



Ventura County  
**RAILWAY COMPANY, LLC**

## **Request for Proposals**

**To Solicit:**

**Operate Freight Rail Service and  
Maintain Port-Owned Rail Infrastructure  
At the Port of Hueneme/Oxnard Harbor District,  
California**

**May 17, 2021**



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## **Request for Proposals**

### **To Solicit:**

### **Operate Freight Rail Service and Maintain Port-Owned Rail Infrastructure**

### **At the Port of Hueneme, California**

**May 17, 2021**

#### **I. Introduction and Overview of the Port**

The Port of Hueneme (“**Port**”) is located in Ventura County, California, 60 miles north of Los Angeles, within the cities of Oxnard and Port Hueneme and is owned and operated by the Oxnard Harbor District (“**District**”). It is the fourth largest port in California and the deepest water port between Los Angeles and Oakland. The Port was created in 1937 to maximize commerce and provide economic benefits to the community. The Port is led by a five-member board of Harbor Commissioners (“**Board**”) who are elected by the citizens of the Oxnard Harbor District. The Port has: two terminals, a main channel depth of 40 feet as of March 2021, a refrigerated facility, and 13 miles of rail trackage. The Port’s rail assets are owned by the Ventura County Railway Company, LLC (“**VCRC**”), a non-operating railroad company which owns 13 miles of railroad track in the Oxnard, California area. The VCRC is a wholly owned subsidiary of the Oxnard Harbor District, which includes the Port of Hueneme.

A summary of rail traffic at the Port is outlined below:

Rail traffic found at the Port can be segmented into two distinct groups of commodities: 1) automotive traffic, or motor vehicles, which are moved by the railroad’s three largest customers and represent the vast majority of rail freight carload volumes and revenues and 2) all other traffic that is shipped by the railroad’s four smaller customers, which constitutes the remainder of carload volume at the Port. Combined, the Port serves seven active customers, including:

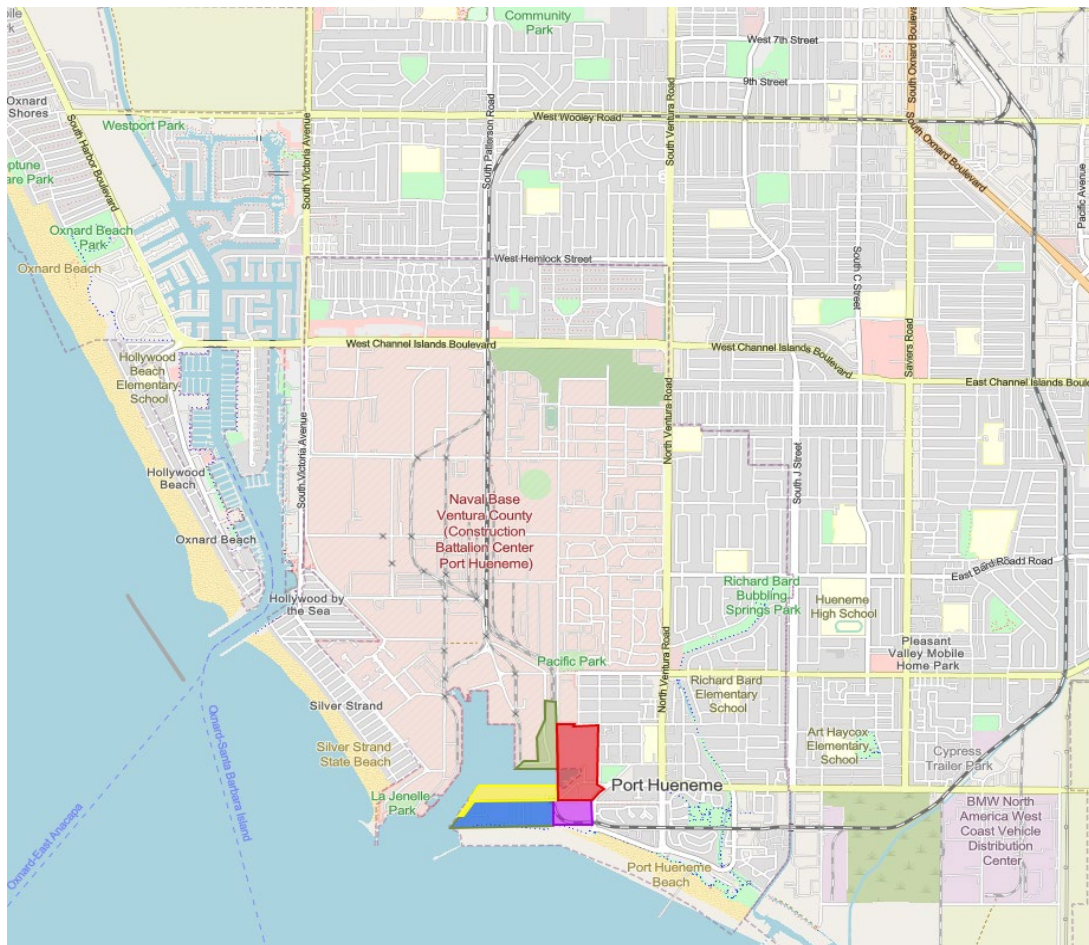
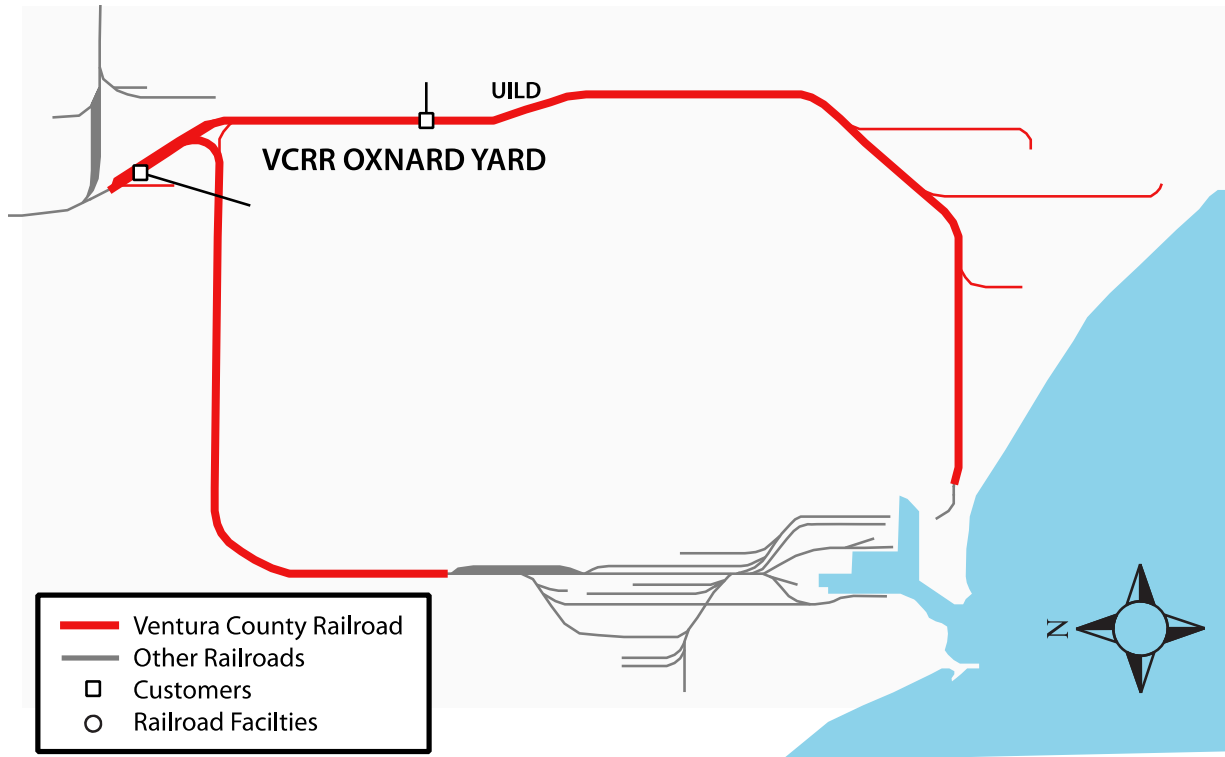
- Wallenius Wilhelmsen Logistics (“**WW**”) (Volvo/Mitsubishi) provides marine terminal and vehicle processing services management on behalf of Mitsubishi and Volvo’s rail-related operations, including the management of loading and unloading vehicles to and from railcars.

