BLS;
 - d. From STA 300+00 to STA 322+00, operate freight service on single contiguous line shifted up to 6 feet from the existing freight track to accommodate the light rail alignment in the KC;
 - e. From STA 322+00 to STA 343+42, operate freight service on single contiguous line shifted up to 40 feet north of the existing freight track to accommodate the light rail alignment in the KC; and
 - f. From STA 234+00 to STA 262+05 (note station equation: STA 300+00 ahead = STA 262+05 back), and from STA 343+42 to STA 393+00, operate freight service on single contiguous line in the existing freight track location in the KC.



2. With respect to the general spacing conditions in the proposed condition, the single contiguous line clearances to adjacent features in the shared corridor in the BLS and KC would be (clearances reported are the clearances as reviewed and approved in the plans submitted to TCWR. Any change from the specifically approved clearances must be individually approved prior to construction):
 - a. A typical spacing of 33 feet with a minimum of 25 feet between the freight track center and the nearest adjacent light rail track center;
 - b. A typical spacing of 25 feet with a minimum of 15 feet between the freight track center to the nearest edge of regional trail located in the KC when light rail is in a tunnel; and
 - c. A minimum of 10 feet between the freight track center and the nearest existing or proposed bridge pier or retaining wall. Any permanent track center spacing less than 25 feet includes AREMA crash wall protection for the adjacent pier or retaining wall.

3. With respect to the proposed light rail and freight improvements between STA 33+00 and STA 72+00 (west of TH 169 to east of the proposed LRT bridge over CSAH 3-Excelsior Boulevard), where LRT would be located parallel and adjacent to the existing BLS right of way, the proposed project includes construction of:
 - a. Parallel eastbound and westbound light rail tracks;
 - b. A corridor protection barrier integrated with retaining wall where light rail is supported on retained fill (STA 45+75 to STA 49+65, and STA 65+90 to STA 71+65);
 - c. Light rail on bridge structure between STA 49+65 and STA 65+90:
 - i. Light rail on bridge structure includes 8 foot high fence when crossing over the BLS (pedestrian traffic on the structure is limited to Metro Transit operations and maintenance staff);
 - d. Light rail systems devices, including the overhead catenary system and traction power substation;
 - e. Intrusion detection between light rail and freight where track separation is less than 50 feet and where light rail is not on retained fill or structure; Intrusion detection, when installed, will always be no closer to the Freight Rail than the design edge of the LRT Ballast.
 - f. A storm water ditch or daintile between light rail and freight along the south edge of the light rail alignment;
 - g. New 136RE rail freight rail track;
 - h. A new No. 15 turnout to terminate siding track at STA 36+40;
 - i. A new No. 11 turnout and spur track at STA 41+05;
 - j. Reconstruction of existing at-grade freight rail crossing of CSAH 3 (Excelsior Boulevard) including new rail, ties, daintile, precast concrete panels and signals;
 - k. A 1 degree, 30 minute reversing curve with a 100' minimum tangent alignment shift located under light rail on bridge structure;
 - l. Relocation of private utilities and public utilities to accommodate improvements in the corridor; and
 - m. New utility crossings including storm sewer, watermain, sanitary sewer, freight and light rail signal duct and ductbank, and traction power electrical feeds beneath existing or new freight rail tracks installed by jacking or open cut although open cutting will only be used in areas where freight rail will not be out of service during cutting.

4. With respect to the proposed light rail, regional trail and freight improvements between STA 72+00 and STA 232+00 (east of the LRT bridge over CSAH 3-Excelsior Boulevard to east of Beltline Boulevard), where LRT would be located generally on the existing BLS right of way and freight rail would be shifted north to be located between the regional trail and light rail, the proposed project includes construction of:

- a. Parallel eastbound and westbound light rail tracks;
 - b. Light rail systems devices, including the overhead catenary system, traction power substations, signal bungalows, and crossovers;
 - c. Intrusion detection between light rail and freight where track separation is less than 50 feet and where light rail is not on retained fill or structure; Intrusion detection, when installed, will always be no closer to the Freight Rail than the design edge of the LRT Ballast.
 - d. Reconstruction of the regional trail located no closer than 25 feet from centerline of freight rail to edge of trail with a fence located adjacent to the trail occurring only in limited areas already reviewed and approved by TCWR;
 - e. Trail underpasses under CSAH 20 (Blake Road) and Wooddale Avenue parallel to the freight rail alignment; Note that this is not agreed to by TCWR, but has been pushed as a requirement of the SPO
 - f. Trail underpass under the BLS at the Louisiana Station;
 - g. Trail overpass over Beltline Boulevard and light rail and freight rail east of Beltline Boulevard;
 - h. A storm water ditch or draitile between light rail and freight along the north edge of the light rail alignment and between freight and the regional trail along the north edge of the freight rail alignment;
 - i. New light rail and trail bridges at Minnehaha Creek and Louisiana Avenue;
 - j. New light rail bridge at TH 100;
 - k. New 136RE rail freight rail track located within a 35 feet corridor;
 - l. A new No. 15 turnout and 136 RE rail "Southerly Connector" spur track to connect to the existing CP MN&S Spur;
 - m. New freight rail bridges at Minnehaha Creek and Louisiana Avenue on the BLS;
 - n. New freight rail bridges over light rail and Oxford Street on the "Southerly Connector";
 - o. A relocated existing freight rail bridge at TH 100 to match the new freight rail alignment;
 - p. Reconstruction of existing at-grade freight rail crossings at CSAH 20 (Blake Road), Wooddale Avenue and Beltline Boulevard including new precast concrete panels and signals;
 - q. Relocation of private utilities and public utilities to accommodate improvements in the corridor; and
 - r. New utility crossings including storm sewer, watermain, sanitary sewer, freight and light rail signal duct and ductbank, and traction power electrical feeds beneath existing or new freight rail tracks installed by jacking or open cut: although open cutting will only be used in areas where freight rail will not be out of service during cutting..
5. With respect to the proposed light rail, regional trail and freight improvements between STA 273+58 and STA 393+00 (east of Beltline Boulevard to Cedar Lake Junction), where LRT would be located south of the existing KC freight rail alignment, the proposed project includes construction of:
- a. Parallel eastbound and westbound light rail tracks;
 - b. Light rail in a tunnel between STA 302+50 and STA 328+30;
 - c. Light rail systems devices, including the overhead catenary system, traction power substations, signal bungalows, and crossovers;
 - d. Intrusion detection between light rail and freight where track separation is less than 50 feet and where light rail is not in a tunnel;
 - e. Replace dual guard rail design in the KC with equipment defect detectors for dragging equipment and hot wheel bearings to be located near Cedar Lake Junction and near Dominic Boulevard.;
 - f. A corridor protection barrier between light rail and freight rail at each light rail tunnel portal;

- g. Reconstruction of the regional trail located no closer than 15 feet (minimum existing condition) from centerline of freight rail to edge of trail with a fence located adjacent to the trail; with the understanding that 15 feet is not the typical condition. 15 feet is the exception and only where specifically approved.
 - h. A storm water ditch or draitile between light rail and freight along the north edge of the light rail alignment or north edge of the trail alignment when light rail is in a tunnel;
 - i. New light rail, trail bridge and freight bridge at the Kenilworth Channel;
 - j. New 136 RE rail freight rail track from STA 300+00 to STA 343+42 and from STA 355+50 to STA 359+50;
 - k. Replace existing 115 RE rail with 136 RE rail from STA 234+00 to 262+05 (note station equation: STA 300+00 ahead = STA 262+05 back) and STA 347+42 and STA 355+50;
 - l. Improve track structure within limits of Kenilworth Corridor for which trackwork is not currently proposed by performing the following Work:
 - i. Replacing ties to bring tie condition to FRA Class 5 Standards as inspected and approved by the FRA. Tie replacement from STA 234+00 to 262+05 (note station equation: STA 300+00 ahead = STA 262+05 back), STA 347+42 to STA 355+50 (note station equation: STA 347+42 ahead = STA 343+42 back), and STA 359+50 to STA 390+50.
 - m. Reconstruction of existing at-grade freight rail crossing at Cedar Lake Parkway including new precast concrete panels and signals;
 - n. Reconstruction of existing at-grade freight rail crossing at West 21st Street including a raised top of rail profile, new storm sewer, new precast concrete panels and signals;
 - o. Reconstruction of the at-grad Cedar Lake Trail pedestrian crossing at STA 385+00 near Bryn Mawr Station and Cedar Lake Junction;
 - p. Relocation of private utilities and public utilities to accommodate improvements in the corridor; and
 - q. New utility crossings including storm sewer, watermain, sanitary sewer, freight and light rail signal duct and ductbank, and traction power electrical feeds beneath existing or new freight rail tracks installed by jacking or open cut; although open cutting will only be used in areas where freight rail will not be out of service during cutting..
6. To address concerns of ensuring safe freight operations during construction of the proposed SWLRT project, the following measures would be implemented and included in construction documents:
- a. Outages and durations of outages as indicated on the "BLS and KC Phasing Out of Service Matrix";
 - b. Project Safety Plan complying with BNSF's "Contractor Responsibilities and Requirements for Working on BNSF Right-of-Way";
 - c. Railroad flagging provided by TCWR at the expense of SPO;
 - d. Requirements for excavation activities adjacent to active freight railroads in accordance with BNSF "Guidelines for Temporary Shoring" document with the following revisions and clarifications:
 - i. Allow the Contractor to install temporary shoring as follows:
 - 1. Minimum: 15 feet from centerline of operating track; and
 - a. Less than 15 feet only used with written approval from TCWR and continuous flagging by TCWR at the expense of SPO.
 - ii. It is anticipated that it will be necessary to locate temporary shoring between 15 feet and 8.5 feet from centerline of operating track at the following locations:
 - 1. Adjacent to the LRT Kenilworth tunnel and boat sections;
 - 2. Adjacent to the LRT Excelsior bridge piers and retaining walls;



3. On the Skunk Hollow Track where the proposed Southerly Connector Track crosses the existing Skunk Hollow Track; and
 4. Other locations with written approval from TCWR pending unforeseen site conditions.
- iii. Where possible, stage excavation activities such that they do not occur adjacent to the operating railroad.
- e. Requirements for construction personnel to clear up at 25 feet from centerline of track
 - i. Require the Contractor to create Sight Specific Work Plans (SSWP) to provide a detailed accounting of how the Contractor proposes to accomplish Work in a safe manner, within the proposed Project Schedule and for which maintains railroad operations. Key items in the SSWP include the following:
 1. There are four types of SSWP's based on "Adjacencies":
 - a. Out of Service Adjacency: SSWP requires a continuous suspension of freight railroad operations to facilitate construction activities, including disturbing active freight railroad track;
 - b. Fouling Adjacency: SSWP requires fouling of the freight railroad track to facilitate construction activities. A fouling adjacency is required when any Work is performed within 15 feet of an active freight railroad, and when full extension of equipment has potential to foul an active freight railroad;
 - c. Adjacent Adjacency: SSWP requires construction activities and CONTRACTOR personnel to be located between 15 feet and 25 feet of an active freight railroad, and when full extension of equipment does not have potential to foul an active freight railroad; and
 - d. Clear Adjacency: SSWP requires construction activities and CONTRACTOR personnel to be located between 25 feet and 100 feet of an active freight railroad, and when full extension of equipment does not have potential to foul within 25 feet of an active freight railroad.
 2. The SSWP's will include detailed scope of Work identifying Work activities, personnel and equipment involved in the Work, personnel and equipment locations during the Work, clearing locations, Work schedule, safety equipment, contingency plans, and other pertinent information as necessary.
 - f. Monitoring the railroad and geotechnical conditions adjacent to the Kenilworth LRT tunnel with appropriate instrumentation. Output of the instrumentation will be monitored and reviewed by SPO/Contractor and would be shared with TCWR:
 - i. The Contractor in coordination with the SPO is responsible ensuring the integrity of the railroad and geotechnical conditions and ensuring safe passage of trains at all times during construction; and
 - ii. TCWR would have a qualified employee on site during construction who would have authority to stop construction activities if required.
 - g. Provide 8 foot tall temporary chain link construction fencing adjacent to active freight track to provide fall protection for TCWR employees at locations where track is adjacent to excavations including:
 - i. Adjacent to the LRT Kenilworth tunnel and boat sections; and
 - ii. At locations where an excavation is located within 15 feet of centerline of track, and the excavation presents a drop from existing grade that is greater than 2 feet and the resulting side slope is greater than 3 horizontal to 1 vertical.

- h. Provide 4 foot tall temporary orange construction fence adjacent to active freight track to provide a physical separation between Contractor activities and railroad operations. Fence will be placed as follows:
 - i. Desired minimum: 25 feet from centerline of operating track; and
 - ii. Absolute minimum: 15 feet from centerline of operating track with TCWR approval.
 - 1. Less than 15 feet only used with approval from TCWR.
 - i. Freight rail speed restrictions after track has been disturbed during pre-planned and approved outages for purposes of normalizing the track structure as follows:
 - i. To accommodate a passing train when the track has not been set to final tolerances, but meets minimum FRA Class 2 standards.
7. With regards to other technical issues discussed, the SPO would:
- a. Provide a copy of all final Contract Documents to TCWR;
 - b. Provide typical track section that meets the CP mainline standard track section;
 - c. Provide 136RE rail (or 115RE rail left in place) on timber ties, with standard AREMA tie plates, cut spikes, and rail anchors:
 - i. Transitioning from 115RE rail to 136RE rail would be facilitated using transition rails; and
 - ii. 115RE Rail removed in the Kenilworth Corridor will be salvaged and become the property of TCWR. The SWLRT Contractor will cut the rail into 80 feet long lengths and transport and off-load at the Hopkins depot.
 - d. Construct ballast and subballast side slopes at 2 horizontal to 1 vertical;
 - e. Construct track on AREMA Grade "7 inch" - 7 inch x 9 inch x 8 feet-6 inch timber ties at 20 inches on center, with 7 inch x 9 inch x 10 feet ties used within limits of at-grade crossings;
 - i. Rail will be placed on standard AREMA double shoulder tie plates with cut spikes and box anchored at every other tie except at at-grade crossings where every tie will be box anchored through the crossing and for a distance of 195' on either side of the crossing. TCWR originally requested Pandrol clips with lagged anchors, however, TCWR is willing to compromise on this item ensuring that every other tie outside of crossings will be anchored.
 - f. Construct a typical section with a subballast width of 20 feet as measured at the top of subballast:
 - i. The typical section would include a 6 foot wide flat area in the subballast only, centered about the center of tie. This is based on the CP standard typical section.
 - g. Require the Contractor to be responsible for operating a geometry car under loading after final construction of the track, but prior to placing the track in service. Geometry car will measure the integrity of the track, rail defects, final elevation, grade, alignment, gauge and gauge under load
 - h. Provide geotechnical improvements and install select granular material below the typical track section including improving existing poor draining soils within construction limits near and beneath West Lake Street;
 - i. SPO would subcut and replace existing soil, to a depth between 1.5 feet and 7.5 feet below bottom of proposed subballast (based on geotechnical investigations);
 - j. Provide a cellular concrete support slab under the Bass Lake Spur in the vicinity of Louisiana Ave. to mitigate poor soil conditions;
 - k. Provide a load transfer platform under the Southerly Connector to mitigate poor soil conditions. The load transfer platform will consist of a concrete slab supported by H piles or equivalent;
 - l. Construct drainage facilities that provide positive drainage:
 - i. Construct undergrade drainage pipes utilizing reinforced concrete class V pipe, with individual sections mechanically fastened, and all joints sealed watertight;



- ii. Construct ditches and infiltration basins adjacent to the railroad such that:
 - 1. Infiltration ditches include check dams for purposes of regulating flow;
 - 2. Check dams would be constructed of clay, graded at 3:1;
 - 3. Check dams, and infiltration ditches would be drivable for light maintenance vehicles;
 - 4. Amended soils for infiltration are located at the bottom of adjacent ditches a minimum of 14.2 feet from the track;
 - 5. Infiltration basins shall be designed for a maximum 100 year high water level of 31.5" below top of rail;
 - 6. Infiltration basins shall draw down completely within 48 hours of a 100 year rainfall; and
 - 7. Overland emergency overflow for rainfall events exceeding a 100 year storm shall be provided from all adjacent infiltration basins or drainage ditches.
- m. Construct a freight track alignment that is capable of operating speeds as follows:
 - i. BLS: 25 mph;
 - ii. Southerly Connector: 25 mph; and
 - iii. KC: 25 mph – note that the TCWR plans to operate at 10 mph;
- n. Provide and install turnouts in accordance with AREMA standards for material and geometry
 - i. Adjustable rail braces per AREMA Plan 224; and
 - ii. Switch points and stock rails in accordance with AREMA Plan 5100 (Samson undercut stock rail).
- o. Provide and install hand throw switch machines as follows:
 - i. In compliance with AREMA Standard Plan 251;
 - ii. Configured in accordance with Racor Style 36EH with 45 inch Tri-Handle;
 - iii. Equipped with adjustable mechanism and throw rod;
 - iv. Equipped with green and red targets;
 - v. Equipped for switch locks – TCWR to supply locks; and
 - vi. Located on diverging side of the turnout.
- p. Construct a freight track alignment which provides sufficient vertical and horizontal clearances to adjacent corridor elements for wind turbine components. Clearance calculations to address this are contained in a SPO performed analysis and summarized in an internal memorandum titled "TC&W - High and Wide Loads" dated November 13, 2014;
- q. Provide minimum vertical clearance of 23 feet at all overhead bridges except for the following:
 - i. Burnham Road overhead bridge clearance of 19 feet-11 inches, which is an existing condition; and
 - ii. West Lake Street overhead bridge clearance of 21 feet-7 inches, which is an existing condition.
- r. Construct at-grade crossings with Mirafi HP570 or equal fabric placed between the subgrade and select granular material;
- s. Relocate the Distant Signal located at Cedar Lake Parkway (by BNSF forces) as follows:
 - i. The DS temporary location during tunnel construction will positioned on the left for east bound traffic; and
 - ii. The DS final location after tunnel construction is complete and freight track is in its final location will be positioned on the right for east bound traffic.
- t. Provide and install "Whistle", "Milepost", and "Flanger" signs per BNSF Standards.

- u. Provide TCWR with the ability to review Contractor submittals. Metropolitan Council and TCWR intend to agree to a procedure for TCWR to be included in construction communications and for review of submittals prior to construction. Items to consider include the following:
 - i. TCWR would be granted access and review of submittals via e-Builder;
 - ii. TCWR would be granted access to CAR submittal comments;
 - iii. TCWR would participate in construction meetings and on-site activities; and
 - iv. TCWR would be granted access to As-Built drawings and track geometry data.
- v. Include monetary penalties in the Contract which assess charges to the Contractor after actual damages occur for the following:
 - i. Failure to receive approval for any non pre-scheduled activity which requires an outage to the freight railroad; and
 - ii. Failure to restore the railroad to operation in accordance with any approved pre-planned outage schedule.

Other

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT A

VERIFIED STATEMENT OF MR. MARK WEGNER

ATTACHMENT 9

September 12, 2016

Mr. Jim Alexander
Project Manager – Southwest Light Rail
Metro Transit – Southwest LRT Project Office
6465 Wayzata Blvd., Suite 500
Saint Louis Park, Minnesota 55426

Dear Mr. Alexander,

After our meeting on September 9, we need to reset what expectations are, relative to freight rail operations look like prior, during and after the Southwest Light Rail (SWLRT) project.

Please understand that Met Council, in assuming the leadership of developing the SWLRT on January 1, 2013 inherited relevant agreements that Hennepin County Regional Railroad Authority (HCRRA) had entered into not only with Twin Cities & Western Railroad Company (TC&W) but also Canadian Pacific Railway (CPR). These agreements that Met Council inherited go back to at least 1991, the year that Canadian Pacific's predecessor, Soo Line Railroad sold to the founders of the TCW 143.94 miles of rail line that preserved freight rail service to south central Minnesota.

Part of that 1991 sale anticipated that the current freight rail route to St. Paul, what is now the Midtown Greenway, would be sold to Hennepin County, and as part of that sale, Soo Line (now Canadian Pacific) guaranteed that if that sale occurred (which it did), an alternate route for freight rail would be found to St. Paul, and at NO ADDITIONAL COST to TC&W.

When the route changed in 1998, for administrative purposes Canadian Pacific Railway continued to charge TC&W the historical trackage rights fees for the entire segment, and TC&W gets reimbursed from CPR for what TC&W pays Hennepin County. CPR maintains the Bass Lake Spur at their expense (Maintenance and Capital) – TC&W has not paid anything to CPR for this segment except for trackage rights expense, which is on a per-car, per mile basis.

When TC&W was re-routed onto the Kenilworth Corridor, HCRRA wanted TC&W to maintain that segment, and agreed to reimburse TC&W for its expenses on an annual basis for its costs to maintain. For Capital expenditures, HCRRA, as owner assumed responsibility and has invested HCRRA dollars for capital items since 1998 such as additional ties, additional rail inventory, bridge rehabilitation, extra ballast, and rail replacement.

When Met Council, in mid-2013 asked TC&W about the notion about running the LRT east of 169 on existing freight rail track, and putting the freight on the HCRRA property, TC&W agreed to cooperate AS LONG AS TRACK CAPACITY remained the same and post LRT, operating expenses remained the same. TC&W's shippers cannot be negatively impacted by the construction and operation of SWLRT.

This guiding principle must be understood by Met Council, otherwise TC&W's shippers will have a say in the forthcoming STB application.

Since our meeting last week, TC&W undertook a study to determine what it paid CPR for the 7.49 miles from Tower E-14 (the west end of the Bass Lake Spur) to Cedar Lake Junction. In 2015, TC&W paid CPR \$157,499.12 in trackage rights over the two segments; CPR maintained the Bass Lake Spur at its expense and TC&W was reimbursed by HCRRA for its expense of maintaining the HCRRA track.

