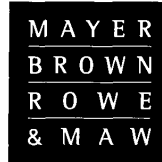


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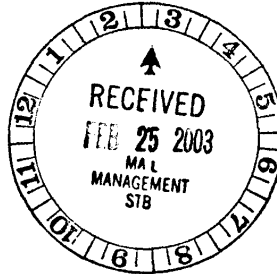
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February 25, 2003

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001



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Re: Finance Docket No. 34319
Consolidated Rail Corporation --
Declaratory Order Proceeding

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of Consolidated Rail Corporation's Petition for Institution of a Declaratory Order Proceeding. Please date-stamp the extra copy that is enclosed and return it to our representative.

Also enclosed are a check in the amount of \$1,400.00 to cover the filing fee and a diskette containing the Petition in electronic format.

Sincerely yours,

Robert M. Jenkins III

RMJ/bs

Enclosures

FILED

FEB 25 2003

**SURFACE
TRANSPORTATION BOARD**

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FEB 25 2003

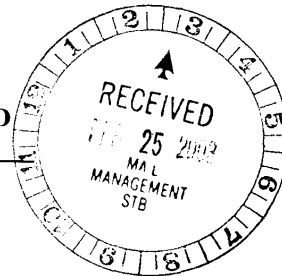
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BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34319

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FEB 25 2003

**SURFACE
TRANSPORTATION BOARD**

**CONSOLIDATED RAIL CORPORATION –
DECLARATORY ORDER PROCEEDING**

**CONSOLIDATED RAIL CORPORATION'S
PETITION FOR INSTITUTION OF
A DECLARATORY ORDER PROCEEDING**

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**SURFACE
TRANSPORTATION BOARD**

Attorneys for Consolidated Rail Corporation

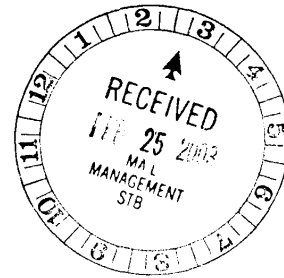
Dated: February 25, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34319

**CONSOLIDATED RAIL CORPORATION –
DECLARATORY ORDER PROCEEDING**

**CONSOLIDATED RAIL CORPORATION'S
PETITION FOR INSTITUTION OF
A DECLARATORY ORDER PROCEEDING**



Introduction

Consolidated Rail Corporation (“Conrail”) hereby petitions the Board, pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, to institute a declaratory order proceeding to resolve whether certain alleged breach of contract and declaratory judgment claims made in *AT&T Communications, Inc. v. Consolidated Rail Corp.*, No. 03-CV-147 (BWK) (E.D. Pa.), filed January 10, 2003, are preempted under 49 U.S.C. § 11321(a) by the Board’s approval of the Conrail control transaction in *CSX Corp. et al. – Control and Operating Leases/Agreements – Conrail Inc., et al.*, 3 S.T.B. 196 (1998) (“Decision No. 89”).

The law is settled that the preemption of “all other law” in Section 11321(a) includes the preemption of contracts as necessary for a person to carry out a Board-approved transaction. *See, e.g., Norfolk & Western Railway Co. v. American Train Dispatchers’ Ass’n*, 499 U.S. 117 (1991); *Consolidation Coal Sales Co. v. Consolidated Rail Corp.*, F.D. No. 34169, 2002 STB LEXIS 317 (served May 24, 2002) (“*Consolidation Coal*”). The law is also clear that the STB has exclusive jurisdiction to determine the scope of preemption under Section 11321(a). *See, e.g., Union R.R. Co. v. United Steelmakers of Am.*, 242 F.3d 458 (3d Cir. 2001); *Railway Labor Executives’ Ass’n v. Southern Pacific Transp. Co.*, 7 F.3d 902 (9th Cir. 1993).

In the contract action brought against Conrail by AT&T Communications, Inc. (“AT&T”), AT&T makes claims regarding the application of a “most favored nation” clause (“MFN clause”) in a fiber optic contract (“FOC License Agreement”) between AT&T and Conrail that directly implicate the implementation of the Transaction Agreement as approved in Decision No. 89.¹ Conrail seeks here to have the STB resolve three issues raised by AT&T’s complaint:

- (1) Whether Decision No. 89 – which expressly authorized the division of most of Conrail’s lines between NYC² and PRR³, for independent operation by CSX⁴ and NS⁵ – preempts any claim that Conrail breached the MFN clause in the FOC License Agreement by “disabling itself of the ability to perform its obligations” under the MFN clause after the “Split Date” of June 1, 1999.
- (2) Whether Decision No. 89 preempts any claim against Conrail arising from the application of the MFN clause in the FOC License Agreement to fiber optic contracts separately entered into by CSX/NYC and NS/PRR, including any subsidiaries of those entities,⁶ regarding former Conrail lines after the Split Date.
- (3) Whether Decision No. 89 preempts any claim against Conrail arising from the application of the MFN clause in the FOC

¹ Attached as Exhibit A hereto is a copy of AT&T’s district court complaint.

² “NYC” refers to New York Central Lines LLC.

³ “PRR” refers to Pennsylvania Lines LLC.

⁴ For convenience, we use the term “CSX” here to refer to CSX Corporation and/or CSX Transportation, Inc., and their subsidiaries.

⁵ For convenience, we use the term “NS” here to refer to Norfolk Southern Corporation and/or Norfolk Southern Railway Company, and their subsidiaries.

⁶ For purposes of this petition, Conrail refers to “CSX/NYC” and “NS/PRR,” rather than to the specific entities, because Conrail does not know which entities may have entered into fiber optic contracts regarding former Conrail lines after the Split Date.

License Agreement insofar as the ownership and operation of former Conrail right of way by CSX/NYC and NS/PRR after the Split Date renders Conrail's compliance with that clause commercially impossible or impracticable.

Conrail is contemporaneously filing with the District Court for the Eastern District of Pennsylvania a partial motion to dismiss or, in the alternative, to refer to the STB and to stay the entire action pending a resolution of the proceedings before the Board. Conrail proposes a schedule for filings with the Board under which the parties' submissions would be complete within 75 days of the Board's institution of the declaratory order proceedings.

Background

In 1984, AT&T and Conrail entered into the FOC License Agreement, which provided for the installation of fiber optic cable along Conrail's right of way. The MFN clause at issue in the FOC License Agreement states:

CONRAIL covenants and agrees that, in the event it enters into any agreement with a party other than [AT&T] providing for the use by such party of right of way owned or controlled by CONRAIL for the installation of a [fiber optic cable] system between any two points on the Licensed Premises, whether such system is to be installed on the Licensed Premises or parallel to the Licensed Premises, CONRAIL will, at its option, either (i) charge such other party a per mile fee at least equal to the average per mile fee (including adjustments thereto referred to in Paragraphs 3 and 4 hereof), between such two points which [AT&T] is obligated to pay CONRAIL pursuant to this License, or, in the alternative, (ii) reduce its average per mile fee between such two points to [AT&T] to the average per mile fee charged to such other party.

FOC License Agreement, attached hereto as Ex. B, ¶ 11.2. AT&T then installed, pursuant to the FOC License Agreement, fiber optic cable along Conrail's right of way. The initial term of the FOC License Agreement was for fifteen years, but the agreement contained two fifteen-year

renewal options. AT&T expressed its intent to exercise its right to renew the FOC License Agreement in 1997, and the renewal became effective January 1, 1999.

Conrail has also entered into numerous agreements with other FOC licensees. Among these agreements was a 1996 contract with Qwest Communications Corporation ("Qwest") which permitted the installation of Qwest fiber optic lines along Conrail's right of way. The Qwest agreement provided that Qwest would "pay" consideration to Conrail by allowing Conrail to use Qwest's fiber optic lines for railroad operation-related communications. Qwest completed building its network along Conrail's right of way in 1999.

In June 1997, Conrail entered into an acquisition agreement with CSX and NS. The Board approved the 1997 agreement in Decision No. 89, resulting in the division of the great majority (approximately 90 percent) of Conrail's assets on the Split Date between NYC and PRR. Pursuant to that Transaction Agreement, as approved by the Board, Conrail retained the AT&T FOC License Agreement, even though the majority of the rail lines along which AT&T's fiber optic cable was installed were allocated to NYC and PRR and were operated, respectively, by CSX and NS.⁷ Conrail did not retain any rights to enter into new fiber optic agreements on PRR and NYC rights of way after the Split Date.

⁷ The CSX/NS/Conrail Transaction Agreement provided as follows with respect to the fiber optic licenses:

(d) All Contracts granting any unrelated Person the right to bury fiber optic cable longitudinally along Assets shall be designated as Retained Assets (if any Assets in respect of which such rights are given are Allocated Assets, NYC or PRR, as the case may be, will license or otherwise grant rights to CRC or its Affiliates to maintain the subject matter of the Contracts granting such rights), except where such rights relate only to either NYC Allocated Assets or PRR Allocated Assets, in which case such Contracts shall be designated in the same manner as such

(cont'd)

AT&T alleges, among other things, that Conrail

has ***breached*** the MFN Covenant, and ***repudiated*** the [FOC] License Agreement, ***by transferring to [NYC and PRR]*** its interests in some or all of the right of way that is subject to AT&T's license and then disclaiming any further obligation to AT&T with respect to the transferred right of way and ***disabling itself of the ability to perform*** its obligations under the MFN Covenant.

Compl. ¶ 4 (emphasis added); *see also id.* ¶ 39.c (seeking to hold Conrail liable for fiber optic agreements entered into by CSX/NYC and NS/PRR along former Conrail right of way); *id.*

¶ 39.d (seeking to hold Conrail liable for “divesting itself of the ability to perform its obligations” as a result of Decision No. 89); *id.* ¶ 39.e (alleging breach of contract by failing to disclose terms of agreements made by CSX/NYC and NS/PRR along former Conrail right of way); *id.* ¶ 41 (“Conrail’s breaches of the License Agreement identified in Paragraphs 39(c) and (d) above constitute a repudiation of the License Agreement”). *See generally id.* ¶¶ 24, 27-34.

As a result of these alleged breaches, AT&T claims that it has suffered damages “to the extent that [CSX/NYC or NS/PRR] may have entered into one or more agreements providing for the use of the MFN ROW in return for an average per mile license fee that is less than the average per mile fee paid by AT&T for the MFN ROW.” *Id.* ¶ 42.

(... cont'd)

Allocated Assets, provided that NYC and PRR shall, to the extent permitted under such Contracts that are designated as Retained Assets, be given equal access to CRC's or its Affiliate's rights to use capacity on such fiber optic cable and shall participate equally in any other benefits of such Contracts.

CSX/NS/Conrail Transaction Agreement at 21.

AT&T also seeks a declaratory judgment from the district court that the MFN clause is applicable to any agreements – including agreements entered into by CSX/NYC and NS/PRR – pertaining to former Conrail right of way (*id.* ¶ 45) and that “**Conrail has repudiated** the [FOC] License Agreement as a result of **Conrail’s disabling itself** of the ability to perform its obligations under the MFN Covenant.” *Id.* ¶ 46 (emphasis added). *See also id.* ¶ 44. AT&T alternatively seeks a declaratory judgment from the district court that Conrail must reduce AT&T’s average per mile fee to any amount charged to third-party licensees along former Conrail right of way “where **any** [FOC] License Agreement provides for the use of the MFN ROW for a FOC system” and that Conrail must disclose future agreements in its possession, custody, or control, “even if **Conrail is not a party** to the agreements.” *Id.* ¶ 47.a, b (emphasis added); *see also id.* ¶ 47.c (requesting an annual accounting).⁸

Argument

The division of Conrail’s assets between NYC and PRR, for operation by CSX and NS, was at the core of Decision No. 89. Without the division of those assets, the particularly complicated CSX/NS/Conrail transaction could not have been consummated and the pro-competitive benefits of direct, head-to-head rail competition in much of the Northeast and Midwest could not have been realized. Now, over five years after CSX, NS, and Conrail submitted their application for Board approval – and over four years after the Board issued Decision No. 89 – AT&T seeks to hold Conrail liable for the division of its assets under a breach of contract theory. AT&T asserts, on the one hand, that Conrail improperly “divested itself” of

⁸ AT&T makes other claims concerning pre-Split Date activities that do not implicate Decision No. 89. Conrail is not seeking a declaratory order from the Board regarding those claims.

its ability to perform under the FOC License Agreement and, on the other hand, that Conrail is responsible for fiber optic agreements entered into by CSX/NYC and NS/PRR. But read for what they really are, AT&T's claims are a collateral attack on Decision No. 89.