- BMW North America (“BMW”) receives vehicle imports through the Port of Hueneme and is currently doing all of its vehicle processing on its own as of October 1<sup>st</sup>, 2020. Prior to May 2020, WW provided vehicle processing services and received a significant number of inbound BMW vehicles through the Port from BMW’s Spartanburg Manufacturing Plant in South Carolina destined to local distribution at various Southern California dealers. However, as of May 2020, BMW no longer moves any volume through the Port to this facility. Glovis America, Inc. (“Glovis”), a logistics and distribution service provider, processes all Kia and General Motors (“GM”) shipments at the Port. Glovis’s operations can be segmented into outbound and inbound traffic, with outbound volume of Kia shipments and inbound volume of GM shipments. On behalf of Kia, Glovis receives and unloads cars from South Korea and ships them outbound by rail to a regional distribution center in Shreveport, LA. Approximately 10% of outbound shipments are via rail, with the remainder via truck to additional locations. On behalf of GM, Glovis recently began transitioning its domestically-produced inbound GM shipments from various locations in the U.S. from truck to rail, a transition that is expected to be fully complete by the end of this year. Glovis offloads inbound volumes and loads them on ships to be sent onwards to South Korea and Japan.
- Wallenius Wilhelmsen Logistics (Mitsubishi) also offloads cars at a separate operation at the Port from overseas shipments on behalf of Mitsubishi, distributing a variety of volumes outbound to various locations across the U.S. Approximately 40-45% of Mitsubishi’s outbound volumes are moved through the Port. All other volumes are moved to markets within approximately 500 miles via truck. Mitsubishi’s rail/truck volume splits vary significantly month to month.
- New Indy Containerboard (“New Indy”) is a manufacturer and supplier of recycled containerboard in the corrugated box industry. New Indy’s Oxnard location is one of its four mills around the country, and ships corrugated rolls

outbound to various domestic locations. Approximately 50% of New Indy's rail volumes are shipped within California.

- The United States Department of the Navy ("Navy") via Navy Base Ventura County, uses the Port to ship containers of military equipment to and from international locations via the Port as required by geopolitical and military needs.
- J.M. Smucker ships outbound frozen fruit products using refrigerated boxes to various destinations in the U.S. Those shipments typically occur during summer and fall months.
- Builders FirstSource (formerly ProBuild Holdings LLC) is a lumber and building materials supplier. Builders FirstSource began receiving inbound lumber products in 2018 and is one of the Port's newer customers.

The Port moves over \$10 billion in cargo annually, providing \$1.5 billion in economic impact to the District. . The rail assets of the VCRC connect the Port of Hueneme waterfront and surrounding industrial areas with the national rail network via an interchange with the Union Pacific ("UP") in Oxnard. The VCRC rail assets are leased to and operated by the Ventura County Railroad ("VCRR"), a class III short line railroad subsidiary of Genesee & Wyoming ("G&W"). The lease governing VCRR's lease of the VCRC assets terminated on October 1, 2018, though the VCRR continues to lease and operate the VCRC assets on a month-to-month basis. In 2019, the VCRR carried 8,503 carloads for the Port's seven unique customers as described above. For more information on the frequency of rail operations see the Volume and Commodity Report included in this RFP as Attachment "C" .



The purpose of this Request For Proposals (“**RFP**”) is to solicit proposals from operationally and financially qualified firms which will be evaluated by the Port, resulting in the selection of an operator to provide rail service on the Port facilities and UP interchange.

The Port will provide the right-of-way, trackage, bridges, trestles and culverts, signage and grade crossing warning systems to the selected proposer to be maintained in their current condition.

## **II. Current Operations**

Typical current operations of the actively served rail customers are shown below:

- 2 switch jobs operate Monday to Friday;
- Crews come on duty at Oxnard Yard;
- Crew 1 on-duty at 0600, Crew 2 on-duty at 0800;
- Night and weekend extras are called from time to time upon customer request however the impacts on residential neighborhoods discourages night time and weekend switching;
- UP typically performs interchange at Oxnard Yard between 0800 and 0900, employing 2 interchange tracks holding a total of about 60 railcars.

## **III. Proposed Operating Agreement**

At the conclusion of the RFP process, the Port and the selected proposer will enter into an agreement to operate rail freight services on the Port’s rail facilities (“**Operating Agreement**”). See Attachment “A” to review the proposed Operating Agreement which may be subject to negotiation between the Port and the selected Proposer.

The term of the Operating Agreement shall be an initial period of five (5) years, with a possible renewal term of five additional years provided both parties are agreeable. Under the Operating Agreement, the selected proposer will have exclusive use of the Port rail facilities to conduct rail freight operations in exchange for payment of operating fees, which will be determined as part of the RFP process as illustrated in Exhibit B [to be included in Final



Agreement], and fulfillment of other requirements set forth in the Operating Agreement. Thus the Operating Agreement contains the duties and responsibilities expected to be observed and performed by the Port and the selected proposer in its day-to-day operations of the Port rail facilities. By way of example and not limitation, the Operating Agreement requires the operator to do the following:

- Make various reports to the Port, including reports relating to financial performance, operations, marketing and maintenance of way;
- Maintain the Port rail facilities in accordance with the Port's track maintenance standards and asset guidelines;
- Furnish all required management, supervision and other services required in the performance of rail operations;
- Meet certain marketing & sales and operator & maintenance standards as further outlined in the draft operating agreement;
- Cooperate with the Port to carry out the Port's mission of preserving rail freight service and fostering economic development and job creation in the region through the improvement and expansion of rail infrastructure;
- Provide and maintain specified insurance policies ; and
- Indemnify the Port against damages and losses arising from the rail operations.

As the Operating Agreement provides the relevant rights and responsibilities of the Port and the railroad operator, proposers are advised to review carefully the proposed Operating Agreement with legal counsel. Any conflict in terms between this RFP and the Operating Agreement shall be resolved in favor of the Operating Agreement. In addition to the Operating Agreement, the selected proposer may also be required to enter into a separate agreement with the Navy.

#### **IV. Proposal Contents, Process and Requirements**

##### **A. Proposal Submissions**

Each proposer must submit its proposal in an electronic format, as either a PDF or Microsoft Word format. Proposals submitted pursuant to this RFP must be received by the Port no later than **September 17, 2021** at the following email address:

Dona Toteva Lacayo  
Chief Commercial & Public Affairs Officer  
(805) 890-9772  
[dlacayo@portofh.org](mailto:dlacayo@portofh.org)

All questions regarding this RFP must be submitted to Dona Lacayo by the deadline in the Proposal Procurement Schedule below and will be shared with all proposers. The Port reserves the right to issue a revised RFP or addenda as a result of comments and questions received from prospective proposers. Otherwise, prospective proposers are not to attempt to approach or discuss this proposal with any Port staff or Board member and any such efforts will result in disqualifying that proposer's bid.

All proposals submitted in response to this request will be screened by Port staff and/or other Port designated representatives. The screening will determine which proposers will be recommended to the Board and/or invited to interview. Recommended proposers will have the opportunity to conduct a site visit at the Port prior to interviews, if any occur. The Port reserves the right to make a final selection without an interview, or to choose not to negotiate or execute a contract with any proposer.

##### **B. Proposal Requirements**

Submitted proposals must be clearly labeled as **“Proposal to Operate Freight Rail Service and Maintain Port-Owned Rail Infrastructure”** and must include the following in the following order:

1. A Transmittal Letter, which must include the following information:

- The name and signature of the person authorized to obligate the bidder or bidders, and the location of the bidder's principal office. If activities are to be shared among companies and offices at different locations, indicate where each office is located and what activities are to be performed in each office;
- A summary description of the work to be performed by any subcontracting company proposed., if any; and
- The e-mail address, telephone and fax numbers of the representative to which correspondence should be sent.

2. A detailed description of the proposer's demonstrated ability to perform operator to provide rail service on the Port facilities and UP interchange, including its safety compliance record for the 3 facilities that most closely align with the Port's including, but not limited to, total annual injuries and accidents, derailments, injury and accident frequency rate per 100,000 man/train hours/miles, and compliance with the requirements of the California Public Utilities Commission ("CPUC"), Federal Railroad Administration ("FRA") and all other regulatory agencies that would govern the proposer's business of operating rail service at the Port.

3. A mobilization plan and a schedule detailing the start-up of rail service upon issuance of a Notice To Proceed by the Port.

4. A Service Plan that includes the following:

- Detailed information concerning the rolling stock and other equipment proposed to be used at the Port. The use of Tier 4/Genset locomotives, or a plan to acquire them, is highly encouraged.
- Meets or exceeds existing Port policies and procedures;
- Provides names and resumes of key personnel to be directly involved in rail operations and maintenance;

- Identifies where management, operating and maintenance employees will be based; Outlines expected operational improvements, synergies and methodologies employed;
- Describes capability, approach and track record of bringing new industry/business development;
- Discusses expected impacts on existing customers and UP; and
- Provides optimal service to freight customers and address the proposer's ability to ensure consistency of freight rail service and return to service of the Port rail facilities after unplanned outages such as derailments.

5. A maintenance plan addressing the Port's rail facilities, to not less than FRA Class 1 standards and the proposers rolling stock, both of which must include an environmental protection program. The maintenance plan shall include the location from which the proposer's maintenance activities will be staged, as well as storage facilities of the proposer's rolling stock.

6. A projected five-year financial plan for the Port operation, supported by the proposer's most recent financial statements that demonstrate the proposer's financial position as well as the availability of the financial resources that would be used to provide the requested services.. The financial plan must include projected capital expenditures as well as estimated revenues and expenses, including the proposer's insurance plan, limits of liability and deductible consistent with minimum requirements set forth in Attachment B.

7. The proposed compensation between the proposer and the Port on revenues generated on the Port's rail facilities. Proposals should include an annual rental fee for use of the Port's Rail Facilities and revenue sharing plan that could take the form of: (i) fee per car after a certain threshold, (ii) a fee per car after a certain revenue threshold, or (iii) an alternative form of revenue sharing the Proposer feels would fairly and adequately compensate both parties. The proposer should include an escalation method for both fees.