TC&W's economic expectation, on behalf of the customers it serves in south central Minnesota and eastern South Dakota are that whatever Operating and Maintenance agreement is arrived at with Met Council, the underlying current expense exposure remains the same.

We thought it would be helpful to give Met Council a context in which to work from.

Sincerely,

Mark

Mark Wegner
President
Twin Cities & Western Railroad Company
Glencoe, Minnesota

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT A

VERIFIED STATEMENT OF MR. MARK WEGNER

ATTACHMENT 10



TWIN CITIES & WESTERN RAILROAD COMPANY

2925 - 12th Street East
Glencoe, MN 55336
(320) 864-7200
FAX (320) 864-7220

September 29, 2017

Ms. Joan Hollick
Assistant Project Manager – Southwest Light Rail
Metro Transit – Southwest LRT Project Office
6465 Wayzata Blvd., Suite 500
Saint Louis Park, Minnesota 55426

Dear Joan,

We appreciated the opportunity to meet with you, Chair Alene Tchourumoff and Hennepin County Commissioner Peter McLaughlin on Wednesday, September 6, 2017. We both expressed frustration at the time consumed to date and the fact that we still have not arrived at an agreement between Twin Cities & Western Railroad Company and Met Council.

From the railroad's viewpoint, we began this journey on what we believed was a clear understanding with Met Council that the railroad would not be asked to bear costs it did not previously have nor find itself or its shippers economically disadvantaged in any way by sharing the freight rail corridor with light rail. We both have noted off and on in this process that the circumstances of this transaction are unique and I confess that some of the delay on our end involved trying to digest the scope and extent of the added risk and financial impact of this transaction on our business. Also, further delay resulted when we volunteered to take on the task of trying to minimize some of the economic impact for Met Council and discovered the process was much longer and the analysis much more complicated than either of us anticipated.

Chair Tchourumoff expressed two major items of concern which I will address in this letter: 1) Does the TC&W Board intend to proceed to cooperate with Met Council to enable the SWLRT or does the TC&W Board intend to cease all cooperation to, in effect, terminate the SWLRT project; and 2) When can Met Council expect a reply from TC&W's Board?

As I indicated in our meeting, I committed that I would earnestly try to arrange a meeting with our Board the next day or the day after. Fortunately our Board was able to shuffle schedules to meet late Thursday afternoon on September 7, 2017.

To answer your most pressing question, it has never been the intention of our Board to terminate the SWLRT project and TC&W has been working in good faith to reach an agreement with Met Council to resolve the complex issues related to the effect of the SWLRT project on our freight rail operations. We had a very intense discussion about the five issues raised in the meeting with you and how we can best address them, in the spirit of reaching reasonable resolution. These were very serious discussions, especially since, as I have communicated on numerous occasions, we are very risk conscious and very protective of the short line rail economics of both the railroad and our shippers as exists in our current, pre-SWLRT environment.

To address the five areas of concern, I have received TC&W Board commitment on the following items:

We discussed at length the FTA contract provisions to which we would be binding our company. Although we already abide by many of the provisions, there are others that refer to statutes and regulations with which we are not familiar and appear to be inapplicable to TC&W. I recommended TC&W agree with the language Met Council proposed for Section 10 in its 20170831 draft of the Construction Agreement even though TC&W is not familiar with every aspect of the FTA requirements referenced. The Board agreed with my recommendation.

With respect to the liability and indemnification language, I expressed my confidence that our attorney, Janet Gilbert, and Met Council's Manager of Risk Management & Claims, Phillip Walljasper, could work together to arrive at language that would address both Phillip's concerns, as Met Council's risk manager, and TC&W's concerns that agreed-upon language also address the risk concerns of the railroad. The TC&W Board will agree to this process for reaching agreement on the liability and indemnification language. However, we need your commitment that Met Council will also abide by this process. Our experience to date has been frustrating in that we often believe we have reached agreement only to find that as language is vetted through Met Council's approval matrix of attorneys, it is rejected. For example, Met Council and TC&W agreed some time ago that Met Council would indemnify TC&W in certain circumstances, even if there was no insurance coverage for the indemnified loss. However, language we supplied over a week ago addressing such a circumstance was stricken from the agreement without explanation. The appointed persons on each of our teams can arrive at mutually acceptable language and TC&W's team is confident it will be able to agree to the same. TC&W's Board approved this approach subject to Met Council's commitment to do the same.

The next issue, salvage for the Bass Lake Spur West, was identified by Met Council at our last meeting as a "moving the goal post" issue by TC&W. This is not the case. During our on-going discussions over the past 12 months, TC&W's agreement to an access fee of \$55,000 annually was made under TC&W's assumption that the salvage from the Bass Lake Spur West would become TC&W property. Our original position was that \$40,000 per year would be a reasonable access fee, but ultimately compromised at an access fee of \$55,000 per year, based in part on our assumption that TC&W would receive the salvage when the Bass Lake Spur West was rehabilitated. The Met Council team now contends the issue of salvage was never explicitly discussed. However, I did not realize that was an issue until Met Council gave us their exhibit of proposed payment schedule in July of this year and I noticed the Bass Lake Spur West was missing. I then promptly brought the issue to Met Council's attention and explained that if it wants to retain the salvage, TC&W would need to adjust the access fee because our agreement on the fee was based on the assumption we would get the salvage. Based on the above, I recommended, and our Board approved, that Met Council give the salvage of Bass Lake Spur West to TC&W as part of the project.

With respect to the railroad tax valuation issue -- this issue recently arose during the course of the 1031 tax exchange discussions. As you know, TC&W has taken the lead to try to come up with a solution to save the project from a \$4.6 million additional expenditure related to the replacement/relocation of certain side tracks currently used by TC&W as part of the SWLRT project through the use of a 1031 exchange. The structure of the exchange would require TC&W to own the replacement land and track, the result of which would trigger an increase in the valuation of TC&W's land, track and improvements for state railroad tax purposes. The increased valuation would cause an increase in TC&W's property tax for the next 30 years: an increase of approximately \$150,000 in the first year, which amount would decline slowly each year as the value is depreciated.

The raising of this issue is not a moving of the goal posts as Met Council contends. It is, instead, the result both TC&W's and Met Council's tax attorneys reached in trying to save the project \$4.6 million in

income tax consequences and equalize the economics for TC&W in structuring the 1031 transaction. It is important to note that this increase in valuation for property tax purposes does not result in any true increase in the value of the railroad – the railroad is simply exchanging the right to use certain track for the right to use the same amount of track in a different location. The need for this exchange is caused by the SWLRT project. The reason for the increase in property tax is because of the structure of the 1031 transaction (a transaction being used to save the Met Council millions of dollars). TC&W does not anticipate any economic benefit as a result and, instead, expects a significant increase in its property tax burden.

Following our meeting, I was able to contact James Clements of CP, and contrary to my assumption, Met Council is correct that a portion of TC&W's approximately \$160,000 current trackage rights payment to CP over the Bass Lake Spur IS allocated by CP to the railroad tax. James was unable to confirm exactly what portion of the payment is allocated to tax (Chuck Hubbard, the CP person who would know, is on vacation until September 11), but James opined that 30% of the variable cost of TC&W's trackage rights paid to CP is allocated towards property taxes (confirmation will be forthcoming from CP).

I did not take any of this into consideration when TC&W agreed to the \$55,000 annual access fee. I assumed TC&W's long term maintenance obligations would be \$120,000, which were subsequently reduced to \$105,000, a compromise on our part which did not have a property tax component in it.

That being said, from TC&W's internal trackage rights agreement documents and the information provided by James Clements, I have been able to extrapolate what part of TC&W's trackage rights payments to CP are allocated to property taxes. Of the \$160,000, approximately \$5,707 goes towards property taxes. So we still have a difference of approximately \$144,000 in increased railroad taxes in year one, which will decline slowly over the next 30 years.

The TC&W Board approved requiring Met Council to cover those costs as a result of this project. This is consistent with the spirit and intent of our negotiations since the project began. TC&W should not be damaged because of the decision to build light rail in the freight right-of-way.

The final issue that has been exceedingly difficult for both Met Council and TC&W is the risk related to the 1031 exchange transaction, both defined and undefined. Met Council has agreed to take on certain defined risks, but has also raised the question of what happens if Met Council's accepted risks are somehow increased by TC&W's actions or lack of action.

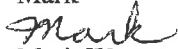
TC&W has been clear since the beginning of its discussions with Met Council about the SWLRT project, that while TC&W is willing to work with Met Council to resolve issues affecting TC&W as a result of the project, TC&W's freight rail customers should not be negatively impacted and TC&W should not be expected to bear any increased costs or operational risks. As you know, there is a way to eliminate the 1031 risks by structuring the exchange of trackage rights differently with greater cost to Met Council, and TC&W much prefers this structure. However, TC&W and its consultants have diligently worked through myriad issues trying to reach agreement with you on the 1031 transaction. At this point, Met Council has refused to accept all the risks of the 1031 transaction thereby opening up TC&W to potential economic risk in excess of \$4 million. You can understand why the TC&W Board is reluctant to move forward under this scenario. However, after a significant amount of soul searching and internal discussion of the risks and options for mitigating them, our Board has agreed to accept the risk language regarding the 1031 exchange as currently proposed by Met Council, provided that Met Council agrees to a few other clarifications and changes to the 1031 agreement. Such clarifications and changes include granting TC&W the option to terminate the 1031 transaction at any time, making whole TC&W's shareholders who are not able to deduct payments of costs and fees relating to any audit of the transaction or to the enforcement of the indemnification provisions, and mutually agreeing to adjust the dates in the 1031

agreement, as necessary due to changes in the timing of the SWLRT project. This agreement is conditioned upon Met Council's acceptance of TC&W's proposals with respect to the Bass Lake West salvage and agreement to pay any increased railroad property taxes related to the track exchange.

I am hopeful we can resolve these issues. If we can, then TC&W can, in good conscience, support Met Council's STB filing.

I send this with sincerity,

Mark



Mark Wegner

President & CEO

Twin Cities & Western Railroad Company

2925 12th Street E

Glencoe, Minnesota 55336

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT A

VERIFIED STATEMENT OF MR. MARK WEGNER

ATTACHMENT 11



TWIN CITIES & WESTERN RAILROAD COMPANY

2925 - 12th Street East
Glencoe, MN 55336
(320) 864-7200
FAX (320) 864-7220

February 27, 2018

Ms. Joan Hollick
Assistant Project Manager – Southwest Light Rail
Metro Transit – Southwest LRT Project Office
6465 Wayzata Blvd., Suite 500
Saint Louis Park, Minnesota 55426

Dear Joan:

On September 29, 2017, Twin Cities & Western Railroad Company (TC&W) sent a letter to you, outlining five broad areas left to be resolved between us with respect to the Southwest Light Rail project, along with suggestions on how to resolve them. We hoped and expected to receive a prompt response to this letter. It has now been nearly five months since the letter was sent, with no formal response from you.

As you are aware, one of the open issues relates to structuring the track capacity replacement as a 1031 tax free exchange. Due to the time-sensitive nature of the 1031 exchange issue, TC&W must now rescind the offer of using the 1031 exchange structure. As a result, we wish to advise you that the Met Council will need to increase the dollar amount paid to TC&W to compensate our company for the construction of replacement track capacity so the TC&W is made whole in the transaction.

Also, at the time of the September 29, 2017 letter, it was anticipated that a Construction Agreement would have been agreed upon in October. As you know, this Agreement was to provide for reimbursement of TC&W's costs related to working with Met Council on the Southwest Light Rail project going back to June 2017. Since there still is no Construction Agreement in place, TC&W has not yet been reimbursed for its costs for the period of June-September, 2017 (\$200,000).

In addition, TC&W proceeded in good faith with soil borings, wetland delineation and other site-related activities with respect to the replacement of track capacity in October-December, incurring another \$30,000 in costs.

In the absence of any formal response to our September 29, 2017 letter, please be advised that TC&W is hereby formally requesting immediate reimbursement of all of these costs by Met Council. Furthermore, TC&W is unable to engage in any further discussions with Met Council with respect to the Southwest Light Rail project until these expenses are paid in full and arrangements for prompt reimbursement of future expenses are made. Please advise regarding the process for TC&W to be reimbursed for its expenses.

Mark

Mark Wegner
President & CEO
Twin Cities & Western Railroad Company
Glencoe, Minnesota

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

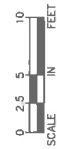
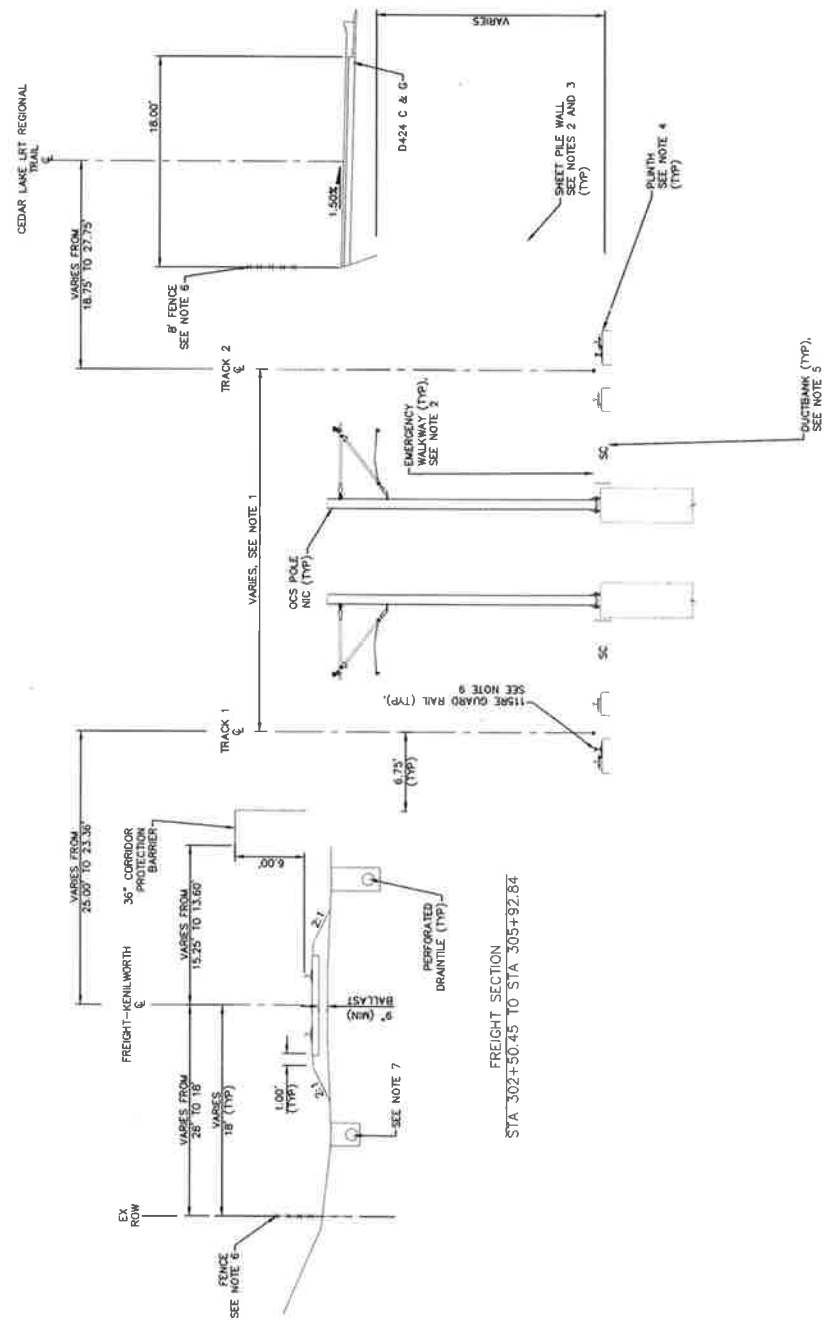
FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT B

- NOTES:
1. TRACK CENTERS NARROW FROM 30.37' TO 18.92' BETWEEN STA 2772+50.00 AND STA 2776+00.00.
 2. MOOT BRIDGE 27C15. SEE TUNNEL PLANS.
 3. FOR TRACK CENTERLINE, SEE TUNNEL PLANS AND FINAL STRUCTURE. SEE TUNNEL PLANS.
 4. SEE TRACK DETAILS FOR PLINTH LAYOUT.
 5. SEE SYSTEMS PLANS FOR DUCTBANK AND CABLE PLACEMENT.
 6. SEE URBAN DESIGN PLANS FOR FENCE LOCATION AND DETAILS.
 7. PERFORATED DRAIN TILE BEGINS AT FREIGHT STA 302+50.45.
 8. FOR GUARD RAIL LIMITS, SEE TRACK CHARTS.



TYPICAL SECTION
STA 2772+50.00 TO STA 2776+00.00

FREIGHT SECTION
STA 302+50.45 TO STA 305+92.84

1. I hereby certify that this plan, specification, or report was prepared by me or under my direct supervision and that I am a duly Licensed Professional Engineer in the State of Minnesota. STEPHEN D. KLEY DATE: 8/15/2017 LIC. NO. 11159	AECOM	SOUTHWEST CONSTRUCTION	CIVIL - VOLUME 3B TRACK TYPICAL SECTIONS SHEET 153 OF 466 PROJECT NAME: E3-TRK-TYP - 012
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DRAFT - CONFORMED

DRAFT - CONFORMED

TYPICAL SECTION
STA 2778+00.00 TO STA 2780+50.00

AECOM



METROPOLITAN

**CIVIL - VOLUME 3B
TRACK
TYPICAL SECTIONS**

E3-TRK-TYP - 014

TRACK

DRAFT - CONFORMED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT C

Council Draft - 20170831

**CONSTRUCTION AGREEMENT
BETWEEN
METROPOLITAN COUNCIL
AND
TWIN CITIES & WESTERN RAILROAD COMPANY**

CONSTRUCTION AGREEMENT

THIS CONSTRUCTION AGREEMENT (the "Agreement") is made this ____ day of _____, 2017 ("Execution Date"), between Metropolitan Council, a public corporation and political subdivision of the State of Minnesota ("Council"), and Twin Cities & Western Railroad Company, a Minnesota corporation ("TCWR"). The Council and TCWR are collectively referred to as the "Parties" or individually as a "Party." The terms "Parties" and "Party" mean only the Council and TCWR.

RECITALS

- A. The Parties filed Notices of Exemption and other petitions with the Surface Transportation Board on _____, 2017 to authorize: (1) the Council's acquisition of the Kenilworth Corridor and the Bass Lake Spur, and (2) TCWR's acquisition of, and right to operate as a rail common carrier over the Freight Rail Easements granted by Hennepin County Regional Railroad Authority ("HCRRA") over the Kenilworth Corridor and by Soo Line Railroad Company d/b/a Canadian Pacific ("CP") over the Bass Lake Spur. The Kenilworth Corridor, the Bass Lake Spur, are collectively referred to herein as the "Corridor" are depicted on **Exhibit A**; and
- B. The Council intends to use a portion of the Corridor (as defined in Section 1) to provide light rail transit ("LRT") service; and
- C. The construction plan for LRT requires that the Freight Rail Facilities operated on by TCWR be shifted to accommodate Freight Rail Service, Light Rail Service (as defined in Section 1), and a bicycle/pedestrian trail in the Corridor; and
- D. To accommodate the shift of Freight Rail Facilities, the Council will convey to TCWR an exclusive, permanent rail freight operating easement ("Final Freight Rail Easement") over the portions of the Corridor on which the Freight Rail Facilities as relocated are situated, including: (i) those portions of the Kenilworth Corridor and the Bass Lake Spur on which Freight Rail Facilities remain situated after the relocation referenced in Recital C above; and (ii) additional property acquired by the Council to accommodate the relocated Freight Rail Facilities. The Final Freight Rail Easement shall supersede and replace the HCRRA Freight Rail Easement and the CP Freight Rail Easement, and shall be recorded no later than the Construction Completion Date; and
- E. Concurrent with this Agreement, the parties are entering into an Operations & Maintenance Agreement (the "O&M Agreement"), which provides for the Parties' cooperation and coordination in connection with use of the shared Corridor to provide Freight Rail Service and LRT service; and
- F. TCWR's willingness to accept the Freight Rail Easements (and eventually one Final Freight Rail Easement) is conditioned on the Council's construction of Modifications in accordance with Council's work plans pursuant to the process set forth in this Agreement; and

G. In this Agreement, the parties desire to set forth their respective rights and obligations with respect to the design and construction of the Modifications (as defined in Section 1) in and adjacent to the Corridor.

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

SECTION 1. DEFINITIONS

In addition to other terms defined in other parts of this Agreement, the following capitalized terms shall have the following meanings:

1.1 “Activities” means the activities TCWR will engage in pursuant to this Agreement required for the Council to construct the Project.

1.2 “Agreement” is defined in the preamble.

1.3 “AREMA” means American Railway Engineering and Maintenance-of-Way Association.

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

1.5 “Bass Lake Spur” means Bass Lake Spur – East and Bass Lake Spur – West so long as both properties are owned by the Council. If the Council sells any portion of the Bass Lake Spur, then “Bass Lake Spur” shall refer only to the portion still owned by the Council.

1.6 “Bass Lake Spur – East” means the Council-owned portions of the Bass Lake Spur from the point of connection to the Bass Lake Spur – West at CP milepost 432.12 to the point of connection to the Kenilworth Corridor at Cedar Lake Junction (CP milepost 428.38, former CNW milepost 16.3) in the City of St. Louis Park and also includes the connecting track to the “Camden Line,” known locally as the CP MN&S.

1.7 “Bass Lake Spur – West” means the Council-owned portions of the Bass Lake Spur from Tower E-14 at CP milepost 435.06 in the City of Hopkins to the point of connection to the Bass Lake Spur – East at CP milepost 432.12.