AT&T's post-Split Date allegations turn on the transfer of Conrail's right of way to NYC and PRR, including any new FOC license agreements entered into by CSX/NYC and NS/PRR along NYC and PRR right of way. In other words, the "breaches" of which AT&T complains arose as a result of this Board's decision to approve the break-up of Conrail and the natural results that flowed from that break-up. But the allocation of Conrail's assets between NYC and PRR – as well as the retention by Conrail of certain assets – was necessary to carry out the CSX/NS/Conrail transaction. Indeed, it was the very essence of the transaction.

If third parties could subject Conrail to liability for "divest[ing] itself" of responsibility over rail lines that have been allocated to NYC and PRR, for operation and full enjoyment by CSX and NS, then CSX/NS/Conrail could not have been consummated. As the Board has recently held, Conrail "*simply cannot be held liable, under State law, for entering into a contract* (here, the 1997 Agreement) that contemplates a transaction (here, the CSX/NS/CRC transaction) that *[the Board]*, acting under [its] exclusive authority under 49 U.S.C. 11323-25, [has] *authorized [Conrail] to consummate.*" *Consolidation Coal*, 2002 STB LEXIS 317, at *13 (emphasis added). No party would willingly enter into a Board-approved transaction if a third party could frustrate the Board's exclusive jurisdiction by filing district court claims collaterally attacking the approved transaction, potentially subjecting the transacting party to multi-million dollar liability two, five, or ten years after the fact. Yet that is what AT&T is seeking to do here.

AT&T's alternative claim that Conrail is responsible under the MFN clause for fiber optic contracts separately entered into by CSX/NYC and NS/PRR is equally untenable. There

was and is no doubt that the transaction approved by the STB contemplated fully independent operation of the Conrail lines allocated to NYC and PRR and integrated into CSX's and NS's respective rail systems. It was and is clear that Conrail would have no involvement with any fiber optic contracts that CSX/NYC or NS/PRR might enter into, much less control over the pricing of those contracts. Yet, rather than stating any objections it may have had to Conrail's retention of the FOC License Agreement to the Board when it was analyzing the CSX/NS/Conrail agreement,⁹ AT&T not only sat idly by, but *renewed* the FOC License Agreement. AT&T's tactics will open the floodgates to numerous other parties who claim to have been impacted by Decision No. 89, yet who chose not to assert any rights before the Board for its consideration. To the extent that AT&T seeks to hold Conrail liable by application of the MFN clause in the FOC License Agreement to contracts separately entered into by CSX/NYC and NS/PRR after the Split Date, those claims should be preempted by the Board's decision approving the CSX/NS/Conrail transaction.

Conrail also seeks a declaratory order from the Board finding that Decision No. 89 preempts the application of the MFN clause in the FOC License Agreement to the extent that the operation of former Conrail right of way by CSX and NS post-Split Date renders Conrail's compliance with that clause commercially impossible or impracticable. AT&T may argue, for example, that the "effective" per-mile fee paid to Conrail under the Qwest barter contract, in which Conrail is "paid" consideration through its ability to use Qwest's fiber optic lines, can be determined by the current value that the use of those lines has to Conrail. But by the time Qwest

⁹ Approximately 160 entities that had contracts with Conrail potentially affected by the CSX/NS/Conrail transaction, including, among others, various utility, trucking, and manufacturing companies, submitted their comments, objections, and concerns about the transaction to the Board. See Decision No. 89, 3 S.T.B. at 250.

completed building its fiber optic network along Conrail's right of way in 1999, most of Conrail's assets were being divided between NYC and PRR, thus rendering Conrail largely incapable of using Qwest's lines for its entire former network, as was contemplated under the Qwest agreement. To the extent AT&T is asserting a claim that Conrail's inability to use Qwest's fiber optic lines reduces the value of that contract to Conrail and, hence, lowers the effective per mile fee paid by Qwest to Conrail, such a claim should be preempted because Conrail's inability to realize the vast majority of the benefit of its agreement with Qwest derives directly from Decision No. 89.

The Board has ample cause to institute a declaratory order proceeding here. AT&T's complaint demonstrates beyond question that there is an active controversy between the parties that is predicated on matters that lie exclusively within the jurisdiction of the Board. *See, e.g., Railway Labor Executives' Ass'n*, 7 F.3d at 906 ("[B]ecause the ICC had exclusive authority to approve the Rio Grande merger and thereby exempt the Railroads from any procedural or substantive law which might otherwise impede that merger, it should have exclusive authority to clarify the scope of its own approval and the corresponding breadth of the section 11341(a) [now 11321(a)] exemption."). *Accord Union R.R. Co.*, 242 F.3d at 458.

Prayer for Relief

For the foregoing reasons, Conrail prays that the Board institute a declaratory order proceeding to determine:

(1) Whether Decision No. 89 preempts any claim that Conrail breached the MFN clause in the FOC License Agreement by "disabling itself of the ability to perform its obligations" under the MFN clause after the Split Date.

(2) Whether Decision No. 89 preempts any claim against Conrail arising from the application of the MFN clause in the FOC License Agreement to fiber optic contracts separately

entered into by CSX/NYC and NS/PRR, including any subsidiaries of those entities, regarding former Conrail lines after the Split Date.

(3) Whether Decision No. 89 preempts any claim against Conrail arising from the application of the MFN clause in the FOC License Agreement insofar as the ownership and operation of former Conrail right of way by CSX/NYC and NS/PRR after the Split Date renders Conrail's compliance with that clause commercially impossible or impracticable.

Conrail requests that the Board set a modified procedure schedule for the submission of evidence and argument regarding these three issues. Conrail proposes (a) that its opening brief and evidence be due 30 days from the Board's order instituting the proceedings, (b) that AT&T's reply brief and evidence be due 30 days from Conrail's opening filing, and (c) that Conrail's rebuttal be due 15 days after AT&T's reply. Conrail does not believe that any discovery is necessary in the proposed proceeding to resolve the three issues presented.

Respectfully submitted,



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Dated: February 25, 2003

Attorneys for Consolidated Rail Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2003, I caused copies of the foregoing Petition for Institution of a Declaratory Order Proceeding, including Exhibits A and B attached hereto, to be served on the following individuals by hand delivery:

Paul W. Kisslinger, Esq.
Robert J. Higgins, Esq.
Howard N. Feldman, Esq.
Laura H. Calaluca, Esq.
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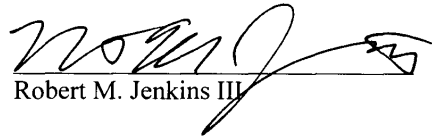

Robert M. Jenkins III

EXHIBIT A

\$150.00

BWK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AT&T COMMUNICATIONS, INC.,
900 Route 202/206 North
Bedminster, NJ 07921

Plaintiff,

v.

CONSOLIDATED RAIL CORPORATION,
Serve: Corporation Service Company
2704 Commerce Drive
Harrisburg, PA 17110

Defendant.

FILED

MICHAEL E. KUNZ, Clerk

By TH Dep. Clerk

Civil Action No. 03-00147
JURY TRIAL DEMANDED

COMPLAINT

Plaintiff AT&T Communications, Inc. ("AT&T"), for its complaint for damages, declaratory judgment, an accounting and other relief against Defendant Consolidated Rail Corporation ("Conrail"), states as follows:

NATURE OF ACTION

1. AT&T brings this action to enforce Conrail's contractual obligation to comply with the "most favored nation" covenant (the "MFN Covenant") in a license agreement between AT&T and Conrail dated January 1, 1984 (the "License Agreement") relating to AT&T's use of Conrail's right of way for a fiber optic cable ("FOC") system.

2. AT&T has paid Conrail over \$200 million in license fees in connection with the License Agreement and currently is paying Conrail more than \$17 million per year in license fees.

8

3. The MFN Covenant requires that if a third party is given the right to use any right of way between any two points on or parallel to the AT&T Licensed Premises for installation of a FOC system, either (i) the third party shall be charged a per mile fee at least equal to the average per mile fee paid by AT&T, or (ii) AT&T's per mile fee shall be reduced to the average per mile fee charged to the third party. Conrail has breached this obligation to AT&T's detriment by entering into agreements with third parties that charge a per mile fee that is effectively less than the average per mile fee paid by AT&T without reducing AT&T's average per mile fee to the amount charged the third party licensees.

4. Conrail also has breached the MFN Covenant, and repudiated the License Agreement, by transferring to its wholly-owned subsidiaries its interests in some or all of the right of way that is subject to AT&T's license and then disclaiming any further obligation to AT&T with respect to the transferred right of way and disabling itself of the ability to perform its obligations under the MFN Covenant.

5. AT&T seeks monetary damages for Conrail's breaches of the MFN Covenant and, at AT&T's election, the right to terminate the License Agreement without further obligation to Conrail. AT&T also seeks a judgment declaring that (i) the MFN Covenant is applicable to agreements permitting third parties to use FOC on the right of way that is subject to the License Agreement, even if Conrail is not a party to the agreements, and (ii) that Conrail is liable to AT&T to the extent such agreements charge the licensees an average per mile fee that is less than the average per mile fee paid by AT&T for the same right of way. AT&T also seeks a judgment declaring that, by virtue of Conrail's breaches and repudiation, AT&T, at its election, (i) is discharged from any further obligation under the License Agreement, or alternatively (ii) is entitled to a reduction of its future license fees by the amount that those fees exceed the average per mile fee charged to any other

licensee for the right to use the same right of way covered by the MFN Covenant. Finally, AT&T seeks a judgment declaring that, in the event AT&T elects to reduce its future license fees (rather than terminating the License Agreement), Conrail is required to disclose to AT&T all future agreements allowing the installation of FOC on the right of way covered by the MFN Covenant and to submit to an accounting of the average per mile fees paid by each licensee under each agreement that it is required to disclose.

PARTIES

6. AT&T is a corporation organized and existing under the laws of Delaware, with its principal place of business at Bedminster, New Jersey. AT&T owns and operates telecommunications equipment and provides telecommunications and related services throughout the United States.

7. Defendant Conrail is a corporation organized and existing under the laws of Pennsylvania with its principal place of business at Philadelphia, Pennsylvania. Conrail owns and operates railroads and railroad properties.

JURISDICTION AND VENUE

8. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1332(a)(1) because the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs, and the parties are citizens of different states.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because Conrail is a resident of Philadelphia, Pennsylvania and a substantial part of the events giving rise to this complaint occurred in Philadelphia.

MATERIAL BACKGROUND FACTS

A. The License Agreement

10. In the 1980s, to improve its telecommunications services offered to the public, AT&T began creating a network of fiber optic telecommunications cable throughout the United States.

11. In 1984, AT&T and Conrail entered into a License Agreement which permitted AT&T to install a FOC system on selected portions of Conrail's railroad right of way. This License Agreement was the first agreement that AT&T entered into with any railroad in connection with the development of AT&T's new fiber optic network.

12. Upon information and belief, the License Agreement was also the first agreement that Conrail entered into with any major telecommunications company relating to the development of a new fiber optic network.

13. The License Agreement permitted AT&T to use specified right of way (initially, approximately 750 miles between Harrisburg, Pennsylvania and Chicago, Illinois) owned or controlled by Conrail for the purpose of constructing, installing, maintaining, operating and repairing a FOC system.

14. The License Agreement also granted AT&T the option to license up to 2,250 miles of additional Conrail right of way for its FOC system.

15. The License Agreement required AT&T to pay Conrail a monthly per mile fee for the original right of way it licensed for its FOC system. Those fees are periodically adjusted for changes in the Consumer Price Index ("CPI"), with a stated minimum increase of no less than twelve percent (12%) over various three-year time periods. The License Agreement also sets forth a per mile fee structure for the additional right of way that AT&T licensed, with attendant CPI increases.

16. The License Agreement expressly limits AT&T's FOC system to a single fiber optic cable containing not more than 24 fibers, along with the associated electronics. AT&T was given the right to install cable consisting of 36 fibers provided that the additional fibers did not create "fiber miles in excess of the product of 10% of the right of way comprising the Licensed Premises, multiplied by 12." (The term "Licensed Premises" as used in the License Agreement covers all of the right of way licensed by AT&T.)