8. References from clients for which the proposer has performed similar rail operations experience; the Port prefers at least three such references, however proposers

submitting fewer than three references but not less than one reference, will not be disqualified from consideration. Each reference should include the contact's name, title, address and phone numbers, and include an explanation of the services provided, in addition to the years in which they were provided.

Proposals provided should not exceed 30 pages (excluding financial information, forms and appendices) and use a minimum font of 10 pt.

The Port reserves the right to reject any proposals that do not contain all of the information requested above, are not submitted in the form requested above, are submitted after the deadline provided above, or are submitted to the wrong email address.

**C. Proposal Procurement Schedule**

Question Period Deadline	August 20, 2021, Midnight
Proposal Submission	Sept 17, 2021, Midnight
Site Inspection for recommended proposers	June 8-10, 2021
Proposal Interviews, if applicable	TBA
Proposal Selection	TBA
Complete Negotiations with Selected Firm	TBA
Board approves Contract with Firm	TBA
Selected Operator files with Surface Transportation Board ("STB")	
STB Approval Secured	TBA
Commence Operations	TBA

The Port reserves the right to alter the foregoing schedule for any reason.

**D. Property Rights**

Any proposal received within the prescribed deadline becomes the property of the Port and all rights to the contents therein become those of the Port.

**E. Confidentiality**

After the deadline to submit proposals has passed, all proposals will be regarded as public records and will be subject to review by the public. Except as expressly provided below, any language purporting to render all of portions of the proposals confidential will be regarded as non-effective and will be disregarded. If any proposal is based on: i) information constituting a trade secret, as that term is defined in Evidence Code section 1060, or ii) information that is subject to a Confidentiality Agreement, the proposer may submit such information separately from the proposal, clearly marked as ***Confidential***. The proposer shall state in writing whether any such confidential information is a trade secret or is subject to a Confidentiality Agreement. Such information will be designated and treated as confidential but only to the extent permitted by the California Public Records Act. In the event of a legal challenge to the confidentiality of any such information submitted by a proposer, the Port will give the proposer notice of such legal challenge and the opportunity to defend the confidentiality of such information but such defense will not be the responsibility of the Port.

**F. Amendments to Request for Proposals**

The Port reserves the right to amend this RFP by addenda before the final proposal submittal dates.

**G. Non-Commitment of the Port**

This RFP does not commit the Port to award a contract, to pay any costs incurred in the preparation of a proposal for this request, or to procure or contract any services. All products used or developed in the execution of any contract resulting from this Request For Proposals will remain in the public domain at the completion of the contract.

**H. Conflict of Interest**

The proposer shall disclose any financial interest, or any business or other relationship that may have an impact upon the proposal or any services rendered to the Port. The proposer also shall list current clients who may have a financial interest in the outcome of this contract. A proposer has a “financial interest” if it is reasonably foreseeable that the proposer may gain a material financial advantage as a result of proposer’s relationship with any person or entity connected with,

or directly affected by, the services provided or work performed. As used throughout this Section, the term “proposer” includes every owner and employee of the proposer, including their immediate families. If requested by the Port, the proposer, its owners and employees will be required to file a completed “Fair Political Practices Commission (“FPPC”) Form 700, Statement of Economic Interests”.

**I. Nondiscrimination**

The contract awarded as a result of this Request For Proposals will be awarded without discrimination based on race, color, national origin, religion, religious creed, age (over 40), sex and gender, sexual orientation, gender identity, gender expression, disability (mental and physical), medical condition, genetic information, marital status, or military and veteran status.

**J. Operator Selection and Contract Negotiations**

The selection of a proposer to provide rail services and rail infrastructure maintenance at the Port shall be made by the Port in accordance with the selection criteria contained in Attachment D and in accordance with the schedule detailed above.

At the conclusion of the proposal ranking process, the Port may offer a contract to the highest-ranked proposer and negotiate final contract terms with that firm. If agreement cannot be reached with the highest-ranked proposer, the Port may terminate negotiations with that proposer and commence negotiations with the next highest-ranked proposer. If necessary, the Port may repeat this process until a final contract has been negotiated.

**K. Attachments to the Request For Proposals**

- A. Draft Operating and Maintenance Agreement
- B. Insurance Requirements
- C. Volume and Commodity Report
- D. Selection Criteria

**Attachment A – Draft Operating and Maintenance Agreement**

This Operating and Maintenance Agreement (“**Agreement**”), entered into and effective as of \_\_\_\_\_, 2021, is by and between Ventura County Railway Company, LLC, a wholly-owned subsidiary of the Port of Hueneme (“**VCRC**”) and \_\_\_\_\_ (“**Rail Operator**”), also referred to herein individually as “Party” or collectively as “Parties”.

**WITNESSETH:**

**WHEREAS**, the Port of Hueneme (“Port”) owns certain property located in Ventura County, California within the cities of Oxnard and Port Hueneme consisting of four terminals that handle various commodities via sea, rail and truck;

**WHEREAS**, VCRC owns approximately 13 miles of railroad property as depicted in more detail on Exhibit A [to be included in Final Agreement] and hereinafter referred to as (“**Rail Facilities**”);

**WHEREAS**, VCRC has issued a Request For Proposals (“**RFP**”) to procure a rail operations and infrastructure maintenance provider to operate and maintain the Port Rail Facilities;

**WHEREAS**, VCRC and the Rail Operator desire to enter into an Operating and Maintenance Agreement whereby the Rail Operator will be responsible for providing third party switching services to the VCRC’s customers and tenants at the Port and maintaining the VCRC’s Rail Facilities; and

**NOW THEREFORE**, in consideration of the covenants and conditions herein and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the parties agree as follows:

**1. Glossary of Terms**

<b>TERM</b>	<b>Meaning</b>
<b>AAR</b>	Association of American Railroads, a policy, research, standard setting, and technology organization representing the North American rail industry



<b>TERM</b>	<b>Meaning</b>
<b>Annual Maintenance Program</b>	Plan submitted by the Rail Operator outlining annual plans to repair and maintain the Rail Facilities as further described in Section 13
<b>Car hire (per diem)</b>	A payment made by railway holding a railcar to the owner of the railcar, on a time or mileage basis
<b>Carrier</b>	Railway
<b>Class I Railway</b>	Any of the seven largest freight railways operating in North America: BNSF, CN, CP, CSX, KCS, NS and UP
<b>Connecting carrier</b>	Term used herein to describe a Railroad that connects with VCRR or UP with an origin or destination of the Port
<b>Control</b>	The rail industry term for the party responsible for managing a railcar
<b>Destination</b>	Typically refers to the final destination of a shipment
<b>FRA</b>	US Federal Railroad Administration
<b>Interchange</b>	The point or junction where railways exchange loaded or empty railcars, also the act of passing traffic from one railway to another
<b>Operating Fees</b>	Fees paid to the Port by the Rail Operator as further described in Exhibit B
<b>Origin</b>	The origin of a shipment
<b>Port</b>	The Port of Hueneme
<b>PUC</b>	California Public Utility Commission
<b>Rail Facilities</b>	Railroad infrastructure depicted on Exhibit A
<b>Rail Operator</b>	Party selected by the VCRC to operate and maintain the Rail Facilities under the terms of this Agreement
<b>Receiver</b>	End-customer that receives a shipment from a shipper
<b>Shipper</b>	A customer that ships goods by rail; the originator of a shipment
<b>STB</b>	US Surface Transportation Board, the government agency that regulates US railways
<b>Tariff</b>	A schedule of charges published by a railway under which it moves goods (as opposed to contract rates, which are private)
<b>Terminal</b>	A transloading facility, such as a port terminal (ship-to-rail or ship-to-truck) or rail-to-truck terminal
<b>UP</b>	Union Pacific Railroad Company, a US Class I railway

TERM	Meaning
VCRC	Ventura County Railway Company, LLC a wholly owned subsidiary of the Port.

2. **Effective Date and Term.** The term of this Agreement (the “Term”) shall be five (5) years beginning [INSERT DATE] and continuing through and including [INSERT DATE]. The Rail Operator or the VCRC may extend the Term an additional five-year period, provided that written consent of the other party is obtained. If either party desires to so extend the Term of this Agreement an additional five-year period, the party desiring to extend shall submit a written request to the other Party to extend the Term the additional five-year period at least two (2) years but not more than three (3) years prior to the expiration of the Term. The other Party shall then, within one hundred twenty (120) days of receipt of such notice, render a decision on the first Party’s request and notify the Party in writing of its decision. If the extension is approved, the Term shall be extended an additional five-year period to beginning on \_\_\_\_\_ and continuing until \_\_\_\_\_. All terms and conditions of this Agreement shall apply throughout the Term as extended unless amended by mutual agreement of the Rail Operator as well as the VCRC. There shall be no other extension of the Term thereafter under this Agreement.

3. **Exclusive Use of Rail Facilities.** The VCRC shall provide the Rail Operator exclusive access to and use of the Rail Facilities but only to provide rail freight service and maintenance thereon during the Term of this Agreement, or any permitted extension or renewal thereof, subject to the terms and conditions hereinafter contained. The Agreement shall not be construed as conveying any ownership interest to Rail Operator. Any use of the Rail Facilities to accomplish purposes other than rail freight service and maintenance shall require prior written permission of the VCRC.