1.8 “BNSF” means BNSF Railway Company.

1.8 “Cessation of Operations Date” means the last date TCWR shall operate on the Freight Rail Facilities specified in a SSWP.

1.9 “CGL” means commercial general liability.

1.10 “Change Order” means a written order issued by the Council to the Council’s Contractor authorizing an addition, deletion, or revision in the Work within the general scope of the Contract Documents.

1.11 “Construction Commencement Date” means the date the Council notifies TCWR that construction of Modifications to be constructed pursuant to this Agreement will begin and TCWR’s maintenance responsibilities outlined in the O&M Agreement will temporarily suspend on the Kenilworth Corridor and Bass Lake Spur - East. The Construction Commencement Date is expected to coincide with the Council’s issuance of a notice-to-proceed to the Council’s Contractor, anticipated in December 2017.

1.12 “Construction Completion Date” means the date that the Council notifies TCWR that all Modifications to be constructed pursuant to this Agreement have been completed and TCWR’s maintenance responsibilities outlined in the O&M Agreement will resume on the Kenilworth Corridor and Bass Lake Spur - East. The Construction Completion Date is anticipated in December 2020.

1.13 “Construction Coordination Committee” means the committee established pursuant to Section 3.2 of this Agreement.

1.14 “Contract Documents” means the complete package of agreements between the Council and the Council’s Contractor, including the contractor’s bid, certificates and representations, performance and payments bonds, general conditions, supplementary conditions, specifications and drawings, SSWPs approved by the Council, Management Plans approved by the Council, and Change Orders approved by the Council.

1.16 “Corridor” means the Council-owned Kenilworth Corridor, the Council-owned Bass Lake Spur, and the Council-owned Relocation Freight Rail Easement Area.

1.17 “Council” is defined in the Preamble.

1.18 “Council’s Authorized Representative” or “CAR” means the primary point of contact designated by the Council pursuant to Section 3.2.

1.19 “Council’s Contractor” means any contractor or supplier who performs Work or supplies materials for the Modifications, including subcontractors regardless of tier, and other agents of the Council providing services to the Council in connection with the Work.

1.21 “Days” or “days” means calendar days.

1.22 “Execution Date” is defined in the preamble to this Agreement.

1.23 “Force Majeure Event” means any event beyond the reasonable control of the party, which may include, but not be limited to, an order, rule, or regulation of any federal, state, or local government entity, work stoppage or labor dispute resulting in a strike or slowdown, extraordinary unavailability of essential materials, services or products from suppliers, accident, derailment, natural disaster, an act of war or terrorism, or civil disorder.

1.24 “Foul” or “Fouling” means the placement of an individual or an item of equipment or other personal property in such proximity to a track that the individual, equipment or other item of personal property could be struck by a moving train or on-track equipment, or in any case is within twenty-five feet (25') of the centerline of the closest track, and when cranes or similar equipment positioned beyond twenty-five (25) feet from the closet track centerline could contact the track, a train, or on-track equipment in event of tip over or other catastrophic occurrence.

1.25 “Freight Rail Easements” means, as relevant at the particular time, (i) the HCRRA Freight Rail Easement, (ii) the CP Freight Rail Easement, and (iii) the Final Freight Rail Easement, each as defined in the OMA.

1.26 “Freight Rail Facilities” means all rails, fastenings, switches, switch mechanisms and frogs with associated materials, ties, ballast, signals and communications devices (and associated equipment), drainage facilities, other track material, Automatic Warning Devices, roadbed, embankments, bridges, trestles, culverts, and any other structures or things necessary for the support thereof and, if any portion thereof is located in a thoroughfare, the term includes pavement, crossing planks and other similar materials or facilities used in lieu of pavement or other street surfacing materials at vehicular and pedestrian crossings of tracks, and any and all structures and facilities required by lawful authority in connection with the construction, renewal, maintenance and operation of any of the foregoing, to the extent any of the above are contained within the boundaries of the Freight Rail Easements and are necessary or related to the provision of Freight Rail Service.

1.27 “Freight Rail Service” means freight rail operations.

1.28 “Freight Railroad Management Plan (FRMP)” is defined in Section 3.3.

1.29 “Freight Railroad Safety Action Plan (FRASP)” is defined in Section 3.3.

1.30 “FTA” means the Federal Transit Administration.

1.31 “Inspection-Point” means a mandatory verification point to check the quality of the completed Work and beyond which Work cannot proceed without approval by the CAR. Inspection-Points will be identified in the SSWPs.

1.32 “Modifications” means the relocation or other Work on existing Freight Rail Facilities or construction or installation of new Freight Rail Facilities, but excluding maintenance work on Freight Rail Facilities conducted in the ordinary course of business pursuant to the O&M Agreement, and which is unrelated to and not occasioned by the Project.

1.33 “Kenilworth Corridor” means the Council-owned property acquired from HCRRA through the HCRRA Property Transfer Agreement from former CNW milepost 16.3 (CP milepost 428.38) in the City of St. Louis Park, easterly to former CNW milepost 13.7 (BNSF milepost 13.0) at a point of connection with BNSF in the City of Minneapolis.

1.34 “Loss or Damage” means all losses, damages, claims, demands, costs, liabilities, obligations, judgments, fines, costs incurred to reroute trains, consequential damages, special damages, incidental damages, economic damages, lost profits, and fees (including, without

limitation, Environmental Tort Liability, any liability under the Federal Employer's Liability Act, the Safety Appliance Act, or the Locomotive Inspection Act, or any claims of strict liability), reasonable attorneys' fees and expenses related to the above (including, without limitation, costs of investigation, expert fees, expenses at arbitration, trial or appeal and, with respect to damage or destruction of property, cleanup, repair and replacement expenses), all of the above of any nature arising from, involving, in any way related to, or in connection with death of or injury to persons whomsoever, damage to or destruction of property whatsoever and resulting loss or diminution of any other interest or right.

1.35 "LRT" means light rail transit.

1.36 "LRT Facilities" means any light rail transit that serve LRT passengers or LRT operations, including, without limitation, all LRT rails, fastenings, switches, switch mechanisms and frogs with associated materials, ties, ballast, signals and communications devices (and associated equipment), drainage facilities, other track material, Automatic Warning Devices roadbed, embankments, bridges, trestles, culverts, and any other structures or things necessary for the support thereof and, if any portion thereof is located in a thoroughfare, the term includes the pavement, crossing planks and other similar materials or facilities used in lieu of pavement or other street surfacing materials at vehicular and pedestrian crossings of tracks, and any and all structures and facilities required by lawful authority in connection with the construction, renewal, maintenance and operation of any of the foregoing, LRT stations, platforms, parking lots, LRT signals, traction power substations, overhead catenary systems, and maintenance/repair equipment, all land within the Corridor, to the extent any of the above are necessary or related to the provision of LRT Service.

1.37 "LRT Service" means operation of LRT vehicles or equipment with or without passengers, on the Corridor.

1.38 "Management Plans" means the Freight Railroad Safety Action Plan, Freight Railroad Management Plan, and the Site Specific Work Plans.

1.39 "Monthly Fee" means the payment to be made by the Council to TCWR outlined in Section 7.1.

1.40 "Non-Compliance Charge" means charges for delays to TCWR Freight Rail Service due to Outages that are not Pre-Planned Outages.

1.41 "O&M Agreement" means the Operations and Maintenance Agreement between the Council and TCWR.

1.42 "Outages" means interruptions to Freight Rail Service for any reason that are directly attributable to accommodating Work in the Corridor.

1.43 "Pre-Planned Outage" means a temporary Outage of Freight Rail Service within the time frames specified in the Outage Matrix set forth in **Exhibit C**.

1.44 "Project" means the Modifications to be constructed pursuant to this Agreement.

1.45 “Return to Service Date” means the date specified in a SSWP from the Council to TCWR, on which the Council shall authorize TCWR to commence use of specific Freight Rail Facilities for the Freight Rail Service.

1.46 “Site Specific Work Plan(s) (SSWP or SSWPs)” is defined in Section 3.3.

1.47 “Substantial Completion” means the point in time when all of the Modifications to be constructed pursuant to this Agreement have progressed to the point where, in the opinion of the Council, it is sufficiently complete, in accordance with the Contract Documents, so that the Modifications can be utilized for their intended purposes.

1.48 “TCWR” is defined in the Preamble.

1.49 “TCWR Modifications Completion Certificate” means the certificate issued by TCWR after inspection that evidences TCWR’s acknowledgement that the relevant Modifications have been completed and are suitable for operation of the Freight Rail Service.

1.56 “Wayzata Subdivision” means the portion of BNSF’s right of way in Minneapolis, MN from MP 11.79 to 12.2 where Council operates LRT on BNSF property and from MP 12.2 to 13.0 (known as the Cedar Lake Junction) where Council operates LRT adjacent to BNSF property.

1.50 “Unsafe Work” means Work that, after inspection, TCWR determines would materially impair the safety or efficient operation of Freight Rail Service.

1.51 “Work” means the entire completed construction of Modifications, to be constructed pursuant to this Agreement, as required by the Contract Documents. Work includes and is the result of performing or furnishing labor and furnishing and incorporating materials and equipment into the construction, performing or furnishing hoisting, scaffolding, or temporary bracing or shoring, and performing or furnishing services and furnishing documents, as required by the Contract Documents. Work will be divided into separate SSWPs.

Capitalized terms not defined herein shall have the meaning provided in the O&M Agreement.

SECTION 2. DESIGN

2.1 Design.

- a. The Council shall design all Modifications, including preparation of final plans and specifications as the Council deems necessary and appropriate, at the Council’s sole cost and expense. And the Council shall procure professional liability insurance related to the Project design. Such insurance shall provide coverage for liability arising from professional errors, acts, and omissions, including resulting bodily injury or property damage. The limit of insurance shall not be less than \$50,000,000 each claim and in the annual aggregate.

- b. The Parties acknowledge that the design of the Project requires TCWR to operate Freight Rail Service on a combination of existing and newly constructed Freight Rail Facilities during construction. The schedule for operating on specific Freight Rail Facilities will be identified in the SSWPs. Except for Pre-Planned Outages as defined herein, the Freight Rail Facilities will be designed, constructed and maintained in a condition that permits safe, continuous, and uninterrupted operation of Freight Rail Service on a track structure based on not less than AREMA E80 loading.
- c. Except for Pre-Planned Outages, the design of the Modifications shall provide for TCWR to operate continuous and uninterrupted Freight Rail Service on a single contiguous line on the Corridor, and a segment of BNSF Railway Wayzata Subdivision, with the following modifications:
 - i. Freight Rail Facilities will be shifted up to thirteen (13) feet south of the existing main line to accommodate Project construction from STA 33+00 to STA 59+25 (west of TH 169 to CSAH 3-Excelsior Boulevard);
 - ii. Freight Rail Facilities will be shifted up to forty-eight (48) feet north of the existing freight track to accommodate Project construction from STA 59+25 to STA 234+00 (CSAH 3-Excelsior Boulevard to east of Beltline Boulevard);
 - iii. Freight Rail Facilities will be shifted up to six (6) feet north from the existing freight track to accommodate Project construction from STA 300+00 to STA 322+00 (CSAH 25-West Lake Street to Cedar Lake Parkway);
 - iv. Freight Rail Facilities will be shifted up to forty (40) feet north of the existing freight track to accommodate Project construction from STA 322+00 to STA 343+42 (Cedar Lake Parkway to Burnham Road); and
 - v. Freight Rail Facilities from STA 234+00 to STA 262+05 (note station equation: STA 300+00 ahead = STA 262+05 back) (east of Beltline Boulevard to CSAH 25-West Lake Street), and from STA 343+42 to STA 393+00 (Burnham Road to Cedar Lake Junction) will be improved but will stay in their existing location with no shifting.
- d. TCWR acknowledges that prior to the Execution Date the Council provided it with an opportunity to review and comment on the Project design summarized in **Exhibit B** (the “Design & Plan Summary”), and that **Exhibit B** is consistent with the general parameters described in Section 2.1(c).

SECTION 3. CONTRACT ADMINISTRATION

3.1 Oversight. Except as otherwise set forth in this Agreement, the Council shall perform, direct, and supervise all construction, contract administration and inspection Council deems required or necessary and appropriate and, where such Work involves Freight Rail Service,

Council shall assure that such Work has been inspected by TCWR as outlined in Section 5.1. All Work shall be performed by the Council or the Council's Contractors, as directed by the Council, in accordance with the Contract Documents for the Project. The Contract Documents will be kept on file at the SWLRT Project Office, 6465 Wayzata Boulevard, St. Louis Park, Minnesota during construction and at the Metropolitan Council, 390 Robert Street North, St. Paul, Minnesota, after construction, or at such other location as the Council may advise TCWR from time to time.

3.2 Construction Coordination Committee – Membership and Purpose.

- a. The Council and TCWR shall establish an advisory Construction Coordination Committee consisting of at least two (2) representatives of each Party. The Construction Coordination Committee shall be a forum for the Parties to share information, discuss matters submitted by one Party to the other Party for review and approval, and to work to resolve any issues between the Parties with respect to this Agreement. The Construction Coordination Committee shall participate in weekly meetings with the Council's Contractor and also as necessary (in person or by telephone) to address issues between the Parties that require prompt resolution. The first meeting of the Construction Coordination Committee shall occur within fourteen (14) days of the Execution Date. The Construction Coordination Committee will terminate on the Construction Completion Date.
- b. The Council and TCWR shall each designate one representative to the Construction Coordination Committee as their authorized primary point of contact with respect to matters concerning Project design and construction during the Term of this Agreement. Each Party shall be entitled to act in reliance upon directions from the other Party's designated primary point of contact in carrying out the Party's obligations pursuant to this Agreement. Except as specifically authorized in this Agreement with respect to emergencies or Work Stoppage by TCWR as outlined in Section 4.3, TCWR shall not have any authority to direct the Council's Contractor(s), and all communications with the Council's Contractor(s) shall be through or authorized by the CAR.

3.3 Management Plans.

- a. The Contract Documents shall require the Council's Contractor to submit the following Management Plans for the Council's approval:
 - i. Freight Railroad Safety Action Plan (FRSAP). The FRSAP shall describe the actions the Council's Contractor shall implement to increase safety for Work occurring adjacent to freight railroads. The FRSAP shall identify areas of concern and plans to address those identified concerns, provide a summary of the employee training program and job safety briefings to be conducted by Council's Contractor, emergency preparedness plans, fire prevention plans, and on-site safety assessments.
 - ii. Freight Railroad Management Plan (FRMP). The FRMP shall provide a detailed accounting of how the Council's Contractor shall manage Work

activities occurring adjacent to freight railroads in a safe manner, in accordance with the schedule approved by the Council for each SSWP. The FRMP shall identify an organization and staffing levels for each SSWP, freight railroad interface control, safety and security management, community and public impact, clean up and disposal, environmental impact and emergency response and contact information.

iii. Site Specific Work Plans (SSWPs). SSWPs are detailed plans for Work in the Corridor. The type of SSWP required shall depend upon the proximity to Freight Rail Facilities (referred to as "type of adjacency" in the Contract Documents) for which the Work is being performed. The SSWPs shall identify the detailed scope of work, schedule (including Inspection-Points, Return to Service Date, and Cessation of Operations Date), personnel and equipment requirements, contingency plans, controls, safety, community and public impact, clean up and disposal, emergency response and contact information, and address flagger shortage procedures so that Work can continue in the event TCWR's flaggers are unavailable.

b. The Council shall submit each Management Plan to TCWR for review and comment prior to the Council approving the same pursuant to the Contract Documents. TCWR shall provide written review comments (if any) to the Council within fourteen (14) days of its receipt of the FRSAP and FRMP, and within seven (7) days of its receipt of each SSWP. If the Council does not accept all of TCWR's comments, then within fourteen (14) days of receipt of such comments the Parties shall meet and confer regarding the unaccepted comments in an effort to resolve the issues posed by such comments. The Council shall cause the Council's Contractor to revise the Management Plans to address TCWR's concerns as it relates to the safe and efficient operation of Freight Rail Service. If the parties do not resolve the unaccepted comments, the Council shall not be obligated to incorporate them unless failure to do so would materially impair the safety or efficient, continuous and uninterrupted operation of Freight Rail Service or violate any other provision of this Agreement. Upon completion of final plans, the Council shall give a copy of the final Management Plans to TCWR for its records.

SECTION 4. CONSTRUCTION

4.1 Flagging. TCWR shall, at Council's expense and on Council's behalf, provide all flagging necessitated by Work on Freight Rail Facilities in the Corridor pursuant to a Master Purchase Order between the Council to TCWR. The flagging requirements and schedule will be included in the SSWPs reviewed by the Parties as outlined in Section 3.3(b).

TCWR shall designate one of the flaggers as the crew leader and primary contact or liaison between TCWR and the CAR. The Council's Contractor shall coordinate with the flagger crew leader. If TCWR is unable to provide flagging in accordance with the SSWPs, TCWR shall notify the Council at least five (5) days prior to a scheduled flagger shortage (such as planned vacations or training) or as much advanced notice as possible prior to an unscheduled flagger shortage (such as a personnel issue). If TCWR provides such notice, and at any time that TCWR fails to provide

flaggers as required in this Section, Work will continue under the flagger shortage procedures to be developed as required in Section 3.3.a.iii.

4.2 Pre-Planned Outages. TCWR shall temporarily suspend Freight Rail Services in accordance with the time frames set forth in the Pre-Planned Service Outage Matrix (the “Outage Matrix”, see **Exhibit C-1**). The Construction Coordination Committee shall review the Outage Matrix at each monthly meeting to identify any adjustments necessary to synchronize the Outage Matrix with actual Project construction progress. The Parties may agree upon and make necessary changes to the Outage Matrix based upon the Construction Coordination Committee’s recommendations without amending this Agreement. The changes to the Outage Matrix shall be deemed to be incorporated herein when executed by the primary point of contact for each Party. The Council shall notify TCWR promptly upon the Council’s determination that suspension of Freight Rail Service on any portion of the Freight Rail Facilities will not be required at a time specified in the Outage Matrix. The Parties shall meet and confer to address any anticipated delay or acceleration in the Project, and to agree upon any corresponding adjustment to the timeframes set forth in the Outage Matrix that are necessitated by such delay or acceleration. The Parties agree that Pre-Planned Outages are the exception to the obligations related to obligations of “continuous and uninterrupted operation of Freight Rail Service” throughout this Agreement.

4.3 Work Stoppage by TCWR. It is understood and agreed that TCWR shall have the right to request that Council’s Contractor cease Work immediately if, in TCWR’s sole discretion, any Work poses a threat to the safety of Freight Rail Service, TCWR’s employees or contractors, or the general public or creates unsafe working or operating conditions and if Work Stoppage is approved by the Council, and Council shall assure that its Contractor abides by such order. In the event that TCWR requests that Council’s Contractor stop Work, TCWR agrees to immediately notify the Council in writing and must include the action which, in the opinion of TCWR must be taken to rectify the situation, and the prescribed time period by which the situation must be rectified without resulting in an Unscheduled Outage. Failure by the Council to rectify the situation by the prescribed time period may result in an Unscheduled Outage at TCWR’s reasonable discretion.

4.4 Unscheduled Outages. If the Council’s Contractor’s activities require an Outage that, (i) at TCWR’s sole discretion, materially impacts TCWR’s Freight Rail Service (as demonstrated by a daily schedule of planned Freight Rail Service, upon request) which are not Pre-Planned Outages included on **Exhibit C-1**, or (ii) the Contractor overstays a Pre-Planned Outage (collectively an “Unscheduled Outage”), the Council’s Contractor will be assessed a Non-Compliance Charge. A Non-Compliance Charge for each incident will be assessed at the rate(s) outlined in **Exhibit C-2**. The Council shall remit to TCWR all Non-Compliance Charge(s) whether or not collected or withheld from the Council’s Contractor. TCWR agrees to accept any Non-Compliance Charge(s) collected or withheld from the Council’s Contractor as its sole remedy for an Unscheduled Outage.

4.5 Utilities. The Council shall be responsible for coordinating the modification and relocation of all existing utilities on the Corridor as required by the Project, and the costs related to the modification and/or relocation of utilities shall not be borne by TCWR.

4.6 Change Orders. The Council shall provide TCWR with an opportunity to review and comment on any proposed Change Order that could impair the safe or efficient, continuous, and uninterrupted operation of Freight Rail Service (exceptions for interruptions are outlined in Section

4.2). The Council shall submit proposed Change Order including any interim plans and design documents to TCWR for TCWR's review and comment. TCWR shall cooperate with the Council in reviewing and providing written comments on any proposed Change Order submitted by the Council to TCWR for review and comment within fourteen (14) days for a plan set in excess of twenty (20) sheets plus one (1) day for each additional twenty (20) sheets, and seven (7) working days for plan submittals of nineteen (19) sheets or less. Review time will be based on the number of sheets submitted in a 24-hour period of the Council's submittal of proposed Change Order to TCWR. Upon the Council's request, TCWR shall promptly meet and confer with the Council to address comments raised by TCWR with respect to proposed Change Order.

4.7 Ownership of Modifications. All Modifications made, changed or relocated by the Council on the Corridor, including but not limited to the Freight Rail Facilities, will be owned by the Council.

4.8 Salvage. The Council shall have the option to retain all materials salvaged from the Work, except for existing 115RE running railand tie plates removed in the Kenilworth Corridor which shall be salvaged and stockpiled by the Council's Contractor on the site of the freight depot in Hopkins, MN for pickup by TCWR. TCWR will be provided the salvaged materials free of charge, however, TCWR shall promptly pick up any materials salvaged and stockpiled for its benefit, and shall be responsible for all costs associated with transport and storage of the stockpiled materials. If TCWR fails to pick up the materials salvaged and stockpiled for its benefit within 10 business days of written notification from Council's Contractor that the materials have been so stockpiled, the Council's Contractor may dispose of the materials and TCWR shall promptly reimburse Council's Contractor upon receipt of an invoice for such costs from the Council's Contractor.