17. AT&T subsequently licensed additional miles and has installed a total of approximately 2,700 miles of fiber optic cable on Conrail's right of way. AT&T continues to operate its FOC system on this right of way.

18. The original term of the License Agreement, which commenced on January 1, 1984, was for 15 years ending on January 1, 1999. The License Agreement gave AT&T the option of extending the License Agreement for two additional 15-year terms. AT&T exercised the first of those options and the License Agreement is now effective until January 1, 2014.

19. AT&T has paid Conrail over \$200 million in license fees in connection with the License Agreement. AT&T is currently paying Conrail more than \$17 million per year in license fees and, unless the License Agreement is terminated, AT&T will continue to pay Conrail license fees through January 1, 2014.

20. In 1986, when AT&T wanted to install FOC containing more than 24 fibers, such that the additional fibers created "fiber miles in excess of the product of 10% of the right of way comprising the Licensed Premises, multiplied by 12," Conrail advised AT&T that the additional fibers would result in "the creation of a theoretical segment, for pricing purposes of 17.3 miles." Conrail required that AT&T pay license fees for these additional 17.3 miles at the highest per mile in service rate required in the License

Agreement. AT&T has been paying Conrail the highest in service license fee rate in effect on these miles since January 1986.

B. The MFN Covenant

21. Because the License Agreement was Conrail's first agreement for the use of its right of way by a major telecommunications firm for the installation of a FOC system, and it was expected that Conrail would enter into similar agreements with other firms for the right to use its right of way, AT&T bargained for a "most favored nation" obligation. Paragraph 11.2 of the License Agreement contains the MFN Covenant in which Conrail agreed that, in the event agreements were entered with third parties providing for the use of any right of way between any two points on or parallel to the AT&T Licensed Premises, the third parties would be charged a per mile fee that was at least equal to the average per mile fee paid by AT&T, or AT&T's average per mile fee would be reduced to the average per mile fee paid by the third party. Specifically, the MFN Covenant states:

CONRAIL covenants and agrees that, in the event it enters into any agreement with a party other than [AT&T] providing for the use by such party of right of way owned or controlled by CONRAIL for the installation of a FOC system between any two points on the Licensed Premises, whether such system is to be installed on the Licensed Premises or parallel to the Licensed Premises, CONRAIL will, at its option, either (i) charge such other party a per mile fee at least equal to the average per mile fee (including adjustments thereto referred to in Paragraphs 3 and 4 hereof), between such two points which [AT&T] is obligated to pay CONRAIL pursuant to this License, or, in the alternative, (ii) reduce its average per mile fee between such two points to [AT&T] to the average per mile fee charged to such other party.

22. The purpose of the MFN Covenant was to protect AT&T against a possible competitive disadvantage in the event that the MFN ROW was licensed to others. (As used in this Complaint, the term "MFN ROW" will refer to the right of way that is covered by

the MFN Covenant, specifically, any right of way that is between any two points on the AT&T Licensed Premises, whether on or parallel to the Licensed Premises.)

23. The MFN Covenant gives AT&T “most favored” status on the MFN ROW for the full term of the License Agreement.

C. Conrail’s Breaches of the MFN Covenant

24. Since the inception of the License Agreement in 1984, Conrail and its successors have entered into numerous license agreements with third parties for the installation by those parties of FOC systems on Conrail right of way. Some of those license agreements cover the MFN ROW. In connection with those agreements that cover the MFN ROW, Conrail has a duty to AT&T under the MFN Covenant to ensure that those licensees are charged a per mile fee that is at least equal to the average per mile fee AT&T pays Conrail in connection with that right of way, or to reduce AT&T’s average per mile fee so that it does not exceed the average per mile fee paid by any of those licensees.

25. Conrail has entered into a number of license agreements providing for the use of the MFN ROW in which it charges licensees an average per mile license fee that is less than the average per mile fee paid by AT&T.

26. Conrail has failed or refused to reduce the fees AT&T pays under the License Agreement so that AT&T’s fees do not exceed the average per mile fee paid by those licensees. As a result, AT&T has paid, and is paying, Conrail license fees that are greater than the average per mile fees paid by other licensees for the right to use the MFN ROW.

27. In 1999, as part of a corporate reorganization, Conrail formed two wholly-owned subsidiaries, New York Central Lines LLC (“NYC”) and Pennsylvania Lines LLC.

Upon information and belief, Conrail has conveyed to NYC and Pennsylvania Lines all, or a substantial portion, of the right of way that is subject to the AT&T License Agreement.

28. AT&T has paid and continues to pay Conrail monthly license fees under the License Agreement for the right to use the right of way property that Conrail transferred to its wholly owned subsidiaries, NYC and Pennsylvania Lines.

29. In consideration for large annual payments based upon the value of the transferred property, NYC and Pennsylvania Lines have entered into operating agreements with third-party operating companies and assigned the right of way for the use and enjoyment of those operating companies. The operating agreements require those operating companies to obtain the written consent of NYC or Pennsylvania Lines in connection with any agreement granting a third party the right to use the assigned property, including the right of way subject to the AT&T License Agreement.

30. Upon information and belief, in its property conveyances to NYC and Pennsylvania Lines, Conrail specifically recognized that the conveyances are subject to the License Agreement.

31. Paragraph 16.5 of the License Agreement provides that the obligations under the License Agreement are binding on Conrail and its successors and assigns.

32. Upon information and belief, one or more of the third-party operating companies has entered into one or more agreements with a third party pursuant to which the third party is permitted to use the MFN ROW.

33. Conrail has asserted to AT&T that it has no control over the transferred right of way and the third-party operating companies and it does not have any authority over the terms of their license agreements.

34. AT&T has requested that Conrail provide AT&T with information about the agreements that the third-party operating companies have made with third parties pursuant to which the third parties are permitted to use the MFN ROW. AT&T made this request to allow it to determine whether these agreements also implicate the MFN Covenant. Conrail has refused to produce any information, claiming that it has no liability to AT&T for any license agreement entered into by any of the third-party operating companies and approved by one of its wholly-owned subsidiaries, NYC or Pennsylvania Lines, even if such agreements license some of the MFN ROW and even if such agreements charge the third party a per mile fee that is effectively less than the average per mile fee AT&T is charged.

COUNT I

BREACH OF CONTRACT

35. AT&T adopts and incorporates by reference as though fully set forth herein the allegations of paragraphs 1 through 34 as stated above.

36. The License Agreement constitutes a valid and binding contract under which Conrail has a continuing duty to charge AT&T an average per mile fee for its licensed right of way that is no greater than average per mile fee charged to any third party for the right to use the MFN ROW.

37. AT&T has at all times performed, and continues to perform, its obligations under the License Agreement.

38. In addition to its express duties under the MFN Covenant, Conrail has an obligation, implied by law into the License Agreement, to refrain from taking any actions that have the effect of destroying or injuring AT&T's right to receive the bargained-for

fruits of the License Agreement, including its “most favored” status under the MFN Covenant.

39. Conrail has breached its express and implied duties under the License Agreement by:

a. entering into agreements with third parties allowing the use of the MFN ROW, and charging those third parties an effective per mile license fee that is lower than the average per mile fee paid by AT&T under the License Agreement;

b. failing to disclose to AT&T that it had entered into agreements providing for the use of the MFN ROW in which it charged others an effective per mile license fee that is lower than the average per mile fee paid by AT&T under the License Agreement;

c. transferring portions of the MFN ROW to its wholly-owned subsidiaries (NYC and Pennsylvania Lines) and then disclaiming any responsibility for subsequent agreements providing for the use of the MFN ROW that may violate the MFN Covenant;

d. transferring portions of the MFN ROW to its wholly-owned subsidiaries (NYC and Pennsylvania Lines) and then divesting itself of the ability to perform its obligations under the MFN Covenant; and

e. refusing to disclose to AT&T whether agreements providing for the use of the MFN ROW (that were made after Conrail transferred the MFN ROW to its wholly-owned subsidiaries) charge third parties an effective per mile license fee that is lower than the average per mile fee paid by AT&T under the License Agreement.

40. As a result of Conrail’s breaches of the License Agreement identified in Paragraphs 39(a) and (b) above, AT&T has suffered monetary damages in an as yet

unknown amount. AT&T continues and will continue to suffer harm throughout the remaining term of the License Agreement to the extent that the monthly fees it pays Conrail exceed the average per mile fees paid for the use of the MFN ROW by any other licensee.

41. Conrail's breaches of the License Agreement identified in Paragraphs 39(c) and (d) above constitute a repudiation of the License Agreement. As a result of Conrail's repudiation, AT&T is discharged from any further obligation to render performance under the License Agreement.

42. As a result of Conrail's breaches of the License Agreement identified in Paragraphs 39(c), (d) and (e) above, AT&T may have been damaged and may continue to suffer damages to the extent that one or more of the third-party operating companies may have entered into one or more agreements providing for the use of the MFN ROW in return for an average per mile license fee that is less than the average per mile fee paid by AT&T for the MFN ROW. AT&T is entitled to an accounting of the terms of the contracts involving the MFN ROW and the fees charged and paid under all such contracts in order to determine the full extent of its damages.

WHEREFORE, AT&T prays that the Court enter judgment for AT&T and against Conrail:

A. Awarding AT&T compensatory damages for Conrail's past breaches of the MFN Covenant in an amount to be proved at trial, including damages for any breaches that are identified from the accounting that is sought in Paragraph B(2)(b) below;

B. Declaring either

(1) that AT&T is discharged from any further performance of its duties and obligations under the License Agreement, or, alternatively, at AT&T's election,

(2) that (a) the amount of AT&T's monthly license fees owed Conrail on an ongoing basis through the current term of the License Agreement be reduced by the amounts that AT&T's average per mile fees exceed the average per mile fees charged to any third party for the right to use the MFN ROW; (b) Conrail must submit to an annual accounting of the terms of its contracts providing for the use of the MFN ROW and the fees charged and paid under all such contracts, (c) Conrail must disclose and provide to AT&T any future agreements in its possession, custody or control providing for the use of some of the MFN ROW, including, but not limited to, agreements entered into between third-party operating companies and others with the consent of Conrail's subsidiaries; and (d) Conrail must submit to an annual accounting of the average per mile fees charged to and paid by each of the licensees under all agreements that it is ordered to disclose pursuant to subparagraph (c) above; and

C. Granting such other and further relief as the Court deems just and proper.

COUNT II

DECLARATORY JUDGMENT UNDER 28 U.S.C. § 2201

43. AT&T adopts and incorporates by reference as though fully set forth herein the allegations of paragraphs 1 through 42 as stated above.

44. An actual controversy exists between AT&T and Conrail as to whether the MFN Covenant is applicable to, and Conrail has liability to AT&T for, agreements entered

into by the third-party operating companies that allow the use of some or all of the MFN ROW, if under such agreements the right of way user is charged an average per mile fee that is effectively less than the average per mile fee AT&T is charged under the License Agreement for the same right of way.

45. AT&T is entitled to a declaratory judgment against Conrail declaring that the MFN Covenant is applicable to any agreements providing for the use of the MFN ROW for a FOC system, even if Conrail is not a party to the agreements.

46. AT&T is entitled to a declaratory judgment against Conrail declaring that Conrail has repudiated the License Agreement as a result of Conrail's disabling itself of the ability to perform its obligations under the MFN Covenant, thereby discharging AT&T's remaining duties to render performance and permitting AT&T to elect to terminate the License Agreement.

47. In the alternative, AT&T is entitled to a declaratory judgment against Conrail declaring that

a. where any license agreement provides for the use of the MFN ROW for a FOC system in return for an average per mile license fee that is less than the average per mile fee paid by AT&T for the MFN ROW Conrail must reduce AT&T's average per mile fee to the amount charged the third party licensee;

b. Conrail is required to disclose and provide to AT&T for the remaining term of the License Agreement any future agreements in its possession, custody or control that provide for the use of the MFN ROW for a FOC system, even if Conrail is not a party to the agreements; and

c. Conrail must submit to an annual accounting of the average per mile fees charged to and paid by each of the licensees under all agreements that it is ordered to disclose.

