

**PORT OF TACOMA/CITY OF TACOMA DEPARTMENT OF PUBLIC UTILITIES
OPERATING AGREEMENT**

This Operating Agreement (the “**Agreement**”), dated as of July 1, 2013 (“**Effective Date**”), is made and entered into by and between the Port of Tacoma (“**Port**”) and the City of Tacoma, Department of Public Utilities, Beltline Division dba Tacoma Rail (“**Tacoma Rail**”). The Port and Tacoma Rail are sometimes referred to in this Agreement individually as “**Party**” and collectively as the “**Parties**”.

RECITALS

A. The Parties acknowledge that each owns land, rail track and supporting facilities which function as a port and as a rail system within the general area frequently referred to as the Tacoma Tideflats. The Parties seek to maximize the performance of the Port and the rail system and enhance the level of coordination between their respective organizations.

B. The Parties entered into the Belt Line Agreement on November 15, 1990, (the “**1990 Belt Line Agreement**”) whereby the Port granted certain operating rights to Tacoma Rail and Tacoma Rail agreed to provide certain rail services to the Port. The Parties clarified the 1990 Agreement pursuant to the Trackage Rights and Operating Agreement made as of November 16, 1993, between the Parties (the “**1993 Agreement**”).

C. Previously the Parties had entered into the Lease on August 30, 1984, (the “**TACSIM Lease**”) whereby the City of Tacoma Department of Public Utilities leased certain property described therein to the Port for use as a rail intermodal yard.

D. The Parties anticipate substantial growth in Port of Tacoma rail traffic volumes and operations.

E. This Agreement is intended to set forth the rights and obligations of the Parties, which have heretofore been set forth in the 1990 Belt Line Agreement and the 1993 Agreement to facilitate the handling of the increased rail traffic volumes.

AGREEMENT

THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Port and Tacoma Rail hereby agree as follows:

1. Definitions

For the purposes of this Agreement, the terms defined above and the following terms will have their respective meanings.

“**Class 1 Carriers**” means the BNSF Railway Company and the Union Pacific Railroad or their respective successors operating their line haul rail services to and from the Port and Tacoma Rail.

“Environmental Laws” means any applicable federal, state and/or local environmental protection laws, rules, regulations, and permit requirements as the same may presently exist or may hereafter be enacted, promulgated, or amended, including, but not limited to, the Resource Conservation and Recovery Act, (RCRA), the Clean Water Act, the requirements of the Pierce County Health Department, the Model Toxics Control Act (MTCA), the Oil Pollution Act, the Hazardous Materials Transportation Act, Federal Railroad Administration (FRA), and the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

“Hazardous Materials” means any (a) hazardous waste as defined in RCRA, as amended (42 U.S.C. §6901, *et seq.*), and regulations promulgated thereunder, and WAC 173-303, Washington State Dangerous Waste Regulations; (b) hazardous substance as defined in CERCLA, as amended (42 U.S.C. §9601, *et seq.*), and regulations promulgated thereunder; (c) hazardous substances as defined and promulgated under the MCTA, WAC 173-340; (d) petroleum or liquid petroleum or wastes; and, (e) any other toxic or hazardous substances that may be regulated from time to time by federal, state, or local environmental laws.

“KPIs” means the Key Performance Indicators mutually agreed upon by the Parties from time to time pursuant to Section 2.6.

“Management Committee” means a joint oversight committee consisting, at a minimum, of the Tacoma Public Utilities Director of Utilities/Chief Executive Officer and the Port’s Chief Executive Officer (CEO), and/or their respective designees, as set forth in Section 11.2.

“Operating Committee” means a joint tactical committee consisting, at a minimum, of the Tacoma Rail Superintendent and the Port’s Chief Operating Officer, and/or their respective designees, as set forth in Section 11.1.

“Port Customer” means any tenant of the Port and/or any person or entity authorized by agreement or tariff to operate on Port-owned or Port-controlled property or a customer of the Port or such tenant, person or entity. The expression “the Port and its customers” where used herein is understood to mean “the Port and the Port Customers.”

“Port Indemnified Party” has the meaning set forth in Section 14.1.

“Port Property” means the property of the Port identified in Exhibit B.

“Port Track” means all track (comprised of Port Rail Service and Port Industry Track) and track-related infrastructure, including rights of way, yard and siding tracks and switches, now or hereafter owned and/or controlled by the Port within the Tacoma Tideflats area as identified in Exhibit B.

“Port Rail Service Track” means Port Track exclusive of Port Industry Track utilized by Tacoma Rail for purposes of accessing and providing Rail Services for the Port and the Port Customers, including Port marine terminal and industrial customers. Examples of Port Rail Service Track include, but are not limited to, various arrival and departure tracks, lead tracks not exclusive to a Port Customer, and storage tracks.

“Port Industry Track” means Port Track exclusive of Port Rail Service Track which is assigned to and/or controlled by a specific Port Customer or the Port and used by the Port Customer or the Port for the loading and unloading of railcars, including, but not limited to, the loading and discharging of containers to and from railcars.

“Rail Services” means railcar switching services consistent with applicable laws and regulations and following reasonable standards customary among railroads for the Port, all Port Customers within the Tacoma Tideflats (specifically excluding the grain elevator facility located on Schuster Parkway) and other Tacoma Rail customers on and/or between the Port Property and the Class 1 Carriers, including without limitation railcar movement reporting, FRA Compliance, the handling, hauling and movement of rail cargo to and from warehouses and yards and the switching of loaded and empty railcars into and out of the Port Property to facilitate railroad line-haul services for such railcars by the Class 1 Carriers.