4.9 As-Built CAD Drawings. After the Construction Completion Date, the Council shall furnish to TCWR a minimum of one (1) set of as-built plans for the Modifications included in the Project, at no cost to TCWR, prepared in U.S. Customary Units, and a minimum of one (1) set of computer diskettes, containing as-built CAD drawings of the Modifications. The "as-built plans" shall (i) depict all information in Project engineering stationing and mile post pluses, (ii) include plan and profile, structural drawings and specifications, and drainage plans, and (iii) show all Freight Rail Facility Modifications.

4.10 LRT System Testing. The Council shall have the right to conduct testing of the LRT Facilities on the Corridor, including pre-revenue service testing of vehicles and passenger carriage, and to conduct tours and other promotional activities on the Corridor. The Council shall coordinate the testing and promotional activities with TCWR through the Construction Coordination Committee.

4.11 Permits. The Council shall be responsible for obtaining all required environmental and/or planning documents, including any environmental permits, needed for the Project. If the permit process requires that TCWR sign the permit application or request, TCWR shall, after reviewing the application or request and all related documents, respond to any requests to sign a permit application or request within fourteen (14) days of request by the Council, and shall advise the Council in writing of the reasons for any refusal to comply with a request, specifying how the Work that is the subject of the request would materially impair the safety or efficient, continuous, and uninterrupted operation of the Freight Rail Services. In the event of any such refusal, TCWR

shall meet and confer with the Council to address the reasons why TCWR believes the Work would materially impair the safety or efficient, continuous, and uninterrupted operation of the Freight Rail Service so as to justify TCWR's refusal to sign a permit application or request. If the Council concurs with TCWR, the Council shall modify its permit application to address the reasons for TCWR's refusal, and resubmit the request to TCWR. If the Parties are unable to reach agreement the matter shall be submitted to dispute resolution in accordance with Section 15.

4.12 Clearing of Wrecks. During the period of construction, TCWR shall, at its sole expense, be responsible for clearing all freight rail derailments and wrecks occurring on the Corridor for which it is liable as provided in the O&M Agreement. Any derailment which is caused, in whole or in part, by Council's Contractors shall be the responsibility of Council and shall be cleared in accordance with the terms of the O&M Agreement.

4.13 Temporary Crossings and Roadways. The Council shall provide TCWR with an opportunity to review and comment on any proposed temporary at-grade crossings used during construction, whether roadway (including temporary haul roads) or pedestrian, that could Foul the freight rail tracks, in accordance with the process for review and comment on Management Plans set forth in Section 3.3.

4.14. Temporary License for Use of Council Property. Temporary License for Use of Council Property for Freight Rail Service on Council's Freight Rail Facilities. The Parties acknowledge that, for certain time periods during the term of this Agreement, Freight Rail Service will be provided on Freight Rail Facilities not located on any Freight Rail Easement. Pursuant to this Section 4.14, the Council grants permission for TCWR to use the Council's property to provide Freight Rail Service on locations where Freight Rail Facilities exist (either temporarily or permanently) subject to the same terms and conditions contained in the applicable Easements, the O&M, and this Agreement.

SECTION 5. ACCEPTANCE OF WORK

5.1 Inspection.

a. The Council shall be responsible for constructing all Work at the sole cost and expense of the Council, in accordance with the Contract Documents. TCWR shall have the right to review and inspect the as-built condition of all Work on the Freight Rail Facilities for compliance with Contract Documents prior to the Council's acceptance of the Work from the Council's Contractor.

b. **Inspection Process:**

- i. The Council shall provide TCWR with seven (7) days advance notice of the date on which the Council anticipates reaching an Inspection-Point or Return to Service Date, as identified in a SSWP, of any Work on Freight Rail Facilities.
- ii. The Council shall notify TCWR of the date on which the Inspection-Point or Return to Service Date has been achieved and the Work is available for TCWR's inspection. TCWR shall complete its inspection and provide written notice of any Unsafe Work identified by TCWR in its inspection

within seven (7) days from the date of such notice that the Work has reached an Inspection-Point or Return to Service Date.

TCWR's Notice of Unsafe Work must specify the reason(s) the Work is unsafe, and the actions which, in the opinion of TCWR, must be taken to make the Work safe and operational. The Council shall in good faith take reasonable steps to address the Unsafe Work specified in TCWR's notice.

- iii. The Council shall require the Council's Contractor to make corrections of Unsafe Work and notify TCWR when the Work identified by TCWR as Unsafe Work has been corrected, and TCWR shall have up to five (5) days to conduct an inspection of the corrected Work. Upon such further inspection, TCWR shall either provide a further notice of Unsafe Work, or a notice that the Unsafe Work has been corrected. The process shall repeat until the Unsafe Work is in compliance with the Contract Documents. Disagreements between the Council and TCWR with respect to the existence of Unsafe Work shall be resolved in accordance with the dispute resolution process specified in Section 15.
- iv. TCWR's failure to inspect the Work within the time specified in this Section shall be deemed to waive TCWR's right to inspect the Work. TCWR's failure to inspect the Work, or to notify the Council of Unsafe Work within the time specified in this Section shall be deemed a waiver of TCWR's right to request any further changes, except for any changes necessary to correct Unsafe Work that would materially impair the safety or efficient operation of the Freight Rail Services.

5.2 Substantial Completion & Construction Completion Date.

- a. The Council will provide TCWR with written notice of the Construction Completion Date after the Council determines that all of the Modifications to be constructed pursuant to this Agreement have progressed to the point it is sufficiently complete and in accordance with the Contract Documents ("Substantial Completion"). Together, the Parties will inspect the Freight Rail Facilities in the Corridor and the process in accordance with Section 5.1.
- b. After the joint inspection, TCWR shall provide the Council with a certificate in the form of **Exhibit D** (a "*TCWR Modifications Completion Certificate*") acknowledging that the relevant Modifications have been completed and are suitable for operation of the Freight Rail Service. Construction Completion shall not occur until TCWR has executed and delivered the TCWR Modifications Completion Certificate.
- c. Upon the issuance of the *TCWR Modifications Completion Certificate*, TCWR's maintenance responsibilities outlined in the O&M Agreement will resume on the Kenilworth Corridor and Bass Lake Spur – East.

SECTION 6. ACCESS RIGHTS

6.1 Access to Freight Rail Facilities. In addition to the access rights outlined in Section 5 of the O&M Agreement, as applicable, the Council and Council's Contractor shall have access to the Freight Rail Facilities from the Construction Commencement Date until the Construction Completion Date as outlined in the SSWPs.

6.2 Maintenance of Freight Rail Facilities. TCWR is responsible for inspecting, maintaining, and repairing the Freight Rail Facilities in accordance with the O&M Agreement until the Construction Commencement Date. The Council's Contractor shall be responsible for necessary inspection, maintenance, repair and renewal of Freight Rail Facilities on the Kenilworth Corridor and Bass Lake Spur - East from the Construction Commencement Date until the Construction Completion Date.

SECTION 7. COMPENSATION BASIS: MAXIMUM TOTAL COMPENSATION

7.1 Monthly Fee. The Council shall pay TCWR the amount identified on the Payment Schedule shown on **Exhibit E** for TCWR's performance of Activities in connection with the Project and as mitigation for operational interruptions during construction.

Activities enumerated in this Agreement include, but are not limited to:

1. Analyzing proposed changes to the Corridors and proposed changes in TCWR's Freight Rail Facilities and Freight Rail Service resulting from Project construction, particularly with respect to safety requirements to ensure the TCWR will be able to continue to operate Freight Rail Service effectively, efficiently, continuously and safely during and after construction;
2. Planning and coordination with the Council, including providing information and/or documentation related to TCWR engineering standards, guidelines, and requirements related to design, construction, maintenance, safety, and operation of freight rail infrastructure and other technical guidance during review of SSWPs; and
3. Reviewing and providing comments on the Management Plans.

7.2 Maximum Total Compensation. The Maximum Total Compensation payable to TCWR herein, shall not exceed \$16,112,210.

7.3 It is understood and agreed that, as applied to Work or Activities performed or carried out as part of this Agreement, TCWR is not, and shall not be considered, a contractor providing services to the Council hereunder however, this acknowledgement does not relieve TCWR from its obligations to comply with the provisions of this Agreement, including the Federal Transit Administration Clauses outlined in Section 10, as applicable.

7.4 WILL ADD 1031 LANGUAGE WHEN ITS READY (CURRENTLY UNDER REVIEW BY TCWR)

SECTION 8. METHOD OF PAYMENT

8.1 Monthly Method of Payment. TCWR shall submit to the Council an invoice in the form of **Exhibit E** on or before the 20th day of each month. Each invoice shall set forth the information shown on **Exhibit E**. The Council will make payment within thirty (30) days of receipt of the invoice.

8.2 Verification. On verification and acceptance by the CAR of each monthly invoice, the Council shall pay TCWR the agreed upon Monthly Fee.

8.3 Final Invoice. After TCWR submits the TCWR Modifications Completion Certificate, TCWR shall submit to the Council a final invoice for the Monthly Fee and a request for payment of the sums then owing. The final invoice must include the following certification, signed by an authorized representative of TCWR:

The undersigned represents that payment of this request for payment constitutes the final payment to be made pursuant to the payment schedule agreed upon and acknowledges that the undersigned shall reimburse the Council for any payments due the Council as a result of an audit.

SECTION 9. ADDITIONAL REQUIREMENTS FOR PROJECT FUNDED WORK

9.1 Records-Keeping. TCWR shall maintain such books, records, documents and other evidence relevant to activities performed pursuant to this Agreement, including, but not limited to flagging, track inspection, and project management. These books, records, documents, and data shall be retained for at least six (6) years after the term of the Agreement, except in the event of litigation or settlement of claims arising from the performance of this Agreement, in which case TCWR agrees to maintain them until the Council and any of its duly authorized representatives have disposed of the litigation or claims.

The provisions of this Section 9.1 shall survive termination or cancellation of this Agreement.

9.2 Audits. To the extent applicable, the Parties incorporate Minnesota Statutes, section 16C.05, subdivision 5. However, by entering into this Agreement, TCWR is not waiving and does not waive its right to refuse to allow or limit the examination of its records, books, documents, and accounting procedures and practices provided by any applicable law, statute, rule or regulation, including, but without limitation, the Minnesota Government Data Practices Act. TCWR shall permit a required examination and audit at any time during regular business hours. Audits conducted by the Council under this provision shall be in accordance with generally accepted auditing standards. Financial adjustments resulting from any audit by the Council shall be paid in full within thirty (30) days of TCWR's receipt of audit.

The six-year audit and examination provisions of this Section 9.2 shall survive termination or cancellation of this Agreement.

9.3 Prompt Payment of Subcontractors. Consistent with Minnesota Statutes, section 471.425, if any part of the Activities is subcontracted, TCWR shall pay any such subcontractor within ten

(10) days of TCWR's receipt of payment from the Council for undisputed Activities provided by the subcontractor. TCWR shall not, by reason of said payments, be relieved from responsibility for that portion of the Activities done by the subcontractor and shall be responsible for the entire Activities until the same is finally accepted by the Council. TCWR does not anticipate hiring any subcontractors.

SECTION 10. FEDERAL TRANSIT ADMINISTRATION (FTA) CLAUSES

10.1 Purpose. The provisions of this Section 10 are required because this Agreement is funded in whole or in part by the FTA. The requirements in this Section are in addition to and, unless inconsistent and irreconcilable, do not supplant requirements found elsewhere in this Agreement. If any requirement of this Section is inconsistent with a provision found elsewhere in this Agreement and is irreconcilable with such provision, the requirement in this Section shall prevail.

a. To the extent (i) TCWR incurs costs to comply with the FTA required provisions of this Section 10 that would not otherwise apply but-for this Agreement, and (ii) those costs would cause the payments under this Agreement to exceed the Maximum Total Compensation specified in Section 7.2, the Parties agree to enter into negotiations for an amendment of this Agreement to increase the Maximum Total Compensation amount pursuant to the process outlined in Section 10.1(b).

b. The Parties acknowledge that the total amount to be reimbursed by the Council to TCWR must not exceed the Maximum Total Compensation (pursuant to Section 7.2) unless mutually agreed to by the Parties in writing. TCWR shall notify the Council prior to incurring costs pursuant to Section 10.1(a) and provide a detailed cost estimate for compliance with the FTA required provisions. The costs estimate must be accurate, comprehensive, in sufficient detail to verify and must not include markup or profit. If the cost estimate is agreed to by the Parties, the Council will seek authorization for such costs in excess of the Maximum Total Compensation, and the Parties will expeditiously execute an amendment to this Agreement.

(a)

To the extent applicable to TCWR Activities performed pursuant to this Agreement, TCWR agrees as follows:

10.2 Fly America Requirements. TCWR agrees to comply with 49 U.S.C. 40118 (the "Fly America Act") in accordance with the General Services Administration's regulations at 41 CFR Part 301-10, which provide that recipients and subrecipients of federal funds and their contractors are required to use U.S. Flag air carriers for U.S. Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act. TCWR shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. Flag air carrier was not available or why it was necessary to use a foreign air carrier and shall, in any event, provide a certificate of compliance with the Fly America requirements. TCWR agrees to include the requirements of this Section in all subcontracts related to this Agreement that may involve international air transportation.

10.3 Energy Conservation. TCWR agrees to comply with mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the federal Energy Policy and Conservation Act , if applicable to its Activities under this Agreement.

10.4 Access to Records and Reports. TCWR agrees to provide the FTA Administrator, the Comptroller General of the United States, and any of their authorized representative with access to any books, documents, papers and records of TCWR which are directly pertinent to this Agreement for the purposes of making audits, examinations, excerpts, and transcriptions.

TCWR also agrees, pursuant to 49 CFR § 633.15, to provide the FTA Administrator or the Administrator's authorized representatives, including any project management oversight (PMO) contractor, access to TCWR's records and construction sites directly pertinent to this Agreement and pertaining to a major capital project, defined at 49 U.S.C. 5302(a)(1), which is receiving federal financial assistance through the programs described at 49 U.S.C. §§ 5307, 5309, or 5311, but only to the extent related to TCWR's Activities under this Agreement.

TCWR agrees to permit any of the foregoing parties to reproduce the documents described in the preceding paragraph by any means whatsoever or to copy excerpts and transcriptions as reasonably needed. In addition to any requirements for maintenance of project records and documents in other sections of this Agreement, TCWR agrees to maintain such records and documents required by this Section 10.4 until the FTA Administrator, the Comptroller General, or any of their duly authorized representatives have disposed of all litigation, appeals, claims or exceptions arising from the performance of this Agreement.

10.5 Federal Changes. TCWR shall comply with the required FTA clauses set forth in this Agreement and with all applicable FTA regulations, policies, procedures and directives including, without limitation, those listed directly or by reference in the agreement between the Council and FTA which are directly pertinent to this Agreement. TCWR's failure to comply with such applicable FTA regulations, policies, procedures, and directives, as they may be amended or promulgated from time to time during the term of this Agreement, shall constitute a material breach of this Agreement.

10.6 No Obligation by the Federal Government. The Council and TCWR acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of this Agreement, absent the express written consent by the Federal Government, the Federal Government is not a party to this Agreement and shall not be subject to any obligations or liabilities to the Council, TCWR, or any other party (whether or not a party to the Agreement) pertaining to any matter resulting from this Agreement.

TCWR agrees to include the preceding clause in each subcontract under this Agreement, modified only to identify the subcontractor that will be subject to the provisions.

10.7 Civil Rights. The following requirements apply to this Agreement:

1. Nondiscrimination. In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. § 2000d, section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6102, section 202 of the Americans with Disabilities Act of 1990, 42

U.S.C. § 12132, and federal transit law at 49 U.S.C. § 5332, TCWR agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age, or disability. In addition, TCWR agrees to comply with applicable federal implementing regulations and other implementing requirements FTA may issue.

2. Equal Employment Opportunity. The following equal employment opportunity requirements apply to this Agreement:

- a. Race, Color, Creed, National Origin, Sex. In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e, and federal transit laws at 49 U.S.C. § 5332, TCWR agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor,” 42 CFR Parts 60 *et seq.*, (which implement Executive Order No. 11246, “Equal Employment Opportunity,” as amended by Executive Order No. 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” 42 U.S.C. § 2000e note), and with any applicable federal statutes, executive orders, regulations, and federal policies that may in the future affect construction activities undertaken in the course of this Agreement. TCWR agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, TCWR agrees to comply with any implementing requirements FTA may issue.
- b. Age. In accordance with section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623 and federal transit law at 49 U.S.C. § 5332, TCWR agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, TCWR agrees to comply with any implementing requirements FTA may issue.
- c. Disabilities. In accordance with section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. § 12112, TCWR agrees that it will comply with the requirements of U.S. Equal Employment Opportunity commission, “Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act,” 29 CFR Part 1630, pertaining to employment of persons with disabilities. In addition, TCWR agrees to comply with any implementing requirements FTA may issue.

3. Inclusion in Subcontracts. TCWR agrees to include the requirements of this Section 10.7 in each subcontract under this Agreement, modified only to identify the subcontractor that will be subject to the provision.

10.8 Disadvantaged Business Enterprise (“DBE”). (FTA funding with no DBE Goal)

1. Nondiscrimination. Pursuant to 49 CFR Section 26.13, TCWR, sub-recipients, or subcontractors shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. TCWR shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by TCWR to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy, as the Council deems appropriate. TCWR shall include this requirement in all subcontracts pursuant to this Agreement.
2. Payment. TCWR agrees to pay subcontractors within ten (10) calendar days of TCWR's receipt of payment from the Council for undisputed services provided by the subcontractor. In addition, TCWR agrees to pay subcontractors all undisputed retainage payments within ten (10) calendar days of TCWR's receipt of the subcontractor's final undisputed invoice regardless of whether Contractor has received any retainage payment from the Council. TCWR shall not postpone or delay any undisputed payments owed subcontractors without good cause and without prior written consent of the Council. TCWR agrees to include in all subcontracts a provision requiring the use of appropriate alternative dispute resolution mechanisms to resolve payment disputes. TCWR will not be reimbursed for work performed by subcontractors unless and until TCWR ensures that subcontractors are promptly paid for work they have performed. Failure to comply with the provisions of this Section may result in the Council finding TCWR in noncompliance with the DBE provisions of this Agreement.

10.9 Incorporation of FTA Terms. Specific provisions in this Agreement include, in part, certain standard terms and conditions required by USDOT, whether or not expressly set forth in the Agreement provisions. All contractual provisions required by USDOT, as set forth in 2 CFR §§ 200.317-200.326 and the most recent version of FTA Circular 4220 are hereby incorporated by reference. Notwithstanding anything to the contrary in this Agreement, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. TCWR shall not perform any act, fail to perform any act, or refuse to comply with any Council requests which would cause the Council to be in violation of the FTA terms and conditions.

10.10 Clean Water. The provisions of this Section 10.10 apply only if the amount of this Agreement (including the value of any amendments thereto) exceeds \$150,000.

TCWR agrees to comply with all applicable standards, orders, or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. Section 1251 *et seq.* TCWR agrees to report each violation to the Council and understands and agrees that the Council will, in turn, report each violation as required to assure notification to FTA and the appropriate Environmental Protection Agency (EPA) Regional Office. TCWR also agrees to include these requirements in each new subcontract procured for services exceeding \$150,000 financed in whole or in part with federal assistance provided by FTA.

10.11 Certification of Restrictions on Lobbying; Disclosure. The provisions of this Section 10.11 apply only if the amount of this Agreement (including the value of any amendments thereto) is equal to, or exceeds \$100,000.

TCWR certifies that no federal appropriated funds have been paid or will be paid by or on behalf of TCWR for influencing or attempting to influence an officer or employee of any federal agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement. The certification of this compliance ("Lobbying Restriction Certification") submitted by TCWR in connection with this Project is incorporated in, and made a part of, this Agreement.

TCWR further certifies that, if any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee or any federal agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the projects funded by the funds allocated to TCWR in this Agreement, TCWR shall complete and submit to the Council, Standard Form-LLL, "*Disclosure Form to Report Lobbying*," in accordance with its instructions, except as set forth in 31 USC § 1352(d)(2).

The certifications referred to in this Section (including the "Lobbying Restriction Certification" submitted by TCWR in connection with this project and incorporated in, and made a part of, this Agreement) are material representations of fact upon which the Council relies when this Agreement is made.

TCWR certifies that it will require the language of this certification be included in the award documents for any subcontracts equal to or in excess of \$100,000.00 under this Agreement, and that all subcontractors shall certify and disclose accordingly to TCWR. All certifications and disclosures shall be forwarded to the Council by TCWR.

10.12 Clean Air. The provisions of this Section 10.112 apply only if the amount of this Agreement (including the value of any amendments thereto) exceeds \$150,000.

TCWR agrees to comply with all applicable standards, orders, or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. section 7401 *et seq.* TCWR agrees to report each violation to the Council and understands and agrees that the Council will, in turn, report each violation as required to assure notification to FTA and the appropriate Environmental Protection Agency (EPA) Regional Office. TCWR also agrees to include these requirements in each new subcontract procured for services exceeding \$150,000 financed in whole or in part with federal assistance provided by the FTA.

10.13 Integrity Certification/Debarment & Suspension. The provisions of this Section 10.13 apply only if the amount of this Agreement (including the value of any amendments thereto) exceeds \$25,000.