4. **Use by Other Carriers or Third Parties.** In the event that the Rail Operator desires to allow any other person or entity access to or upon the Rail Facilities to accomplish any purpose other than the provision of rail freight service and maintenance hereunder, the Rail Operator shall secure prior written approval from the VCRC, which approval shall not be unreasonably withheld. Nothing herein shall prohibit the Rail Operator from providing access to

or upon the Rail Facilities by persons or entities as required to enable the Rail Operator to provide rail freight service and maintain the subject rail infrastructure as provided herein.

5. **Operating Fees.** The Rail Operator shall pay certain operating fees (“Operating Fees”) to use the Rail Facilities as set forth in Exhibit B [to be included in Final Agreement], entitled “Operating Fees,” which is attached hereto and incorporated herein by reference. It is expressly understood that the Operating Fees shall be paid by the Rail Operator to the VCRC without off-set for any charges incurred by Operator in the provision of rail freight service and maintenance.

6. **Non-Transferability.** This Agreement and the rights herein granted shall not be assigned, sold, leased or transferred, in whole or in part, without the prior written consent of the VCRC, which may be withheld in the VCRC’s discretion for any reason. For purposes of this Section, an assignment shall include any transfer of any rights under this Agreement, whether voluntary or involuntary or by operation of law, including any merger or consolidation of the Rail Operator or any Change in Control of the Rail Operator made without the VCRC’s prior written consent.

7. **Defects in Title.** The rights contained herein as to the Rail Facilities are granted only insofar as the VCRC’s federal regulatory authorization and title permits. The VCRC specifically disavows any implied or other warranty of title and the VCRC shall not be liable to the Rail Operator regarding any defects in or encumbrances upon the title to the Rail Facilities, the Port and the Rail Operator shall cooperate with each other and take action as necessary to preserve the Rail Facilities for the Rail Operator’s intended uses hereunder.

8. **Right to Inspect.** The VCRC, its agents, contactors and/or assigns, shall have the right, upon reasonable notice, to enter upon the properties constituting the Rail Facilities for the purpose of making reasonable inspections. The VCRC and the Rail Operator shall make reasonable arrangements to assure that the inspections can be performed safely, without undue interference or disruption of the Rail Operator’s railroad operations and maintenance, in a manner consistent with the security of the Rail Facilities. The Rail Operator shall, upon adequate advance notice from the VCRC, provide hi-rail equipment and a qualified driver to facilitate inspections exercised

hereunder. The cost of such hi-rail equipment and driver shall be borne by the Rail Operator; provided, however, that in the event the VCRC requires such inspections more than two times during any calendar year (excluding any inspection to be conducted jointly by the VCRC and the Rail Operator to assess the condition of the Rail Facilities after any emergency or natural disaster), the VCRC shall reimburse the Rail Operator the cost incurred by the Rail Operator associated with such additional inspections.

**9. Taxes and Utilities.** The Rail Operator shall pay, on or before the last day on which payment may be made without penalty or interest, any and all taxes (including, without limitation, all real property taxes), assessments, charges assessed by public utilities, excise, license and permit fees assessments, sewer rentals and other governmental impositions and charges with shall or may during the Term hereof be charged, assessed, imposed, become due and payable, or a lien upon, or arising in connection with the use by the Rail Operator of the Rail Facilities. The Rail Operator shall have the right to contest any such taxes or other charges by appropriate legal proceedings, conducted at its own expense, provided that the Rail Operator shall furnish to the VCRC a surety bond or other security satisfactory to the VCRC sufficient to cover the amount of the contested item or items when such item or times exceed \$2,500.00, with interest and penalty covering the period which such proceeding may be expected to take. The Rail Operator shall also pay any and all charges in connection with water, gas, electricity and other utility services provided to the Rail Facilities and used by the Rail Operator in the provision of rail freight service and maintenance hereunder.

**10. Existing Agreements.** The Rail Operator's use of the Rail Facilities is subject to all of the terms and conditions contained in the following existing agreements, copies of which have been previously delivered to the Rail Operator:

[as applicable]

**11. Condition of Rail Facilities.** The Rail Operator has inspected the Rail Facilities and accepts the same "as is." The Rail Operator acknowledges that the Rail Facilities are suitable to accomplish the Rail Operator's intended uses and responsibilities under this Agreement. The VCRC makes no representation or warranty to the Rail Operator as to the physical condition of

the Rail Facilities or the condition of the legal title. The Rail Operator shall return the Rail Facilities to the VCRC upon the termination or expiration of this Agreement in FRA Class I standard or better condition as received or as improved. Notwithstanding the foregoing, the VCRC shall make no claim or demand against the Rail Operator regarding the condition of the Rail Facilities at the termination of this Agreement, provided that the Rail Operator has complied with its annual maintenance responsibilities as set forth in Section 13 of this Agreement.

**12. Provision of Personnel, Additional Equipment and Facilities.** The Rail Operator shall have the responsibility of providing all personnel, equipment and facilities reasonably necessary to conduct safe, timely and adequate rail freight service and maintenance on the Rail Facilities. Such personnel shall be under the sole control and direction of the Rail Operator and shall be properly qualified and trained in the operation of rail freight service and maintenance. Such equipment and facilities shall include, but shall not be limited to, locomotives, rolling stock, maintenance equipment, office space, and such other facilities and equipment as are reasonably necessary to provide rail freight service and maintenance on the Rail Facilities and maintain the Rail Facilities as contemplated under this Agreement. Notwithstanding the above, the Rail Operator shall not be found in default if cars which must be obtained from a Class I Carrier are not available at that time for which they are requested.

**13. Maintenance.** The Rail Operator shall perform or cause to be performed maintenance of the Rail Facilities, as may be necessary for the safe operation of rail freight service and maintenance, and as further provided in this Section.

(a) The Rail Operator shall have sole responsibility to maintain the Rail Facilities in accordance with FRA Class 1 track standards as found in the Code of Federal Regulations Chapter II (49 CFR Ch. II) hereinafter referred to as, "VCRC Standards." Any portion of the Rail Facilities that does not presently comply with VCRC Standards shall be improved to a condition that complies with VCRC Standards over a reasonable period of time, through the Annual Maintenance Program hereinafter described, and which shall thereafter be maintained to VCRC Standards. Without limiting the foregoing, the Parties further agree as follows:

1) On or before January 15 of each year, the Rail Operator shall prepare and submit to the VCRC a program (the “Annual Maintenance Program”) setting forth the maintenance items to be performed on the Rail Facilities during the remainder of the calendar year to ensure that the Rail Facilities are maintained in accordance with VCRC Standards;

2) The Rail Operator will review the Annual Maintenance Program with the VCRC’s Staff who shall review and amend the same to ensure that it complies with the VCRC Standards not later than March 1 of said year.

3) The Rail Operator, at its own cost, shall have sole responsibility to maintain the Rail Facilities in accordance with the VCRC Standards as set forth in the Annual Maintenance Program approved by the VCRC.

4) The VCRC shall inspect the Rail Facilities at least twice each calendar year to ensure that the Rail Operator is maintaining same in accordance with the Annual Maintenance Program adopted by the VCRC and the Rail Operator as regards the Rail Facilities. Any deficiencies noted by the VCRC or by inspectors from the FRA or PUC in routine inspections of the Rail Facilities shall be communicated to the VCRC immediately and promptly remedied by the Rail Operator at its sole cost and expense.

(i) Any and all rails, ties or other items of track and signaling equipment removed and replaced by the Rail Operator in the performance of required maintenance (the “Replacement Materials”) shall become the property of the Rail Operator, regardless of whether such removed property is sold or retained by the Rail Operator as materials and supplies, provided the Rail Operator purchased the material used in the replacement and

(ii) In the event of damage to the Rail Facilities as a result of flood, landslide, geological disturbance or natural disaster, the Rail Operator shall bare the sole responsibility of paying the first \$50,000 of costs to repair the Rail Facilities to the condition they were in prior to such damage, and thereafter up to 50% of any additional costs of repairing such damage to the Rail Facilities resulting from such disaster, up to a maximum of \$100,000 per occurrence, except where the cost of such repairs are fully reimbursed by any local, state or federal government agency.

**14. Capital Improvements.** The Rail Operator shall have the right, but not the obligation, with the prior written approval of the VCRC, to make, at its own expense, Capital Improvements to accomplish railroad purposes on the Rail Facilities during the Term of this Agreement. In the event it undertakes such voluntary Capital Improvements, the Rail Operator shall be required to pay the cost of removing appurtenant structures, excluding track improvements, where required by the VCRC. Where such Rail Operator-financed Capital Improvements require or involve the replacement of an asset in place, such assets will belong to the VCRC. The Rail Operator shall have no other obligations to finance or pay for any Capital Improvement to the Rail Facilities under the terms of this Agreement.