“Tacoma Rail Indemnified Party” has the meaning set forth in Section 14.2.

“Tacoma Rail Property” means the property of Tacoma Rail identified in Exhibit B.

“Tacoma Rail Track” means the Tacoma Rail-owned track and related facilities, including rights of way, yard and siding tracks and switches, identified in Exhibit B.

“Term” means the term of this Agreement described in Section 6.1.

2. Rail Services

2.1 General. During the Term, Tacoma Rail will provide Rail Services to the Port and the Port Customers and act as a common carrier on behalf of the Port and the Port Customers in transporting railcars to and from the Port Property and to and from the Class 1 Carriers as provided in this Agreement. Tacoma Rail will be the sole provider of Rail Services to the Port and the Port Customers during the Term and the Port will not enter into any agreement or allow any other person or entity to perform Rail Services for the Port and the Port Customers without the consent of Tacoma Rail except for:

(a) current practices afforded under the switching rights granted to Pacific Rail Services as agreed by the Port and Pacific Rail Services as set forth in the Intermodal Yard Operating Contract dated November 19, 1991;

(b) the intra-plant switching of railcars for loading and/or unloading exclusively on Port Industry Track;

(c) the delivery and departure of trains by a Class 1 Carrier to and from the South Intermodal Yard as is the current practice as of the Effective Date of this Agreement;

(d) military movements as described in Section 9; and,

(e) Force Majeure conditions as provided in Section 15.1 and Section 15.2.

2.2 Service Standards & Schedules. The Operating Committee as set forth in Section 11.1 shall discuss and seek agreement regarding service schedules for all Port and Tacoma Rail marine terminals, industries and interchange with Class 1 Carriers. Service scheduling and levels, including railcar inventory, will reflect the service requirements of the Port, Tacoma Rail and the Port Customers. Performance measurements will be included in the KPI review process identified in Section 2.6.

2.3 Equipment and Personnel. With the exception of railcars, Tacoma Rail will provide all locomotives, equipment, Tacoma Rail Track and personnel necessary to provide the Rail Services to the Port and the Port Customers without expense to the Port. Railcars will be provided under standard rail industry agreements and practices.

2.4 Railcar Hire and Demurrage. The Port reserves the right to place orders for railcars with the Class 1 Carriers, on its customers' behalf at its customers' request. Orders for railcars may also be placed by the Port Customer directly. Railcar demurrage will be calculated, processed, and collected by Tacoma Rail in accordance with its demurrage tariff.

2.5 Inspection of Railcars and Equipment. To the extent Tacoma Rail provides Rail Services as set forth in this Section and/or provides rail services to its non-Port Customers, Tacoma Rail will, at no cost to the Port, be responsible for inspecting the condition of the inbound and outbound railcar traffic to and from the Port Property as required by the FRA and the Association of American Railroads and will inspect the outbound trains and perform required initial terminal brake tests where air tests have expired or have been rendered invalid. Tacoma Rail may engage third party contractors to meet their aforementioned inspection obligations.

2.6 Performance Metrics and Joint Meetings. A key element of this Agreement is the Parties' desire to improve the service, efficiency and reliability and reduce the costs of rail freight movement in the Port. To achieve this purpose, the Parties agree to form an Operating Committee as provided in Section 11.1 and to meet on a monthly basis or more frequently as necessary to jointly develop performance metrics, including KPIs, review performance relative to the agreed set of KPIs and to review the business activities and opportunities of the Parties related to this Agreement. The initial set of KPIs, as agreed by the Parties to be implemented upon Effective Date of this Agreement, is set forth in Exhibit C.

2.7 Meetings with Class 1 Carriers. Each Party will use reasonable efforts to give the other Party advance notice of all meetings between such Party and the Class 1 Carriers relating to the Rail Services or the Port Track and permit the other Party to attend such meetings. In the event any separate meetings or discussions relating to the Rail Service or the Port Track occur between the Class 1 Carriers and a Party to this Agreement, then the Party participating in such a meeting or discussion will promptly inform and brief the other Party.

3. Port Track Usage

3.1 Rights Grant. Subject to the provisions of Section 3.2, the Port hereby grants to Tacoma Rail access to use the Port Track, excluding however Port Industry Track except by prior consent of the Port or to the extent access is needed by Tacoma Rail to provide the Rail Services as defined herein.

3.2 Operational Control and Coordination. Subject to the Provisions of Section 2.1, Tacoma Rail, in consultation with the Port, will have operational control of the Port Rail Service Track and will control all operations related to providing Rail Services on the Port Rail Service Track provided that such control will not adversely affect rail service to the Port or to the Port Customers. Tacoma Rail agrees to coordinate with the Port and applicable shippers regarding the release and movement of railcars. The Port and its representatives, and agents, will have access to the Port Track at all reasonable times for the purpose of inspecting the Port Track or any activity on the Port Track; provided that the Port will use reasonable efforts not to unreasonably interfere with the use and occupancy of the Port Track by Tacoma Rail. To the extent applicable, inspections by the Port or its representatives will comply with occupancy regulations provided under 49 CFR 200-299.

3.3 Ownership. The Port retains ownership of the Port Track and the Port Property and remains responsible for paying any applicable property taxes, permitting costs, and fees (including storm-water fees) to which it may be subject as owner of the Port Track and the Port Property. Except where otherwise provided by separate agreement, Tacoma Rail retains ownership of the Tacoma Rail Track and the Tacoma Rail Property and remains responsible for paying any applicable property taxes, permitting costs, and fees (including storm-water fees) to which it may be subject as owner of the Tacoma Rail Track and the Tacoma Rail Property.