By signing this Agreement, TCWR certifies that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this Agreement by any federal department or agency. This certification is a material representation of fact upon which the Council relies in entering this Agreement. If it is later determined that TCWR knowingly rendered an erroneous certification, in addition to other

remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment. TCWR shall provide to the Council immediate written notice if at any time TCWR learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

10.14 False Statements or Claims and Related Acts. TCWR acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. Section 3801 et seq., and USDOT regulations, "*Program Fraud Civil Remedies*," 49 CFR Part 31, apply to its actions pertaining to this Agreement. Upon execution of this Agreement, TCWR certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to this Agreement or the FTA-assisted project for which this work is being performed. In addition to other penalties that may be applicable, TCWR further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986 on TCWR to the extent the Federal Government deems appropriate.

TCWR also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under a contract connected with a project that is financed in whole or in part with Federal assistance originally awarded by FTA under the authority of 49 U.S.C. Chapter 53, the Federal Government reserves the right to impose the penalties of 18 U.S.C. Section 1001 and 49 U.S.C. Section 5307(k)(1) and 49 U.S.C. Section 5323(l), or other applicable federal law, on TCWR, to the extent the Federal Government deems appropriate.

TCWR agrees to include the above language in each subcontract financed in whole or in part with Federal assistance provided by the FTA under this Agreement, modified only to identify the subcontractor that will be subject to the provisions.

SECTION 11. NON DISCRIMINATION AND AFFIRMATIVE ACTION

In providing the Activities under this Agreement, TCWR agrees as follows:

11.1 Prohibition on Discriminatory Practices. TCWR shall take affirmative action to ensure that applicants are selected, and that employees are treated during employment, without regard to their race, color, creed, religion, national origin, sex, sexual orientation, marital status, status with regard to public assistance, membership or activity in a local civil rights commission, disability or age.

11.2 Affirmative Action. The provisions of this Section 11.2 apply only if the amount of this Agreement (including the value of any amendments thereto) exceeds one hundred thousand dollars (\$100,000).

1. **General Requirements.** The requirements of Minnesota Statutes, section 473.144, and Minnesota Rules, parts 5000.3400 to 5000.3600, regarding affirmative action plans, are incorporated in this Agreement by reference.
2. **Disabled Individuals Affirmative Action.**

- a. TCWR must not discriminate against any employee or applicant for employment because of a physical, sensory, or mental disability in regard to any position for which the employee or applicant for employment is qualified. TCWR agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified disabled persons without discrimination based upon their physical, sensory, or mental disability in all employment practices such as the following: employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.
- b. TCWR agrees to comply with the rules and relevant orders of the Minnesota Department of Human Rights issued pursuant to the Minnesota Human Rights Act.
- c. In the event of TCWR's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with Minnesota Statutes, section 363A.36, and the rules and relevant orders of the Minnesota Department of Human Rights issued pursuant to the Minnesota Human Rights Act.
- d. TCWR agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form prescribed by the Commissioner of the Minnesota Department of Human Rights. Such notices must state TCWR's obligation under law to take affirmative action to employ and advance in employment qualified disabled employees and applicants for employment, and the rights of applicants and employees.
- e. TCWR must notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that TCWR is bound by the terms of Minnesota Statutes, section 363A.36 of the Minnesota Human Rights Act and is committed to take affirmative action to employ and advance in employment physically, sensory, and mentally disabled persons.

11.3 Freedom from Sexual Harassment. The Council has a policy that establishes a work environment for Council employees free of sexual harassment of any form, whether mental or physical. TCWR shall require its employees and all other persons performing Activities in association with this Agreement, to conform to this policy as their actions may relate to Council employees.

11.4 Drug Free. TCWR shall not permit the possession or use of intoxicating liquors or illegal drugs by TCWR, or its agents, or employees, or subcontractor upon any Council facility or property.

SECTION 12. INSURANCE, LIABILITY AND INDEMNITY

12.1 Council's Contractor Insurance. Throughout the term of this Agreement Council shall require the Council's Contractor to procure and maintain the following insurance:

- a. Commercial General Liability (CGL). The Council's Contractor shall maintain CGL on an occurrence form (ISO CG 00 01 12 04, or its equivalent) and, if necessary, commercial umbrella insurance with a limit of not less than \$100,000,000 each occurrence and in the annual aggregate. The annual aggregate limit shall apply separately

to this project. The policy shall provide defense and coverage for liability arising from premises, operations, independent contractors, products-completed operations, personal injury, advertising injury, and contractual liability (ISO CG 24 17, or its equivalent).

i. The Council, the Council's Contractor, its officers, agents and employees, and TCWR, shall be included as an additional insured under the CGL utilizing ISO CG 20 26 07 04 and ISO CG 20 37 07 04, or their equivalent. Such coverage shall be maintained for a minimum period of three years following final acceptance of the Modifications by the Council of the Work related to this Agreement. This insurance shall be primary and non-contributory with respect to any other insurance or self-insurance programs afforded to the Council or TCWR. There shall be: (1) no endorsement or modification of the CGL to make it excess over other available insurance, (2) no exclusions for any contractual liability assumed within fifty (50) feet of a railroad, (3) provisions requiring insurers to waive any subrogation or recovery that may exist against TCWR, its affiliate, subsidiaries, officers, directors, employees or agent or the Council, its members, officers, directors, employees or agents.

b. Automobile and Umbrella Liability Insurance. The Council's Contractor shall maintain business automobile coverage, ISO CA 00 01, 1997 or later edition, and if necessary an Umbrella Liability policy on a following-form basis, for liability arising out of the operation, maintenance or use of any automobile, whether owned, non-owned, rented or leased, with a limit of not less than \$100,000,000 each accident.

i. Pollution liability coverage equivalent to that provided under the ISO pollution liability-broadened coverage for covered autos endorsement (CA 99 48) shall be provided, and the Motor Carrier Act endorsement (MCS 90) shall be attached.

ii. The Council, its officers, agents and employees, and TCWR, shall be included as an additional insured by endorsement, ISO Form CA 20 48 02 99 or equivalent.

c. Contractor Pollution Liability (CPL). The Council's Contractor shall maintain this coverage with limits not less than \$10,000,000 each claim and \$10,000,000 annual aggregate. Coverage shall include bodily injury, property damage, including loss of use of property, clean-up costs, defense (including costs and expenses incurred in the investigation, defense, or settlement of claims), products and/or completed operations, and contractual liability. Coverage shall also be provided for transport of waste and non-owned disposal sites, if the Council's Contractor is disposing of waste.

i. The Council and TCWR shall also be listed as an insured on such policy.

d. Certificates of Insurance evidencing that the above insurance is in place must be provided to TCWR prior to the Construction Commencement Date.

12.2 Council Insurance.

a. Council shall procure and maintain Commercial General Liability insurance written on an occurrence form basis (ISO CG 00 01 12 04, or its equivalent) with per occurrence and aggregate limits no less than \$10,000,000. TCWR shall be listed as an additional insured, on a primary and non-contributory basis, utilizing ISO CG 20 26 10 01 and ISO CG 20 37 10 01, or their equivalent. Council shall cause its insurers to waive rights of subrogation in favor of TCWR.

b. Builder's Risk Property Insurance. Council will maintain a Builder's Risk policy for the Project. Policy shall be written on replacement cost basis and shall provide a waiver of subrogation in favor of TCWR.

c. Railroad Protective Liability Insurance. Railroad Protective Liability Insurance naming TCWR as a named insured having limits of not less than \$100,000,000 each occurrence and in the aggregate. The policy shall be issued using Insurance Services Offices forms CG 00 35 04 13 and CG 28 31 04 13, or their equivalents.

d. Certificates of Insurance evidencing that the above insurances is in place and a copy of the original Railroad Protective Liability policy must be provided to TCWR prior to the Construction Commencement Date.

12.3 TCWR Insurance. TCRW shall procure and maintain the insurance that it is required to procure and maintain pursuant to the O&M Agreement, the provisions of which are incorporated herein by reference.

12.4 Indemnities as between Council and TCWR. To the fullest extent allowed by law, Council shall indemnify, defend, and hold harmless, TCWR, its officers, agents, and employees, from and against Loss or Damage, including Loss or Damage caused by, arising out of, or resulting from the performance of the Work, regardless of whether or not caused in whole or in part by any act or omission of TCWR, including the negligence of TCWR of any degree or type and including the sole negligence or other fault of TCWR. **[FLAGGED FOR DISCUSSION]**

12.5. Indemnities from Council's Contractors to TCWR. Council shall assure that all Agreements between Council and any Contractor performing Work or otherwise providing services under this Agreement shall contain indemnity terms in favor of TTCWR, its affiliates, subsidiaries, officers, directors, employees or agents as least as favorable to TCWR as Contractor provides to Council. Nothing contained in this Section 12.5 shall limit Council's indemnity obligations to TCWR set forth in Section 12.4.

SECTION 13. SUSPENSION; TERM; DEFAULT.

13.1 Suspension. The Council may suspend Work at any time by giving thirty (30) days' written notice of suspension to TCWR. The Council will consult with TCWR at the earliest opportunity to discuss issues relating to the status of the Corridor.

(a) Prior to such suspension the Council shall (i) take all actions needed to ensure that worksites are not left in a condition that will hinder or endanger the employees or other representatives of TCWR, or the structures or equipment of TCWR and either (ii) take actions to prevent material impairment of the safety or efficiency of operation of the Freight Rail Service, or restore Freight Rail Service so there are fully functioning Freight Rail Facilities of equivalent functionality and quality to the Freight Rail Facilities prior to the Construction Commencement Date.

(b) If Council fails to take actions in Section 13.1(a), within seven (7) days written notice by TCWR, TCWR may at its election take actions to prevent material impairment of the safety or efficiency of operation of the Freight Rail Service caused or threatened by the condition of the worksite as a result of such suspension if the Council, The Council shall reimburse TCWR for any costs that TCWR incurs to eliminate the impairment or threat of impairment to the safety or efficiency of operation of the Freight Rail Service due to such suspension or such TCWR actions.

(c) The Council may subsequently reinstate Work on the Modifications by giving thirty (30) days' written notice, unless otherwise agreed to by the Parties, of reinstatement to TCWR, provided that TCWR shall have the right to seek reimbursement from the Council for the additional reasonable costs incurred by TCWR directly caused by the suspension, excluding suspension due to a Force Majeure Event. Costs must be accurate, comprehensive, verifiable, and in sufficient detail and must not include profit. The Council and TCWR shall amend the applicable SSWP('s) as necessary to account for the time of suspension.

SECTION 14. MISCELLANEOUS PROVISIONS

14.1 Legal Compliance. The Parties shall comply with all applicable local, state or federal laws or regulations. The Parties shall exert their best efforts to give all notices required by law and to avoid violations of the law in connection with their Activities under this Agreement. The Parties shall monitor their agents and employees for the purposes of ensuring compliance with all applicable laws. The Parties agree that the most recent version of these shall govern at any given time. If any change in circumstances or law will affect either Party's compliance under this Agreement, the Party so affected shall notify the other Party's Project Director of the change in circumstances or law at its earliest opportunity.

14.2 Independent Contractors. The Parties agree that any and all persons employed by or on behalf of a Party to perform any Activities as an agent of a Party under this Agreement shall not be considered employees of the other Party. Any and all claims that may or might arise under the Workers Compensation Act of Minnesota, as applicable, on behalf of said employees or persons while so engaged, and any and all claims made by any third person as a consequence of any act or omission on the part of said employees or persons while so engaged in any Activities contemplated in this Agreement, shall not be the obligation or responsibility of the other Party.

14.3 Agreement Conflicts. In the event of an express conflict between any provisions of this Construction Agreement and the OMA, the terms of the agreement specifically governing the particular activity in question will control, with the construction related terms of this Construction Agreement controlling with regard to events occurring in the Kenilworth Corridor and Bass Lake Spur-East before the Construction Completion Date, and the terms of the OMA controlling with regard to events occurring after the Construction Completion Date for the Kenilworth Corridor and Bass Lake Spur-East.

14.4 Amendments. The terms of this Agreement may be changed only by mutual agreement of the Parties. Such changes shall be effective only upon the execution of written amendments signed by the Parties' authorized representatives.

14.5 Non-Waiver. The failure of either Party at any time to insist upon the strict performance of any or all of the terms, conditions, and covenants in this Agreement shall not be deemed a waiver by that Party of any subsequent breach or default in the said terms, conditions, or covenants by the other Party.

14.6 Severability. The provisions of this Agreement shall be deemed severable. If any part of this Agreement is rendered void, invalid or unenforceable, such rendering shall not affect the validity and enforceability of the remainder of this Agreement unless the part or parts which are void, invalid or otherwise unenforceable shall substantially impair the value of the entire Agreement with respect to either Party.

14.7 Assignment Prohibited. Neither Party shall assign their obligations under this Agreement without receiving the express prior written consent of the other Party.

14.8 Time. The Parties agree that all obligations undertaken under this Agreement, will be diligently performed in a manner consistent with the proper exercise of professional care and with due consideration to Project timelines and constraints.

14.9 Notices. Except as otherwise expressly provided in this Agreement, all requests, notices, demands, authorizations, directions, consents, waivers or other communications required or permitted under this Agreement shall be in writing and shall either be:

- a. Delivered in person;
- b. Deposited postage prepaid in the certified mails of the United States, return receipt requested;
- c. Delivered by a nationally recognized overnight or same-day courier service that obtains receipts; or
- d. Delivered via email attachment.

Such communications shall be directed to the individuals specified below or to such other persons and at such other addresses as either Party may at any time or from time to time designate for itself by notice in accordance with this Section. Each such request, notice, demand, authorization, direction, consent, waiver or other document shall be deemed to be delivered to a Party when received at its address set forth or designated as above provided.

For the Council:

Project Director
Southwest LRT Project Office
6465 Wayzata Blvd., Suite 600
St. Louis Park, MN 55416

For the TCWR:

President
Twin Cities & Western Railroad Company
2925 12TH Street East
Glencoe, MN 55336

14.10 Dispute Resolution.

a. Process. A dispute resolution process shall be used for any unresolved issue, dispute, or controversy between the Parties before any legal remedies are exercised. The dispute resolution process contains a three-level dispute resolution ladder that escalates a dispute from the project management level through the executive management level. TCWR is represented by the Vice President Operations or designee. The Council is represented from level 1 to 3 in the following order: Southwest LRT Project Director, Council's Metro Transit division's General Manager, and the Council's Regional Administrator. Each level, representatives of the Parties shall meet and continue to explore resolution until either Party determines, in good faith, that effective resolution is not possible at the current level, and notifies the other Party that the process is elevated to the next level. If either or both Parties make such a determination at any point during issue resolution at level 3, then the dispute resolution process has been exhausted.

b. Pending Resolution. While the Dispute Resolution process provided for in Section 14.10(a) is underway, the business and the operations to be conducted and compensation for Activities under this Agreement, to the extent they are the subject of such controversy, shall continue to be transacted, used and paid in the manner and form existing prior to the arising of such dispute.

14.11 Project Directors. The Council's Project Director for purposes of administration of this Agreement is the person whose title is listed in Section 14.9, or such other person designated in writing by the Council's Regional Administrator. However, nothing in this Agreement shall be deemed to authorize the Project Director to execute amendments to this Agreement on behalf of the Council.

TCWR's Project Director for purposes of administration of this Agreement is the person whose title is listed in Section 14.9, or such other person designated in writing by the TCWR. TCWR's Project Director shall:

- a. coordinate the carrying out of TCWR's Activities under this Agreement; and
- b. attend meetings as ability allows called by the Council's Project Director for the Activities provided or performed under this Agreement.

14.12 Applicable Law and Venue. This Agreement shall be construed and interpreted in accordance with the laws of the State of Minnesota or federal law where applicable.

14.13 Effective Date and Termination. This Agreement shall be effective on the Execution Date set forth in the Preamble. This Agreement shall terminate upon the earliest of:

- a. The Construction Completion Date;
- b. A determination by the Council that the Project should not proceed; or
- c. A determination by the Council that sufficient funds do not exist, or are not reasonably projected to exist, in order to complete the Project.

In the event that delays or difficulties arise which in the opinion of the Council render it impractical to proceed with the Project, then at any time the Council may serve formal notice of cancellation upon TCWR in accordance with Section 14.9, and this Agreement shall become null and void, except for those provisions that expressly survive its termination. The Council shall promptly reimburse TCWR for all costs incurred by TCWR prior to notice of cancellation, which are unavoidable by TCWR after notice of cancellation has been received.

14.14 Tax Withholding Representations. In accordance with Minnesota Statutes, section 270C.66, TCWR represents that it is in compliance with any applicable tax withholding on wages requirements of Minnesota Statutes, section 290.92.

14.15 Continuing Obligations. The Parties agree that Project closeout or termination of this Agreement does not invalidate continuing obligations imposed on each by this Agreement or any agreements entered into pursuant to this Agreement.

14.16 Data Practices. TCWR understands and agrees that the Minnesota Government Data Practices Act (the "Act") regulates the collection, creation, storage, maintenance, dissemination and access to government data in government entities. In the event that government data is disseminated to TCWR as a result of this Agreement, and TCWR receives a request to release such government data, TCWR agrees to promptly notify the Council of the request. The Council shall give TCWR instructions concerning the release of said data to the requesting Party before the data is released; however, TCWR does not waive any right it may have under the Act or under other applicable law to refuse to produce the data or limit its production. The Council shall reimburse TCWR for its actual, reasonable and verifiable costs in complying with the Act.

The Council understands and agrees that certain data that TCWR may provide to the Council under this Agreement is information that TCWR considers to be confidential, proprietary, trade secret or security information that should not be made accessible to the public. If the Council receives a request to release any information TCWR has provided the Council or which the Council has otherwise received or created regarding TCWR, its business or its operations, the Council agrees to promptly notify TCWR of the request. TCWR shall give the Council instructions concerning the release of the data to the requesting Party before any such data is released by the Council.

The Council acknowledges and agrees that by entering into this Agreement TCWR is not waiving and will not waive any rights it may have under the Act or under other applicable law to refuse to produce data or to limit its production and the Council will respect TCWR's instructions with

respect to any request to release such data, to the extent legally permitted, in order to protect TCWR's trade secret data, security information, and "not public data." Minnesota Statutes Section 13.2, Subdivision 8a defines "not public data" as "any government data classified by statute, federal law, or temporary classification as confidential, private, nonpublic, or protected nonpublic." The Council agrees to reimburse TCWR for its actual, reasonable and verifiable costs in complying with the Act.

14.17 Governmental Requirements. The statutes, regulations, standards, policies, orders, procedures, directives, requirements, provisions, terms, and conditions (hereinafter the "Requirements") of the Council and of any other governmental entity which are cited, named, described, or referred to in this Agreement apply, if at all, only to TCWR's performance of the Activities associated with this Agreement.

14.18. Hopkins Depot. Prior to January 1, 2018, the Parties shall enter into an amendment of that certain Agreement identified as Lease No. 31320 between Council (as successor to Soo Line Railroad Company) and TCWR, dated as of November 1, 2004, with respect to TCWR's depot structure at Hopkins, MN, to provide for a revised Basic Term of 25 years with automatic extensions for additional 25 year periods.

14.19. Preparation. The Parties and their legal counsel have cooperated in the drafting of this Agreement. Accordingly, this Agreement shall be deemed the joint work product of the Parties and not be construed against either party by reason of such preparation. Neither Party shall use the drafts of this Agreement against the other to construe the meaning or interpretation of terms or wording deleted from terms during the drafting process.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives on the dates indicated below.

