

Appendix 1

Form of Preliminary Operating Agreement

[See attached]

**PHASE 1 RAILYARD -
PRELIMINARY OPERATING AGREEMENT
(FORMER OAKLAND ARMY BASE)**

This Preliminary Operating Agreement (this "Agreement"), entered into and effective as of _____, 20__, is by and between the Board of Port Commissioners of the City of Oakland, California (the "Port"), and _____ (the "Rail Operator").

This Agreement is made with reference to the following facts and circumstances:

A. The Port owns or controls former Oakland Army Base ("OAB") lands that are intended to be used or redeveloped for new maritime related commerce. Approximately 35 acres of that land is intended to be redeveloped into a new Phase I Rail Yard as further described in that certain Request for Qualifications dated November 16, 2012, issued by the Port (as amended, the "RFQ"). The City of Oakland, California (the "City") also owns or controls a portion of the former OAB lands and plans to redevelop its lands into new maritime and commercial facilities that will require railroad switching service.

B. The Port and the Rail Operator desire to enter into a Rail Operating Agreement (the "Rail Operating Agreement") whereby the Rail Operator will be responsible for providing third party switching services to the Port's and the City's customers and tenants at the former OAB and for operating and maintaining the Port railroad tracks and related facilities on or adjacent to the former OAB, including at the proposed Phase I Rail Yard planned to be completed in 2015 (the "Phase I Rail Yard," or the "Project").

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Rail Operator and the Port hereby agree as follows:

1. Effective Date and Term. This Agreement shall become effective on the latest of (a) the date on which the Board of Port Commissioners adopts a resolution approving and authorizing this Agreement, (b) the date on which the parties hereto have duly executed and delivered this Agreement and (c) the date on which the Port Attorney's Office approves the form and legality of this Agreement (the latest of such dates, the "Effective Date"). The term of this Agreement (the "Term") shall commence on the Effective Date and expire on the earlier of (i) the first anniversary of the Effective Date, unless extended by mutual agreement of the parties or earlier terminated as permitted under this Agreement, and (ii) the effective date of the Rail Operating Agreement. Notwithstanding the foregoing, either party may terminate this Agreement without liability to the non-terminating party by delivering thirty (30) days' prior written notice to the non-terminating party.

2. Negotiations Regarding Rail Operating Agreement and Related Documents.

a. During the Term, the Port will negotiate exclusively with the Rail Operator for the purpose of agreeing upon and entering into the Rail Operating Agreement. The Rail Operating Agreement shall obligate the Rail Operator to provide third party switching services to the Port's and the City's customers and tenants, and to operate and maintain railroad

track and related facilities on or adjacent to the Port's former OAB lands, all as further described in the RFQ and in the reference documents available in the Port's on-line dataroom at http://portofoakland.com/business/rfq_oab.asp, with such changes and additions thereto as may be mutually agreed by the parties. The parties acknowledge that Rail Operator will be responsible for providing its own tools and equipment, including rolling stock and engines, and trained personnel for the performance of switching and maintenance services under the Rail Operating Agreement. The parties expect to enter into the Rail Operating Agreement on or before the expiration of the Term, and each agrees to negotiate in good faith and to dedicate to the negotiations a sufficient amount of staff time and attention, including legal services and including the time and attention of staff designated with decision making authority in this matter, as necessary, during the Term. The Rail Operator will be responsible for all costs and expenses incurred by it in connection with the preparation and negotiation of the Rail Operating Agreement. Notwithstanding anything herein to the contrary, if for any reason the Port and the Rail Operator do not agree upon the terms of, and/or do not enter into, the Rail Operating Agreement prior to the expiration or earlier termination of the Term, the Port shall have no obligation to the Rail Operator with respect to entering into a Rail Operating Agreement or otherwise.

b. Concurrently with the preparation and/or negotiation of the Rail Operating Agreement between the Rail Operator and the Port during the Term, the Port intends to prepare, negotiate, finalize and/or enter into certain other documents or agreements with third parties related to the design and operation of the Project, which agreements may include, without limitation, (i) designs for the development and/or construction of the Project, prepared by the Port's design-build contractor or others, and (ii) a Rail Access Agreement between the Port and the City governing the provision of third party switching services between the Phase I Rail Yard and rail customers on City lands. The Port and the Rail Operator acknowledge and agree that the final form of such documents and agreements may impact the use and operation of the Project by the Rail Operator. Therefore, the Rail Operator shall be given the opportunity to review and comment (at Rail Operator's sole cost and expense) on some or all such agreements and documents as determined by the Port, on Rail Operator's own behalf and not as a representative of the Port or on behalf of the Port. If the Rail Operator elects to review and comment on any such agreements and documents provided to it by the Port, such review and comment by the Rail Operator shall be performed promptly following the Rail Operator's receipt of any drafts of such documents or agreements, and in any event within such times specified by the Port to the Rail Operator as necessary to maintain any schedule established by the Port related to the development or operation of the Project. The Port may elect, in its sole discretion, to accept or reject any comments that the Rail Operator may provide on such documents or agreements, and the Port assumes no obligation to request or require any applicable third party to accept or incorporate any comments of the Rail Operator.