3.4 Track Inspection. The Port shall be responsible for all inspection, maintenance, repair, replacement, and reporting related to Port Track, without cost to Tacoma Rail. Tacoma Rail shall be responsible for all inspection, maintenance, repair, replacement, and reporting related to Tacoma Rail Track, without cost to the Port.

3.5 Maintenance and Repair of Port Track and Tacoma Rail Track. The Port and/or its contractors, at Port's expense, will perform all maintenance, repairs, and replacements on all Port Track as required to maintain operating and safety standards consistent with FRA Class 1 standards and all other applicable laws, regulations, rules, or orders. The Port shall use only reasonable and customary care, skill and diligence in maintaining and repairing Port Track to FRA Class 1 standards.

Tacoma Rail and its contractors, at Tacoma Rail's expense, will perform all maintenance, repairs and replacements on all Tacoma Rail Track required to maintain operating safety standards consistent with the FRA Class 1 standards and all applicable laws, regulations, rules or orders. Tacoma Rail shall use only reasonable and customary care, skill and diligence in maintaining and repairing Tacoma Rail Track to FRA Class 1 standards.

The Parties will consult with each other prior to initiating major capital improvements or additions to their respective track and track-related infrastructures.

3.6 Unsafe Condition. If at any time during this Agreement Tacoma Rail determines in its sole discretion that the condition of a portion of the Port Track is unsafe to provide Rail Services, Tacoma Rail may delay or decline to provide Rail Services upon such track portion until such time as the Port Track portion is repaired or replaced to meet the standard specified in Section 3.5 or the condition has been resolved to the satisfaction of Tacoma Rail. Except in the case of an emergency,

Tacoma Rail shall provide the Port initial verbal notice followed by written notice of any unsafe condition prior to delaying or declining service.

4. Rates and Compensation

Tacoma Rail and the Port agree on the mutual goal of Tacoma Rail providing competitive Rail Services to the Port and Port Customers by utilizing Tacoma Rail's Tidelands Division on a cost-of-service basis. Tacoma Rail operations should meet or exceed rail industry standards and provide initiatives for cost control including labor productivity. The Parties may conduct rail industry benchmarking studies to help assess Tacoma Rail's achievement of this goal. The Port will not charge Tacoma Rail for use of the Port Track. Tacoma Rail and the Port recognize that control of line haul rail pricing is retained by the Class 1 Carriers, and that the Class 1 Carriers have final say in setting rail pricing to and from Tacoma Rail. Tacoma Rail will consult with the Port prior to making any changes to its tariff charges. The Parties agree to notify the Operating Committee one hundred twenty (120) days prior to initiating any changes to rates and charges. The Parties will seek and accept input from each other in the development of rates and charges; however, the Parties reserve the right to set their own rates and charges.

5. Rail Volume Allowance

Tacoma Rail will pay the Port a volume allowance based on the annualized intermodal Platform railcar volumes according to the terms specified in the attached Exhibit A, which terms are incorporated by reference into this Agreement. Tacoma Rail will establish a separate financial account to accrue funds for the purpose of paying the volume allowance and provide monthly reports of the same to the Port in a form mutually agreed by the Parties.

6. Term and Termination

6.1 Term. The term of this Agreement will be twenty (20) years from the Effective Date.

6.2 Termination. In addition to its other remedies available under applicable law, either Party may terminate this Agreement upon one hundred eighty (180) days' prior written notice if the other Party materially breaches this Agreement, including in the case of Tacoma Rail, failure to fulfill its role with respect to the service standards and KPIs mutually agreed upon by the Parties pursuant to Sections 2.2 and 2.6, and fails to cure such breach within ninety (90) days (ten (10) days if the breach is a payment default) of its receipt of written notice of such breach or within the timeline for remedy in the Notice of Breach whichever is longer. Each notice of default will specify the alleged event of default, the expected remedy and the required timeline for remedy. If the Port exercises its option to terminate this Agreement, the Port shall pay Tacoma Rail an amount equal to one-half of the remaining unamortized track and track infrastructure investments made by Tacoma Rail on Port Track, Port Property, or on Tacoma Rail Track for the benefit of the Port after the Effective Date of the Agreement and, to the extent grant repayment by Tacoma Rail is required, the Port shall repay any and all outstanding federal, state or local grants and loans obtained by Tacoma Rail primarily related to providing Rail Service to the Port. During the Term, Tacoma Rail will advise the Port of such amortized investments and federal, state or local grant and loan amounts as outlined in Sections 10.1 and 10.2.

6.3 Operations in the Event of Termination. In the event this Agreement is terminated, the Parties agree that each shall have permission to operate without charge across the tracks of the other for a period of one hundred eighty (180) days following termination of this Agreement in order to service their respective customers consistent with the Parties' most recently agreed service schedule and service level plan. The one hundred eighty (180) day period may be extended by mutual agreement of the Parties.

6.4 Survival. Sections 6.3, 14.1-14.4, 16, 17 and 18, and all other provisions that may reasonably be construed as surviving the termination or expiration of this Agreement, will survive the termination or expiration of this Agreement. The term of and obligation to provide insurance coverage does not extend after termination but insurance coverages will survive to the extent applicable to address any claim.