**TWIN CITIES & WESTERN
RAILROAD COMPANY**

By: _____

Its: _____

Date: _____

METROPOLITAN COUNCIL

By: _____

Its: _____

Date: _____

List of Exhibits

Exhibit A	Depiction of Kenilworth Corridor and Bass Lake Spur - East
Exhibit B	Design & Plan Summary
Exhibit C-1	Outage Matrix
Exhibit C-2	Rates for Non-Compliance Charges
Exhibit D	Form of TCWR Modifications Completion Certificate
Exhibit E	Payment Schedule
Exhibit F	Form of Invoice

EXHIBIT A: Limits of the Corridor

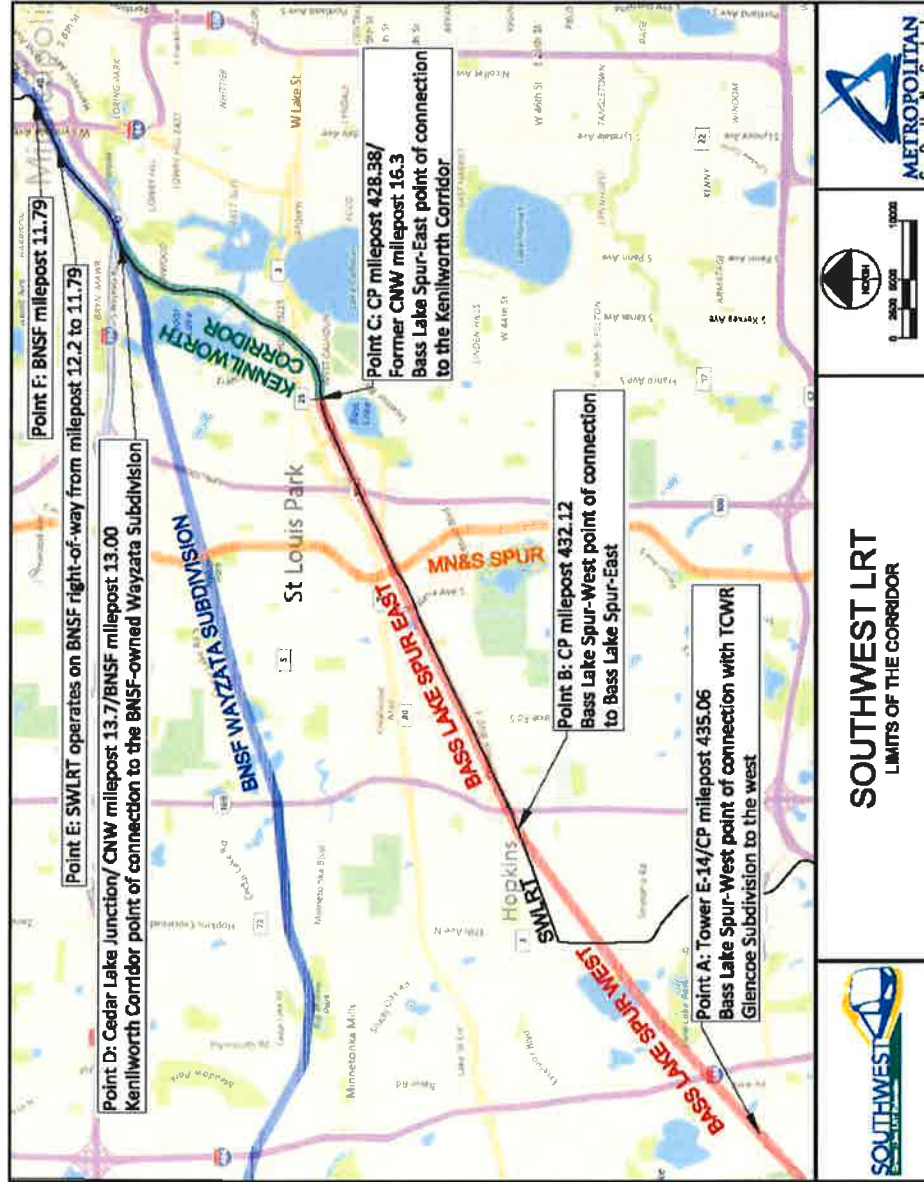


EXHIBIT B: Design & Plan Summary

1. With respect to the general layout of the single track alignment as compared to existing conditions, TCWR would:
 - a. Continue to operate freight service on a single contiguous line on the BLS, KC and a segment of BNSF's Wayzata Subdivision;
 - b. From STA 33+00 to STA 59+25, operate freight service on single contiguous line shifted up to 13 feet south of the existing main line to accommodate the light rail in the BLS;
 - c. From STA 59+25 to STA 234+00, operate freight service on single contiguous line shifted up to 48 feet north of the existing freight track to accommodate the light rail alignment in the BLS;
 - d. From STA 300+00 to STA 322+00, operate freight service on single contiguous line shifted up to 6 feet from the existing freight track to accommodate the light rail alignment in the KC;
 - e. From STA 322+00 to STA 343+42, operate freight service on single contiguous line shifted up to 40 feet north of the existing freight track to accommodate the light rail alignment in the KC; and
 - f. From STA 234+00 to STA 262+05 (note station equation: STA 300+00 ahead = STA 262+05 back), and from STA 343+42 to STA 393+00, operate freight service on single contiguous line in the existing freight track location in the KC.
2. With respect to the general spacing conditions in the proposed condition, the single contiguous line clearances to adjacent features in the shared corridor in the BLS and KC would be:
 - a. A typical spacing of 33 feet with a minimum of 25 feet between the freight track center and the nearest adjacent light rail track center;
 - b. A typical spacing of 25 feet with a minimum of 15 feet between the freight track center to the nearest edge of regional trail located in the KC when light rail is in a tunnel;
 - c. A minimum of 10 feet between the freight track center and the nearest existing or proposed bridge pier or retaining wall. Any permanent track center spacing less than 25 feet includes AREMA crash wall protection for the adjacent pier or retaining wall; and
 - d. All clearances or distances between freight track and adjacent light rail tracks or other corridor features shall be as shown in the 100% design plans to be reviewed and commented on by TCWR.
3. With respect to the proposed light rail and freight improvements between STA 33+00 and STA 72+00 (west of TH 169 to east of the proposed LRT bridge over CSAH 3-Excelsior Boulevard), where LRT would be located parallel and adjacent to the existing BLS right of way, the proposed project includes construction of:
 - a. Parallel eastbound and westbound light rail tracks;

- b. A corridor protection barrier integrated with retaining wall where light rail is supported on retained fill (STA 45+75 to STA 49+65, and STA 65+90 to STA 71+65);
 - c. Light rail on bridge structure between STA 49+65 and STA 65+90:
 - i. Light rail on bridge structure includes 8 foot high fence when crossing over the BLS (pedestrian traffic on the structure is limited to Metro Transit operations and maintenance staff);
 - d. Light rail systems devices, including the overhead catenary system and traction power substation;
 - e. Intrusion detection between light rail and freight where track separation is less than 50 feet and where light rail is not on retained fill or structure:
 - i. Intrusion detection will be located no closer to the freight railroad than the top of LRT subballast.
 - f. A storm water ditch or draitile between light rail and freight along the south edge of the light rail alignment;
 - g. New 136RE rail freight rail track;
 - h. A new No. 15 turnout to terminate siding track at STA 36+40;
 - i. A new No. 11 turnout and spur track at STA 41+05;
 - j. Reconstruction of existing at-grade freight rail crossing of CSAH 3 (Excelsior Boulevard) including new rail, ties, draitile, precast concrete panels and signals;
 - k. A 1 degree, 30 minute reversing curve with a 100' minimum tangent alignment shift located under light rail on bridge structure;
 - l. Removal of approximately 2,595 feet of siding track west of Excelsior Boulevard. SWLRT project construction work will be staged such that removal of the siding track is coordinated with plans to be prepared by TCWR for replacement of the siding track outside the SWLRT project limits;
 - m. Relocation of private utilities and public utilities to accommodate improvements in the corridor; and
 - n. New utility crossings including storm sewer, watermain, sanitary sewer, freight and light rail signal duct and ductbank, and traction power electrical feeds beneath existing or new freight rail tracks installed by jacking or open cut although open cutting will only be used in areas where freight rail will be out of service during a pre-approved out of service period during cutting.
4. With respect to the proposed light rail, regional trail and freight improvements between STA 72+00 and STA 232+00 (east of the LRT bridge over CSAH 3-Excelsior Boulevard to east of Beltline Boulevard), where LRT would be located generally on the existing BLS right of way and freight rail would be shifted north to be located between the regional trail and light rail, the proposed project includes construction of:
- a. Parallel eastbound and westbound light rail tracks;
 - b. Light rail systems devices, including the overhead catenary system, traction power substations, signal bungalows, and crossovers;
 - c. Intrusion detection between light rail and freight where track separation is less than 50 feet and where light rail is not on retained fill or structure:
 - i. Intrusion detection will be located no closer to the freight railroad than the top of LRT subballast.

- d. Reconstruction of the regional trail located no closer than 25 feet from centerline of freight rail to edge of trail with a fence located adjacent to the trail:
 - i. 25 feet represents a minimum dimension.
 - ii. Trail alignments shall be as shown in the 100% design plans to be reviewed and commented on by TCWR.
 - e. Trail underpasses under CSAH 20 (Blake Road) and Wooddale Avenue parallel to the freight rail alignment;
 - f. Trail underpass under the BLS at the Louisiana Station;
 - g. Trail overpass over Beltline Boulevard and light rail and freight rail east of Beltline Boulevard;
 - h. A storm water ditch or draintile between light rail and freight along the north edge of the light rail alignment and between freight and the regional trail along the north edge of the freight rail alignment;
 - i. New light rail and trail bridges at Minnehaha Creek and Louisiana Avenue;
 - j. New light rail bridge at TH 100;
 - k. New 136RE rail freight rail track located within the corridor;
 - l. A new No. 15 turnout and 136 RE rail "Southerly Connector" spur track to connect to the existing CP MN&S Spur;
 - m. Removal of approximately 10,745 feet of siding track east of Excelsior Boulevard. SWLRT project construction work will be staged such that removal of the siding track is coordinated with plans to be prepared by TCWR for replacement of the siding track outside the SWLRT project limits;
 - n. New freight rail bridges at Minnehaha Creek and Louisiana Avenue on the BLS;
 - o. New freight rail bridges over light rail and Oxford Street on the "Southerly Connector";
 - p. A relocated existing freight rail bridge at TH 100 to match the new freight rail alignment;
 - q. Reconstruction of existing at-grade freight rail crossings at CSAH 20 (Blake Road), Wooddale Avenue and Beltline Boulevard including new precast concrete panels and signals;
 - r. Relocation of private utilities and public utilities to accommodate improvements in the corridor; and
 - s. New utility crossings including storm sewer, watermain, sanitary sewer, freight and light rail signal duct and ductbank, and traction power electrical feeds beneath existing or new freight rail tracks installed by jacking or open cut although open cutting will only be used in areas where freight rail will be out of service during a pre-approved out of service period during cutting.
5. With respect to the proposed light rail, regional trail and freight improvements between STA 273+58 and STA 393+00 (east of Beltline Boulevard to Cedar Lake Junction), where LRT would be located south of the existing KC freight rail alignment, the proposed project includes construction of:
- a. Parallel eastbound and westbound light rail tracks;
 - b. Light rail in a tunnel between STA 302+50 and STA 328+30;
 - c. Light rail systems devices, including the overhead catenary system, traction power substations, signal bungalows, and crossovers;

- d. Intrusion detection between light rail and freight where track separation is less than 50 feet and where light rail is not in a tunnel;
- e. Replace dual guard rail design in the KC with equipment defect detectors for dragging equipment and hot wheel bearings to be located near Cedar Lake Junction and near Dominic Drive;
- f. A corridor protection barrier between light rail and freight rail at each light rail tunnel portal;
- g. Reconstruction of the regional trail located no closer than 15 feet (minimum existing condition) from centerline of freight rail to edge of trail with a fence located adjacent to the trail:
 - i. 15 feet represents a minimum dimension.
 - ii. Trail alignments shall be as shown in the 100% design plans to be reviewed and commented on by TCWR.
- h. A storm water ditch or draintile between light rail and freight along the north edge of the light rail alignment or north edge of the trail alignment when light rail is in a tunnel;
- i. New light rail, trail bridge and freight bridge at the Kenilworth Channel;
- j. New 136 RE rail freight rail track from STA 300+00 to STA 343+42 and from STA 355+50 to STA 359+50;
- k. Replace existing 115 RE rail with 136 RE rail from STA 234+00 to 262+05 (note station equation: STA 300+00 ahead = STA 262+05 back), and STA 347+42 to STA 355+50 (note station equation: STA 347+42 ahead = STA 343+42 back);
- l. Improve track structure within limits of Kenilworth Corridor for which trackwork is not currently proposed by performing the following Work:
 - i. Replacing ties to bring tie condition to FRA Class 5 Standards, as inspected and approved by the FRA.
- m. Tie replacement from STA 234+00 to 262+05 (note station equation: STA 300+00 ahead = STA 262+05 back), STA 347+42 to STA 355+50 (note station equation: STA 347+42 ahead = STA 343+42 back), and STA 359+50 to STA 390+50. Reconstruction of existing at-grade freight rail crossing at Cedar Lake Parkway including new precast concrete panels and signals;
- n. Reconstruction of existing at-grade freight rail crossing at West 21st Street including a raised top of rail profile, new storm sewer, new precast concrete panels and signals;
- o. Reconstruction of the at-grade Cedar Lake Trail pedestrian crossing at STA 385+00 near Bryn Mawr Station and Cedar Lake Junction;
- p. Relocation of private utilities and public utilities to accommodate improvements in the corridor; and
- q. New utility crossings including storm sewer, watermain, sanitary sewer, freight and light rail signal duct and ductbank, and traction power electrical feeds beneath existing or new freight rail tracks installed by jacking or open cut although open cutting will only be used in areas where freight rail will be out of service during a pre-approved out of service period during cutting.

6. To address concerns of ensuring safe freight operations during construction of the proposed SWLRT project, the following measures would be implemented and included in construction documents:
 - a. Pre-planned Outages and durations of Outages as indicated on the “Exhibit C – Outage Matrix”;
 - b. Project Safety Plan complying with BNSF’s “Contractor Responsibilities and Requirements for Working on BNSF Right-of-Way”;
 - c. Railroad flagging provided by TCWR at the expense of SPO;
 - d. Requirements for excavation activities adjacent to active freight railroads in accordance with BNSF “Guidelines for Temporary Shoring” document with the following revisions and clarifications:
 - i. Allow the Contractor to install temporary shoring as follows:
 1. Minimum: 15 feet from centerline of operating track; and
 2. Absolute minimum: 8.5 feet from centerline of operating track.
 - a. Less than 15 feet only used as identified in Management Plans to be prepared by the Council’s Contractor, subject to review and comment by TCWR.
 - ii. It is anticipated that it will be necessary to locate temporary shoring between 15 feet and 8.5 feet from centerline of operating track at the following locations:
 1. Adjacent to the LRT Kenilworth tunnel and boat sections;
 2. Adjacent to the LRT Excelsior bridge piers and retaining walls;
 3. On the Skunk Hollow Track where the proposed Southerly Connector Track crosses the existing Skunk Hollow Track; and
 4. At other locations as identified in Management Plans to be prepared by the Council’s Contractor, subject to review and comment by TCWR.
 - iii. Where possible, stage excavation activities such that they do not occur adjacent to the operating railroad.
 - e. Requirements for construction personnel to clear up at 10 feet from centerline of track within the Kenilworth Tunnel Construction area, and 25 feet for the remainder of the Project:
 - i. Require the Contractor to create Sight Specific Work Plans (SSWP) to provide a detailed accounting of how the Contractor proposes to accomplish Work in a safe manner, within the proposed Project Schedule and for which maintains railroad operations. Key items in the SSWP include the following:
 1. There are four types of SSWP’s based on “Adjacencies”:
 - a. Out of Service Adjacency: SSWP requires a continuous suspension of freight railroad operations to facilitate construction activities, including disturbing active freight railroad track;
 - b. Fouling Adjacency: SSWP requires fouling of the freight railroad track to facilitate construction activities. A fouling adjacency is required when any Work is performed within

- 15 feet of an active freight railroad, and when full extension of equipment has potential to foul an active freight railroad;
 - c. Adjacent Adjacency: SSWP requires construction activities and CONTRACTOR personnel to be located between 15 feet and 25 feet of an active freight railroad, and when full extension of equipment does not have potential to foul an active freight railroad; and
 - d. Clear Adjacency: SSWP requires construction activities and CONTRACTOR personnel to be located between 25 feet and 100 feet of an active freight railroad, and when full extension of equipment does not have potential to foul within 25 feet of an active freight railroad.
2. The SSWP's will include detailed scope of Work identifying Work activities, personnel and equipment involved in the Work, personnel and equipment locations during the Work, clearing locations, Work schedule, safety equipment, contingency plans, and other pertinent information as necessary.
- f. Monitoring the railroad and geotechnical conditions adjacent to the Kenilworth LRT tunnel with appropriate instrumentation. Output of the instrumentation will be monitored and reviewed by SPO/Contractor and would be shared with TCWR:
 - i. The Contractor in coordination with the SPO is responsible for monitoring and ensuring the integrity of the railroad and geotechnical conditions and ensuring safe passage of trains at all times during construction; and
 - ii. TCWR would have a qualified employee on site during construction who would have authority to stop construction activities if required.
 - g. Provide 8 foot tall temporary chain link construction fencing adjacent to active freight track to provide fall protection for TCWR employees at locations where track is adjacent to excavations including:
 - i. Adjacent to the LRT Kenilworth tunnel and boat sections; and
 - ii. At locations where an excavation is located within 15 feet of centerline of track, and the excavation presents a drop from existing grade that is greater than 2 feet and the resulting side slope is greater than 3 horizontal to 1 vertical.
 - h. Provide 4 foot tall temporary orange construction fence adjacent to active freight track to provide a physical separation between Contractor activities and railroad operations. Fence will be placed as follows:
 - i. Desired minimum: 15 feet from centerline of operating track; and
 - ii. Absolute minimum: 8.5 feet from centerline of operating track.
 - 1. Less than 15 feet only used as identified in Management Plans to be prepared by the Council's Contractor, subject to review and comment by TCWR.
 - i. Freight rail speed restrictions after track has been disturbed during pre-planned and approved Outages for purposes of normalizing the track structure as follows:
 - i. To accommodate a passing train when the track has not been set to final tolerances, but meets minimum FRA Class 2 standards.

7. With regards to other technical issues discussed, the SPO would:
- a. Provide a copy of all final Contract Documents to TCWR;
 - b. Provide typical track section that meets the CP mainline standard track section;
 - c. Provide 136RE rail (or 115RE rail left in place) on timber ties, with standard AREMA tie plates, cut spikes, and rail anchors:
 - i. Transitioning from 115RE rail to 136RE rail would be facilitated using transition rails; and
 - ii. 115RE Rail removed in the Kenilworth Corridor will be salvaged and become the property of TCWR. The SWLRT Contractor will cut the rail into 80 feet long lengths and transport and off-load at the Hopkins depot.
 - iii. In the final condition, existing 115RE rail will be located from the west limit of Cedar Lake Jct Interlocking to the east work limit at W 21st Street. New 136RE will be located from the east work limit at W 21st Street to the west freight railroad work limit at about 575 feet west of the TH 169 overhead bridge.
 - d. Construct ballast and subballast side slopes at 2 horizontal to 1 vertical;
 - e. Construct track on AREMA Grade "7 inch" - 7 inch x 9 inch x 8 feet-6 inch timber ties at 20 inches on center, with 7 inch x 9 inch x 10 feet ties used within limits of at-grade crossings;
 - i. Rail will be placed on standard AREMA double shoulder tie plates with cut spikes and rail anchors.
 - ii. Rail will be box anchored at every other tie except for the following locations:
 - 1. At at-grade crossings: box anchor every tie through the crossing and to a location 195 feet on either side of the crossing.
 - 2. At turnouts: box anchor every tie to a location 195 feet on either side of the crossing.
 - f. Construct a typical section with a subballast width of 20 feet as measured at the top of subballast:
 - i. The typical section would include a 6 foot wide flat area in the subballast only centered about the center of tie. This is based on the CP standard typical section.
 - g. Require the Contractor to be responsible for operating a geometry car under loading after final construction of the track, but prior to placing the track in service;
 - i. Geometry car will measure the integrity of the track, final elevation, grade, alignment, and gage. All measurements will be made under simulated railroad loading.
 - h. Provide geotechnical improvements and install select granular material below the typical track section including improving existing poor draining soils within construction limits near and beneath West Lake Street;
 - i. Subcut and replace existing soil, to a depth between 1.5 feet and 7.5 feet below bottom of proposed subballast (based on geotechnical investigations);
 - j. Provide a cellular concrete support slab under the Bass Lake Spur in the vicinity of Louisiana Ave. to mitigate poor soil conditions;

- k. Provide a load transfer platform under the Southerly Connector to mitigate poor soil conditions. The load transfer platform will consist of a concrete slab supported by H piles or equivalent;
- l. Construct drainage facilities that provide positive drainage:
 - i. Construct undergrade drainage pipes utilizing reinforced concrete class V pipe, with individual sections mechanically fastened and sealed watertight;
 - ii. Construct ditches and infiltration basins adjacent to the railroad such that:
 - 1. Infiltration ditches include check dams for purposes of regulating flow;
 - 2. Check dams would be constructed of clay, graded at 3:1;
 - 3. Check dams, and infiltration ditches would be drivable for light maintenance vehicles;
 - 4. Amended soils for infiltration are located at the bottom of adjacent ditches a minimum of 14.2 feet from the track;
 - 5. Infiltration basins shall be designed for a maximum 100 year high water level of 31.5" below top of rail;
 - 6. Infiltration basins shall draw down completely within 48 hours of a 100 year rainfall; and
 - 7. Overland emergency overflow for rainfall events exceeding a 100 year storm shall be provided from all adjacent infiltration basins or drainage ditches.
- m. Construct a freight track alignment that is capable of operating speeds as follows:
 - i. BLS: 25 mph;
 - ii. Southerly Connector: 25 mph; and
 - iii. KC: 25 mph – note that the TCWR plans to operate at 10 mph;
- n. Provide and install turnouts in accordance with AREMA standards for material and geometry
 - i. Adjustable rail braces per AREMA Plan 224; and
 - ii. Switch points and stock rails in accordance with AREMA Plan 5100 (Samson undercut stock rail).
- o. Provide and install hand throw switch machines as follows:
 - i. In compliance with AREMA Standard Plan 251;
 - ii. Configured in accordance with Racor Style 36EH with 45 inch Tri-Handle;
 - iii. Equipped with adjustable mechanism and throw rod;
 - iv. Equipped with green and red targets;
 - v. Equipped for switch locks – TCWR to supply locks; and
 - vi. Located on diverging side of the turnout.
- p. Construct a freight track alignment which provides sufficient vertical and horizontal clearances to adjacent corridor elements for wind turbine components. Clearance calculations to address this are contained in a SPO performed analysis and summarized in an internal memorandum titled "TC&W - High and Wide Loads" dated November 13, 2014;
- q. Provide minimum vertical clearance of 23 feet at all overhead bridges except for the following:
 - i. Burnham Road overhead bridge clearance of 19 feet-11 inches, which is an existing condition; and

- ii. West Lake Street overhead bridge clearance of 21 feet-7 inches, which is an existing condition.
- r. Construct at-grade crossings with Mirafi HP570 or equal fabric placed between the subgrade and select granular material;
- s. Relocate the Distant Signal located at Cedar Lake Parkway (by BNSF forces) as follows:
 - i. The DS temporary location during tunnel construction will positioned on the left for east bound traffic; and
 - ii. The DS final location after tunnel construction is complete and freight track is in its final location will be positioned on the right for east bound traffic.
- t. Provide and install "Whistle", "Milepost", and "Flanger" signs per BNSF Standards.
- u. Provide TCWR with the ability to review Contractor submittals. Metropolitan Council and TCWR intend to agree to a procedure for TCWR to be included in construction communications and for review of submittals prior to construction. Items to consider include the following:
 - i. TCWR would be granted access and review of submittals via e-Builder;
 - ii. TCWR would be granted access to CAR submittal comments;
 - iii. TCWR would participate in construction meetings and on-site activities; and
 - iv. TCWR would be granted access to As-Built drawings and track geometry data.
- v. Include liquidated damages in the Contract which assess charges to the Contractor after actual damages occur for the following:
 - i. Failure to receive approval for any non pre-scheduled activity which requires an Outage to the freight railroad; and
 - ii. Failure to restore the railroad to operation in accordance with any approved pre-planned Outage schedule.