3. Compensation. For the avoidance of doubt, in no event shall the Rail Operator receive or be entitled to any compensation or reimbursement from the Port in connection with the Rail Operator's negotiation of the Rail Operating Agreement with the Port or the Rail Operator's review and comment on any document or agreement related to the Project.

4. Port Acting as Owner of the Project. The Rail Operator acknowledges that the Port is acting in its capacity as the owner of the Project, with a proprietary interest in the Project, and not as a regulatory agency with police powers.

5. Agreements Subject to Environmental Review and Governmental Approvals. By entering into this Agreement, the Port is not committing itself or agreeing to undertake any definite course of action, except as explicitly set forth herein. The terms of this Agreement do not commit the Port to undertake (a) any conduct to dispose of or grant control over the Project to the Rail Operator, or (b) any other acts or activities predetermining, affecting, or influencing the subsequent independent exercise of discretion related to the transactions contemplated hereunder by the Port or by any other governmental agency or authority. The Rail Operator acknowledges that the Port cannot enter into or be bound by any documents or agreements that will cause or result in any future work by the Rail Operator on the Project or a grant of any rights with respect to any development of the Project until all environmental reviews required by CEQA or NEPA, or any other necessary regulatory approvals, are completed.

6. Disputes. The Rail Operator shall continue its good faith negotiation with the Port related to the Rail Operating Agreement, and its other obligations hereunder, throughout the course of any dispute, and the Rail Operator's failure to continue such good faith negotiation and other work hereunder during a dispute shall be a material breach of this Agreement.

7. Governing Law. This Agreement shall be deemed to be made in and shall be construed in accordance with the laws of the State of California. The exclusive venue for all litigation arising from or relating to this Agreement shall be in Alameda County, California. Should any clause, provision or aspect of this Agreement be determined at any time to be unenforceable or in contravention of law, then the remaining clauses and provisions of this Agreement shall be enforceable to the fullest extent permitted by law and construed to give effect to, to fullest extent possible, the intent of this Agreement.

8. Relationship of the Parties. Rail Operator shall at all times be deemed an independent contractor fully liable for the acts and omissions of its employees, subconsultants and agents. The Rail Operator represents that it has experience in operating and maintaining railroad lines and facilities, railroad terminals and/or industrial parks, is familiar with applicable rules and regulations promulgated by the Federal Railroad Administration and the California Public Utilities Commission, and the operations and procedures of the Union Pacific Railroad Company and the BNSF Railway Company.

Rail Operator is and shall at all times be and remain independent from the Port and shall not be an agent of the Port. Nothing herein contained shall be construed to place the parties in the relationship of partners or joint ventures. Neither party shall have any right or power to obligate or bind any other party in any manner whatsoever except as expressly authorized in this Agreement.

The Rail Operator shall pay all taxes (including California sales and use taxes) levied upon this Agreement, the transaction, and/or any goods or services delivered pursuant hereto without additional compensation, regardless of which party has liability for such tax under

applicable law, and any deficiency, interest or penalty asserted with respect thereto. The Rail Operator represents that it will collect, report, and pay all applicable sales and or use taxes to the State Board of Equalization. Upon full payment, the Rail Operator will issue the Port a receipt pursuant to California Revenue and Taxation Code Section 6203, relieving the Port of all liability for any tax relating to the scope of this Agreement. The Rail Operator shall pay all other taxes including but not limited to any applicable City of Oakland business tax, not explicitly assumed in writing by the Port hereunder. The Rail Operator shall comply with all valid administrative regulations respecting the assumption of liability for the payment of payroll taxes and contributions as above described and to provide any necessary information with respect thereto to proper authorities.

This Agreement is not intended, nor shall it be construed, to create any third party beneficiary rights in any third party, unless otherwise expressly provided. The Port is not a fiduciary and has no special responsibilities to the Rail Operator beyond any obligations expressly set forth herein.