7. Personnel Assignments and Equipment and/or Material Exchanges

During the Term, Tacoma Rail and the Port may agree to exchange personnel, equipment and/or material related to commercial and intermodal business development and rail operations to assist each Party in the efficient and effective execution of this Agreement. Prior to commencing a personnel, equipment and/or material exchange under this Section, the Parties will develop a written statement listing, as applicable, any limitations relative to the use of the equipment and/or material and/or the duties and responsibilities to be carried out in the assignment to include a statement that the assigned employee(s) will observe all rules governing the agency or organization to which the assignment is made and any payment or other consideration which support the exchange.

8. Derailments and Collisions: Notice and Cure

8.1 Notice. Each Party, upon notice of a derailment and/or collision affecting the Port Track and/or Tacoma Rail Track, shall immediately report the same to the other Party. Both Parties agree to cooperate in determining the cause of such derailments and/or collisions.

8.2 Port Track Derailments and Collisions. Tacoma Rail will be responsible for curing all collisions and/or derailments, except repairing Port Track, involving Tacoma Rail equipment occurring on the Port Track as a result of a collision and/or derailment when railcars or locomotives are being moved by Tacoma Rail or by tariff authority of Tacoma Rail. Costs associated with derailments and/or collisions are allocated per Section 14. Tacoma Rail locomotives used to provide Rail Services to the Port and the Port Customers will be equipped with an operable event recorder download system which records the date, time, speed, throttle positions, braking activations of the locomotive.

8.3 Tacoma Rail Track Derailments and Collisions. During any period in which the Port is using Tacoma Rail Track pursuant to Sections 9 and 15.2, the Port will be responsible for curing all collisions and/or derailments, except repairing Tacoma Rail Track, involving the Port equipment occurring on the Tacoma Rail Track as a result of collision and/or derailment when railcars or locomotives are being moved by the Port or Port contractors. Costs associated with derailments and/or collisions are allocated per Section 14.

9. Military Movements

Tacoma Rail will provide Rail Services as needed for military movements to and from the Port Property. Tacoma Rail and the Port will hold a pre-planning meeting with all involved parties prior to each such military movement to discuss the costs and other impacts of such movement. Tacoma Rail will, upon its issuance of written notice, have the right to delay or decline to provide switching services if it deems in its sole discretion that to provide such services will result in an imminent safety hazard to Tacoma Rail personnel or equipment. If Tacoma Rail provides a written notice to delay or decline a movement, the Port may contract with another entity to perform the specific movement without being in breach of the exclusivity clause set forth in Section 2.1.

10. Financial Planning

10.1 Biennial Plan. Tacoma Rail will, for all divisions of Tacoma Rail, biannually provide to the Port, at the earliest practical time, the then current draft update of its long-range financial plan, including estimates, and supporting back-up materials if requested by the Port, for operation, capital expenditures, capital acquisitions, staffing, and financial performance.

10.2 Tacoma Rail Budget. Tacoma Rail will annually provide the following draft budget documents, and supporting back-up materials if requested by the Port, to the Port:

- (a) Preliminary operating expense estimates of Tacoma Rail labor, staffing, material and other operating expense estimates for the next calendar year;
- (b) Preliminary estimates of Tacoma Rail maintenance and capital expenditure levels for the next five (5) calendar years, and
- (c) Preliminary estimates of Tacoma Rail revenues and tariffs for the next calendar year.

10.3 Port Provided Documents. The Port will annually provide the following draft budget documents to Tacoma Rail, and supporting back-up materials if requested by Tacoma Rail, at the earliest practical time consistent with the Port budgeting process:

- (a) Preliminary rail volume projections for the next calendar year; and
- (b) Preliminary capital outlay budget identifying major Port capital expenditures involving Port Track and track-related infrastructure for the next five (5) calendar years.

11. Administration of this Agreement

11.1 Operating Committee. An Operating Committee is hereby established consisting of the Tacoma Rail Superintendent and the Port Chief Operating Officer and/or their respective designees. The Operating Committee meetings can include additional Port and Tacoma Rail staff members as deemed appropriate by the Parties. The Operating Committee shall meet monthly or more frequently as necessary to jointly establish an operating usage plan for the Port Track which Tacoma Rail intends to use to provide Rail Service, to act in an advisory capacity to the

Management Committee and to resolve long term operational and financial performance issues including but not limited to:

- (a) cost of service, including methodologies for calculating the same, and tariff determinations;
- (b) Class 1 Carriers operations and coordination;
- (c) revenue, capital and operating budget status;
- (d) KPI and service performance;
- (e) joint safety and risk management performance;
- (f) repetitive and unresolved issues; and,
- (g) any other issues related to performance under this Agreement.

In the event the Operating Committee is unable to resolve an issue after 60 days after the Committee's first discussion of that issue, the unresolved issue(s) will be submitted in writing to the Management Committee for review and recommendation.

11.2 Management Committee. A Management Committee is hereby established consisting of the Port CEO and the Tacoma Public Utilities Director/CEO to address and resolve major issues relating to this Agreement. The Management Committee shall meet quarterly or more frequently as necessary.

12. Compliance With Laws

Each Party will comply with all applicable laws, regulations, rules, orders, and other requirements, including Environmental Laws, now or hereafter in effect, of any applicable governmental authority, in its performance of this Agreement.