WHEREFORE, AT&T prays that the Court enter judgment for AT&T and against Conrail:

A. Declaring that the MFN Covenant is applicable to any agreements providing for the use of the MFN ROW for a FOC system, even if Conrail is not a party to the agreement;

B. Declaring that Conrail has repudiated the License Agreement as a result of Conrail's disabling itself of the ability to perform its obligations under the MFN Covenant, thereby discharging AT&T's remaining duties to render performance and permitting AT&T to elect to terminate the License Agreement;

C. Alternatively, declaring that

(1) under the terms of the License Agreement, any license agreement that provides for the use of the MFN ROW for a FOC system in return for an average per mile license fee that is less than the average per mile fee paid by AT&T for the MFN ROW requires a reduction of AT&T's average per mile fee to the amount charged the third party licensee;

(2) under the terms of the License Agreement, Conrail must disclose and provide to AT&T for the remaining term of the License Agreement any agreements in its possession, custody or control that provide for the use of the MFN ROW for a FOC system, even if Conrail is not a party to the agreement; and

(3) Conrail must submit to an annual accounting of the average per mile fees charged to and paid by each of the licensees under all agreements that it is ordered to disclose pursuant to subparagraph (2) above; and

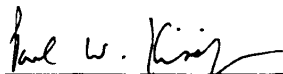
D. Granting such other and further relief that the Court deems just and proper.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), AT&T hereby demands a trial by jury.

Dated: January 10, 2003

Respectfully Submitted,

By 
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EXHIBIT B

Agreement
Registry No. 267 666

LICENSE AGREEMENT

This License Agreement (the "License"), dated as of the 1st day of January 1984, by and between CONSOLIDATED RAIL CORPORATION, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania ("CONRAIL"), and AT&T COMMUNICATIONS, INC., a corporation organized and existing under the laws of the State of Delaware ("LICENSEE").

WHEREAS, an efficient communications system is, and has always been, essential to the safe and cost-effective operation of a railroad;

WHEREAS, CONRAIL'S communications system is, and has always been, furnished by LICENSEE;

WHEREAS, since the advent of deregulation in the rail and trucking industries, competition within and between those industries has dramatically intensified;

WHEREAS, in order to survive and prosper in the present deregulated environment, it is necessary that CONRAIL be able to use a cost-effective and efficient communications system

capable of expeditiously transmitting and receiving pricing, routing and other information necessary to rail operations;

WHEREAS, fiber optic communications ("FOC") technology appears to CONRAIL to be the most appropriate communications technology presently available which is suitable to CONRAIL'S needs for rail communications;

WHEREAS, the installation and operation by LICENSEE of FOC systems on CONRAIL right of way will enhance CONRAIL'S communications system;

WHEREAS, LICENSEE is a recognized world leader in the telecommunications industry;

WHEREAS, in furtherance of CONRAIL'S objective to have the use of, pursuant to tariff, an efficient communications system, CONRAIL desires that LICENSEE construct and operate a FOC system(s) along the railroad right of way owned or controlled by CONRAIL between Harrisburg, Pennsylvania and Chicago, Illinois, and between other locations, said FOC system(s) to be defined as a telecommunications transmission system, including fiber optic cable, repeaters, junctions, terminals, power supply access, and attendant buildings, equipment, fixtures, and appurtenances necessary and incidental to such use, all as further defined in and qualified by this License;

WHEREAS, in furtherance of CONRAIL'S objective to have the use of, pursuant to tariff, an efficient communications system, CONRAIL desires that LICENSEE acquire various options for the acquisition of other licenses with respect to other rights of way owned or controlled by CONRAIL for possible future construction and operation of additional FOC systems;

WHEREAS, CONRAIL, for the reasons set forth above, desires to have its communications, to the extent practicable, carried over said FOC systems, as such systems may be expanded from time to time, for its own communications purposes as such purposes may be expanded from time to time and LICENSEE agrees to use its best efforts to do so, pursuant to its applicable tariffs and statutes;

WHEREAS, LICENSEE desires to furnish to its customers, including Conrail, high quality, reliable telecommunications services at reasonable rates;

WHEREAS, the foregoing objective of LICENSEE will be furthered by licensing the right of way owned or controlled by Conrail between Harrisburg, Pennsylvania and Chicago, Illinois for the construction and operation of an FOC system;

WHEREAS, since LICENSEE has no experience with the construction and operation of an FOC system along a railroad

right of way, this License Agreement will allow LICENSEE to gain such experience;

WHEREAS, if such experience indicates that construction and operation of an FOC system along a railroad right of way is cost effective, LICENSEE may desire to construct and operate additional FOC systems along CONRAIL'S right of way;

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants and agreements hereinafter set forth, the parties hereto, intending to be legally bound, agree as follows:

1. The Licensed Premises

1.1. CONRAIL, to the extent its rights, title or interest with respect to its right of way permit, hereby licenses LICENSEE, for the term and upon the conditions, covenants, and agreements hereinafter set forth, to use such portion of its right of way between Harrisburg, Pennsylvania and Chicago, Illinois, the mileposts of which are set forth in Exhibit A hereto, as is necessary for the sole purposes of construction, installation, operation, maintenance and repair by LICENSEE of a FOC system(s) consisting of one fiber optic cable containing not more than 24 fibers (subject to Paragraph 4.5 hereof), together with associated electronics, between Harrisburg, Pennsylvania and Chicago, Illinois (the "Licensed Premises"). CONRAIL and LICENSEE shall mutually

determine the specific location of the Licensed Premises and said fiber optic cable on said right of way in order to provide for optimum installation and maintenance of the cable, subject to CONRAIL'S consideration of its needs for orderly and efficient rail operations; provided, however, that said cable shall not be installed between existing tracks or within four (4) feet of the gage of the near rail, in either case without the mutual written agreement of the parties. In addition to such portion of the right of way, the Licensed Premises shall include : (i) access to property, including bridges, trestles, overpasses, tunnels and other structures, owned or controlled by CONRAIL in order to permit cable installation, operation, maintenance and repair, subject to CONRAIL'S consideration of its needs for orderly and efficient rail operations, and (ii) use of land owned or controlled by CONRAIL on or adjacent to such right of way for LICENSEE to construct or install repeater stations at locations to be mutually agreed upon in writing by CONRAIL and LICENSEE at intervals of approximately sixteen (16) to twenty (20) miles. By granting this License, CONRAIL is not conveying any real property interest in the Licensed Premises, nor any right or interest not specifically set forth herein.

1.2. The Licensed Premises shall not include any space or land along or adjacent to the right of way for the installation of any facilities or equipment for the

performance or provision by LICENSEE of communications or other activities or services other than those necessary to the operation of the FOC system. For purposes of the preceding sentence, "activities or services necessary to the operation of the FOC system" include activities involving interconnection on a temporary or emergency basis to communications facilities other than the FOC system to provide for alternate routing or restoral of communications services in cases of interruption or failure of the FOC system, as well as the ability to interconnect on a permanent basis, subject to this License, with any communications facility necessary to extend communications carried over the FOC system.

1.3. By granting this License, CONRAIL is not conveying, and this License does not convey, to LICENSEE any right to use electrical power purchased by or available to CONRAIL. LICENSEE shall be solely responsible for securing, purchasing, separately metering, and paying for all electrical power used to construct, operate, maintain, and repair any FOC system, including the repeater stations, whether such electrical power is used for normal operation of said system or for emergency purposes. Where practicable, CONRAIL will permit LICENSEE, at LICENSEE'S cost, to connect with AC power leads on CONRAIL'S right of way to provide power to the repeater stations.

2. Term of License

2.1. The License shall commence at 12:01 a.m. on January 1, 1984, and shall terminate at 12:01 a.m. on January 1, 1999 ("Initial Term"), unless extended pursuant to Paragraph 2.2 hereof.

2.2. LICENSEE shall have the option to extend this License for two (2) terms of fifteen (15) years each, the first of which extensions shall terminate at 12:01 a.m. on January 1, 2014 (the "First Extended Term") and the second of which extensions shall terminate at 12:01 a.m. on January 1, 2029 (the "Second Extended Term"); provided, however, that the Second Extended Term shall be available to LICENSEE only if LICENSEE is not in default on December 31, 2012 under any of the provisions of this License. Said options shall be exercisable by LICENSEE'S giving written notice of extension to CONRAIL by December 31, 1997 and December 31, 2012, respectively, and the license granted shall be on the same terms and conditions as set forth herein.

3. License Charges

3.1. LICENSEE shall pay CONRAIL a license fee of (i) \$333.34 per mile by the first business day of February 1984, (ii) \$166.67 per mile by the first business day of each month thereafter during 1984 and 1985, and (iii) \$250.00 per

5.
mile by the first business day of the earlier of (a) the first month after commencement of operation of any activated portion of a FOC system on the Licensed Premises referred to in Paragraph 1.1 hereof, or (b) January 1986, and each month thereafter during the Initial Term for use of the right of way referred to in Paragraph 1.1 hereof (which, for purposes of calculation of license fees pursuant to this License shall be deemed to be 750 miles), said license fee to be adjusted pursuant to Paragraph 3.2 hereof.

3.2. On January 1, 1987 and every three years thereafter on January 1 of each third year during the Initial Term the \$250.00 per mile monthly license fees referred to in Paragraphs 3.1 and 4.2 hereof shall be increased by the same percentage as the percentage increase in the Consumer Price Index for All Urban Consumers, All Items, United States, Base 1967 = 100, issued by the Bureau of Labor Statistics of the United States Department of Labor ("CPI-U"), for the immediately preceding three-year period; provided, however, that in no event shall any such increase be less than twelve percent (12%) or more than eighteen percent (18%). If the governmental body issuing the CPI-U ceases to use the 1967 average of 100 as the basis for calculation, the CPI-U shall be adjusted to the figure that would have been arrived at had the manner of so calculating the CPI-U not been so changed. If the CPI-U (or a successor or a substitute index) ceases to be published, or ceases to be generally recognized as an

index of inflation, the parties hereto shall select and substitute an index which is mutually acceptable, published by a governmental or other disinterested body with appropriate reconciliation of the base of the substituted index with the base of the CPI-U.

3.3. As an additional license fee, LICENSEE agrees and covenants to pay all taxes, excluding income taxes, but including assessments, use and occupancy taxes, charges for public utilities, excises, and levies (collectively, "Taxes") that are levied on LICENSEE'S property on the Licensed Premises or that arise out of the construction, maintenance, or operation of any FOC system on the Licensed Premises, including without limitation any Taxes, or any increases in Taxes, imposed on CONRAIL by virtue of the construction, maintenance or operation of any FOC system. CONRAIL shall promptly provide reasonable notice and documentation to LICENSEE with regard to any proposed or actual assessment of Taxes of which CONRAIL has actual notice, or any increases in Taxes, imposed or to be imposed on CONRAIL of which CONRAIL has actual notice and for which LICENSEE is responsible for payment pursuant to the terms of this Section 3.3. If LICENSEE determines that such Taxes or increase in taxes is unreasonable or excessive, CONRAIL shall appeal such imposition at the written request and expense of LICENSEE.

4. Options of LICENSEE

4.1. CONRAIL hereby grants to LICENSEE an option to acquire a license for up to 2,250 additional miles (including the 250 miles referred to in Paragraph 4.2 hereof) of right of way owned or controlled by CONRAIL, in addition to the license of right of way referred to in Paragraph 1.1 hereof, subject to the provisions of Paragraphs 4.1.a through 4.1.d hereof, such option to expire on December 31, 1985. LICENSEE shall select the right of way to be included in said option pursuant to Paragraphs 4.1.a and 4.1.b hereof. LICENSEE hereby agrees to pay CONRAIL \$375,000 by February 1, 1984 and \$187,500 by the first business day of each month thereafter to and including December 1986 for such option, unless (i) LICENSEE fails to exercise either its option under Paragraph 4.3 hereof or Paragraph 4.3 hereof, in which event such payments shall cease with the December 1985 payment, or (ii) LICENSEE exercises its option under 4.2 hereof but not under 4.3 hereof, in which event LICENSEE shall pay to CONRAIL on the first business day of each month during 1986 an amount equal to \$83.33 for each mile of right of way as to which LICENSEE has exercised its option under 4.2 hereof.