9. Conflicts of Interest/Confidentiality.

a. The Rail Operator represents that it is familiar with Section 1090 et seq. and Section 87100 et seq. of the Government Code of the State of California, and that it does not know of any facts that constitute a violation of said sections.

b. The Rail Operator represents that it has completely disclosed to the Port all facts bearing upon any possible interests, direct or indirect, that the Rail Operator believes any member of the Port, or other officer, agent or employee of the Port or any department presently has, or will have, in this Agreement or in the performance thereof. Willful failure to make such disclosure, if any, shall constitute ground for termination of this Agreement by the Port for cause. The Rail Operator agrees to comply with all conflict of interest codes adopted by the City or the Port of Oakland and their reporting requirements.

c. 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 the negotiation of the Rail Operating Agreement or any other obligations of the Rail Operator under this Agreement. Without limitation, the Rail Operator represents to and agrees with the Port that the Rail Operator has no present, and will have no future, conflict of interest between providing the Port the services contemplated by the Rail Operating Agreement and any interest the Rail Operator may presently have, or will have in the future, with respect to any other person or entity (including but not limited to any federal or state wildlife, environmental or regulatory agency) which has any interest adverse or potentially adverse to the Port, as determined in the reasonable judgment of the Port. The provisions of this Section 9(c) shall remain fully effective indefinitely after the expiration or termination of the Term.

d. The Rail Operator acknowledges and agrees that, in connection with the negotiation of the Rail Operating Agreement or other obligations of the Rail Operator hereunder, the Rail Operator may have access to private or confidential information which may be owned or controlled by the Port and that such information may contain proprietary or confidential details,

the disclosure of which to third parties may be damaging to the Port. The Rail Operator agrees that all information disclosed by the Port to or discovered by the Rail Operator shall be held in strict confidence and used only in performance of the Agreement. The Rail Operator shall exercise the same standard of care to protect such information as a reasonably prudent consultant would use to protect its own proprietary data, and shall not accept employment adverse to the Port's interests where such confidential information could be used adversely to the Port's interests. The Rail Operator agrees to notify the Port immediately in writing if it is requested to disclose any information made known to or discovered by the Rail Operator during the performance of or in connection with this Agreement.

e. Any publicity or press releases with respect to this Agreement, the Project or the negotiation of the Rail Operating Agreement shall be under the Port's sole discretion and control. The Rail Operator shall not discuss this Agreement, the Project, the Rail Operating Agreement, or any matters pertaining thereto, with the public press, representatives of the public media, public bodies or representatives of public bodies, without the Port's prior written consent. The Rail Operator shall have the right, however, without the Port's further consent, to communicate with persons (including third parties) or public bodies where necessary to perform under this Agreement.

10. Attorneys' Fees. In the event of a default under this Agreement or in the event a dispute arises in a judicial or quasi-judicial proceeding concerning the meaning or interpretation of any provision of this Agreement, the defaulting party or the party not prevailing in such dispute, as the case may be, shall pay any and all costs and expenses incurred by the other party in enforcing or establishing its or their rights hereunder (whether or not such action is prosecuted to judgment), including, without limitation, court costs and reasonable attorneys' fees. For purposes of this Agreement, reasonable fees of attorneys of the Port Attorney's Office shall be based on the fees the Port Attorney pays its outside private attorneys who work on any such dispute. The provisions under this Section 10 shall survive the expiration or termination of the Term.

11. Indemnity. The Rail Operator shall indemnify, protect, defend and hold harmless the Port and the Port's officers, agents and employees, 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 activity of Rail Operator, or its agents, employees or contractors, under this Agreement, except to the extent such Losses are caused by the gross negligence or willful misconduct of Port. The provisions under this Section 11 shall survive the expiration or termination of the Term.

12. Notices. Unless otherwise expressly provided herein, any notice given under this Agreement shall be effective only if in writing and given by delivering the notice in person or by sending it first-class mail or certified mail with a return receipt requested or by Express Mail, return receipt requested, with postage prepaid, or via facsimile, as follows:

If to the Port: Executive Director
 Port of Oakland
 530 Water Street
 Oakland, CA 94607

with copies to: Director of Maritime
 Port of Oakland
 530 Water Street
 Oakland, CA 94607

Port Attorney
Port of Oakland
530 Water Street
Oakland, CA 94607

If to Rail Operator: _____

with a copy to: _____

13. Counterparts. This Agreement may be executed by PDF or electronic signature, and it may be executed in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

[RAIL OPERATOR]

By: _____

Its: _____

Dated: _____

**BOARD OF PORT COMMISSIONERS OF
THE CITY OF OAKLAND, CALIFORNIA**

By: _____

Its: _____

Dated: _____

**THIS AGREEMENT SHALL NOT
BE VALID OR EFFECTIVE FOR
ANY PURPOSE UNLESS AND
UNTIL IT IS SIGNED BY THE
PORT ATTORNEY OR HIS
DESIGNEE.**

Approved as to form and
legality this __ day of
_____, 20__

_____,
Port Attorney

By: _____
Port Attorney

Resolution Number: _____

Adopted: _____