**15. Railroad Operations.** The Rail Operator shall at all times during the Term of this Agreement:

(a) Pay all charges and fees required to be paid under this Agreement, including, but not limited to the Operating Fees, at such time as the same are due and payable, which charges and fees may be recovered by the VCRC in the same manner as any charge or fee due or in arrears;

(b) Operate rail freight service and provide rail infrastructure maintenance in accordance with all federal, state and local requirements and obtain all governmental approvals, authorizations, franchises, licenses and permits as may be prerequisite to the rendering of such service, including compliance with all required and pertinent California and national environmental regulations; in your proposal please include the engine tier of your locomotives and highlight any other environmental initiatives pursued by your organization; California encourages proactive environmental stewardship;

(c) Observe and comply with any and all requirements of all constituted public authorities, including, but not limited to, any inspections of the Rail Operator's equipment or facilities, and with all federal, state and local statutes, ordinances, regulations and standards applicable to the Rail Operator or its use of the Rail Facilities;

(d) Maintain and operate, at its own expense, the Rail Facilities, including any buildings used or leased by the Rail Operator thereon, in good operating condition and repair in a

manner consistent with sound, accepted engineering practices and in accordance with Section 13 of this Agreement. Such operations shall include, but not be limited to, the removal of all wrecks and derailments within five (5) days following any such occurrence, restoration of the derailment site to safe operating condition within five (5) days following such occurrence and restoration of a derailment site to its original condition or better within thirty (30) days following the occurrence, unless the VCRC otherwise agrees to extend such deadlines for good cause shown by the Rail Operator; and

(e) Operate rail freight service on the rail lines of the VCRC at such levels and at such frequency as reasonably acceptable to the VCRC, subject to the following guidelines:

1) The Rail Operator shall provide Rail Freight Service a minimum of four per week or a level of service that the VCRC and Rail Operator mutually agree to given existing volumes. Nothing herein shall require the Rail Operator to operate a scheduled train when there are no cars to be picked up from or delivered to customers on the Rail Facilities. Failure to provide Rail Freight Service over five (5) consecutive days (exclusive of Saturdays, Sundays and holidays) after need for such Rail Freight Service has been communicated to the Rail Operator and Maintainer, according to subsection (e)(2) hereof, shall constitute default by the Rail Operator;

2) Shipments destined to and from stations on the Rail Facilities shall be handled in accordance with applicable rail transportation contracts or delivered to consignee not later than the third day (exclusive of Saturdays, Sundays and holidays) after arrival of the shipment in the yard serving the line with adequate billing information, unless consignee notifies the supervisor in charge of the Rail Operator's Rail Freight Service of the shipment's imminent arrival on the lines of the Rail Operator, in which case the consignee can request a prompt placement date. The Rail Operator shall exercise reasonable efforts to provide prompt empty car placement whenever the consignor notifies the Rail Operator's supervisor three (3) days prior to the day on which the empty car(s) shall be placed for loading, specifying the date for the placement of the empty car(s) for movement to the destination. However, nothing in this paragraph contemplates the Rail Operator's providing better levels of Rail Freight Service to certain customers with similar, but not identical, characteristics without collection of the applicable contract or appropriate published charges for such special Rail Freight Service. Nothing in this



paragraph precludes the Rail Operator from providing more frequent Rail Freight Service than that agreed upon in accordance with subsection (e)(1) above;

3) The Rail Operator shall provide safe and efficient rail freight service, including, but not limited to: i) delivery of and access to empty rail cars subject to car availability; ii) prompt handling of loaded rail cars with reasonable dispatch to and from points of interchange with UP and iii) maintenance and repairs, clearing of train derailments and wrecks on the Rail Facilities, all as specified in this Agreement. The Rail Operator shall provide the name, address, telephone number, and point of contact of new customers it acquires on the Rail Facilities to the VCRC within thirty (30) days of acquiring additional customers. The VCRC shall survey rail customers during the Term of this Agreement to determine the perceived quality of rail freight service provided by the Rail Operator, provided, however, that such survey shall not seek information concerning confidential rail transportation contracts, rates or price negotiations covering rail freight service by the Rail Operator or its connecting carriers and that survey results will be provided to the Rail Operator;

4) The Rail Operator shall have exclusive control of the operation, performance and pricing of the rail freight service, including, but not limited to, the dispatching and control of trains, assignment of available cars in good order, assignment of crews and other employees, and assignment of use of power. The Rail Operator shall use its best efforts to provide such rail freight service in an efficient manner;

5) The Rail Operator shall have the exclusive authority to promulgate and adopt rules, regulations and tariffs consistent with regulations issued by the Surface Transportation Board (STB) and FRA and the provisions of Title 49 of the United States Code, Subtitle IV, Part A and

6) The Rail Operator shall report any incidents, including but not limited to derailments, involving any actual or potential damage or injury to person or property occurring on the Rail Facilities or other railroad properties used by the Rail Operator to provide rail freight service under this Agreement, immediately to the VCRC. The Rail Operator shall, within three (3) days of receiving notice of any such incident, furnish a written report to VCRC

including a brief statement of the facts and an estimate by the Rail Operator as to the approximate potential claim that may arise. If a notice or claim of damage or injury is made to the Rail Operator, then the Rail Operator shall promptly furnish the VCRC with a copy of each such notice or claim. Thereafter, the Rail Operator shall provide the VCRC with copies of any further records or reports involving such incident and shall periodically report to the VCRC concerning the status of the incident and, upon resolution, the final disposition of the matter;

(f) Notify the VCRC in writing within ten (10) days of any management and supervisory personnel changes. In the event that any member of the Rail Operator's management or supervisory personnel is no longer part of the Rail Operator's organization, the Rail Operator shall advise the VCRC of the action taken to ensure that it will continue to be able to provide rail freight service and maintenance under this Agreement;

(g) Perform marketing and sales activities pursuant to a marketing plan prepared by the Rail Operator and periodically reviewed by the VCRC, which shall include the following:

1) proactive support to economic development agencies, the Port's member counties, the State of California and the Port in the recruitment of industry to the Port's service area;

2) other activities to promote increased rail traffic to and from the Rail Facilities and to support the VCRC's mission of furthering economic development through the retention, improvement and expansion of rail infrastructure and rail service.

(h) Annually, on the anniversary date of this Agreement, provide the VCRC with the following information, which to the extent possible under applicable law and this Agreement, shall be maintained by the VCRC in confidence:

1) Complete listing of names and addresses of all officers, directors and other senior management of the Operator.

2) Complete listing of names and addresses of all owners (whether stockholders, members, partners or other owners) in the Operator, including the total ownership interest owned by each owner;

(i) Provide sixty (60) days' written notice of any proposed Change in Control of the Rail Operator. The VCRC shall have the right to terminate this Agreement if any actual Change in Control occurs without VCRC approval;

(j) Provide and maintain unencumbered minimum working capital in the amount of \$100,000.00;

(k) Prepare a proposed annual budget setting forth the estimated revenue and expenditures projected to occur in the upcoming calendar year (the "Annual Budget"). The Annual Budget shall be made available to the VCRC for review by the VCRC's staff on or before January 15 of each year. The Annual Budget shall include projected expenditures on the Rail Operator's transportation and rail freight service operations and a preliminary estimate of projected expenditures to meet the Rail Operator's maintenance obligations, among other items.

1) On or before February 1 of the year to which the Annual Budget relates, the Rail Operator will review the Annual Budget with the VCRC.. The review will include: A) the rail freight service operations portion of the Annual Budget, to evaluate whether the Rail Operator is making an appropriate investment in the rail freight service operations in light of the Rail Operator's requirements under this Agreement to maintain VCRC Standards and B) the maintenance portion of the Annual Budget in light of the Annual Maintenance Program requirements under Section 13 of this Agreement; provided, however, this review of the maintenance portion of the Annual Budget shall be secondary to the Annual Maintenance Program review performed by the VCRC which may, but shall not be obligated to, consider the results of the Annual Budget review in connection with its review of the Annual Maintenance Program as required by Section 13 of this Agreement. The VCRC may propose reasonable modifications to the Annual Budget to promote good faith efforts by the Rail Operator to meet the requirements of this Agreement in the particular calendar year. The Rail Operator, in good faith, shall revise its Annual Budget to incorporate the VCRC's proposed modifications;

2) If the VCRC determines that the Rail Operator is failing to meet the requirements of Section 14 of this Agreement, the Rail Operator shall provide an explanation of the reason underlying such failure;

3) As part of its submission of its Annual Budget, the Rail Operator also shall submit a proposed timetable of rail freight service operations on the Rail Facilities effective the balance of the upcoming year, which shall be subject to VCRC Approval;

4) Obtain and maintain during the Term of this Agreement an irrevocable standby letter of credit (the "Letter of Credit") with a lending institution acceptable to the VCRC securing Rail Operator's faithful performance of its obligations under this Agreement. The Letter of Credit shall be subject to approval by the VCRC, shall be in an amount of not less than One Million Dollars (\$1,000,000) and shall name the VCRC as beneficiary. The VCRC shall have the right to draw upon the Letter of Credit in the event the VCRC incurs any out-of-pocket expenses resulting from a default by the Rail Operator, including but not limited to, costs incurred by the VCRC in restoring Rail Freight Service on the Rail Facilities and claims brought against the VCRC by third parties, including railroad customers, that arise out of the Rail Operator's failure to perform its obligations under this Agreement. This right would be in addition to, and not in lieu of, any other rights and remedies available to the VCRC under this Agreement or otherwise at law.