13. Hazardous Materials

13.1 Condition Of The Port Property. The Parties acknowledge that various properties over which they operate are, or may be, contaminated as a result of prior industrial uses. The Parties further acknowledge that such prior uses and any resulting contamination may be unrelated to the current or prior operations or activities of either Party. The Parties agree to use all reasonable efforts to avoid disturbing, by individual or joint action of the Parties, soils and/or materials which may be contaminated, and agree that in the event such contaminated soils and/or materials are exposed or disturbed during the curing of a collision, derailment and/or in the course of maintenance, repair, modification, renovation or construction, the Party undertaking such curing of a collision, derailment and/or maintenance, repair, modification, renovation or construction shall remove and arrange proper disposition of the contaminated soil and/or materials encountered or disturbed. Nothing in this Section shall serve to impart, nor result in a waiver of, liability as respects either Party's, or the Parties', or any third party's, actions or activities.

13.2 Release of Hazardous Materials. The Parties agree to immediately report all known releases of Hazardous Materials, including releases of Hazardous Materials by any of its vendors, contractors or by any persons or entity working at their request or direction, on or about the Tacoma Rail Property and/or the Port Property, including the Port Track and/or the Tacoma Rail Track, to the other Party, the Pierce County Health Department, the Washington State Department of Ecology, FRA and other appropriate federal, state, county and local regulatory agencies as required by law or code. In the event a Party which owns the affected property has notice from the other Party, or otherwise, of a Hazardous Materials release or violation of Environmental Laws by the other Party on the Party's property caused by the negligent acts or omissions of the other Party, the Party owning the affected property may require the other Party, at the other Party's sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure such release or violation affecting the Party's property. The Parties, upon consultation and agreement, may agree that the property owner may at the other Party's expense assume clean-up and remediation control of the site. The Parties will promptly respond to the each other's request for information regarding said conditions or activities.

14. **Indemnification and Insurance**

14.1 Indemnification by Tacoma Rail. Tacoma Rail and its contractors will defend, indemnify and hold harmless, the Port, its directors, commissioners, officers, agents and employees (each a "**Port Indemnified Party**") from and against any and all losses, costs, damages, injuries, liabilities, claims, demands, fines, penalties, assessments, interest and causes of action, expenses, including reasonable attorney's fees and costs, incurred by or asserted against any Port Indemnified Party to the extent and as a result of this Agreement and any and all of the following:

(a) any bodily injury, death or damage to tangible property to the extent caused by the negligence or willful misconduct of Tacoma Rail relating to or arising out of its performance of this Agreement;

14.2 Indemnification by the Port. The Port and its contractors will defend, indemnify and hold harmless, Tacoma Rail, the City of Tacoma and their respective elected officials, directors, officers, agents and employees (each a "**Tacoma Rail Indemnified Party**") from and against any and all losses, costs, damages, injuries, liabilities, claims, demands, fines, penalties, assessments, interest and causes of action, expenses, including reasonable attorney's fees and costs, incurred by or asserted against any Tacoma Rail Indemnified Party to the extent and as a result of this Agreement and any and all of the following:

(a) any bodily injury, death or damage to tangible property to the extent caused by the negligence or willful misconduct of the Port relating to or arising out of its performance of this Agreement;

(b) any objections or challenges to, or disallowances or requested refund (including demands for penalties and interest) of, the volume allowances paid by Tacoma Rail to the Port as provided in Exhibit A.

14.3 Collisions and/or Derailments. The costs of any damages from collisions and/or derailments will be borne by the responsible Party. The costs of any damages from collisions and/or

derailments caused by the concurrent or disputed negligence or misconduct of the Parties or from other causes will be borne proportionally by the Parties, who will cooperate in attempting to affect recovery from other potentially liable third parties.

14.4 Indemnification Procedure. Any Party seeking indemnification under this Agreement will: (a) give the indemnifying Party prompt written notice of the claim; (b) cooperate with the indemnifying Party in connection with the defense and settlement of the claim; and (c) permit the indemnifying Party to control the defense and settlement of the claim; provided that the indemnifying Party will not settle the claim without the prior written consent of the Party seeking indemnification, which consent will not be unreasonably withheld. Neither Party shall seek indemnity from, nor make any claim or demand against, the other for losses alleged to have arisen from improper design or execution of rail track construction, modification, maintenance or repair.

14.5 Insurance. Each Party shall, at its own expense, purchase and maintain Commercial General Liability Insurance and/or Marine Terminal Operator's Liability Insurance or equivalent, with a reputable company(ies) with an A.M. Best Rating of A- VII or better (or equivalent) with minimum limits of Ten Million Dollars (\$10,000,000) minimum limits for bodily injury, death, and property damage, combined single limit per occurrence with endorsement(s) to eliminate any exclusions for rail activities or work, which shall name the other Party as an additional insured. Each Party shall purchase and maintain Pollution Legal Liability Insurance or equivalent sudden and accidental pollution coverage with limits of not less than Two Million Dollars (\$2,000,000) per occurrence and including coverage for environmental damage and related remediation and cleanup costs which shall remain in effect for at least two (2) years following the end of the Term and which shall name the other Party as additional insured. Each Party shall also maintain Business Auto Liability coverage insuring all owned, rented, leased vehicles to minimum limits of Three Million Dollars (\$3,000,000) Combined Single Limit per occurrence. Each Party shall maintain Workers' Compensation Insurance, Federal Employers Liability Act coverage or equivalent, as required by law, and Employer's Liability Insurance with minimum limit of One Million Dollars (\$1,000,000) each accident. Each Party shall deliver to the other certificates of such insurance and policy endorsements evidencing all required coverage and the other Party's additional insured status to be in effect. Each Party shall be given at least thirty (30) days (ten (10) days for non-payment of premiums) prior written notice of any cancellation or non-renewal of any policy required to be maintained.