4.1.a. If CONRAIL, before September 1, 1984, receives an offer from another party for use by such other party of right of way owned or controlled by CONRAIL for a telecommunication transmission system, CONRAIL shall promptly notify LICENSEE in writing of such offer. LICENSEE shall have sixty (60) days from the date of such notice to notify CONRAIL in writing whether or not LICENSEE wishes to identify any portion of such right of way as part of the up to 2,250 miles with respect to which LICENSEE has an option pursuant

to Paragraph 4.1 hereof; provided, however, that LICENSEE will not use this option process as a means of willfully interfering with CONRAIL'S ability to license its right of way between major terminal points to other parties. If LICENSEE so notifies CONRAIL on or before the sixtieth (60th) day after the date of CONRAIL'S written notice referred to in the first sentence of this Paragraph 4.1.a, LICENSEE shall, at CONRAIL'S expense, within thirty (30) days after LICENSEE'S notice to CONRAIL, survey the right of way referred to in such notice and identify the location on said right of way where LICENSEE would elect to install its cable. LICENSEE shall not be required to perform such surveys for more than 500 miles of right of way in any calendar month. LICENSEE shall, as promptly as practicable after the completion of such survey, notify CONRAIL of the location of the proposed cable installation, which location shall be determined in accordance with the provisions governing the location of the cable on the Harrisburg to Chicago right of way, as set forth in Paragraph 1.1 hereof. If LICENSEE fulfills each of its obligations pursuant to this Paragraph 4.1.a, CONRAIL shall not enter into an agreement before January 1, 1986 with any other party which would significantly interfere with the installation, operation or maintenance of a FOC cable by LICENSEE in such location. If LICENSEE fails to fulfill any such obligations, CONRAIL shall have the unrestricted right at any time to enter into any

agreement with any other party with respect to such portion of the right of way, and the provisions of Paragraph 11.2 hereof shall not apply to such agreement.

4.1.b. LICENSEE shall, at one or more times before September 1, 1984, identify those portions of right of way owned or controlled by CONRAIL which LICENSEE selects to comprise the 2,250 miles as to which it has an option pursuant to Paragraph 4.1 hereof. Any right of way which LICENSEE has (i) identified to CONRAIL as part of said 2,250 miles pursuant to Paragraph 4.1.a hereof, or (ii) exercised its option pursuant to Paragraph 4.2 hereof, shall be deemed included in such selection.

4.1.c. CONRAIL shall have the unrestricted right to enter into agreements with other parties at any time on or after September 1, 1984 with respect to portions of its right of way not identified by LICENSEE as part of the 2,250 miles pursuant to Paragraph 4.1.b hereof, and the provisions of Paragraph 11.2 hereof shall not apply to any such agreement.

4.1.d. If CONRAIL, on or after September 1, 1984, receives an offer from another party for use by such other party of right of way identified by LICENSEE as part of said 2,250 miles, CONRAIL shall promptly notify LICENSEE in writing of such offer. LICENSEE shall, at its own expense, within thirty (30) days after the date of such notice, survey

the right of way referred to in said notice and specify in writing to CONRAIL the location on such right of way where LICENSEE proposes to install its cable. Such location shall be determined in accordance with the provisions governing the location of the cable on the Harrisburg to Chicago right of way, as set forth in Paragraph 1.1 hereof. LICENSEE shall not be required to survey more than 500 miles of right of way in any calendar month. If LICENSEE fulfills each of its obligations pursuant to this Paragraph 4.1.d, CONRAIL shall not enter into an agreement before January 1, 1986 with any other party which would significantly interfere with the installation, operation or maintenance of a FOC cable by LICENSEE in such location. If LICENSEE fails to fulfill any such obligations, CONRAIL shall have the unrestricted right at any time to enter into any agreement with any other party with respect to such portion of the right of way, and the provisions of Paragraph 11.2 hereof shall not apply to such agreement.

4.2. At any time prior to January 1, 1985, LICENSEE may exercise a separate option for up to 250 miles of right of way owned or controlled by CONRAIL, in addition to the right of way referred to in Paragraph 1.1 hereof; provided, however, that such option shall be exercised for not more than four segments of right of way of not less than 60 miles each. Upon exercise of any portion of the option referred to in this Paragraph 4.2, LICENSEE shall, on the first business

day of the first month after the exercise of such option, and on the first business day of each month thereafter pay CONRAIL a license fee of (i) \$83.33 per mile through the earlier of (a) the month before commencement of operation of a FOC system on any activated portion of said 250 miles of right of way, or (b) December 1986, and (ii) in the event of such commencement of operation prior to January 1, 1987, \$166.67 per mile after such commencement through December 1986, and (iii) \$250.00 per mile commencing January 1987 and continuing thereafter during the Initial Term, which license fee shall be increased in accordance with the provisions of Paragraph 3.2.

4.3. In the event LICENSEE before January 1, 1986 exercises its option with respect to any right of way owned or controlled by CONRAIL pursuant to Paragraphs 4.1.a through 4.1.d in addition to any right of way as to which LICENSEE has exercised its option pursuant to Paragraph 4.2 hereof, LICENSEE shall pay to CONRAIL (i) commencing on the first business day of the first month after commencement of construction by LICENSEE of a FOC system on any portion of CONRAIL right of way as to which LICENSEE has exercised its option pursuant to Paragraphs 4.1.a through 4.1.d and 4.2, and continuing until the first business day of the first month after commencement of operation of such FOC system, a monthly license fee equal to the product of (x) \$83.33 during 1986, and (y) \$166.67 thereafter, in each case multiplied by

the number of miles of right of way under construction, and (ii) commencing on the first business day of the first month after commencement of operation of any such FOC system and continuing thereafter throughout the Initial Term, a monthly license fee equal to the product of \$250 multiplied by the number of miles of right of way in such FOC system; provided, however, that for purposes of this Paragraph 4.3, LICENSEE shall be deemed (a) to have commenced construction by January 1, 1987 of FOC systems on at least 1,000 miles of such right of way, plus any miles of right of way as to which LICENSEE did not exercise its option pursuant to Paragraph 4.2 hereof, and to have commenced operations of all such FOC systems by January 1, 1989, and (b) to have commenced construction by January 1, 1986 of FOC systems on an additional 1,000 miles of such right of way, and to have commenced operations of all such FOC systems by January 1, 1990; further provided that in no event shall the total miles of right of way covered by the License exceed 3,000. The license fees set forth above in this Paragraph 4.3 shall be increased on the dates and pursuant to the formula set forth in Section 3.2 hereof.

4.3.a. In addition to the license fees set forth elsewhere in this License, LICENSEE shall pay to CONRAIL commencing on the first business day of January 1990 and each month thereafter during the Initial Term, a license fee of \$187,500, which shall be increased commencing January 1, 1993

on the dates and pursuant to the formula set forth in Paragraph 3.2 hereof.

4.4. In the event that LICENSEE exercises its option to extend this License to January 1, 2014 pursuant to Paragraph 2.2 hereof, (A) the license fees referred to in Paragraphs 4.2, 4.3 and 4.3.a hereof, in each case as increased pursuant to Paragraph 3.2 hereof, shall be increased, effective January 1, 1999, by the amount in each case which is equal to the difference between (i) two-thirds of the percentage increase in the CPI-U between January 1, 1984 and January 1, 1999, and (ii) the aggregate amount of percentage increases by which such license fees were increased during such period pursuant to Paragraph 3.2 hereof; provided, however, that there shall be no increase in the event that the percentage increase referred to in (ii) is greater than the two-thirds percentage increase referred to in (i), and (B) the license fees referred to in Paragraph 3.1 hereof, as increased pursuant to Paragraph 3.2 hereof, shall be increased, effective January 1, 1999, by the amount in each case which is equal to the difference between (i) 55% of the percentage increase in the CPI-U between January 1, 1984 and January 1, 1999, and (ii) the aggregate amount of percentage increases by which such license fees were increased during such period pursuant to Paragraph 3.2 hereof; provided, however, that there shall be no increase in

the event that the percentage increase referred to in (ii) is greater than the 55% increase referred to in (i). All such increased fees shall be increased on January 1, 2002 and each third anniversary thereafter during the First Extended Term in accordance with the formula set forth in Section 3.2 hereof. In the event that LICENSEE exercises its option to extend this License to January 1, 2029 pursuant to Paragraph 2.2 hereof, the license fees referred to in Paragraphs 3.1, 4.2, 4.3 and 4.3.a hereof shall be increased, effective January 1, 2014, by the amount in each case which is equal to the difference between (i) the percentage increase in the CPI-U between January 1, 1999 and January 1, 2014, and (ii) the aggregate amount of percentage increases by which such license fees were increased during such period pursuant to Paragraph 3.2 hereof and the preceding sentences of this Paragraph 4.4; provided, however, that there shall be no increase in the event that the percentage increase referred to in (ii) is greater than the percentage increase referred to in (i). Such increased fees shall be increased on January 1, 2017 and each third anniversary thereafter during the Second Extended Term in accordance with the formula set forth in Section 3.2 hereof.

4.5. Any portions of right of way with respect to which LICENSEE exercises an option pursuant to any of the provisions of Paragraph 4 shall from the date of such exercise be deemed Licensed Premises for all purposes under

this License, and subject to all of the terms, conditions and restrictions contained herein; provided, however, that LICENSEE may install cable containing up to 36 fibers on the Licensed Premises, including the right of way referred to in Paragraph 1.1 hereof, so long as the additional fibers in such cables do not create fiber miles in excess of the product of 10% of the right of way comprising the Licensed Premises, multiplied by twelve.

4.6. Except as otherwise provided in Paragraph 11.2 hereof, CONRAIL shall have the unrestricted right to enter into agreements with other parties at any time on or after January 1, 1986 with respect to any portions of its right of way, whether or not LICENSEE has a license to use such right of way pursuant to this License; provided however, that CONRAIL shall not permit any other party to use any CONRAIL right of way as to which LICENSEE has exercised an option pursuant to Paragraph 4 hereof in a manner which would significantly interfere with the installation, operation or maintenance of a FOC cable by LICENSEE pursuant to this License in the location on such right of way specified by LICENSEE for its cable installation if LICENSEE fulfills all of its obligations under this Paragraph 4.6. If LICENSEE has not specified the location for cable installation on a portion of the CONRAIL right of way prior to the time that CONRAIL contemplates executing an agreement with another party with respect to such right of way, CONRAIL shall notify

LICENSEE in writing of its intention to enter into such agreement, and the LICENSEE shall have thirty (30) days thereafter to survey, at its own expense, the right of way referred to in said notice and specify in writing to CONRAIL the location on such right of way where LICENSEE proposes to install its cable. Such location shall be determined in accordance with the provisions governing the location of the cable on the Harrisburg to Chicago right of way, as set forth in Paragraph 1.1 hereof. LICENSEE shall not be required to survey more than 500 miles of right of way in any calendar month.

5. Construction of FOC Systems; Repairs and Maintenance

5.1. CONRAIL agrees to deliver to LICENSEE, promptly upon request therefor, upon payment to CONRAIL of its costs in connection therewith, copies of the following items:

(a) route maps;

(b) plan and profile drawings and engineering and architectural data heretofore prepared or compiled with respect to bridges, tunnels and other such engineering obstacles along the Licensed Premises; and

(c) such other documents and materials as may reasonably be required to construct and maintain the FOC system;

provided, however, that CONRAIL'S sole obligation under this paragraph shall be to provide documents, maps, drawings, and data in its existing files, and CONRAIL shall not be under any obligation to develop new documents, maps, drawings, or data for LICENSEE.

5.2. LICENSEE and its designated employees, agents, and representatives shall have the right to enter the Licensed Premises for the purpose of surveying and inspecting the same and performing engineering or other tests or studies necessary to the construction of FOC systems, and for the installation, maintenance and repair of said systems, subject to CONRAIL'S determination of its needs for orderly and efficient rail operations. Neither LICENSEE nor any of its employees, agents or representatives shall move equipment or material across CONRAIL right of way without advance approval by CONRAIL. Such activities shall be coordinated in advance with CONRAIL. LICENSEE shall require its agents and contractors, but not LICENSEE or its employees, to execute and deliver appropriate releases to CONRAIL.

5.3. Prior to commencement of construction of any FOC system on any portion of the Licensed Premises, LICENSEE

shall submit to CONRAIL construction plans and specifications (not to include technical specifications of the FOC system, but which shall include the placement of marker tape approximately twelve (12) inches above the cable or cable duct and the placement at specified intervals or locations of marker posts as mutually agreed to indicate the location of the cable and the telephone number of LICENSEE to be called in case of damage or repair or maintenance to be performed), including repeater stations and any other facilities to be used in connection therewith, together with a timetable for completion of construction, said timetable to include specific milepost references for the completion of particular segments of such FOC system. LICENSEE shall not commence construction until said plans, specifications and timetable are approved in writing by CONRAIL, which approval shall not be unreasonably withheld or delayed. LICENSEE understands and agrees that CONRAIL labor shall have the right to perform, at LICENSEE'S expense, any work in connection with the construction or installation of any FOC system which CONRAIL labor is entitled to perform under any collective bargaining agreement; provided, however, that LICENSEE may, at its option, perform, or have performed, any such work so long as LICENSEE indemnifies CONRAIL for any expenses incurred by CONRAIL arising out of the performance of such work by LICENSEE or its agents or contractors.