Exhibit C-1: Outage Matrix

Outage No.	BASS LAKE SPUR				KENILWORTH CORRIDOR			
	Outage Name	Phase No.	Timing	Duration of Outage	Outage Name	Phase No.	Timing	Duration of Outage
1					Cut and Throw to KW_TMP_A	2	May '18	4 Hour
2	Excelsior I	2	May '18	4 Hour	Track Shift to KW_TMP_B	4	May '18	8 Hour (possible 2x 4 Hour)
3					Cut and Throw KW_TMP_A to Proposed Track	6	October '18	4 Hour
4	TH 100 - HCRRA	5	March '19	4 Hour				
5	Wooddale - TH 100	7	April '19	4 Hour				
6	TH 100 Bridge Move, Temp No. 11 T/O at Wooddale, and Shift at Blake	9	Memorial Day Weekend '19	36 Hour	Reconstruct Track and W 21st St Crossing	7	Memorial Day Weekend '19	36 Hour
7	Southerly Connector	10	December '19	Skunk Hollow OOS 3-6 Weeks				
8	LRT Bridge - Blake	12	April '20	4 Hour				
9	Excelsior II	13	May '20	4 Hour				
10					Cut and Throw From KW_TMP_B to Proposed Track	9	July '20	6 Hour

11					Shift KW_TMP_B to Proposed Track	11	August '20	8 Hour (possible 2x 4 Hour)
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Exhibit C-2: Rates for Non-Compliance Charges

Manifest Train:

- Hourly Cost Per Train: \$2,331
- Lump Sum Cost Per Train: \$0

Unit Grain Train:

- Hourly Cost Per Train: \$2,473
- Lump Sum Cost Per Train: \$11,000 per train

Unit Train other than Grain:

- Hourly Cost Per Train: \$2,473
- Lump Sum Cost Per Train: \$0

Delay of a Hazardous Material Train

- Based on actual fines assessed to TCWR by the FRA for civil penalties incurred for violation of 49 CFR Part 174 due to a train delay, in particular 49 CFR 174.14 and 174.16.b

All of the above rates shall be escalated at the rate of three (3) percent annually on the anniversary of the Execution Date.

Exhibit D
FORM OF TCWR MODIFICATIONS COMPLETION CERTIFICATE

TCWR Modifications Completion Certificate

This TCWR Modifications Completion Certificate is given by Twin Cities & Western Railroad Company, a Minnesota corporation ("TCWR") to the Metropolitan Council, a public corporation and political subdivision of the State of Minnesota (the "Council"), pursuant to Section 5.2(b) of that certain Construction Agreement between TCWR and the Council dated as of [date] (the "Construction Agreement"). Capitalized terms not separately defined in this certificate have the meanings assigned such terms in the Construction Agreement.

TCWR hereby certifies to the Council that:

1. On [date] Council provided to TCWR the written notice required pursuant to Section 5.2(a) of the Construction Agreement indicating that all of the Modifications to be constructed pursuant to the Construction Agreement had progressed to the point of Substantial Completion.
2. On [date(s)] TCWR and the Council jointly inspected the Freight Rail Facilities in the Corridor in accordance with the inspection process set forth in Section 5.1 of the Construction Agreement.
3. Having completed the joint inspection process, TCWR acknowledges and agrees that the Modifications have been completed as required pursuant to the Construction Agreement and are suitable for operation of the Freight Rail Service.
4. TCWR further acknowledges and agrees that from and after the [insert date of this Certificate] TCWR accepts the condition of the Modifications and shall be fully responsible and obligated to operate and maintain the Kenilworth Corridor and the Bass Lake Spur – East as set forth in the O&M Agreement, which remains in full force and effect as provided therein.

Date: _____

Twin Cities & Western Railroad Company

Name: _____

Title: _____

Exhibit E: Payment Schedule

Exhibit F: Form of Invoice



TWIN CITIES & WESTERN RAILROAD COMPANY

2925 12th Street East
Glencoe, MN 55336
(320) 864-7200
FAX (320) 864-7205

Invoice Number: -IN
Invoice Date:
Terms: NET 30 DAYS
Customer
Number:

Invoice Description:

TCWR has engaged in Activities in connection with the Southwest Light Rail Transit Project pursuant to Article 7.1 and Exhibit E: Payment Schedule of the Construction Agreement with the Metropolitan Council for the period:
[Month/Year]

PLEASE REMIT TO:

**Twin Cities & Western Railroad Company
SDS 12-0839, PO Box 86
Minneapolis, MN 55486-0839**

TOTAL: \$ 0.00

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT D

C-38673

MEMORANDUM OF UNDERSTANDING

Preservation of Kenilworth Corridor in Public Ownership and Control

This Memorandum of Understanding is between the City of Minneapolis (City) and the Metropolitan Council (Council).

1. It is the intent of the parties that all of that part of the Kenilworth Corridor between M.P. 13.7 and M.P. 16.2 (as shown on Exhibit 1 attached) that is being used for rail transportation of any kind, that may foreseeably in the future be used for rail transportation of any kind or that legally has a present use for rail transportation of any kind, shall remain in public ownership. The Council will take all reasonable actions to keep the Kenilworth Corridor in public ownership while it is being used for rail transportation of any kind, including but not limited to the following:

(a) The Metropolitan Council will exert whatever influence it has to have the current owner of the rail line in the Kenilworth Corridor, the Hennepin County Regional Railroad Authority, enter into an agreement with the City, committing on behalf of itself and any successors in interest (i) to not admit additional railroad tenants or users to use of the line; and (ii) to limit use, to the maximum extent possible, pursuant to its rights under Section 2.3 of that certain Trackage Rights Agreement between Soo Line Railroad Company, Twin Cities & Western Railroad Company and Hennepin County Regional Railroad Authority dated August 10, 1998, as amended to date, (the "Trackage Agreement"); and (iii) to prohibit modification of the Trackage Agreement without City consent; (iv) that transfer of the property, if any, will be an intergovernmental transfer intended to keep the corridor in public ownership; and (v) it will not sell or offer the property for sale so as to create an obligation to offer a right of first refusal under Minnesota Statutes, Section 222.632.

(b) If the Council acquires any property in the Kenilworth Corridor to be used for freight rail, including but not limited to property from BNSF or others located to the west of the HCCRA property and just north of the channel in the Kenilworth Corridor, then the Council agrees on behalf of itself and any successors in interest as to any such property: (i) to take all reasonable actions to keep the property that is being used for freight rail in public ownership while it is being used for rail transportation of any kind; and (ii) to admit only Twin Cities & Western Railroad Company and not admit additional railroad tenants or users to use of this property; and (iii) to impose limitations in any new or amended trackage rights agreement that limit use of this property, to the maximum extent possible, consistent with the limitations in Section 2.3 of the above-referenced Trackage Agreement; and (iv) to not sell or offer this property for sale so as to create an obligation to offer a right of first refusal under Minnesota Statutes, Section 222.632.

(c) The Council agrees that any transfer of the property used for freight rail in the Kenilworth Corridor to the Council, shall be made strictly as an intergovernmental transfer of property.

(d) Any transfer of any property used for freight rail in the Kenilworth Corridor shall be contingent upon assumption by the transferee of the above-referenced agreements, including the Trackage Agreement(s), the HCCRA-City agreement and the applicable Council commitments in this MOU. A memorandum of these agreements shall be filed in the county real estate records.

2. The Council intends that any property located in the Kenilworth Corridor that is now owned or subsequently acquired from BSNF Railroad by the Council that will not actively be used either for the Project or freight rail (as shown on attached Exhibit 2) shall be conveyed to the Minneapolis Park and Recreation Board for use as parkland upon terms and conditions that are agreeable to both the Council and the Board. The Council intends that any property located in the Kenilworth Corridor that it may acquire from HCCRA that it will not actively use for either the Project or freight rail shall be conveyed to the Minneapolis Park and Recreation Board for use as parkland upon terms and conditions that are agreeable to both the Council and the Park Board. This refers to the "excess" or "remnant" pieces of land and does not include any land that will actively be used for the Project, freight rail or the bicycle and pedestrian trail.
3. To the extent necessary to perpetuate and maintain the connection to local and regional trails in the area, if the Council obtains land in the Kenilworth Corridor, the Council will grant a permanent easement to the Minneapolis Park and Recreation Board for a pedestrian and bicycle trail in the Kenilworth Corridor that is laid out so as to connect to regional and local trails in the area. This permanent easement will include, as applicable, an easement for the trail to be placed over any Council owned tunnel, together with any necessary restrictions thereon.



Metropolitan Council
Regional Administrator

Date: 7-1-2014



City of Minneapolis

Date: _____

IN WITNESS WHEREOF, the parties have executed this Contract as of the date first written above.

FOR THE CITY:

Approved as to Form

By: Gary M. Conover 9-22-14
Assistant City Attorney

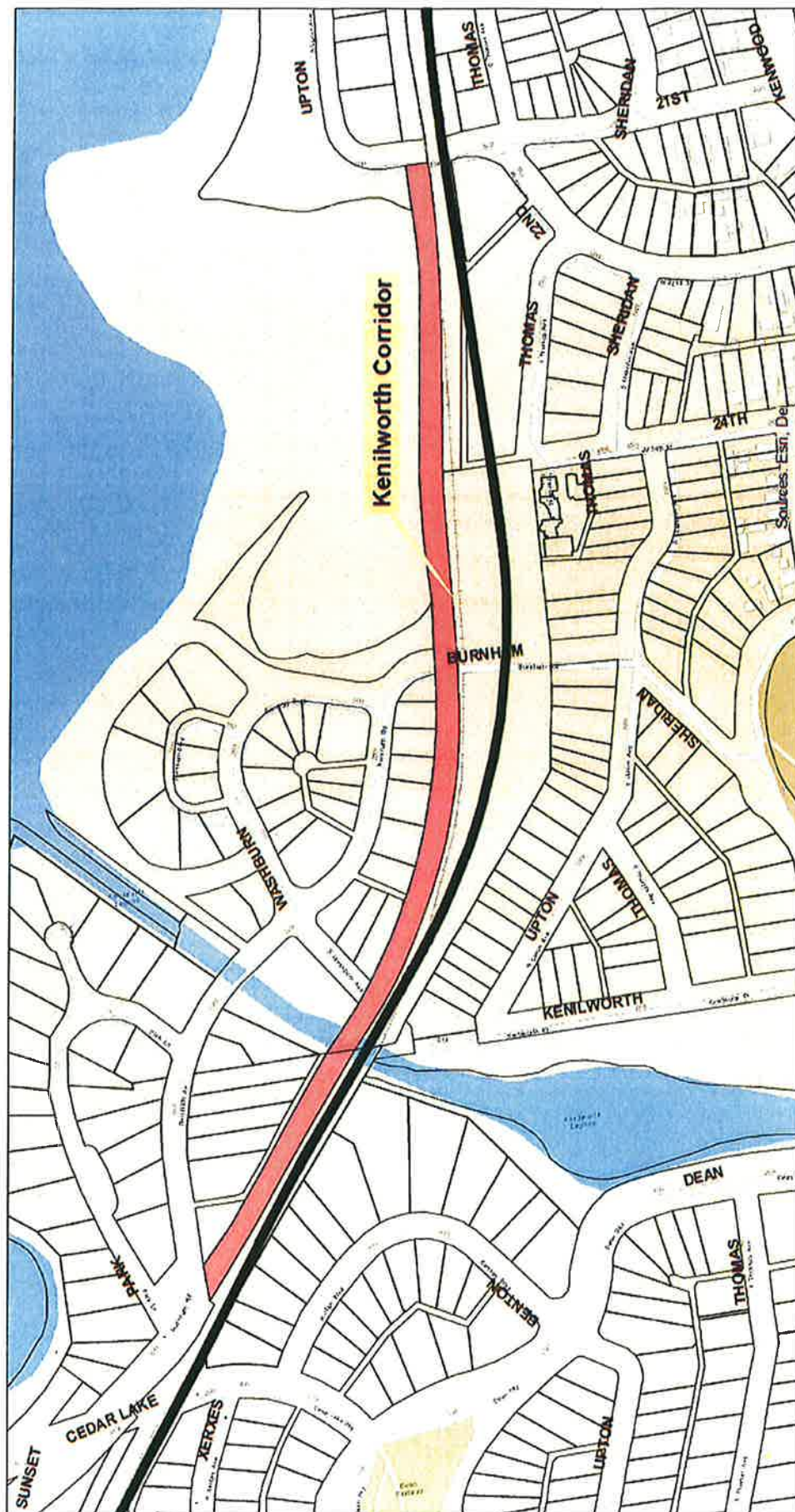
Approved [Signature] 9/22/14

Department Head responsible for Administering and Monitoring this contract

Countersigned: [Signature] 9/29/14
Finance Officer/ Designee



Exhibit 2



BNSF Parcels

Date: 7/7/2014

Legend

- BNSF parcels
- All other properties
- SWLRT Alignment



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT E

VERIFIED STATEMENT OF MR. WILL BROWN

Operational Impact Report

William Brown III

General Manager of Operations for TCW

6/27/18

Biography

I was asked to give a write up of the operational impact removing tracks from Hopkins would have on the Twin Cities and Western Railroad Company ("TCW") Local Servicing Operation Plan ("LSOP"). I will give a brief background of myself that will show I'm fully qualified to deliver this report. I started my railroad career in July 2004 with Canadian Pacific ("CP"). I started as a conductor, then I was promoted to Locomotive Engineer in March 2006. In July 2010, I was promoted into the management ranks as Road Foreman of Engines. In January 2011, I accepted a promotion as Trainmaster for the CP's River Subdivision. In August 2014, I resigned from my management position and went back to the union ranks of Locomotive Engineer, and in December 2016 I resigned from CP. In December 2016, I began working for Metropolitan Council in the Metro Transit Rail division as a Rail Supervisor until August 2017, when I accepted the General Manager of Operations position for TCW. Prior to my railroad career, I was a US Marine from September 1993 until August 2004.

OVERVIEW OF OPERATIONS

The Hopkins depot on the Bass Lake Spur, located just west of the Highway 169 Bridge over the railroad track, is one of the busiest places on TCW's line. In 2017, TCW handled 68,725 loaded and empty railcars through the Bass Lake Spur corridor. As of May 31, 2018, TCW had handled 25,283 cars on the Bass Lake Spur. Two train movements start out at this location, the St. Paul turn (a day shift) and the Glencoe turn (a night shift).

The St. Paul turn goes east along the Bass Lake Spur and the Kenilworth Corridor onto the BNSF Railway ("BNSF") Wayzata subdivision. It delivers loaded and empty railcars in a manifest train to the CP yard located in St. Paul. The next day, the St. Paul turn crew delivers loaded and empty railcars to the Union Pacific's east Minneapolis yard and to Minnesota

Commercial Railroad ("MNNR"), also located in Minneapolis, and these railcars are destined for the MNNR, BNSF, and the Canadian National Railroad. While delivering railcars, the crew simultaneously picks up empty and loaded railcars from these locations and brings them to Hopkins. The St. Paul turn crew then uses the Bass Lake Spur sidetracks to switch cars in order to group together cars that are destined for the same destination. This is called "blocking." Once the cars are blocked, they are joined together in the order needed to deliver the cars and reassembled into manifest trains.

The night shift crew (Glencoe turn) takes the train of railcars that were blocked by the day shift west to Glencoe, which is approximately 41.5 miles to the west. If the day shift crew has not had time to block the train, the Glencoe turn crew will block the train using the Bass Lake Spur sidetracks and do additional blocking in route to Glencoe. All the sidetracks the light rail plans to remove from Bass Lake Spur are used on a daily basis.

UNIT (SHUTTLE) TRAINS

In addition to the St. Paul and Glencoe turns described above, TCW receives unit trains from BNSF, CP and UP. Unit grain trains typically have over 100 covered hoppers and three or four six-axle locomotives. There are also ethanol, coal, and Dried Distiller Grain unit trains with a similar number of cars and locomotives. Unit trains vary in length, but are normally about 7,000 feet long. TCW unit train customers are located in eight cities served by TCW, seven on TCW's main line and one on the Minnesota Prairie Line ("MPL"). Unit trains are on time schedules with financial penalties for customers if the train is not returned loaded for interchange to the Class I railroad within a certain number of hours. As a result, unit trains, both empty west bound trains and loaded trains moving east, must be given priority over manifest trains such as the St. Paul turn and Glencoe turn. When a unit train is moving west, it is sometimes necessary

to park manifest trains on the Bass Lake Spur sidetracks so that a unit train can travel over the main line. In 2017, TCW handled 307 empty and loaded unit trains through the Bass Lake Spur that were received in interchange from the Class I railroads.

IMPACT OF REMOVING 16,000 FEET OF SIDETRACKS

The impact of the Southwest Light Rail Transit Project ("Project") removing 16,000 feet of sidetracks along the Bass Lake Spur is explained below. Due to the railroad terminology, a glossary is attached to describe the actions. The attached map shows the sidetracks that the Project plans to remove (see Attachment 1).

SIDETRACK A-NORTH SIDING TRACK

Track A on Attachment 1 is located just north of the Hopkins depot, running from about 475 feet west of the Highway 169 Bridge to a point approximately 1,000 feet east of Highway 169. This sidetrack is primarily used to set out locomotives and freight cars prior to switching and blocking them to assemble trains for interchange east into the Twin Cities or for movement west to customers on TCW, MPL, or the Sisseton Milbank Railroad in South Dakota.

From May to October, this sidetrack is used to trans-load rock for customer LG Everest (page 5 paragraph H of the 1991 Trackage Rights Agreement ("1991 TRA") allows this activity). LG Everest typically has a minimum of 20 cars per week. If this track is removed by the Project, TCW will likely lose this customer, because there is nowhere else in Hopkins to trans-load the rock from railcar to truck. TCW would not be able to allow trans-loading on the mainline because it needs to remain clear for shuttle train traffic during the day. Due to this and other sidetracks being removed by the Project, the remaining sidetracks near Hopkins will be filled with cars from those other sidetracks. Moving the trans-loading to another location further west would increase the distance for the customer to truck the rock in the metro area. By increasing

the distance to truck the rock, the customer's pricing would increase and its competitiveness would suffer.

SIDETRACK B - SALT TRACK

The next track to the east that is to be removed is siding B on Attachment 1, commonly called the "Salt Track." This track is used for overflow traffic when the Bass Lake Yards further east sidetracks (E) and (F) are full of cars. This track is primarily used for loaded plastic cars that are being placed for furtherance to deliver to the Class I railroads. If these cars must be moved further west on TCW's line, the customer may see up to a 48-hour delay on their product being delivered to a Class I railroad, as the next closest siding is 24 miles further west at Cologne. However, that siding is only approximately 4,210 feet long and is usually occupied by empty cars staged to be taken down to the ethanol plant in Winthrop on the MPL or loaded ethanol or DDG cars from the ethanol plant. If the Cologne siding is not available, some or all the loaded plastic cars will likely have to be moved further west to Bongards (3.3 miles beyond Cologne) or Glencoe (14 miles further). These movements will cause excess wear and tear on the rail cars due to their traveling nearly an extra 100 miles and being handled multiple times in service. The inefficiencies from such moves may mean TCW will lose that customer's business. TCW will also incur additional wear and tear on our mainline tracks as these plastic cars are all loaded cars.

SIDETRACK C - CLOVER STUB

The next track to the east that the Project plans to remove is sidetrack (C), called the "Clover Stub." This short sidetrack's primary function is to store six-axle locomotives that we receive from the Class I railroads. Losing this track will create significant delays for TCW unit trains. When TCW receives unit or shuttle trains from the Class I railroads, we want the train to

have both a west-facing and an east-facing locomotive because TCW does not have a place to turn the locomotives on TCW's line (turning is reversing a west facing locomotive to face east and vice versa). If a shuttle train comes onto TCW's track without at least one east-facing engine and one west-facing engine, TCW crews will separate a locomotive from the rest of the train and put it onto the Clover Stub (sidetrack C). The locomotive is then taken east through the Kenilworth Corridor and onto the BNSF Wayzata subdivision to Minneapolis Junction on the BNSF track, where it can be turned and then brought back. This is a 20-mile roundtrip from the Clover Stub. Removal of this Clover Stub sidetrack would mean the unit train would have to go all the way to its destination (the closest unit train customer is in Brownton, which is over 52 miles west). Once the train is loaded, TCW would have to put a crew on duty to take just the locomotives all the way back to Minneapolis Junction on the BNSF track north of downtown and over the Mississippi River, turn them around, and then go back to the customer's elevator and put the train together for movement east. This extra 124-mile movement could take anywhere from six to twelve hours depending on when BNSF would allow this movement to happen on their property. This would impact BNSF traffic on its property and may be delayed by having to wait for the commuter Northstar traffic that runs on the BNSF Wayzata sub to clear. Once the crew puts the train back together, it would require another crew to deliver the train back to the Class I railroad in St. Paul. TCW estimates the cost of a crew start is approximately \$768.00.

SIDETRACK D - CREEK

The next sidetrack to the east that the Project plans to remove is sidetrack (D) on Attachment 1, which TCW calls the "Creek." Losing this sidetrack would have the most harmful operational impact of all of the sidetracks that the Project plans to remove. TCW uses this track

for “train meets,” switching, blocking and staging. A train meet is when two trains, one going east and one going west, need to pass each other.

At times, a unit train customer further west is not ready to receive a unit train and it is necessary to park the unit train for several hours. The Creek sidetrack is approximately 8,500 feet long and is used to park unit trains. When a customer is not ready to receive the unit train and the unit train is staged on that sidetrack, the locomotives may be disconnected and taken back to a Class I rail yard.