15. Force Majeure and Tacoma Rail Track Usage Rights

15.1 Excused Performance. Neither Party will be liable for, or be considered to be in breach of or default under this Agreement on account of, any delay or failure to perform as required by this Agreement as a result of any causes or conditions beyond such Party's reasonable control (including without limitation: fire, explosions, earthquakes, storms, flood, wind, drought, and acts of God or the elements; court orders; acts, delays, and failures to act by civil, military, or other governmental authority; strikes, lockouts, labor disputes, riots, insurrections, sabotage, and war; breakdown or destruction of, or damage or casualty to, any equipment, facilities, or other property caused by a third party; interruption, suspension, curtailment, or other disruption of utilities). The Management Committee will determine the severity of such conditions and jointly identify potential corrective actions to resume Rail Service performance by Tacoma Rail. Rail Service related

embargoes or service orders can only be issued or approved by authority of the Operating Committee.

15.2 Tacoma Rail Track Usage Rights. In the event the performance of Rail Services by Tacoma Rail shall be rendered impossible due to the occurrence of any of the events described in Section 15.1 and such impediment is not or cannot be removed within a 72 hour period, then the Port may, after written notice to, and consultation with, Tacoma Rail, use or permit qualified subcontractors to use the Tacoma Rail Track to perform the Rail Services to the Port and the Port Customers until such impediment is removed or cured and Tacoma Rail notifies the Port, by written notice, that Tacoma Rail is able to resume performance of the Rail Service ("Suspension Period"). Tacoma Rail hereby grants to the Port, at no charge, the right to use the Tacoma Rail Track during the pendency of a Suspension Period to provide such Rail Services. In its usage of the Tacoma Rail Track and operation of the Rail Service during the period described above, the Port shall comply with the same standards and obligations set forth in this Agreement regarding Tacoma Rail's usage of the Port Track. Tacoma Rail will make a reasonable good faith effort to provide the Port operational assistance during the Suspension Period including the reporting of intra-terminal and inter-terminal rail car movement, interchange and the collection of tariff charges. The Management Committee will mutually agree as to the Port expense to be reimbursed from the tariff rate charges paid to Tacoma Rail by Port Customers and Class 1 Carriers for actual Rail Service performed by the Port during the Suspension Period.

16. Dispute Resolution

In the event a dispute arises out of the performance of this Agreement that cannot be resolved by the Operating Committee or the Management Committee, then the Parties agree that any and all such disputes will be settled in arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The disagreement will be submitted to three (3) arbitrators, one of whom will be appointed by the Port and the other will be appointed by Tacoma Rail. The third arbitrator will be appointed by the first two arbitrators, and if they cannot agree, by the Pierce County Superior Court presiding judge. The decision of said arbitrators, or of any two of them, will be final and binding on both Parties with respect to the matter or matters submitted for arbitration, and each Party agrees that upon the rendering of such decision, it will conform to and comply with such decision. Each Party will pay the fee and expenses of its witnesses and the arbitrator appointed by it, and the fee and expense of the third arbitrator will be borne equally by the Parties hereto. The location of the arbitration shall be Tacoma, Washington. Notwithstanding the foregoing, issues of law may be appealed to Superior Court of the State of Washington in Pierce County and reviewed de novo. The State of Washington Court Rules of Civil Procedure will be applicable for any pre-hearing discovery desired by a Party.

17. General Provisions

17.1 Independent Contractor. Each Party is acting under this Agreement as an independent contractor, not an agent of the other Party. Neither Party will represent or hold itself out as an agent of the other Party. Neither Party will be entitled to or will attempt to create or assume any obligation, express or implied, on behalf of the other Party. This Agreement will not be interpreted or construed as creating or evidencing any association, joint venture, or partnership among the Parties or as imposing any partnership obligation or liability on any Party.

17.2 Limitation of Liability. NEITHER PARTY WILL BE LIABLE, WHETHER IN CONTRACT, WARRANTY, OR TORT (INCLUDING NEGLIGENCE (WHETHER ACTIVE, PASSIVE, OR IMPUTED), STRICT LIABILITY, OR PRODUCT LIABILITY), FOR ANY INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES OR LOSS OF REVENUE, PROFIT OR SAVINGS ARISING OUT OF ITS PERFORMANCE OR NONPERFORMANCE OF THIS AGREEMENT.

17.3 Assignment. Neither Party will assign this Agreement or any of its rights, title or interests under this Agreement without the prior written consent of the other Party. Subject to the foregoing, this Agreement will be binding upon, inure to the benefit of, and be enforceable by each of the Parties and their respective successors and assigns. The foregoing will not limit Tacoma Rail's right to delegate the performance of portions of its obligations under this Agreement, excluding Rail Services, to subcontractors; provided, however, that as between the Parties, Tacoma Rail remains solely responsible for its subcontractors' satisfactory performance of its obligations in accordance with the terms of this Agreement. Neither Party is restricted from selling or mortgaging any of its property, except to the extent to do so would impair the rights of the other Party under this Agreement, in which case, mutual consent of the Parties will be obtained prior to any sale or property encumbrance.

17.4 Severability. If for any reason any portion of this Agreement will be held by a court of competent jurisdiction to be invalid or unenforceable, the Parties must agree in writing that the remaining portions of this Agreement will remain in full force and effect and the portions of this Agreement held to be invalid or unenforceable portions will be construed and deemed amended in a valid and enforceable manner as jointly agreed between the Parties that most closely reflects the effect and intent of the original language.