5.4. LICENSEE shall construct the FOC systems in accordance with the plans and specifications referred to in Paragraph 5.3. LICENSEE shall not depart from, change, alter, revise or amend said plans and specifications without the prior approval of CONRAIL, which approval shall not be unreasonably withheld or delayed. CONRAIL shall have the right to verify by inspection that the construction of any FOC system is in compliance with the plans and specifications referred to in Paragraph 5.3. Any repeater stations constructed or installed in connection with any FOC system shall be constructed or installed by LICENSEE at its own expense and at its own risk, and CONRAIL shall not be responsible for, although it will use reasonable caution to avoid, conditions in and around said stations that might adversely affect or cause damage thereto or to the contents thereof. LICENSEE agrees that all repeater stations constructed or installed by LICENSEE on CONRAIL'S property shall be approximately five hundred (500) square feet in area.

5.5. The plans and specifications referred to in Paragraph 5.3 may, at LICENSEE'S option, include the use by LICENSEE or its agent of a rail-mounted plow for installation of FOC systems. If requested, CONRAIL shall provide LICENSEE or its agent with other railroad equipment or personnel useful in conjunction with (i) the use of said plow, and (ii) to the extent deemed appropriate by CONRAIL, other

aspects of installation of FOC systems. LICENSEE shall pay CONRAIL the costs, plus CONRAIL'S normal corporate overheads, for any equipment or personnel furnished to LICENSEE or its agent pursuant to this Section 5.5.

5.6. All construction plans and specifications shall comply with current railroad engineering standards and any Federal, state or local laws applicable to railroad crossings and occupancy of railroad rights of way. In constructing the FOC systems, LICENSEE hereby agrees to comply with all applicable Federal, state, and municipal laws, orders, rules and regulations now or hereinafter enacted, to assume all costs and expense and responsibility in connection therewith, and to defend and indemnify CONRAIL with respect to any costs, expenses or liabilities in connection therewith.

5.7. Except as otherwise provided in Paragraph 4.1.a hereof, all costs of surveying, inspection by LICENSEE, engineering or other tests or studies, construction and installation of the FOC systems, including costs relating to attachments to bridges, trestles, overpasses, tunnels and other structures, and costs relating to power connections, shall be borne by LICENSEE, including without limitation engineering fees, fees and expenses provided for in any construction contracts, and the financing and purchase of all equipment owned by LICENSEE used in the FOC systems.

5.8. If at any time during the work of construction or repair or maintenance of any FOC system on any portion of the Licensed Premises, CONRAIL should in its sole discretion deem flagmen or watchmen or other measures, including but not limited to train rerouting, desirable or necessary to protect its operations or property or its employees or other persons on or near the Licensed Premises, CONRAIL shall have the right to place such personnel or take such measures, at the sole risk, cost and expense of LICENSEE. LICENSEE hereby covenants and agrees to bear the full risk, cost and expense thereof and to promptly reimburse CONRAIL upon receiving from CONRAIL an itemized, written demand for such reimbursement. LICENSEE shall have the right to audit such costs and expenses. The failure to furnish such personnel or take such measures by CONRAIL shall not relieve LICENSEE of any obligations or liabilities it might otherwise have assumed.

5.9. All cranes, lifts, drilling equipment, or other machinery that is to be operated in the vicinity of CONRAIL'S electrification or power transmission facilities in connection with construction or repair or maintenance of any FOC system on any portion of the Licensed Premises shall be electrically grounded as directed by CONRAIL. LICENSEE shall require in any contracts for the operation of such cranes, lifts, drilling equipment, or other machinery that any of contractors' employees or agents operating any such equipment shall have no less than twelve (12) months' experience in the

operation of the machinery being used, and LICENSEE'S employees operating such machinery shall also have such level of experience.

5.10. If, during construction or repair or maintenance of any FOC system on any portion of the Licensed Premises, LICENSEE, its agents, employees, or contractors discover scientific or historical artifacts, LICENSEE shall immediately notify CONRAIL of said discovery and shall not harm such artifacts until identified and removed by the appropriate authorities exercising jurisdiction, if so requested by CONRAIL.

5.11. Prior to completion of construction of any FOC system on any portion of the Licensed Premises, LICENSEE will deliver to CONRAIL a plan for regular maintenance and repair of such FOC system in sufficient detail to meet CONRAIL'S operational needs. LICENSEE will deliver to CONRAIL any amendments to any such plan throughout the Initial Term and any Extended Term.

5.12. Upon completion of construction of each FOC system on any portion of the Licensed Premises, LICENSEE shall notify CONRAIL of such completion, shall provide to CONRAIL maps and drawings sufficient to identify clearly such FOC system "as built" on the Licensed Premises, and shall

leave CONRAIL right of way in a condition satisfactory to CONRAIL.

5.13. LICENSEE shall maintain and repair each FOC system on any portion of the Licensed Premises in accordance with communications industry and applicable railroad industry standards and all applicable Federal, state and municipal laws, orders, rules and regulations. CONRAIL shall advise LICENSEE with respect to applicable railroad industry standards. Except as otherwise set forth in Paragraph 7.3, LICENSEE shall bear all costs and expenses of all maintenance and repair to each FOC system.

5.14. LICENSEE shall make emergency repairs as promptly as practicable in order to ensure that any FOC system is fully restored to operation with the least possible interruption. LICENSEE agrees to consult with CONRAIL and to seek CONRAIL'S approval prior to the initiation of any emergency measures, to the extent that it is feasible to engage in such consultation and to obtain such approval. After emergency measures have been implemented to provide service substantially equivalent to that provided over the FOC system, LICENSEE shall take subsequent measures to restore the FOC system to full and continuing operation, subject to regulatory requirements.

5.15. CONRAIL shall have the right to inspect all maintenance and repairs performed on each FOC system which may affect rail operations.

5.16. CONRAIL approvals pursuant to this License shall be limited in scope to the impact on rail operations of the matters for which such approvals are sought, and shall not in any way imply CONRAIL'S approval of the operational aspects of any FOC system, nor shall any such approval give rise to any liability on the part of CONRAIL to LICENSEE or any third party.

6. Liens and Encumbrances

LICENSEE will not permit any mortgage, pledge, security interest, lien or encumbrance, including without limitation tax liens or encumbrances and liens or encumbrances with respect to work performed or equipment furnished in connection with the construction, installation, repair, maintenance or operation of any FOC system on any portion of the Licensed Premises (collectively, "Liens or Encumbrances"), to be established or remain against the Licensed Premises or any portion thereof; provided, however, that the existence of such Liens or Encumbrances shall not constitute a violation of this sentence if payment with respect thereto is not yet due and payable; and provided further that LICENSEE shall not be required to pay, discharge

or remove any such Lien or Encumbrance against the Licensed Premises or any portion thereof, so long as LICENSEE shall, after written notice to CONRAIL, contest the same or the validity thereof in good faith by appropriate proceedings which shall operate to prevent the collection of such Lien or Encumbrance so contested and the transfer of LICENSEE'S or CONRAIL'S interest in the Licensed Premises or any portion thereof to satisfy the same. If any such Lien or Encumbrance does attach to or affect in any way the Licensed Premises or any portion thereof and is not so contested, LICENSEE shall bond, discharge or otherwise cause to be removed such Lien or Encumbrance within sixty (60) days of receipt of actual notice of its existence.

7. Railroad Operations

7.1. CONRAIL and LICENSEE shall cooperate to avoid, to the extent practicable, actions which could endanger any FOC system or the railroad. LICENSEE shall not interfere with railroad operations in the Licensed Premises. CONRAIL may, at its option, require that employees, agents and contractors of LICENSEE who are or will be involved in the construction, operation and maintenance of any FOC system on any portion of the Licensed Premises be trained in railroad safety matters via courses or materials to be offered or provided by CONRAIL.

7.2. LICENSEE understands and agrees that the normal course of railroad operations may involve construction, maintenance, demolition and similar activities that have the potential to cause interruption or damage to the installation, operation, maintenance and repair of the FOC systems. CONRAIL recognizes the serious and essential nature of the functioning of the FOC systems and understands and agrees that reasonable precautions shall be taken by its personnel and agents to avoid such interruption or damage, and whenever practicable CONRAIL will notify LICENSEE in advance of activities that might reasonably be foreseen to cause such interruption or damage. CONRAIL'S only liability for interruption or damage to the installation, operation, maintenance or repair of any FOC system shall be limited to the liability of CONRAIL as set forth in Paragraph 7.3 hereof.

7.3. CONRAIL agrees that, to the extent the negligence of CONRAIL, its employees, agents or other parties performing services for CONRAIL causes an interruption in service over, or damage to, any FOC system, CONRAIL shall pay the reasonable and necessary expenses of restoring such FOC system to full and continuing operation. The actual cost of restoring an FOC system to operation shall be the sole remedy of LICENSEE and the sole liability of CONRAIL for any delay in commencement or interruption of service over, or damage to, any FOC system and in no event shall CONRAIL be liable

for loss of income, cost of substitute services, or other consequential damages of any kind. For purposes of this paragraph, the term "interrupt" or "interruption" shall mean an actual break in, or failure of, service and shall not encompass degradations of service.

7.4. LICENSEE shall notify CONRAIL in advance of LICENSEE'S maintenance and other activities requiring access to the Licensed Premises, in order to coordinate said access by LICENSEE with CONRAIL'S railroad operations. CONRAIL shall provide LICENSEE with a list of telephone numbers which will be staffed 24 hours a day.

7.5. CONRAIL and LICENSEE shall cooperate with each other and coordinate their activities in an effort to ensure that FOC system construction, operation, repair and maintenance activities do not conflict with, and are not inconsistent with, the duties and obligations of CONRAIL under CONRAIL'S labor agreements with the Brotherhood of Railroad Signalmen, the International Brotherhood of Electrical Workers, and any other labor unions with which CONRAIL has or may have labor agreements. CONRAIL shall use its best efforts to ensure that nothing contained in its labor agreements interferes with or obstructs the construction, operation and maintenance of the FOC systems. In the event of any such conflict, inconsistency, interference or obstruction, CONRAIL shall be entitled to

fulfill its duties and obligations under its labor agreements and shall have no liability to LICENSEE as a result thereof.

8. Governmental Approvals and Related Matters

8.1. LICENSEE shall not commence installation of any FOC system on any portion of the Licensed Premises before obtaining, at its own cost and expense, all permits, licenses and approvals for the construction, operation, maintenance, repair and use of such FOC system required by the Federal Communications Commission ("FCC"), state and local public utility commissions, and any other governmental authorities, including but not limited to construction permits and common carrier operating authority. LICENSEE shall continue in full force and effect throughout the Initial Term and any Extended Term all such permits, licenses and approvals. CONRAIL will cooperate with LICENSEE to the extent reasonably requested by LICENSEE in obtaining such permits, licenses and approvals. In the event LICENSEE'S application for any such permit, license or approval is denied or is not granted within one year after such application was filed or submitted, LICENSEE shall have the right to select other right of way owned or controlled by CONRAIL equal in length to the right of way covered by such application, whereupon such selected

right of way shall become Licensed Premises for all purposes under this License, and this License shall terminate as to the right of way covered by such application.

8.2. LICENSEE will ensure at all times that the design, construction, operation and maintenance of each FOC system complies with sound electronic and engineering practices; with the engineering and safety rules and regulations imposed by any governmental authority having jurisdiction over any FOC system or railroad operations, including but not limited to the FCC, the Federal Railroad Administration, and the Rural Electrification Administration; with appropriate standards of recognized industry and professional associations, including but not limited to, as applicable, the Safety Rules for the Installation and Maintenance of Electric Supply and Communications Lines, National Electrical Safety Code Handbook, Part 2; and with CONRAIL'S standards for engineering and safety, pipeline occupancy, and wire, conduit and cable operations, which standards shall be made available to LICENSEE. The manner of, and the equipment and devices to be used for, any installation, relocation or removal of LICENSEE'S equipment must be approved by CONRAIL, which approval shall not be unreasonably withheld.