If that siding is removed as part of the Project, the next location of a siding capable of holding a unit train is at Bongards, Minnesota, over 27 miles to the west. However, the siding at Bongards is busy and almost always holds both loaded and empty railcars. The siding at Bongards is only 7,000 feet long and the presence of other cars means there is not enough track space to park a unit train. There are sidetracks in Cologne and Glencoe, but those sidetracks are short, busy and may contain empty and loaded cars. The Cologne and Glencoe sidetracks do not have enough empty track space to allow parking a unit train. The next siding able to handle a unit train is in Brownton, approximately 25 miles west of Bongards. If the Creek sidetrack is removed by the Project, there will be no sidetrack able to hold a unit train anywhere along a 52-mile corridor (Hopkins to Brownton).

An even greater problem is presented if an empty unit train is heading west to one customer and a loaded unit train from another customer is heading east at the same time. There will be no sidetrack capable of parking a 7000-foot unit train to allow a train meet.

Removing the Creek track will require manifest train meets to take place at the Bongards siding, over 27 miles west of Hopkins. All westbound trains would take priority as BNSF will not hold trains on its property. Any eastbound trains would have to hold at Bongards or at

customers' facilities until the westbound trains passed. This would cause an estimated two-hour delay when compared to the current state on the eastbound train waiting for the westbound to pass.

TCW also uses the Creek to stage DDG, ethanol trains or other railcars for further movement west that aren't ready immediately to go to their destination. TCW stages DDG trains at the Creek to promptly return the BNSF locomotives to the BNSF yard. DDG cars have to go to the ethanol plants in Winthrop, Minnesota on the MPL and in Granite Falls, Minnesota. The DDG cars need to be switched and blocked to set the cars out down the line at their intended destinations. DDG trains do not come blocked; therefore, TCW crews do this work at the Creek and bring the trains out in manifest service (the Glencoe turn).

The Creek sidetrack is also used to switch and block cars for manifest trains received from the Class I railroads for further movement west of Hopkins. Removing the Creek sidetrack will mean these trains will have to be blocked somewhere down the line. The first two options without intersecting road crossings are at Cologne and Bongards. Cologne is already at full utilization and capacity (it usually stages cars destined for the MPL or which have come off the MPL and will be picked up by a train destined for the Twin Cities). The siding at Bongards is currently also at very high utilization levels due to the current state of business and service design. If there were to be a train meet, TCW would not be able to block this train and cars would have to be set out in multiple blocks at the customer facilities if track space is available. This would result in multiple re-crews of trains. The Creek is one of two sidetracks that is able to handle the heavy six-axle Class I locomotives we receive with unit trains.

SIDETRACKS E AND F - BASS LAKE YARD

The most easterly of the sidetracks that the Project plans to remove is the Bass Lake Yard, east of the crossing over Highway 100 - sidetracks (E) and (F) on Attachment 1. These sidetracks together hold roughly 40 cars. The majority of the traffic on these sidetracks is loaded plastic cars for the furtherance and empty fertilizer cars for rapid deployment when needed by customers.

The Bass Lake Yard is used for switching as well; since there are multiple tracks, the crew switches cars into multiple blocks. TCW does not have any yard with this type of multiple parallel sidetracks until Glencoe, over 41 miles west. However, the tracks at Glencoe are already busy with locomotives and cars since that is where TCW's shops are located to service locomotives and repair cars. Even if the Glencoe tracks are available, there are road crossings in and near Glencoe that would be blocked by switching and blocking railcars.

Moving car switching and blocking to Glencoe would also create problems for handling railcars that are destined to go onto the MPL. The connection to the MPL is at Norwood-Young America. If the Bass Lake Spur sidetracks are removed as planned by the Project, cars destined to go south onto the MPL would have to be moved 11 miles west to Glencoe and, after they were switched and blocked, brought back to Norwood-Young America. This would be inefficient and expend crew time and fuel unnecessarily.

IMPACT DURING CONSTRUCTION

I have reviewed the Operations And Maintenance Agreement ("OMA") between Met Council and HCRRA. Unfortunately, that OMA creates more questions than it provides answers. For nearly a year, TCW and Met Council negotiated a Construction Agreement between Metropolitan Council and TCW ("LRT Construction Agreement") to protect against

interferences to freight traffic resulting from the Project and ensure that TCW operations would continue safely and without interruption. Unfortunately, a final agreement was never executed. I recently received the proposed OMA and my review of the OMA raises numerous concerns both during construction and post-construction.

In order for TCW to truly know the impact the proposed project will have on its' operations during the construction phase and ongoing, TCW needs to know what the management plan is for how the inspections, maintenance repair or replacement of Freight Rail Facilities will be conducted. TCW also needs to know what the plan is to ensure both railroads are working safely together in concerns of movements through the corridor. TCW needs to know who HCRRA/ Met Council is going to use as a "qualified third-party contractor" to provide flagging and that the contractor is staffed and equipped with the knowledge of freight railroads rules and regulations concerning flaggers. When a third party contractor is used TCW needs to know how the contractor will communicate with TCW crews to ensure safe movement through the corridor and to ensure freight trains aren't being delayed. HCRAA says they will use a third party contractor, but TCW needs to know who the third party contractor is to answer these questions and to also formulate an operations plan during this time. TCW needs to know who to contact to ensure safe movement can be made through the corridor and that those working on the construction of the LRT are clear to allow for rail movement and prevent injury or death. TCW is moving record volumes through this corridor and all of these scenarios need to be looked at and discussed.

The OMA is simply an inadequate substitute for the LRT Construction Agreement previously negotiated by the parties. Some of my concerns related to construction include the OMA takes away TCW's rights to: review design plans and provide input on replacement rail

facilities, inspect work done by Met Council, have TCW representation in a Construction Coordination Committee, review the project's Management Plan, and to control all project flagging. Met Council's decision to do away with LRT Construction Agreement could result in TCW having to operate on new freight rail tracks which are not built correctly, or even worse could result in the injury or death of railroad personnel because of the absence of proper construction and operation protocols.

IMPACT UPON PROJECT COMPLETION

The OMA acknowledges that HCRRA will have common carrier rights and should Local Freight Rail Service (as defined in the OMA) be *reasonably* requested over the Corridor (defined to include the Kenilworth Corridor and Bass Lake Spur), HCRRA would provide it. See Section 2.1(a) of the OMA. The OMA doesn't state how this would happen and how would it affect TCW's daily operation if the customer is serviced by a railroad other than TCW. HCRAA will also acquire an "exclusive permanent and irrevocable easement on the Bass Lake Spur and become a party to the Bass Lake Spur and will succeed to all of CP's rights and obligations under that agreement in the Bass Lake Spur Corridor". See Section 2.1(b) of the OMA. Finally, Section 2.1(c) of the OMA states a long list of protocols yet to be developed, discussed or executed by HCRRA and Met Council to ensure that operation of LRT Service (as defined in the OMA) will not interfere with HCRRA's provision of Local Freight Rail Service, Overhead Freight Rail Service (provided by CP or TCW pursuant to trackage rights in the Corridor), or Overhead Trackage Rights. Collectively, these speculative provisions provide no actual information to demonstrate that TCW's operations over the shared use corridor once the proposed project is complete will not interfere with TCW's provision of common carrier service

to its shippers. TCW would need to see actual protocols to determine the effect of such protocols on TCW's operations and ability to provide service to TCW's shippers.

While the Council states it will "avoid unreasonable interference" with HCRRA's provision of Local Freight Rail Service, Overhead Freight Rail Service (provided by CP or TCW pursuant to trackage rights in the Corridor), or Overhead Trackage Rights, it does not state how. Currently, CP dispatches the Bass Lake Spur. After June 30, 2019, the OMA claims HCRRA will secure third parties to provide this function. The OMA says nothing about the transition of the dispatching service and/or coordinating such a transition with TCW. TCW doesn't know how the contractor to be named later will dispatch our trains if they don't understand how TCW operations work. TCW doesn't know if dispatching will be available 24/7 as it is today. Without the "how" TCW cannot effectively plan its operation during the construction phase or after. Met Council and HCRRA must provide specifics now rather than after they collectively wreak havoc with TCW's operations and caused problems for TCW's shippers. The OMA also states the HCRAA will continue to have CP provide the dispatch service and flagging service until June 30th, 2019, but doesn't state how communication between CP, TCW and those doing the construction will be in communication with each other to ensure a smooth flow of freight rail service. This is all new territory for the Met Council, as they have never built a line next to a freight railroad before. The OMA should fully and completely explain how freight railroad service will not be impacted in order for TCW to be able to fully come up with an operational plan and feel confident that during and after the construction of the SWLRT, freight operations will not be negatively impacted. TCW is being asked to redo 27 years of history. The least Met Council and HCRAA could do is provide answers to these questions.

10,000 Feet of Remaining Sidetracks

If the project plans are allowed to proceed and the 16,000 feet of sidetracks discussed above are removed, approximately 10,000 feet of sidetracks will be left on the Bass Lake Spur. Currently TCW uses these sidetracks differently at what is called the FTC switch. TCW uses the sidetracks west of the switch to hold loaded cars of plastics for rapid delivery to the sites once the customer orders the cars out. The sidetracks east of the FTC switch are used daily to block manifest trains coming from the Class I railroads in the Cities. That area east of the FTC switch holds about 65 cars. Trains that the St. Paul turn assignment brings back from the Class I rail yards are switched and blocked using the FTC switch. Once the switching and blocking are done, the train is put onto the westbound track. This is done so the train is staged for the Glencoe Turn assignment and to clear the main in case there are unit trains coming onto or leaving TCW property. Unit train meets cannot happen on these sidetracks because CP has advised that these tracks cannot be used to hold the heavy six-axle locomotives..

My understanding is that the proposed Met Council-HCRRRA agreement says HCRRRA will have exclusive control over the 10,000 feet of remaining sidetracks. TCW does not know what that means. The remaining 10,000 feet of sidetracks should not interfere with the light rail tracks as they will have a “fly over” bridge over these sidetracks. However for TCW to be able to conduct its operations as it does today, even if the 16,000 feet of sidetracks are replaced in a different location, TCW needs to be able to use the remaining 10,000 feet of side to conduct

SUMMARY

Losing 16,000 feet of track will be detrimental to TCW’s operations. In 1991, when the 1991 TRA with CP was signed, TCW was not handling the volume of traffic they do today. The number of cars has grown significantly since 1991 when the 1991 TRA was signed. TCW

utilizes every sidetrack space available for setouts, pickups and switching due to the volume of cars handled through this corridor. The 1991 TRA also states in Section 2 paragraph 2.1 that, “The construction, maintenance, repair and renewal of the Subject Trackage together with the discretion to add, modify, or remove facilities and appurtenances, signals and switches, along the Subject Trackage shall be under the exclusive direction and control of SOO. SOO shall make any additions, modifications or removals to or along the Subject trackage which SOO deems necessary or desirable for safe, efficient, and economical use of the subject trackage by the Parties; provided that any such change shall not materially interfere with Buyer’s right to use Subject Trackage for the purpose defined in Section 1.” Removing the sidetracks along the Bass Lake Spur will materially interfere with TCW’s ability to set-out, pickup and switch between Tower E14 and MP 427 on the Merriam Park Line. This would not be economical or efficient for TCW because the sidetracks are the only location with a yard such as the Bass Lake Yard (E) and (F) to pre-block cars, switch and stage trains for furtherance, and have train meets. When TCW negotiates contracts with its customers, the freight rates are negotiated based upon the current LSOP, which includes being able to use the sidetracks on the Bass Lake Spur to set-out, pickup and switch railcars for movement west onto TCW’s property. Losing this sidetrack capacity will force TCW to redo the operating plan to meet obligations to customers that were negotiated with the available track space TCW currently has.

The OMA produced by the Met Council on June 5, 2018 has created more questions than it provided answers. TCW cannot make an operational plan or commitment to its customers based on the information provided in the OMA. While it is easy to state that Met Council’s proposed Project will not interfere with Freight Service, it is another thing to demonstrate that there will be no interference, or that Met Council has a contingency plan in the event that some

unforeseen event occurs. This project is dangerous enough during the construction phase, without adding moving freight trains in the mix. It is imperative to prevent the risk of bodily injury or death for railroad employees and construction personnel, that there be a well thought out plan, and that all stakeholders have a clear, complete and mutual understanding of the plan!

GLOSSARY of TERMS

Blocking cars - Switching and placing railcars in order to assemble a train so that when the train reaches location "A," all of the cars for that location are connected and can be set-out and dropped off as a group or block, and so on for locations "B," "C," and "D." Blocking cars allows railroad operations to be more fluid and faster. Blocking all the cars for a particular destination avoids tremendous amounts of in route switching which can tie up the main line.

Manifest train - A manifest train is a freight train hauling all kinds of different freight, i.e., covered hoppers, box cars, tank cars, flat cars, etc.

Trans-loading - The process of transferring a shipment from one mode of transportation to another. It is most commonly employed when one mode cannot be used for the entire trip, such as when goods are to be shipped via railroad and then off loaded and delivered via truck.

Verification

I, William Brown III, General Manager of Operations for Twin Cities & Western Railroad Company, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to file this Verified Statement in connection with the Reply Comments of Twin Cities & Western Railroad Company being filed with the Surface Transportation Board.

Executed on June 27, 2018



William Brown III

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

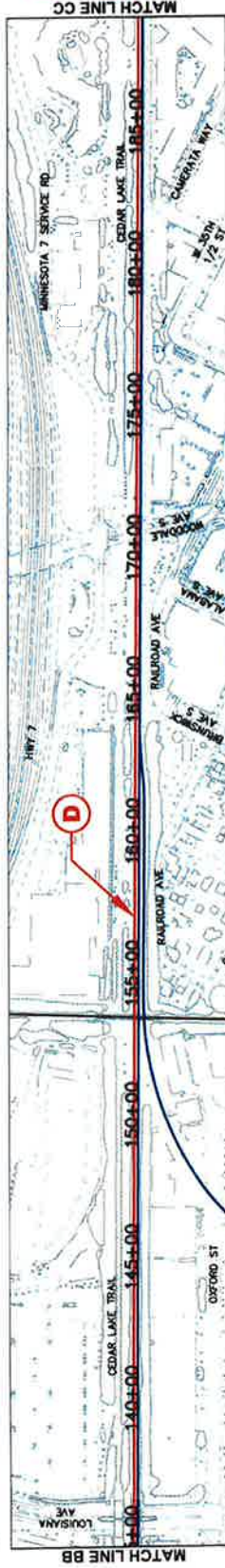
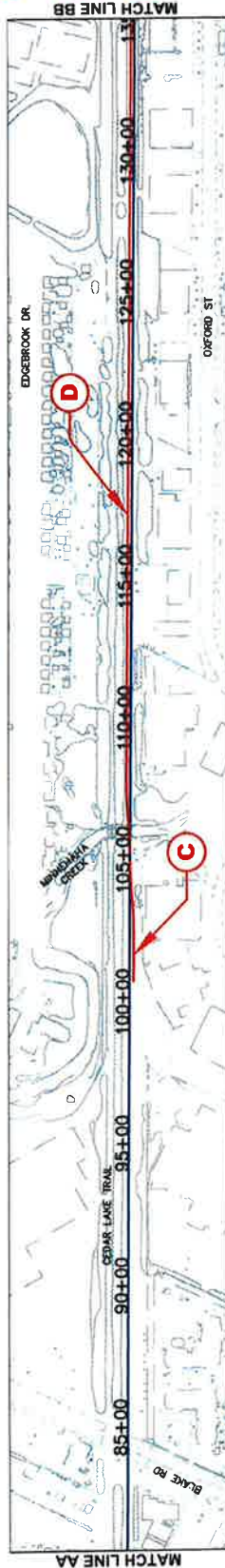
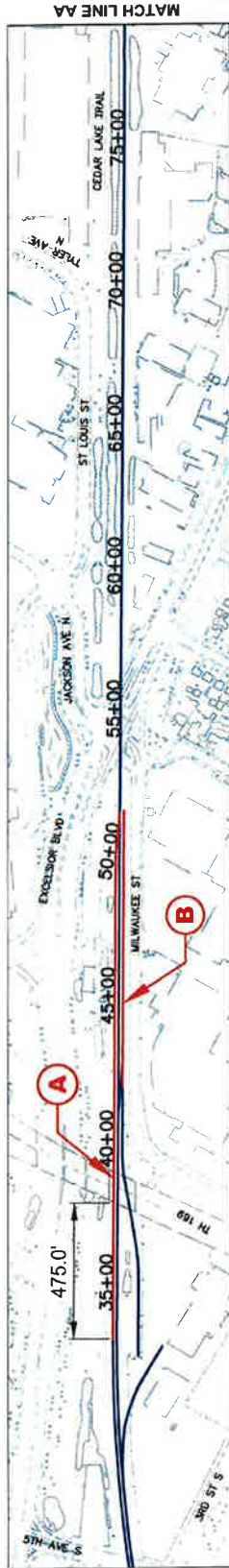
METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT E

VERIFIED STATEMENT OF MR. WILL BROWN

ATTACHMENT 1



(A) SIDING TRACK REMOVAL SCHEDULE
NORTH SIDING TRACK: FROM WEST END
OF EXCELSIOR BLVD. AT-GRADE
CROSSING TO ABOUT 475' WEST OF
TH-169 OVERHEAD BRIDGE

(B) SALT TRACK: FROM WEST END OF
EXCELSIOR BLVD. AT-GRADE CROSSING
TO ABOUT 250' EAST OF TH-169
OVERHEAD BRIDGE

(C) SPUR TRACK: FROM WEST END OF
EXCELSIOR BLVD. AT-GRADE CROSSING
TO ABOUT 400' WEST OF MINNEHAHA
CREEK UNDERGRADE BRIDGE

(D) SIDING TRACK: FROM EAST END OF
MINNEHAHA CREEK UNDERGRADE BRIDGE
TO WEST END OF TH-100 UNDERGRADE
BRIDGE

(E) SOUTH SIDING TRACK: FROM EAST END
OF EXCELSIOR BLVD. AT-GRADE CROSSING
TO ABOUT 150' EAST OF BELTLINE BLVD.
AT-GRADE CROSSING

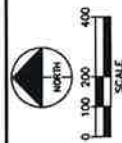
(F) SOUTH SIDING TRACK: FROM ABOUT 450'
EAST OF TH-100 UNDERGRADE BRIDGE
TO ABOUT 500' EAST OF BELTLINE BLVD.
AT-GRADE CROSSING

TOTAL SIDING TRACK REMOVAL: 16,000 LF

LEGEND
— BASS LAKE SPUR
— BASS LAKE SPUR SIDING REMOVAL

ABBREVIATIONS
TH : TRACK FOOT

DRAFT-WORK IN PROCESS



07/31/2017

SOUTHWEST LIGHT RAIL

TRACK
BASS LAKE SPUR SIDING TRACK
REMOVAL EXHIBIT ILLUSTRATING ALL SIDING TRACK REMOVAL



AECOM

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT F

<u>Responsibility</u>	<u>Current</u>	<u>Original Proposal</u>	<u>New Proposal</u>
Common Carrier			
Kenilworth	HCRRA	TCW	HCCRA (Met Council)
Bass Lake Spur	CP	TCW	HCRRA (Met Council)
Ownership			
Kenilworth	HCRRA	Met Council	Met Council
Bass lake Spur	CP	Met Council	Met Council
Bike Trail Ownership	HCRRA	HCRRA	HCRRA

Shifting of Responsibilities

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF TWIN CITIES & WESTERN RAILROAD COMPANY

EXHIBIT G

RAILROAD EASEMENT

(reserved for valuation and tax data)

(reserved for recording data)

STATE DEED TAX DUE HEREON: \$ _____

Date: August 10, 1998

FOR VALUABLE CONSIDERATION, the Hennepin County Regional Railroad Authority, a political subdivision and local government unit under the laws of the State of Minnesota, Grantor, hereby conveys and quitclaims to the Twin Cities and Western Railroad Company, a corporation under the laws of the State of Minnesota, Grantee, a railroad easement over real property in Hennepin County, Minnesota, the terms of which are set forth in Trackage Rights Agreement between the Twin Cities and Western Railroad Company, Soo Line Railroad Company and the Hennepin County Regional Railroad Authority dated August 10, 1998. The real property is described as follows:

(Legal description on Exhibit A)

Hennepin County Regional Railroad Authority

By Mary Tambornino
Its Chairman

By Jeff Spartz
Its Executive Director

STATE OF MINNESOTA)

)ss

COUNTY OF HENNEPIN)

The foregoing was acknowledged before me this 10th day of August, 1998, by Mary Tambornino and Jeff Spartz, the Chairman and Executive Director of Hennepin County Regional Railroad Authority, a political subdivision and local government unit under the laws of Minnesota, on behalf of the Authority.

Mary Ellen Hudson
Notary Public

This instrument was drafted by:

Hennepin County Regional Railroad Authority
417 North Fifth Street, Suite 320
Minneapolis, MN 55401-1362

Tax Statements for the real property
described in this instrument should be sent to:

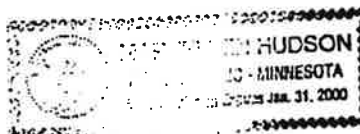


EXHIBIT A

Description of Railroad Easement

A strip of land fifty feet in width lying 25 feet on either side of the centerline of the railroad tracks extending from the point of connection with Soo Line trackage at or near Chicago North Western Railway milepost 16.2 in the City of St. Louis Park, easterly to Chicago North Western Railway milepost 13.7 at a point of connection with Burlington Northern Santa Fe Railway in the City of Minneapolis except as the width is limited by the Trackage Rights Agreement between the Twin Cities and Western Railroad, Soo Line Railroad Company and the Hennepin County Regional Railroad Authority dated *Aug. 10, 1998*.