**16. Restrictions.** The Rail Operator further agrees that it will not:

(a) Occupy the Rail Facilities in any way or for any purposes unrelated to the provision of Rail Freight Service;

(b) Assign, mortgage, pledge or encumber the Rail Facilities or any part thereof or assign all or any part of its obligations under this Agreement without the prior written consent of the VCRC;

(c) Permit to be created or knowingly allow to exist upon the Rail Facilities any use or storage (except as necessary for the provision of Rail Freight Service), or the disposal or release of Hazardous Materials, public or private, and the Rail Operator shall indemnify, protect,

defend and hold harmless the VCRC in accordance with Section 16 against any losses arising out of the same. The Rail Operator shall comply with all applicable federal, state and local laws, rules and regulations pertaining to air, water, noise and wastes and other pollution or relating to the storage, transport, disposal or release of Hazardous Materials, and shall bear the expense of any and all pollution control structures, devices or equipment required during the Term of this Agreement under applicable laws, ordinances or governmental regulations as a result of the Rail Operator's provision of Rail Freight Service. The Rail Operator shall exercise due care in its use and operation of the Rail Facilities, including taking precautions against reasonably foreseeable acts or omissions or the release of Hazardous Materials into the environment;

(d) Except upon the VCRC's prior written consent, enter into negotiations or agreements with any other railroad, including, specifically, Class I railroads, which in the reasonable opinion of the VCRC affects the interests of the VCRC, including: i) the competitive access of the VCRC's rail customers within the Port Facilities to Class I rail services; ii) the proper maintenance of the Rail Facilities or iii) the carrying out of the VCRC's stated mission to preserve rail service in California and to further economic development through the retention, improvement and expansion of rail infrastructure;

(e) Except upon the VCRC's prior written consent, enter into negotiations or agreements with any third parties addressing the lease or acquisition of rail lines located within the county comprising the membership of the VCRC, or which directly connect with the Rail Facilities, it being the express understanding of the Port and the Operator that the VCRC shall have the right of first refusal and option to acquire any such lines;

(f) Amend, modify, cancel or terminate any interchange agreement with any Class I railroad which relates to Rail Freight Service on the Rail Facilities without prior notice to the VCRC.

## **17. Indemnification.**

(a) The Rail Operator, and its parents, Subsidiaries and Affiliates, jointly and severally agree to indemnify, protect, defend and hold harmless the VCRC and the Port and the Port's members, directors, officers, agents and employees (each, an "Indemnified Party") from and

against any and all claims, demands, losses, liabilities, damages, liens, injuries, penalties, fines, lawsuits and other proceedings, judgments, awards, costs and expenses, including, without limitation, reasonable attorneys' and consultants' fees and costs through appeal (collectively, "Losses"), arising out of or related to any act or omission of the Rail Operator, or its agents, employees or contractors, including, but not limited to:

1) any bodily injury, death or damage to tangible property to the extent caused by the Rail Operator or relating to or arising out of the Rail Operator's performance of this Agreement; ii) any collision or derailment; iii) any claims, grievances or lawsuits brought by or on behalf of the Rail Operator's own employees or their representatives, pursuant to any state or federal law, including, but not limited to, the Federal Employer's Liability Act, or pursuant to employee protective conditions imposed by a governmental agency or a collective bargaining agreement arising out of the Rail Operator's operations hereunder;

2) any environmental contamination on the Rail Facilities (whether arising out of any environmental protection or pollution law, or any liability in tort (strict liability or otherwise) or (v) any default under this Agreement or failure of Rail Operator to perform any obligation under this Agreement. Provided, however, the Rail Operator's obligation to indemnify under this Section shall be proportionately reduced to the extent any such loss is judicially determined to be attributable to the negligence or willful misconduct of the VCRC;

(b) An Indemnified Party seeking indemnification under this Agreement shall:  
i) give the Rail Operator prompt written notice of the claim; ii) cooperate with the Rail Operator in connection with the defense and settlement of the claim and iii) permit the Rail Operator to control the defense and settlement of the claim; provided that the Rail Operator will not settle the claim without the prior written consent of the Indemnified Party, which consent will not be unreasonably withheld;

(c) The VCRC does not in any manner waive its rights and immunities provided by applicable federal or state law and/or regulation under this Section or otherwise under this Agreement and

(d) The Rail Operator's and Maintainer's obligations under this Section shall survive termination or expiration of this Agreement.

**18. Insurance.** During the Term of this Agreement, the Rail Operator shall take out and maintain, at its own cost and expense, the following minimum insurance amounts not less than specified herein, which shall be with insurance carriers qualified to do business in California and maintain an agent for process within the State. Such carriers shall have not less than 'A' policyholder's rating and a financial rating of not less than "Class VII" according to the latest Best Key Rating Guide.

**19. Type and Amount**

1) Comprehensive General Liability.

(i) The Rail Operator shall take out and maintain, during the performance of all work under this Agreement, in amounts not less than \$5,000,000 per occurrence and \$10,000,000 aggregate for bodily injury (including death), personal injury and property damage. Commercial General Liability Insurance. Coverage for Commercial General Liability insurance shall be at least as broad as the following:

a. Insurance Services Office Commercial General Liability coverage (Occurrence Form CG 0001)

(ii) Commercial General Liability Insurance must include coverage for the following:

a. Bodily Injury (including death) and Property Damage

b. Personal Injury/Advertising Injury

c. Premises/Operations Liability

d. Contractual Liability with respect to this Contract

- e. Broad Form Property Damage
- f. Independent Consultants Coverage
- g. Sexual Misconduct Coverage, with no applicable sublimit
- h. Contain endorsement form CG 24 17 10 01 (or a substitute form providing equivalent coverage) showing “Ventura County Railroad Company, LLC” as the Scheduled Railroad and “13 miles of railroad property as depicted in more detail on Exhibit A [to be included in Final Agreement] and hereinafter referred to as (“**Rail Facilities**”)” as the Designated Job Site.

(iii) All such policies shall name the Ventura County Railroad Company, LLC, the Port of Hueneme, its Board of Commissioners, and each member thereof, its officers, employees, and agents as Additional Insureds under the policy.

(iv) The general liability program may utilize either deductibles or provide coverage excess of a self-insured retention, subject to written approval by the VCRC. All deductibles and self-insured retentions must be declared to the VCRC prior to commencing work under this Agreement.

2) Federal Employer’s Liability Act/Workers’ Compensation.

(i) At all times during the performance of the work under this Agreement the Rail Operator shall maintain Worker’s Compensation in compliance with applicable statutory requirements and Employer’s Liability Coverage in amounts of \$5,000,000 per accident for bodily injury or disease.

(ii) Such insurance shall include an insurer's Waiver of Subrogation in favor of the VCRC and will be in a form and with insurance companies acceptable to the VCRC.



(iii) If insurance is maintained, the workers' compensation and employer's liability program may utilize either deductibles or provide coverage excess of a self-insured retention, subject to written approval by the VCRC.

(iv) Before beginning work, the Rail Operator shall furnish to the VCRC satisfactory proof that the Rail Operator has taken out for the period covered by the work under this Agreement, full compensation insurance for all persons employed directly by the Rail Operator to carry out the work contemplated under this Agreement, all in accordance with the "Workers' Compensation and Insurance Act," Division IV of the Labor Code of the State of California and any acts amendatory thereof. Rail Operator shall require all subconsultants to obtain and maintain, for the period covered by the work under this Agreement, worker's compensation of the same type and limits as specified in this Section.

3) Automobile Liability.

(i) At all times during the performance of the work under this Agreement the Rail Operator shall maintain Automobile Liability Insurance for bodily injury (including death) and property damage including coverage for owned, non-owned and hired vehicles, in a form and with insurance companies acceptable to the VCRC and in an amount not less than \$2,000,000 per occurrence for bodily injury (including death) and property damage.

(ii) Coverage for automobile liability insurance shall be at least as broad as Insurance Services Office Form Number CA 0001 (ed. 6/92) covering automobile liability, Code 1 (any auto).

(iii) The automobile liability program may utilize deductibles, but not a self-insured retention, subject to written approval by the VCRC.

4) Pollution Legal Liability.

(i) At all times during the performance of the work under this Agreement and for sixty (60) months following the date of termination of the Agreement, the Rail Operator shall maintain Pollution Legal Liability insurance in an amount not less than \$2,000,000 per occurrence or claim and \$4,000,000 aggregate.

(ii) The Rail Operator, along with all employees, agents and subconsultants who have a reasonable probability of coming into contact with hazardous materials, shall be adequately trained to comply with all laws and regulations relating to the care and protection of the environment in the performance of the work performed by the Rail Operator or any portion thereof.

5) Public Liability Property Damage Insurance.

(i) At all times during the performance of the work under this Agreement the Rail Operator shall carry and maintain public liability property damage at amounts not less than \$5,000,000 per person, \$5,000,000 per occurrence of public liability, and \$5,000,000 for property damage.

The Rail Operator shall cause the VCRC to be named as an additional insured under each such policy (other than Employer's Liability) and furnish the VCRC appropriate certificates of such insurance which shall specifically provide that the insurance company shall furnish to the VCRC at least thirty (30) days' prior notice of any lapse or material changes in such insurance. The insurance above shall be specifically endorsed to be primary over any insurance maintained by the VCRC. Any available proceeds in excess of the specified minimum limits of insurance and coverage shall be available to the VCRC.

**20. Relationship between the Rail Operator and the Port.** Whenever the Rail Operator requires written approval from the VCRC, the signature of the General Manager will suffice to validate such written approval. Whenever the VCRC requires written approval from the Rail Operator, the signature of the President or other highest ranking officer will suffice to validate the written approval of the Rail Operator. The Rail Operator shall inform the VCRC and affected shippers of any action or event that may limit Rail Freight Service as soon as the Rail Operator knows of such action or event. The VCRC will inform the Rail Operator of any problems or concerns related to the Rail Freight Service of which it receives notice.