9... Insurance

9.1. LICENSEE represents and warrants that it is self-insured for the following coverages in the following amounts:

- a. Workers' Compensation, Employer's Liability Insurance and Occupational Disease Insurance;
- b. Public Liability Insurance

Public Liability Insurance covering actions by LICENSEE providing for a limit of not less than \$2,000,000, single limit, bodily injury and/or property damage combined, for damages arising out of bodily injuries to or death of all persons in any one occurrence and for damage to or destruction of property, including the loss of use thereof, in any one occurrence.

- c. Protective Public Liability Insurance

Protective Public Liability Insurance covering actions by LICENSEE'S contractors and agents providing for a limit of not less than \$2,000,000, single limit, bodily injury and/or property damage combined, for damages arising out of bodily injuries to or death of all persons in any one occurrence and

for damage to or destruction of property, including the loss of use thereof, in any one occurrence.

d. Automobile Liability Insurance

If any motor vehicles are used in connection with the work to be performed, Automobile Public Liability Insurance with limits of not less than \$2,000,000 single limit, bodily injury and/or property damage combined, for damages to or destruction of property including the loss of use thereof, in any one occurrence.

9.2. Except to the extent expressly waived in writing by CONRAIL, LICENSEE shall, as soon as practicable after the execution of this License, at its own expense obtain and deliver to CONRAIL, the original copy of the AAR-AASHTO policy for Railroad Protective Public Liability Insurance in the name of Consolidated Rail Corporation providing for a limit of not less than \$2,000,000, single limit, bodily injury and/or property damage combined, for damages arising out of bodily injuries to or death of all persons in any one occurrence and for damage to or destruction of property, including the loss of use thereof, in any one occurrence. Such insurance shall be furnished with an aggregate of not less than \$6,000,000 for all damages as a result of more than one occurrence.

9.3. The insurance hereinbefore specified shall be continued until three years after the termination of the last Extended Term, or, in the event there is no Extended Term, the Initial Term. The amounts of insurance referred to in Paragraphs 9.1 and 9.2 hereof shall be increased by LICENSEE, at its sole cost and expense, not less than once every five years during the term of this License, said increased amount to be in the same percentage as the net increase in the CPI-U over said five-year period.

9.4. The insurance provided for in Paragraph 9.2 hereof shall be effected under standard form policies issued by insurers of recognized responsibility, authorized to do business in all of the states in which any portion of the Licensed Premises is located, which are well-rated by national ratings associations and have been approved in writing by CONRAIL, such approval not to be unreasonably withheld.

9.5. Not less than thirty (30) days prior to the expiration dates of the expiring policies theretofore furnished pursuant to this Section 9, originals or duplicate originals of the insurance policies required hereunder, bearing notations evidencing the payment of premiums or accompanied by other evidence satisfactory to CONRAIL of such payment, shall be delivered by LICENSEE to CONRAIL.

9.6. Each policy delivered hereunder shall, to the extent obtainable, contain an agreement by the issuer that such policy shall not be cancelled without at least thirty (30) days prior written notice to CONRAIL.

10. Indemnification and Liability

10.1. LICENSEE agrees to indemnify, defend and hold CONRAIL harmless from and against any and all claims, damages, liabilities, costs and expenses, including reasonable attorney's fees, for:

(a) Libel, slander, infringement of copyright, or unauthorized use of any trademark, trade name, or service mark, arising out of the material, data, information or other content transmitted or received over any FOC system (excluding material, data, information or other content transmitted by or on behalf of CONRAIL); and

(b) Except to the extent caused by CONRAIL'S negligence, but subject to the provisions of Paragraph 7.3 hereof, any personal injury to, or death of, any person or persons, and any loss, damage, defacement, or destruction of property, arising out of the presence on or about any portion of the Licensed

Premises of any FOC system or LICENSEE, its agents, contractors, or employees.

10.2. LICENSEE shall be solely responsible for any settlement or damage to the Licensed Premises, including but not limited to settlement of or damage to roadbed, tracks, facilities, shelters, structures, and appurtenances of CONRAIL, arising from or as a result of the construction, installation, maintenance, repair and operation of any FOC system by LICENSEE on the Licensed Premises. In the event that LICENSEE fails to repair any such damage, CONRAIL shall have the right to repair, replace, restore or correct any such settlement or damage at the sole cost and expense of LICENSEE.

10.3. Upon written notice by CONRAIL to LICENSEE of a claim or suit covered by Paragraph 10.1 or 10.2, LICENSEE shall promptly assume responsibility for the claim or undertake the defense of any litigation on behalf of CONRAIL, its agents, contractors, and employees; hold CONRAIL harmless for any expense associated therewith; and promptly pay any settlement or judgment that may be agreed to by the parties or entered by a court. CONRAIL shall not settle or compromise any such claim or suit without the written consent of LICENSEE.

10.4. In the event that LICENSEE does not assume and meet its obligations under Paragraph 10.3 promptly upon receiving written notice from CONRAIL, CONRAIL may, at its option, defend or settle any such claims or suits and make any reasonable expenditures or incur any reasonable obligations for the payment of money in connection with or arising out of the matters referred to in Paragraphs 10.1 or 10.2, including but not limited to attorney's fees. Such sums paid or obligations incurred shall be deemed to be additional license charges under this License and shall be paid promptly by LICENSEE upon the rendering of a statement to LICENSEE therefor.

11. Representations and Warranties

11.1. Each party hereby represents to the other and warrants that:

(a) It has been duly incorporated and is validly existing as a corporation in good standing under the laws of the state of its incorporation, is, or one of its subsidiaries is, duly qualified to do business as a foreign corporation and in good standing in each state in which any portion of the Licensed Premises is located.

(b) There is no litigation or governmental or administrative proceeding pending, or, to the best knowledge of the party, threatened against either the party or the real or personal property that the party is providing pursuant to this License, that might adversely affect the right or ability of the party to enter into or perform this License. Both parties recognize that regulatory approval is required with respect to the construction and operation of FOC systems.

(c) The execution and delivery by the party of this License, and the performance of its obligations thereunder, have been duly authorized by all necessary corporate action and do not, and adherence by the party to this License will not, violate any provision of law or of the party's certificate of incorporation or by-laws, or any material agreement or instrument which is binding on the party or by which it or its property is bound or affected, or any statute, order, judgment, decree, rule, or regulation of any court or governmental agency or body having jurisdiction over the party or the real or personal property being provided by the party pursuant to the terms of this License, or any franchise, license, or permit with respect to said real or personal property, subject to the provisions of Section 11.5 hereof.

(d) This License Agreement is a legal, valid and binding obligation of the party, enforceable in accordance with its terms, except as enforceability may be limited by bankruptcy or similar laws relating generally to enforcement of creditors' rights.

(e) No authorization, approval, consent, or other order of, or registration with, any governmental authority is legally required for the execution and delivery by the party of this License or the performance of its obligations thereunder, except as referred to Paragraph 8 hereof.

11.2. CONRAIL covenants and agrees that, in the event it enters into any agreement with a party other than LICENSEE providing for the use by such party of right of way owned or controlled by CONRAIL for the installation of a FOC system between any two points on the Licensed Premises, whether such system is to be installed on the Licensed Premises or parallel to the Licensed Premises, CONRAIL will, at its option, either (i) charge such other party a per mile fee at least equal to the average per mile fee (including adjustments thereto referred to in Paragraphs 3 and 4 hereof), between such two points which LICENSEE is obligated to pay CONRAIL pursuant to this License, or, in the alternative, (ii) reduce its average per mile fee between

such two points to LICENSEE to the average per mile fee charged to such other party.

11.3. CONRAIL covenants and agrees that it will defend, at its sole cost and expense, any and all claims or disputes challenging, on the basis of alleged insufficiency of title, CONRAIL'S right to license to LICENSEE any portion of the Licensed Premises, whether before a court or a governmental agency having jurisdiction of the matter, to a final, non-appealable judgment or order; provided, however, that if in the opinion of counsel to CONRAIL, which counsel shall be acceptable to LICENSEE, CONRAIL does not have a significant likelihood of success on the appeal of any such order or judgment CONRAIL, at its option, shall be relieved of any obligation to defend or prosecute such appeal, and LICENSEE, at its sole cost and expense, shall thereafter be entitled to defend or prosecute such appeal; and provided further that any such claim or dispute may be settled or otherwise disposed of at any time with the agreement of both CONRAIL and LICENSEE.

11.4. Each party covenants and agrees to give the other prompt written notice of the institution of any claim or dispute referred to in Paragraph 11.3 hereof. LICENSEE covenants and agrees to cooperate as reasonably requested by CONRAIL in the defense of any such claim or dispute (such cooperation to be at CONRAIL'S sole cost and expense), and to

satisfy and discharge without any liability to CONRAIL, and to indemnify CONRAIL against, any final judgment, order or settlement arising out of any such claim or dispute; provided, however, that in the event any such final judgment, order or settlement shall prohibit LICENSEE from using the right of way the title to which was being contested, CONRAIL shall, as promptly as practicable, return to LICENSEE the full amount of all license fees previously paid by LICENSEE to CONRAIL pursuant to this License with respect to such right of way, and LICENSEE shall have no further obligations to CONRAIL pursuant to this License with respect to such right of way. In the event that LICENSEE institutes condemnation proceedings against any right of way which any final judgment, order or settlement prohibits LICENSEE from using, CONRAIL agrees to cooperate as reasonably requested by LICENSEE in any such condemnation proceedings (such cooperation to be at LICENSEE'S sole cost and expense) and not to oppose such proceedings. Such condemnation proceedings shall not contemplate any interference with CONRAIL'S interest in such right of way.

11.5. Nothing in this License shall be deemed or construed to be a representation, warranty or covenant to the effect that CONRAIL'S right, title or interest with respect to its right of way will permit LICENSEE'S use of such right of way as contemplated by this License, or a limitation on

the rights of CONRAIL to abandon or discontinue service over any portion of its right of way.

11.6. LICENSEE covenants and agrees that it intends to use its best efforts to transmit CONRAIL communications subscribed to by CONRAIL pursuant to tariff over the FOC systems. LICENSEE covenants and agrees to provide CONRAIL with quarterly reports with respect to CONRAIL'S communications transmissions over the FOC systems.

12. Events of Default

12.1. The following events shall constitute "Events of Default" under this License:

(a) Non-payment by LICENSEE of any amount due CONRAIL pursuant to Paragraphs 3 or 4 hereof on the date on which such amount is due;

(b) LICENSEE shall commence a voluntary case or other proceeding seeking liquidation, reorganization or other relief with respect to itself or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect or seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its property, or shall consent to any such relief or to the

appointment of or taking possession by any such official in an involuntary case or other proceeding commenced against it, or shall make a general assignment for the benefit of creditors, or shall fail generally to pay its debts as they become due, or shall take any corporate action to authorize any of the foregoing; or an involuntary case or other proceeding shall be commenced against LICENSEE seeking liquidation, reorganization or other relief with respect to it or its debts under any bankruptcy, involvency or other similar law now or hereafter in effect or seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its property, and such involuntary case or other proceeding shall remain undismissed and unstayed for a period of sixty 60 days; or an order for relief shall be entered against LICENSEE under the Federal bankruptcy laws as now or hereafter in effect; and

(c) Breach by CONRAIL or LICENSEE as to any other representations, warranties, or covenants of this License.

12.2. Upon the occurrence of an Event of Default as defined in Paragraph 12.1(b), this License shall terminate immediately without the necessity of any action by CONRAIL. Upon the occurrence of an Event of Default as defined in

Paragraph 12.1(a) or (c), the other party may give written notice to the defaulting party of such Event of Default, and the defaulting party shall then have thirty (30) days to cure the default. Upon the failure of the defaulting party to cure before the expiration of (i) said thirty (30) days, or, (ii) sixty (60) days after such written notice if the default cannot reasonably be cured within thirty (30) days and the defaulting party is diligently proceeding to cure said default at the expiration of said thirty (30) days, this License may be terminated, but only as to the Licensed Premises as to which such default relates, at the option of the non-defaulting party, upon written notice to the defaulting party.