17.5 Entire Agreement: Termination of Prior Agreements. Exhibits A through C are hereby incorporated into this Agreement in their entirety. This Agreement constitutes the entire agreement, and supersedes the 1990 Belt Line Agreement and the 1993 Agreement which are hereby terminated. Unless agreed by the Parties, the termination of these agreements shall not affect any other existing agreement wherein reference to the now terminated agreements is made. Any amendment of this Agreement will be set forth in writing, approved by each Party's respective elected or appointed board and signed by both Parties.

17.6 Construction. The provisions of this Agreement were negotiated by the Parties, each of whom had the opportunity to be and/or were represented by legal counsel. This Agreement will not be deemed to have been drafted by either Party and will not be construed against either Party as the drafter.

17.7 No Third Party Beneficiaries. This Agreement is not intended, nor will it be construed, to create any third party beneficiary rights. The rights, duties, and privileges arising or inuring to the benefit of the Parties under this Agreement will not accrue to the benefit of any third parties.

17.8 Waiver. No waiver will be effective against a Party unless set forth in writing and signed by the Party charged with making the waiver. No waiver of any default will constitute a waiver of any other breach or default, whether of the same or any other covenant or condition. No

waiver, benefit, privilege or service voluntarily given or performed by either Party will give the other Party any contractual right by custom, estoppel, or otherwise.

17.9 Governing Law. This Agreement will be interpreted, governed by and enforced in accordance with the laws of the State of Washington without reference to its choice of law rules. Neither Party will commence or prosecute any suit, proceeding, or claim to enforce the provisions of this Agreement, or otherwise arising under or by reason of this Agreement, other than in the courts of the State of Washington located in Pierce County.

17.10 Notice. Any notices required or permitted to be given under the terms of this Agreement, or by law, will be in writing and may be given by personal delivery, or by registered or certified mail, return receipt requested, or by overnight courier, directed to the applicable Party at the following addresses, or such other address as such Party may designate in writing prior to the time of the giving of such notice, or in any other manner authorized by law:

Port: Deputy CEO/Chief Operating Officer
Port of Tacoma
PO Box 1837
Tacoma, Washington 98401

Tacoma Rail: Rail Superintendent
2601 SR 509 N Frontage Rd
Tacoma WA 98421

Any notice given will be effective when actually received, or if given by certified or registered mail, upon the recipient's receipt of a notice from the U. S. Postal Service that the mailed notice is available for pick up.

17.11 Authority. Each signer warrants that they have the authority to, and do bind, the entity for which they sign.

18. South Intermodal Yard Lease

The TACSIM Lease remains in full force and effect and is not amended by this Agreement.

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PORT OF TACOMA



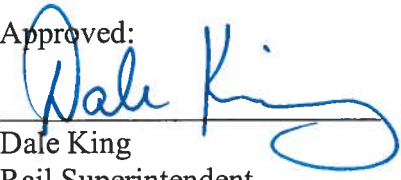
John Wolfe
Chief Executive Officer

CITY OF TACOMA
DEPARTMENT OF PUBLIC UTILITIES



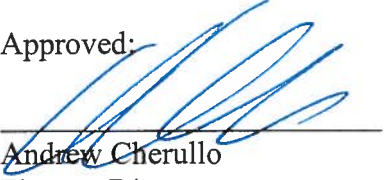
William A. Gaines
Director of Utilities/CEO

Approved:



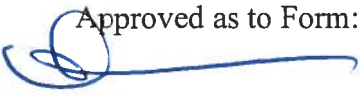
Dale King
Rail Superintendent

Approved:



Andrew Cherullo
Finance Director

Approved as to Form:



Carolyn Lake
Port General Legal Counsel

Approved as to Form:



William C. Fosbre
Chief Deputy City Attorney

EXHIBIT A
Rail Volume Incentive Allowance

1. Definitions

For purposes of this Exhibit A, the following terms will have their respective meaning:

“Platform” or “Platforms” means a type of railcar classified by the Uniform Machine Language Equipment Register (UMLER) consisting of one (1) to five (5) wells (Platforms) counted individually for use to transport intermodal containers whether loaded or empty. Notwithstanding the above, Platforms will not include 53-foot platforms ordered by the Agreed Upon Customers but returned empty to BNSF Railway as part of its domestic repositioning program, and (2) bad orders that cannot be loaded. Platforms will also not include Northwest Container traffic or any future traffic that falls under Item 669.020 of the Port of Tacoma Terminals Tariff No. 300, or the tariff’s supplements or replacements.

ITEM 669.020 Loaded or empty containers handled in the Hyundai Intermodal Yard, North Intermodal Yard, the South Intermodal Yard or the Pierce County Terminal Intermodal Yard, for intermodal rail containers with origin/destinations points within a four hundred (400) mile radius of the Port of Tacoma, and moving through a Port of Tacoma marine terminal. The Provider will be assessed a facility charge.....\$12.50 per container

“Agreed Upon Customers” means those terminal customers of Tacoma Rail located within the Port of Tacoma identified and agreed to by the Operating Committee that contribute to the total number of Platforms for a given payment year.