**21. Conflicts of Interest.** The Rail Operator represents that it has completely disclosed to the VCRC all facts bearing upon any possible interests, direct or indirect, that the Rail Operator believes any member, director, officer, employee or agent of the VCRC presently has, or will have,

in this Agreement or in the performance of this Agreement. The Rail Operator shall comply with all codes of conduct and/or conflict of interest policies adopted by the VCRC. The Rail Operator covenants that it presently has no interest, and shall not have any interest, direct or indirect, which would conflict in any manner with the performance of its obligations under this Agreement. The Rail Operator represents to the VCRC that Rail Operator has no present, and will have no future, conflict of interest between providing the VCRC the services contemplated by this Agreement and any interest the Rail Operator may presently have, or will have in the future, with respect to any other person or entity that has any interest adverse or potentially adverse to the VCRC, as determined in the reasonable judgment of the VCRC. The provisions of this Section shall remain fully effective indefinitely after the expiration or termination of this Agreement.

**22. Annual Reporting.** During the Term, the Rail Operator shall prepare an annual report (the “Annual Report”) including, at a minimum: 1) the number of revenue producing carloads; 2) the number of reportable accidents as defined by FRA and their location; (3) reportable derailments as defined by FRA and their location; 4) financial statements audited by an accounting firm acceptable to the VCRC; 5) construction and maintenance expenses; 6) FRA, PUC, and/or VCRC inspection reports with corrective action taken or planned; 7) a report of other occurrences having a significant impact on the condition of the Rail Facilities or the rail traffic handled thereon; 8) a current list of all Subsidiaries and Affiliates; 9) an organizational chart setting forth the current ownership of the Rail Operator and 10) a proactive risk management program and emergency response plan. Federal and state income tax returns of the Rail Operator and any Subsidiaries and Affiliates shall be made available to the VCRC’s auditors to confirm the summary of income tax information provided in the Annual Report. The Annual Report shall cover the Rail Operator’s fiscal years or parts of fiscal years from the date of execution of this Agreement to its termination. The Annual Report shall be submitted to the VCRC within three (3) months after the close of each fiscal year, provided Rail Operator’s tax filings are completed by that time, and shall be submitted to the VCRC subsequent to a deferred tax filing upon completion by Rail Operator’s accountant, in which instance a preliminary Annual Report shall be submitted within three (3) months after the close of the Rail Operator’s fiscal year.

Upon reasonable notice, the Rail Operator will allow the auditors of the VCRC to audit all the records of the Rail Operator that were used to determine the revenues and costs related to the Annual Report. All such records shall be kept a period of four (4) years after the issuance of the related Annual Report. The Rail Operator will also allow inspection of the Rail Facilities and the equipment used thereon by the authorized representatives of the VCRC upon reasonable notice.

**23. Confidentiality.**

(a) The Rail Operator and the VCRC acknowledge that this Agreement requires the Rail Operator to provide certain records, documents or instruments (collectively, “records”) that may include proprietary or confidential information, the disclosure of which to third parties may be damaging to the Rail Operator or other third parties who contract with the Rail Operator. At the time of providing such records, the Rail Operator’s highest-ranking officer shall certify in writing as to the confidentiality of any such records submitted to the VCRC that are deemed confidential and proprietary by the Rail Operator, and include a statement concerning the legal basis of treating such records as confidential and proprietary. To the extent possible under law, the VCRC shall hold such records and information in strict confidence and shall use such records and information only in connection with this Agreement, except where required to be disclosed under any applicable federal or state law requiring public disclosure of information relating to the business of the VCRC or any order of a court or public agency having jurisdiction requiring disclosure. The Rail Operator shall comply with any policy or policies adopted by the VCRC from time to time concerning the treatment of confidential information of third parties provided to the VCRC. The Rail Operator shall not discuss this Agreement, or any matters pertaining thereto, with the public press, representatives of the public media, public bodies or representatives of public bodies, without the VCRC’s prior written consent. The Rail Operator shall have the right, however, without the VCRC’s further consent, to communicate with persons (including third parties) or public bodies where necessary to perform under this Agreement.

**24. Performance Audit.** The VCRC at its expense, from time to time, may conduct a performance audit of marketing, operating, maintenance and other obligations and functions of the Rail Operator, and the Rail Operator shall cooperate with the VCRC in the performance of the audit.

**25. Non-Operating Properties.** The VCRC is solely responsible for entering into, extending, or terminating all non-operating leases, licenses and easements on all VCRC and Port property, including the Rail Facilities. The VCRC shall receive any and all payments arising from any leases, private crossings, easements, licenses and occupations or renewals thereof on any portion of the Rail Facilities, including, but not limited to, rents, license fees, crossing fees, easement fees, and other revenues paid by any party occupying a portion of the Rail Facilities with poles and wire, and rentals and fees from signboards, platform locations, driveways, storage facilities, side tracks, pipe lines, water rights, fiber optics, land rents, building rents and water tank rents, among other things. The VCRC shall collect such amounts as they become due and such amounts shall not accrue to the Rail Operator unless otherwise agreed by the VCRC and the Rail Operator in writing. The VCRC shall determine the properties classified as “Non-Operating Properties,” except that any such designation shall not interfere with Rail Operator’s ability to fulfill its obligations under this Agreement. In addition, the VCRC shall have the unilateral right to withdraw such portions of the Rail Facilities from the provisions of this Agreement, including any tracks, railroad lines, buildings, land or any other property, as it deems appropriate so long as such withdrawal will not unreasonably interfere with Rail Operator’s a ability to fulfill its common carrier obligations and to provide Rail Freight Service to customers under this Agreement. Furthermore, the VCRC may add additional premises to the Rail Facilities as it reasonably determines are necessary for the Rail Operator’s performance of this Agreement, in its sole discretion. In such event, the Rail Operator and the VCRC will cooperate in obtaining approval of the STB and any other applicable governmental agencies, to the extent required, to include such additional premises within the Rail Facilities under this Agreement.

**26. Public Crossings.** During the Term of this Agreement or any renewal thereof, the Rail Operator shall assume and shall indemnify the VCRC against all obligations with respect to all public crossings or the railroad by public streets and highways, pedestrian walkways and bikeways, bridges, or utilities, including such obligations as presently exist or which may be hereinafter imposed, and any orders issued thereunder with respect to the Rail Facilities, except those “Non Operating Properties” over which the VCRC has sole responsibility under Section 23 of this Agreement.

**27. Condemnation of Rail Facilities.** If the VCRC's ownership interest in the Rail Facilities, or any portion thereof, are condemned or taken by any competent authority for public use, the award for payment of damages resulting therefrom, or any amount paid in settlement thereof, shall be paid to and retained by the VCRC, except as hereinafter provided. If the Rail Operator's occupancy interest in the Rail Facilities or any portion thereof are condemned or taken by any competent authority for public use, the award or payment of damage resulting or any amount paid in settlement thereof shall be paid to and retained by the Rail Operator. If the entire Rail Facilities are so taken or such substantial part thereof as shall materially impair or interfere with the Rail Operator's proper use and enjoyment thereof, this Agreement shall automatically terminate as of the date of the taking. If only such portion of the Rail Facilities is taken as shall not materially impair or interfere with the Rail Operator's proper use and enjoyment thereof, this Agreement shall continue in full force and effect, and all proceeds of the condemnation award or payment to either party shall first be used as may be required to restore the Rail Facilities in such manner as will enable the continuing operation thereof of Rail Freight Service hereunder.

**28. Termination.** Upon the occurrence of an Event of Default (as hereinafter defined), and subject to subsection b) below, this Agreement may be terminated by the VCRC by written notice to the Rail Operator in accordance with this Section.

(a) Any one or more of the following events shall constitute an event of default under this Agreement (an "Event of Default"):

1) The Rail Operator's failure to pay any Operating Fees due to the VCRC within fifteen (15) days of the date due and payable hereunder;

2) The Rail Operator's failure to observe and perform any of the terms, covenants, conditions, limitations or commitments under this Agreement on the Rail Operator's part to be observed or performed (other than payment of Operating Fees);

3) The Rail Operator shall file a voluntary petition in bankruptcy or shall be adjudicated a bankrupt or insolvent, or shall file any petition or answer seeking any reorganization, arrangements, composition, readjustment, liquidation, dissolution or similar relief under the present or any future federal bankruptcy or insolvency statute or law (collectively,

“insolvency laws”), or shall seek, consent to or acquiesce in the appointment of any bankruptcy or insolvency trustee, receiver or liquidator of the Rail Operator or of all or any substantial part of its properties;

4) The commencement of any action, case or proceeding against the Rail Operator seeking: A) any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any insolvency laws, or B) the appointment, without the consent or acquiescence of the Rail Operator, of any trustee, receiver or liquidator of the Rail Operator or of all or substantially all of its properties, and such proceeding shall continue undismissed for a period of sixty (60) days;

5) The Rail Operator shall discontinue service or vacate any portion of the Rail Facilities without the VCRC’s prior written consent;

6) A federal or state tax lien is filed against the Rail Operator affecting the Rail Facilities and remains undischarged within sixty (60) days after its filing;

7) A final judgment for the payment of money in excess of \$25,000 shall be rendered against the Rail Operator and such judgment shall remain undischarged for a period of sixty (60) days during which execution shall not be effectively stayed and

8) A Change in Control of the Rail Operator shall occur without the VCRC’s prior written consent.