12.3. In the event that this License or any part thereof terminates because of an Event of Default by LICENSEE, (a) CONRAIL shall have an unqualified right to retain (as payment pursuant to this License, and not as liquidated damages) the full amount of the license charges with respect to the terminated portion made by LICENSEE pursuant to the terms of this License, and (b) to receive from LICENSEE the aggregate amount of all future license charges set forth in this License with respect to the terminated portion until the expiration of the Initial Term, or, if the Initial Term has expired, until the expiration of the then current Extended Term, discounted at the then

appropriate rate to the then present value of such aggregate amount.

12.4. The termination provisions of Paragraphs 12.2 and 12.3 shall be in addition to, and not in lieu of, any other rights, whether in law or equity, either party hereto has for breach of this License by the other.

12.5. If LICENSEE fails to obtain the guarantee by American Telephone and Telegraph Company of all of LICENSEE'S obligations under this License by February 3, 1984 in a form satisfactory to CONRAIL, CONRAIL may, in its sole discretion and without any liability, terminate this License upon written notice to LICENSEE.

13. Expiration of Term of License.

Upon the expiration or termination of this License, LICENSEE (i) shall, at its cost and expense, remove all repeater stations from the Licensed Premises and restore the Licensed Premises substantially to the condition of the Licensed Premises prior to the commencement of the Initial Term, and (ii) may at its option remove, at its cost and expense, any fiber optic cable and associated electronics and other equipment placed on the Licensed Premises by LICENSEE or its agents or contractors. Any such material not removed by LICENSEE within twelve (12) months after the later of

(i) said expiration, or (ii) the obtaining of any necessary regulatory approval, shall at the end of said twelve-month period become the property of CONRAIL and LICENSEE shall execute and deliver such documents as are useful or necessary to evidence full vesting of title thereto in CONRAIL. If LICENSEE does not receive the required regulatory approval to discontinue service on any FOC system by the expiration or termination (other than as a result of LICENSEE'S default under Section 12.1 hereof) of this License, this License shall be extended until such regulatory approval has been obtained. All such removals and restoration shall be subject to the same terms and conditions set forth in Paragraph 5 hereof which apply to LICENSEE'S repair and maintenance activities.

14. Assignment

14.1. LICENSEE shall not assign, sell, or transfer, for collateral or for any other purpose, all or any of its rights or obligations under this License, or sublicense all or any part of the Licensed Premises without the prior written approval of CONRAIL, which will not be withheld if such transferee is a subsidiary or affiliate of LICENSEE and CONRAIL is satisfied with the financial and operational ability of the transferee to perform all of the terms and conditions of this License.

14.2. CONRAIL shall have an unrestricted right to assign, for collateral or for any other purpose, all or part of its right to receive payments pursuant to the terms of this License.

15. Notices

15.1. All notices, demands, requests, or other communications which may be or are required to be given, served, or sent by one party to the other pursuant to this License (except as otherwise specifically provided in this License, including but not limited to Paragraph 5.14) shall be in writing and shall be mailed by first-class, registered or certified mail, return receipt requested, postage prepaid, or transmitted by telegram or telex, addressed as follows:

(a) If to CONRAIL:

Consolidated Rail Corporation
Six Penn Center
Philadelphia, Pennsylvania 19104

Attention: Richard C. Sullivan
Vice President - Resource
Development

(b) If to LICENSEE:

AT&T Communications
3033 Chain Bridge Road
Oakton, Virginia 22165

Attention: M. E. Perkins
General Manager - Engineering

15.2. All payments due from LICENSEE to CONRAIL hereunder shall be delivered to: Treasury Department, Consolidated Rail Corporation, P.O. Box 8538-230, Philadelphia, Pennsylvania 19117, or such other address as CONRAIL, by notice to LICENSEE in writing, may direct LICENSEE to use for payment delivery.

15.3. Either party may designate by notice in writing a new address and/or individual to which any notice, demand, request or communication made thereafter shall be so given, served or sent.

15.4. Each notice, demand, request, or communication which shall be mailed or telexed in the manner described in Paragraph 15.1, or which shall be delivered to a telegraph company, shall be deemed sufficiently given, served, sent or received for all purposes at such time as it is delivered to the addressee first named above as to each party (with the return receipt or the delivery receipt being deemed conclusive evidence of such delivery, or (with respect to a telex) the answerback being deemed presumptive evidence of such delivery) or at such time as delivery is refused by the addressee upon presentation.

16. Miscellaneous Matters

16.1. By licensing occupancy of the Licensed Premises to LICENSEE, CONRAIL is not hereby establishing any joint undertaking, joint venture or partnership with LICENSEE, its agents, or contractors. Each party shall be deemed to be an independent contractor, and shall act solely for its own account.

16.2. CONRAIL shall have the right, but not the obligation, after LICENSEE has been given notice and an opportunity to cure in accordance with Paragraph 12.2 hereof, to cure any defaults by LICENSEE of its obligations pursuant to any loan agreements, governmental requirements, or any other matters regarding LICENSEE'S construction, maintenance or operation of any FOC system.

16.3 This License constitutes the entire agreement between the parties, and supersedes all previous oral or written understandings, agreements, commitments, or representations concerning the subject matter of this License. This License may not be changed, amended, or modified in any way, and none of its provisions may be waived, except as may be agreed to in writing executed by each of the parties.

16.4. Neither the waiver by either of the parties hereto of a breach of or a default under any of the provisions of this License, nor the failure of either of the parties, on one or more occasions, to enforce any of the provisions of this License or to exercise any right or privilege hereunder shall thereafter be construed as a waiver of any subsequent breach or default, or as a waiver of any of such provisions, rights, or privileges hereunder. Time shall be of the essence with respect to each obligation of either LICENSEE or CONRAIL under this License which obligation is required to be performed by a specific date, or within a certain number of days, specified herein.

16.5. This License shall be binding upon and shall inure to the benefit of both parties hereto and, subject to the provisions of Paragraph 14.1 hereof, their respective legal representatives, successors and assigns.

16.6. This License, the rights and obligation of the parties hereto, and any claims or disputes relating thereto, shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania, except that all claims or disputes referred to in Paragraph 11.3 hereof shall

be governed by and construed in accordance with the laws of the state in which the real property as to which such claim or dispute arose is located.

16.7. To facilitate execution, this License may be executed in as many counterparts as may be required; and it shall not be necessary that the signatures of, or on behalf of, each party, or that the signatures of all persons required to bind any party, appear on each counterpart; but it shall be sufficient that the signature of, or on behalf of, each party, or that the signatures of the persons required to bind any party, appear on one or more of the counterparts. All counterparts shall collectively constitute a single agreement. It shall not be necessary in making proof of this License to produce or account for more than a number of counterparts containing the respective signatures of, or on behalf of, all of the parties hereto.

16.8. Section headings contained in this License are inserted for convenience of reference only, shall not be deemed to be a part of this License for any purpose, and shall not in any way define or affect the meaning, construction or scope of any of the provisions hereof.

16.9. In connection with this License, LICENSEE may find it necessary to disclose to CONRAIL specifications, drawings, computer programs and/or technical or business information (herein collectively referred to as information) which LICENSEE considers confidential or proprietary.

16.9.a. LICENSEE shall clearly mark proprietary information provided under this License by either applying the following inscription:

AT&T COMMUNICATIONS - PROPRIETARY

Use pursuant to company instructions or by marking the information as proprietary and placing on it the date the information is disclosed, e.g., "AT&T Communications Proprietary Information 1/1/84."

16.9.b. In connection with information marked proprietary CONRAIL shall:

- (a) restrict disclosure of such information solely to those of its employees with a need to know, and not disclose it to other parties,
- (b) advise employees of the obligation of confidentiality hereunder, and

- (c) use and require employees to use the same degree of care as is used with CONRAIL'S proprietary information.

16.9.c. Upon request, CONRAIL shall return all copies of information marked proprietary to LICENSEE, or if requested by LICENSEE, shall certify to LICENSEE that all such information has been destroyed; provided, however, that CONRAIL shall be entitled to retain, until the expiration or termination of this License in its entirety, any information which is necessary or useful to enable CONRAIL to monitor LICENSEE'S performance under this License.

16.9.d. Notwithstanding anything to the contrary herein, CONRAIL shall have no obligation to preserve the confidentiality of any information which:

- (a) was previously known to CONRAIL free of any obligation to keep it confidential, or
- (b) is disclosed to other parties by LICENSEE without restriction, or
- (c) is or becomes publicly available, by other than unauthorized disclosure by CONRAIL.

16.9.e. Nothing contained in this paragraph shall be construed as granting or conferring any rights by license or otherwise in any information marked proprietary and disclosed to CONRAIL.

16.9.f. Notwithstanding any of the foregoing, in the event that CONRAIL receives a request to disclose all or any part of the information marked proprietary under the terms of a valid and effective subpoena or order issued by a court of competent jurisdiction or by other governmental body authorized to issue compulsory process, CONRAIL agrees to (i) notify LICENSEE as promptly as practicable of the existence, terms and circumstances surrounding such a request, and (ii) consult with LICENSEE on the advisability of taking legally available steps to resist or narrow such request or to motion the court for protection of the information if disclosed. If CONRAIL is nonetheless, in the opinion of its counsel, which counsel shall be satisfactory to LICENSEE, obliged to disclose such information or else be adjudged in contempt or suffer other sanction or penalty, CONRAIL may so disclose such information without liability hereunder.

IN WITNESS WHEREOF, the undersigned have caused this License Agreement to be duly executed on their behalf as of the day and year first hereinabove set forth.

[Corporate Seal]
ATTEST:

Allen S. Gorman

CONSOLIDATED RAIL CORPORATION

By: Richard C. Sullivan
Richard C. Sullivan
Vice President -
Resource Development

[Corporate Seal]
ATTEST:

A. G. Walton

AT&T COMMUNICATIONS, INC.

By: Robert Kleinert
Robert Kleinert
President and
Chief Operating Officer

EXHIBIT A

CONRAIL RIGHT OF WAY TO BE OCCUPIED BY AT&T FIBER CABLE
BETWEEN HARRISBURG, PA. AND CHICAGO, ILL.

<u>Line Code</u>	<u>From MP</u>	<u>To MP</u>	<u>Description</u>
13-1302	105.5	113.5	Main Line Harrisburg to Pittsburgh
21-2102	113.5	290.2	Main Line Harrisburg to Pittsburgh
22-2202	290.2	353.3	Main Line Harrisburg to Pittsburgh
22-2202	0.0	25.9	Main Line Pittsburgh to Chicago
22-2233	25.9	29.3	Low Grade Branch
25-2433	29.3	41.8	Low Grade Branch
25-2423	41.8	75.5	E&A Branch
25-2424	75.5	80.9	PY&A Secondary
25-6501	160.5	164.9	Main Line Meadville
25-6501	164.9	201.7	Freedom Secondary
25-2412	88.5	98.0	Main Line Alliance to Cleveland
35-2412	98.0	102.0	Main Line Alliance to Cleveland
35-3512	102.0	123.6	Main Line Alliance to Cleveland
35-3500	182.3	194.3	Main Line Buffalo to Chicago
-3600	194.3	420.0	Main Line Buffalo to Chicago
-3200	420.0	501.0	Main Line Buffalo to Chicago
-3202	446.7	466.2	Main Line Pittsburgh to Chicago

Note: Several alternate routes exist through Cleveland, Oh.
The final route may include the following line segments
as appropriate:

35-3534	9.2	12.9	Clark Branch
35-3532	12.9	22.3	Clark Branch
35-3531	9.0	17.9	Cleveland Short Line
35-3541	0.0	1.8	Harvard Connection
35-6502	2.2	5.2	Randall Secondary

GUARANTEE AGREEMENT

This Guarantee Agreement (the "Guarantee"), dated as of the 1st day of February 1984, by and between CONSOLIDATED RAIL CORPORATION, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania ("CONRAIL"), and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, a corporation organized and existing under the laws of the State of New York ("AT&T").

WHEREAS, CONRAIL and AT&T Communications, Inc., a wholly-owned subsidiary of AT&T (the "LICENSEE") have executed a License Agreement dated as of January 1, 1984 (the "License Agreement") providing for, among other things, the acquisition by LICENSEE of a license over 750 miles of CONRAIL right of way and options by LICENSEE to acquire licenses over up to an additional 2,250 miles of CONRAIL right of way for the purpose of installing and operating fiber optic cable communications systems on said rights of way;

WHEREAS, AT&T and LICENSEE have significant internal purposes for having LICENSEE execute the License Agreement instead of AT&T;