2. Volume Allowance

Tacoma Rail will provide the Port with an annual volume incentive allowance based on the total number of Platforms ordered by the Agreed Upon Customers during each month and switched by Tacoma Rail per the payment schedule set forth in Section 3 below. The first annual incentive payment will be made by Tacoma Rail to the Port within 30 days of invoice date for the time period covering July 1, 2012, 00:00 hours through June 30, 2013, 24:00 hours. Within twelve (12) months following its receipt of a volume incentive allowance, the Port will expend an amount equal to its received volume incentive allowance to either (a) upon agreement by Tacoma Rail, fund projects involving design, permitting and/or construction and/or maintenance of Tideflats rail and/or rail-related infrastructure improvements, and/or, (b) incentivize volume growth through payments reasonably related to the additional volumes through the Port of Tacoma. The distribution of volume incentive allowance funds will be reported to the Management Committee and the Port shall provide Tacoma Rail an accounting of all such payments to the Agreed Upon Customers within thirty (30) days after such payments.

3. Payment Schedule

Annual Totals are the number of loaded and empty Platforms handled during such period.

Tier	Annual Total	Annual Incentive Allowance
1	187,200	\$ 500,000
2	199,300	\$ 1,000,000
3	211,600	\$ 1,500,000
4	224,100	\$ 2,000,000
5	236,400	\$ 2,500,000
6	248,800	\$ 3,000,000
7	261,100	\$ 3,500,000
8	273,000	\$ 4,000,000
9	285,000	\$ 4,500,000
10	297,000	\$ 5,000,000

4. Payment Processing

4.1 Monthly Report. Tacoma Rail will provide the Port with a monthly report showing the total number of Platforms ordered by the Agreed Upon Customers and switched by Tacoma Rail during a given month. The report will be made available within fifteen (15) days following the end of the month and will be reconciled by Tacoma Rail against Platform counts provided by the Class 1 Carriers. Tacoma Rail will create a special fund in which to accrue monthly incentive allowance funds under the payment schedule found in Section 3 above. The Port will have the right to audit the monthly reports or incentive allowance account.

4.2 Invoice and Payment. After each June's monthly report, the Port will furnish an invoice to Tacoma Rail based on the payment schedule for the corresponding total number of Platforms for the given year. Payment of the invoice will be made within thirty (30) days after Tacoma Rail's receipt of the invoice. In the event the Port has failed to disburse all of the incentive allowance funds received under this Agreement within twelve (12) months following its receipt of a volume incentive allowance, the Port will return such undisbursed funds to Tacoma Rail within thirty (30) days. Tacoma Rail may deposit and use these returned funds without restriction.

5. Term

Tacoma Rail will pay the volume incentive allowances to the Port pursuant to the terms of this Exhibit A during the period ending June 30, 2021, unless extended by mutual agreement of the Parties.

EXHIBIT B
Map of Current Port Property, Port Track and Tacoma Rail Track

EXHIBIT C

Initial Key Performance Indicators

In accordance with the provisions of Section 2.6, the Parties agree to the establishment of the initial set of Key Performance Indicators listed below.

1) Marine Terminal Intermodal On-Time Switching Performance

- a. Provide switching service consistent with a jointly established switching plan for the North Intermodal Yard, Pierce County Terminal and Washington United Terminal.
- b. Target: 95% of terminal intermodal yard placements are completed on-time (i.e., per schedule) when (1) properly blocked by the Class 1 Carriers; and, (2) a switch request is submitted by 1400 the prior day.¹

2) Import (Outbound/Eastbound) On-Time Performance

- a. Improve eastbound origin intermodal train on-time departure performance to meet customer and Class I service performance requirements.²
- b. Target: 95% on-time performance (i.e., actual compared to schedule).

3) Commercial Business Performance

- a. Support commercial businesses through a jointly established service schedule for commercial customers located on the Tidelands.
- b. Target: 85% of commercial cars in normal movement (i.e., without restriction or exception) which are interchanged to Tacoma Rail prior to 0800 on any given day are placed at the destination industry by 0800 the following day.

4) Increase Railcar Velocity

- a. Decrease railcar dwell-time to improve infrastructure utilization and increase terminal capacity.
- b. Target: Pending. Thirty (30) days following the Effective Date of this Agreement, the Parties will jointly establish a baseline of rail car dwell-time and inventory. This baseline will be compared to carload volume projections to develop and implement a rail service plan to reduce dwell-time.

¹ For purpose of these KPIs, a “properly blocked” train is defined for eastbound trains as 6,000 feet of train with all blocks in station order; and, for westbound trains, a train comprised of three (3) blocks or less in station order.

² For purpose of these KPIs, the point of “departure” (or “arrival”) is defined as the location of the AEI scanner at Bullfrog Junction.

5) Operating Efficiency Through Westbound Blocking

- a. Reduce yard switching requirements for platform cars and increase platform car availability.
- b. Target: Pending. Thirty (30) days following the Effective Date of this Agreement, the Parties will jointly develop a baseline and establish and implement a Class 1 container train service plan.

6) Financial Controls

- a. Establish an annual operating ratio target that meets cost-of-service requirements.³
- b. Target: 95% operating ratio (measured monthly and annually).

During the Term of this Agreement, upon the request of any one Party, the members of the Management Committee will use good faith efforts to re-evaluate these KPIs. The adoption of new and/or modified KPIs will be by mutual agreement of the Tacoma Public Utilities Director/CEO and the Port's Chief Executive Officer. Each year, following the anniversary of the Effective Date of this Agreement, the members of the Management Committee will jointly report to their respective elected or appointed boards the actual service performance for the preceding one (1) year period relative to the agreed KPIs.

³ For purpose of these KPIs, "Operating Ratio" is defined as operating expenses divided by operating revenues.