(b) Notwithstanding the preceding subsection a), upon an Event of Default described only in subsection a) ii) above, such Event of Default may be cured (and no Event of Default will be deemed to have occurred) if the Rail Operator, after receiving written notice from VCRC demanding cure of such default: 1) either cures the default within thirty (30) days; or 2) if the cure requires more than thirty (30) days, immediately initiates to cure the default within thirty (30) days to the satisfaction of the VCRC and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical, but in no event later than one hundred twenty (120) days after written notice demanding cure of such default was delivered.

(c) In the event the Rail Operator commits an Event of Default, which Event of Default is not timely cured (to the extent curable as provided in subsection b) above), the VCRC shall have the right, in addition to any other rights and remedies available at law or equity, which shall not be limited, to immediately terminate this Agreement upon written notice to the Rail Operator.

(d) Upon termination of this Agreement, the VCRC will use its best efforts to engage a replacement operator to provide Rail Freight Service on the VCRC's rail lines. The Rail Operator agrees to fully cooperate with the VCRC in transitioning operations on the VCRC's rail lines to the replacement operator. In the event no replacement operator can be engaged by the VCRC, and in the event the Rail Facilities are abandoned by the VCRC by reason of such termination, the Rail Operator shall cooperate fully with the VCRC in settling any and all claims sought by any party as a result. Furthermore, in the event such replacement operator must be subsidized by the VCRC, and this Agreement was terminated by VCRC for any reason above, the VCRC will bill the Rail Operator the subsidy amount and the Rail Operator shall remit payment to the VCRC within thirty (30) days of the date of the invoice.

**29. Force Majeure.** In no event shall any party be deemed in default of this Agreement for any loss, damage, injury, delay, failure or inability to meet all or any portion of its commitments hereunder caused by or arising from any cause which is unavoidable or beyond its reasonable control, including without limitation, war, hostilities, invasion, insurrection, riot, terrorist activities the order of any competent civil or military government, explosion, fire, earthquakes, epidemics, pandemics, strikes, lockouts, AAR service orders, actions of other carriers that materially affects Rail Operator's operations, maintenance, labor disputes, perils of water including floods, ice, breakdowns, Acts of God including storms or other adverse weather conditions, washouts, wrecks or derailments that cannot be removed within thirty (30) days pursuant to Section 15(d) or other causes of a similar or dissimilar nature which wholly or partially prevent a party from carrying out the terms of this Agreement; provided that such party experiencing a force majeure event shall promptly give to the other party written notice that the disabling effect of such force majeure shall be eliminated as soon as and to the extent reasonably possible and that either party shall have the right to determine and settle any strike, lockout and labor dispute in which the party may be



involved in its sole discretion. In the event that the Rail Operator's performance is suspended in whole or in part by force majeure, its obligation to perform hereunder shall be suspended or commensurately reduced during the duration of the force majeure and for such additional reasonable period as may be required because of the existence of the force majeure. In the event the Rail Operator's performance hereunder is suspended by force majeure and cannot be resumed within a reasonable period of time, either party shall have the right to seek STB authorization to abandon and/or seek a discontinuance of service with respect to that portion of the Rail Facilities adversely affected by the force majeure condition and upon receipt of such authorization to terminate this Agreement with respect thereto.

**30. Discontinuance of Operations.** Upon expiration or termination of this Agreement for any reason, the Rail Operator immediately shall file a discontinuance notice with the STB and shall cease operations on the Rail Facilities promptly upon grant of discontinuance authority or qualification of a successor pursuant to a change in operator filing with the STB and shall assist the VCRC in making the transition to a new operator. Notwithstanding the foregoing, in the event the Rail Operator contests any asserted termination by reason of default and demand arbitration in accordance with Section 33 of this Agreement, the Rail Operator shall not be required to file a discontinuance of Rail Freight Service until such date as such arbitration has been concluded and a determination has been rendered by the arbitrators that the Rail Operator has defaulted under this Agreement. At expiration or termination of this Agreement, the Rail Operator shall peacefully deliver up and surrender possession of the Rail Facilities to the VCRC in the condition described in Section 11 of this Agreement and shall allow its successor to monitor its information and systems in the week preceding the changeover.

**31. Notice.** Any notice required or provided for in this Agreement shall be sufficient if sent by certified mail postage prepaid, or commercial overnight delivery service requiring execution of a receipt indicating delivery, as follows:

To the VCRC:

\_\_\_\_\_

Attn: General Manager

To the Rail Operator:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

or to such other address as either party may, from time to time designate to the other in writing.

**32. Regulatory Jurisdiction.** This Agreement is subject to the orders, rules and regulations of appropriate regulatory authorities, including the STB and the PUC, having jurisdiction over the Rail Operator and the VCRC. In the event that either Party determines that it is necessary to participate in an administrative or judicial proceeding or to take a position before any governmental body which may affect the interests of the other or the Rail Freight Service provided hereunder, each Party shall provide the other Party reasonable advance notice of its intent to do so and the nature of the interest or position it will assert. In such case, the Parties shall use their best efforts to communicate and coordinate their participation and/or positions.

**33. Access to Records.** The Rail Operator shall establish and maintain all necessary accounting services appropriate to conducting business as a railroad and complying with its obligations under this Agreement. The Rail Operator shall maintain sufficient records and reports to permit the VCRC to fully verify statements of traffic, revenue and expenditures furnished to the VCRC by the Rail Operator. The VCRC shall maintain the information contained in such records and reports in confidence to the extent possible under applicable law and under **Section 21** of this Agreement. The VCRC, or its agents, shall have full access to these records and reports during normal business hours and the right to make copies at the Rail Operator's office upon 48 hours written notice, duly given to the Rail Operator.

**34. Labor Conditions.** If during the Term of this Agreement or renewal thereof, any labor protective conditions should be imposed as a result of an STB order or pursuant to the federal Railway Labor Act, 45 U.S.C. § 151 et seq., as amended and supplemented, the Rail Operator agrees to fully indemnify the VCRC from the costs of such labor protective conditions.

**35. Successors and Assigns.** This Agreement shall inure to the benefit of and shall be binding upon the Parties hereto and their respective successors and assigns. However, this

provision shall not be construed to confer on the Rail Operator any right or authority to assign all or any part of this Agreement without the VCRC's prior consent. It is expressly agreed that the VCRC shall have the right to assign its interest in this Agreement to a lending institution for purposes of financial security.

**36. Entire Agreement.** This Agreement, including any exhibits or other agreements expressly incorporated herein by reference, contains the entire understanding of the Parties with respect to its subject matter. It is expressly understood that this Agreement shall supersede and replace any other agreements for Rail Freight Service on the Rail Facilities. No oral statement or prior written matter shall have any force or effect. The Parties hereby acknowledge that they are not relying on any representations or agreements other than those contained in this Agreement. This Agreement shall not be amended or modified except by a written instrument executed by the Rail Operator and the VCRC.

**37. Severability.** If any term, covenant, condition or provision (or part thereof) of this Agreement or the application thereof to any person or circumstances shall, at any time or to any extent, be judicially determined to be invalid or unenforceable, the remainder of this Agreement or the application of such term or provision (or remainder thereof) to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term, covenant, condition and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law. It is understood that the VCRC shall not be subject to any liability to the Rail Operator in the event any term herein is found to be invalid or unenforceable.

**38. Nondiscrimination.** The Rail Operator shall comply with the nondiscrimination clause attached [[to be included in Final Agreement as Exhibit C].

**39. Applicable Law.** This Agreement shall be construed in accordance with the laws of the State of California.

[SIGNATURE BLOCKS TO BE INCLUDED]

### **Attachment B – Insurance Requirements**

Tenant's Insurance. Tenant shall furnish public liability property damage insurance, and worker's compensation insurance with the following limits:

- Commercial General Liability in amounts not less than \$20,000,000 per occurrence and \$40,000,000 in aggregate for bodily injury (including death), personal injury and property damage.
- Federal Employer's Liability/workers' Compensation in amounts of \$5,000,000 per accident for bodily injury or disease.
- Automobile Liability in an amount not less than \$5,000,000 per occurrence for bodily injury (including death) and property damage.
- Pollution Legal Liability in an amount not less than \$5,000,000 per occurrence or claim and \$5,000,000 in aggregate.
- Public Liability Property Damage Insurance in an amount not less than \$5,000,000 per person, \$5,000,000 per occurrence of public liability and \$5,000,000 for property damage.

### Attachment C – Volume and Commodity Report

Commodity	Estimatd Carloads*				Estimated Rev./Carload**	
	2019 Low	2019 High	2020 Low	2020 High	Low	High
Motor Vehides***	4,260	7,790	4,260	5,790	\$ 295	\$ 382
Pulpboard	380	460	380	460	N/A	N/A
All Other Traffic	100	200	100	200	N/A	N/A

\*Carload volume estimates based on interviews with both Port of Hueneme and major customers

\*\*Estimated revenue per carload developed by RLBA based on published waybill data

\*\*\*Estimated motor vehides carloads expected to dedine in 2020 due to loss of BMWtraffic

**Attachment D – Selection Criteria**

1. Transmittal Letter	0 pts.
2. Safety Compliance	10 pts.
3. Mobilization Plan	5 pts.
4. Service Plan	20 pts.
5. Maintenance Plan	20 pts.
6. Financial Plan	10 pts.
7. Compensation Plan	20 pts.
8. Prior Experience (References)	15 pts.